

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-08-063

Appellee

Trial Court No. 2008 CR 0293

v.

Anthony Cunningham

DECISION AND JUDGMENT

Appellant

Decided: December 31, 2009

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Gwen
Howe-Gebers, Chief Assistant Prosecuting Attorney, and
Jacqueline M. Kirian, Assistant Prosecuting Attorney, for appellee.

Wendell R. Jones, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common
Pleas that found appellant guilty of three counts of trafficking in cocaine and imposed a

term of imprisonment. For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} Appellant sets forth three assignments of error:

{¶ 3} "I. Appellant's rights under the Sixth Amendment to the United States Constitution and Article I, § 10 of the Constitution of the State of Ohio were denied when he was prohibited from confronting and examining a witness against him.

{¶ 4} "II. The jury erred in finding that the specifications included in counts one and two of the indictment were proven beyond a reasonable doubt.

{¶ 5} "III. As a consequence of incorrect findings by the jury, appellant was convicted and sentenced improperly as regarded counts one and two of the indictment."

{¶ 6} On June 5, 2008, appellant was indicted on three counts of trafficking in cocaine in violation of R.C. 2925.03(A)(1) and (C)(4)(c), felonies of the third degree. Each count specified that the amount of the drug involved equaled or exceeded one gram but was less than five grams of crack cocaine, and that the offense was committed in the vicinity of a school or in the vicinity of a child.

{¶ 7} Appellant was tried before a jury on September 9, 2008. Five witnesses testified on behalf of the state; the defense did not present any witnesses. Detective John Joseph, Deputy Matt Dickson and Deputy Mike Cortez, all associated with various multi-county drug task forces, testified as to arrangements made with a confidential informant who had volunteered to make controlled drug buys on October 26 and 31, 2007, in Fostoria, Wood County. The detective and deputies testified that they transported the

informant to the designated location and searched him for contraband before and after each drug buy. During each buy, the informant wore a "recorder/transmitter" which allowed the officers to listen to the transactions as they occurred as well as make an audio recording. None of the officers directly observed any of the drug transactions. Detective Joseph identified the CD's which contained the downloaded recordings from each of the transactions. The recordings from the three drug buys were played for the jury.

{¶ 8} Deputy Dickson testified that the buys took place in a trailer park in the Wood County portion of Fostoria. Dickson testified that after each buy, the informant turned the suspected drugs over to him. After the second buy on October 31, the informant returned to the deputy's vehicle and they drove past the "target location." The informant then pointed out the trailer where he bought the drugs. Deputy Dickson identified the drugs the informant gave him after each buy, and the drugs were admitted into evidence. Dickson further testified that the suspected drugs were submitted to the Bureau of Criminal Identification and Investigation ("BCI") for chemical testing. Deputy Cortez also testified as to his involvement at the time of each drug buy.

{¶ 9} Seneca County Sheriff's Deputy Ryan Rettig testified that he was the "controlling officer" of the informant used in this case. He stated that the informant contacted him in October 2007 to set up a drug transaction with a subject known to him as "Ant Dog" or Anthony Cunningham. Rettig testified that, based on his past covert operations within the community, he was familiar with "Ant Dog" and knew that individual to be Anthony Cunningham. Rettig further testified that he listened to the

transmissions while the informant made each drug buy. Rettig also testified that he had used that particular informant "quite a few times" and was familiar with his voice, which he heard transmitted during the three drug buys. The officer further testified that all three transactions took place at Lot 104, Nye's Trailer Park, in Fostoria, Wood County. He also stated that he had seen appellant at Lot 104 during the course of other official investigations.

{¶ 10} The state presented the testimony of Anthony Fechau, a forensic scientist with the state BCI in Bowling Green, who analyzed the evidence submitted in this case. Fechau testified that he examined the contents of three plastic bags and that each bag contained 1.3 grams of a substance which he determined to be crack cocaine.

