[Cite as *State v. England*, 2011-Ohio-1144.]

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

State of Ohio — Court of Appeals No. WM-10-012

Appellee — Trial Court No. 10 CR 052

v.

Steven J. England — **DECISION AND JUDGMENT**

Appellant — Decided: March 11, 2011

* * * * *

Thomas A. Thompson, Williams County Prosecuting Attorney, and Katherine J. Middleton, Assistant Prosecuting Attorney, for appellee.

Clayton M. Gerbitz, for appellant.

* * * * *

OSOWIK, P.J.

{¶1} This is an appeal from a judgment of the Williams County Court of Common Pleas that found appellant guilty of one count of aggravated possession of drugs and four counts of illegal assembly or possession of chemicals for the manufacture of drugs. For the following reasons, the judgment of the trial court is affirmed.

{¶2} Appellant sets forth three assignments of error:

{¶3} "I. The verdict finding appellant guilty of all counts of the indictment was against the manifest weight of the evidence.

{¶4} "II. Trial counsel provided appellant with ineffective assistance of counsel throughout appellant's trial.

{¶5} "III. The court erred to prejudice of the appellant by not ordering the entry of a judgment of acquittal to Count I of the indictment as there was insufficient evidence for a conviction."

{¶6} The undisputed facts relevant to the issues raised on appeal are as follows. On June 19, 2009, Brandi Jordan attempted to use identification belonging to appellant's wife, Angel England, at the Wal-Mart in Bryan, Ohio, to purchase pseudoephedrine, an essential ingredient in the manufacture of methamphetamine, a schedule II controlled substance. Later that evening, appellant and his wife ("Angel") went to the same Wal-Mart and purchased Coleman fuel, another ingredient used to manufacture methamphetamine ("meth"). Upon leaving the store, appellant and his wife were stopped by Bryan police officers, who had been called to the store by a security officer due to appellant's history of theft offenses from that store. After officers spoke to appellant and his wife, they requested and received consent to search the truck appellant had driven to the store. In the truck, officers found several items used in the manufacture of meth, including a two-liter soft drink bottle with a hole in the cap, a straw, a push-rod, a scooper, a receipt from a CVS pharmacy printed with the store's pseudoephedrine policy, and baggies. Officers also found a plastic bag with the corner cut off, which also can be

part of the meth-manufacturing process, and a tube, both of which contained residue later identified as meth. Appellant was arrested and later interrogated regarding meth use and production. During the interrogation, appellant told officers he had used methamphetamines earlier in the day and that his friend Daniel Goebel, with whom appellant was living, was manufacturing meth at his Williams County residence. On June 20, 2009, officers working with the Multi-Area Narcotics Task Force ("MAN unit") in Williams County obtained and executed a search warrant for Goebel's residence, where they seized various items used in manufacturing meth, including: Coleman fuel, soft drink bottles, fertilizer, salt, tubing, a bottle of solvent, cat litter, propane tanks, grill tanks used to store anhydrous ammonia, lye, coffee filters, sulfuric acid, a bottle with a funnel and pieces of foil. Officers also seized a bag belonging to appellant that contained a coffee grinder (commonly used to crush pseudoephedrine tablets), liquid fire, drain cleaner, coldpacks and cutters (commonly used to tear batteries apart). Additionally, officers searched Angel's car, which was parked on Goebel's property, and seized numerous lithium batteries and 116 loose pseudoephedrine pills, which also are items used to manufacture meth.

{¶7} On April 14, 2010, appellant was indicted on four counts of illegal assembly or possession of chemicals for the manufacture of drugs in violation of R.C. 2925.041(A) and one count of aggravated possession of drugs in violation of R.C. 2925.11(A) and (C)(1)(a). Appellant entered pleas of not guilty to all counts and a two-day jury trial commenced on May 17, 2010.

{¶8} The state presented the testimony of police officers, forensic scientists with the Ohio Bureau of Criminal Identification and Investigation ("BCI"), pharmacy employees and two of appellant's acquaintances. Stephen Doctor, a security officer at the Wal-Mart in Bryan, Ohio, and part-time Edgerton, Ohio, police officer, authenticated several surveillance videos from the store's pharmacy. Doctor identified videos from April 13 and 30, May 27, and June 7, 13, and 15, 2009, all of which showed appellant making purchases at the pharmacy. Doctor further testified that on June 19, 2009, he was notified by the pharmacy department that Angel England was attempting to use someone else's identification card to purchase pseudoephedrine. Doctor called the Bryan Police Department and officers were sent to the store to investigate. Doctor made two more calls to the police department that evening, the final one when appellant entered the store. Doctor further testified that he was watching appellant because appellant had committed numerous theft offenses in the store; however, the jury was instructed to disregard that statement.

{¶9} Officer Jeff Ridgway, Bryan Police Department, testified that he responded to a call from Wal-Mart on June 19, 2009, regarding appellant and his wife. Ridgway and his partner stopped appellant and Angel when they left the store and talked to them. Appellant had purchased a can of Coleman fuel. In the open bed of the pick-up truck appellant had driven to the store, the officer saw hoses, gas cans and jars, all items which the officer believed could be related to meth production. Officer Ridgway testified that appellant and his wife were taken into custody "because there was a theft involved." That

statement was made in reference to store merchandise that had not been paid for that was found in Angel's possession. The jury was instructed to disregard the statement and it was stricken from the record. At one point while appellant was in custody, Ridgway looked in a trash can next to appellant and saw a sticker from a bottle of drain cleaner and a Rite-Aid receipt. The officer testified that drain cleaner can be used in the meth production process. On the sales receipt the letters "S-U-P-H-R-N" and "$6.99" were visible.

{¶10} Officer Christopher Chapa, Bryan Police Department, testified that he interviewed appellant on the night of June 19, 2009. After Chapa read appellant his Miranda rights, appellant agreed to talk. Appellant told the officer that he has used meth and had used it earlier that day. He also told the officer that he was going to use the Coleman fuel he purchased at Wal-Mart for camping. Appellant told the officers that Daniel Goebel and several other individuals were manufacturing meth at Goebel's home, where appellant and his wife were staying. The officer further testified that appellant had given his written consent for a search of the truck he drove to Wal-Mart. After the questioning, officers decided to request a search warrant for Goebel's residence. Chapa, who participated in the search, testified as to the evidence seized, explaining in detail how the various items seized can be used in the meth manufacturing process. After the search, Chapa went to Wal-Mart and obtained the pharmacy's pseudoephedrine records, which indicated that appellant had purchased pseudoephedrine on April 13 and June 13, 2009. Chapa also identified another of Wal-Mart's logs which indicated that appellant's

wife had purchased pseudoephedrine on three occasions during May and June 2009; the store's video indicated that appellant was with her at those times.

{¶11} Officer George Moser, Defiance, Ohio, Police Department, testified that he searched the truck appellant drove to Wal-Mart on the night of June 19, 2009. Moser identified items found in the truck which, based on his training, he believed could be used to manufacture meth and explained the significance of each item. Moser further testified as to his involvement with the search of Goebel's residence and a car parked on the property that was registered to appellant's wife. Moser testified in detail as to how the evidence was collected, placed in evidence bags and identified. Moser testified that one of the clear straws found in appellant's truck tested positive for meth residue, as did one of the plastic baggies.

{¶12} Officer Tom Weicht, Auburn, Indiana, Police Department, testified as to his involvement with appellant's case at the request of officers in Williams County, Ohio. Weicht stated that he obtained information from Meth Check, a computer database that tracks purchases of controlled substances, which indicated that appellant purchased pseudoephedrine from CVS, Rite Aid and Meijer pharmacies in the Auburn area on April 25, May 13, May 26, June 9 and June 18, 2009. Weicht also obtained reports from Wal-Mart and Walgreen pharmacies in Angola, Indiana, that indicated appellant purchased pseudoephedrine on May 4 and 20, and June 1, 2009.

{¶13} BCI forensic scientist Scott Dobransky tested numerous pieces of evidence submitted in this case and identified methamphetamine residue on a pouch containing a

straw, push rod and scooper, on a gallon-sized plastic bag, and on a pouch containing a plastic bag and coffee filters. Dobransky also testified that Coleman fuel, which appellant had purchased at Wal-Mart prior to his arrest, is a solvent used in the production of meth. Additionally, BCI forensic scientist Kelsey Degen testified that the 116 tablets found in Angel England's vehicle were pseudoephedrine.

