[Cite as *State v. Miller*, 2010-Ohio-3488.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2009-CA-0113
RONDALE LAMONT MILLER	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Richland County Court of Common Pleas Court Case No. 2009-CR-259D

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: July 23, 2010

APPEARANCES:

For Plaintiff-Appellee:

JAMES J. MAYER, JR.
Richland County Prosecuting Attorney
38 South Park Street
Mansfield, Ohio 44902

KIRSTEN L. PSCHOLKA-GARTNER
0077792
(Counsel of Record)
Assistant Prosecuting Attorney

For Defendant-Appellant:

Charles M. Brown 0002950
Weldon, Huston & Keyser, L.L.P.
76 North Mulberry Street
Mansfield, Ohio 44902

Delaney, J.

{¶1} Defendant-Appellant, Rondale Lamont Miller, appeals from his conviction and sentence of one count of aiding and abetting in the conveyance of drugs of abuse into a detention facility, a felony of the third degree, in violation of R.C. 2921.36(A)(2).

STATEMENT OF THE CASE AND FACTS

{¶2} On February 10, 2009, Appellant was serving a prison sentence at the Richland Correctional Institute for domestic violence, menacing by stalking, and violation of a protective order.

{¶3} Shasta Edwards, the mother of Appellant's child, came to the Richland Correctional Institute to visit Appellant.

{¶4} Upon passing the first checkpoint at the detention facility, Edwards immediately went to the restroom. This aroused suspicion in Correction Officer Felicia Fennebrew because it is common for visitors attempting to smuggle in contraband to go to the restroom after arrival and move the contraband to a more easily transferable location. Fennebrew continued to monitor Edwards closely as she came out of the restroom and into the visiting room.

{¶5} Using the visiting room surveillance system, Fennebrew watched Edwards reach into the front pocket of her hooded sweatshirt, retrieve something, and place it on Appellant's food tray. Appellant responded by covering up the items with a paper napkin, made no attempt to refuse the items, and did not notify corrections officers of its presence.

{¶6} Fennebrew continued to monitor Edwards and Appellant on the surveillance video as they conversed, and recognized that Appellant was acting odd.

Fennebrew described Appellant's smile and laugh as fake and forced. Appellant's hand would linger around the napkin and come up in a cupped position. However, his food tray consisted of a sausage biscuit sandwich and potato chips, neither of which would be eaten with a cupped hand. Appellant moved his cupped hand quickly to his mouth, swallowed what was held, and lowered it back to the tray. This mannerism is contrasted from his regular eating habit displayed on the video, where he licked his fingers after each chip. Furthermore, Appellant would take a large gulp of Mountain Dew after placing the item from his cupped hand into his mouth.

{¶7} A second surveillance camera showed the items hidden under the edge of the napkin and Appellant taking pieces into his cupped hand.

{¶8} Based on her training and experience, Fennebrew conclusively determined that contraband was present, entered the visiting room, and took the tray. She found thirteen to fourteen marble sized balloons under the napkin, later identified to be filled with 12.47 grams of marijuana.

{¶9} Appellant was indicted by the Richland County Grand Jury on April 10, 2009, for one count of aiding and abetting in the illegal conveyance of a drug of abuse into a detention facility in violation of R.C. 2921.36(A)(2).

{¶10} Appellant proceeded to a jury trial where he was found guilty as charged on August 20, 2009, and sentenced to the maximum of five years in prison.

{¶11} Appellant now raises three assignments of error:

{¶12} "I. THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUSTAIN THE CONVICTION, AND AFTER REVIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE PROSECUTION, ANY RATIONAL TRIER OF FACT

COULD NOT HAVE FOUND THE ESSENTIAL ELEMENTS OF THE CRIME PROVEN BEYOND A REASONABLE DOUBT.

