[Cite as *State v. Rodriguez*, 2009-Ohio-4059.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio	Court of Appeals No. WD-08-011
Appellee	Trial Court No. 07 CR 215
v.	
Scott Rodriguez	**DECISION AND JUDGMENT**
Appellant	Decided: August 14, 2009

* * * * *

Paul Dobson, Wood County Prosecuting Attorney,
Gwen Howe-Gebers and Jacqueline M. Kirian,
Assistant Prosecuting Attorneys, for appellee.

Deborah K. Rump, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals his conviction and sentence for trafficking marijuana rendered in the Wood County Court of Common Pleas. Since we find the conviction was proper, we affirm.

{¶ 2} On June 1, 2007, appellant, Scott Rodriguez, was riding as a passenger with his father on I-75 in a Chevy S10 pick-up truck when they, and a Ford F150 pick-up truck traveling two cars behind them, were pulled over at the same time. Approximately 80

pounds of marijuana was found in the F150 truck. Appellant, his father, and the occupants of the F150 truck, Luis Melendez and Kyle Tolka, were all arrested in connection with the marijuana. Rodriguez was convicted of one count of trafficking marijuana and sentenced to a mandatory eight years imprisonment.

{¶ 3} Among those witnesses who testified for the state were Melendez, Tolka, Confidential Informant Saul Ramirez, Agent Mark Apple, an investigator with the Ohio Attorney General's Office Bureau of Criminal Investigations, and Agent Mike Ackley, a deputy sheriff with the Wood County Sheriff's Department. Based on their experience, Agents Apple and Ackley were both deemed by the court as experts in drug organizations and testified as to how drug organizations generally work. Testimony of the events and circumstances leading up to the arrest are as follows.

{¶ 4} Agent Apple was involved in the present drug transaction in an undercover capacity, working with Ramirez. He testified that he was in constant communication with Ramirez on May 31, 2007, and that he and Ramirez set up a meeting at a Meijer store in Rossford, Ohio, on June 1, 2007. Agent Apple also testified that a briefing was held on May 31, 2007, with law enforcement agencies in the area. There it was decided that a traffic stop would be conducted on anyone who showed up to meet with Ramirez and Agent Apple at the Meijer store on June 1, 2007.

{¶ 5} At the store, Agent Apple and Ramirez discussed the price of the marijuana with Melendez. Appellant was not a part of the discussion. Agent Apple testified that

had no contact with appellant, nor did he see appellant have any contact with Ramirez, Melendez, or Tolka. He did not see appellant in possession of any drugs. Agent Apple did, however, testify that even though his attention was not focused on appellant, in his expert opinion, appellant was acting as a "lookout" because he was looking at them when he walked by and he was walking around the store.

{¶ 6} Agent Ackley testified that he and his team pulled over the S10 and the F150 per instructions to look for two pick-up trucks, one smaller one and one larger white one. He testified that he was present during the search of both vehicles, and that the marijuana was found in the F150. The registration for the F150 was found in the S10. He testified that nothing of evidentiary value was seized from appellant, and that he did not personally see anything to connect appellant to the marijuana seized from the F150.

{¶ 7} Ramirez testified that he had no discussion or interaction with appellant regarding the drug transaction. Ramirez did claim that he shook both appellant's and appellant's father's hands at the Meijer store, but referred to them during his testimony as "this guy" and "the guy's son." Ramirez testified that he knew Melendez before the present drug transaction, that Melendez had begun as a mule and then started dealing drugs himself. According to Ramirez' testimony, a "mule," or driver, is paid to transport the drugs and would be someone who is trusted by the drug "supplier." He testified that when there is more than one vehicle traveling, it is common for the supplier to either be the "lead" vehicle or to be following behind the mule. He also testified that Melendez

had offered to sell him a kilo of cocaine a few weeks before the present transaction. Ramirez had been a drug dealer for approximately 15 to 20 years and, in exchange for his cooperation in the present drug investigation, all drug charges in the state of Ohio were dropped.

