[Cite as *State v. Hodgkinson*, 2015-Ohio-2678.]

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

State of Ohio — Court of Appeals No. H-14-012

Appellee — Trial Court No. CRI-2013-0371

v.

Heather M. Hodgkinson — **DECISION AND JUDGMENT**

Appellant — Decided: June 30, 2015

* * * * *

Russell V. Leffler, Huron County Prosecuting Attorney, Dina Shenker and Patrick M. Hakos, Jr., Assistant Prosecuting Attorneys, for appellee.

James Joel Sitterly, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Heather Hodgkinson, appeals her convictions in the Huron County Court of Common Pleas for drug trafficking. For the reasons that follow, we affirm.

{¶ 2} On April 10, 2014, appellant was convicted, by a jury, of two counts of trafficking in psilocyn, more commonly known as mushrooms, felonies of the fourth degree. R.C. 2925.03(A)(1)(C)(1)(a). Appellant was also convicted of a third-degree count of trafficking in psilocyn because a transaction took place in the presence of a minor.

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

I. APPELLEE'S EVIDENCE PRESENTED IN ITS CASE IN CHIEF WAS LEGALLY INSUFFICIENT TO SUSTAIN A CONVICTION.

II. THE APPELLANT'S CONVICTION WAS AGAINST THE MAINIFEST (sic) WEIGHT OF THE EVIDENCE.

III. THE TRIAL COURT ERRED BY DENYING THE APPELLANT'S MOTION TO DECLARE A MISTRIAL WHEN APPELLEE VIOLATED THE APPELLANT'S GUARANTEES UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION AND ADVISED THE JURY THAT THE APPELLANT HAD TO TESTIFY DESPITE HER RIGHT AGAINST SELF INCRIMINATION.

{¶ 4} In her first assignment of error, appellant contends that her convictions were based on insufficient evidence. A sufficiency of the evidence argument challenges

whether the state has presented adequate evidence on each element of the offense to allow the case to go to the jury or to sustain the verdict as a matter of law. *State v. Shaw*, 2d Dist. Montgomery No. 21880, 2008-Ohio-1317, ¶ 28, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). During a sufficiency of the evidence review, this court's function 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*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. Sufficiency of the evidence is a "test of adequacy" and a question of law. *State v. Thompson*, 6th Dist. Lucas Nos. L-08-1208, L-09-1214, 2011-Ohio-5046, ¶ 62. The ultimate 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. *Jenks* at paragraph two of the syllabus.

{¶ 5} The elements of R.C. 2925.03(A)(1), drug trafficking, are as follows: "(A) No person shall knowingly do any of the following: (1) Sell or offer to sell a controlled substance or a controlled substance analog[.]" R.C. 2925.03(A)(1)(C)(1)(b) enhances the penalty if a sale of a controlled substance takes place in the vicinity of a juvenile

{¶ 6} A controlled substance is defined as any substance listed in Schedules I through V under R.C. 3719.41. Psilocyn appears in the list.

{¶ 7} The jury heard testimony that on three separate occasions and under the supervision of the Huron County Sherriff's office, informant Dan Pickering purchased psilocyn from appellant. At least one of the transactions took place at appellant's residence while her young daughter was present. The jury also heard audio recordings of the sales. Appellant now contends that the state failed to show that the items purchased by Pickering from appellant contained psilocyn at the time of the transactions.

{¶ 8} State exhibits No. 1, 2 and 3 were the mushrooms Pickering allegedly purchased from appellant on three different occasions. Two forensic scientists testified that the three exhibits all contained psilocyn. Appellant does not dispute their findings. However, she claims that the state must prove that on the days of the three transactions, the exhibits contained psilocyn.

{¶ 9} Both forensic scientists testified that mushrooms contain psilocyn and psilocybin. Both testified that psilocybin eventually breaks down into psilocyn. Appellant seems to have based her argument on this testimony, inferring that on the transaction dates, the psilocybin may not have yet broken down into psilocyn.

{¶ 10} We find the issue of psilocyn versus psilocybin to be irrelevant for purposes of this case. Mushrooms contain both substances, one happens to break down into the other. Both are listed as controlled substances in R.C. 3719.41. Appellant does not allege that there was a break in the chain of custody or that the evidence was tampered with. Viewing the evidence in a light most favorable to the state, any rational

trier of fact could have found the essential elements of the crimes proven beyond a reasonable doubt. Appellant's first assignment of error is found not well-taken.

{¶ 11} In her second assignment of error, appellant contends her convictions were against the manifest weight of the evidence.