{¶13} "II. DEFENDANT-APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL PROVIDED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 10 OF THE OHIO CONSTITUTION, AS WELL AS DUE PROCESS PROTECTION UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND IN ARTICLE 1, SECTION 16 OF THE OHIO CONSTITUTION.

{¶14} "III. THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT-APPELLANT TO THE MAXIMUM PRISON TERM OF 5 YEARS FOR THE OFFENSE AS CHARGED, IN VIOLATION OF OHIO REVISED CODE SECTION 2953.08(A)(1)(A)."

I.

{¶15} In his first assignment of error, Appellant argues that there was insufficient evidence to support his conviction.

{¶16} When reviewing a claim of sufficiency of the evidence, an appellate court's role 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. Contrary to a manifest weight argument, a sufficiency analysis raises a question of law and does not allow the court to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. 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. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541.

{¶17} In order to uphold Appellant's conviction, the state must have presented sufficient evidence to prove the elements of illegal conveyance of a drug of abuse into a detention facility, with regard to Edwards, pursuant to R.C. 2921.36(A)(2), and Appellant's complicity in the offense pursuant to R.C. 2923.03.

{¶18} R.C. 2921.36(A)(2) provides, in relevant part,

{¶19} "No person shall knowingly convey, or attempt to convey, onto the grounds of a detention facility * * * any of the following items:

{¶20} " * * *

{¶21} "(2) Any drug of abuse, as defined in section 3719.011 * * * of the Revised Code[.]"

{¶22} Whether a person acts knowingly can only be determined, absent that person's admission, from all the surrounding facts and circumstances, including the commission of the act itself. *State v. Huff* (2001), 145 Ohio App.3d 555, 563, 763 N.E.2d 695. (Footnote omitted). Thus, the test for whether a person acted knowingly is a subjective one, but it is decided on objective criteria. *State v. McDaniel* (May 1, 1998), Montgomery App. No. 16221, citing *State v. Elliott* (1995), 104 Ohio App.3d 812, 663 N.E.2d 412.

{¶23} The state presented testimony from Correction Officer Fennebrew that she observed Edwards take a clear plastic bag out of her hooded sweatshirt pocket and place it on Appellant's food tray. Investigator Brett Purdue pointed out in the surveillance video that the transaction occurred at the timestamp of 12:10:44.

{¶24} Fennebrew testified that she continued to watch Edwards and Appellant until she was convinced that contraband was on the tray, at which point she entered the room and took the tray with the balloons on it.

{¶25} Correction Officer Prauner testified that Fennebrew brought her the tray after taking it from Appellant's table, and corroborated that it had several balloons on it.

{¶26} The jury could determine based on the facts in the officers' testimonies and their own observations of the surveillance video that Edwards knowingly conveyed the balloons to Appellant.

{¶27} Evidence was also admitted that the balloons were filled with 12.47 grams of marijuana, which is defined as a drug of abuse in R.C. 3719.011.

{¶28} Therefore, the state presented sufficient evidence from which a jury could conclude, beyond a reasonable doubt, that Edwards committed the offense of illegal conveyance of a prohibited item onto the grounds of a detention facility.

{¶29} With the elements of the underlying offense sufficiently proven, the state must also have established Appellant's complicity in the crime.

{¶30} R.C. 2923.03 provides, in relevant part,

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

{¶32} " * * *

{¶33} "(2) Aid or abet another in committing the offense."

{¶34} It is true that a person's mere association with a principal offender is not enough to sustain a conviction based on aiding and abetting. *State v. Sims* (1983), 10 Ohio App.3d 56, 58, 460 N.E.2d 672. Generally, a criminal defendant has aided or

abetted an offense if he has supported, assisted, encouraged, cooperated with, advised, or incited another person to commit the offense. See *State v. Johnson* (2001), 93 Ohio St.3d 240, 754 N.E.2d 796, syllabus; *State v. Hickman*, Stark App. No.2003-CA-00408, 2004-Ohio-6760 at ¶ 45. "'Participation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed.'" *State v. Mendoza* (2000), 137 Ohio App.3d 336, 342, 738 N.E.2d 822, quoting *State v. Stepp* (1997), 117 Ohio App.3d 561, 568-569, 690 N.E.2d 1342; *State v. Myers*, Richland App. No. 03-CA61, 2004-Ohio-3052 at ¶ 116.

