

[Cite as *State v. Larkins*, 2006-Ohio-5736.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87421

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBERT LARKINS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-462335

BEFORE: Celebrezze, P.J., McMonagle, J., and Corrigan, J.

RELEASED: November 2, 2006

JOURNALIZED:

[Cite as *State v. Larkins*, 2006-Ohio-5736.]

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FRANK D. CELEBREZZE, JR., P.J.:

{¶ 1} Appellant, Robert Larkins, appeals his convictions for drug trafficking and drug possession. After a thorough review of the arguments and for the reasons set forth below, we affirm the judgment of the trial court.

{¶ 2} On February 15, 2005, appellant and co-defendant, Conley Conway, were indicted on two counts of drug trafficking, in violation of R.C. 2925.03, a felony in the first degree, and one count of drug possession, in violation of R.C. 2925.11, a felony in the first degree. Each of the charges carried firearm specifications, in violation of R.C. 2941.141 and R.C. 2941.145. Appellant was also separately indicted for aggravated burglary, in violation of R.C. 2911.11, a felony in the first degree; carrying a concealed weapon, in violation of R.C. 2923.12, a misdemeanor in the first degree; and possession of criminal tools, in violation of R.C. 2923.24, a felony in the fifth degree. Appellant's charge of aggravated burglary carried firearm specifications, in violation of R.C. 2941.141 and R.C. 2941.145.

{¶ 3} At his arraignment on March 2, 2005, appellant entered a plea of not guilty and opted for a jury trial, which commenced on October 11, 2005. After the jury deliberated, he was found guilty of two counts of drug trafficking and one count of drug possession, each felonies in the first degree, and not guilty of the remaining counts. Appellant was sentenced to three-year terms of incarceration, to be served concurrently.

{¶ 4} The incident that gave rise to the charges against the appellant occurred on February 1, 2005. On that evening, Cleveland Police Detective Todd Clark was involved in a buy-bust operation with other police vice officers in the area of East 95th Street in the city of Cleveland. The operation was facilitated by the use of a confidential informant, who was aware that regular drug transactions occurred in the area. The informant was provided with “flash money” and was searched to ensure he did not have any contraband on his person before the operation took place. Police also outfitted the informant with an audio transmitting device that would record the transaction as it occurred.

{¶ 5} After the informant was prepared for the transaction, Clark followed him to the place where the transaction was to take place. Clark testified that the informant made a call to Conway, who was the target. Soon after, Conway and appellant arrived at the target location in an SUV, which appellant was driving. The informant, Conway and appellant huddled close together so the transaction could take place. The informant exchanged the flash money with Conway for crack cocaine. Although flash money is normally not exchanged during a buy-bust operation, the informant felt that he needed to have the money exchange hands in order for the transaction to occur and to maintain his safety.

{¶ 6} After the transaction took place, the informant returned to his car. Sensing police presence, appellant and Conway fled on foot towards East 93rd

Street. Following the transaction, the police recovered 60 grams of crack cocaine from the informant.

{¶ 7} After fleeing the scene of the transaction, appellant entered the apartment of Marla Smith, who lived on East 93rd Street. Smith testified that she was on the porch of her apartment the evening of the incident and saw two men run from the back of the house where her apartment is located. Upon passing her porch, the two men separated. Conway continued down East 93rd Street, and appellant followed Smith into her apartment. Smith testified that appellant appeared to be scared and stated that the police were following him.

{¶ 8} Shortly after appellant entered Smith's apartment, the police arrived, and he was apprehended. Cleveland Police Sergeant Frederick Mone testified that he had followed appellant's footprints in the snow, which led directly to Smith's apartment. Appellant had two handguns in his possession at the time he entered Smith's home. Those handguns were later discovered in Smith's stairwell in a pair of boots. Smith testified that the handguns did not belong to her and that no one living at her residence owned a handgun.

{¶ 9} Appellant brings this appeal asserting two assignments of error for our review:

{¶ 10} "I. The trial court erred in denying appellant's motion for acquittal as to the charges when the state failed to present sufficient evidence to sustain a conviction.

