[Cite as *State v. Allah*, 2009-Ohio-3887.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91955

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SHAKIM ALLAH

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-508914

BEFORE: Gallagher, P.J., Sweeney, J., and Jones, J.
RELEASED: August 6, 2009
JOURNALIZED:

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SEAN C. GALLAGHER, P.J.:

{¶ 1} Defendant-appellant, Shakim Allah, appeals his conviction from the Cuyahoga County Court of Common Pleas. Finding no error in the proceedings below, we affirm.

{¶ 2} On March 12, 2008, the Cleveland Police Department First District Vice Unit learned from an informant that she could buy illegal drugs from someone who goes by the nickname "Tone." The detectives identified "Tone" as Allah and confirmed this with the informant by showing the informant a photograph. The informant supplied the detectives with a phone number and the make and model of Allah's vehicle. The detectives organized a "buy-bust" operation, using the informant to order drugs from Allah.

{¶ 3} The informant called Allah from the vice unit's cell phone and ordered $100 worth of crack cocaine. The detectives recorded and listened to the phone call. The informant arranged to buy drugs from Allah at Hobo Joe's, a restaurant at West 95th Street and Lorain Avenue in Cleveland.

{¶ 4} Det. Pitts obtained $100 in "buy-money" from Sergeant Kelly. Det. Pitts recorded the serial numbers, photocopied the money, and marked the money with small ink dots in the lower right corner of each twenty-dollar bill and in the center of the "20."

{¶ 5} The informant was searched by Det. Matos to confirm that the informant was free of all items, legal and illegal. The informant was fitted with

a transmitting device that the detectives could monitor with their scanner radio. The informant was given the buy money and transported to Hobo Joe's by Det. Mendoza, who went into the restaurant with the informant to wait for Allah.

{¶ 6} Det. Matos positioned her undercover vehicle so she could keep constant surveillance on the informant, Det. Mendoza, the restaurant, and the parking lot. Det. Matos observed a black GMC Jimmy truck, driven by Allah, pull into the parking lot of Hobo Joe's. The informant exited the establishment and entered the vehicle; Allah drove out of the lot and onto Lorain Avenue with the informant. Det. Matos followed the vehicle into a small shopping plaza nearby.

{¶ 7} Allah exited the vehicle and went into a telephone store, and the informant remained in the truck. Det. Matos parked next to the vehicle. Allah left the store, returned to his vehicle, and drove back to Hobo Joe's. Det. Matos followed. The informant then exited the vehicle and gave a pre-arranged signal to indicate that the drug transaction had occurred. Det. Matos notified the take-down units that the informant had completed the deal.

{¶ 8} Allah was stopped within seconds of leaving the parking lot. He was ordered out of the vehicle and arrested. The buy-money, as well as a pager and $225 cash, was located on Allah's person. Allah's cell phone was discovered in

the vehicle, and the list of calls received included the cell phone number of the first district vice unit.

{¶ 9} Meanwhile, the informant handed Det. Matos five suspected rocks of crack cocaine, which were individually wrapped in small plastic bags. Det. Matos placed the suspected narcotics into an evidence bag, sealed it, and gave it to the detective in charge, Det. Pitts. Det. Matos then searched the informant again.

{¶ 10} The rocks tested positive for cocaine, weighing 1.39 grams.

{¶ 11} Allah was charged with two counts of trafficking crack cocaine (sale and preparation for sale), one count of possession of crack cocaine, and possession of criminal tools (money and/or cell phone and/or pager and/or automobile/truck). Allah pled not guilty, and a jury trial ensued. Allah was found guilty on each count of the indictment. Allah was sentenced to a total of 15 months in prison. Allah appeals, advancing two assignments of error for our review.

{¶ 12} Allah's first assignment of error states the following:

{¶ 13} "The verdict and judgment below are against the manifest weight of the evidence."

{¶ 14} Allah argues that because the informant never testified, his convictions are against the manifest weight of the evidence. He insists that his convictions are based on speculation as to what transpired in the vehicle.

{¶ 15} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether "there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether 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. Leonard*, 104 Ohio St.3d 54, 68, 2004-Ohio-6235 (internal quotes and citations omitted).

{¶ 16} "It is well settled that the state may rely on circumstantial evidence to prove an essential element of an offense, because circumstantial evidence and direct evidence inherently possess the same probative value. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph one of the syllabus. 'Circumstantial evidence' is the proof of certain facts and circumstances in a given case, from which the jury may infer other connected facts which usually and reasonably follow according to the common experience of mankind. *State v. Duganitz* (1991), 76 Ohio App.3d 363, 601 N.E.2d 642, quoting Black's Law Dictionary (5 Ed.1979) 221. Since circumstantial evidence and direct evidence are indistinguishable so far as the jury's fact-finding function is concerned, all that is required of the jury is that it weigh all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt. *Jenks,*

61 Ohio St.3d at 272. Although inferences cannot be based on inferences, a number of conclusions can result from the same set of facts. *State v. Lott* (1990), 51 Ohio St.3d 160, 168, 555 N.E.2d 293. Therefore, the [trier of fact] may employ a series of facts or circumstances as the basis for its ultimate conclusion. Id. * * * Identification can be proved by circumstantial evidence, just like every other element the state must prove." *State v. Kiley*, Cuyahoga App. Nos. 86726 and 86727, 2006-Ohio-2469 (internal quotations omitted).

