[Cite as *State v. Hackney*, 2009-Ohio-3444.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 24491
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
CHRISTOPHER R. HACKNEY	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 08 02 0617

DECISION AND JOURNAL ENTRY

Dated: July 15, 2009

CARR, Presiding Judge.

{¶1} Appellant, Christopher Hackney, appeals his conviction out of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On March 3, 2008, Hackney was indicted on one count of possession of cocaine in violation of R.C. 2925.11(A)(C)(4), a felony of the fifth degree; and one count of possession of counterfeit controlled substances in violation of R.C. 2925.37(A), a misdemeanor of the first degree. He pled not guilty at arraignment. On September 4, 2008, a supplemental indictment was filed, charging Hackney with one count of complicity to commit possession of cocaine in violation of R.C. 2923.03/2925.11(A)(C)(4), a felony of the fifth degree; and one count of complicity to commit possession of counterfeit controlled substances in violation of R.C. 2923.03/2925.37(A), a misdemeanor of the first degree. Hackney was arraigned immediately prior to trial, at which time he pled not guilty to the supplemental charges.

{¶3} The matter proceeded to trial. At the conclusion of trial, the jury found Hackney guilty of all four charges. The trial court sentenced Hackney to six months in jail and suspended same on the condition that he successfully complete eighteen months of community control. Hackney filed a timely appeal, raising one assignment of error for review.

II.

ASSIGNMENT OF ERROR

> "THE TRIAL COURT ERRED IN NOT GRANTING THE APPELLANT'S MOTION FOR A RULE 29 ACQUITTAL BECAUSE INSUFFICIENT EVIDENCE WAS PRESENTED BY THE APPELLEE TO PROVE BEYOND A REASONABLE DOUBT THAT HE WAS GUILTY OF POSSESSION OF COCAINE, POSSESSION OF A CONTROLLED COUNTERFEIT SUBSTANCE AND CONSPIRACY POSSESS TO COCAINE AND A COUNTERFEIT CONTROLLED SUBSTANCE. FURTHERMORE, THE APPELLANT'S CONVICTION OF THE AFOREMENTIONED OFFENSES WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE." (sic)

{¶4} Hackney argues that his convictions are not supported by sufficient evidence and are against the manifest weight of the evidence. This Court disagrees.

{¶5} Crim.R. 29 provides, in relevant part:

> "(A) The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case."

{¶6} A review of the sufficiency of the State's evidence and the manifest weight of the evidence adduced at trial are separate and legally distinct determinations. *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600. "While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." Id., citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook J., concurring). When reviewing the sufficiency of the evidence, this

Court must review the evidence in a light most favorable to the prosecution to determine whether the evidence before the trial court was sufficient to sustain a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259, 279.

> "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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." Id. at paragraph two of the syllabus.

{¶7} A determination of whether a conviction is against the manifest weight of the evidence, however, does not permit this Court to view the evidence in the light most favorable to the State to determine whether the State has met its burden of persuasion. *State v. Love*, 9th Dist. No. 21654, 2004-Ohio-1422, at ¶11. Rather,

> "an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, 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. Otten* (1986), 33 Ohio App.3d 339, 340.
>
> "Weight of the evidence concerns the tendency of a greater amount of credible evidence to support one side of the issue more than the other. *Thompkins*, 78 Ohio St.3d at 387. Further when reversing a conviction on the basis that it was against the manifest weight of the evidence, an appellate court sits as a 'thirteenth juror,' and disagrees with the factfinder's resolution of the conflicting testimony. Id." *State v. Tucker*, 9th Dist. No. 06CA0035-M, 2006-Ohio-6914, at ¶5.

This discretionary power should be exercised only in exceptional cases where the evidence presented weighs heavily in favor of the defendant and against conviction. *Thompkins*, 78 Ohio St.3d at 387.

{¶8} This Court has stated that "sufficiency is required to take a case to the jury[.] *** Thus, a determination that [a] conviction is supported by the weight of the evidence will also be

dispositive of the issue of sufficiency." (Emphasis omitted.) *State v. Roberts* (Sept. 17, 1997), 9th Dist. No. 96CA006462.

{¶9} Hackney was charged with possession of cocaine in violation of R.C. 2925.11(A), which states that "[n]o person shall knowingly obtain, possess, or use a controlled substance." R.C. 2901.22(B) states:

> "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. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶10} "Possess" means "having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found." R.C. 2925.01(K). R.C. 2901.21(D)(1) states that "[p]ossession is a voluntary act if the possessor knowingly procured or received the thing possessed, or was aware of the possessor's control of the thing possessed for a sufficient time to have ended possession." This Court has repeatedly held that "a person may knowingly possess a substance or object through either actual or constructive possession." *State v. See*, 9th Dist. No. 08CA009511, Slip Opinion No. 2009-Ohio-2787, at ¶10, quoting *State v. Hilton*, 9th Dist. No. 21624, 2004-Ohio-1418, at ¶16. "[C]onstructive possession may be inferred from the drugs' presence in a usable form and in close proximity to the defendant." *State v. Figueroa*, 9th Dist. No. 22208, 2005-Ohio-1132, at ¶8, citing *State v. Thomas*, 9th Dist. No. 21251, 2003-Ohio-1479, at ¶11. In addition, "[c]ircumstantial evidence is itself sufficient to establish dominion and control over the controlled substance." *Hilton* at ¶16.

