[Cite as *State v. Robinson*, 2009-Ohio-5220.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 91873 and 91874

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ERIC ROBINSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-508445 and CR-508514

BEFORE: Dyke, J., Kilbane, P.J., and Blackmon, J.

RELEASED: October 1, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this courts announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

ANN DYKE, J.:

{¶ 1} In these consolidated appeals, defendant Eric Robinson appeals from his conviction for trafficking in marijuana, and firearms related offenses.[1] For the reasons set forth below, we affirm.

{¶ 2} On February 22, 2008, defendant was indicted in Case No. CR-508445 for carrying a concealed weapon, having a weapon while under disability, improper handling of a firearm in a motor vehicle, all with forfeiture specifications, and trafficking in less than 200 grams of marijuana with firearm and forfeiture specifications. Defendant pled not guilty to these charges.

{¶ 3} On March 13, 2008, defendant was indicted in Case No. CR-508514 for two counts of trafficking in less than one gram of cocaine, with schoolyard and forfeiture specifications, and one count of possession of less than one gram of cocaine, with forfeiture specifications. He subsequently entered guilty pleas to these charges and was sentenced to eleven months of imprisonment.

{¶ 4} Case No. CR-508445 proceeded to a jury trial on June 11, 2008. The state presented the testimony of Sharneika Mims, Curtis Lawson, Cleveland Police Det. James Ealey, Scientific Examiner Nicole Pride and Cleveland Police Officer John Franko.

{¶ 5} Sharneika Mims testified that on February 22, 2008, she loaned her

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[1] Defendant moved for consolidation of the appeal from his conviction following a jury trial in Cuyahoga County Case No. CR-508445 with the appeal from his guilty pleas in Case No. CR-508514. This court granted the motion to consolidate, but the issues raised on appeal emanate from the trial in Case No. CR-508445.

Dodge Caravan to her sister, Taquita, who was moving. The van was empty at this time. Taquita Mims and her boyfriend, Curtis Lawson, picked up the van in the morning. Later that day, Sharneika learned that Lawson had been arrested and the van was in the Cleveland impound lot. Sharneika testified that neither she nor her sister own guns and that she did not know Lawson to have a gun.

{¶ 6} The prosecuting attorney subsequently advised the trial court that she had just learned of an inculpatory oral statement that defendant allegedly made to Curtis Lawson while the two men were seated in the police cruiser at the time of defendant's arrest. Because this statement had not been given to the defense during discovery, the trial court conducted a voir dire hearing on the matter. At this time, the defense was permitted to cross-examine Lawson regarding defendant's alleged inculpatory statement. The record established that Lawson did not make a statement to police, did not speak with any prosecutors prior to trial, and that the prosecutor who tried the case had just met Lawson that morning.

{¶ 7} Defense counsel conceded that the prosecuting attorney may not have known about the alleged statement prior to trial, but he asked the court to exclude it as a sanction for non-disclosure. The trial court permitted introduction of the statement over the objection of the defense.

{¶ 8} Curtis Lawson next testified that various individuals helped him and Taquita move. The group then had a few beers at defendant's home. Defendant wanted to go to his brother's house. Lawson felt intoxicated and did

not know the location of the house so defendant drove the van. The brakes failed and the van collided with a truck. The police were in the area of the collision and immediately arrived on the scene. Defendant did not have a driver's license, so the officers placed the men in the back of the police cruiser and, according to Lawson, defendant said that he hoped that the police did not find the gun.

{¶ 9} Lawson subsequently acknowledged that he did not see defendant with the gun, and did not see him place the gun in the van. He also admitted that the gun was found among bags of laundry in the middle row of seats, but he stated that he does not own a gun and insisted that the gun belongs to defendant. With regard to marijuana that was also found in the van, Lawson stated that each bag contained about enough for one "joint" and defendant also had little cigars. According to Lawson, defendant said nothing about selling the marijuana, did not attempt to sell it, and was going to smoke it.

{¶ 10} Officer Timothy Franko testified that, immediately following the accident, defendant stated that the brakes had malfunctioned, and told the officer that he did not have his driver's license on him. Franko subsequently learned that defendant did not have a valid driver's license.

{¶ 11} Officer Franko released Lawson at the scene, but searched the vehicle because it was going to be towed. In the center console area, he found nine individual baggies of suspected marijuana, in "dime bags." According to the officer, based upon his experience, the packaging indicated that the baggies were

for sale. He also found a loaded .25 caliber semi-automatic Bryco Arms pistol in the row of seats immediately behind the driver.

{¶ 12} On cross-examination, Officer Franko admitted that he smelled marijuana on his approach of the vehicle, and suspected that the occupants of the van had been smoking marijuana. He also admitted that he did not see defendant making any furtive gestures and did not see defendant handle the weapon.

