

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 24384

Appellee

v.

MICHAEL A. GERHART

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 06 05 1785(A)

Appellant

DECISION AND JOURNAL ENTRY

Dated: August 19, 2009

CARR, Judge.

{¶1} Appellant, Michael Gerhart, appeals the judgment of the Summit County Court of Common Pleas. The Court affirms.

I.

{¶2} On May 10, 2006, Akron Police went to 568 Stetler Ave. in Akron, Ohio, to investigate reports of a methamphetamine laboratory being operated at that location. Lieutenant Terry Pasko and several other officers approached the house and knocked on the front door. After approximately five minutes, Gerhart answered the door and permitted several officers to enter the house. Upon entering the house, the officers immediately noticed a strong odor which smelled like ammonia. Lieutenant Pasko testified that officers, in their training, are taught that the strong acidic smell of ammonia is one of the by-products of methamphetamine production. The officers requested permission to search the residence. Gerhart stated that he was not the owner of the house and refused. At this time, the officers asked Gerhart for identification.

Gerhart produced a form of identification and the officers proceeded to check for outstanding warrants. It was revealed that Gerhart had an outstanding arrest warrant and he was taken into custody.

{¶3} The police proceeded to find Sherri VanDyke, Martin Griffin and Violet Eagle in the house. Eagle, the owner of the house, granted the officers permission to search the premises. The officers proceeded to the basement where they found the smell of ammonia was stronger and they observed Pyrex tubing and other indicators of methamphetamine production.

{¶4} Detective Ted Male was called to the scene. Detective Male is a member of the Akron Police Department's Street Narcotics Uniform Detective ("S.N.U.D.") Unit. Detective Male and several officers working with him located, photographed and inventoried a variety of items indicative of methamphetamine production.

{¶5} Detective Glenn Payne is another member of the S.N.U.D. Unit who participated in the investigation. Detective Payne testified at trial as to what components are necessary to manufacture methamphetamine and the process by which the components are combined to produce methamphetamine. According to Detective Payne, he found all of the necessary components for the manufacture of methamphetamine in the house. Detective Payne did note, however, that he did not find actual methamphetamine in the house.

{¶6} On May 23, 2006, Gerhart and three co-defendants were indicted by the Summit County Grand Jury on one count of illegal manufacture of drugs under R.C. 2925.04(A), charged as a felony of the first degree because the crime was alleged to have been committed within the vicinity of a school; one count of assembly or possession of chemicals used to manufacture a controlled substance with intent to manufacture a controlled substance under R.C. 2925.041, charged as a felony of the second degree because the crime was alleged to have been

committed within the vicinity of a school; and one count of failure to appear upon release on own recognizance under R.C. 2937.29, a felony of the fourth degree. After a jury trial, Gerhart was found guilty on all three counts on January 17, 2008. The trial court sentenced him accordingly. The conviction was journalized on July 23, 2008. It is that journal entry from which Gerhart appeals.

{¶7} Gerhart raises three assignments of error. This Court consolidates the first and second assignments of error to facilitate review.

II.

ASSIGNMENT OF ERROR I

“APPELLANT GERHART’S CONVICTION FOR ILLEGAL MANUFACTURE OF METHAMPHETAMINE WAS BASED UPON INSUFFICIENT EVIDENCE AS A MATTER OF LAW.”

ASSIGNMENT OF ERROR II

“APPELLANT GERHART’S CONVICTION FOR ILLEGAL ASSEMBLY OR POSSESSION OF CHEMICALS FOR THE MANUFACTURE OF METHAMPHETAMINE WAS BASED UPON INSUFFICIENT EVIDENCE AS A MATTER OF LAW.”

{¶8} Gerhart argues that his convictions for illegal manufacture of drugs and illegal assembly or possession of chemicals for the manufacture of drugs were not supported by sufficient evidence. This Court disagrees.

{¶9} In a criminal prosecution, the State must prove every necessary element of a crime beyond a reasonable doubt. See *In re Winship* (1970), 397 U.S. 358, 365. 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.

{¶10} The test for sufficiency requires a determination of whether the State has met its burden of production at trial. *State v. Walker* (Dec. 12, 2001), 9th Dist. No. 20559; See, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J. concurring).

{¶11} At the outset, we note the legislature’s characterization of the crimes for which Gerhart argues the State did not present sufficient evidence to support convictions. The elements of illegal manufacture of drugs are found in R.C. 2925.04(A), which provides that “[n]o person shall *** knowingly manufacture or otherwise engage in any part of the production of a controlled substance.” The elements of illegal assembly or possession of chemicals for the manufacture of drugs are found in R.C. 2925.041(A), which states, “[n]o person shall knowingly assemble or possess one or more chemicals that may be used to manufacture a controlled substance in schedule I or II with the intent to manufacture a controlled substance in schedule I or II in violation of section 2925.04 of the Revised Code.”