{¶11} A "controlled substance" is "a drug, compound, mixture, preparation, or substance included in schedule I, II, III, IV, or V." R.C. 3719.01(C). Cocaine is classified as a Schedule II controlled substance. R.C. 3719.41 Schedule II (A)(4).

{¶12} Hackney was charged with possession of counterfeit controlled substances in violation of R.C. 2925.37(A) which states that "[n]o person shall knowingly possess any counterfeit controlled substance." R.C. 2925.01(O) defines "counterfeit controlled substance" as any of the following:

> "(1) Any drug that bears, or whose container or label bears, a trademark, trade name, or other identifying mark used without authorization of the owner of rights to that trademark, trade name, or identifying mark;
>
> "(2) Any unmarked or unlabeled substance that is represented to be a controlled substance manufactured, processed, packed, or distributed by a person other than the person that manufacture, processed, packed, or distributed it;
>
> "(3) Any substance that is represented to be a controlled substance but is not a controlled substance or is a different controlled substance;
>
> "(4) Any substance other than a controlled substance that a reasonable person would believe to be a controlled substance because of its similarity in size, shape, and color, or its markings, labeling, packaging, distribution, or the price for which it is sold or offered for sale."

{¶13} Hackney was further charged with complicity to commit both charges in violation of R.C. 2923.03(A)(2), which states, in relevant part, that "[n]o person, acting with the kind of culpability required for the commission of an offense, shall *** [a]id or abet another in committing the offense[.]" The Ohio Supreme Court has held:

> "To support a conviction for complicity by aiding and abetting pursuant to 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." *State v. Johnson* (2001), 93 Ohio St.3d 240, syllabus.

{¶14} At trial, Detective Paul Siegferth of the Akron Police Department ("APD") testified that he works undercover in plain clothes and an unmarked vehicle in target areas where he looks for criminal activity. He testified that the intersection of Marion Place and Paris Place, in Akron, Ohio, is a target area and that he has made more than one hundred drug arrests in that

area. He testified that, if he observes criminal activity, he calls it in so that the uniformed officers can "move in" on the scene. He testified that he has worked undercover hundreds of times looking for potential drug trafficking. The detective described the process as follows. He goes into a target neighborhood and looks for anybody who makes eye contact with him. He then pulls up to the person and sometimes honks his horn or asks whether the person has anything. He testified that he will receive a nod, a wave or a request to go around the block if the person has drugs for sale.

{¶15} Detective Siegferth testified that he was working with the gang unit on special detail during the cold evening of February 19, 2008. He testified that it was 14-15 degrees outside, and the parties stipulated that the trial court could take judicial notice of the weather. The parties further stipulated to the authenticity of a weather report for that day, which the State admitted into evidence.

{¶16} The detective testified that he was driving southbound on Marion Place, towards Paris Place, when he saw someone on the devil strip. He testified that he pulled up to a stop sign, rolled his window halfway down, made eye contact with the individual and waved. The detective testified that the man walked toward him, nodded and waved. He admitted that he did not see the man reach for or pull anything out of his pocket. Detective Siegferth testified that he then drove away and relayed this information over the radio to uniformed officers.

{¶17} A recording of his report was played in open court upon joint stipulation of the parties as to its authenticity. In the recording, Detective Siegferth is heard reporting that a man wearing black clothing with a glittery design on it walked out of a house and waved him down at Marion Place and Paris. The detective identified a photograph of Hackney taken that evening by the police.

{¶18} Detective Siegferth testified that he never purchases drugs from suspects while undercover. He testified that he does not always have a conversation with a suspected drug dealer in these situations. Finally, he testified that he has often seen crack cocaine, as well as substances that appear to be crack cocaine but are not. He explained that selling "fake crack" is a common way for people to make money because it costs nothing and "you can rip people off with it."

{¶19} Officer Adam Lemonier of the APD testified that he has received a lot of drug identification/drug interdiction training. He testified that he works many special details.

{¶20} Officer Lemonier testified that he was working with the gang unit on the evening of February 19, 2008, performing gang sweeps and strict enforcement detail. He described the night as very cold. He testified that he was in a marked police cruiser and was in radio contact with undercover forces who were "looking out" in the area. He testified that he received information from Detective Siegferth regarding a man who had flagged him down. Officer Lemonier testified that he arrived on scene in 20-30 seconds around 10:30 p.m. He testified that he observed two black males walking eastbound from Marion Place down Paris, and that one matched the description called out by Detective Siegferth.

{¶21} Officer Lemonier testified that he got out of his car, stopped the two males and told them why, and patted them down. He testified that he found nothing on either. He identified the males as Hackney and a juvenile.

{¶22} Officer Lemonier testified that approximately four other officers working the special detail were providing back up on the scene. He testified that one of the officers brought to his attention a baggie which was found on the ground approximately six to ten feet away from

where Hackney and the juvenile were stopped. He testified that the baggie was found west of the suspects who were walking east. He testified that the baggie was "still warm and dry."

