[Cite as *State v. Larry*, 2009-Ohio-5948.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- ROY DANTA LARRY Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P. J. Hon. John W. Wise, J. Hon. Patricia A. Delaney, J. Case No. 09 CA 49 O P I N I O N
CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 2008 CR 825D
JUDGMENT:	Affirmed in Part; Reversed in Part and Remanded
DATE OF JUDGMENT ENTRY:	November 6, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JAMES J. MAYER, JR. PROSECUTING ATTORNEY KIRSTEN L. PSCHOLKA-GARTNER ASSISTANT PROSECUTOR 38 South Park Street Mansfield, Ohio 44902	PATRICIA O'DONNELL KITZLER 3 North Main Street Suite 703 Mansfield, Ohio 44902

Wise, J.

{¶1} Defendant-Appellant Roy Danta Larry appeals his conviction and sentence entered in the Richland County Court of Common Pleas following a trial by jury.

{¶2} Plaintiff-Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶3} On September 30, 2008, Detective Steve Blust, a member of the Metrich Drug Enforcement Task Force (METRICH), made a call to a cell phone number he believed belonged to one of his confidential informants. (T. at 219, 222). When a different person answered the phone, Det. Blust asked for "Michael". The person answering the phone identified himself as "Mookie." Id. Recognizing the name “Mookie” as the street name of Roy Larry from recent intelligence he had received, Det. Blust decided to proceed with the conversation. Mookie asked what Det. Blust "needed" and Blust said he needed "crack." (T. at 220). They made arrangements to meet at a location in the vicinity of E&B Market. Id.

{¶4} Detective Blust sent Officer Terry Butler to the area to see if Mookie would show up. (T. at 220-221). He provided Officer Butler with a social security number and description of the subject. (T. at 221). Officer Butler saw a person that he believed to be Mookie walking eastbound on Fourth Street in the area of the E&B Market; however, the person disappeared from his sight when he turned his cruiser around.

{¶5} Officer Butler searched the area but was unable to locate that person again. (T. at 126-129, 221). The following day, on October 1, 2008, Officer Butler contacted Detective Blust and asked him to try and set up another meeting with Mookie.

(T. at 222). Detective Blust placed a second call to the same cell phone number. Once again, the same voice answered the phone. Id. Detective Blust asked Mookie why he did not show up to meet him the day before. Mookie responded that he walked all the way down and didn't see him. Id. He also asked "what do you need today?" Id. Detective Blust indicated that he wanted an "eight", street language for $80 worth of crack cocaine. Id. A second meeting was arranged for the same location. Id. This time, Detective Blust asked Mookie what he would be wearing, so he would know that it was him. Mookie replied that he would be in an orange jacket. (T. at 223). This phone conversation took place in the presence of Officer Keith Porch. (T. at 187).

{¶6} Again, officers went to the area of the E&B Market to await Mookie's arrival. E&B Market is within 1,000 feet of Simpson Middle School. The school was closed at the time of the arranged drug deal; however, the property was still owned and maintained by the Mansfield City Schools Board of Education. (T. 135, 161, 193, 229).

{¶7} This time they spotted an individual matching Mookie's description wearing an orange jacket and walking from the area of Sycamore and West Fourth toward the E&B Market. (T. at 223-224, 175, 188, 226). When the officers drove up in marked cruisers, the suspect attempted to leave the area, throwing a small baggie to the ground. (T. at 159, 176, 189, 226-227). The suspect was apprehended by Officers Patrick Williams and Officer Sara Mosier. (T. at 159, 176). The plastic baggie and a cell phone were collected as evidence. (T. at 189, 208-215). The man initially gave a false name; however, he was later identified as Appellant Roy Larry (a.k.a. Mookie). (T. at 142, 160-161).

{¶8} When Officer Butler was transporting him to jail, Appellant stated that the substance in the baggie was not real, it was "just peanuts," and that he was just trying to make some money. (T. at 148).

{¶9} The substance was later weighed and tested by the Mansfield Police Crime Lab. It weighed .28 grams and tested negative for the presence of any controlled substances. (T. at 210).