{¶12} 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.”

{¶13} R.C. 2925.01(J) defines “manufacture” as

“to plant, cultivate, harvest, process, make, prepare, or otherwise engage in any part of the production of a drug, by propagation, extraction, chemical synthesis, or compounding, or any combination of the same, and includes packaging, repackaging, labeling, and other activities incident to production.”

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). Methamphetamine is classified as a controlled substance. R.C. 3719.41 Schedule II (C)(2).

{¶14} With regard to the illegal manufacture of drugs charge, Gerhart argues that no evidence was presented at trial which proved that he actually produced methamphetamine. Gerhart contends that because no methamphetamine was recovered, the evidence presented by the State only showed that the police discovered chemicals and equipment which may have been usable in the production of methamphetamine. Gerhart further argues that if being in possession of the components to manufacture methamphetamine can result in a conviction under R.C. 2925.04, then the crime of assembly or possession of chemicals for the manufacture of drugs, outlined in R.C. 2925.041, is rendered superfluous. This Court disagrees with both propositions asserted by Gerhart.

{¶15} R.C. 2925.04(A) contains no requirement that evidence of a manufactured product must be produced in order to obtain a conviction. R.C. 2925.01(J) defines “manufacture” as, “to plant, cultivate, harvest, process, make, prepare, or otherwise engage in any part of the production of a drug, by propagation, extraction, chemical synthesis, or compounding, or any combination of the same, and includes packaging, repackaging, labeling, and other activities incident to production.” In order to prove that a defendant manufactured a drug, the State is not required to present the drug in the form of a completed product at trial. Rather, the statute requires the State to show that a defendant knowingly manufactured or engaged “*in any part* of the production of a controlled substance.” (Emphasis added.) R.C. 2925.04(A).

{¶16} The testimony of Detective Payne demonstrated that all of the ingredients necessary to manufacture methamphetamine were found at the 568 Stetler Ave. residence in Akron, Ohio. Detective Payne, as well as Detective Male, testified as to the process by which methamphetamine is manufactured. Both detectives concluded that the items in the house indicated the presence of a methamphetamine laboratory.

{¶17} Detective Male's testimony demonstrates that methamphetamine was manufactured at the residence. Specifically, the testimony revealed that methamphetamine had been completed by extraction, chemical synthesis and compounding. At trial, Detective Male testified as follows. Upon entering the residence, Detective Male noticed a strong odor permeating throughout the house. Detective Male testified the odor was distinct to the production of methamphetamine. In the basement of the house, Detective Male found a case of matches with the striker plates removed so that red phosphorus could be extracted. The glassware discovered by police was stained a "rustic maroon color" which, according to Detective Male's testimony, indicates red phosphorus. The police also discovered a small plastic dish which contained a substance which Detective Male indicated was red phosphorous. When viewed in its entirety, Detective Male's testimony shows that the application of chemicals to match book striker plates allowed for red phosphorous to be extracted which was then prepared in a plastic dish, as well as glassware, during the production of methamphetamine.

{¶18} The State introduced several exhibits during the course of Detective Male's testimony. Detective Male identified the exhibits as photographs which were taken of items in the basement of the 568 Stetler Ave. residence. The first exhibit was a photograph of an "improvised cooker" near a dish containing some red residue. Detective Male testified that several steps in the process of manufacturing methamphetamine require a heat source.

According to Detective Male, an early step in the production process involves heating up iodine, red phosphorous, pseudoephedrine and water. Detective Male testified that the process also requires separating a bonding agent from crushed pseudoephedrine, which also involves the use of a heat source.

{¶19} The second exhibit introduced by the State was a photograph of a tool bag, several Pyrex dishes, mason jars, a funnel and tubing. Detective Male testified that the tubing is used in the step in the process known as the “gassing stage.” After the iodine, red phosphorus, pseudoephedrine and water are cooked, it is necessary to add a strong base. Detective Male testified that once the “meth base” is created, the tubing is used in the gassing process which involves combining rock salt and muriatic acid, as well as sulfuric acid.

{¶20} The third exhibit introduced was a photograph of a case of matches. All of the striker plates had been removed from the matches. Detective Male testified that red phosphorous can be obtained from the striker plates. Detective Male further testified that if either acetone or ether is added so that the red phosphorous can be removed, an “essential element” in the production of methamphetamine has taken place. The fourth exhibit introduced by the State and identified by Detective Male was a photograph of a can of acetone that was found in the basement.