{¶ 17} We find that there is substantial evidence upon which a jury could reasonably conclude that all the elements of trafficking drugs, both sale and preparation for sale, possession of drugs, and possession of criminal tools were proved beyond a reasonable doubt. The testimony established that the informant called Allah and arranged to buy drugs from him. The two were to meet at Hobo Joe's to make the exchange. Allah arrived at Hobo Joe's; the informant entered Allah's truck; they went for a ride, and when they returned, the informant indicated that the exchange had taken place. During the entire transaction, no one was in Allah's truck besides the informant and Allah. When Allah was arrested, the Cleveland Police Department buy-money was recovered from him. The informant was searched prior to the exchange, as well as after. Five individually packaged rocks of crack cocaine were turned over by the informant. A cell phone with the first district vice unit's phone number in it was recovered

from the vehicle, and a pager was recovered from Allah's person. There was testimony that drug dealers often use pagers to facilitate the sale of drugs.

{¶ 18} We find that even without the informant's testimony, the jury could infer that Allah possessed, packaged, and sold the crack cocaine to the informant and used the money, cell phone, pager, and truck for criminal purposes. Accordingly, Allah's first assignment of error is overruled.

{¶ 19} Allah's second assignment of error states the following:

{¶ 20} "The lower court erred and denied the appellant due process of law by failing to require that the jury be unanimous regarding which items, if any, were proven to be criminal tools."

{¶ 21} Allah complains that the trial court's jury instruction for possession of criminal tools did not require that the jury be unanimous as to any of the various items, which were set forth as criminal tools.

{¶ 22} Allah's failure to object to the jury instructions waives all but plain error. *State v. Underwood* (1983), 3 Ohio St.3d 12, syllabus. Plain error "should be applied with utmost caution and should be invoked only to prevent a clear miscarriage of justice." Id. at 14. Plain error exists only where it is clear that the verdict would have been otherwise but for the error. *State v. Long* (1978), 53 Ohio St.2d 91.

{¶ 23} Crim.R. 31(A) requires a unanimous verdict.

{¶ 24} The trial court's jury instruction stated the following:

"Before you can find the Defendant guilty, you must find beyond a reasonable doubt that on or about March 12, 2008, and in Cuyahoga County, Ohio the Defendant possessed or had under his control a substance, device, instrument, or article with purpose to use it criminally, to-wit: money, and/or a cell phone, and/or a pager, and/or an automobile/truck, and such substance, device, instrument or article was intended for use in the commission of a felony.

"Now, I wrote and/or because there seems to me that sometimes the way commas are placed not everybody understands what the meaning of the comma is so I put in it can be and/or. So that means you can find one of the things to be a criminal tool or you can find none of them. It's kind of like a multiple count. So you view them independent[ly] but if you find one to be a criminal tool, then you can make a guilty finding if that's your verdict. If you can't find any of them, then you have to make a not guilty finding."

{¶ 25} R.C. 2923.24(A) prohibits possessing or having under one's control "any substance, device, instrument, or article, with purpose to use it criminally."

{¶ 26} In *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, the Ohio Supreme Court addressed the question of whether jurors must unanimously agree as to which criminal offense a defendant intended to commit during a burglary, when the statute read with purpose to commit "any criminal offense." The court stated that "[a]though Crim.R. 31(A) requires juror unanimity on each element of the crime, jurors need not agree to a single way by which an element is satisfied." Id. at 427, citing *Richardson v. United States* (1999), 526 U.S. 813, 817. The United States Supreme Court has stated, "'[D]ifferent jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom

line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.'" *Schad v. Arizona* (1991), 501 U.S. 624, 631-632, 111 S.Ct. 2491, 115 L.Ed.2d 555, quoting *McKoy v. North Carolina* (1990), 494 U.S. 433, 449, 110 S.Ct. 1227, 108 L.Ed.2d 369 (Blackmun, J., concurring); see *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶226-228 (applying *Schad* rationale in rejecting unanimity claims).

{¶ 27} In *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, the defendant argued that the following jury instructions deprived him of a unanimous verdict:

> **"While committing or attempting to commit, or while fleeing immediately after committing or attempting to commit means that the death must occur as part of acts leading up to, or occurring during or immediately after the commission of kidnapping, or aggravated robbery, or aggravated burglary, and that the death was directly associated with the commission * * * of kidnapping, or aggravated robbery, or aggravated burglary.**
>
> **"* * *
>
> **"Before you can find the Defendant guilty of aggravated murder as alleged in Count 1 of the indictment, the State must also prove beyond a reasonable doubt that the Defendant committed or attempted to commit kidnapping, aggravated robbery or aggravated burglary."**

{¶ 28} The defendant argued that the instruction deprived him of his right to a unanimous jury verdict because some of the jurors may have convicted him

of aggravated murder based on the underlying offense of kidnapping and others on the basis of aggravated robbery or aggravated burglary. The court found that the jury instructions did not result in error, plain or otherwise, because a jury need not agree on a single means for committing an offense.

{¶ 29} In this case, Allah was charged with and found guilty of one count of possession of criminal tools, even though he was in possession of four different criminal tools. The state need only prove the illegal possession of one criminal tool to sustain a conviction for one count under R.C. 2923.24. *State v. McShan* (1991), 77 Ohio App.3d 781; *State v. Hills* (Nov. 15, 1984), Cuyahoga App. No. 48020.

{¶ 30} We find that the jury instructions did not result in error. Accordingly, Allah's second assignment of error is overruled.

Judgment 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. 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.

SEAN C. GALLAGHER, PRESIDING JUDGE

JAMES J. SWEENEY, J., and
LARRY A. JONES, J., CONCUR