[Cite as *State v. McNeal*, 2009-Ohio-3888.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91507

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TANYA McNEAL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-500391

BEFORE: Cooney, A.J., Rocco, J., and Dyke, J.

RELEASED: August 6, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

COLLEEN CONWAY COONEY, A.J.:

{¶ 1} Defendant-appellant, Tanya McNeal ("McNeal"), appeals her drug possession and drug trafficking convictions. Finding no merit to the appeal, we affirm.

{¶ 2} In September 2007, McNeal and codefendants, Daniel Verhun ("Verhun") and Keith Hilliard ("Hilliard"), were charged in an eight-count indictment.[1] McNeal was charged with two counts of drug possession and two counts of drug trafficking. The matter proceeded to a jury trial, at which the following evidence was adduced.

{¶ 3} In January 2007, Cleveland police searched Hilliard's home pursuant to a search warrant. While at Hilliard's home, the police learned that Hilliard planned on ordering a shipment of cocaine from Verhun later that day. Hilliard called Verhun and ordered the drugs in the presence of police. Verhun testified that he then called one of his suppliers, Marlon Bennett ("Bennett"), who advised him to contact McNeal and arrange a meeting to pick up the drugs.[2] Verhun then contacted McNeal, who suggested that they meet at the local Blockbuster Video ("Blockbuster") store. Verhun testified that he has known McNeal for approximately ten years and that she works as a beautician, but also is a drug runner.

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[1]Both Verhun and Hilliard pled guilty to an amended charge of drug possession.

[2]Bennett is Verhun's nephew by marriage.

{¶ 4} Based on Hilliard's information, Cleveland police set up surveillance at Verhun's home and followed him to Blockbuster. Verhun arrived at Blockbuster before McNeal, so he went inside the store. When he came out of the store, he observed McNeal parked next to his vehicle. He walked over to her vehicle and reached into the front passenger window. She handed him a plastic bag that felt heavy to Verhun, so he looked inside and noticed a scale. He did not want the scale, so he took the drugs out of the plastic bag, put them in his vehicle, wrapped the scale in the bag, and returned it to McNeal. Verhun then told her that he would call her later to pay her for the drugs. He intended to sell the drugs to Hilliard for $7,000.

{¶ 5} The police then followed Verhun to Hilliard's house, where he was arrested. When they approached his vehicle, they observed cocaine in the front seat. Verhun told the police that McNeal delivered the drugs to him and that he was going to meet her again to pay her $6,000 for the drugs. After Verhun's arrest, the police had Verhun call McNeal and they arranged to meet at a Drug Mart. When McNeal arrived, Verhun identified her to the police and she was arrested.

{¶ 6} After her arrest, McNeal gave the police consent to search her apartment in Lakewood and her apartment in Cleveland. They found two bags with cocaine residue in a garbage can in the Lakewood apartment.

{¶ 7} McNeal testified in her own defense. She admitted meeting Verhun at Blockbuster, but claimed that she met him there to give him Bennett's belongings, not to give him drugs.[3] She testified that Verhun was supposed to give her the $800 that Verhun's wife owed Bennett. She stated that Bennett was loaning her the money so she could buy some baby items for her pregnant daughter. She testified that she gave Verhun a plastic bag that contained the scale and another bag, which contained clothing. Verhun returned the scale to her, but did not give her the $800 she was expecting. She stated that she met Verhun at Drug Mart in order to get the $800 from him, but was stopped by the police. She testified that she did not know that there were drugs in the bag and at her home. She also denied knowing that she was to receive proceeds from Verhun's drug transaction.

{¶ 8} The jury found McNeal guilty of two counts of drug possession and two counts of drug trafficking. The trial court sentenced her to six years in prison on each drug trafficking charge and one of the drug possession charges. She was sentenced to one year in prison on the remaining drug possession charge, with the four counts to be served concurrent to each other, for an aggregate of six years in prison.

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[3]McNeal and Bennett were romantically involved, and she had recently ended the relationship.

{¶ 9} McNeal now appeals, raising three assignments of error for our review.

Other Acts Evidence

{¶ 10} In the first assignment of error, McNeal argues that the trial court erred when it improperly admitted evidence of other acts in violation of Evid.R. 404(B) and R.C. 2945.59.

