[Cite as *State v. Shaw*, 2004-Ohio-5121.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 03 JE 14
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
IAN SHAW	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Jefferson County, Ohio Case No. 02 CR 21
JUDGMENT:	Affirmed in Part. Reversed and Remanded in Part. Enhancement Penalties Vacated.
APPEARANCES:	
For Plaintiff-Appellee:	Atty. Bryan H. Felmet Prosecuting Attorney Atty. Maresa R. Baes Assistant Prosecuting Attorney Jefferson County Justice Center 16001 State Route 7 Steubenville, Ohio 43952
For Defendant-Appellant:	Atty. Eric M. Reszke 2021 Sunset Boulevard Steubenville, Ohio 43952

JUDGES:

Hon. Cheryl L. Waite

Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: September 21, 2004

WAITE, P.J.

{¶1} This appeal arises from Appellant's conviction and sentencing following a jury trial in the Jefferson County Court of Common Pleas. Appellant, Ian Shaw, was convicted of one count of drug trafficking in excess of ten grams in violation of R.C. §2925.03(A)(2) and drug possession, in excess of ten grams, in violation of R.C. §2925.11(A). Both offenses had R.C. §2925.03(C) school specification enhancement penalties and thus constitute first-degree felonies. Appellant was sentenced to four years in prison, a six-month license suspension, and a $5,000.00 fine.

{¶2} The offenses at issue occurred on December 22, 2001, in Steubenville, Ohio. Steubenville police officer Douglas Valero ("Valero") observed Appellant, a passenger in a motor vehicle, throw something from the passenger window. The officers stopped their patrol car, and Valero recovered the baggie that was thrown from the vehicle. (Trial Tr. pp. 83-85.) It was recovered less than a thousand feet from a building identified as Wells school. (Trial Tr. p. 136.) The bag contained fifteen pieces of crack cocaine in individually wrapped baggies. (Trial Tr. pp. 99, 103.)

{¶3} The officers encountered the vehicle again that day, and Steubenville patrolman Matthew Smarrella ("Smarrella") observed the driver of the vehicle, Ricky Smith ("Smith"), throw a baggie out of his window. (Trial Tr. p. 124.) The officers then initiated a traffic stop. (Trial Tr. p. 124.)

{¶4} During the stop, Smarrella recovered two pieces of crack cocaine from the back seat of the vehicle where Charles Wright ("Wright") was sitting. (Trial Tr. p. 126.) The bag containing this crack cocaine was marked as State's Exhibit 4. (Trial Tr. p. 126.) Smarrella retrieved the baggie thrown out of the driver's window, which contained one piece of crack cocaine. (Trial Tr. p. 125.) The bag containing this crack cocaine was marked as State's Exhibit 3. (Trial Tr. p. 125.)

{¶5} Appellant was indicted by the Jefferson County Grand Jury and his case proceeded to jury trial.

{¶6} Following his jury convictions, Appellant timely appealed from the trial court's April 1, 2003, Judgment Entry of Sentence. He asserts two alleged errors on appeal.

{¶7} Appellant's first assignment of error asserts:

{¶8} "THE TRIAL JUDGE ABUSED HIS DISCRETION IN ADMITTING STATE'S EXHIBITS #3 AND #4 INTO EVIDENCE WHEN SAID EXHIBITS HAD NO RELATION TO THE DEFENDANT'S CASE."

{¶9} Appellant asserts herein that the trial court erroneously admitted State's Exhibits Three and Four, which allegedly resulted in unfair prejudice. These exhibits were the baggies that contained the crack cocaine attributed to Smith and Wright, and not Appellant. (Trial Tr. pp. 124, 126.) Appellant does not assert that these exhibits were irrelevant, but he asserts pursuant to Evid.R. 403, the exhibits' prejudicial effects outweigh the probative value.