{¶ 11} The jury found appellant guilty of three counts of trafficking in cocaine in an amount equal to or exceeding one gram but less than five grams of crack cocaine. The jury also found that Counts 1 and 2 were committed in the vicinity of a juvenile. Defendant was sentenced to five years imprisonment as to Counts 1 and 2 and 18 months as to Count 3, with the three sentences to be served concurrently.

{¶ 12} In his first assignment of error, appellant asserts that the admission of the three recordings of the drug transactions, which contained statements of the confidential informant, violated his right to confront a witness against him because the informant was not available to testify at trial.

{¶ 13} The record reflects that prior to jury selection, the state informed the court and defense counsel that the confidential informant could not be located. The state

indicated it intended to go forward, asserting that the recordings of the transactions are not hearsay and that it would offer the recordings as context within which to understand the defendant's statements. The defense objected to the admission of the recordings, arguing that the statements made by the informant on the recordings were testimonial in nature. The defense further argued that the statements were offered to prove that the drug transactions occurred and to prove that the person selling the drugs was Anthony Cunningham.

{¶ 14} The trial court ruled that it would not allow testimony as to what the informant said other than what the officers heard as they listened to the transactions taking place. The court further ruled that the officers could be cross-examined as to what they claimed to have heard but that they could provide no additional testimony as to the informant's statements other than what was captured on the recordings.

{¶ 15} The admission of evidence lies within the broad discretion of a trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that has created material prejudice. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, ¶ 43.

{¶ 16} The Sixth Amendment's Confrontation Clause provides that, in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. *Crawford v. Washington* (2004), 541 U.S. 36, 42. The Confrontation Clause applies to testimonial hearsay, with testimony defined typically as a solemn declaration or affirmation made for the purpose of establishing or proving some fact. *Davis v.*

Washington (2006), 547 U.S. 813. Hearsay is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Evid.R. 801(C).

{¶ 17} In *State v. Lewis*, 1st Dist. Nos. C-050989, C-060010, 2007-Ohio-1485, the court relied on decisions from the United States Supreme Court and the Ohio Supreme Court that have defined a testimonial statement as one made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Lewis* at ¶ 35, quoting *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, paragraph one of the syllabus.

{¶ 18} As to statements which may be testimonial, *Lewis* further explained: "Ohio and federal courts have permitted the introduction of testimonial statements not subjected to prior confrontation where the testimony merely provided background information or a context for the investigation, explained a detective's conduct while investigating a crime, gave meaning to the otherwise admissible responses of the defendants, or served solely to impeach a witness." *Lewis* at ¶ 41. In *State v. Kelley*, 179 Ohio App.3d 666, 2008-Ohio-6598, ¶ 13, the court rejected a confrontation argument similar to that made in the case before us because the informant's testimony in *Kelley* was admitted to show the context of the controlled buy rather than the truth of the matter asserted. *Kelley* relied on the holding of the Eighth District that "tape recordings of drug transactions are not hearsay[,]" citing *State v. Sloan*, 8th Dist. No. 79832, 2002-Ohio-2669, ¶ 16. Explained *Sloan*: "Federal courts have uniformly held that introducing such tapes does not violate

the Confrontation Clause or any evidence rules governing hearsay. Such statements are merely necessary to establish the context of the defendant's statements and responses, and therefore not offered to prove the truth of the matter asserted." *Sloan* at ¶ 16.

{¶ 19} More recently, in *State v. Aldrich*, 12th Dist. No. CA2006-10-044, 2008-Ohio-1362, ¶ 9, the court found no violation of the Confrontation Clause when a confidential informant's taped statements were admitted even though the informant did not testify at trial. See, also, *State v. Smith*, 162 Ohio App.3d 208, 2005-Ohio-3579, holding that statements heard on an audiotape made of a controlled drug buy were not hearsay because the statements were not offered for their truth but simply to provide a context within which to understand the activity taking place.