{¶21} The eighth exhibit introduced by the State was a photograph of a cabinet on the basement wall. In the photograph, Detective Male was able to identify denatured alcohol, coffee filters, wooden spoons, spatulas, a small plastic dish, and a rubber stopper which had been attached to the end of some tubing. Detective Male testified that the coffee filters were significant because there are multiple times during the process of methamphetamine production where coffee filters are necessary to strain out unwanted material. The denatured alcohol was

significant, according to Detective Male, because it can be used to speed up the process of separating bonding agents from the actual pseudoephedrine in allergy tablets. In the photograph, Detective Male was also able to identify a small plastic dish which was catching a substance. Detective Male testified that based on his training and experience, the substance appeared to be red phosphorous. Detective Male also testified as to the significance of the tubing with a rubber stopper at its end. Detective Male testified that this device acts as a gas generator where the rock salt, when combined with sulfuric and muriatic acid, creates hydrogen chloride which goes into the “meth base” and then passes through. According to Detective Male, this is the process by which the “meth oil” and “meth base” is actually turned into a powdery substance which constitutes the actual methamphetamine product.

{¶22} The tenth exhibit introduced by the State was a photograph of a grinder that was found in the basement. Detective Male testified that these devices are often used to grind up pills.

{¶23} The thirteenth exhibit introduced by the State was a photograph of a box which contained two, 2-gallon, jugs of Smart muriatic acid. Earlier in his testimony, Detective Male had explained that muriatic acid was necessary in the gassing stage of methamphetamine production. After describing what was in the photograph, Detective Male stated that muriatic acid was typically used to clean swimming pools. According to Detective Male, he did not observe a swimming pool at the 568 Stetler Ave. residence.

{¶24} Lieutenant Pasko was one of the officers whom Gerhart permitted to enter the house after police arrived at the scene. Lieutenant Pasko testified that the odor he noticed upon entering the house was the same odor he had smelled upon entering other houses which contained methamphetamine laboratories. Lieutenant Pasko received permission to search the

house from the owner of the house, Violet Eagle. When Eagle escorted Lieutenant Pasko down into the basement, he said the odor was so strong that his “eyes started to water and started to burn.”

{¶25} Eagle, a co-defendant in the case, testified that prior to moving into the residence in September of 2005, Gerhart would come over off and on and “gas some meth.” Eagle testified that she had observed Gerhart cooking methamphetamines but she never observed the entire process. Eagle went on to state that she had observed Gerhart conducting the gassing stage of the process two or three times. Eagle further testified that she used to obtain methamphetamine from Gerhart for personal use prior to the May 10, 2006 incident.

{¶26} Sherri VanDyke, another co-defendant, also testified on behalf of the State at trial. VanDyke testified that she had been romantically involved with Gerhart in the months leading up to the May 10, 2006 incident. VanDyke admitted to being a user of methamphetamines during that period of time. VanDyke testified that she saw Gerhart cooking methamphetamine at the Stetler Ave. residence “[a]t least eight to ten times.”

{¶27} Based on the evidence presented at trial, this Court finds there was sufficient evidence, when construed in a light most favorable to the State, to convince an average person that Gerhart was guilty of illegally manufacturing drugs. The testimony of Detective Payne revealed that all of the components necessary to manufacture methamphetamine were found in the house. Detective Male testified that the components were discovered in a state which indicated they had been used to complete the essential steps necessary to produce methamphetamine. Detective Male’s testimony further tended to show that steps had been taken to extract red phosphorous from matchbook striker plates. Finally, Detective Male testified the odor which permeated through the residence was distinctive to the production of

methamphetamine. Lieutenant Pasko testified that upon entering the basement, the odor which he knew to be consistent with the production of methamphetamine was so strong that it made his eyes burn and water. Under these circumstances, this Court concludes that the trial court did not err by finding that the State presented sufficient evidence to prove every element necessary to convict Gerhart of illegally manufacturing drugs.

{¶28} This Court disagrees with Gerhart's contention that R.C. 2925.04(A) makes R.C. 2925.041 superfluous. One crime deals with manufacturing a controlled substance or engaging in any part of the production of a controlled substance while the other crime deals with possessing or assembling a chemical, or chemicals, with the intent to manufacture a controlled substance. In a prosecution under R.C. 2925.041, "it is not necessary to allege or prove that the offender assembled or possessed all chemicals necessary to manufacture a controlled substance in Schedule I or II. The assembly or possession of a single chemical that may be used in the manufacture of a controlled substance in schedule I or II, with the intent to manufacture a controlled substance, is sufficient ***." R.C. 2925.041(B). In contrast, a violation of R.C. 2925.04(A) requires that a person manufacture or otherwise engage in a part of the production of a controlled substance. Therefore, this Court rejects Gerhart's argument that R.C. 2925.041 is superfluous.