{¶10} To be relevant and thus admissible, evidence must have a tendency, "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. However, even if the evidence is relevant, it must be excluded pursuant to Evid.R. 403(A), "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

{¶11} The appropriate review we undertake as to this issue is an abuse of discretion standard. *State v. Maurer* (1984), 15 Ohio St.3d 239, 265, 473 N.E.2d 768, 15 O.B.R. 379, citing *State v. Hymore* (1967), 9 Ohio St.2d 122, 128, 224 N.E.2d 126, 38 O.O.2d 298. In analyzing admissibility under Evid.R 403(A), a trial court must engage in a balancing test to determine whether the probative value of the evidence outweighs its prejudicial effect. *Maurer*, supra, paragraph seven of the syllabus. Further, the trial judge is in a better position to analyze the impact of the evidence on the jury, and thus, the issue as to whether testimony or evidence is relevant, prejudicial, confusing, or misleading is best decided by the trial judge. *Renfro v. Black* (1990), 52 Ohio St.3d 27, 31, 556 N.E.2d 150; Evid.R. 104(A). Thus, this Court must affirm the trial court's ruling absent a showing that the trial court acted unreasonably, arbitrarily, or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶12} Although evidence may be harmful to a defendant, this does not necessarily mean that the evidence is prejudicial under Evid.R. 403(A). Only when the evidence induces the jury to decide the case on an improper basis, usually an

emotional one, does the defendant suffer material prejudice. *State v. Bernatowicz* (1989), 62 Ohio App.3d 132, 138, 574 N.E.2d 1132.

{¶13} Initially it should be noted that both Smarrella and Valero testified about State's Exhibits Three and Four, and Appellant's trial counsel did not object. (Trial Tr. pp. 88, 91, 105, 124-126.) Appellant's counsel did not object until State's Exhibits Three and Four were formally offered into evidence. He then asserted only that the drugs that were once contained in those exhibit baggies were not attributed to Appellant, but to Smith and Wright. (Trial Tr. pp. 158-159.) Appellant's trial counsel did not mention Evid.R. 403 or unfair prejudice in his objection. (Trial Tr. pp. 158-159.) This objection was overruled, and the trial court indicated that:

{¶14} "We just spent two hours talking about those drugs and handling them and identifying them and I don't want to exclude them now. I'm not sure that we should have ever talked about them.

{¶15} "* * *

{¶16} "But since we did talk about them so much I don't think it would be right for them to disappear now. * * *" (Trial Tr. p. 159.)

{¶17} Based on the trial court's comments and conclusion on this objection, it seems apparent that the trial court concluded that Appellant's trial counsel waived this objection since he failed to raise it during the pertinent testimony. Since the testimony was already before the jury without objection, the trial judge evidently concluded that no unfair prejudice would result from formally admitting these exhibits.

{¶18} Evid.R. 103(A)(1) provides that error may not be predicated upon a ruling that admits evidence unless the party opposing the admission timely objects. Further, one's failure to object to the use of evidence when the alleged error could be remedied waives the right to address that issue on appeal. *Mallin v. Mallin* (1988), 44 Ohio App.3d 53, 54-55, 541 N.E.2d 116; *State v. Girard*, 9th Dist. No. 02CA0057-M, 2003-Ohio-7178, at ¶28.

{¶19} It should also be pointed out that Appellant provided no contrary evidence relative to the source of the crack cocaine. Appellant's trial counsel did present the alternative theory that the drugs attributed to Appellant were actually Smith's drugs. (Trial Tr. p. 79.) Appellant's trial counsel stated in his opening statement that Smith plead guilty to possession of a small quantity of drugs and then fled the jurisdiction. (Trial Tr. p. 79.) Appellant's counsel also asked Valero on cross-examination about Smith's plea bargain. (Trial Tr. p. 115.) Notwithstanding his opening remarks, there was no evidence supporting his potential theory that the drugs actually belonged to Smith.

{¶20} Further, on direct examination, Valero testified: "I saw [Appellant's] eyes look at me, I met eyes with him and then I saw him look away and I saw his hand go out the window, and I saw a bag fly from his hand and land in the parking lot." (Trial Tr. p. 88.) There was no evidence to the contrary.

{¶21} Based on the foregoing, we must overrule this assignment of error. The trial court's decision to admit State's Exhibits Three and Four was within the trial judge's discretion, and was not arbitrary or unconscionable because the pertinent

testimony had already been offered to the jury without objection. *Mallin*, supra. The introduction of these exhibits was not unfairly prejudicial since any alleged prejudice was waived.