{¶35} In the current case, Appellant and Edwards had a close relationship. Edwards is Appellant's girlfriend and the mother of his child. In addition, Correction Officer Prauner testified that Edwards' visitor's pass was specifically issued to see Appellant, and Fennebrew testified that Edwards visited Appellant several times before. Hence, Appellant's participation in knowingly conveying the marijuana may be inferred by the trier of fact from his relationship with Edwards.

{¶36} Regarding Appellant's conduct, Fennebrew testified that Appellant covered the items with a white paper napkin after receiving them from Edwards. The surveillance video shown at trial displays Appellant lingering his hand around the napkin, and at 12:14:24 moving his fingers under the napkin in a manner that can be interpreted as taking balloons into his hand. The video also shows that he brought his hand up in a cupped position after fishing under the napkin. These actions can be interpreted by a rational trier of fact as Appellant assisting Edwards in conveying the balloons into the detention facility by knowingly keeping them hidden.

{¶37} Appellant argues that there is insufficient evidence that he aided Edwards because the prison monitored him for four to five days after the event and there were no balloons or marijuana found in his fecal matter. However, Appellant overestimates the significance of the prison's monitoring because the prosecution did not have to prove that he ingested the balloons, only that he aided and abetted Edwards in bringing them into the detention facility. Evidence describing and displaying Appellant's attempt to hide the balloons by placing his napkin over them and secretly taking some into his cupped hand can be interpreted by the trier of fact as sufficient conduct to establish the elements of complicity, regardless of whether he ultimately swallowed any of the balloons.

{¶38} Therefore, upon review of the evidence in a light most favorable to the prosecution, we believe that the state presented sufficient evidence from which the trier of fact could conclude, beyond a reasonable doubt, that Appellant aided and abetted in the illegal conveyance of a drug of abuse into a detention facility.

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

II.

{¶40} Appellant claims he was denied effective assistance of counsel because his trial counsel should have filed a motion for acquittal, and failed to object to lay opinion and prejudicial testimony. We disagree.

{¶41} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was

prejudiced by counsel's ineffectiveness. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley*, 42 Ohio St.3d at 142. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists that counsel's conduct fell within the wide range of reasonable professional assistance. Id.

{¶42} "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. The question is whether counsel acted "outside the wide range of professionally competent assistance." Id. at 690.

{¶43} In order to warrant a reversal, an appellant must additionally show that they were prejudiced by counsel's ineffectiveness. "Prejudice from defective representation sufficient to justify reversal of a conviction exists only where the result of the trial was unreliable or the proceeding fundamentally unfair because of the performance of trial counsel." *State v. Carter* (1995), 72 Ohio St.3d 545, 558, 651 N.E.2d 965, citing *Lockhart v. Fretwell* (1993), 506 U.S. 364, 370, 113 S.Ct. 838, 122 L.Ed.2d 180. Under this "actual prejudice" prong, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

{¶44} Appellant contends that his trial counsel should have made a Criminal Rule 29(A) motion for acquittal on the basis that the state failed to prove the elements of

the offense, and failure to make said motion fell below the objective standard of reasonable representation.

{¶45} However, trial counsel is not ineffective for failing to raise a motion which would have been denied. *State v. Washington,* 5th Dist. No. 2005CA00050, 2006-Ohio-825, at ¶21. Upon review of the trial record and consistent with our disposition of Appellant's first assignment of error, we do not find Appellant's trial counsel's performance deficient for failing to make a motion for acquittal because the evidence noted supra, when considered in a light most favorable to the prosecution, would most likely have resulted in the motion being denied.

