

[Cite as *State v. Starling*, 2011-Ohio-479.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 94931**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**SHELDON STARLING**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-529454

**BEFORE:** Keough, J., Stewart, P.J., and Cooney, J.

**RELEASED AND JOURNALIZED:** February 3, 2011

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KATHLEEN ANN KEOUGH, J.:

{¶ 1} Defendant-appellant, Sheldon Starling, appeals from the trial court's judgment, rendered after a jury verdict, finding him guilty of drug trafficking and sentencing him to 16 months of community control. He contends that (1) the evidence was insufficient to support his conviction; (2) the trial court erred in denying his pretrial motion to disclose the identity of the confidential informant who aided the police in their buy-bust operation prior to his arrest; and (3) the trial court erred in instructing the jury on complicity. We affirm.

### **I. Facts and Procedural History**

{¶ 2} Starling and codefendant Daniel Thompson were indicted as follows: Count 1, drug possession in violation of R.C. 2925.11(A); Count 2, drug trafficking in violation of R.C. 2925.03(A)(1); Count 3, drug trafficking in violation of R.C. 2925.03(A)(2); and Count 4, possession of criminal tools in violation of R.C. 2923.24(A). All counts contained forfeiture specifications referring to an automobile and \$100 U.S. currency. At the State's request, the trial court subsequently dismissed all forfeiture specifications relating to the car.

{¶ 3} The charges arose out of a buy-bust operation conducted by the Cleveland police on September 23, 2009 in the area around a Dairy Mart store located at East 131st Street and Lenacrave Avenue. Cleveland police detective John Hall, the State's sole witness at trial, testified that the area was targeted because people routinely stand outside the store and sell drugs.

{¶ 4} At approximately 9:45 p.m. on September 23, Detective Hall dropped off a confidential informant in the area and then parked his undercover car just east of the store, where he could observe the entire area. Hall testified that immediately before driving to the area, he searched the confidential informant and photocopied and marked a \$20 bill that he gave to the informant to use as buy money.

{¶ 5} Hall watched as the informant spoke to an unidentified male in front of the store. He then observed the confidential informant and unknown

male walk northbound on East 131st Street and east on Coath Avenue, where they spoke briefly with another male, later identified as codefendant Thompson. After speaking with the confidential informant and unidentified male, Thompson walked over to a nearby parked car and spoke with Starling, who was sitting in the driver's seat of the car with the door open.

{¶ 6} Hall testified that Thompson spoke briefly with Starling and then walked back to the confidential informant. Hall then saw a brief hand-to-hand transaction between Thompson and the confidential informant.

The confidential informant then began walking back to East 131st Street, while Thompson walked back to the parked car and again spoke with Starling, who was still sitting in the car with the driver's door open.

{¶ 7} Hall radioed for the take-down units, who moved in and detained Thompson and Starling. The officers found the marked \$20 bill and \$100 cash on Starling but did not find any drugs on either Starling or Thompson.

{¶ 8} Meanwhile, Hall picked up the confidential informant, who gave him what Hall suspected was a rock of crack cocaine. (The parties subsequently stipulated that the substance was crack cocaine weighing .15 grams.) Hall searched the confidential informant and determined that he no longer had the buy money nor any other drugs, contraband, or weapons on his person.

{¶ 9} At the conclusion of the State’s case, the trial court denied Starling’s motion for acquittal under Crim.R. 29(A).<sup>1</sup> Neither Starling nor Thompson presented any evidence, and the jury subsequently found Starling guilty of Count 3, drug trafficking in violation of R.C. 2925.03(A)(2). It acquitted him of the other counts, as well as the forfeiture specification relating to Count 3.<sup>2</sup>

## II. Sufficiency of the Evidence

{¶ 10} In his first assignment of error, Starling contends that the evidence was insufficient to support his conviction.

{¶ 11} A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the State has met its burden of production at trial. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541. On review for sufficiency, courts are to assess not whether the State’s evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *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.*

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<sup>1</sup>The court granted Thompson’s motion in part and dismissed Count 4, possession of criminal tools.

