

[Cite as *State v. Hennings*, 2010-Ohio-5482.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 94219**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**MICHAEL HENNINGS**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED IN PART;  
REVERSED AND REMANDED IN PART**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-514385

**BEFORE:** McMonagle, J., Gallagher, A.J., and Celebrezze, J.

**RELEASED AND JOURNALIZED:** November 10, 2010

**ATTORNEY FOR APPELLANT**

Thomas A. Rein  
Leader Building, Suite 940  
526 Superior Avenue  
Cleveland, OH 44114

**ATTORNEYS FOR APPELLEE**

William D. Mason  
Cuyahoga County Prosecutor  
Tiffany Hill  
Assistant Prosecuting Attorney  
The Justice Center, 8<sup>th</sup> Floor  
1200 Ontario Street  
Cleveland, OH 44113

CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Michael Hennings, appeals from the trial court's judgment, rendered after a bench trial, finding him guilty of drug possession and drug trafficking, and sentencing him to one year incarceration on each count. Hennings contends that his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence, and that he was denied his right to effective assistance of counsel. We affirm Hennings's convictions, but remand for resentencing.

{¶ 2} Hennings and his co-defendant, Katie Harper, were charged in a multi-count indictment as follows: Count 1, drug trafficking in violation of R.C. 2925.03(A)(2); Count 2, possession of a controlled substance (ecstasy) in violation of R.C. 2923.11(A); and Count 3, tampering with evidence in violation of R.C. 2921.12(A)(1). Hennings pled not guilty and waived his right to a jury trial.

{¶ 3} At the subsequent bench trial, Parma police officer Robert A. Curtin, Jr., testified that at approximately 2:15 a.m. on August 7, 2008, he observed a vehicle parked in front of a store that was closed. A male was sitting in the passenger seat of the car; a woman was getting in the driver's side. Thinking that the individuals might have broken into the store, Curtin decided to investigate. As he approached the car, he saw the male, later identified as Hennings, rolling a marijuana cigarette. The female, later identified as Harper, got out of the car and went into the store, ignoring Curtin's repeated instructions to stop.

{¶ 4} After securing Hennings, Curtin entered the store and saw Harper approaching from the rear of the store. When Harper told him that she was the store owner's daughter, he surmised that she had hidden marijuana in the store. He called Harper's father, who gave him permission to search the store without a warrant. Curtin eventually discovered a plastic

bag containing about 30 multi-colored pills in a desk drawer by the cash register; the pills tested positive for ecstasy.

{¶ 5} Harper testified that she and Hennings had been at a party earlier that evening; they eventually left the party to get cigarettes and water from her family's store. According to Harper, when the police pulled up as they were getting ready to leave the store, Hennings told her, "[t]hose things are in your purse." Harper said she assumed that Hennings was referring to the ecstasy pills because she had seen him sell one to her friend Samantha earlier that evening. She said she got scared when Hennings told her about the pills, so she went in the store to try to hide them.

{¶ 6} Harper testified that she knew Hennings had put some of his things in her purse, but did not know that the pills were in her purse until he told her. Harper admitted on cross-examination that she had pled guilty to the charges but received a favorable deal from the prosecutor in exchange for her testimony at Hennings's trial.

{¶ 7} Samantha Amerla, a friend of Harper's, admitted that she had previously used ecstasy and knew what the pills looked like. She said that she had seen Hennings with the bag of ecstasy pills at the party earlier that evening; she denied seeing Harper with any ecstasy pills.

{¶ 8} Parma police detective Kevin P. Monnolly interviewed Hennings in jail after his arrest. According to Monnolly, Hennings denied any

knowledge of what was in Harper's purse, including the ecstasy pills. Monnolly testified that Hennings was initially very forthcoming and relaxed when he was talking to him, but later, when Monnolly told him that the police would check his fingerprints against any from the plastic bag containing the ecstasy pills, he became "extremely nervous" and "just froze up." Monnolly also testified that although no fingerprints were obtained from the plastic bag, the large amount of pills in the bag indicated to him that they were not for personal use.

{¶ 9} At the close of the State's case, the trial court granted Hennings's Crim.R. 29 motion in part and dismissed the tampering with evidence charge. The court denied the motion regarding the other counts.

{¶ 10} The defense rested without calling any witnesses. The trial court denied Hennings's renewed Crim.R. 29 motion and found him guilty of Counts 1 and 2. It subsequently sentenced him to one year incarceration on each count, to be served concurrently.

## II

{¶ 11} In his first and second assignments of error, Hennings contends that his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence.

{¶ 12} The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Bowden*, 8th Dist.

No. 92266, 2009-Ohio-3598, ¶12. 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 942, paragraph two of the syllabus.

{¶ 13} A manifest weight challenge, on the other hand, questions whether the prosecution met its burden of persuasion. *State v. Thomas* (1982), 70 Ohio St.2d 79, 80, 434 N.E.2d 1356. A reviewing court may reverse the judgment of conviction if it appears that 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. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. A finding that a conviction was supported by the manifest weight of the evidence necessarily includes a finding of sufficiency. *Id.* at 388.