{¶ 12} The standard of review for manifest weight is the same in a criminal case as in a civil case, and an appellate court's function is to determine whether the greater amount of credible evidence supports the verdict. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 12. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). "A manifest weight of the evidence challenge contests the believability of the evidence presented." (Citation omitted.) *State v. Wynder*, 11th Dist. Ashtabula No. 2001-A-0063, 2003-Ohio-5978, ¶ 23. When determining whether a conviction is against the manifest weight, the appellate court must review the record, weigh the evidence and all reasonable inferences drawn from it, consider the witnesses' credibility and decide, in resolving any conflicts in the evidence, whether the trier of fact "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. Prescott*, 190 Ohio App.3d 702, 2010-Ohio-6048, 943 N.E.2d 1092, ¶ 48 (6th Dist.), citing *Thompkins* at 387. It has long been held that the weight to be given to the evidence and the credibility of the witnesses is primarily for the trier of fact to decide. *State v. Thomas*, 70 Ohio St.2d 79, 80, 434 N.E.2d 1356 (1992).

{¶ 13} Once again, appellant bases her argument on the distinction between psilocyn and psilocybin. As discussed above, this is a distinction without merit for purposes of this appeal. We have reviewed the entire record and considered the credibility of witnesses and conflicts in the evidence. We conclude that competent, credible evidence in the record supports the guilty verdicts. We conclude that the verdicts did not create a miscarriage of justice and there is no indication that the jury lost its way. Accordingly, appellant's second assignment of error is found not well-taken.

{¶ 14} In her third assignment of error, appellant alleges prosecutorial misconduct during the state's closing argument. Specifically, appellant contends the prosecutor violated her right against self-incrimination

{¶ 15} The test for prosecutorial misconduct is whether the prosecutor's conduct was improper, and, if so, whether it prejudicially affected the substantial rights of the accused. *State v. Smith*, 14 Ohio St.3d 13, 14 (1984). "'"The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." * * *.'" *State v. Wilkerson*, 10th Dist. No. 01AP-1127, 2002-Ohio-5416, ¶ 38, quoting *State v. Hairston*, 10th Dist. No. 01AP-252, WL 1143191 (Sept. 28, 2001) (additional citations omitted). Prosecutorial misconduct thus is not grounds for reversal unless the accused has been denied a fair trial. *State v. Maurer*, 15 Ohio St.3d 239, 266, 473 N.E.2d 768 (1984).

{¶ 16} A prosecutor is entitled to a certain degree of latitude in closing argument. *State v. Grant*, 67 Ohio St.3d 465, 482, 620 N.E.2d 50 (1993), citing *State v. Richey*, 64

Ohio St.3d 353, 362, 620 N.E.2d 50 (1992). We review the prosecutor's summation in its entirety to determine if the allegedly improper remarks prejudicially affected the accused's substantial rights. *State v. Loughman*, 10th Dist. Franklin No. 10AP-636, 2011-Ohio-1893, ¶ 24.

{¶ 17} During his closing, the prosecutor stated: "[a] defendant does not have to testify, and they have a right not to testify; however, if you were going to bring up an inducement defense, say that someone induced you, you have to put something on, you have to put some kind of a case on." Following appellant's objection and the court's denial of her motion for mistrial, the court gave the jury the following curative instruction:

> During the rebuttal portion of the state's argument, there was a reference to the defendant not testifying. I just wanted to make sure that you understand that it is not necessary that a defendant take the witness stand in her own defense. She has a Constitutional Right not to testify, and the fact that the defendant did not testify should not be considered by you for any purpose. So, if there's any inference in her comments that would lead you to believe that the defendant should or should not have testified in this case, you're specifically instructed to ignore the fact that she didn't testify, and it should not be considered by you for any purpose.

{¶ 18} Curative instructions are presumed to be an effective way to remedy errors that occur during trial. *State v. Treesh*, 90 Ohio St.3d 460, 480, 739 N.E.2d 749 (2001).

"A trial jury is presumed to follow the instructions given to it by the judge." *Beckett v. Warren*, 124 Ohio St.3d 256, 2010-Ohio-4, 921 N.E.2d 624, ¶ 18.

{¶ 19} A conviction will be reversed based on prosecutorial misconduct only where it is clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury would not have found appellant guilty. *State v. Keenan*, 66 Ohio St.3d 402, 405, 613 N.E.2d 203 (1993). In view of the evidence presented of appellant's guilt as well as the adequate curative instruction, we cannot say that it is likely the jury would have found appellant not guilty but for the prosecutor's comments. Appellant's third assignment of error is found not well-taken.

{¶ 20} On consideration whereof, the judgment of the Huron 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE