

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2010-L-084
DAVIA L. LEE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 09 CR 000778.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Ariana E. Tarighati, Law Offices of Ariana E. Tarighati, L.P.A., 34 South Chestnut Street, Suite 100, Jefferson, OH 44047-1092 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Davia L. Lee, appeals her conviction from a jury trial in the Lake County Court of Common Pleas. Appellant was convicted on one count of aggravated drug trafficking in the vicinity of juveniles, a felony of the second degree, and one count of drug trafficking in cocaine, a felony of the fourth degree.

{¶2} Appellant was indicted on November 25, 2009, on two counts of aggravated trafficking in drugs, one in the vicinity of juveniles and one in the vicinity of a school, each in violation of R.C. 2925.03; and one count of trafficking in cocaine with a

forfeiture specification, in violation of R.C. 2925.03. Appellee, the state of Ohio, subsequently dismissed the charge of aggravated trafficking in drugs in the vicinity of a school.

{¶3} At trial, a confidential informant, working in conjunction with Lake County Narcotics agents, testified to two drug transactions involving appellant. During each transaction, the informant's conversations were recorded, and he was followed by narcotics agents. The informant testified that on October 22, 2008, appellant directed him to the residence of Crystal Dykes to buy ten ecstasy pills. The informant also testified that he saw two children between the ages of two and three in the home. A recording of this transaction was played for the jury. The informant further testified that on October 30, 2008, appellant sold him cocaine. A recording of this transaction was also played for the jury.

{¶4} After the jury returned a conviction on both remaining counts, the trial court sentenced appellant to two years on Count One (aggravated trafficking in drugs in the vicinity of juveniles) and 12 months on Count Two (trafficking in cocaine), to run concurrently. On June 17, 2010, appellant's request for a new trial on Count One was denied by the trial court.

{¶5} Appellant filed a timely appeal and raised the following assignment of error:

{¶6} "The trial court erred to the prejudice of the Defendant-Appellant when it returned a verdict of guilty against the manifest weight of the evidence in violation of Article IV of the Ohio Constitution."

{¶7} Under this assignment of error, appellant also raises issues based on the sufficiency of the evidence. In the interest of justice, we first address whether the state

presented sufficient evidence to sustain appellant's convictions on Counts One and Two.

{¶8} The distinction between the sufficiency and weight of evidence has previously been addressed by this court: “Sufficiency’ challenges whether the prosecution has presented evidence on each element of the offense to allow the matter to go to the jury, while ‘manifest weight’ contests the believability of the evidence presented.” *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, at *14-*15. “Sufficiency is a test of adequacy which quantitatively and qualitatively differs from a challenge to the weight of the evidence.” *State v. Sanders* (1998), 130 Ohio App.3d 789, 799. Thus, this court must address the issues of sufficiency and weight separately.

{¶9} The test for determining the issue of sufficiency is “whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt.” *State v. Davis* (1988), 49 Ohio App.3d 109, 112-113, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 319. Furthermore, “[t]he claim of insufficient evidence invokes an inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence.” *Id.* at 113. (Citation omitted.)

{¶10} On Count One, the state had the burden of proving beyond a reasonable doubt that appellant did knowingly sell or offer to sell drugs in Lake County and that the offense was committed in the vicinity of a juvenile, in violation of R.C. 2925.03. The record indicates an adequate basis upon which a rational juror could conclude that each essential element was met: there was direct testimony from the confidential informant

concerning appellant leading him to the house to buy drugs. Further, the informant testified to seeing children between the ages of two and three in the house where the transaction took place, and testified to specifics concerning these children. He indicated one of the children was in the living room, and one in the dining room, with the closest child being four to five feet from the transaction. There is nothing in the record to suggest there was any reason to question the credibility of the informant on this issue, and the jury was free to believe his testimony.

{¶11} On Count Two, the state had the burden of proving beyond a reasonable doubt that appellant did knowingly sell or offer to sell drugs in Lake County, in violation of R.C. 2925.03. The record again indicates sufficient evidence, including direct testimony from the confidential informant, as well as an audio recording of the transaction.

{¶12} Thus, the state's evidence was legally sufficient to sustain the guilty verdicts on both counts.

{¶13} To determine whether a verdict is against the manifest weight of the evidence, courts must consider the weight of the evidence, including the credibility of the witnesses and all reasonable inferences, to determine "whether the jury lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. Unlike the issue of sufficiency, "no conviction resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the appeal." *Webber v. Kelly*, 120 Ohio St.3d 440, 2008-Ohio-6695, at ¶6. (Citations omitted.) In weighing the evidence submitted at a criminal trial, an appellate court must defer to the factual findings of the jury regarding the weight to be given the evidence

and credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶14} As to both counts, the evidence supports a conviction. There are no indications suggesting the evidence is either unbelievable or incredible. Defense counsel had an opportunity to attack the reliability of the audio recording of the transactions and cross-examine all witnesses, including the confidential informant, at trial. Appellant's evidence consisted of the testimony of appellant and Crystal Dykes. Although Dykes testified that this transaction did not take place at her house on October 22, 2008, it is noted that the indictment in the case was not returned until November 9, 2009. The case did not proceed to trial until the end of May 2010. The jury was not bound to accept the testimony of Ms. Dykes about what occurred at her house on a specific date well over one and one-half years prior to her testimony. The jury, after hearing both sides of the case, elected to believe the state's account over the defense.

{¶15} Thus, nothing indicates that the jury "lost its way" when relying on the evidence such that a "manifest miscarriage of justice" occurred. Appellant's sole assignment of error is without merit.

{¶16} For the foregoing reasons, the Judgment of the Lake County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.