{¶23} Officer Lemonier testified that he field tested the white substance in the baggie and that it tested positive for cocaine. He testified that he tested another baggie found at the scene and that it tested negative. The officer testified that, based on his training and experience, it is common to discover substances during drug investigations which do not contain drugs because those substances allow people to make a profit from selling nothing of value.

{¶24} Officer Lemonier testified that the police found a ripped-off portion of a plastic baggie in the juvenile's pocket, which was consistent with the way narcotics are packaged for sale. He testified that he never saw Hackney make any motion indicating he was discarding anything. The officer admitted that the baggies found on the ground were not checked for fingerprints, but he asserted that in nine-and-a-half years and more than two hundred drug cases, he has never known fingerprints to be retrieved from baggies because there is never enough detail to make a positive identification. Officer Lemonier concluded that he linked the baggies containing crack cocaine and fake crack cocaine to Hackney because of his close proximity to the discarded baggies and because of the circumstances of the stop.

{¶25} Officer Rodney Criss of the APD testified that on the evening of February 19, 2008, he was working a gang sweep detail in targeted areas including the area of Marion Place and Paris Place. He testified that it was dark and cold, with a little snow on the ground. He explained that undercover forces would "slide through neighborhoods" to look for criminal activity, which they would report over the designated radio channel. He testified that the uniform officers would then go on scene and stop the appropriate people. Officer Criss testified

that he responded to the scene reported by Detective Siegferth and saw other officers patting down Hackney and a juvenile.

{¶26} Officer Criss testified that he checked the immediate area and found "some substance on the ground" approximately six feet away from Hackney and the juvenile. He described the substances as having coloration consistent with crack cocaine. He testified that three baggies were found and that one tested positive for cocaine, while the other two tested "fake" as if they were counterfeit controlled substances. The officer testified that the baggies did not appear to have been on the ground long because they were not frozen to the ground and not snow-covered despite the presence of snow on the ground.

{¶27} Officer Criss testified that he has seen crack cocaine and counterfeit crack cocaine hundreds of times. He testified that both are sold, the latter for the purpose of cheating people or because the seller has no real product at the time to sell. He testified that crack cocaine is typically packaged for sale as one rock in a plastic bag, and that the ripped-off baggie found on the juvenile would have been used to package several rocks.

{¶28} Finally, Officer Criss testified that no drug-related items were found on Hackney and he did not see Hackney or the juvenile throw anything on the ground. He testified, however, that no other people were out in the neighborhood at the time of the stop.

{¶29} This Court finds that this is not the exceptional case, where the evidence weighs heavily in favor of Hackney. The weight of the evidence supports the conclusion that Hackney possessed cocaine and counterfeit controlled substances, and that he aided and abetted another in the possession of both substances.

{¶30} A thorough review of the record compels this Court to find no indication that the jury lost its way and committed a manifest miscarriage of justice in convicting Hackney of

possession of cocaine and counterfeit controlled substances. In an area targeted for drug activity, Hackney left a house late in the evening on a very cold night when the undercover detective drove in the area. There was evidence that Hackney responded to the undercover detective in a way that indicated, based on the experience of the police, that he had drugs for sale. He was stopped within seconds and, although there were no drugs or drug paraphernalia on his person, three warm baggies were found on the ground in the immediate vicinity from where he had just been, indicating limited but sufficient time for Hackney to have ended possession in the seconds before the arrival of the uniformed police. In addition, given the proximity of the baggies to Hackney and that they were in a "usable form," given their packaging for sale, there was circumstantial evidence that Hackney had constructive possession over the substances. The substances in the baggies appeared to be crack cocaine and were packaged for sale. One of the substances tested positive for such, while the other two did not. Under the totality of the circumstances, the circumstantial evidence demonstrates that Hackney possessed crack cocaine and counterfeit controlled substances.

{¶31} A thorough review of the record compels this Court to find no indication that the jury lost its way and committed a manifest miscarriage of justice in convicting Hackney of complicity to commit possession of cocaine and counterfeit controlled substances. Detective Siegferth saw only Hackney flag him down and did not see the juvenile. Nevertheless, the juvenile appeared with Hackney within seconds of the detective's departure from the scene. They were walking together in the immediate area in which the warm baggies were found on the ground. In addition, a ripped baggie, an item commonly used to package drugs for sale, was found on the juvenile, while rocks of real and fake crack cocaine were found in similar pieces of baggies at the scene.

{¶32} This Court concludes that Hackney's convictions are not against the manifest weight of the evidence. Having concluded that Hackney's convictions are not against the weight of the evidence, this Court further necessarily concludes that there was sufficient evidence to support the jury's verdict. Hackney's assignment of error is overruled.

III.

{¶33} Hackney's sole assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
SLABY, J.
CONCUR

(Slaby, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to, §6(C), Article IV, Constitution.)

APPEARANCES:

JANA DELOACH, Attorney at Law, for Appellant.

CANDANCE KIM KNOX, Attorney at Law, for Appellant.

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