

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 09CA0061-M

Appellee

v.

PHU V. HOANG

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 06-CR-0366

Appellant

DECISION AND JOURNAL ENTRY

Dated: December 13, 2010

WHITMORE, Judge.

{¶1} Defendant-Appellant, Phu Hoang, appeals from his conviction in the Medina County Court of Common Pleas. This Court affirms.

I

{¶2} Following a period of surveillance, agents from the Medway Drug Enforcement Agency (“Medway”) executed a search warrant at eight different locations and arrested Hoang and multiple other individuals based on their suspected involvement in a drug ring. Medway confiscated a total of 23,632 grams of marijuana from the eight locations that its agents searched. Hoang lived at one of the locations, Stoneybrook Lane Apt. 107, with his wife, Than Thi Tran (“Than Thi”), and his brother, Khuong Vay Hoang (“Khuong Vay”). Stoneybrook Lane Apts. 104 and 106 also were connected to the drug ring along with an apartment on Grand Lake Drive and four residential homes on Troon Avenue, Baywood Drive, Red Clover Lane, and Autumnwood Lane, respectively.

{¶3} A grand jury indicted Hoang on the following counts: (1) possession of marijuana, in violation of R.C. 2925.11(A)(C)(3)(f); (2) two counts of conspiracy to commit the crime of possessing marijuana, in violation of R.C. 2923.01(A)(1) and (A)(2), respectively; (3) complicity to commit the crime of possessing marijuana, in violation of R.C. 2923.03(A)(2); (4) unlawful cultivation of marijuana, in violation of R.C. 2925.04(A)(C)(5)(f); (5) two counts of conspiracy to commit the crime of unlawfully cultivating marijuana, in violation of R.C. 2923.01(A)(1) and (A)(2), respectively; and (6) complicity to commit the crime of unlawfully cultivating marijuana, in violation of R.C. 2923.03(A)(2). All of the foregoing counts contained attendant forfeiture specifications. After extensive motion practice and several hearings, the matter proceeded to a jury trial. The jury found Hoang guilty on all counts. The jury also made the specific finding that the amount of marijuana at issue was an amount equal to or in excess of 20,000 grams. The trial court sentenced Hoang, and he appealed. This Court concluded that a resentencing was required due to an improper post-release notification. See *State v. Vu*, 9th Dist. Nos. 07CA0094-M, 07CA0095-M, 07CA0096-M, 07CA0107-M & 07CA0108-M, 2009-Ohio-2945, overruled, *State v. Bedford*, 9th Dist. No. 24431, 2009-Ohio-3972.

{¶4} Subsequently, the trial court resentenced Hoang. The State elected to merge all of Hoang's offenses with his offense for the unlawful cultivation of marijuana, and the court sentenced Hoang to eight years in prison on that count. Hoang now appeals from his conviction and raises three assignments of error for our review.

II

Assignment of Error Number One

“THE EVIDENCE AT TRIAL WAS INSUFFICIENT TO SUPPORT THE JURY’S GUILTY VERDICTS, AND APPELLANT’S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶5} In his first assignment of error, Hoang argues that his convictions for the illegal cultivation, possession, conspiracy, and complicity are based on insufficient evidence and are against the manifest weight of the evidence. We disagree.

{¶6} Initially, we note that Hoang only received one conviction in this case. Although the jury found Hoang guilty of all of the offenses at issue, the court only sentenced him on the illegal cultivation count because all of Hoang's offenses were allied offenses. For purposes of allied offenses, "a 'conviction' consists of a guilty verdict and the imposition of a sentence or penalty." *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, at ¶12. Thus, despite any reference to his "convictions," Hoang's first assignment of error actually tests the sufficiency and weight of his single conviction and his other guilty verdicts. See *id.* at ¶27 (providing that even after the merger of allied offenses, a "the determination of the defendant's guilt for committing allied offenses remains intact"). We separately analyze sufficiency and manifest weight.

Sufficiency

{¶7} In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks* (1991), 61 Ohio St.3d 259, 274. Furthermore:

"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; see, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

"In essence, sufficiency is a test of adequacy." *Thompkins*, 78 Ohio St.3d at 386.

{¶8} "No person shall knowingly cultivate marihuana or knowingly manufacture or otherwise engage in any part of the production of a controlled substance." R.C. 2925.04(A).

Additionally, “[n]o person shall knowingly obtain, possess, or use a controlled substance.” R.C. 2925.11(A). “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.” R.C. 2901.22(B). When the controlled substance at issue is marijuana, a violation of either R.C. 2925.04(A) or R.C. 2925.11(A) is a second-degree felony if the marijuana’s weight equals or exceeds 20,000 grams. R.C. 2925.04(C)(5)(f); R.C. 2925.11(C)(3)(f).