{¶ 20} In the case before us, the informant's taped statements were not offered for their truth, but to provide a context to assist the jury in understanding what transpired during the drug buy. When Deputy Rettig testified as to the events surrounding the three controlled buys, he used the informant's statements on the three tapes to explain the progression of the drug buys. As the jury was listening to the tapes, Rettig explained slang terms being used by the informant and appellant to refer to the pieces of crack cocaine and the amounts being bagged and sold. Rettig identified one of the voices on the tapes as that of the informant and another voice as that of appellant.

{¶ 21} Based on the foregoing, we find that the informant's taped statements are not hearsay. Because they are not hearsay, they are not "testimonial" statements and do

not violate appellant's constitutional right to confrontation under the Sixth Amendment. Accordingly, appellant's first assignment of error is not well-taken.

{¶ 22} Appellant's second and third assignments will be considered together. In support of his second assignment of error, appellant asserts that the jury erred by finding that the enhancements included in Counts 1 and 2 that the offenses were committed in the vicinity of a school or juvenile were proven beyond a reasonable doubt. The jury's findings on the enhancements raised the offenses from fourth-degree felonies to third-degree felonies. In support of his third assignment of error, appellant asserts that because the juvenile enhancements set forth in R.C. 2925.03(C)(4)(c) were not proven, his crimes did not reach the level of third-degree felonies and he therefore was improperly sentenced.

{¶ 23} R.C. 2925.03(C)(4)(c) specifies that "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 of cocaine that is not crack cocaine or equals or exceeds one gram but is less than five grams of crack cocaine, trafficking in cocaine is a *felony of the fourth degree*, and there is a presumption for a prison term for the offense. If the amount of the drug involved is within one of those ranges *and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile*, trafficking in cocaine is a *felony of the third degree*, and there is a presumption for a prison term for the offense." (Emphasis added.)

{¶ 24} R.C. 2925.01(BB) provides: "An offense is 'committed within the vicinity of a juvenile' if the offender commits the offense within one hundred feet of a juvenile or

within the view of a juvenile, regardless of whether the offender knows the age of the juvenile, whether the offender knows the offense is being committed within one hundred feet of or within view of the juvenile, or whether the juvenile actually views the commission of the offense."

{¶ 25} The state's evidence in this case as to the presence of juveniles consisted of background noise on the audiotapes that sounded like children's voices. There also was evidence that the drug transactions occurred at a residence in a mobile home park. Because children's voices were heard and the transactions occurred in a residence, the jury could reasonably have inferred that they took place "within the vicinity of a juvenile" as defined in R.C. 2925.01(BB). Establishing the juvenile enhancement elevates the degree of the offenses of which appellant was found guilty.

{¶ 26} Based on the foregoing, we find that the jury did not err by finding that the drug transactions occurred within the vicinity of a juvenile. Having made that finding, we further conclude that appellant was not improperly sentenced. Accordingly, appellant's second and third assignments of error are not well-taken.

{¶ 27} On consideration whereof, this court finds that appellant was not prejudiced and the judgment of the Wood County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

Arlene Singer, J., concurs in part
and dissents in part.

SINGER, J.

{¶ 28} I dissent from the majority's disposition of Assignment of Error No. II regarding the admission of the audiotapes for the purpose of proving the enhancement element of within the "juvenile vicinity" under R.C. 2925.03(C)(4)(c).

{¶ 29} Any factor that serves to elevate the degree of a crime is not a sentencing enhancement, but rather an element of the crime, which must be proven beyond a reasonable doubt. See *State v. Cole* (1994), 94 Ohio App.3d 629, 633 (holding that

specifications which elevate a crime from a misdemeanor to a felony are elements of a crime, and not penalty enhancements). Thus, the "juvenile vicinity" specification under R.C. 2925.03(C)(4)(c) is an element of a crime, which must be proved beyond a reasonable doubt to elevate the crime of trafficking in cocaine from a fourth degree felony to a third degree felony. See *State v. Brown* (1993), 85 Ohio App.3d 716, 722 (concluding that the finding of "within one thousand feet of the boundaries of any school premises" is an essential element of the state's case-in-chief which must be proved beyond a reasonable doubt before an enhanced penalty can be imposed).