{¶ 11} “II. Appellant’s conviction is against the manifest weight of the evidence.”

{¶ 12} Because appellant's assignments of error are substantially interrelated, they will be addressed together.

{¶ 13} Appellant argues that the trial court erred when it denied his Crim.R. 29 motion for acquittal. More specifically, he asserts that the state provided insufficient evidence to support a conviction for drug trafficking. He further contends that, because of the insufficient evidence offered by the state, the jury’s guilty verdict was against the manifest weight of the evidence.

{¶ 14} Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio St. 486. A conviction based on legally insufficient evidence constitutes a denial of due process. *Tibbs v. Florida* (1982), 457 U.S. 31, citing *Jackson v. Virginia* (1979), 443 U.S. 307.

{¶ 15} Where there is substantial evidence upon which the trier of fact has based its verdict, a reviewing court abuses its discretion in substituting its judgment for that of the jury as to the weight and sufficiency of the evidence. *State v. Nicely* (1988), 39 Ohio St.3d 147. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230. On review, the appellate court must determine, after viewing the evidence in a light most favorable to the prosecution, 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; *Jackson v. Virginia* (1979), 443 U.S. 307.

{¶ 16} Sufficiency of the evidence is subjected to a different standard than is manifest weight of the evidence. Article IV, Section 3(B)(3) of the Ohio Constitution authorizes appellate courts to assess the weight of the evidence independently of the fact-finder. Thus, when a claim is assigned concerning the manifest weight of the evidence, an appellate court “has the authority and the duty to weigh the evidence and determine whether the findings of *** the trier of fact were so against the weight of the evidence as to require a reversal and a remanding of the case for retrial.” *State ex rel. Squire v. City of Cleveland* (1948), 150 Ohio St. 303, 345.

{¶ 17} The United States Supreme Court recognized the distinctions in considering a claim based upon the manifest weight of the evidence as opposed to sufficiency of that evidence. The court held in *Tibbs v. Florida* (1982), 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 752, that, unlike a reversal based upon the insufficiency of the evidence, an appellate court’s disagreement with the jurors’ weighing of the evidence does not require special deference accorded verdicts of acquittal, i.e., invocation of the double jeopardy clause as a bar to relitigation. *Id.* at 43. Upon application of the standards enunciated in *Tibbs*, the court in *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E. 2d 717, has set forth the proper test to be utilized when addressing the issue of manifest weight of the evidence. The *Martin* court stated:

{¶ 18} “The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the 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.” *Martin* at 720.

{¶ 19} This court does not agree with appellant’s contention that his conviction was unsupported by sufficient evidence and was against the manifest weight of the evidence. The trial court’s denial of appellant’s motion for acquittal and the jury’s guilty verdict were based upon credible, direct and circumstantial evidence. On the evening of the incident, police observed the informant as he exchanged flash money for crack cocaine with the target. Cleveland Police Detective John Dlugolinski testified that as the transaction took place between the target and the informant, appellant stood in the immediate vicinity, making him a party to the transaction. Appellant not only facilitated the transaction with his presence, but because he was a party to the transaction, he was also in constructive possession of the narcotics exchanged between the target and informant. After the exchange was complete and police descended upon the scene, appellant and the target fled. Marla Smith testified that, as appellant fled from police, he ran into her apartment and told her that the police were after him. He also stored two handguns that were in his possession at the time of the transaction in a pair of boots on Smith’s stairwell.

{¶ 20} The circumstantial evidence in this case is equally as strong. Cleveland Police Sergeant Frederick Mone followed appellant's footprints in the snow, which led directly to Smith's apartment. Upon entering Smith's residence, Mone discovered that the man inside was the same individual he witnessed during the drug transaction.

{¶ 21} It is clear from appellant's presence during the transaction and his actions immediately following it, that the state presented more than sufficient evidence to support the trial court's decision to deny the appellant's motion for acquittal. Similarly, when evaluating the evidence presented at trial, it is apparent that the jury's verdict was not against the manifest weight of the evidence. Accordingly, appellant's assignments of error are overruled, and the judgment of the trial court is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., PRESIDING JUDGE

MICHAEL J. CORRIGAN, J., CONCURS;
CHRISTINE T. MCMONAGLE, J., DISSENTS
(WITH SEPARATE OPINION).