{¶10} The cell phone was also examined. The number of that phone was (419) 566-2251, and the call log on the phone contained incoming calls on September 30th at 3:50 and 3:53 p.m. and October 1, 2008 at 4:32 p.m. from a restricted or blocked number. (T. at 228). Detective Blust testified that the office phone at Metrich and his personal cell are both blocked so that the number does not appear on caller I.D. (T. at 227-228).

{¶11} Appellant was indicted by the Richland County Grand Jury on one count of trafficking in a counterfeit controlled substance in the vicinity of a school zone in violation of R.C. §2925.37(A)(1), one count of possession of a counterfeit controlled substance, in violation of R.C. §2925.37(B), and one count of trafficking in crack cocaine in an amount not exceeding one gram, in violation of R.C. 2§925.03(A)(1).

{¶12} Appellant pled not guilty to all counts at arraignment, and his case was set for trial.

{¶13} Appellant filed a motion to suppress/motion in limine to exclude statements made by Appellant after his arrest and a motion in limine to prohibit the State from listing Appellant's various aliases, and to prohibit any mention of a separate felony warrant for Appellant's arrest.

{¶14} This matter proceeded to trial on February 26, 2009, and ended on February 27, 2009. Before the trial began, the court ruled on the pre-trial motions, overruling the first one and granting the second one in part to exclude evidence that Appellant had a felony warrant out for his arrest on October 1, 2008.

{¶15} At trial the State presented testimony from Officer Terry Butler, Officer Patrick Williams, Officer Sara Mosier, Officer Keith Porch, and Detective Steve Blust. Both officers Butler and Mosier inadvertently made brief references to a felony warrant during their testimony. Each time, counsel for Appellant promptly objected and moved for a mistrial. Both motions were overruled. The trial court gave a curative instruction to the jury after the second reference. After the State rested, Appellant's counsel raised a Crim.R. 29 motion for acquittal. The motion was overruled, and the defense rested without calling any witnesses.

{¶16} At the conclusion of the trial, the jury found Appellant guilty of all three counts as charged in the indictment. Appellant was also convicted of the school zone specification attached to Count I, the trafficking in counterfeit controlled substances charge.

{¶17} On March 2, 2009, the trial court sentenced Appellant to eighteen (18) months on Count I, trafficking in a counterfeit controlled substance in the vicinity of a school, a felony of the fourth degree. That sentence was to run consecutive to the twelve (12) month sentence on Count II, trafficking in crack cocaine in an amount less than one gram, a felony of the fifth degree. The court imposed a thirty (30) day concurrent sentence for Count II, possession of a counterfeit controlled substance, a

misdemeanor on the first degree. Appellant's total sentence amounted to two and a half years in prison.

{¶18} Defendant-Appellant now appeals, raising the following assignments of error:

ASSIGNMENT OF ERROR

{¶19} "I. APPELLANT'S CONVICTION FOR TRAFFICKING WITHIN 1000 FEET OF A SCHOOL IS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND CONSTITUTES PLAIN ERROR, THUS DENYING APPEALLANT [sic] A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND UNDER ARTICLE 1, SECTION 16 OF THE OHIO CONSTITUTION.

{¶20} "II. APPELLANT WAS DEPRIVED OF A FAIR TRIAL AND DUE PROCESS OF LAW AS GUARANTEED BY THE OHIO AND U.S. CONSTITUTIONS BY THE INEFFECTIVE ASSISTANCE OF COUNSEL.

{¶21} "III. APPELLANT'S CONVICTIONS HEREIN ARE BASED ON A DEFECTIVE INDICTMENT WHICH OMITTED A CULPABLE MENTAL STATE FOR THE SCHOOL SPECIFICATION, CREATING ERROR PERMEATING THE ENTIRE PROCEEDING, WHICH CONSTITUTES STRUCTURAL ERROR, OR IN THE ALTERNATIVE, PLAIN ERROR, THUS DENYING APPELLANT A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND UNDER ARTICLE 1, SECTION 10 OF THE OHIO CONSTITUTION.

{¶22} "IV. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR MISTRIAL AFTER TWO INCIDENTS OF THE STATE'S WITNESSES VIOLATING THE LIMINE ORDER, WHICH IF NOT REVERSIBLE ERROR BY ITSELF, IT IS ERROR TO BE CONSIDERED UNDER THE DOCTRINE OF CUMULATIVE ERROR, THUS DENYING APPELLANT A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE. U.S. CONSTITUTION AND UNDER ARTICLE 1, SECTION 10 OF THE OHIO CONSTITUTION."