{¶ 8} Melendez testified that he met with appellant, his father, and Tolka in Indianapolis, and the four of them then traveled to Chicago. He claimed that once in Chicago, appellant and appellant's father left with the F150 and when they returned the truck contained the marijuana. However, Melendez and Tolka both testified that they never saw appellant in possession of the marijuana, nor did they hear appellant make any statements related to picking up any marijuana. Melendez also testified that he received $10,000 from a customer, which he gave to appellant's father. He claimed that out of that he was given $2,000 as payment for his role in the drug transaction, and $4,000 was sent via Western Union in four separate transactions by appellant, appellant's father, Tolka, and himself.

{¶ 9} Melendez testified that upon arriving at the Meijer store, he did not see appellant because appellant was wandering around the store, but then appellant walked by him, Agent Apple, and Ramirez to get to the cash registers in order to make a purchase. He also testified that appellant's father had told him that when they were leaving the store his son's hands were sweating because he "knew they were cops." Melendez made an agreement with the state of Ohio that if he cooperates and testifies his

sentence would be reduced to five years imprisonment from a possible 16 years imprisonment.

{¶ 10} Tolka testified that he has known appellant for about a year and that he became involved in the present drug transaction because appellant asked him if he wants to "make some money." Tolka testified that he did not see appellant make any wire transfers, nor did he see appellant in possession of any drugs. In exchange for his testimony his sentence was reduced to two years instead of eight years imprisonment.

{¶ 11} Among the evidence introduced at trial were taped conversations between Agent Apple (in his undercover capacity), Ramirez and Melendez, none of them including or mentioning appellant. No fingerprint analysis was undertaken on the packages of marijuana and, therefore, no fingerprint evidence against appellant. Two food receipts from Texas were found in the S10, and Agent Ackley testified that these receipts were significant because Ramirez had told them that the marijuana was coming from Texas. Two wire transfer receipts were also found in the S10, showing that appellant had sent $300 to his brother in Texas and to his grandfather in Illinois.

{¶ 12} On June 6, 2007, appellant was indicted for one count of trafficking in marijuana with specification in violation of R.C. 2925.03(A)(2)(C)(3)(f), F-2. After a jury trial, appellant was convicted and sentenced to a mandatory eight years imprisonment and ordered to pay fines and costs totaling $8,755.31.

{¶ 13} Appellant now appeals setting forth the following assignments of error:

{¶ 14} I. "Rodriguez' conviction was against the manifest weight of the evidence."

{¶ 15} II. "The trial court erred by not granting Rodriguez' Rule 29 motion because the state did not offer sufficient credible evidence to prove beyond a reasonable doubt that Rodriguez knowing transported marijuana."

{¶ 16} III. "The trial court abused its discretion through a series of evidentiary errors, any of which resulted in Rodriguez not receiving a fair trial."

{¶ 17} IV. "The trial court erred by allowing the state to have two law enforcement officers deemed experts in drug investigations thereby allowing them to improperly offer opinions to bolster the state's case."

{¶ 18} V. "The trial court erred by failing to give the requested jury instruction, and by adding a jury instruction for aiding and abetting after the jury instructions had been read to the jury."

I. Manifest Weight

{¶ 19} In his first assignment of error, appellant claims that his conviction was against the manifest weight of the evidence. In examining this type of claim, "[t]he court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin* (1983), 20 Ohio App.3d 172, 175. "In effect, the appellate court sits as a 'thirteenth juror' and disagrees

with the factfinder's resolution of the conflicting testimony." *State v. Owens*, 6th Dist. No. H-07-031, 2008-Ohio-7098, ¶ 9 (quoting *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387).

{¶ 20} Upon review of the record, we conclude that appellant's conviction was supported by sufficiently reasonable and believable evidence. The state presented a logical version of the events, and we do not feel that the jury erred in believing the state's version and in convicting appellant based on the evidence. Although there was some conflicting testimony between the witnesses, "conflicting testimony does not establish that appellant's conviction was against the weight of the evidence." *State v. Glenn* (Aug. 23, 1999), 12th Dist. No. CA98-06-130. "[W]e see no reason why we should question the jury's resolution of the conflicting testimony presented at trial." Id. Accordingly, appellant's first assignment of error is not well-taken.