{¶ 13} Det. James Ealey testified that he examined a Bryco Arms .25 caliber semi-automatic pistol in connection with this matter, and determined that it was operable. He did not check the weapon for fingerprints, but he stated that it would be extremely difficult to get them off of the handle and grooved surfaces of the weapon. Scientific Examiner Nicole Pride testified that she is employed by the Cuyahoga Municipal Housing Authority and is assigned to work in the Cleveland Police Forensic laboratory. Pride stated that she examined the material contained within the baggies that were recovered from the van. She determined that it was marijuana and weighed a total of 6.02 grams.

{¶ 14} The state and the defense also stipulated that in 1999, defendant was convicted of trafficking in drugs and possession of cocaine.

{¶ 15} Defendant testified on his own behalf and stated that, at the time of his arrest, he was in possession of about 11 little bags of marijuana. He claimed that they were in this form when he purchased them and they were not for sale, but were for his own personal use. He stated that he also had little cigars and he

planned to smoke the marijuana in the cigars after removing the tobacco. He and Lawson smoked some of the marijuana while driving. Defendant further stated that he told the officers that the marijuana belonged to him.

{¶ 16} Defendant further stated that Lawson was asleep so the officer could not speak with him, and he specifically denied telling Lawson that he hoped that the police did not find the gun. Defendant also indicated that the officers never asked him any questions about a gun, and that there was a considerable amount of clothing inside the van. Defendant stated that the gun, which officers found inside the van, did not belong to him. He did not place it inside the van, and he was never in possession of it. He admitted on cross-examination, however, that many years earlier, he had owned a 9 millimeter handgun.

{¶ 17} Defendant was subsequently convicted of all four charges and sentenced to a total of three years of imprisonment, plus three years of post-release control. The sentence was also ordered to be served concurrently with the sentence imposed in Case No. CR-508514. Defendant now appeals and assigns three errors for our review.

{¶ 18} For his first assignment of error, defendant complains that the State of Ohio violated Crim.R. 16 by failing to timely disclose defendant's alleged inclupatory statement, made to Lawson while in the police cruiser, that "I hope they don't find that gun."

{¶ 19} Crim.R. 16(B) provides in relevant part:

{¶ 20} "(B) Disclosure of evidence by the prosecuting attorney

{¶ 21} "(1) Information subject to disclosure.

{¶ 22} "(a) Statement of defendant or co-defendant. Upon motion of the defendant, the court shall order the prosecuting attorney to permit the defendant to inspect the copy or photograph any of the following which are available to, or within the possession, custody, or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney:

{¶ 23} "(i) Relevant written or recorded statements made by the defendant or co-defendant, or copies thereof; * * *."

{¶ 24} Criminal Rule 16(E)(3) provides for the regulation of discovery and permits a trial court to exercise discretion in selecting the appropriate sanction for a discovery violation. See *State v. Wiles* (1991), 59 Ohio St.3d 71, 571 N.E.2d 97; *State v. Parson* (1983), 6 Ohio St.3d 442, 453 N.E.2d 689. Crim.R. 16(E)(3) states:

{¶ 25} "If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances."

{¶ 26} In general, in imposing a sanction for a discovery violation, the trial court must impose the least severe sanction that is consistent with the purposes

of the rules of discovery. *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 511 N.E.2d 1138, syllabus. In *State v. Joseph,* 73 Ohio St.3d 450, 458, 1995-Ohio-288, 653 N.E.2d 285, the Ohio Supreme Court explained the point at which a discovery violation would constitute reversible error:

{¶ 27} "Prosecutorial violations of Crim.R. 16 are reversible only when there is a showing that (1) the prosecution's failure to disclose was a willful violation of the rule, (2) foreknowledge of the information would have benefitted the accused in the preparation of his defense, and (3) the accused suffered some prejudicial effect." Id.

{¶ 28} In this matter, the record indicates that the prosecuting attorney's failure to provide discovery of the statement was not willful, and there was no evidence that the state had knowledge of it prior to trial since Lawson did not mention the remark to police or to the prosecutors prior to trial. Further, we cannot say that knowledge of the statement would have benefitted the defense since defendant admitted that the drugs were his, he was driving the van, and the weapon was found within the constructive possession of the driver. Finally, we cannot say that defendant suffered prejudice as the result of not having the statement prior to trial, since the trial court allowed defense counsel to probe this issue during voir dire; and in his cross-examinations, trial counsel elicited from the key witnesses that they did not see defendant with a weapon on the day of his arrest, and raised the issue of whether Lawson, who had been drinking, was even awake when police arrived.

