[Cite as *State v. Throckmorton*, 2009-Ohio-5344.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 08CA17
vs.	:	
ERNEST THROCKMORTON,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT:[1] Timothy Young, Ohio Public Defender, and Claire R. Cahoon, Assistant Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215

COUNSEL FOR APPELLEE: James B. Grandey, Highland County Prosecuting Attorney, and Keith C. Brewster III, Highland County Assistant Prosecuting Attorney, 112 Governor Foraker Place, Hillsboro, Ohio 45133

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 9-25-09

PER CURIAM.

{¶ 1} This is an appeal from a Highland County Common Pleas Court judgment of conviction and sentence. The jury found Ernest Throckmorton, defendant below and appellant herein, guilty of: (1) the illegal manufacture of drugs in the vicinity of a school in violation of R.C. 2925.04(A); (2) the illegal assembly or possession of chemicals for the manufacture of drugs in the vicinity of a school in violation of R.C.

[1] Different counsel represented appellant during the trial court proceedings.

2925.041(A); and (3) the possession of methamphetamine in violation of R.C. 2925.11.

{¶ 2} Appellant raises the following assignments of error for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT VIOLATED MR. THROCKMORTON'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY FINDING, IN THE ABSENCE OF SUFFICIENT EVIDENCE, THAT MR. THROCKMORTON'S OFFENSES WERE COMMITTED 'IN THE VICINITY OF A SCHOOL' WHEN THE DISTANCE TO AND IDENTITY OF THE SCHOOL WERE NOT PROVEN."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT VIOLATED ERNEST THROCKMORTON'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN, IN THE ABSENCE OF SUFFICIENT EVIDENCE, THE TRIAL COURT FOUND MR. THROCKMORTON GUILTY OF ILLEGAL ASSEMBLY OR POSSESSION OF CHEMICALS FOR THE MANUFACTURE OF DRUGS."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT VIOLATED ERNEST THROCKMORTON'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN IT ENTERED JUDGMENTS OF CONVICTION FOR ILLEGAL MANUFACTURE OF DRUGS AND ILLEGAL ASSEMBLY OR POSSESSION OF CHEMICALS FOR THE MANUFACTURE OF DRUGS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY IMPOSING COURT COSTS IN ITS JUDGMENT ENTRY, WITHOUT NOTIFYING MR. THROCKMORTON OF THE COSTS AT HIS SENTENCING HEARING OR THAT FAILURE TO PAY COURT COSTS MAY RESULT IN THE COURT'S ORDERING HIM TO PERFORM COMMUNITY SERVICE."

{¶ 3} On August 7, 2007, law enforcement officers discovered an apparent methamphetamine lab in the basement of appellant's home. Appellant admitted to officers that he had been manufacturing methamphetamine for the past twenty years and had been doing so at this particular residence for the past year to year and one-half.

{¶ 4} On September 11, 2007, the Highland County Grand Jury returned an indictment charging appellant with: (1) the illegal manufacture of drugs in the vicinity of a school in violation of R.C. 2925.04(A); (2) the illegal assembly or possession of chemicals for the manufacture of drugs in the vicinity of a school in violation of R.C. 2925.041(A); and (3) the possession of methamphetamine in violation of R.C. 2925.11.

{¶ 5} On June 12 and 13, 2008, the trial court held a jury trial. Betsy Johnson, who lived with appellant, testified that on August 7, 2007 law enforcement officers knocked on her door and explained that they had received a tip that someone had been "cooking * * * some kind of drugs" in the home. She told them that they had received false information and invited them to look around the house. The officers asked if they could search the basement, but she informed them that everything in the basement belonged to appellant and that they would have to ask him for permission to search the basement.

{¶ 6} Hillsboro City Police Officer Jon Salyer testified that law enforcement officers received information that there was a methamphetamine lab operating in the basement of a residence near the high school, across the street from the public library. He stated that after the officers discovered the contents in the basement, he sat in the

police cruiser with appellant while the other officers searched the basement. Officer Salyer stated that appellant admitted that he had a methamphetamine lab and had been producing methamphetamine for about twenty years. Appellant told the officer that he had been producing methamphetamine at his current residence for about a year to a year and one-half.

{¶ 7} Highland County Sheriff's Detective Richard Warner similarly testified that officers had received a tip that there was a methamphetamine lab in the basement of a home on West Main Street that sat "catty-corner from the school, across from the library." He stated that upon searching the basement, he observed a bottle of "liquid fire," a hot plate, a crock pot, a butter container with yellow substance, clear tubing, mason jars with clear liquid, pills, and clear liquid with coffee filters. He also testified that he smelled a strong chemical smell similar to ether, which is used to produce meth. Detective Warner stated that he believed that he had discovered a meth lab.

{¶ 8} Hillsboro Police Sergeant Ron Priest stated that he also was involved in the search at appellant's residence. He stated that the residence is close to the school. He estimated that the distance between the residence and the school was "[p]robably less than one hundred yards." Sergeant Priest explained: "[Y]ou could stand on the front porch and look at the school rather closely." He testified that after officers discovered the apparent methamphetamine lab, he spoke with appellant. Appellant informed the sergeant that he had been cooking for about twenty years and had been cooking methamphetamine in the basement for about eighteen months. Appellant told Sergeant Priest that there was completed methamphetamine in the house.

{¶ 9} Highland County Sheriff's Detective Dan Croy testified that the officers found some items commonly used to manufacture methamphetamine in appellant's basement, including "liquid fire" and coffee filters. He believed the basement contained an active methamphetamine lab.

{¶ 10} After the prosecution's case-in-chief, appellant moved for a judgment of acquittal on the school specification penalty enhancement and the illegal assembly or possession of chemicals for the manufacture of drugs offense. Appellant asserted that the officer's estimate of the distance between appellant's residence and the school did not constitute sufficient evidence to prove that the offense occurred within one thousand feet of a school. Appellant further argued that the prosecution failed to produce evidence that the school met the statutory definition, i.e., that it was operated by the board of education. Appellant stated: "The Court heard no testimony on the State Board of education minimum standards[;] it might be a school, but the State has not met its burden." The trial court overruled appellant's motion.

{¶ 11} The jury found appellant guilty as charged and the trial court sentenced appellant to serve concurrent terms of imprisonment totaling six years. This appeal followed.

I

{¶ 12} In his first two assignments of error, appellant asserts that the trial court erred by overruling his Crim.R. 29(A) motion for judgment of acquittal. Because the same standard of review applies to both assignments of error, we consider them together.

{¶ 13} In his first assignment of error, appellant argues that the prosecution failed to present sufficient evidence to support the school specifications attached to his convictions for the illegal manufacture of drugs and illegal assembly or possession of chemicals for the manufacture of drugs. He claims that the prosecution failed to present sufficient evidence to show that he committed the offenses "in the vicinity of a school." Appellant asserts that the prosecution failed to present adequate evidence to show that he committed the offenses within one thousand feet of a school and that it failed to prove the existence of a "school," as defined in R.C. 2925.01(Q)-(S). He contends that the prosecution must present precise evidence demonstrating that the distance is within one thousand feet and that the purported school meets the statutory definition of "school."

{¶ 14} In his second assignment of error, appellant argues that the prosecution failed to present sufficient evidence to support his illegal assembly or possession of chemicals for the manufacture of drugs conviction. Specifically, he claims that the prosecution failed to prove that he possessed one or more chemicals used to manufacture methamphetamine.

A

STANDARD OF REVIEW

{¶ 15} A trial court may order a judgment of acquittal "if the evidence is insufficient to sustain a conviction of such offense or offenses." Crim.R. 29(A). A trial court shall not enter a judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether the state has established, beyond a reasonable doubt, each essential element of the offense. See, e.g., State v.

Bridgeman (1978), 55 Ohio St.2d 261, 9 O.O.3d 401, 381 N.E.2d 184, syllabus; State v. Brooker, 170 Ohio App.3d 570, 2007-Ohio-588, 868 N.E.2d 683, at ¶7. "A motion for acquittal under Crim.R. 29(A) is governed by the same standard as the one for determining whether a verdict is supported by sufficient evidence." State v. Tenace, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, at ¶37, citing State v. Carter (1995), 72 Ohio St.3d 545, 553, 651 N.E.2d 965; State v. Thompkins (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541.

{¶ 16} When reviewing the sufficiency of the evidence, our inquiry focuses primarily upon the adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. See State v. Thompkins (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (stating that "sufficiency is the test of adequacy'); State v. Jenks (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492. The standard of review 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. Jackson v. Virginia (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560; Jenks, 61 Ohio St.3d at 273. Furthermore, a reviewing court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." Thompkins, 78 Ohio St.3d at 390 (Cook, J., concurring).

{¶ 17} Moreover, when reviewing sufficiency-of-evidence claims, appellate courts must construe the evidence in a light most favorable to the prosecution. See State v. Hill (1996), 75 Ohio St.3d 195, 205, 661 N.E.2d 1068; State v. Grant (1993), 67 Ohio

St.3d 465, 477, 620 N.E.2d 50. Reviewing courts will not overturn convictions on sufficiency-of-evidence claims unless reasonable minds could not reach the conclusion that the trier of fact did. See State v. Tibbetts (2001), 92 Ohio St.3d 146, 749 N.E.2d 226; State v. Treesh (2001), 90 Ohio St.3d 460, 739 N.E.2d 749.