I., III.

{¶23} In his first and third assignments of error, Appellant contends that his conviction on the "school zone" specification was not supported by sufficient evidence, and that the indictment was defective because it did not include a *mens rea* element for such specification.

{¶24} R.C. §2925.37, offenses involving counterfeit controlled substances, provides in relevant part:

{¶25} "(B) No person shall knowingly make, sell, offer to sell, or deliver any substance that the person knows is a counterfeit controlled substance."

{¶26} The statute further provides that the offense is a felony of a fourth degree if the offense was committed in the vicinity of a school. R.C. § 2925.37(H).

{¶27} The school zone specification as set forth above does not contain the *mens rea* element "knowingly," found in R.C. §2925.37(B).

{¶28} R.C. §2901.21(B) provides that:

{¶29} "[w]hen the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in such section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense."

{¶30} In *State v. Miller* (1993), Montgomery County App. No. 13121, the Second District Court of Appeals, in reviewing this issue, held:

{¶31} "We find that the legislature has plainly indicated a purpose to impose strict liability on persons who are within one thousand feet of a school when they knowingly traffick in drugs. The statute is designed, as we discuss in greater detail below, to protect school children from the dangers of drug traffick and the other criminal activity that so often attends drug trafficking. *State v. Lattimore* (Aug. 28, 1985), Hamilton App. No. C-840569, unreported (dealing with a firearm penalty enhancement); *United States v. Falu* (1985), 776 F.2d 46, 50. Nor does the specification threaten to criminalize behaviour [sic] that is otherwise innocent. A knowing violation of the underlying offense of drug trafficking is necessary to satisfy the elements of the specification. See *United States v. Cross* (6th Cir.1990), 900 F.2d 66."

{¶32} We follow such reasoning and find that the indictment in this case was not defective as to such specification and overrule Appellant's third assignment of error.

{¶33} We must next determine whether the state presented sufficient evidence that the offense occurred within the "vicinity of a school" within the meaning of the statute. We conclude that it did not.

{¶34} Upon review of this issue, it should be noted that Appellant failed to object at trial to the school zone issue or the failure of the trial court to instruct on the statutory definition of a "school". Appellant did, however, cross-examine one of the police officers as to issue of the school having been closed for at least one year prior to Appellant's arrest. This issue must therefore be reviewed under the plain error standard of review.

{¶35} The defendant bears the burden of demonstrating that a plain error affected his substantial rights. *United States v. Olano* (1993), 507 U.S. at 725,734, 113 S.Ct. 1770; *State v. Perry* (2004), 101 Ohio St.3d 118, 120. Even if the defendant satisfies this burden, an appellate court has discretion to disregard the error and should correct it only to "prevent a manifest miscarriage of justice." *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus. *Perry,* supra, at 118.

{¶36} As the school zone enhancement elevated the degree of the offense in this case to a fourth degree felony from a fifth degree felony, we find that any error therein affected Appellant's substantial rights.

{¶37} In order to convict a defendant under the school specification, the State must prove beyond a reasonable doubt that the drug transaction occurred within the specified distance of a school. The State has the burden of establishing all material elements of a crime by proof beyond a reasonable doubt. *Mullaney v. Wilbur* (1975), 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508; *State v. Adams* (1980), 62 Ohio St.2d 151. That requirement also applies in cases involving the imposition of an enhanced punishment upon proof of some additional element. See, *e.g., State v. Gaines* (1989), 46 Ohio St.3d 65; *State v. Gordon* (1971), 28 Ohio St.2d 45.

{¶38} "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).

{¶39} "School" means any school *operated* by a board of education, any community school established under Chapter 3314. of the Revised Code, or any nonpublic school *for which the state board of education prescribes minimum standards* under section 3301.07 of the Revised Code, whether or not any instruction, extracurricular activities, or training *provided by the school* is being conducted at the time a criminal offense is committed." R.C. §2925.01(Q).