{¶ 14} Hennings was convicted of drug trafficking in violation of R.C. 2925.03(A)(2), which provides that “[n]o person shall knowingly \* \* \* prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offenders know or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person.” He was also convicted of drug possession in

violation of R.C. 2925.11(A), which provides that “[n]o person shall knowingly obtain, possess, or use a controlled substance.”

{¶ 15} “A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature.” R.C. 2901.22. Absent a defendant’s admission, whether a person acts knowingly is determined from all the surrounding facts and circumstances. *State v. Huft* (2001), 145 Ohio App.3d 555, 563, 763 N.E.2d 695.

{¶ 16} Hennings contends that his convictions were against the manifest weight of the evidence because the drugs were not found on his person and there was no evidence tying him to the drugs found in the store. He argues that his fingerprints were not found on the plastic bag that contained the pills and that Harper’s testimony was not credible because she received a favorable deal from the State in exchange for her testimony. He also contends there was no evidence he “knowingly” possessed or trafficked in drugs. We are not persuaded.

{¶ 17} The testimony at trial established that Amerla saw Hennings with the bag of pills earlier in the evening and that he sold one of the pills to her. Furthermore, Harper’s testimony established that Hennings put the pills in her purse, and she hid them in the store. Although Hennings contends that Harper was not credible, credibility determinations are primarily for the

trier of fact. *State v. DeHaas* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. Finally, there was testimony that Hennings's demeanor changed completely when Monnolly told him that the police would compare his fingerprints with any found on the plastic bag, apparently because Hennings believed his fingerprints would be found on the bag. In light of this evidence, it is apparent the pills belonged to Hennings, even though they were not found on his person at the scene. Accordingly, his conviction for drug possession was not against the manifest weight of the evidence.

{¶ 18} Likewise, Hennings's conviction for drug trafficking was not against the manifest weight of the evidence. Harper testified that she saw Hennings sell ecstasy to her friend Samantha Amerla earlier that evening and Amerla confirmed that she had seen Hennings with the bag of pills earlier that evening. This is not a case where the evidence weighs heavily against the convictions or where the factfinder lost its way. Hennings's convictions are supported by the manifest weight of the evidence; hence they are also supported by sufficient evidence. Appellant's first and second assignments of error are therefore overruled.

### III

{¶ 19} In his third assignment of error, Hennings contends that he was denied his right to effective assistance of counsel because counsel did not



cross-examine Harper more extensively about the deal she made with the prosecutor in exchange for her testimony at his trial.

{¶ 20} To establish ineffective assistance of counsel, Hennings must demonstrate that his lawyer's performance fell below an objective standard of reasonable performance and that he was prejudiced by that deficient performance, such that but for counsel's error, the result of the proceeding would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Sanders*, 94 Ohio St.3d 150, 151, 2002-Ohio-350, 761 N.E.2d 18. In short, counsel's errors must be so serious as to render the result of the trial unreliable.

{¶ 21} We find nothing in the record to suggest that the outcome of Hennings's trial would have been different if counsel had cross-examined Harper more extensively about her plea deal. The trial judge who acted as finder-of-fact in Hennings's trial took Harper's plea. Furthermore, the scope of cross-examination is a matter of trial strategy that this court will not second-guess. *State v. Smith* (1985), 17 Ohio St.3d 98, 100, 477 N.E.2d 1128; *State v. Campbell*, 90 Ohio St.3d 320, 2000-Ohio-183, 738 N.E.2d 1178, ¶38. Appellant's third assignment of error is therefore overruled.

#### IV

{¶ 22} Not raised by Hennings in the brief, but raised at oral argument, was the sentence in this matter. Under R.C. 2941.25(A), "[w]here the same

conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.” The Ohio Supreme Court has held that drug possession in violation of R.C. 2925.11(A) and drug trafficking in violation of R.C. 2925.03(A)(2), of which Hennings was convicted, are allied offenses. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, paragraph two of the syllabus; see, also, *State v. Moore*, 8th Dist. No. 92829, 2010-Ohio-3305, ¶48-49.

{¶ 23} As this court stated in *Moore*, “[e]ven though the trial court sentenced appellant to concurrent terms for each conviction, ‘a defendant is prejudiced by having more convictions than are authorized by law.’ \* \* \* Therefore, this case must be remanded to the trial court for resentencing where the state shall decide on which charge appellant should be convicted and sentenced.” *Id.* at ¶49 (internal citations omitted).

Affirmed in part; reversed and remanded in part for resentencing.

It is ordered that the parties share equally in the 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.

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

CHRISTINE T. McMONAGLE, JUDGE

SEAN C. GALLAGHER, A.J., and  
FRANK D. CELEBREZZE, JR., J., CONCUR