{¶14} Linda McCarthy, a pharmacy technician for Wal-Mart in Bryan, Ohio, testified as to the store's policy concerning the purchase of pseudoephedrine. Products containing pseudoephedrine are kept behind the pharmacy counter and must be paid for there. A customer who requests such a product must provide photo identification. Address and age are verified and a customer must be at least 18 years old to purchase pseudoephedrine. The employee also determines whether the customer has purchased pseudoephedrine in the past and, if so, how much and how recently.

{¶15} Donna Rosebrock, a pharmacy technician at Rite Aid in Bryan, Ohio, testified that appellant purchased pseudoephedrine from the pharmacy on June 18, 2009. Three pharmacy employees from stores in Auburn and Angola, Indiana, testified, based on records maintained by the stores, that appellant purchased pseudoephedrine in May and June 2009.

{¶16} Brandi Jordan testified that she lived with appellant and his wife in a house in Homer, Michigan, for about three weeks in February 2009. She stated that appellant and his wife eventually moved out because they were all making their own meth and "just

couldn't get along." She further testified that she witnessed appellant making meth at least ten times during that period.

{¶17} Daniel Goebel testified that appellant and his wife lived with him for about one week immediately prior to June 19, 2009. Goebel stated that during that time he saw appellant in the white truck driven to Wal-Mart and the white car parked on his property, both of which were searched by the police. He further testified that during June 2009 appellant made meth at his house at least five times.

{¶18} On May 18, 2010, the jury returned verdicts of guilty as to all counts. Appellant was sentenced to serve two years on each of the first four convictions and six months on the possession conviction, with the sentences to be served consecutively.

{¶19} In support of his first assignment of error, appellant asserts that the verdicts finding him guilty of all counts were against the manifest weight of the evidence. Appellant first argues that the state did not put forth sufficient evidence of his intent to manufacture meth, as charged in four of the counts, and instead relied on "other acts" evidence. As to the four counts of illegal assembly or possession of chemicals for the manufacture of methamphetamine, each count alleged a different date of possession of the chemicals; three of those counts alleged that the chemical was pseudoephedrine while one count alleged that the chemical was Coleman fuel.

{¶20} The "weight of the evidence" refers to the jury's resolution of conflicting testimony. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. In determining whether a verdict is against the manifest weight of the evidence, the appellate court sits as the

"thirteenth juror" and "'* * * 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.'" Id. quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶21} R.C. 2925.041(A) states:

{¶22} "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."

{¶23} Appellant concedes on appeal that on the dates set forth in the indictment he was in possession of Coleman fuel and pseudoephedrine, both of which are chemicals that may be used to manufacture methamphetamine, a schedule II controlled substance. Appellant claims, however, that the state presented no evidence as to his intent, other than numerous instances of other acts "provided by convicted felons" who testified that appellant had previously smoked, sold and manufactured meth in their presence.

{¶24} Intent lies within the privacy of an individual's own thoughts and is not susceptible of objective proof. *State v. Garner* (1995), 74 Ohio St.3d 49, 60. The law recognizes that intent can be proven from the surrounding facts and circumstances and that "persons are presumed to have intended the natural, reasonable and probable consequences of their voluntary acts." Id.

{¶25} With regard to appellant's statement referring to other-acts testimony provided by "convicted felons" Jordan and Goebel, it is well-settled that questions regarding the credibility of witnesses are matters left to the trier of fact. *State v. DeHaas* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Moreover, the trial court instructed the jury as follows: "You are not required to believe the testimony of any witness simply because he or she was under oath. You may believe or disbelieve all or any part of the testimony of any witness. It is your province to determine what testimony is worthy of belief and what testimony is not worthy of belief."

{¶26} Testimony and evidence of appellant's other acts which included manufacturing, smoking and selling meth was offered to show intent. Evidence of other acts which are wholly independent of the crime charged is generally inadmissible. *State v. Thompson* (1981), 66 Ohio St.2d 496, 497. Evid.R. 404(B) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Accordingly, evidence of other acts may be relevant and admissible to show motive or intent, the absence of mistake or accident, or a scheme, plan or system in committing the act in question. *State v. Broom* (1988), 40 Ohio St.3d 277, paragraph one of the syllabus.

{¶27} This court recently considered this issue in *State v. Mills*, 6th Dist. No. WM-09-014, 2010-Ohio-4705, in which we affirmed the appellant's convictions for

violations of R.C. 2925.041(A). In *Mills*, as in the case before us, the appellant argued that his convictions were against the manifest weight of the evidence because the state did not show intent to manufacture methamphetamine. We found, however, that the appellant's prior conviction for possession of meth was properly admitted to prove motive, intent or knowledge under Evid.R. 404(B).