CHRISTINE T. MCMONAGLE, DISSENTING:

{¶ 22} Respectfully, I dissent.

{¶ 23} Initially, I must correct the facts as stated by the majority. First, there is no evidence whatsoever in the record that Conway and Larkins arrived at the scene together in an SUV driven by Larkins. In fact, the only testimony on the issue of Larkin's arrival was given by Detective Dlugolinski, who was the only officer to observe the transaction. Detective Dlugolinski testified that shortly after he parked his car, he saw the informant drive up and park his car. Detective Dlugolinski then heard the informant telephone the target and tell him, "I'm here, I'm ready for the deal." During this conversation, Detective Dlugolinski saw a white Ford Explorer pull up and park on the street between his car and the informant's. As the conversation was ending, co-defendant Conway, wearing a black jacket, walked up from behind Detective Dlugolinski's car, and then Larkins exited the Explorer. The prosecutor specifically questioned Detective Dlugolinski about Conway's appearance at the scene:

{¶ 24} "THE PROSECUTOR: Detective, can you describe the male that was coming from --it looks like 2303--

{¶ 25} “DET. DLUGOLINSKI: He did not come from this area, he came from behind me. I was too busy. I was occupied. My eyes were on this guy right here, and I was listening to the conversation. I knew there was someone else in the area. He appeared from behind me. He came this way, walked right directly in front of my car.

{¶ 26} “THE PROSECUTOR: He came from the south, but he went in front of your undercover car?

{¶ 27} “DET. DLUGOLINSKI: Yes, right towards the driveway.”

{¶ 28} Although it may be helpful to the majority’s resolution of this case to find that Larkins and Conway arrived together in the SUV, it simply did not happen that way; Detective Dlugolinski testified that only Larkins arrived in the SUV.

{¶ 29} Next, the majority states that Conway and Larkins fled the scene after “sensing police presence.” There is likewise no evidence in the record to support this statement. In fact, Detective Dlugolinski testified that although he gave the signal to the takedown units to move in after the deal was done, they did not appear. He testified that he did not know what caused the delay, but by the time the police appeared on the scene, the informant had returned to his car and Conway and Larkins had already run away. Conway and Larkins may have run down the driveway after the drug deal was over, but there is no evidence they did so because they “sens[ed] police presence.”

{¶ 30} The majority also claims that the handguns found in a boot in the stairwell of Marla Smith’s apartment belonged to Larkins. This statement is similarly not supported by the record. Detective Tommy Hall testified that he found a Glock handgun and a small semiautomatic handgun inside a boot, but there was no testimony linking these guns to appellant. Furthermore, no fingerprints were found on the guns. The jury apparently recognized the inadequacies of this evidence: it found Larkins not guilty of the firearm specifications and not guilty of carrying a concealed weapon.

{¶ 31} The majority also asserts that the guns “were in [Larkins’] possession at the time of the transaction.” This assertion is the most troubling. There is, quite simply, no evidence whatsoever in the record that Larkins was carrying guns during the drug deal. The record is clear that no one saw any guns during the drug deal. Detective Dlugolinski, the only officer to observe the transaction, testified that he had a clear view of the transaction, but appellant had his back to him the whole time and he did not see appellant do anything other than “huddle” with Conway and the informant during the transaction. Furthermore, although Detective Todd Clark testified that he learned from the informant after the deal was over that “there was possibly a firearm involved in the transaction,” there was no testimony from him or anyone else that Larkins was carrying guns during the deal.

{¶ 32} With respect to the merits of Larkins’ claim that the evidence was insufficient to support his convictions, Larkins was convicted of drug trafficking

pursuant to R.C. 2925.03 (A)(1), which provides that “no person shall knowingly *** sell or offer to sell a controlled substance.” He was also convicted of drug possession in violation of R.C. 2925.11(A), which provides that “no person shall knowingly obtain, possess, or use a controlled substance.”

