

[Cite as *State v. Moore*, 2010-Ohio-4575.]

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

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 09CA886
 :
 vs. :
 :
 PERRY MOORE, : DECISION AND JUDGMENT ENTRY
 :
 Defendant-Appellant. :

APPEARANCES:

COUNSEL FOR APPELLANT: Michael P. Kelly, 108 S. High Street, Mt. Orab, Ohio
45154

COUNSEL FOR APPELLEE: Aaron Haslam, Adams County Prosecuting Attorney,
and Rebecca L. Bennett, Adams County Assistant
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CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 9-16-10

ABELE, J.

{¶ 1} This is an appeal from an Adams County Common Pleas Court judgment of conviction and sentence. A jury found Perry Moore, defendant below and appellant herein, guilty of: (1) two counts of trafficking in drugs in violation of R.C. 2925.03(A)(1); and (2) carrying a concealed weapon in violation of R.C. 2923.12(A).

{¶ 2} Appellant assigns the following errors for review¹:

¹ Appellant's brief does not contain a separate statement of the assignments of error. See App.R. 16(A)(3). Thus, we have assembled these assignments of error

FIRST ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED IN ALLOWING THE TESTIMONY OF A STATE’S WITNESS WITH AN ADMITTED RECENT USE OF DRUGS.”

SECOND ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED IN FINDING THAT THE STATE HAD PROVEN BEYOND A REASONABLE DOUBT THAT APPELLANT HAD VIOLATED ORC §2925.03.”

{¶ 3} In September 2008, Rachel Silvia was jailed in Adams County for the “fraudulent use of a credit card” when Sheriff’s Detective Richard Demint approached her and asked for assistance with their investigations into local drug trafficking. She agreed to assist the authorities.

{¶ 4} Authorities provided Silvia with money and a tape recorder and directed her to make Oxycontin purchases from appellant. The first purchase occurred on September 20, 2008. The second purchase occurred three days later. On September 24, 2008, Sheriff’s Investigator Shawn Cooley obtained and executed a search warrant on appellant’s home. Although appellant was not present, when he returned home during the search authorities recovered a “22 caliber” handgun on appellant’s person after a pat-down search.

{¶ 5} Subsequently, the Adams County Grand Jury returned an indictment charging appellant with the aforementioned offenses, as well as drug possession in violation of R.C. 2925.11(A). Appellant pled not guilty and the matter came on for a jury trial over several days in July 2009.

from portions of his argument.

{¶ 6} At trial, appellee first called Rachel Silvia to testify. Before she began, however, defense counsel requested that the trial court order her to submit to a drug test to determine her competency. After the court overruled the motion, the witness recounted her recollection of the evening and identified what transpired as the appellee played the recordings of the controlled buys for the jury. Detective Demint and Investigator Cooley also corroborated Silvia's version of events. At trial, Joseph Bramer, a pharmacist employed at the local WalMart, related that appellant has serious medical problems and regularly filled prescriptions for Oxycontin at the pharmacy. As a result, the court dismissed the third count of the indictment (possession).

{¶ 7} After hearing the evidence, the jury returned guilty verdicts on the remaining three counts. The trial court sentenced appellant to serve four years on the first trafficking count, one year on the second trafficking count, and one year on the concealed weapon count, with all sentences to be served concurrently with the four year sentence. This appeal followed.

I

{¶ 8} Appellant asserts in his first assignment of error that the trial court erred by allowing Silvia to testify without ordering her to undergo a drug test to determine her competency as a witness. As support for that contention, he cites Prudential Ins. Co. v. Hashman (1982), 7 Ohio App.3d 55, 58-59, 454 N.E.2d 149, wherein this Court held it is error not to conduct an appropriate inquiry into whether a witness's intoxication is so great as to render him incompetent. As we stated in Hashman, however, the determination of witness competency rests solely in the province in the trial judge. *Id.* at 58. Here, when defense counsel moved to strike Silvia's testimony, the trial court

overruled the motion on the following bases:

“The Court witnessed her throughout all her testimony, both on direct and cross, she was attentive to the questions, did not seem incompetent to answer of the questions, and was somewhat painfully blunt and honest[.]”

{¶ 9} Obviously, a trial court judge sits in the best position to evaluate witness competency. In the case at bar, not only are we disinclined to second-guess the trial court's judgment on this issue, our reading of Silvia's trial testimony does not suggest incompetence. We readily acknowledge that Silvia admitted addiction to prescription medication and further admitted that she planned to go “to detox” on “July 15th.” We, however, do not find these statements to be dispositive of the issue. Appellant cites no authority, and we are aware of none, that *ipso facto* holds that a drug addict cannot testify in a court proceeding. If Silvia was incoherent or under the influence of drugs on the day she testified, we would certainly agree that she should not have been permitted to offer her version of the events. However, we find nothing in the record on appeal to suggest that this was the case.

{¶ 10} As we stated in Hashman, the decision to allow a witness to testify, over objections on competency grounds, should not be reversed absent an abuse of discretion. 7 Ohio App.3d at 58; see also State v. Adkins (Jan. 20, 1982), Scioto App. No. 1307. As we have noted many times, an abuse of discretion is more than an error of law or judgment; rather, it implies that the trial court's attitude was unreasonable, arbitrary or unconscionable. See, e.g., Landis v. Grange Mut. Ins. Co. (1998), 82 Ohio St.3d 339, 342, 695 N.E.2d 1140; Malone v. Courtyard by Marriott L.P. (1996), 74 Ohio St.3d 440, 448, 659 N.E.2d 1242. When applying the abuse of discretion standard, an appellate court may not simply substitute its judgment for that of the trial court. State

ex rel. Duncan v. Chippewa Twp. Trustees (1995), 73 Ohio St.3d 728, 732, 654 N.E.2d 1254; In re Jane Doe 1 (1991), 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181. Instead, to establish an abuse of discretion, the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, and not the exercise of reason but instead passion or bias. Nakoff v. Fairview Gen. Hosp. (1996), 75 Ohio St.3d 254, 256, 662 N.E.2d 1; Bragg v. Hatfield, Vinton App. No. 02CA567, 2003-Ohio-1441, at ¶ 22.

{¶ 11} In the case sub judice, after our review of the record, we find nothing to suggest that Silvia was not competent to testify. In the absence of a clear indication that Silvia was not competent, we cannot hold that the trial court abused its discretion by allowing her to testify or by refusing to strike her testimony once it was concluded.

{¶ 12} Moreover, another factor buttresses our decision on this point. Even assuming, arguendo, that Silvia was incompetent to testify, and that the trial court should have excluded her testimony, we believe that the court's decision to allow her testimony could be, at most, harmless error. See Crim.R. 52(A). Silvia's testimony that she purchased Oxycontin from appellant was cumulative of the recorded "controlled" buys. Those recordings were played for the jury and Detective Demint and Investigator Cooley identified Silvia's voice and appellant's voice for the jury. Thus, Silvia's testimony identifying appellant as the person who sold her Oxycontin, even if tainted by her own status as an addict, is but one piece of evidence adduced at trial. Therefore, any error on the part of the trial court as to the issue of competency would have been harmless.

{¶ 13} Accordingly, we find appellant's first assignment of error is without merit

and is hereby overruled.

II

{¶ 14} In his second assignment of error, appellant asserts that his trafficking conviction is against the manifest weight of the evidence.² Specifically, he contends that his “conviction was based entirely upon the actions and testimony of one person, Rachel Silvia.” “Without her testimony,” appellant continues, “the State did not have a case against [him.]” He concludes that her status as an addict makes her unreliable and her desperation to avoid further jail time, by helping the Sheriff’s office in this case, provided her an incentive to tamper with the evidence and even to include some of her own Oxycontin in the drugs she gave to the authorities to bolster the chance of getting a conviction.

{¶ 15} First, Silvia’s admitted status as prescription drug addict goes to the weight and credibility of her testimony, not its sufficiency or its admissability. We will not reverse a conviction on manifest weight of the evidence grounds unless it is obvious that the trier of fact lost its way and created a manifest miscarriage of justice that requires reversal and a new trial. See State v. Earle (1997), 120 Ohio App.3d 457, 473, 698 N.E.2d 440; State v. Garrow (1995), 103 Ohio App.3d 368, 370-371, 659 N.E.2d 814. We are not persuaded this was the case here. As we noted above, we

² To the extent that the text of his assignment error suggests that appellant is making a “sufficiency of the evidence” argument, we note that “sufficiency” and “manifest weight” are two distinct concepts. State v. Thompkins (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541. Although appellant’s argument is couched in terms of “manifest weight,” we would also conclude that sufficient evidence supports his

find nothing to suggest that Silvia's testimony was unreliable. The trial judge, who is in the best position to view the witness, her demeanor, gestures and voice inflections, concluded that she was competent to testify. We find nothing to contradict that finding.

{¶ 16} Further, during cross-examination defense counsel pointedly questioned Silvia about her drug addiction, as well as her convictions for drug-related offenses. It is axiomatic that witness credibility and evidence weight are issues that the trier of fact must determine. See State v. Dye (1998), 82 Ohio St.3d 323, 329, 695 N.E.2d 763; State v. Williams (1995), 73 Ohio St.3d 153, 165, 652 N.E.2d 721. A trier of fact may believe all, part or none of the testimony of any witness who appears before it. State v. Nichols (1993), 85 Ohio App.3d 65, 76, 619 N.E.2d 80; State v. Caldwell (1992), 79 Ohio App.3d 667, 679, 607 N.E.2d 1096. Here, the jury apparently opted to believe Silva's testimony, despite the evidence of her addiction.

{¶ 17} We also point out, contrary to appellant's assertion, that Silvia's testimony was not the only evidence adduced at trial court implicated him. The recording of the two controlled drug buys, as well as the testimony of Detective Demint and Investigator Cooley, placed appellant at the scene and identified his voice on the recordings, These recordings of the controlled buys were produced at trial. Although neither officer personally witnessed those buys, they did observe appellant arrive and leave Silvia's residence. The recordings were also played several times during the trial and the transcript reveals money and medication being counted.

{¶ 18} In light of all this, we cannot, after our review of the evidence, conclude

conviction for trafficking.

that the jury clearly lost its way and created a manifest miscarriage of justice by finding appellant guilty of the charges. Thus, we overrule appellant's second assignment of error for these reasons.

{¶ 19} Having reviewed all the errors assigned and argued in the briefs, and having found merit in none, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered the judgment be affirmed and that appellee 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 Adams 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.

Harsha, J. & Kline, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, 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.