{¶ 29} Accord *State v. Hyslop,* Lucas App. No. L-03-1298, 2005-Ohio-1556, reversed on other grounds, 109 Ohio St.3d 313, 2006-Ohio-2109, 847 N.E.2d 1174 (state's failure to provide the defense with a written summary of defendant's alleged unrecorded oral inculpatory statements to police by defendant and co-defendant did not render statements inadmissible at trial, where the discovery violation was not willful, there was no evidence that the state had knowledge of statement, foreknowledge of statement would not have benefitted defense, and defendant was not prejudiced); *State v. Tate,* Cuyahoga App. No. 83501, 2004-Ohio-4475 (trial court did not err in refusing to exclude defendant's alleged oral statement that was not provided to defense where court held a voir dire, omission was not willful, information would not have benefitted the defense, and defendant suffered no prejudice).

{¶ 30} The first assignment of error is without merit.

{¶ 31} In his second assignment of error, defendant asserts that his conviction for trafficking in marijuana, and the attendant firearm specification, are not supported by sufficient evidence.

{¶ 32} In *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541, the court noted that "'sufficiency' is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." Black's Law Dictionary (6 Ed.1990) 1433. The issue of whether the evidence is legally sufficient to sustain a verdict is a question of law. Id. The

relevant 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 33} As charged in this matter, the essential elements of trafficking in drugs are set forth in R.C. 2925.03 as follows:

{¶ 34} "(A) No person shall knowingly do any of the following:

{¶ 35} "* * *

{¶ 36} "(2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person."

{¶ 37} Here, the evidence presented by the state indicated that defendant was driving a vehicle in which a gun and nine baggies of marijuana were found. The marijuana was in "dime bags," and according to the arresting officer, the packaging indicated that the baggies were for sale. Viewing the evidence in a light most favorable to the prosecution, we conclude that any rational trier of fact could have found that defendant knowingly transported the drugs in preparation for distribution while knowingly intending them for resale. Defendant insists, however, that his conviction is not supported by sufficient evidence as he simply bought the individually packaged the drugs for his own personal use.

{¶ 38} We rejected this same claim in *State v. Hereford,* Cuyahoga App.

No. 86675, 2006-Ohio-3021, where we stated:

{¶ 39} "Pursuant to R.C. 2925.03, trafficking in drugs includes preparation of a controlled substance for distribution. See, *State v. Winston,* Cuyahoga App. No. 86340, 2006-Ohio-1241. In support of Hereford's conviction for trafficking in drugs, the State presented evidence of the packaging of the drugs. Specifically, Officer Dietz testified that when she recovered the bag, it contained eleven baggies containing green vegetative material analyzed and found to be positive for 16.72 grams of marijuana. Moreover, Dietz and Doles both testified that in their experience, this manner of packaging was consistent with someone selling drugs, not someone using drugs for personal use."

{¶ 40} Accord *United States v. Whitehead* (6th Cir. 2005), 415 F.3d 583 ("[T]he fact that the crack cocaine found in Whitehead's sock was packaged in 37 separate plastic bags is far more consistent with the idea that it had been prepared for individual resale than for Whitehead's personal use.")

{¶ 41} In accordance with the foregoing, this assignment of error is without merit.

{¶ 42} In his third assignment of error, defendant maintains that his conviction for trafficking in marijuana and the attendant firearm specification are against the manifest weight of the evidence.

{¶ 43} In *State v. Thompkins,* supra, the court illuminated its test for manifest weight of the evidence as follows:

{¶ 44} "Weight of the evidence concerns 'the inclination of the greater

amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.' Black's [Law Dictionary (6 Ed.1990)], at 1594."

{¶ 45} When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "'thirteenth juror'" and disagrees with the factfinder's resolution of the conflicting testimony. Id., citing *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S. Ct. 2211, 2220, 72 L.Ed.2d 652, 663. The court, reviewing the entire record, 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. See *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720-721.

{¶ 46} The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. Id.

{¶ 47} In this matter, reviewing the entire record, weighing the evidence and all reasonable inferences, and considering the credibility of the witnesses, we

cannot say that the jury clearly lost its way and created a manifest miscarriage of justice by convicting defendant of the trafficking and weapons offenses. The evidence demonstrated that defendant was driving the van, that he was in control of it, that the weapon was found within the reach of the driver, and defendant admitted to having the drugs that were packaged in a manner consistent with selling them. Although defendant claimed that the weapon was not his, and Lawson insisted that the weapon belonged to defendant, we cannot say that the jury lost its way in accepting Lawson's testimony over defendant's, based upon the record as a whole, including defendant's prior drug conviction. Further, although defendant claimed that the drugs were simply for his personal use and the evidence indicated that he had smoked marijuana prior to the accident, the jury was free to conclude based upon the total number of packages, and the method of the packaging, that the drugs were being transported for sale and were not simply for defendant's personal use.

{¶ 48} This assignment of error is without merit.

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.

ANN DYKE, JUDGE

MARY EILEEN KILBANE, P.J., and
PATRICIA ANN BLACKMON, CONCUR