

[Cite as *State v. Caute*, 2009-Ohio-5222.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92169

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RUSSELL CAUTE

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-512393

BEFORE: Sweeney, J., Stewart, P.J., and Boyle, J.

RELEASED: October 1, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANT

Thomas E. Conway
75 Public Square Building
Suite 700
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William Mason
Cuyahoga County Prosecutor
BY: Erin Donovan
Assistant Prosecuting Attorney
1200 Ontario Street
Cleveland, Ohio 44113

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).

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Russell Caute (“defendant”), appeals his drug trafficking and tampering with evidence convictions. After reviewing the facts of the case and pertinent law, we reverse defendant’s convictions.

{¶ 2} On May 27, 2008, undercover Cleveland Police Detective Matthew Stepic drove up to a man by the name of David Stokes, who was standing near the corner of W. 54th Street and Franklin Blvd. in Cleveland, Ohio, and signaled him by nodding his head and holding up two fingers, which indicated that he wished to purchase drugs. Stokes approached the vehicle and Detective Stepic asked if he could “buy a 20,” which Stokes understood to mean a \$20 rock of crack cocaine. Stokes responded that he did not have the drugs with him, but they could go down the street to make the purchase. Stokes got into the vehicle and the two men drove a few blocks to an apartment building located at 6010 Franklin Blvd.

{¶ 3} Upon arrival, Stokes asked Detective Stepic for the \$20. The officer replied that he would not give Stokes the money until he saw the drugs. Stokes said he would get his partner and return with the crack. Stokes’s intent was to broker this deal in exchange for approximately \$5 of crack cocaine. Stokes went to unit number seven of the apartment building to get Rickey Hightower, who had been selling Stokes crack cocaine for the past several months. However, defendant answered the door to apartment seven and told Stokes that Hightower was not there. Defendant then asked Stokes if he knew who was looking for

Hightower, and Stokes replied that he did not. Defendant told Stokes to step outside and both men exited the building.

{¶ 4} Defendant approached the passenger side of Detective Stepic's car, allegedly with something small in his hand. Detective Stepic held out a \$20 bill, and as defendant leaned into the window, police vehicles surrounded the scene. Stokes, who was standing a few feet away from the car, threw a crack pipe on the ground, which was later recovered. Defendant backed away from the car, tossed something on the ground behind him, and put his hands in the air. Police arrested defendant and Stokes. Defendant had a cell phone and \$172 in cash in his pockets. Although police searched the surrounding tree lawn area, they did not recover any drugs.

{¶ 5} On June 25, 2008, defendant was indicted for drug trafficking in violation of R.C. 2925.03(A)(1), possession of criminal tools in violation of R.C. 2923.24, and tampering with evidence in violation of R.C. 2921.12(A)(1). On September 5, 2008, a jury found defendant guilty of drug trafficking and tampering with evidence. The court sentenced defendant to two years in prison.

{¶ 6} Defendant now appeals, raising two assignments of error for our review.

{¶ 7} "I. The trial court erred in not granting appellant's motion for judgment of acquittal as to the counts of the indictment.

{¶ 8} "II. The jury verdicts of guilty as to drug trafficking and tampering with evidence were against the manifest weight of the evidence."

{¶ 9} When reviewing sufficiency of the evidence, an appellate court must determine “[w]hether, 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. Jenks* (1991), 61 Ohio St.3d 259.

{¶ 10} The proper test for an appellate court reviewing a manifest weight of the evidence claim is as follows:

{¶ 11} “The appellate court sits as the ‘thirteenth juror’ and, reviewing the entire record, weighs all the reasonable inferences, considers the credibility of witnesses and determines whether, in resolving conflicts in 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.” *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶ 12} The elements of drug trafficking are set forth in R.C. 2925.03, which states in pertinent part as follows: “(A) No person shall knowingly * * * (1) Sell or offer to sell a controlled substance * * *.” The legal definition of tampering with evidence is found in R.C. 2921.12, which states that, “(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall * * * (A) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation * * *.”

{¶ 13} The Ohio Supreme Court has expanded on the meaning of “offer to sell a controlled substance,” as the term pertains to drug trafficking. “In R.C. 2925.03(A)(1), the infinitive object is to ‘sell a controlled substance.’ The proscribed conduct is offering *to sell* a controlled substance, not offering the controlled substance. Therefore, our analysis of the statute should not turn on whether appellant transferred a controlled substance.” *State v. Scott* (1982), 69 Ohio St.2d 439, 440 (emphasis in original). Additionally, in *State v. Patterson* (1982), 69 Ohio St.2d 445, 447, the Court stated the following:

{¶ 14} “Triers of fact should consider the totality of circumstances and decide whether, in a particular scenario, there is sufficient evidence to prove beyond a reasonable doubt that the accused has *knowingly offered* to sell a controlled substance. For example, the dialogue and course of conduct of the accused, as well as the nature of the goods transferred, may be relevant to this determination.