{¶ 11} The admission of evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of the syllabus. Accordingly, we review the trial court's decision for an abuse of discretion. *State v. Martin* (1985), 19 Ohio St.3d 122, 483 N.E.2d 1157; *State v. Hymore* (1967), 9 Ohio St.2d 122, 224 N.E.2d 126. An abuse of discretion is "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, quoting *State v. Adams* (1980) 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 12} Evid.R. 404(B) provides that:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."

{¶ 13} R.C. 2945.59 similarly provides that:

> "In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme,

> plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake of accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by defendant."

{¶ 14} McNeal argues that the trial court erred when it allowed Verhun to testify that he had received cocaine from McNeal on a prior occasion. Verhun testified that in 2006 he called a supplier to purchase drugs. The supplier advised him to contact McNeal and pick up the drugs from her. Verhun then called McNeal, who was at her beauty salon, and they arranged to meet there. When he entered the salon, McNeal handed him a brown paper bag that contained powder cocaine. She contends that this evidence violates Evid.R. 404(B) and R.C. 2945.59 because the prior act was too remote and not closely related in nature, time, and place to her drug possession and trafficking charges. In addition, she claims that Verhun's testimony is unreliable because he had an interest in providing testimony for the State to benefit his own case.

{¶ 15} In *State v. Broom* (1988), 40 Ohio St.3d 277, 282, 533 N.E.2d 682, paragraph one of the syllabus, the Ohio Supreme Court held that: "[t]he rule and statute contemplate acts which may or may not be similar to the crime at issue. If the other act does in fact 'tend to show' by substantial proof any of those things enumerated, such as proof of motive, opportunity, intent, preparation,

plan, knowledge, identity or absence of mistake or accident, then evidence of the other act may be admissible."

{¶ 16} In the instant case, the trial court held a hearing regarding Verhun's testimony. The State argued that the evidence was admissible to show absence of mistake on McNeal's part. Furthermore, it demonstrated her intent, knowledge, and common scheme or plan. The court concluded that the State met its burden under Evid.R. 404(B). The trial court found that the evidence was not unfairly prejudice and tended to show McNeal's knowledge, motive, intent, and common scheme or plan. We agree.

{¶ 17} This evidence was relevant in showing that McNeal possessed the required knowledge and intent for the drug possession and trafficking charges. See *State v. Cruz* (Oct. 28, 1993), Cuyahoga App. No. 64007; *State v. Lumbus* (Jan. 11, 2007), Cuyahoga App. No. 87767. The prior act was similar in that she supplied drugs to another party in a hand-to-hand transaction using a bag. In addition, the trial court gave the jury a limiting instructions on other acts evidence and accomplice testimony.

{¶ 18} McNeal also relies on *State v. Pierson* (1998), 128 Ohio App.3d 255, 714 N.E.2d 461, and contends that testimony of prior drug transactions is inadmissible. In *Pierson*, the trial court allowed the witness to testify about his previous drug dealings with Pierson. On appeal, Pierson argued that this testimony violated Evid.R. 404(B). The State argued that this evidence was used

to prove the identity of the perpetrator and his criminal purpose. The *Pierson* court found that criminal purpose was not at issue because Pierson's defense was not that he lacked the requisite intent, but that the witness was lying and Pierson did not sell drugs to the witness. Id. at 260. The court also noted that since the State's proof depended on the witness's credibility, his testimony concerning the uncharged prior drug sales added no independent probative value of Pierson's identity as the perpetrator. Id. at 261. Thus, the court concluded that the witness's testimony violated Evid.R. 404(B). Id.

{¶ 19} The instant case is distinguishable from *Pierson*. Here, McNeal's defense was that she had no knowledge that there were any drugs in the bag or in her house, nor that she was going to receive proceeds from Verhun's drug transaction. Verhun's testimony tended to show McNeal's knowledge, intent, absence of mistake, and common scheme or plan, not her identity. As such, McNeal's reliance on *Pierson* is not persuasive.

{¶ 20} Thus, we find that the trial court did not abuse its discretion in admitting Verhun's testimony regarding a prior drug transaction with McNeal.

{¶ 21} Accordingly, the first assignment of error is overruled.

Jury Instructions

{¶ 22} In the second assignment of error, McNeal argues that the trial court denied her constitutional right to a fair trial when it issued an incomplete

"deliberate ignorance" instruction to the jury as set forth in *U.S. v. Jewell* (C.A. 9, 1976), 532 F.2d 697.