II. Sufficiency Of The Evidence

{¶ 21} In his second assignment of error, appellant asserts that his conviction was against the sufficiency of the evidence. In reviewing a sufficiency of the evidence claim, "we must view the evidence in the light most favorable to the prosecution, and ask whether 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, 274. This court has noted that "[a] conclusion that convictions are not against the manifest weight of the evidence necessarily encompasses a conclusion that the convictions are supported

by sufficient evidence." *Owens* at ¶ 9. Since we have already found that appellant's conviction was not against the manifest weight of the evidence, it so follows that his conviction was not against the sufficiency of the evidence either. Accordingly, appellant's second assignment of error is not well-taken.

III. Evidentiary Errors

{¶ 22} In his third assignment of error, appellant claims that evidentiary errors made by the trial court deprived him of a fair trial. "The trial court's decision excluding the evidence will not be reversed absent an abuse of discretion." *State v. Forbes*, 12th Dist. No. 06-CR-9555, 2007-Ohio-6412, ¶ 7 (citing *State v. Hancock*, 108 Ohio St.3d 57, 76, 2006-Ohio-160, ¶ 122). "An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment." Id. (citing *Hancock* at ¶ 130).

{¶ 23} Appellant first asserts that the trial court erred in refusing to allow the jury to hear an audio recording of a conversation between Melendez and Ramirez in which Melendez offered to sell Ramirez a large quantity of cocaine. Melendez testified at trial that he has not dealt in cocaine and he did not offer to sell any to Ramirez. The court, in denying appellant's request to play the recording, relied on Evid.R. 613(B)(2) and stated that the recording was not "[a] fact that is of consequence to the determination of the action other than the credibility of a witness." We agree with the trial court's determination.

{¶ 24} The transaction that was pertinent to the trial dealt only with marijuana. Cocaine was not involved, and thus, Melendez's offer to sell Ramirez cocaine more than three weeks prior to the marijuana transaction was irrelevant to the determination of the action other than Melendez's credibility.

{¶ 25} Appellant also claims two more errors in evidentiary rulings were made by the trial court: first, when the state was permitted to exceed the boundaries of direct examination on cross but similarly did not allow appellant to do so during Rodriguez' testimony and the testimony of Agent Ackley; and second, when the trial court ruled that the state in its rebuttal closing argument that it could raise new issues that were not raised by appellant. Appellant argues that the totality of the errors resulted in an unfair trial. We find this argument to be without merit. None of these rulings alone were improper, and appellant offers no support for his argument that the totality of the errors resulted in an unfair trial. "It is the duty of the appellant, not this court, to demonstrate his assigned error through an argument that is supported by citations to legal authority and facts in the record." *State v. Ashby*, 9th Dist. No. 06CA0077-M, 2007-Ohio-3118, ¶ 26 (quoting *State v. Taylor* (Feb. 9, 1999), 9th Dist. No. 2783-M; *see also*, App. R. 16(A)(7)). Accordingly, appellant's third assignment of error is not well-taken.

IV. Experts

{¶ 26} In his fourth assignment of error, appellant asserts that the trial court erred in allowing the state to have two law enforcement officers deemed experts in drug

investigations, thereby allowing them to improperly offer opinions to bolster the state's case. "Evid.R. 702(B) specifies that a witness may testify as an expert if she is qualified by, '* * * specialized knowledge, skill, expertise, training, or education regarding the subject matter of the testimony.'" *State v. Ayala* (Mar. 19, 1999), 6th Dist. Nos. L-97-1365, L-97-1356. Further, Evid.R. 703 states that "[T]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing."

{¶ 27} "The determination of expert witness qualifications to testify rests within the sound discretion of the court and will not be reversed absent an abuse of that discretion." Id. (citing *State v. Awkal* (1996), 76 Ohio St. 3d 324, 331; *State v. Bidinost* (1994), 71 Ohio St. 3d 449, 453). The First District Court of Appeals has allowed expert testimony of this type on more than one occasion, stating that "due to the officer's experience in narcotics trafficking, he possessed knowledge that would aid the jury on matters 'beyond its ken.'" *State v. Taylor*, 174 Ohio App.3d 477, 2007-Ohio-7066, ¶ 28 (quoting *State v. Campa* (Mar. 29, 2002), 1st Dist. No. C-010254).