{¶22} Appellant's second assignment of error alleges:

{¶23} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY OVERRULING DEFENDANT'S MOTION FOR ACQUITTAL PURSUANT TO CRIMINAL RULE 29."

{¶24} Appellant was convicted of possession of and trafficking in crack cocaine, with two school specification penalty enhancements under R.C. §2925.03(C)(3)(b). In the jury's March 28, 2003, executed verdict forms they made the specific additional findings that the state proved beyond a reasonable doubt that Appellant committed the crack cocaine trafficking and possession offenses, "in the vicinity of a school, to wit: within one thousand (1000) feet of the boundaries of Wells School which is located at 408 North Street, Steubenville, Ohio * * *." (March 28, 2003, Verdicts Counts One and Two.) This quoted language was already typed on the jury verdict form, and the jury was given the option to write in that Appellant "Did" or "Did Not" commit the respective offenses in a school zone.

{¶25} Appellant asserts that the trial court committed reversible error in failing to grant his motion for acquittal as to the school specifications because the state failed to establish an essential element of the school specification. Specifically, Appellant claims that the state failed to prove, under R.C. §2925.03(C), that the offenses occurred within 1,000 feet of a school as defined in R.C. §2925.01(Q).

{¶26} The state must prove all material elements of a crime beyond a reasonable doubt, which includes the imposition of an enhanced punishment after a showing of some additional element. *State v. Gaines* (1989), 46 Ohio St.3d 65, 545 N.E.2d 68, syllabus; *State v. Murphy* (1990), 49 Ohio St.3d 206, 551 N.E.2d 932.

{¶27} Further, and pursuant to Crim.R. 29(A):

{¶28} "The court on motion of a defendant * * *, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. * * *"

{¶29} The applicable version of R.C. §2925.03(C) effective from February 13, 2001 through January 1, 2004, provides, in pertinent part:

{¶30} "[(4)](e) Except as otherwise provided in this division, if the amount of the drug involved * * * exceeds ten grams but does not exceed twenty-five grams of crack cocaine, trafficking in cocaine is a felony of the second degree[.] * * * *If the amount of the drug involved is within one of those ranges and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the first degree*, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree." (Emphasis added.)[1]

{¶31} At the close of the state's evidence, Appellant's trial counsel requested that the school specifications be dismissed since the state had not presented evidence

[1] This version of R.C. §2925.03(C)(4)(3) has been amended, but the current version provides essentially the same penalties.

establishing that the Wells school met the statutory definition of "school." This request was denied. (Trial Tr. pp. 161-164.)

{¶32} Thereafter, and when asked outside of the jury's presence by the trial judge whether counsel had any knowledge that the Wells school did not actually qualify as a school under R.C. §2925.01, Appellant's trial counsel responded in the negative. (Trial Tr. p. 165.)

{¶33} The pertinent R.C. §2925.01 definitions, provide:

{¶34} "(Q) '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.

{¶35} "(R) 'School premises' means either of the following:

{¶36} "(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;

{¶37} "(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."

{¶38} In support of this alleged error, Appellant directs this Court's attention to *State v. Brown* (1993), 85 Ohio App.3d 716, 621 N.E.2d 447, which held:

{¶39} "'[W]ithin one thousand feet of the boundaries of any school premises' is an essential element of the state's case-in-chief which must be proven beyond a reasonable doubt before an enhanced penalty and elevated degree of felony can be imposed. Therefore, * * * [since] there were no jury instructions given for the definitions of 'school' and 'school premises,' there was error." Id. at 723.

{¶40} The *Brown* decision concluded that Brown's sentence must be vacated and remanded for re-sentencing because the state failed to prove that the offense occurred in the vicinity of a "school" operated by a school board, a "school" whose minimum standards are prescribed by the state board of education or "any parcel of real property that was owned or leased by a board of education of a school * * * for which the state board of education prescribes minimum standards." Id. at 723.

{¶41} Thus, Appellant asserts that his convictions were in error since the state never proved that the Wells school was a "school" as defined in R.C. §2925.01.