{¶ 33} The State’s evidence demonstrated that Larkins was present during the alleged drug transaction. The State also produced evidence that the informant had no drugs on his person prior to the transaction, but had 60 grams of crack cocaine after he met with Conway and Larkins, and that the informant gave Conway \$1,800, which was never recovered. Furthermore, the State presented evidence that Larkins ran away after the alleged drug deal and that he forced his way into Marla Smith’s apartment while carrying two undescribed and unidentified guns.

{¶ 34} Nevertheless, the State presented no evidence other than Larkins’ mere presence at the scene to demonstrate either that he possessed drugs or that he knowingly sold them to the informant. Detective Dlugolinski testified that the informant called *Conway* to set up the deal and that he saw the informant give *Conway* the money. Significantly, Detective Dlugolinski, the “eyes and ears” of the operation, admitted that he did not see Larkins do anything other than “huddle” with the informant and Conway as they stood in the driveway of 2280 East 95th Street during the drug deal. Larkins’ fingerprints were not found on the baggie containing the crack cocaine that was given to the informant. No money or drugs were found

on Larkins' person when he was apprehended. Furthermore, there were no fingerprints on the guns linking Larkins to the firearms found in the basement of Smith's apartment and no testimony from Detective Dlugolinski that he saw any firearms during the transaction.

{¶ 35} The State theorized at trial that Larkins "aided and abetted" Conway as "the muscle, with the guns involved in this case." However, to sustain a conviction for aiding and abetting, the State must prove "two elements: an act on the part of the defendant contributing to the execution of a crime and the intent to aid in its commission." *State v. Miller*, Cuyahoga App. No. 81608, 2003-Ohio-1168; *State v. Sims* (1983), 10 Ohio App.3d 56, 59. Mere presence during the commission of a crime, however, does not constitute aiding and abetting. *State v. Peavy*, Cuyahoga App. No. 80480, 2002-Ohio-5067, at ¶32, citing *State v. Jacobs*, Hancock App. No. 5-99-17, 1999-Ohio-899. Being present, absent some preceding connection with the transaction or conspiracy is not aiding and abetting. *State v. Dunn*, Cuyahoga App. No. 83754, 2004-Ohio-4350, at ¶20, citing *Sims*, supra. Furthermore, "'mere approval or acquiescence, without expressed concurrence or the doing of something to contribute to an unlawful act, is not an aiding or abetting of the act.'" *Peavy*, supra, quoting *Sims*, supra, at 59. Here, the State offered no evidence of any affirmative act by Larkins contributing to the drug sale other than his presence during the transaction.

{¶ 36} The majority’s conclusion that appellant somehow “facilitated the transaction with his presence” flies in the face of extensive case law from this district that requires some overt act beyond mere presence. If the majority means to imply that Larkins facilitated the transaction by brandishing weapons, as discussed above, there is no evidence in the record that he was carrying weapons during the drug deal. Likewise, there is no evidence that the weapons found in Smith’s apartment belonged to Larkins.

{¶ 37} The majority also erroneously asserts that Larkins was somehow in “constructive possession” of the drugs exchanged during the deal merely because he was present during the transaction. The majority cites no cases to support this conclusion, however; presumably because the case law is clear that to find constructive possession, there must be some evidence that the individual exercised “dominion and control” over an object, even though that object was not within his immediate physical possession. *State v. Hankerson* (1982), 70 Ohio St.2d 87, at the syllabus. Here, there is no evidence in the record that Larkins did anything to exercise “dominion and control” over the drugs.

{¶ 38} In short, the majority concludes that Larkins possessed and sold drugs to the informant because he was in the huddle, ran away when the deal was over, and later attempted to evade the police. Even construing this evidence in a light most favorable to the prosecution, without more, this evidence is insufficient to show that Larkins was guilty of drug trafficking and drug possession. Because there was

insufficient evidence to support Larkins' convictions, I would find that the trial court erred in denying his Crim.R. 29(A) motion for acquittal.