{¶28} At the trial below, Daniel Goebel testified that appellant made meth at Goebel's house at least five times during June 2009. Brandi Jordan testified she had witnessed appellant making meth at least ten times when they lived together in Indiana in February 2009. Further, Officer Chapa testified appellant told him he had smoked meth on the day of his arrest. Several pharmacy employees testified as to purchases of pseudoephedrine made by appellant in Bryan, Ohio, on the four dates in question. On several other dates in April, May and June 2009, appellant drove to Indiana to purchase a single box of pseudoephedrine on each occasion. Additionally, several police officers testified as to drug paraphernalia associated with the manufacture of meth which they found in the truck appellant had been driving on the day of his arrest, in the car belonging to his wife and in the bedroom where appellant was living at the time of his arrest. As this court stated in *Mills*, supra, appellant's actions "have left us at a loss for an innocent explanation." Accordingly, we cannot say that the jury lost its way and created a manifest miscarriage of justice when it found appellant guilty of four counts of illegal assembly or possession of chemicals for the manufacture of drugs.

{¶29} As to Count II, aggravated possession of drugs, appellant argues that there was insufficient evidence that he owned or possessed the truck in which officers found several items containing meth residue, and therefore insufficient evidence that he knowingly possessed meth.

{¶30} R.C. 2925.11(A)(C)(1)(a) states:

{¶31} "No person shall knowingly obtain, possess, or use a controlled substance. * * * If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule I or schedule II, * * * whoever violates * * * this section is guilty of aggravated possession of drugs."

{¶32} Appellant does not dispute the evidence that the items in the truck did in fact contain meth residue. Appellant argues that the state did not show that he owned or possessed the vehicle. Evidence admitted at trial, however, contradicts that argument. Officer Chapa and Sergeant Ridgway both testified that appellant drove to Wal-Mart on the day of his arrest in the white truck. When Chapa asked appellant for consent to search the truck, appellant signed the consent form. Further, Officer Moser testified that the truck was registered to appellant. Daniel Goebel testified that appellant and his wife arrived at his residence about a week before the arrest driving the white truck.

{¶33} Based on the foregoing, we are unable to find that the jury lost its way and created a manifest miscarriage of justice in finding appellant guilty of aggravated possession of drugs.

{¶34} Accordingly, we find that appellant's convictions were not against the weight of the evidence and appellant's first assignment of error is not well-taken.

{¶35} In support of his second assignment of error, appellant argues that he was denied effective assistance of counsel at trial in several respects. Appellant asserts that trial counsel failed to object "to anything offered by the state," including inadmissible hearsay testimony and extensive other-acts evidence.

{¶36} To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied upon as having produced a just result. The standard requires appellant to satisfy a two-prong test. First, appellant must show that counsel's representation fell below an objective standard of reasonableness. Second, appellant must show a reasonable probability that, but for counsel's perceived errors, the results of the proceeding would have been different. *Strickland v. Washington* (1984), 466 U.S. 668. This test is applied in the context of Ohio law that states that a properly licensed attorney is presumed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153.

{¶37} Appellant states that trial counsel should have objected to "inadmissible and prejudicial hearsay" but does not identify the alleged hearsay. Therefore, this argument is without merit.

{¶38} Appellant essentially argues that trial counsel did not object often enough. However, the decision to object or not object is a tactical decision to be made by trial counsel. Issues which are arguably a matter of counsel's trial tactics and strategies do not

constitute ineffective assistance. *State v. Clayton* (1980), 62 Ohio St.2d 45, 49, citing *State v. Lytle* (1976), 48 Ohio St.2d 391, 396.

{¶39} As to the "other acts" testimony in this case, the record reflects that appellant's trial counsel and the prosecutor had an extensive dialog with the trial court before trial began concerning this issue. At that time, the trial court asked the prosecutor whether there would be other acts evidence introduced. The prosecutor responded that there would be other acts evidence as to appellant's smoking meth and manufacturing it within a time frame spanning the nine months prior to the arrest, as well as videotape of appellant purchasing pseudoephedrine from various pharmacies. After discussing the matter with counsel, the trial court indicated that it would allow the evidence as discussed for the purpose of showing intent. Having been told by the trial court that the evidence would be admitted, trial counsel clearly made a tactical choice not to object, knowing that the objections would be overruled.