{¶9} R.C. 2923.01 provides, in relevant part, as follows:

“No person, with purpose to commit or to promote or facilitate the commission of *** a felony drug trafficking, manufacturing, processing, or possession offense *** shall *** [w]ith another person or persons, plan or aid in planning the commission of any of the specified offenses; [or] *** [a]gree with another person or persons that one or more of them will engage in conduct that facilitates the commission of any of the specified offenses.” R.C. 2923.01(A)(1)-(2).

Proof of a substantial overt act in furtherance of a conspiracy is required before a person may be found guilty of conspiracy. R.C. 2923.01(B). Once the actual commission of the offense at issue occurs, the crime of complicity arises. See R.C. 2923.01(G); R.C. 2923.03(C). The complicity statute provides, 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[.]” R.C. 2923.03(A)(2). The phrase “aid or abet” means that a defendant “supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that [he] 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.

{¶10} Medway agents conducted surveillance on the eight properties at issue in this case from late April to June 15, 2006. When the agents finally executed search warrants on all of the properties on June 15, 2006, they discovered a large-scale marijuana operation. Charles

DeFelice, the former Director of Medway, testified that his agents found marijuana grow sites at both the Troon Avenue and Red Clover Lane properties. The agents discovered marijuana plants in various stages of growth on both the main and basement floors of the Troon Avenue property and small marijuana plants on the basement floor of the Red Clover Lane property. Both properties also contained large amounts of potting soil and plant fertilizer. Additionally, Former Director DeFelice testified that someone had modified both the ventilation and electrical systems in the houses by installing additional vents through the first floors and attics and by drilling through the concrete foundations in the basements to divert electricity before it reached the electrical meters. He explained that additional ventilation is necessary for indoor grow operations because of the large amount of heat produced. Further, he explained that because the production of the heat necessary to grow marijuana requires large amounts of electricity, electrical diverters help growers avoid “electric detection.” When Medway agents searched the Baywood Drive property, Former Director DeFelice testified, the agents found supplies that matched the items found at the Troon Avenue and Red Clover Lane properties, including plastic grow pots, potting soil, liquid fertilizer, unassembled grow lamps, ventilation tubing, and power supply equipment. The search of the Red Clover Lane property also uncovered a Home Depot receipt in Hoang’s name, dated April 16, 2006.

{¶11} Detective Sergeant Roger Sprowl testified that he helped Medway agents execute the search warrant on Stoneybrook Lane, Apt. 107, on the night of June 15, 2006. He testified that Hoang, Than Thi, and Khuong Vay were all occupants of Apt. 107 and were home when the search commenced. The apartment contained numerous pieces of electronic stereo equipment, televisions, a DVD/VCR player, desktop and laptop computers, a fax machine, and a video camera. The apartment also contained a large amount of documents. Detective Sprowl

identified receipts for items such as growing supplies, fertilizers, PVC piping, aluminum ductwork, and foil tape. The total amount on one receipt alone amounted to \$19,000. Detective Sprowl also testified that the search uncovered notepads with written notations describing various kinds of plant fertilizers; boxes of Jiffy pellet refills; bottles of flowering supplements; books on hydroponics and gardening; titles for several vehicles; property settlement statements for the property on Troon Avenue in the amount of \$222,951.86 and for another property on Avon Road in the amount of \$243,448; and a copy of a warranty deed for the Red Clover Lane property. The 2005 tax returns that the Medway Agents found in Apt. 107 showed a total earned income of \$20,665 for Hoang and his wife and a total earned income of \$28,000 for Khuong Vay. Several other documents related to virtually all of the other individuals who were arrested in connection with the drug ring even though they did not live in Apt. 107. Finally, Medway agents uncovered a small amount of marijuana in the small bedroom of Apt. 107.

{¶12} Hoang's counsel stipulated that Hoang appeared three separate times on three different days on the recordings that Medway's agents created when they conducted surveillance on the various properties at issue between late April and mid-June 2006. On one occasion, Dustin Burnette, a Medway technical surveillance agent, personally observed a man, later identified as Hoang, go inside the Red Clover Lane property to help another man, Lai Vu, load mattresses into a truck for transport. On another occasion in May 2006, Hoang attended a barbecue at the Troon Avenue property. Hoa Kim Tran, another individual arrested as a part of the drug ring, confirmed that Hoang attended the barbecue and further testified that she saw him on one other occasion at Henry Tran's apartment on Grand Lake Drive. Henry Tran and the Grand Lake Drive apartment also were connected to the drug ring along with another individual named Tuan Do. Tuan Do testified that Henry Tran hired him to live at the Troon Avenue

property and take care of the marijuana there. According to Tuan Do, Hoang frequently came to the Troon Avenue property. Tuan Do testified that Hoang showed him how to care for the marijuana plants and regularly helped him do so.