<sup>2</sup>The jury found Thompson guilty of drug possession, as charged in Count 1, and both counts of drug trafficking, as charged in Counts 2 and 3. It acquitted him of all forfeiture specifications.

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

{¶ 12} Starling was convicted of drug trafficking in violation of R.C. 2925.03(A)(2), which states that “no person shall \* \* \* 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.”

{¶ 13} The State’s theory of the case was that Starling aided and abetted Thompson’s sale of the crack cocaine to the confidential informant. Specifically, in closing argument the prosecutor argued that Starling acted as the “pharmacist” who filled the order for drugs and Thompson acted as the “clerk” who passed the drugs to the buyer. Consistent with this argument, the trial court instructed the jury regarding complicity under R.C. 2923.03, which states that “no person, acting with the kind of culpability required for the commission of an offense, shall \* \* \* aid or abet another in committing the offense.”

{¶ 14} But Starling argues that there was no direct or circumstantial evidence that he aided or abetted Thompson. He contends there was no evidence that he had any direct contact with the confidential informant, no evidence of any exchange of drugs between him and Thompson, and no

evidence regarding what he and Thompson said to each other. Accordingly, he contends there was nothing to suggest he had any involvement whatsoever in the drug transaction and that he was convicted merely because he was present at the scene of the crime. We are not persuaded.

{¶ 15} “The mere presence of an accused at the scene of a crime is not sufficient to prove, in and of itself, that the accused was an aider and abettor.” *State v. Widner* (1982), 69 Ohio St.2d 267, 269, 431 N.E.2d 1025. This rule protects innocent bystanders who have no connection to the crime other than simply being present at the time of its commission. *State v. Johnson*, 93 Ohio St.3d 240, 245, 2001-Ohio-1336, 754 N.E.2d 796.

{¶ 16} To support a conviction for complicity by aiding and abetting under R.C. 2923.03(A)(2), “the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal. Such intent may be inferred from the circumstances surrounding the crime.” *Id.* Aiding and abetting may be shown by both direct and circumstantial evidence. *In re R.G.*, 8th Dist. No. 90389, 2008-Ohio-6469, citing *State v. Cartellone* (1981), 3 Ohio App.3d 145, 150, 444 N.E.2d 68.

{¶ 17} The State’s evidence demonstrated that Starling was not merely present at the crime scene but was an active participant in the drug

transaction. Detective Hall testified that he saw the confidential informant talk to Thompson, and then saw Thompson walk over to Starling and talk to him. Detective Hall then saw Thompson walk back to the confidential informant and engage in a hand-to-hand transaction with him. As the confidential informant walked away, Detective Hall saw Thompson walk back to Starling and speak with him again. The confidential informant, who had only \$20 in marked buy money on him when he got out of Detective Hall's car, returned to Detective Hall's car with a rock of crack cocaine but not the buy money. When Starling was arrested moments later, the police found the buy money on him. A reasonable person, viewing this evidence in a light most favorable to the prosecution, could conclude that Starling aided and abetted Thompson in delivering and/or distributing the drugs to the confidential informant. R.C. 2925.03(A)(2).

{¶ 18} Accordingly, we find that Starling's conviction for drug trafficking was supported by sufficient evidence; his first assignment of error is therefore overruled.

### **III. Disclosure of the Confidential Informant's Identity**

{¶ 19} In his second assignment of error, Starling contends that the trial court erred in denying his pretrial motion to compel the State to disclose the confidential informant's identity.



{¶ 20} An informant's identity must be revealed where proof of an element of the crime is dependent upon the informant's testimony or where the testimony would be helpful or beneficial to the defendant in preparing a defense. *State v. Williams* (1983), 4 Ohio St.3d 74, 446 N.E.2d 779, syllabus.