{¶29} We turn now to our analysis of whether the State presented sufficient evidence to convict Gerhart of illegal assembly or possession of chemicals for the manufacture of drugs. Gerhart notes that the State did not produce any scientific test results at trial which showed the materials discovered by the police were actually chemicals used for the production of methamphetamine. It follows, Gerhart contends, that any identification of chemicals made by witnesses at trial was no more than a conclusory opinion based on speculation.

{¶30} In support of his argument, Gerhart points to R.C. 2925.51(A) which provides, in part:

“In any criminal prosecution for a violation of this chapter or Chapter 3719. of the Revised Code, a laboratory report from the bureau of criminal identification and investigation, a laboratory operated by another law enforcement agency, or a laboratory established by or under the authority of an institution of higher education that has its main campus in this state and that is accredited by the association of American universities or the north central association of colleges and secondary schools, primarily for the purpose of providing scientific services to law enforcement agencies and signed by the person performing the analysis, stating that the substance that is the basis of the alleged offense has been weighed and analyzed and stating the findings as to the content, weight, and identity of the substance and that it contains any amount of a controlled substance and the number and description of unit dosages, is prima-facie evidence of the content, identity, and weight or the existence and number of unit dosages of the substance.”

Gerhart argues that R.C. 2925.51(A) has the effect of excluding all other forms of proof other than laboratory results to prove the identity of a chemical in a criminal prosecution.¹ This Court does not accept this interpretation of the statute.

{¶31} As the Twelfth District recently noted, Ohio courts rely on the testimony of law enforcement officials when dealing with drug-related cases. *State v. Graham*, 12th Dist. No. CA2008-07-095, 2009-Ohio-2814, at ¶32 “Through an officer or agent's testimony, juries, trial judges, and reviewing courts are able to consider the evidence from well-trained and reliable sources familiar with drugs and drug-related activity.” *Id.*, citing *State v. Alexander*, 151 Ohio App.3d 590, 2003-Ohio-760, ¶ 46 (noting that “in a specialized area like drug interdiction, the

¹ We note that in *Melendez-Diaz v. Massachusetts* (2009), 129 S.Ct. 2527, 2532, the United States Supreme Court held that under the Confrontation Clause, affidavits showing the results of forensic analysis performed on substances which had been seized by law enforcement fall into the core class of testimonial statements and, therefore, are inadmissible unless the defendant has the opportunity to cross-examine the analyst responsible for the affidavits at trial. However, this issue is not before us in this case.

court should consider the evidence from the perspective of one who is trained in the field of law enforcement.”).

{¶32} At trial, both Detective Male and Detective Payne testified at length as to the chemicals discovered by police in the basement of the 568 Stetler Ave. residence. As a member of the S.N.U.D Unit, Detective Male has participated in approximately fifty investigations involving methamphetamine laboratories. Detective Payne had worked in the narcotics unit for twelve years. As discussed above, Detective Male testified at trial regarding the numerous items discovered in the basement of the residence. Among those items were a can of acetone and muriatic acid, both chemicals necessary in the production of methamphetamine. Detective Payne specifically testified that the police found all of the ingredients necessary to manufacture methamphetamine were present in the house. The distinct odor which permeated through the house and the fact that all of the components necessary to manufacture methamphetamine were found together in the basement suggests Gerhart had the intent to manufacture methamphetamine. Based on the testimony and the aforementioned exhibits introduced by the State, this Court concludes that the trial court did not err in finding that the State presented sufficient evidence to convict Gerhart of assembly or possession of chemicals for the manufacture of drugs.

{¶33} This Court concludes that Gerhart’s conviction for illegal manufacture of drugs, under R.C. 2925.04(A), as well as his conviction for illegal possession of chemicals for the manufacture of drugs, under R.C. 2925.041, were supported by sufficient evidence. Gerhart’s first and second assignments of error are overruled.

ASSIGNMENT OF ERROR III

“APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.”

{¶34} In his brief filed with this Court, Gerhart argues that to the extent this Court would conclude that trial counsel waived the issues raised in the first two assignments of error, Gerhart contends that his trial counsel rendered ineffective assistance of counsel. Because this Court addressed Gerhart's first and second assignments of error, we decline to address Gerhart's third assignment of error because it is rendered moot. See App.R. 12(A)(1)(c).

III.

{¶35} Gerhart's first two assignments of error are overruled. This Court declines to address the third assignment of error. 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

MOORE, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

NICHOLAS SWYRYDENKO, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.