{¶13} Charles Ellis, a Medway senior agent, testified that Medway combined all the marijuana it found at the various properties at issue after determining that all the properties were part of the same criminal conspiracy. Jennifer Acurio, a forensic scientist with the Ohio Bureau of Criminal Identification and Investigation (“BCI”), testified that she tested and weighed the marijuana Medway turned over to BCI. Acurio testified that all of the substance was, in fact, marijuana and that the marijuana had a total weight of 23,632 grams.

{¶14} Based on all of the foregoing, a reasonable jury could have found that Hoang actually cultivated and possessed marijuana in addition to helping others do so. As noted above, Tuan Do provided direct evidence that Hoang cultivated and possessed marijuana. While virtually all of the evidence in this case was circumstantial, “the State may rely on circumstantial evidence to prove an essential element of an offense, as ‘[c]ircumstantial evidence and direct evidence inherently possess the same probative value[.]’” *State v. Ha*, 9th Dist. 07CA0089-M, 2009-Ohio-1134, at ¶32, quoting *Jenks*, 61 Ohio St.3d at paragraph one of the syllabus. Testimony placed Hoang at several of the locations where Medway agents discovered very large amounts of marijuana. The marijuana and the supplies necessary to grow the marijuana at these locations essentially occupied entire floors of the properties, including the main floor at the Troon Avenue property. Further, the apartment where Hoang resided contained numerous receipts and other documents tied to the various people and properties at issue in this case, including a settlement agreement for the Troon Avenue property. We cannot say that the jury erred by concluding that Hoang’s presence around the foregoing properties and all of the

receipts, documents, and other evidence in his own apartment was proof of his knowledge of and involvement in the drug ring that produced 23,632 grams of marijuana. Tuan Do's testimony also indicated that Hoang specifically came to the Troon Avenue property to help care for the marijuana and to teach him to do so. The evidence supports the jury's findings of guilt on all of Hoang's offenses.

Manifest Weight

{¶15} When considering a manifest weight argument, the Court:

“[M]ust 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.

A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *Thompkins*, 78 Ohio St.3d at 387. Further, when reversing a conviction on the basis that the conviction was against the manifest weight of the evidence, the appellate court sits as the “thirteenth juror” and disagrees with the factfinder’s resolution of the conflicting testimony. *Id.* Therefore, this Court’s “discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.” *State v. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *Otten*, 33 Ohio App.3d at 340.

{¶16} Hoang argues that his conviction and guilty verdicts are against the manifest weight of the evidence because they rested upon the “highly suspect and self-serving” testimony of co-conspirators. He further argues that the evidence showed, at most, that he associated with many of the people involved in the drug ring. We disagree.

{¶17} The evidence in this case did not hinge entirely upon the testimony of Hoa Kim Tran and Tuan Do. As previously noted, Medway agents saw Hoang at the Troon Avenue and Red Clover Lane properties on several occasions. Hoang’s own apartment was filled with evidence connected to the drug ring, including documents pertaining to virtually every individual involved in the drug ring, receipts for every type of equipment and growing material necessary to produce marijuana, and real estate documents evidencing the possession of the Troon Avenue property as well as other properties. The jury simply chose to believe, based on all of the evidence at trial, that Hoang was an active participant in the drug ring and not just someone who sometimes associated with its participants. See *State v. Morgan*, 9th Dist. No. 22848, 2006-Ohio-3921, at ¶35 (“We will not overturn the verdict on a manifest weight challenge simply because the jury chose to believe the [State’s] evidence[.]”). Hoang’s first assignment of error lacks merit.

Assignment of Error Number Two

“THE INDICTMENT, ON ITS FACE, IS FATALLY DEFECTIVE IN THAT IT: FAILS TO PROPERLY SPECIFY A SUBSTANTIAL, OVERT ACT UNDERTAKEN IN FURTHERANCE OF THE CONSPIRACY; FAILS TO ALLEGE A SUBSTANTIAL, OVERT ACT THAT IS CRIMINAL IN NATURE; ALLEGES AS A SUBSTANTIAL, OVERT ACT CONDUCT CONSTITUTIONALLY PROTECTED; AND, MAKES DISCRIMINATING ALLEGATIONS OF RACIAL PROFILING.”