{¶46} We now turn to Appellant's assertion that trial counsel was ineffective for failing to object to the testimony of Correction Officer Fennebrew, who offered her lay opinion testimony that Appellant was trying to cover up the marijuana-filled balloons.

{¶47} Evid. R. 701 provides, in relevant part,

{¶48} "Opinion Testimony by Lay Witness

{¶49} "If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue."

{¶50} Lay opinions, inferences, impressions, or conclusions are therefore admissible if they are those that a rational person would form on the basis of the observed facts and if they assist the jury in understanding the testimony or delineating a fact in issue. *State v. Kehoe* (1999), 133 Ohio App.3d 591, 729 N.E.2d 431.

{¶51} Evid. R. 701 affords the trial court considerable discretion in controlling the opinion testimony of lay witnesses. *City of Urbana ex rel. Newlin v. Downing* (1989), 43 Ohio St.3d 109, 113, 539 N.E.2d 140; see also *Kehoe*, 133 Ohio App.3d at 603.

{¶52} Fennebrew testified as to her extensive training and experience of ten years as a correction officer at the Richland Correctional Institute. Her general testimony, interpreting her personal observations of Appellant's movements and demeanor, was helpful to the trier of fact in understanding the significance of his conduct.

{¶53} Under these circumstances, Fennebrew's testimony meets the requirements of Evid. R. 701 and therefore, we cannot say that defense counsel's failure to object fell below the objective standard of reasonable representation.

{¶54} Appellant next argues that his trial counsel should have objected to the evidence of marijuana being found in his segregation unit as irrelevant and prejudicial.

{¶55} However, the trial transcript clearly shows that an objection was made by Appellant's trial counsel to testimony concerning marijuana in the segregation unit, and was overruled.

{¶56} Since an objection for relevancy was made at trial, Appellant may not now claim that counsel was inadequate for failing to make that same objection.

{¶57} We next address Appellant's claim that counsel should have objected to Investigator Purdue's testimony about marijuana found on other prisoners in Appellant's segregation unit as prejudicial, confusing, and misleading pursuant to Evid. R. 403.

{¶58} In *Bradley,* supra, the Supreme Court of Ohio truncated the *Strickland* standard, holding that reviewing courts need not examine counsel's performance if

appellant fails to prove the second prong of prejudicial effect. *Bradley*, 42 Ohio St.3d 136. "The object of an ineffectiveness claim is not to grade counsel's performance." Id. at 142.

{¶59} Since the prosecution did not have to prove that Appellant actually swallowed any marijuana-filled balloons to meet the elements of complicity, discussed supra, then there is not a reasonable probability that the results of the proceeding would have been different even if Investigator Purdue's testimony was excluded. Thus, Appellant's argument fails the second prong of the *Strickland* test, and as a result, there is no need to grade trial counsel's performance or to weigh the probative value of the testimony against its prejudicial effect.

{¶60} For reasons stated, Appellant's second assignment of error is overruled.

III.

{¶61} In his third assignment of error, Appellant argues that the trial court erred in sentencing him to the maximum term of five years in prison. We disagree.

{¶62} Under Ohio law, judicial fact-finding is no longer required before a court imposes a maximum prison term. See *State v. Foster,* 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856; *State v. Mathis,* 109 Ohio St.3d 54, 846 N.E.2d 1, 2006-Ohio-855. Instead, the trial court is vested with discretion to impose a prison term within the statutory range. See *Mathis,* 109 Ohio St.3d at ¶ 36. In exercising its discretion, the trial court must carefully consider the statutes that apply to every felony case, including R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12, which provides guidance in considering factors relating to the seriousness of the offense and recidivism of the offender, and statutes that are specific to the case itself. Id. at ¶ 37.