{¶ 15} “* * *

{¶ 16} “Through R.C. Chapter 2925, the General Assembly has attempted to extirpate the malevolent traffic in drugs within Ohio. This is strong legislation, not an insipid gesture. R.C. 2925.03(A) criminalizes participation at all levels of commerce in drugs. Under R.C. 2925.03(A)(1), (5) or (7), one who knowingly offers to sell a controlled substance markets drugs. Failure to deliver does not *ipso facto* exonerate the accused.” (Emphasis in original.)

{¶ 17} In the instant case, testimony established that street level drug transactions are often set up using certain suggestions or gestures, such as “nodding [the] head or making hand signals or just showing * * * money like having it folded up in your hands so they know you’re interested * * *.” See, also, *State v. Woodruff*, Cuyahoga App. No. 88306, 2007-Ohio-3064 (noting that in a high drug trafficking area, when someone standing on a street corner makes eye contact and nods, it is typically “a signal indicating the sale of drugs”).

{¶ 18} Stokes testified that it was his intent to arrange the sale of a rock of crack cocaine to undercover Detective Stepic. However, Stokes stated that he intended to get the drugs from Hightower, rather than defendant. Stokes said that although most times when he went to Hightower’s apartment to purchase drugs, defendant was there, he never engaged in drug transactions with defendant. Stokes further testified that he was unsure if he told defendant why a stranger was looking for Hightower.

{¶ 19} After Stokes and defendant exited the apartment building, defendant approached the car and Stokes stood out of the way. Stokes testified as follows regarding what happened next: “I believe the detective asked for a 20 and Russell began to pat his pockets and I took it that Russell didn’t understand what the guy was talking about. I took it that Russell thought the guy needed change for a \$20 bill because he was patting his pockets, and I told Russell at that time that the man is not looking for \$20 change. He’s looking for \$20 of crack.”

{¶ 20} A minute or two later, Stokes ran into Hightower in the yard. He spoke with Hightower and did not pay attention to the remainder of what transpired between defendant and the officer. According to Stokes, he never saw defendant's hand go into the car window and he never saw defendant with any drugs that night. Stokes testified that he could not recall defendant saying anything to Detective Stepic. Asked if there would be a reason other than buying drugs that someone was looking for Hightower, Stokes stated, "Probably not. Rickey is kind of a popular guy [for] drug buys." Asked if there would be a reason other than facilitating a drug purchase that defendant would follow Stokes out of the building, Stokes stated, "I couldn't really answer that. I was under the impression that, originally I was under the impression he was just being nosey, but when he walked up to the car, I thought - honestly I thought maybe there was a chance * * * he could help me with this * * *."

{¶ 21} Sergeant Thomas Shoulders of the Cleveland Police Department testified that he was working undercover in a surveillance vehicle in the Franklin Blvd. and W. 54th Street area on May 27, 2008. He observed Stokes get into Detective Stepic's undercover car, and he followed the car east on Franklin Blvd. According to Sergeant Shoulders, when Stokes got out of the vehicle to get the drugs, he saw him motion to someone in the second story window of the apartment building before he went inside. Sergeant Shoulders also testified that as the other officers arrived on the scene, he witnessed defendant toss something to the ground behind his back.

{¶ 22} Detective Stepic testified as follows, regarding how the events transpired after he and Stokes arrived at their destination:

{¶ 23} “A. * * * He asked me for the money. I acted like a crack head would. Said this is the only 20 I’ve got for the night. You’re not getting my money until I get my dope.

{¶ 24} “He said I’ll bring it right back. I said you ain’t getting my money. We haggled back and forth. He said all right, I’ll go upstairs, get my partner and, you know, he’ll bring it down. Somebody will bring my dope before I give up my money.

{¶ 25} “Q. By dope you mean crack cocaine?

{¶ 26} “A. Yeah.

{¶ 27} “Q. Not to be confused with marijuana?

{¶ 28} “A. No. This was strictly understood I was looking to buy a \$20 rock of crack cocaine.

{¶ 29} “Q. He told you he would go up and get his partner?

{¶ 30} “A. Yeah * * *.”