B

SCHOOL SPECIFICATION

{¶ 18} In the case sub judice, we believe that the record contains sufficient evidence to support the school specification penalty enhancement. We reject appellant's contention that the prosecution was required to produce more precise evidence to prove the school specification.

{¶ 19} The school specification penalty enhancement statutes require the prosecution to prove that the offense was "committed * * * in the vicinity of a school * * *." See R.C. 2925.04(C)(3)(b) and R.C. 2925.041(C). "[A]n offense is 'committed in the vicinity of a school' if the offender commits the offense on school premises, in a school building, or within one thousand feet of the boundaries of any school premises, regardless of whether the offender knows the offense is being committed on school premises, in a school building, or within one thousand feet of the boundaries of any school premises." R.C. 2925.01(P). The purpose of the school enhancement specification is "intended to punish more severely those who engage in the sale of illegal drugs in the vicinity of our schools and our children." Manley, 71 Ohio St.3d at 346.

{¶ 20} "[I]n order to convict a defendant under the school specification, the state must prove beyond a reasonable doubt that the drug transaction occurred within the

specified distance of a school." Manley, 71 Ohio St.3d at 346. The prosecution need not present direct evidence to prove the school specification, but rather, may use circumstantial evidence. Id. Circumstantial and direct evidence are of equal evidentiary value. See Jenks, 61 Ohio St.3d at 272, 574 N.E.2d 492 ("Circumstantial evidence and direct evidence inherently possess the same probative value [and] in some instances certain facts can only be established by circumstantial evidence."). When reviewing the value of circumstantial evidence, we note that "the weight accorded an inference is fact-dependent and can be disregarded as speculative only if reasonable minds can come to the conclusion that the inference is not supported by the evidence." Wesley v. The McAlpin Co. (May 25, 1994) Hamilton App. No. C-930286, unreported (citing Donaldson v. Northern Trading Co. (1992), 82 Ohio App.3d 476, 483, 612 N.E.2d 754).

{¶ 21} In the case sub judice, appellant asserts that the prosecution did not present sufficient evidence to show that he committed the offense within one thousand feet of the boundaries of any school premises because: (1) the prosecution did not present exact evidence to show the distance between the location of his offense and the boundaries of the purported school; and (2) the prosecution did not present precise evidence that the offenses occurred in the vicinity of a "school," "school building," or "school premises," as defined in R.C. 2925.01(Q)-(S).[2] We disagree with appellant.

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[2] R.C. 2925.01(Q)-(S) stated:

> (Q) "School" means any school operated by a board of education, any community school established under Chapter 3314. of the Revised Code, or any nonpublic school for which the state board of education prescribes minimum standards under section 3301.07 of the Revised

{¶ 22} Several cases have addressed the type of evidence sufficient to prove the school specification penalty enhancement. In State v. Manley (1994), 71 Ohio St.3d 342, 643 N.E.2d 1107, the Ohio Supreme Court reviewed a sufficiency-of-the-evidence claim as it related to a school specification. In Manley, the defendant was convicted of trafficking in drugs within one thousand feet of the boundaries of a school premises. At trial, two police officers and a confidential informant testified that the drug transaction occurred in the vicinity of "Whittier School" or simply a "school." The confidential informant stated that the drug transaction occurred about four houses from the school. One of the police officers testified that he measured the distance from the edge of the school property to the edge of the property where the drug transaction occurred and

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> Code, whether or not any instruction, extracurricular activities, or training provided by the school is being conducted at the time a criminal offense is committed.
>
> (R) "School premises" means either of the following:
>
> (1) The parcel of real property on which any school is situated, whether or not any instruction, extracurricular activities, or training provided by the school is being conducted on the premises at the time a criminal offense is committed;
>
> (2) Any other parcel of real property that is owned or leased by a board of education of a school, the governing authority of a community school established under Chapter 3314. of the Revised Code, or the governing body of a nonpublic school for which the state board of education prescribes minimum standards under section 3301.07 of the Revised Code and on which some of the instruction, extracurricular activities, or training of the school is conducted, whether or not any instruction, extracurricular activities, or training provided by the school is being conducted on the parcel of real property at the time a criminal offense is committed.
>
> (S) "School building" means any building in which any of the instruction, extracurricular activities, or training provided by a school is conducted, whether or not any instruction, extracurricular activities, or training provided by the school is being conducted in the school building at the time a criminal offense is committed.

stated that the distance was 255.3 feet. Manley did not question any of the witnesses' testimony regarding the distance of the school to the location of the drug transaction and he did not question whether the building referred to as a school was in fact an academic institution used for the education of children. After his conviction, he appealed to the Ohio Supreme Court and argued that the prosecution did not present sufficient evidence to prove the school specification. The Ohio Supreme Court disagreed.

{¶ 23} The court first rejected Manley's argument that the prosecution failed to prove that the offense occurred within one thousand feet of the school. It noted the testimony of three witnesses who testified as to the proximity of the school to the drug transaction. The court further observed that Manley never challenged the prosecution's witnesses' testimony.

{¶ 24} The court also rejected Manley's argument that the prosecution failed to prove that the building met the statutory definition of "school." The court held that circumstantial evidence could prove the existence of a "school." The court further observed that imposing too rigid a requirement when reviewing the sufficiency of the evidence necessary to sustain a school specification penalty enhancement would result in "viewing the evidence in less than the most favorable light to the prosecution." Id. at 348.

{¶ 25} The supreme court expressly disagreed with the appellate court's conclusion that the prosecution failed to present sufficient evidence to establish the school specification because it did not present any evidence that the school was operated by a board of education. The court stated: "That conclusion requires an

unacceptably strict application of the statute rather than an application which gives effect to the obvious intention of the law." Id. at 346. The court explained: "The provisions of R.C. 2925.03(C)(5) clearly indicate that the Ohio legislature intended to punish more severely those who engage in the sale of illegal drugs in the vicinity of our schools and our children." Id. at 346. Thus, even though none of the witnesses testified that the school met the statutory definition of a "school," the court nonetheless upheld the conviction on the school specification.

{¶ 26} In State v. Speers, Ashtabula App. No.2003-A-0112, 2005-Ohio-4654, the court sustained a school specification penalty enhancement even though the prosecution did not present precise evidence regarding the distance between the location of the offense and the school. In Speers, law enforcement officers testified as to the approximate distance between the school and the location of the offense. The officers approximated that the offense occurred two hundred to four hundred feet from the school. Additionally, the officers stated that the offense occurred on a property lot adjacent to the school.

{¶ 27} On appeal, the defendant claimed that the officers' testimony regarding distance was not sufficient or entitled to weight because they did not actually measure the distance. The court of appeals disagreed and affirmed the conviction. The court stated that the officers' testimony approximating the distance constituted sufficient evidence, standing alone, to support the defendant's school specification. Id. at ¶29. For similar reasons, the court also rejected the defendant's assertion that his school specification penalty enhancement was against the manifest weight of the evidence. The court stated that the officers were not required to testify with precision regarding

the distance.

{¶ 28} Similarly, in State v. Brown, Summit App. No. 23637, 2008-Ohio-2670, the court rejected a sufficiency-of-the-evidence challenge to a school specification penalty enhancement when the prosecution did not present exact evidence regarding the distance between the school and the location of the offense. In Brown, the prosecution did not present any witness testimony approximating the distance between the school and the location of the offense. Instead, the evidence simply showed that the offense occurred in a house directly across the street from a school. Additionally, the prosecution introduced photographs and a satellite image depicting the house and the school. The appellate court determined that this evidence adequately supported a conclusion that less than one thousand feet separated the two buildings:

> "* * * 1,000 feet is approximately one fifth of a standard 5,280-foot mile. We note that it would be extremely uncommon to encounter a city street the width of which even approaches one fifth of a mile. A rational trier of fact could infer that the width of a street is far less than 1,000 feet and that buildings separated only by a city street and standard front yards are, thus, less than 1,000 feet apart. While direct evidence of the distance as provided by actual measurement would have been more impressive evidence, the State's evidence permitted a reasonable inference that the distance between [the defendant's] house and the school was less than 1,000 feet."

Id. at ¶18.

{¶ 29} In State v. Cates (Nov. 21, 2000), Franklin App. No. 00AP-73, the court found that the prosecution presented sufficient evidence to support the defendant's school specification penalty enhancement. In Cates, two officers testified that the offense occurred within the vicinity of "Douglas Elementary." The appellate court determined that this testimony sufficiently showed the existence of a school as defined

in the statute. The court also found that the prosecution presented sufficient evidence to show that the offense occurred within one thousand feet of the school. One of the officers stated that she witnessed the offense occur near the school. The undercover officer who purchased drugs from the defendant stated that the offense occurred within one thousand feet of the school. She stated that on one occasion, she purchased the drugs at a gas station that is approximately ten to twelve feet from the school, and that on another occasion, she purchased drugs at the defendant's house, which is approximately five hundred feet from the school.

{¶ 30} In State v. Boyd, Ottawa App. No. OT-06-34, 2008-Ohio-1229, the appellate court determined that the prosecution did not present sufficient evidence to prove the school specification. In Boyd, a detective testified that the distance between the school and the location of the offense measured 264 feet. Another detective stated that the school was approximately one-half a block from the location of the offense. The prosecution did not present any evidence to support the detectives' approximations. Moreover, the prosecution did not present any evidence that identified the school by name. Rather, the witnesses simply testified as to the existence of a school. The trial court overruled the defendant's motion for judgment of acquittal regarding the school specification, stating that it could take judicial notice of the school and the town plats.

{¶ 31} On appeal, the court vacated the defendant's school specification penalty enhancements. The court determined that the prosecution failed to present adequate evidence to prove the school specification and explained:

> "Only [one witness] testified to the distance of the 'school' from the

> last three transactions, in CI Nowak's apartment. The distance was measured by a non-testifying agent, unlike Brown, Manley, and Shaw. This court has previously reversed a school enhancement specification where the state presented insufficient testimony as to how the distance was calculated and presented no documentary evidence supporting the assertions. State v. Olvera (Oct. 15, 1999), 6th Dist. No. WM-98-022, WM-98-023. More importantly, unlike Brown, Manley, and Shaw, [the detective] did not state the name of the school, and absolutely no evidence indicated the type of school. We cannot assume the existence of sufficient evidence to support an essential element of the state's case-in-chief. Brown, supra, Olvera, supra. In this context, where the state presented insufficient evidence on its burden of proof, the failure to instruct the jury that a 'school' must meet the definition of R.C. 2923.01 is plain error. That is, had the jury been instructed that the drug transaction must have occurred within one thousand feet of a 'school' as defined by statute, the jury would clearly have decided otherwise. Appellant suffered prejudice from the error."

Id. at ¶48.

{¶ 32} In State v. Brown (1993), 85 Ohio App.3d 716, 621 N.E.2d 447, the defendant challenged the sufficiency of the prosecution's evidence to prove the school specification. He asserted that the prosecution's failure to present any evidence that he committed the offense within the requisite distance of a "school," as defined in the statute, constituted reversible error. The appellate court agreed. The court concluded that the prosecution was required to present evidence satisfying the statutory definition of school. The court thus vacated the defendant's school specification penalty enhancement because the prosecution did not present any evidence that the school "was being operated by a board of education." Id. at 724.

{¶ 33} In State v. Shaw, Jefferson App. No. 03-JE-14, 2004-Ohio-5121, the court also vacated a school specification penalty enhancement on the basis of insufficient evidence. In Shaw, officers saw the defendant throw a baggie of crack cocaine out of an automobile within one thousand feet of "Wells school." At trial, counsel for both

parties referred to the school as "Wells school." The city engineer testified that the distance between the offense and the school property was less than one thousand feet. The defendant moved for a judgment of acquittal on the school specification and claimed that the prosecution failed to produce sufficient evidence that the purported school met the statutory definition. The trial court overruled the defendant's motion and stated that "everybody in Jefferson County" knows that "Wells school" is a school.

{¶ 34} The court of appeals, however, held that the prosecution failed to present sufficient evidence that the offense occurred within one thousand feet of a "school." The appellate court rejected the trial court's apparent attempt to take judicial notice that the school fulfilled the statutory definition. It held that "judicial notice cannot be taken of elements of an offense." Id. at ¶55. The court explained its reasoning as follows:

> "No witness actually testified that Appellant's drug offenses occurred within one thousand feet of an actual school. It appears that each witness assumed the existence of an operational school at this location. However, merely calling the building "Wells school" does not rise to the level required to prove its existence. For all this Court can glean from this record, the building may once have been a school, but is no longer used for that purpose. There must be some evidence on the record on which to base this assumption."

Id. at ¶56. The court, therefore, vacated the school specification enhancement penalties and remanded for re-sentencing.

{¶ 35} In State v. Goins (Sept. 29, 2000), Morgan App. No. CA99-08, the court determined that the prosecution failed to present sufficient evidence to prove a school specification. In Goins, the officers used laser speed control to measure the distance between the defendant's residence (the location of the offense) and the school. A ravine divided the defendant's residence and the school. The prosecution did not

present any testimony regarding the dimensions of the ravine. Instead, the officers testified that they measured the distance "as the crow flies." The court concluded that this testimony was not sufficient to prove that the offense occurred within one thousand feet of a school.

{¶ 36} In the case sub judice, we believe that a straight application of Manley supports appellant's school specification penalty enhancements. In the instant case, as in Manley, several prosecution witnesses testified that the offenses occurred close to the school. One police officer stated that the school is less than one hundred yards from the premises where the offenses occurred. Photographic evidence also supports his approximation. Under Manley, this is sufficient evidence to prove that the offenses occurred within the distance specified in the statute. Manley imposes no requirement that the prosecution present exact evidence regarding the distance. While it certainly would be better practice for the prosecution to present precise evidence showing the distance to avoid challenges to the sufficiency of the evidence, we will not sustain a challenge to the sufficiency of the evidence regarding the distance in the absence of exact evidence. The question is the sufficiency of the evidence, not whether the evidence is of the best quality.

{¶ 37} Moreover, just as in Manley, in the case sub judice (none of the prosecution's witnesses testified that the school met the statutory definition. However, all of the witnesses identified the premises as a school. Furthermore, the Manley court expressly cautioned courts from reading the statute so rigidly as to preclude a conviction when the facts clearly demonstrate that the offense occurred "in the vicinity of a school." In the case at bar, no one seriously challenges whether the premises

were school premises. Indeed, during a bench conference, appellant's counsel implied that he did not question whether the building was a school but only whether the state presented evidence as to whether the school presented evidence to show that the school met the definition set forth in R.C. 2925.01(Q). Counsel stated: "The Court heard no testimony on the State Board of education minimum standards[;] it might be a school, but the State has not met its burden." (Emphasis added). Appellant desires to take advantage of the failure to produce a witness to utter the language set forth in the school specification statute. We do not believe that such a technical failure negates appellant's school specification penalty enhancements. Instead, Manley implies just the opposite.

{¶ 38} Furthermore, we find that the evidence presented in the instant case is similar to that involved in Speers, Brown, Summit App. No. 23637, and Cates. As in those cases, in the case at bar the prosecution did not adduce any evidence regarding the exact distance between the school and the property where the offense occurred. The prosecution did, however, present evidence of an approximate distance and a photograph that depicted the school in relation to the property. Like the Brown court, we conclude that the photograph supports a reasonable inference that the distance between the property and the school was less than one thousand feet. The school is located on the corner of an intersection and the residence sits diagonally from the school. The intersection appears to consist of no more than two-four lane roads. Thus, the officer's estimate that the school sits within three hundred feet of the residence does not appear to be unreasonable or unsupported by the evidence. Consequently, we believe that the prosecution presented sufficient evidence to show

that appellant committed the crimes within one thousand feet of the school. Again, it may not be the best evidence, but it is sufficient to withstand this challenge.

{¶ 39} Additionally, appellant's argument that we must reverse the school specification penalty enhancements because the prosecution failed to present sufficient evidence that the school met the statutory definition is meritless. As we previously indicated, appellant's counsel did not seriously dispute that the building was a school, but argued that the prosecution was required to produce a witness to utter the magic words contained in the statute. We refuse to overturn his conviction on the basis that the prosecution failed to produce sufficient evidence that the building met the statutory definition of a school. To do otherwise would violate the statement in Manley that courts should refrain from reading the statute so rigidly that the statute's purpose–to punish more severely those who commit offenses in the vicinity of a school–goes unfulfilled. Additionally, in the case sub judice four witnesses identified the building as a school.

{¶ 40} To the extent that the cases appellant cites hold that the prosecution must present precise evidence regarding the distance between the location of the alleged offense and the school and that the school fulfills the statutory definition, we disagree with them. We again note that Manley upheld a school specification penalty enhancement on less-than-precise evidence. We further note that Manley expressly disapproved of a requirement that the prosecution present direct evidence that the school was being operated by a board of education.

{¶ 41} Consequently, we disagree with appellant that the state failed to present sufficient evidence to prove the school specification.

C

ILLEGAL ASSEMBLY OR POSSESSION OF CHEMICALS FOR THE MANUFACTURE OF DRUGS

{¶ 42} Appellant next asserts that the prosecution failed to present sufficient evidence to support his illegal assembly or possession of chemicals for the manufacture of drugs conviction. We disagree.

{¶ 43} R.C. 2925.041(A) sets forth the essential elements of illegal assembly or possession of chemicals for the manufacture of drugs and states: "(A) No person shall knowingly assemble or possess one or more chemicals that may be used to manufacture a controlled substance * * *." The statute further reads:

> (B) In a prosecution under this section, 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 in either schedule, is sufficient to violate this section.

{¶ 44} In the case at bar, the prosecution presented sufficient evidence to show that appellant possessed one or more chemicals used to manufacture methamphetamine. The prosecution presented evidence that the officers recovered liquid fire from the premises. The evidence shows that liquid fire is used to produce methamphetamine. This evidence is sufficient to prove that appellant possessed one or more chemicals to produce methamphetamine. See R.C. 2925.041(B).

Additionally, Detective Warner testified that he smelled ether, which he stated is a chemical used to produce methamphetamine. Moreover, the evidence shows that appellant possessed other non-chemical items used to manufacture methamphetamine and that he admitted to manufacturing methamphetamine. See State v. White, Summit App. Nos. 23955 and 23959, 2008-Ohio-2432 (concluding that possession of individually innocuous items, such as acetone, matchbooks, Coleman fuel, crystal iodine, coffee filters stained with methamphetamine, and tubing collectively sufficient to prove illegal assembly or possession charge); State v. Davis, Stark App. No. 2003CA198, 2004-Ohio-3527, at ¶62 (finding that evidence that defendant possessed camping fuel, plastic tubing, and non-iodized salt sufficient to prove illegal assembly or possession of chemicals for the manufacture of drugs).

{¶ 45} Accordingly, based upon the foregoing reasons, we overrule appellant's first and second assignments of error.

II

{¶ 46} In his third assignment of error, appellant contends that his convictions for illegal manufacturing of drugs and illegal assembly or possession of chemicals for the manufacture of drugs are against the manifest weight of the evidence.

{¶ 47} When an appellate court considers a claim that a conviction is against the manifest weight of the evidence, the court must dutifully examine the entire record, weigh the evidence, and consider the credibility of witnesses. The reviewing court must bear in mind, however, that credibility generally is an issue for the trier of fact to resolve. See State v. Issa (2001), 93 Ohio St.3d 49, 67, 752 N.E.2d 904; State v. DeHass (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

Once the reviewing court finishes its examination, the court may reverse the judgment of conviction only if it appears that the fact-finder, in resolving conflicts in evidence, "'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" Thompkins, 78 Ohio St.3d at 387, 678 N.E.2d 541, quoting State v. Martin (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶ 48} If the prosecution presented substantial evidence upon which the trier of fact reasonably could conclude, beyond a reasonable doubt, that the essential elements of the offense had been established, the judgment of conviction is not against the manifest weight of the evidence. See State v. Eley (1978), 56 Ohio St.2d 169, 10 O.O.3d 340, 383 N.E.2d 132, syllabus. A reviewing court should find a conviction against the manifest weight of the evidence only in the "'exceptional case in which the evidence weighs heavily against conviction.'" Thompkins, 78 Ohio St.3d at 387, 678 N.E.2d 541, quoting Martin, 20 Ohio App.3d at 175, 485 N.E.2d 717; see, also, State v. Lindsey (2000), 87 Ohio St.3d 479, 483, 721 N.E.2d 995.

{¶ 49} In the case at bar, we do not believe that the evidence weighs heavily against either conviction. The prosecution presented substantial evidence to support the essential elements of each offense.

{¶ 50} R.C. 2925.04(A) sets forth the essential elements of the illegal manufacture of drugs offense and states: "No person shall knowingly * * * manufacture or otherwise engage in any part of the production of a controlled substance."

{¶ 51} In the case sub judice, with regard to appellant's illegal manufacture of

drugs conviction, appellant admitted to the law enforcement officers that he has been manufacturing methamphetamine for twenty years and that he has been doing so at the West Main Street residence for approximately one year to eighteen months. Law enforcement officers discovered various items used to produce methamphetamine, including: liquid fire, a hot plate, a crock pot, clear tubing, mason jars containing liquids, and coffee filters. They also uncovered finished methamphetamine from the residence. Detective Croy opined that based upon the items recovered, the basement was an active methamphetamine lab. Furthermore, the evidence shows that appellant had access to the basement, and his live-in girlfriend testified that appellant kept his belongings in the basement. The totality of this evidence provides substantial support for appellant's conviction.

{¶ 52} Regarding appellant's illegal assembly or possession of chemicals for the manufacture of drugs conviction, as we explained in our discussion of appellant's second assignment of error, the evidence shows that officers recovered liquid fire, a chemical used to manufacture methamphetamine. This evidence alone disputes appellant's claim that the evidence fails to show that he possessed any chemicals used to manufacture methamphetamine. See R.C. 2925.041(B). Moreover, substantial circumstantial evidence supports the jury's finding that appellant assembled or possessed chemicals for the manufacture of methamphetamine. Detective Warner testified that he smelled ether, which he stated is a chemical used to produce methamphetamine. Furthermore, the evidence shows that appellant possessed other non-chemical items used to manufacture methamphetamine. Additionally, appellant admitted that he manufactured methamphetamine at the residence. To do so, he

necessarily had to possess one or more chemicals to manufacture methamphetamine. Thus, appellant's convictions are not against the manifest weight of the evidence.

{¶ 53} Accordingly, based upon the foregoing reasons, we overrule appellant's third assignment of error.

IV

{¶ 54} In his fourth assignment of error, appellant challenges the trial court's imposition of court costs. He first asserts that the trial court erred by imposing court costs in the sentencing entry when it did not impose the costs at the sentencing hearing. Second, appellant claims that the court failed to notify him that his failure to pay court costs could result in the court ordering him to perform community service.

A

FAILURE TO IMPOSE COURT COSTS AT SENTENCING HEARING

{¶ 55} R.C. 2947.23 requires trial courts to impose the costs of prosecution as part of a defendant's sentence. This is a mandatory duty. See Middleburg Hts. v. Quinones, 120 Ohio St.3d 534, 2008-Ohio-6811, 900 N.E.2d 1005, at ¶9.

{¶ 56} Due to the mandatory nature of the statute, some appellate courts have held that the trial court need not orally impose costs at the sentencing hearing. See State v. Ward, Logan App. No. 8-04-27, 2004-Ohio-6959; State v. Powell, Montgomery App. No. 20857, 2006-Ohio-263; State v. Joseph, Allen App. No. 1-07-50, 2008-Ohio-1138. Other courts have ruled that under Crim.R. 43(A), which requires the defendant's presence during the imposition of sentence, a trial court must impose costs during the sentencing hearing. See State v. Smoot, Franklin App. No. 05AP-104,

2005-Ohio-5326; State v. Peacock, Lake App. No. 2002-L-115, 2003-Ohio-6772; State v. Triplett, Cuyahoga App. No. 87788, 2007-Ohio-75.

{¶ 57} The Ohio Supreme Court currently is considering whether a trial court must impose court costs at the sentencing hearing. See State v. Joseph, 118 Ohio St.3d 1504, 2008-Ohio-3369, 889 N.E.2d 1023 (certifying the following question: "May a trial court impose court costs pursuant to R.C. 2947.23 in its sentencing entry, when it did not impose those costs in open court at the sentencing hearing?").

{¶ 58} This court has not yet ruled on this exact issue. Until the Ohio Supreme Court resolves the conflict, we choose to follow those courts that hold that because a trial court has a mandatory duty to impose costs as part of the defendant's sentence, it need not advise the defendant at the sentencing hearing that costs will be included as part of his sentence. Obviously, the better practice would be to inform a defendant at the sentencing hearing that he will be subject to the costs of prosecution.[3] However, in light of the mandatory nature of the imposition of court costs, we decline to rule that the failure to do so constitutes reversible error.

B

NOTIFICATION THAT FAILURE TO PAY COURT COSTS COULD RESULT IN IMPOSITION OF COMMUNITY SERVICE

{¶ 59} Appellant also argues that the failure to notify him that community service

[3] Additionally, as we discuss below, the trial court must inform a defendant that failure to pay court costs could result in the imposition of community service. This presupposes that court costs will be imposed. Thus, it would seem logical that before a court orally informs a defendant that his failure to pay court costs could result in the imposition of community service, it would actually impose those costs.

could be imposed if he failed to pay court costs is also reversible error. We disagree.

{¶ 60} It is true that R.C. 2947.23(A)(1)(a) requires trial courts to inform defendants that, if they fail to pay court costs, they may be ordered to perform community service in lieu thereof. But, this Court has held on several occasions that the issue is not ripe for appellate review if the defendant remains incarcerated and no order of community service has been imposed. See State v. Welch, Washington App. No. 08CA29, 2009-Ohio-2655, at ¶13; State v. Boice, Washington App. No. 08CA24, 2009-Ohio-1755, at ¶¶9-11; State v. Slonaker, Washington App. No. 08CA21, 2008-Ohio-7009, at ¶7. Because the record shows appellant is still incarcerated, and thus has not suffered any prejudice as a result of the trial court's failure to give her such warning, we find that the issue is not yet ripe for review and overrule the assignment of error for that reason.

{¶ 61} Having reviewed all of the errors assigned and argued in the briefs, and finding merit in none of them, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

Abele, J., Dissenting:

{¶ 62} I respectfully dissent. I concede that on a number of occasions we have applied the ripeness doctrine and have declined to review a trial court's failure to comply with R.C. 2947.23(A)(1)(a) when an appellant remains incarcerated and has not yet been ordered to perform community service (however, a different panel determined the issue ripe and reversed the sentence - See State v. Burns, Gallia App. Nos. 08CA1, 08CA2 & 08CA3, 2009-Ohio-878, at ¶12, fn. 3). I adhere to the reasoning in Burns. The problem with applying the "ripeness" doctrine is that for all practical purposes, it

places this error beyond the scope of effective appellate review. If the issue is not dealt with on direct appeal, how will it be effectively reviewed in the future? An appeal from the actual order that imposes community service strikes me as a waste of judicial resources when the issue can be resolved in one appeal rather than two.

{¶ 63} Thus, until I am convinced that a more practical and straightforward means is available by which to raise this issue in the future, if and when a court imposes a community service order, I believe that we should simply consider the issue at the present time. Thus, I would sustain the assignment of error and remand the case for re-sentencing on this point.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and appellee shall recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Kline, P.J. & McFarland, J.: Concur in Judgment & Opinion

Abele, J. Concurs in Judgment & Opinion as to Assignments of Error I, II & III; Dissents with Opinion as to Assignment of Error IV

For the Court

BY:_____
Roger L. Kline
Presiding Judge

BY:_____
Peter B. Abele, Judge

BY:_____
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.