{¶18} In his second assignment of error, Hoang argues that his indictment was defective because it failed to identify the substantial, overt act that Hoang allegedly took in furtherance of the conspiracy at issue.

{¶19} In *State v. Childs* (2000), 88 Ohio St.3d 194, syllabus, the Ohio Supreme Court held that an indictment charging conspiracy “must allege some specific, substantial, overt act performed in furtherance of the conspiracy.” This Court has similarly recognized that a

conspiracy conviction is void if it is prefaced upon an indictment that fails to allege a substantial, overt act. *State v. Callahan* (Oct. 17, 2001), 9th Dist. No. 20432, at *4. Unlike the indictments in *Childs* and *Callahan*, however, Hoang’s indictment charged, in the alternative, three substantial, overt acts for each count of conspiracy. Compare *Childs*, 88 Ohio St.3d at 197 (phrasing the issue before the Court as whether an indictment that fails to allege “*at least one* specific, substantial, overt act” is fatally defective) (Emphasis added.); *Callahan*, at *4. Hoang insists that his indictment was defective because it did not charge him with one, specific overt act. He essentially asks this Court to extend *Childs*’ holding and conclude that an indictment is defective both when it fails to allege a substantial, overt act and when it alleges more than one specific, substantial, overt act. Because Hoang failed to preserve this argument in the court below and has not argued plain error on appeal, we decline to address it.

{¶20} A defendant may argue that an indictment fails to charge an offense at any point “during the pendency of the proceeding.” Crim.R. 12(C)(2). Moreover, even if a defendant does not do so, he or she may challenge the indictment by way of plain error on appeal. *State v. Honaker*, 9th Dist. No. 09CA009687, 2010-Ohio-2515, at ¶10 (reviewing defendant’s claim of plain error where he forfeited his argument that his indictment did not charge an offense). “In a plain-error analysis ‘the *defendant* bears the burden of demonstrating that a plain error affected his substantial rights.’” (Emphasis in original.) *Id.*, quoting *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, at ¶14.

{¶21} The trial court record reflects that Hoang never argued that his indictment was defective because it did not specify the particular overt act he allegedly committed in furtherance of the conspiracy. Further, Hoang has not argued plain error on appeal. Because Hoang forfeited this argument below and has not argued plain error on appeal, we will not address its

merits. *State v. Arnold*, 9th Dist. No. 24400, 2009-Ohio-2108, at ¶8 (“[T]his Court will not construct a claim of plain error on a defendant’s behalf if the defendant fails to argue plain error on appeal.”). Hoang’s second assignment of error is overruled.

Assignment of Error Number Three

“THE TRIAL COURT ERRED IN NOT ORDERING THE STATE TO PROVIDE DEFENDANT WITH RIGHTS PROVIDED UNDER THE GENEVA CONVENTION.”

{¶22} In his third assignment of error, Hoang argues that the trial court erred by not ordering the State to afford him “rights provided under the Geneva Convention.” Although Hoang’s captioned assignment of error and several parts of his argument reference the Geneva Convention, it appears from his discussion and from the cases he cites therein that his argument actually relates to the Vienna Convention. See *Medellin v. Texas* (2008), 552 U.S. 491. Hoang filed a motion to dismiss in the court below, based partially on the State’s failure to allow him to consult “his consular offices” in violation of the Vienna Convention. Yet, Hoang specifically asked the court to allow him to withdraw that motion, and the court filed an order permitting him to do so. Hoang never raised the issue again.

{¶23} Even assuming that Hoang forfeited rather than waived this issue at trial when he withdrew his motion, Hoang does not point this Court to any evidence in the record in support of his argument that the State did not afford him any rights to which he may or may not have been entitled under the Vienna Convention. An appellant bears the burden of demonstrating error on appeal by supporting his argument with citations to the trial record and applicable authority. App.R. 16(A)(7). As this Court has repeatedly held, “[i]f an argument exists that can support [an] assignment of error, it is not this [C]ourt’s duty to root it out.” *Cardone v. Cardone* (May 6, 1998), 9th Dist. No. 18349, at *8. Hoang’s third assignment of error is overruled.

III

{¶24} Hoang's assignments of error are overruled. The judgment of the Medina 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 Medina, 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.

BETH WHITMORE
FOR THE COURT

DICKINSON, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

DAVID V. GEDROCK, Attorney at Law, for Appellant.

DEAN HOLMAN, Prosecuting Attorney, and RUSSELL A. HOPKINS and ANNE EISENHOWER, Assistant Prosecuting Attorneys, for Appellee.