The defendant has the burden of establishing the need for disclosure. *State v. Mays*, 8th Dist. No. 82474, 2003-Ohio-6949, citing *State v. Brown*, 64 Ohio St.3d 649, 653, 1992-Ohio-19, 597 N.E.2d 510. "In meeting this burden, the defendant must set forth more than mere speculation that 'the informer might somehow be of some assistance in preparing the case.'" *State v. Steward*, 8th Dist. No. 80993, 2003-Ohio-1337, ¶13, quoting *State v. Parsons* (1989), 64 Ohio App.3d 63, 69, 580 N.E.2d 800. The trial court's determination as to whether disclosure of an informant's identity is necessary will not be reversed absent an abuse of discretion. *State v. Feltner* (1993), 87 Ohio App.3d 279, 282, 622 N.E.2d 15.

{¶ 21} In *Williams*, supra, the Ohio Supreme Court held that where the informant's participation in a drug transaction is witnessed in its entirety by a police officer who is available to testify, the informant's testimony is not necessary to proving the crime. In this case, the drug deal was observed in its entirety by Detective Hall and he testified about his observations at trial. Further, he testified that he never lost sight of the confidential informant

prior to, during, or after the transaction. Hence, the informant's testimony was not necessary to establish any element of the crime.

{¶ 22} Likewise, Starling failed to meet his burden of demonstrating that the informant's testimony would be helpful in preparing his defense. Starling contends that the informant's identity should have been disclosed because Detective Hall was too far away to see what actually happened, whereas the informant observed the drug deal and could have testified that Starling played no role in the transaction. Starling's argument fails. First, the informant's testimony was not necessary because Starling had the opportunity to cross-examine Detective Hall about his involvement or lack thereof in the transaction. Further, Starling's assertion that the informant would have testified that he was not involved in the transaction is belied by the evidence. Detective Hall saw the informant give the buy money to Thompson, who then walked over to Starling. Although Detective Hall did not see Thompson hand Starling the money, the buy money was subsequently found on Starling, leading to only one logical conclusion: that Starling received the money from Thompson. Thus, it is reasonable to conclude that Starling did indeed play a role in the transaction. As the informant's testimony was not necessary to prove any element of the crime and Starling failed to meet his burden of demonstrating that the informant's testimony would be helpful to his defense, the trial court did not abuse its discretion in

denying Starling's motion to compel. The second assignment of error is therefore overruled.

#### **IV. Jury Instruction Regarding Complicity**

{¶ 23} In accord with the State's theory that Starling was guilty as an aider and abettor, the trial court instructed the jury on complicity. In his third assignment of error, Starling contends that the trial court abused its discretion in giving this instruction because there was insufficient evidence that he aided and abetted Thompson, the principal, in the commission of the crime. We disagree.

{¶ 24} "Ordinarily requested instructions should be given if they are correct statements of the law applicable to the facts in the case and reasonable minds might reach the conclusion sought by the instruction." *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591, 575 N.E.2d 828, quoting Markus & Palmer, *Trial Handbook for Ohio Lawyers* (3 Ed. 1991), 860, Section 36.2. We review a trial court's issuance of a jury instruction for an abuse of discretion. *State v. Williams*, 8th Dist. No. 90845, 2009-Ohio-2026, ¶50. An abuse of discretion in this context occurs when the instruction is not supported by the evidence. *State v. Ponce*, 8th Dist. No. 91329, 2010-Ohio-1741, ¶45.

{¶ 25} We find no abuse of discretion in the trial court's instruction because reasonable minds could easily conclude from the evidence in this case

that Starling aided and abetted Thompson in the drug deal. Specifically, Thompson consulted with Starling both before and after the transaction. Further, the buy money given to Thompson by the confidential informant was found on Starling when he was arrested only moments after the transaction was completed, strong evidence that he “supported, assisted, encouraged, cooperated with, advised, or incited” Thompson in the commission of the crime and shared his criminal intent.

{¶ 26} Accordingly, the trial court did not abuse its discretion in instructing the jury regarding complicity; the third assignment of error is therefore overruled.

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.

KATHLEEN ANN KEOUGH, JUDGE

MELODY J. STEWART, P.J., and

COLLEEN CONWAY COONEY, J., CONCUR