Thus, after *Foster,* "there is no mandate for judicial fact-finding in the general guidance statutes. The court is merely to 'consider' the statutory factors." *Foster,* 109 Ohio St.3d at ¶ 42; *State v. Rutter,* 5th Dist. No. 2006-CA-0025, 2006-Ohio-4061 at ¶ 11; *State v. Konstantinov* (Dec. 30, 2009), 5th Dist. No. 09-CAA-090077, 2009 WL 5174100, 6, citing *State v. Delong,* 4th Dist. No. 05CA815, 2006-Ohio-2753 at ¶ 7-8.

{¶63} Where the record adequately justifies the sentence imposed, the court need not recite its reasons. *Konstantinov,* 2009 WL 5174100 at 7. In other words, an appellate court may review the record to determine whether the trial court failed to consider the appropriate sentencing factors. *State v. Firouzmandi,* 5th Dist No. 2006-CA-41, 2006-Ohio-5823 at ¶ 52.

{¶64} Accordingly, appellate courts may find an "abuse of discretion" where the record establishes that a trial judge refused or failed to consider statutory sentencing factors. *Konstantinov,* 2009 WL 5174100 at 7, citing *Cincinnati v. Clardy* (1978), 57 Ohio App.2d 153, 385 N.E.2d 1342. An "abuse of discretion" has also been found where a sentence is greatly excessive under traditional concepts of justice or is manifestly disproportionate to the crime or the defendant. *Konstantinov,* 2009 WL 5174100 at 7, citing *Woosley v. United States* (1973), 478 F.2d 139, 147. The imposition by a trial judge of a sentence on a mechanical, predetermined, or policy basis is subject to review. Id. An appellate court may reverse a sentence where the severity of the sentence shocks the judicial conscience or greatly exceeds penalties usually exacted for similar defendants, and the record fails to justify, or the trial court fails to explain, the imposition of the sentence. Id. This by no means is an exhaustive or exclusive list of the circumstances under which an appellate court may find that a trial

court abused its discretion in the imposition of a sentence in a particular case. *Firouzmandi,* 2006-Ohio-5823 at ¶ 56.

{¶65} In the current case, Appellant was found guilty after a jury trial of one count of aiding and abetting in the illegal conveyance of a drug of abuse into a detention facility, a felony of the third degree in violation of R.C. 2921.36(A)(2). Pursuant to R.C. 2929.14(A)(3), felonies of the third degree are punishable by "one, two, three, four, or five years." By judgment entry filed Aug. 21, 2009, the trial court sentenced Appellant to five years in prison.

{¶66} At the sentencing hearing, the trial judge considered Appellant's criminal history, which consisted of aggravated assault, menacing by stalking, domestic violence, and violation of a protective order. T. at 178. Also, Appellant encouraged Edwards, a woman with no prior criminal record, to bring drugs into a prison for his own benefit. Id. at 180. With regard to recidivism considerations, Appellant has been sanctioned in the past and still continued to commit crimes.

{¶67} Upon review of the record, we believe that the trial court's statements at the sentencing hearing were guided by the overriding purposes of felony sentencing, specifically to protect the public from future crime by the offender and to punish the offender. R.C. 2929.11. Based on the transcript of the sentencing hearing and the subsequent judgment entry, this Court cannot find that the trial court acted unreasonably, arbitrarily, or unconscionably.

{¶68} Appellant's third assignment of error is overruled.

By: Delaney, J.

Edwards, P.J. and

Hoffman, J. concur.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. WILLIAM B. HOFFMAN

[Cite as *State v. Miller*, 2010-Ohio-3488.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
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-vs-	:	JUDGMENT ENTRY
	:	
RONDALE LAMONT MILLER	:	
	:	
Defendant-Appellant	:	Case No. 2009-CR-0113
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas is affirmed. Costs assessed to Appellant.

_____
HON. PATRICIA A. DELANEY

_____
HON. JULIE A. EDWARDS

_____
HON. WILLIAM B. HOFFMAN