{¶ 23} In *Jewell,* the Ninth Circuit Court of Appeals held that the term "'knowingly' in criminal statutes is not limited to positive knowledge, but includes the state of mind of one who does not possess positive knowledge only because he consciously avoided it." Id. at 702. Thus, the *Jewell* court adopted a "deliberate ignorance" or "willful blindness" jury instruction, which requires: "(1) that the required knowledge is established if the accused is aware of a high probability of the existence of the fact in question, (2) unless he actually believes it does not exist." Id. at 704, fn. 21. See, also, *U.S. v. Heredia* (C.A.9, 2007), 483 F.3d 913.

{¶ 24} This instruction may be used when an individual participates in, but closes his eyes to the obvious risk that he is engaging in unlawful conduct. *U.S. v. Sarantos* (C.A.2, 1972), 455 F.2d 877. The deliberate ignorance instruction "should not be given in every case in which a defendant claims lack of guilty knowledge, but should only be given 'when there is evidence that the defendant has his suspicions aroused but then * * * deliberately omits making inquiry in order to avoid having actual knowledge.'" (Internal citation omitted.) *U.S. v. Baron* (C.A.9, 1996), 94 F.3d 1312, 1317. The "substantive justification for the rule is that deliberate ignorance and positive knowledge are equally culpable." *Jewell* at 700. "To act knowingly, therefore, is not necessarily to act only with

positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question." Id. See, also, *State v. McKoy* (Feb. 17, 2000), Cuyahoga App. No. 74763.

{¶ 25} "'A court can properly find wilful [sic] blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realised [sic] its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge.'" Id., fn. 7, quoting G. Williams, Criminal Law: The general part, Chapter 57 at 159 (2d Ed. 1961).

{¶ 26} In the instant case, the trial court instructed the jury as follows: "Deliberate ignorance. You can further find that the defendant acted knowingly if she deliberately closed her eyes to what she had reason to believe were the facts." McNeal argues that this instruction fails to include the second prong of the *Jewell* test. She claims that the trial court deleted the presumption of innocence when it failed to instruct the jury that: "[y]ou may not find such knowledge, however, if you find that the defendant actually believed that no drugs were in the vehicle driven by the defendant, or if you find that the defendant was simply careless." See *Heredia* at 913. We disagree.

{¶ 27} In *State v. Smith* (June 15, 1995), Cuyahoga App. No. 67524, this court found that the identical jury instruction does not "relieve[ ] the State of its burden to prove that appellant knowingly possessed the [drugs] beyond a

reasonable doubt. The instruction as stated does not create a presumption of knowledge. The State must present the facts and circumstances surrounding the delivery of the box to prove that one in appellant's shoes must have known that the box contained an illegal substance." Thus, the *Smith* court concluded that, under the circumstances of that case, the instruction was proper.

{¶ 28} Likewise, in the instant case, the State presented facts and circumstances surrounding McNeal's handling, transporting, and providing of drugs. The trial court found that the instruction was proper because McNeal's "argument to the jury [was] that if there were drugs there, she had no knowledge of it * * *." Defense counsel told the jury to watch and listen to the instruction for knowingly and what McNeal knowingly did, raising the inference that if McNeal delivered something, she did not know what she was doing. Thus, based on the facts of the instant case, we find that the trial court's deliberate ignorance instruction was proper.

{¶ 29} Accordingly, the second assignment of error is overruled.

Sufficiency and Manifest Weight

{¶ 30} In the third assignment of error, McNeal states that her drug trafficking and drug possession convictions "are against the manifest weight of the evidence," but also argues that there was insufficient evidence to support her convictions.

{¶ 31} The standard of review for the sufficiency of evidence is set forth in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus, which states:

> "Pursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."

{¶ 32} See, also, *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23, 514 N.E.2d 394; *State v. Davis* (1988), 49 Ohio App.3d 109, 113, 550 N.E.2d 966.

{¶ 33} *Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541 and *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the State has met its burden of production at trial. *Thompkins*. On review for sufficiency, courts are to assess not whether the State's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. Id. The 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. *Jenks* at paragraph two of the syllabus.