{¶40} "School premises" means either of the following:

{¶41} "(1) The 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;

{¶42} "(2) Any other parcel of real property that is owned or leased by a board of education of a school, the governing authority of a community school established under Chapter 3314. of the Revised Code, or the governing body of a nonpublic school *for which the state board of education prescribes minimum standards* under section 3301.07 of the Revised Code *and on which some of the instruction, extracurricular activities, or training of the school is conducted*, whether or not any instruction, extracurricular activities, or training *provided by the school* is being conducted on the parcel of real property at the time a criminal offense is committed." R.C. §2925.01(R).

{¶43} "School building" means any building in which any of the instruction, extracurricular activities, or training *provided by a school* is conducted, whether or not any instruction, extracurricular activities, or training *provided by the school* is being conducted in the school building at the time a criminal offense is committed." R.C. §2925.01(S). (emphasis added).

{¶44} Based on the emphasized language, we find that the legislature did not intend that abandoned school buildings or school premises that have been closed or are being used for purposes other than providing instruction, training, or extracurricular activities should fall within the ambit of the school proximity specification. This reading is consistent with the purposes of the specification provision, which are to "protect school children from the ... dangers of drug activity." *State v. Altick*, (Sept. 2, 1992) Montgomery App. No. CA-13254. For a similar analysis and result, see *Miller*, supra.

{¶45} In *State v. Manley*, 71 Ohio St.3d 342, 1994-Ohio-440, the Ohio Supreme Court addressed the issue of whether "the presence of a statutorily defined school can be shown only by some affirmative proof that a board of education operated the premises." *Id.* at 347-348. The *Manley* court held that the state was not required to present evidence that the school was operated by a board of education. *Id.* Such a requirement, the court explained, would be inconsistent with the court's prior decisions allowing the elements of an offense to be established by circumstantial as well as direct evidence. *Id.,* citing *State v. Murphy* (1990), 49 Ohio St.3d 206, and *Jenks,* supra.

{¶46} In *Manley,* two police officers and a police informant testified that the drug transaction "occurred within the immediate vicinity of a school" without any further elaboration regarding whether the school was operated by a board of education or

operated under standards set by a board of education. *Id.* at 348. Noting that there was no evidence that the facility in question was not a school, the court concluded that reasonable minds could conclude beyond a reasonable doubt that the state had proven the school specification. *Id.*

{¶47} However, unlike the case sub judice, in *Manley*, the issue of whether the school in question met the statutory definition was not challenged by cross-examination. Here, Officer Williams testified on cross-examination that Simpson Middle School was closed at the time this offense occurred, and that this was the second school year this school had been closed. (T. at 168-169). Similarly, Officer Porch also testified that the school was closed on the date of the offense, and that such school had been closed "for some while." (T. at 194).

{¶48} We therefore find, absent any proof that the school was open, operating, or provided any instruction, training, or extracurricular activities, that there would be any schoolchildren in the area. We must therefore conclude that the state has failed to satisfy the "school premises" element of R.C. §2925.03(C)(5)(a). Thus, there was no sufficient evidence presented at trial upon which a jury could reasonably conclude that all the elements of the offense, i.e. the specification, had been proven beyond a reasonable doubt." *State v. Eley* (1978), 56 Ohio St.2d 169, syllabus.

{¶49} Appellant's first assignment of error is sustained.

II.

{¶50} In his second assignment of error, Appellant contends that he was denied the effective assistance of counsel. We disagree.

{¶51} Our standard of review is set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Ohio adopted this standard in the case of *State v. Bradley* (1989), 42 Ohio St.3d 136. These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. First, we must determine whether counsel's assistance was ineffective; i.e., whether counsel's performance fell below an objective standard of reasonable representation and whether counsel violated any of his or her essential duties to the client.

{¶52} If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different. *Id.* at 141-142. Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie,* 81 Ohio St.3d 673, 675, 1998-Ohio-343.

{¶53} Appellant specifically cites trial counsel's failure to fully challenge the school issue through cross-examination, request a jury instruction on same, or otherwise challenge such issue through cross-examination or raise such in his motion for acquittal. Appellant also argues that his trial counsel failed to object to his sentence on the basis of allied offenses of similar import as to Counts I and II.