{¶ 30} R.C. 2925.01(BB) provides: "An offense is 'committed in the vicinity of a juvenile' if the offender commits the offense within one hundred feet of a juvenile or within the view of a juvenile, regardless of whether the offender knows the age of the juvenile, whether the offender knows the offense is being committed within one hundred feet of or within view of the juvenile, or whether the juvenile actually views the commission of the offense." R.C. 2925.01(N) defines "juvenile" as "a person under eighteen years of age." Although the statute does not require proof of the specific age or identity of the alleged juvenile, the state must prove beyond a reasonable doubt that any such individual is under the age of 18. See *State v. Creech*, 12th Dist. No. CA2006-05-019, 2007-Ohio-2558 (police officer's testimony that he observed a female juvenile in a kitchen which was near the area where the drug buy took place was sufficient to prove presence of a child); *State v. Fannin*, 8th Dist. No. 80014, 2002-Ohio-4180 (rejecting the defendant's argument that proof of the ages of children reportedly present at the

defendant's home when law enforcement uncovered a quantity of drugs was required, and finding the testimony of a detective differentiating between "adults" and "children" he observed on the premises to be sufficient to support a conviction on a juvenile specification). See, also, *State v. Flores*, 6th Dist. Nos. WD-04-012, WD-04-050, 2005-Ohio-3355.

{¶ 31} Nevertheless, Evid.R. 901 provides that, "as a condition precedent to admissibility," certain evidence must be authenticated or identified by a foundation that is "sufficient to support a finding that the matter in question is what its proponent claims." By way of illustration but not limitation, voice identification must be authenticated, "whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." Evid.R. 901(B)(5). The threshold standard for authenticating evidence pursuant to Evid.R. 901(A) is low, and "does not require conclusive proof of authenticity, but only sufficient foundational evidence for the trier of fact to conclude that * * * [the evidence] is what its proponent claims it to be." *State v. Easter* (1991), 75 Ohio App.3d 22, 25.

{¶ 32} In the present case, over defense counsel's objection to the admission of the audiotapes because the confidential informant was unavailable to testify, the trial court admitted the recordings, but the informant's statements were admitted only as to "context." As noted by the majority, when statements are offered to show "context," they are not being offered for the truth of the matter asserted and, thus, do not violate the

Confrontation Clause. *United States v. Tolliver* (C.A.7, 2006), 454 F.3d 660, 665-666.

The statements made by the alleged drug seller's voice, identified only by one deputy as appellant's voice, were admissible to prove the elements related to the drug trafficking charges. Without additional foundation, the "context" evidence may not be used to prove an element of the crime.

{¶ 33} During trial, no testimony was ever presented that children were near or lived in the mobile home where the alleged buys took place. No testimony or foundation was made as to any of the background noises on the audiotapes to prove that any alleged "voices" were minor children. In fact, no references to any background "voices" were made until the prosecutor's closing argument, which is not evidence. Therefore, the record indicates that the trial was devoid of any foundation which would be sufficient to support a finding that "the matter in question is what its proponent claims it was," i.e., that the background noise was a voice of a minor child, to prove the "juvenile vicinity" element.

{¶ 34} As a result, I would hold that Evid.R. 901 required the authentication or identification of any alleged voices in the background of the tape to prove that they actually belonged to juveniles and were not simply television noise or an adult with a high pitched voice. Since no foundation was presented and the tapes were otherwise admitted only for "context," the tapes were not admissible as proof of the "juvenile vicinity" element for penalty enhancement of the underlying crime. Therefore, I would

affirm the convictions for the underlying drug trafficking charges, but would reverse and vacate the "juvenile vicinity" enhancements for Counts 1 and 2.