{¶ 34} To warrant reversal under a manifest weight of the evidence claim, this 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 evidence, the trial court clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *Thompkins* at 387.

{¶ 35} As the *Thompkins* Court declared:

> "Weight of the evidence concerns 'the inclination of the greater amount of credible evidence offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.' * * *
>
> The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." Id.

{¶ 36} A reviewing court must be mindful that the weight of the evidence and the credibility of witnesses are matters primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. Moreover, in reviewing a claim that a conviction is against the manifest weight of the evidence, the conviction cannot be reversed unless it is obvious that the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins* at 387.

{¶ 37} In the instant case, McNeal was convicted of two counts of drug possession under R.C. 2925.11(A), which provides that: "[n]o person shall knowingly obtain, possess, or use a controlled substance." She was also convicted of two counts of drug trafficking under R.C. 2925.03(A)(1) and (2), which provide that: "[n]o person shall knowingly do any of the following: "(1) Sell or offer to sell a controlled substance; (2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person."

{¶ 38} We note that "[a] person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B). In *State v. Teamer* (1998), 82 Ohio St.3d 490, 492, 696 N.E.2d 1049, the Ohio Supreme Court held that the issue of whether a person charged with drug possession knowingly possessed, obtained, or used a controlled substance "is to be determined from all the attendant facts and circumstances available."

{¶ 39} McNeal argues that Verhun's self-serving testimony coupled with the allegation of a prior drug transaction led the jury to find knowledge where none existed. We disagree.

{¶ 40} A review of the record reveals that Verhun knew McNeal personally and had a prior occasion with her as a drug runner. Verhun testified that six months earlier he had a similar hand-to-hand transaction with McNeal when she supplied him with a paper bag containing cocaine. On the day of the incident, Verhun contacted McNeal and set up a place to meet her so he could pick up nine ounces of cocaine powder from her. Verhun met McNeal at a local Blockbuster. Verhun testified that he walked over to McNeal's vehicle and reached into the passenger window. She handed him a plastic bag, which felt heavy to him, so he looked inside and observed a scale. He did not want the scale so he took the drugs out of the plastic bag, put them in his vehicle, placed the scale back in the bag, and returned it to McNeal. Verhun then told her that he would call her later to meet her and pay for the drugs. He intended to sell the drugs to Hilliard for $7,000. Verhun further testified that he never received any of Bennett's belongings in the plastic bag McNeal gave him.

{¶ 41} The Cleveland police officers on the scene corroborated Verhun's testimony. The officers testified that they followed Verhun to Blockbuster and saw him take a plastic bag out of McNeal's vehicle, place a package into his vehicle, and then return the bag to McNeal. After this transaction, the police followed Verhun as he proceeded directly to Hilliard's house, where he was arrested. The police found nine ounces of powder cocaine in Verhun's vehicle and absolutely no clothing inside the vehicle. The police also monitored Verhun

when he later called McNeal to arrange to meet her and pay for the drugs. Police officers testified that when they searched McNeal's vehicle, they found a plastic bag with a scale inside. They also found cocaine residue at her home and McNeal stipulated to the drug's identity and authenticity.

{¶ 42} Although Verhun and McNeal could be found to lack credibility in that their testimony conflicts, the jury as the trier of fact in the instant case, weighed all the evidence and reasonable inferences and found Verhun to be a more credible witness. When assessing witness credibility, "the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123, 489 N.E.2d 277. The factfinder is free to believe all, part, or none of the testimony of each witness appearing before it. *Hill v. Briggs* (1996), 111 Ohio App.3d 405, 412, 676 N.E.2d 547. The court below is in a much better position than an appellate court "to view the witnesses, to observe their demeanor, gestures and voice inflections, and to weigh their credibility." *Briggs*, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

{¶ 43} Based on the aforementioned facts and circumstances, we conclude that McNeal acted "knowingly." Thus, we find that there was sufficient evidence to support McNeal's convictions. We also find that her convictions are not against the manifest weight of the evidence.

{¶ 44} Accordingly, the third assignment of error is overruled.

{¶ 45} Judgment is affirmed.

It is ordered that appellee recover of appellant 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 common pleas court to carry this judgment into execution.

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

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COLLEEN CONWAY COONEY, ADMINISTRATIVE JUDGE

KENNETH A. ROCCO, J., and
ANN DYKE, J., CONCUR