{¶54} Upon review of the records, we cannot say that Appellant’s counsel’s performance fell below the standard. Appellant’s counsel did challenge the school zone specification by raising the issue on cross-examination as to the school being closed. Appellant’s counsel then focused his attention on the actual drug charges, rather then

the specification, in an attempt to obtain an acquittal on said charges. Tactical or strategic trial decisions, even if ultimately unsuccessful, will not substantiate a claim of ineffective assistance of counsel. *In re M.E.V.,* 10th Dist. No. 08AP-1097, 2009-Ohio-2408, ¶ 34.

{¶55} As to the allied offenses argument, we do not find that these two offenses were allied offenses of similar import, in that the events giving rise to the charges occurred at separate times. The trafficking charges arose from the telephone conversation between Det. Blust and Appellant and the possession charge at the time of his arrest.

{¶56} We further find, assuming arguendo such failure to raise same did amount to ineffective assistance, Appellant suffered no prejudice because the sentences for these two crimes was ordered to run concurrently.

{¶57} Appellant's second assignment of error is overruled.

IV.

{¶58} In his fourth assignment of error, Appellant contends the trial court erred in denying his motions for mistrial. We disagree.

{¶59} The standard of review for evaluating a trial court's decision to grant or deny a mistrial is abuse of discretion. *State v. Graewe,* Tuscarawas App.No. 2007 AP 10 0070, 2008-Ohio-5143, ¶ 46, citing *State v. Sage* (1987), 31 Ohio St.3d 173, 182. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶60} "A mistrial should not be ordered in a criminal case merely because some error or irregularity has intervened * * *." *State v. Reynolds* (1988), 49 Ohio App.3d 27, 33. The granting of a mistrial is necessary only when a fair trial is no longer possible. *State v. Franklin* (1991), 62 Ohio St.3d 118, 127; *State v. Treesh* (2001), 90 Ohio St.3d 460, 480.

{¶61} In the instant case, the trial court had granted a motion in limine limiting the State's ability to raise the issue of an outstanding felony warrant, which Appellant had at the time of his arrest. Despite such ruling, two of the police officers testified that Appellant had a felony warrant. (T. at 145, 172). The trial court found such testimony to be inadvertent but did, after the second reference, give a cautionary instruction advising the jury that the fact that a felony warrant existed did not mean that a felony had been committed. (T. at 173).

{¶62} Upon review, we find that the trial court did not abuse its discretion in finding that the violation of the motion in limine was not deliberate.

{¶63} With regard to the decision to grant or deny a motion for a mistrial, great deference is afforded to the trial court's discretion in this area, in recognition of the fact that the trial judge is in the best position to determine whether the situation in his courtroom warrants the declaration of a mistrial. *State v. Widner* (1981), 68 Ohio St.2d 188, 189. See, also, *Wade v. Hunter* (1949), 336 U.S. 684, 687, 69 S.Ct. 834, 836, 93 L.Ed. 974.

{¶64} Having heard the testimony, the trial court was in a better position to make this determination than this Court.

{¶65} We find that the trial court's instruction to the jury to disregard the references to Appellant's outstanding warrant was sufficient to cure any alleged error.

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

{¶67} The judgment of the Court of Common Pleas, Richland County, Ohio, is affirmed in part, reversed in part and remanded for further proceedings consistent with the law and this opinion.

By: Wise, J.

Delaney, J., concurs.

Hoffman, P. J., concurs separately.

/S/ JOHN W. WISE_____

/S/ PATRICIA A. DELANEY_____

_____

JUDGES

JWW/d 1007

Hoffman, P.J., concurring

{¶68} I concur in the majority's analysis and disposition of Appellant's Assignments of Error I, III, and IV.

{¶69} As to Appellant's Assignment of Error II, I would find the claim of ineffective assistance for not fully challenging the school issue moot given our disposition of the first assignment of error. And, while I agree the trafficking and possession charges are not allied offenses of similar import, I do not agree Appellant suffers no prejudice had we determined otherwise merely because the sentences were run concurrently.

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HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
ROY DANTA LARRY	:	
Defendant-Appellant	:	Case No. 09 CA 49

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Richland County, Ohio, is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

Costs to be split equally.

/S/ JOHN W. WISE_____

/S/ WILLIAM B. HOFFMAN_____

/S/ PATRICIA A. DELANEY_____

JUDGES