{¶ 28} Here, both officers had extensive experience in drug investigations that qualified them as experts, thus permitting them to testify to matters beyond the knowledge of laypersons. Their testimony as to how drug organizations generally work was based on their own specialized knowledge and was proper. Further, Apple's testimony that appellant was acting as the lookout was "based on [his] own observations

and was within the scope of [his] expertise." *Taylor* at ¶ 29. Accordingly, we conclude that the trial court did not abuse its discretion in qualifying both officers as experts and in allowing them to give their opinions.

{¶ 29} Accordingly, appellant's fourth assignment of error is not well-taken.

V. Charge To The Jury

{¶ 30} In his fifth assignment of error, appellant claims that the trial court erred by failing to give the requested jury instruction and by adding a jury instruction for aiding and abetting after the jury instructions had been read to the jury. Specifically, appellant requested two jury instructions, including: (1) language from Federal Jury Practice and Instructions § 15.07, which in pertinent part states "[P]rior conviction of a crime that is a felony is one of the circumstances which you may consider in determining the credibility of that witness"; and (2) a *falsus in uno, falsus in omnibus* instruction, which stated that "if you find from the evidence that a witness has testified falsely as to any material fact about which the witness could not reasonably have been mistaken, you have a right to distrust that witness' testimony in all other particulars and you may disregard all or part of the testimony of that witness, or you may give it such credibility as you believe it deserves."

{¶ 31} "It is well settled that the giving of jury instructions is within the sound discretion of the trial court." *State v. Luke* (Feb. 1, 1999), 3d Dist No. 4-98-13 (citing *State v. Dehass* (1967), 10 Ohio St.3d 230). "Further, jury instructions must not be

examined in isolation but rather within the totality of the charge." Id. (citing *State v. Price* (1979), 60 Ohio St.2d 136, 398 N.E.2d 772). "The Supreme Court of Ohio has held that it is prejudicial error for a trial court to refuse 'a requested charge which is pertinent to the case, states the law correctly, and is not covered by the general charge.'" *State v. Harris* (June 20, 1994), 5th Dist. No. CA 9456 (quoting *State v. Scott* (1986), 26 Ohio St.3d 92, 101). The court has also held that "* * * if requested instructions are correct and pertinent, they must be included, at least in substance, in the general charge." *State v. Barron* (1960), 170 Ohio St. 267, 270.

{¶ 32} "A *falsus in uno, falsus in omnibus* instruction is permissible, if at all, only where an apparent conscious falsity is uttered by a witness as to a material fact or circumstance." *Mikula v. Tailors* (1970), 24 Ohio St.2d 48, 51. "Seemingly contradictory utterances of a witness do not, per se, establish a conscious falsity." Id. at 52. "Something more must appear which will permit the jury reasonably to believe that perjury was committed." Id.

Here, the requested jury instruction was, in substance, included in the general charge. The jury was instructed by the court on how to weigh the witnesses' credibility. In addition, the jury was aware of the witnesses' prior felony convictions. We also cannot find anything in the record to suggest that any of the witnesses lied about a material fact or circumstance, nor does appellant point to any specific instance. Therefore, we

conclude that appellant was not prejudiced by the court's denial to read the requested jury instruction pertaining to credibility, and that the court's refusal to give the *falsus in uno, falsus in omnibus* instruction was proper.

{¶ 33} Finally, appellant claims that the trial court erred by adding a jury instruction for aiding and abetting after the jury instructions had been read to the jury. The additional instruction was given to the jury immediately after the jury instructions were initially read and before closing arguments had begun. In addition, the court cautioned the jury more than once not to place any undue weight on the aiding and abetting instruction just because it was given after the other instructions. We conclude that there was no prejudice to appellant, and the trial court did not err in adding the aiding and abetting instruction.

{¶ 34} Accordingly, appellant's fifth assignment of error is not well-taken.

{¶ 35} On consideration whereof, the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J.

Thomas J. Osowik, J.

James R. Sherck, J.
CONCUR.

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JUDGE

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JUDGE

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JUDGE

Judge James R. Sherck, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.