{¶42} Notwithstanding *Brown*, supra, the Ohio Supreme Court in *State v. Manley* (1994), 71 Ohio St.3d 342, 643 N.E.2d 1107, held otherwise. The *Manley* Court relied on the lack of evidence to the contrary and concluded that the three witnesses' testimony that the drug transactions occurred in the vicinity of a school was

sufficient to support the R.C. §2925.03(C) school specification. Id. at 348. As in *Brown,* supra, the trial court in *Manley* failed to provide the jury the statutory definition of school. Id. However, the *Manley* Court reasoned that despite the trial court's failure to provide the pertinent jury instructions, there was no potential prejudice because this testimony was not disputed. Id. at 347-348.

{¶43} In the instant cause, it is undisputed that the "Wells school" was referred to as a school throughout Appellant's trial by both counsel. Further, Michael Dolak ("Dolak"), Steubenville's City Engineer, testified that he measured the distance from the Hardees' parking lot to the Wells school, and that the distance between the two was less than 1,000 feet. (Trial Tr. pp. 136-140.)

{¶44} However, Dolak never testified that Wells school was indeed a school. Instead, the prosecutor's questioning assumed the fact that it was a school, and his questioning focused on the distance between the restaurant and Wells school. (Trial Tr. p. 135.) Further, Dolak only referred to it as "Wells school" after the prosecutor referred to it in this manner twice in his questioning. (Trial Tr. pp. 135-136.)

{¶45} Appellant's counsel on cross-examination elicited testimony from Dolak that Dolak was not a member of the school board and that he did not bring any records establishing who owned the building. (Trial Tr. p. 141.)

{¶46} Certainly, the record reflects that Appellant's trial counsel never presented evidence to the contrary; that the building was not a school operated or owned by a school board. Also, State's Exhibit Five, a letter from Dolak, recites the

distance between Hardees and the "Wells School." It also contains an aerial photograph that identifies "Wells School." (Trial Tr. p. 136.)

{¶47} Unlike the situation which occurred in *Brown*, the trial court in the instant matter provided the jury with the correct instructions as to the definitions of "school," "school premises," and "school building" as defined in R.C. §2925.01. (Trial Tr. pp. 195-196.)

{¶48} In response to Appellant's request for a dismissal of the school specifications, the trial record reflects the following exchange:

{¶49} "[Appellant's trial counsel]: It's my argument that it has not been approved that it is a qualifying school. I don't have a clue myself what Wells School is.

{¶50} "THE COURT: But the rest of us in this room and everybody in Jefferson County does.

{¶51} "* * *

{¶52} "THE COURT: * * * I'm going to overrule it. That's like doing a DUI and saying that there's no proof that Route 22 is a state highway. Everybody knows it's a state highway. So do you have to bring ODOT down here to say yeah it's a state highway? No. Cause everyone knows that it is. So I'm treating it like that kind of element.

{¶53} "* * *

{¶54} "* * * That's how I'm looking at it." (Trial Tr. pp. 164-165.)

{¶55} It appears that the trial court may have intended to take judicial notice that the Wells school met the applicable statutory definition, however it never properly

instructed the jury in compliance with Evid.R. 201(G). Further, "[j]udicial notice cannot be taken of elements of an offense. The state must offer proof of every element to sustain a conviction unless the accused stipulates as to that element." *In the Matter of Howman* (March 8, 1994), 5th Dist. No. CA-1059, 3; *Gaines,* 46 Ohio St.3d 65, 545 N.E.2d 68, syllabus. There was no stipulation that this was a school. In fact, Appellant objected to the trial court's assumption of this fact.

{¶56} No witness actually testified that Appellant's drug offenses occurred within one thousand feet of an actual school. It appears that each witness assumed the existence of an operational school at this location. However, merely calling the building "Wells school" does not rise to the level required to prove its existence. For all this Court can glean from this record, the building may once have been a school, but is no longer used for this purpose. There must be some evidence on the record on which to base this assumption. There is absolutely no testimony as to this building's current use. Thus, based on this record, the state failed to prove the school enhancement beyond a reasonable doubt.

{¶57} Appellant's second assignment of error is sustained and his R.C. §2925.03(C) enhancement penalties are vacated. Appellant's convictions constitute second degree felonies under R.C. §2925.03(C)(4)(e). We hereby remand this matter to Jefferson County Court of Common Pleas for Appellant's re-sentencing according to law and consistent with this Court's Opinion.

Vukovich, J., concurs.

DeGenaro, J., concurs.