

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92935

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

EBAY FULLER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-520493

BEFORE: Blackmon, P.J., Stewart, J., and Celebrezze, J.

RELEASED: February 11, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant Ebay Fuller appeals his convictions for drug trafficking, possession of drugs, and possession of criminal tools. He assigns the following error for our review:

“I. The verdict of the jury finding defendant-appellant guilty of drug trafficking, possession of drugs, and possession of criminal tools is against the manifest weight of the evidence.”

{¶ 2} Having reviewed the record and pertinent law, we affirm Fuller’s convictions. The apposite facts follow.

Facts

{¶ 3} On the evening of August 1, 2006, Cleveland police set up a controlled buy using a confidential informant (“CI”). The CI had informed the police that he could arrange to purchase 100 Ecstasy pills for \$650 from a dealer by the name of “Ebay.” Officers checked the name “Ebay” on their computer. Only two Ebays existed in Ohio; only one lived in the Cleveland area, Ebay Fuller. The officers showed the computer photograph of Ebay Fuller to the CI; he confirmed Ebay Fuller was the dealer.

{¶ 4} A controlled telephone call was made by the CI to Fuller to set up the buy. A meeting location was arranged at an address located on Svec Street in Cleveland, Ohio. The amount and price of the drugs were also agreed upon.

{¶ 5} Detectives Moran and Klamert searched the CI and his car prior to the buy to ascertain there were no drugs. They then gave him prerecorded

money with which to purchase the drugs. They followed the CI to the location and parked behind him and in front of the appointed house. The officers were in a van with tinted back windows; therefore, they had a clear view of the house without being seen.

{¶ 6} The CI proceeded to the front porch to wait. Eventually, Fuller pulled up in a maroon Mercury Mountaineer. The detectives recognized Fuller from the computer photograph. Fuller got out of the vehicle and approached the CI. The men then conducted the drug transaction in the front yard of the house. Fuller then got back into his car and drove off. As he did so, he passed by the officers' van. Detective Moran stated he was able to look right at Fuller as he passed. The detectives then radioed the take-down unit that Fuller was driving away. Detectives Moran and Klamert retrieved the 100 pills of Ecstasy from the CI.

{¶ 7} Detectives Negron and Baeppler were assigned to follow Fuller's vehicle. Both testified they were not in a position to view the drug sale because they were parked too far away. They followed Fuller, but lost him after a high-speed chase. Fuller's vehicle was involved in an accident several blocks from where the police lost sight of it. The vehicle contained two cell phones, one that was verified as being used to arrange the sale, the buy money from the controlled purchase, and 12 Ecstasy pills.

{¶ 8} The jury found Fuller guilty of drug trafficking, possession of drugs, and possession of criminal tools. The trial court sentenced him to a three-year concurrent sentence for the drug offenses and a consecutive six-month sentence for the possession of criminal tools.

Manifest Weight of the Evidence

{¶ 9} In his sole assigned error, Fuller contends his convictions were against the manifest weight of the evidence. We disagree.

{¶ 10} In *State v. Wilson*,¹ the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

“The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. *Id.* at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence’s effect of inducing belief.

¹113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264.

Id. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. Id. at 387, 678 N.E.2d 541. 'When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony.' Id. at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."

{¶ 11} However, an appellate court may not merely substitute its view for that of the jury, but must find that "in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered."² Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction."³

²*State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541.

³*Id.*, quoting *State v. Martin* (1983), 20 Ohio App.3d 172,175, 485 N.E.2d 717,

{¶ 12} Fuller contends the officers' testimony was inconsistent. Both Detectives Moran and Klamert testified that the drug sale occurred shortly after 9:30 p.m. According to Fuller, this time was incorrect because his cell phone records indicated that the CI made a call to his cell phone at 10:38 p.m.

This evidence was presented to the jury, who obviously found the fact the CI called Fuller later was inconsequential. We conclude the jury did not lose its way in resolving the conflict because at most the difference in time was only an hour.

{¶ 13} Fuller also contends the officers' testimony was deficient because Officers Negrón and Baeppler did not witness the drug sale. Officers Negrón and Baeppler did not witness the drug sale because they were assigned to be a part of the take-down unit that was parked further away than the surveillance van. Officers Moran and Klamert were assigned to observe the drug transaction. Both testified they observed Fuller sell the CI the Ecstasy pills. The pills were recovered from the CI, and the prerecorded money was found in the car driven by Fuller. Moreover, a computer check of the license plate indicated the car was registered to Fuller's mother, who lived at the same address as Fuller.

{¶ 14} Fuller also contends that because both Officers Moran and Klamert testified it was dark, they would be unable to see the transaction

without a light; both Officers Moran and Klamert testified they could not recall whether a light was on at the house. Officer Moran testified he believed there was a street light nearby because he had no problem seeing the men. He also testified that he was able to look right at Fuller as he drove past the van.

{¶ 15} Officer Klamert also testified that although it was dark out, he was able to observe the transaction. Moreover, the officers' testimony was corroborated by the fact that after Fuller left, the CI had the drugs, and the prerecorded drug money was found in the car Fuller was driving. Additionally, the officers' ability to see was raised before the jury. The jury obviously chose to believe the officers' testimony that they could see. Resolving these inconsistencies was within the province of the jury.⁴ Accordingly, Fuller's assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed,

⁴*State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212.

any bail pending appeal is terminated. 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.

PATRICIA ANN BLACKMON, PRESIDING JUDGE

MELODY J. STEWART, J., and
FRANK D. CELEBREZZE, J., CONCUR