{¶40} As set forth in Evid.R. 404(B), evidence of other acts may be admissible for certain purposes. In the case before us, testimony from the witnesses as to appellant's purchases of pseudoephedrine in Ohio and Indiana, as well as testimony that he possessed a wide variety of paraphernalia that could be used to produce meth, was put before the jury to show intent to commit the crimes charged. In response to testimony from numerous witnesses that appellant purchased pseudoephedrine from a variety of pharmacies, trial counsel chose to emphasize through cross-examination that it is not illegal to purchase or possess pseudoephedrine.

{¶41} Based on the foregoing, we find that trial counsel made a reasonable tactical decision not to highlight the other acts evidence by objecting each time a witness testified either as to appellant's purchasing pseudoephedrine or as to the drug paraphernalia found in the various searches. Therefore, this argument is without merit.

{¶42} Appellant also argues that trial counsel was ineffective for failing to file a motion to suppress the evidence obtained from the searches of the truck, the car and Goebel's residence. As to this issue, this court has recently stated that in order to demonstrate ineffective assistance for failing to file a motion to suppress, a defendant must show a basis for the motion, that the motion had a reasonable probability of success, and a reasonable probability that suppression of the challenged evidence would have changed the outcome of the trial. *State v. Clark*, 6th Dist. No. WM-09-009, 2010-Ohio-2383.

{¶43} Appellant has not shown how a motion to suppress would have succeeded. The record reflects that appellant consented to the search of the truck while it was parked in the Wal-Mart lot. As for Goebel's residence and the car parked in his driveway, the police obtained valid search warrants. Appellant has not argued that the warrants were not obtained or executed lawfully. Further, appellant's statements that he smoked meth on the day of his arrest and that he had smoked meth 50 times in the past with Goebel were made after he was read his Miranda rights and agreed to talk. We therefore find that trial counsel was not ineffective for deciding not to file a motion to suppress which in all probability would have been denied.

{¶44} Accordingly, we find that appellant has not shown that, but for trial counsel's actions, the result of the trial would have been different and has failed to establish that counsel was ineffective. Appellant's second assignment of error is not well-taken.

{¶45} In support of his third assignment of error, appellant asserts that the trial court erred by denying his Crim.R. 29 motion for acquittal as to Count I of the indictment. "Pursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus.

{¶46} Count I of the indictment charged appellant with a violation of R.C. 2925.041(A), which states:

{¶47} "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."

{¶48} In addition to charging a violation of the statute as set forth above, Count I of the indictment in this case stated in relevant part that appellant "* * * did knowingly aid and abet another, to wit: Brandi Jordan * * *" who was in possession of one or more chemicals used in the manufacture of methamphetamine.

{¶49} Appellant argues that there was insufficient evidence to convict him on Count I because the state did not prove that he aided or abetted Brandi Jordan as specified in the indictment. However, it is important to note that before trial began, the following dialog took place in the judge's chambers between the judge, defense counsel (Ms. Burns) and the prosecutor (Mr. Walker):

{¶50} "THE COURT: Mrs. Burns, you indicated you have another issue you'd like to bring to the attention of the Court?

{¶51} "MS. BURNS: Yes, on the first count?

{¶52} "MR. WALKER: We'll just be proceeding as to Mr. England's own conduct.

{¶53} "THE COURT: As if he's a principal rather than complicitor.

{¶54} "MR. WALKER: Yes.

{¶55} "THE COURT: Alright. * * *"

{¶56} Clearly, all parties agreed prior to trial that the state would proceed as to Count I on appellant's acts only, rather than attempt to prove complicity to Brandi Jordan's criminal acts. The record reflects that the state offered sufficient evidence that appellant violated R.C. 2925.041(A) when he knowingly assembled or possessed one or more chemicals that can be used to manufacture methamphetamine, a schedule II substance, with the intent to manufacture a schedule I or II controlled substance. The issue of complicity was not before the jury.

{¶57} We further note that, because appellant and his counsel had notice prior to trial that the state would not be proceeding on a theory of complicity under Count I, appellant was not prejudiced by the decision to proceed only as to appellant's conduct.

{¶58} Accordingly, the trial court did not err by denying appellant's motion for acquittal and appellant's third assignment of error is not well-taken.

{¶59} On consideration whereof, the judgment of the Williams County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant 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.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE