[Cite as *State v. Diggs*, 2018-Ohio-2761.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

ANDRE CORNELL DIGGS,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 16 BE 0036

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 16 CR 100

BEFORE:
Kathleen Bartlett, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed in part; reversed and remanded in part

Atty. J. Flanagan, Assistant Prosecutor, Courthouse Annex 1, 147-A West Main Street, St. Clairsville, Ohio 43950, for Plaintiff-Appellee and

Attys. Peter Galyardt and *Timothy Young*, Ohio Public Defenders, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, for Defendant-Appellant.

Dated: June 25, 2018

Bartlett, J.

{¶1} Appellant Andre Diggs appeals his convictions for three counts of drug trafficking following a jury trial in the Belmont County Court of Common Pleas. Specifically, Appellant was convicted of knowingly selling or offering to sell heroin in an amount equal to or in excess of five grams but less than ten grams in a school zone, in violation of R.C. 2925.03(A)(1)(C)(6)(d), a felony of the second degree (count one); cocaine in an amount less than five grams, in violation of R.C. 2925.03(A)(1)(C)(4)(a), a felony of the fifth degree (count two); and cocaine in an amount less than five grams, in violation of R.C. 2925.03(A)(1)(C)(4)(a), a felony of the fifth degree (count three). The trial court imposed maximum, consecutive sentences for each count – eight years for count one, and twelve months each for counts two and three – for an aggregate sentence of ten years.

{¶2} Appellant challenges the sufficiency of the evidence supporting his conviction for heroin trafficking in the vicinity of a school. He further contends that the state failed to establish that the amount of heroin sold was equal to or in excess of five grams. Next, Appellant asserts a manifest weight of the evidence challenge to all three of his drug trafficking convictions. He contends that the testimony of Dusty Funkhouser, the state's witness who performed the three controlled buys that form the nucleus of this case, was not credible. Finally, Appellant argues that he was denied due process of law because the trial judge, rather than the state, posed several questions intended to elicit testimony to establish essential elements of the drug trafficking crimes. The Belmont County Prosecutor's office did not file an appellate brief.

{¶3} For the following reasons, all three of Appellant's convictions for drug trafficking, as well as the school enhancement specification in count one, are affirmed. However, the additional finding regarding the statutory weight aggravator in count one is reversed and this case is remanded for modification of the degree of the offense and for resentencing consistent with Ohio law.

I. Facts

{¶4} Appellant's convictions were predicated upon three controlled buys performed by Funkhouser, a confidential informant working on behalf of Belmont County Drug Task Force officers, Belmont County Deputy Sheriff Brian Carpenter and Martins Ferry Police Department Officer Tim Starkey. Funkhouser, Deputy Carpenter, and Officer Starkey were the only individuals who offered testimony at the jury trial. At the time of her testimony, Funkhouser was incarcerated for drug possession, theft, and passing bad checks. (Trial Tr., p. 148.)

{¶5} Funkhouser testified that she was addicted to heroin and crack cocaine when she first met Officer Carpenter, who arrested her on an outstanding warrant in late 2015 or early 2016. That arrest warrant resulted in the conviction and sentence she was serving at the time of the jury trial. Deputy Carpenter found heroin and crack cocaine on her person during the arrest. He testified that they spoke in detail about the local drug trade and she provided some information about her suppliers at that time. (Trial Tr., pp. 101-103.)

{¶6} Funkhouser encountered Deputy Carpenter a second time when he initiated a traffic stop of a motor vehicle she was driving, while she was under a license suspension. Both Funkhouser and Deputy Carpenter testified that she was desperate to avoid criminal charges because of custody issues with her children, who were in the state system in Georgia. She volunteered information about drug dealers in Belmont County, and, rather than arresting her, Deputy Carpenter decided to use her as a confidential informant. From that point forward, Funkhouser advised Deputy Carpenter about individuals involved in drug trafficking and their whereabouts, including Appellant. (Trial Tr., pp. 104-107, 155-160.)

{¶7} Subsequently, Deputy Carpenter, in concert with Officer Starkey, who had access to an unmarked patrol car and "buy money," asked Funkhouser to perform a series of controlled buys from Appellant. Funkhouser testified that she was eager to assist the officers because they had participated in a family drug intervention and demonstrated a genuine interest in getting her admitted to a rehabilitation facility. She

denied that her cooperation was a *quid pro quo* arrangement, claiming instead that she wanted to return the favor and also help others suffering from addiction. (Trial Tr., pp. 157-159, 168-169.)

{¶8} Funkhouser conceded that she was still abusing drugs when she participated in the controlled buys, and that, unbeknownst to the officers, she acquired additional drugs for her personal use from Appellant during the second and third controlled buys. (Trial Tr., pp. 162-163, 167.)

{¶9} Prior to each controlled buy, Funkhouser was given buy money by the officers, which was photocopied for the purpose of identification. She was frisked both before and after the controlled buys.

{¶10} Funkhouser initiated each buy with a telephone call to Appellant at (216) 317-8860 ("(216) number"), which were recorded by Deputy Carpenter and Officer Starkey.

{¶11} The first controlled buy occurred on February 4, 2016. In the officers' presence, Funkhouser contacted Appellant at the (216) number and placed an order for $100.00 worth of cocaine. (Trial Tr., pp. 110-111.) She met Appellant at the apartment of Diane Harris in the Bell Village Apartment complex. Harris and several other men were present during the controlled buy.

{¶12} Funkhouser explained that she owed Appellant money for previous drug purchases, and she described a sort of revolving credit arrangement with Appellant: She would pay down her debt by a certain amount and receive the value paid in the form of additional drugs. She testified that Appellant "spotted" her drugs when she paid down her debt. (Trial Tr., pp. 164-167.) A BCI report admitted at the jury trial established that Funkhouser turned over .35 grams of cocaine after the first transaction with Appellant. (Trial Tr., p. 215.)

{¶13} The second controlled buy occurred on February 10, 2016. Funkhouser called the (216) number and requested $200 worth of crack cocaine. She met Appellant at the apartment of Rebecca Moore in the Bell Village Apartment complex. Funkhouser testified that, in addition to the cocaine she received on that date and turned over to the officers, she was also spotted an unidentified quantity of heroin for her personal use, which she hid from the officers when they frisked her. (Trial Tr., pp. 167-168) A BCI

report admitted at the jury trial established that Funkhouser turned over .45 grams of cocaine after her second transaction with Appellant. (Trial Tr., p. 216.)

{¶14} Early in the morning of February 11, 2016, Officer Carpenter initiated a traffic stop of a vehicle in which Appellant was a passenger. Officer Carpenter confiscated $3,232.00 from Appellant, which included $80.00 in bills bearing the same serial numbers as bills from the buy money that Funkhouser used to purchase drugs from Appellant the previous day. (Trial Tr., pp. 118-119.)

{¶15} The third and final controlled buy occurred on February 16, 2016. The buy was initiated in the same manner as the others. Funkhouser called the (216) number and spoke to a man she believed to be Appellant, who told her to meet him at a residence in Martins Ferry, Ohio. (Trial Tr., pp. 119-120.) According to Funkhouser, she told the man she believed to be Appellant that her father was going to give her a large sum of money to finance a trip to Georgia to see her children. During the telephone call, Funkhouser says, "I finally got the money" and "I'd like to try and get about five or six." However, the man never offers to sell or agrees to sell a specific amount of heroin.

{¶16} Shortly before Funkhouser arrived at the residence in Martins Ferry, she called the (216) number to let Appellant know that she would be arriving presently. When Appellant answered the call, he was puzzled as to why she was on her way to the residence in Martins Ferry. It was then that Funkhouser discovered that she had made arrangements to meet with an unidentified man who answered the (216) number.

{¶17} Appellant told Funkhouser to meet him instead at the McDonald's in Martins Ferry. Funkhouser's fiancé dropped her off at the Martins Ferry McDonald's and Funkhouser entered Appellant's vehicle. Funkhouser requested five or six grams of heroin, and, unbeknownst to the officers, she also requested crack cocaine. Funkhouser testified that she was roughly $250 in debt to Appellant at that time. Appellant told her that he did not have enough heroin or cocaine with him and that she would have to meet him at Moore's apartment in the Bell Village Apartment complex to collect the rest of the drugs.

{¶18} Funkhouser testified that she gave Appellant $1,200.00 – all of the buy money allotted for the third controlled buy – in the McDonald's parking lot. (Trial Tr., p.

180.) Funkhouser testified that she got "at least some heroin" and "at least some crack cocaine" prior to leaving Martins Ferry. She explained that Appellant did not have a sufficient amount of drugs with him because he was not the recipient of her phone call. As a consequence, he was not aware of the amount of heroin she had requested. (Trial Tr., pp. 178-179.)

{¶19} According to Officer Starkey's testimony, St. Mary's Catholic School, a parochial elementary school, is located within 1,000 feet of the Martins Ferry McDonald's parking lot. Officer Starkey testified, "It's just a few hundred feet north of McDonald's." He further testified that the McDonald's parking lot is essentially connected to the back of the school by an alley. He based his calculation on "the tool [they] use on the computer" that "gives a diameter of a thousand feet." (Trial Tr., p. 240.)

{¶20} Funkhouser testified that she and Appellant travelled to Moore's apartment in separate vehicles. Upon arrival, Appellant gave her an additional amount of heroin, as well as an undetermined amount of cocaine, which she hid from the officers when they frisked her. A BCI report admitted at the jury trial established that Funkhouser turned over 3.38 grams of heroin after the third transaction. (Trial Tr., p. 216.) During Appellant's arrest following the third controlled buy, Deputy Carpenter confiscated two mobile telephones, including the mobile phone assigned to the (216) number that Funkhouser used to contact Appellant.

{¶21} In the course of the jury trial, the judge posed several questions to the state's witnesses. After Deputy Carpenter described the location where the first drug transaction occurred, the judge asked, "Where is that located? . . .I mean what city, what township?" (Trial Tr., p 111.) Later, when Deputy Carpenter was describing the second drug transaction, the judge inquired, "How much crack cocaine was the first time? . . .And how much weight was it?" The judge then asked, "And the second time?" (Trial Tr., p. 115.)

{¶22} In its closing argument, the state appeared to rely on the "offer to sell" language in the trafficking statute with respect to count one in order to invoke the greater statutory weight aggravator. The prosecutor stated:

> First of all, buy No. 3, which is listed in Count I, we have this as five grams or more of heroin. And here's why. You may say, well, wait a minute, the lab report indicates 3.38 grams of heroin. Ladies and gentlemen, it is not our fault that the defendant shorted us that money. The agreement, according to [Funkhouser], and she told you, hey, look they wanted six grams. I dial it back by about 150 or 200 bucks to say five grams for a thousand dollars so that she could pay her previous drug deal. But the statute, Ohio Revised Code says, sell or offer to sell. Sell is to barter, exchange.

(Trial Tr., p. 273.)

{¶23} Although the testimony elicited at trial established that Appellant sold 3.38 grams of heroin to Funkhouser during the third controlled buy, and the jury was instructed on the lesser included offense of trafficking in heroin in an amount greater than one gram but less than five grams, the jury convicted Appellant for the sale of heroin in an amount equal to or greater than five grams but less than ten grams.

II. Law

{¶24} R.C. 2925.03, captioned "Trafficking offenses" reads, in pertinent part:

> (A) No person shall knowingly do any of the following:
>
> (1) Sell or offer to sell a controlled substance or a controlled substance analog;
>
> . . .
>
> (C) Whoever violates division (A) of this section is guilty of one of the following:
>
> . . .
>
> (6) If the drug involved in the violation is heroin or a compound, mixture, preparation, or substance containing heroin, whoever violates division (A) of this section is guilty of trafficking in heroin. The penalty for the offense shall be determined as follows:

> (a) Except as otherwise provided in division (C)(6)(b), (c), (d), (e), (f), or (g) of this section, trafficking in heroin is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.
>
> (b) Except as otherwise provided in division (C)(6)(c), (d), (e), (f), or (g) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.
>
> (c) Except as otherwise provided in this division, if the amount of the drug involved . . .equals or exceeds one gram but is less than five grams, trafficking in heroin is a felony of the fourth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the third degree, and there is a presumption for a prison term for the offense.
>
> (d) Except as otherwise provided in this division, if the amount of the drug involved. . .equals or exceeds five grams but is less than ten grams, trafficking in heroin is a felony of the third degree, and there is a presumption for a prison term for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the second degree, and there is a presumption for a prison term for the offense.

{¶25} Ohio courts have applied the trafficking statute to three seemingly distinct types of drug sales: First, the sale of actual drugs, where a substance containing actual drugs is recovered following the transaction; Second, the sale of counterfeit drugs, where a substance that does not contain any actual drugs is recovered following the

transaction; And, third, the mere offer to sell drugs, that is, where no substance is recovered at all because no transaction has occurred. While each of the foregoing scenarios constitutes drug trafficking in Ohio, the appropriate sentence varies based upon the specific conduct.

{¶26} Of course, when a defendant sells actual drugs, the statutory weight aggravator may be applied based upon the amount of actual drugs sold. On the other hand, when a defendant sells counterfeit drugs, that is, actual drugs are offered but some other substance is recovered, the trafficking conviction may be upheld, but no statutory weight aggravator may be applied. *State v. Chandler*, 109 Ohio St.3d 223, 2006-Ohio-2285, 846 N.E.2d 1234, ¶ 9 (substance offered as crack cocaine was actually baking soda).

{¶27} The same is not true when a defendant merely offers to sell drugs. The mere offer to sell an amount of drugs subject to a statutory weight aggravator may result in an aggravated conviction even though no drugs are recovered. *Garr v. Warden, Madison Corr. Inst.*, 126 Ohio St.3d 334, 2010-Ohio-2449, 933 N.E.2d 1063, ¶¶ 1-2.

{¶28} At least one Ohio appellate court has addressed the hybrid situation, where a defendant offers to sell a specific amount of drugs, but delivers a lesser amount. In *State v. Siggers*, 9th Dist. No. 09CA0028-M, 2010-Ohio-1353, the defendant offered to sell approximately 10.5 grams of crack cocaine but delivered only 4.6 grams at the time of sale. Nevertheless, the jury found the defendant guilty of selling crack cocaine in an amount equal to or greater than five grams but fewer than ten grams. The Ninth District reasoned that the evidence before the jury established that Siggers actually sold 4.6 grams of crack cocaine, and concluded that the enhanced sentence imposed for trafficking in an amount equal to or greater than five grams but fewer than ten grams rested upon insufficient evidence. *Id.* ¶¶ 16-21.

{¶29} Regardless of the amount of drugs offered or sold, the school enhancement specification is intended to punish more severely those who engage in the sale of illegal drugs in the vicinity of Ohio schools and Ohio school children. *State v. Throckmorton*, 4th Dist. No. 08CA17, 2009-Ohio-5344, ¶ 19, *rev'd in part on other grounds*, 126 Ohio St.3d 55, 2010-Ohio-2693. In order to convict a defendant under a school specification, the state must prove beyond a reasonable doubt the drug

transaction occurred within the specified distance from the school. *State v. Goins*, 5th Dist. No. CA99-08 (Sept. 29, 2000).

{¶30} Ohio courts have found sufficient evidence to support a conviction on a school enhancement where the state presented testimony regarding the approximate distance between the drug transaction and the school, combined with photographs depicting the school in relation to the property. *Throckmorton* at ¶ 38; See also *State v. Brown*, 9th Dist. No. 23637, 2008–Ohio–2670, ¶ 18.

{¶31} Courts have also found testimony by a witness as to an approximate distance sufficient to prove a drug offense occurred within the vicinity of a school in the absence of additional photographic evidence. See *State v. Speers*, 11th Dist. No.2003-A-0112, 2005-Ohio-4654, ¶¶ 28-29 (testimony by detectives that controlled buys occurred approximately 400 feet from elementary school "standing alone, adequately established sufficient evidence that the 'controlled buys' occurred 'within the vicinity' of a school"); See also *State v. Howard*, 12th Dist. No. CA2012-04-034, 2013-Ohio-1489, ¶ 65-66 (testimony by detective that offices where drug transactions occurred were within 200 feet of a kindergarten daycare center sufficient to support school enhancement specification).

III. Analysis

FIRST ASSIGNMENT OF ERROR

> The trial court erred in denying Andre Diggs's Crim.R. 29 motion for acquittal, and violated his rights to due process and a fair trial when, in the absence of sufficient evidence, it convicted him of second-degree felony drug trafficking. Constitution; Article I, Sections 10 and 16, Ohio Constitution. R.C. 2925.03. Trial Tr. 218, 240, 245, 249, 251; June 7, 2016 Judgment Entry.

{¶32} When a court reviews a record for sufficiency, '[t]he 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.' " *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d

930, ¶ 146, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

{¶33} The evidence established that Appellant sold Funkhouser 3.38 grams of heroin during the third controlled buy. Even assuming arguendo that the state relied on the "offer to sell" heroin as opposed to the actual sale of heroin in count one, there is no evidence in the record that the unidentified man who told Funkhouser to meet him at the residence in Martins Ferry stated a specific quantity of drugs for sale. Funkhouser requested "five or six," and the unidentified man simply instructed her to come to Martins Ferry.

{¶34} Likewise, Funkhouser offered no testimony that Appellant offered to sell her a specific amount of heroin, only that he did not have enough in the vehicle in Martins Ferry, and that she would have to travel to the Bell Village Apartment complex to receive additional drugs. The facts of this case do not even present the hybrid situation addressed by the Ninth District in *Siggers*, supra. As a result, we find that there was insufficient evidence to support the jury's verdict on count one relative to the statutory weight aggravator. This conclusion appears to fall in line with the public policy underlying the Ohio Supreme Court's decision regarding the sale of counterfeit drugs, which relies upon the tangible amount of actual drugs sold, regardless of the amount that appeared before testing to be sold.

{¶35} Conversely, we find that there is sufficient evidence to support the trial court's conclusion that the third drug transaction occurred within the vicinity of a school. Officer Starkey testified, "It's just a few hundred feet north of McDonald's." He based his calculation on "the tool [they] use on the computer" that "gives a diameter of a thousand feet." (Trial Tr., p. 240.)

{¶36} Ohio appellate courts have accepted estimates made by law enforcement regarding the proximity of a school to an alleged drug transaction. Here, Officer Starkey testified that he used a tool designed for approximating the distance between a drug transaction and a school. Further, there is nothing in the record to suggest that St. Mary's is not within a few hundred feet of the McDonald's in Martins Ferry.

{¶37} In summary, Appellant's first assignment of error is sustained with respect to the statutory weight aggravator, but overruled with respect to the school enhancement penalty. The judgment entry as it pertains to count one, statutory weight aggravator, is reversed and this case remanded for modification of the degree of the offense and for resentencing consistent with Ohio law.

SECOND ASSIGNMENT OF ERROR

> The trial court erred and violated Andre Diggs's rights to due process and a fair trial when it convicted him of three counts of drug trafficking. Fifth and Fourteenth Amendments, United States Constitution; Article I, Sections 10 and 16, Ohio Constitution. R.C. 2925.03. Trial Tr. 130-137, 158-159, 162, 164-168, 1171-181, 193-197, 217, 218, 223, 224-242, 245, 247; June 7, 2016 Judgment Entry.

{¶38} In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court must 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. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 119. Although a court of appeals may determine that a judgment is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence." *Thompkins* at 387, 678 N.E.2d 541.

{¶39} The weight to be given to the evidence and the credibility of the witnesses are nonetheless issues for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967). The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997).

{¶40} Appellant contends that Funkhouser's testimony alone resulted in his convictions for drug trafficking. He asserts that her testimony was completely

incredible, based upon her drug dependence at the time of the controlled buys, as well as her desire to avoid additional drug charges. Because other individuals were present during the controlled buys, but law enforcement was not, Appellant reasons that the state should have called witnesses without a vested interest in the outcome of the trial.

{¶41} To the contrary, the state is free to call any witness whose testimony will establish the essential elements of the crimes charged in the indictment. Here, the state chose to rely exclusively upon Funkhouser's testimony to establish the events surrounding the three controlled buys. The state's decision was a risky one, as the jury was instructed that it should consider whether a witness had any interest in the case.

{¶42} Despite her admissions that she was both addicted to drugs and seeking to avoid additional drug charges when she performed the controlled buys, the jury obviously believed Funkhouser. Appellant has failed to point to any inconsistencies in Funkhouser's testimony to suggest that the jury lost its way in crediting her testimony or convicting him of multiple drug trafficking charges. For the foregoing reasons, we find that the jury's verdicts are supported by the manifest weight of the evidence, and Appellant's second assignment of error is meritless.

THIRD ASSIGNMENT OF ERROR

> The trial court violated Andre Diggs's rights to due process and a fair trial through judicial bias. Fifth and Fourteenth Amendments, United States Constitution; Article I, Sections 10 and 16, Ohio Constitution. Trial Tr. 111, 115.

{¶43} A criminal trial before a biased judge is fundamentally unfair and denies a defendant due process of law. *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶ 34 (2002). Judges are governed by the Ohio Code of Judicial Conduct. Rule Two requires that a judge "shall perform the duties of judicial office, including administrative duties, without bias or prejudice." Rule 2.3(A). This rule further states that "[a] judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice." Rule 2.3(B). Rule 2.2 provides that "[a] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."

{¶44} "Under Evid.R. 611, the court has discretion to control the flow of the trial. This control includes asking questions of the participants and the witnesses in a search for truth. Evid.R. 614. Because the trial court's powers pursuant to Evid.R. 611 and 614 are discretionary, a court reviewing a trial court's interrogation of witnesses and comments must determine whether the trial court abused that discretion. *State v. Davis* (1992), 79 Ohio App.3d 450, 454, 607 N.E.2d 543." *State v. Prokos* (1993), 91 Ohio App.3d 39, 44, 631 N.E.2d 684. To constitute an abuse of discretion, the court's actions must be more than legal error; they must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶45} "A judge abuses his discretion when he plays the part of an advocate, but the rule is not so restrictive that [a] judge is not permitted to participate in a search for the truth." *State v. Kight* (Sept. 9, 1992), 4th Dist. No. 682, 1992WL226352. A trial court "may interrogate witnesses, in an impartial manner, whether called by itself or by a party." Evid.R. 614(B). "This rule exists because the trial court has an 'obligation to control proceedings, to clarify ambiguities, and to take steps to insure substantial justice.' " *State v. Stadmire*, 8th Dist. No. 81188, 2003-Ohio-873, ¶ 26, quoting State *v. Kay* (1967), 12 Ohio App.2d 38, 49, 230 N.E.2d 652.

{¶46} In the course of the jury trial, the judge posed several questions to the state's witnesses. Said questions give the impression that the judge intended to establish venue and to identify the amount of the drugs allegedly sold. The trial court posed questions in an impartial manner, without derogation directed at either party. Appellant has not advanced any other evidence of judicial bias. While the trial court did elicit testimony which established essential elements of the state's case, we find that the trial court sought to clarify ambiguities rather than play the part of an advocate. Therefore, we find that the trial court did not abuse its discretion when it questioned the state's witnesses, and conclude that Appellant's third assignment of error is meritless.

IV. Conclusion

{¶47} In summary, we sustain in part Appellant's first assignment of error as it relates to the statutory weight aggravator in count one, and find that there is insufficient evidence to sustain Appellant's conviction for trafficking heroin in an amount equal to or

greater than five grams but less than ten grams. That portion of the judgment entry is reversed and this case is remanded for modification of the degree of the offense and for resentencing consistent with Ohio law.

{¶48} We overrule in part Appellant's first assignment of error, as it relates to the school enhancement specification in count one, and find that there exists sufficient evidence to support Appellant's conviction for selling heroin in a school zone. Appellant's second and third assignments of error, predicated upon manifest weight of the evidence and judicial bias, are overruled and Appellant's convictions on counts two and three are affirmed.

Waite, J., concurs.
Robb, P.J., concurs.

For the reasons stated in the Opinion rendered herein, we sustain in part Appellant's first assignment of error as it relates to the statutory weight aggravator in count one, and find that there is insufficient evidence to sustain Appellant's conviction for trafficking heroin in an amount equal to or greater than five grams but less than ten grams. That portion of the judgment entry is reversed and this case is remanded for modification of the degree of the offense and for resentencing consistent with Ohio law.

We overrule in part Appellant's first assignment of error, as it relates to the school enhancement specification in count one, and find that there exists sufficient evidence to support Appellant's conviction for selling heroin in a school zone. Appellant's second and third assignments of error, predicated upon manifest weight of the evidence and judicial bias, are overruled and Appellant's convictions on counts two and three are affirmed.

It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is remanded for modification of the degree of the offense and for resentencing consistent with Ohio Law and consistent with this Court's Opinion. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes the final judgment entry.