{¶ 31} Detective Stepic testified that he also saw Stokes gesture to someone in a second story window before entering the complex. Detective Stepic radioed Sergeant Shoulders that Stokes was bringing someone down to sell him the drugs. Approximately a minute or two later, Stokes and defendant came out of the building and approached the passenger side of the undercover police vehicle. Detective Stepic testified as to what happened next:

{¶ 32} “A. They had some kind of conversation that I couldn’t hear. Stood out of the car for a little bit. The heavy set Mr. Caute walked up to the car. He was doing something with his hands. He was obviously looking down in his hand manipulating something in his hand kind of going like this. I couldn’t exactly see what it was at that time.

{¶ 33} “* * *

{¶ 34} “Q. His right hand and he was bouncing it up and down?

{¶ 35} “A. Yeah, like something was in his hand like.

{¶ 36} “Q. Was he looking in his hand?

{¶ 37} “A. Pardon me?

{¶ 38} “Q. Was he looking at his hand at all?

{¶ 39} “A. Yeah.

{¶ 40} “Q. Looking at it and bouncing it?

{¶ 41} “A. Yeah.”

{¶ 42} Detective Stepic next testified that he paid special attention to defendant’s hand movements because police officers are trained to always watch an offender’s hands, as that is where potential danger lies. Detective Stepic’s testimony continued:

{¶ 43} “Q. What happens when he approaches your window?

{¶ 44} “A. He leans into the thing setting both his forearms on the top of the door where the glass comes out.

{¶ 45} “Q. Where are his hands in relation to the door frame?

{¶ 46} "A. Inside the car.

{¶ 47} "Q. Both hands are inside the car?

{¶ 48} "A. I'm leaning here on the console of the car. It's only a Grand Am. I can reach over and touch the passenger door. He leans in and, you know, pretty close proximity.

{¶ 49} "* * *

{¶ 50} "Q. Once he leans in the car, did he say anything to you?

{¶ 51} "A. He said something. I don't remember what he said.

{¶ 52} "Q. Did you say anything to him?

{¶ 53} "A. I said here is my money. You got my dope?

{¶ 54} "Q. Was there - there was no response from him or you don't recall?

{¶ 55} "A. I don't recall.

{¶ 56} "Q. What happened next?

{¶ 57} "A. As we were - I'm trying to see what he has in his hand. Nobody trusts each other when you do these things because [as] Sergeant Shoulders said, testified, sometimes they'll grab your \$20 and run. We call it getting ganged. You just got robbed of your \$20. That's what they call it or sometimes crack heads if they're on a binge or real high, they get real brave or desperate and try to snatch the dope out of the dope boy's hand. It's one of these, give me the rock, I'll give you the \$20 kind of thing. That's about where we were at when the troops showed up.

{¶ 58} “Q. You’re extending your 20 at this point into his hands?”

{¶ 59} “A. He was kind of like leaning extending farther into the car.

{¶ 60} “Q. You’re about a foot away?”

{¶ 61} “A. Yes.

{¶ 62} “Q. In your opinion you know exactly what Mr. Caute, Mr. Caute knows exactly what you want when you extend that \$20?”

{¶ 63} “A. It sure seemed like it.”

{¶ 64} Detective Stepic testified that when the police pulled up on the tree lawn, defendant made a movement with his right hand before putting both hands up in the air. Furthermore, according to Detective Stepic, it is routine for the arresting officers to arrive on the scene as quickly as possible after they believe the transaction is complete, to ensure they apprehend the offender and keep the evidence intact.

{¶ 65} To convict defendant of drug trafficking in the instant case, the state must present sufficient evidence that defendant *knowingly offered* to sell drugs to Detective Stepic. In reviewing the record on appeal, we take into consideration the totality of the circumstances in this particular scenario. See, *Patterson*, supra. R.C. 2901.22(B) states 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.” In *State v. Scott* (1982), 69 Ohio St.2d 439, 440, the Ohio Supreme Court defined “offer” as “to declare one’s readiness or willingness.” See, also, Black’s Law Dictionary (7th Ed.) 1111 (defining “offer”

as “[t]he act or an instance of presenting something for acceptance”; “[a] promise to do * * * some specified thing in the future”).

{¶ 66} We also find guidance in *State v. Miller*, Cuyahoga App. No. 81608, 2003-Ohio-1168. In *Miller*, detectives and a confidential informant set up a controlled buy with a suspected drug dealer, agreeing to pay \$450 for one-half ounce of crack cocaine. When the suspected dealer arrived at the pre-arranged location, Miller was sitting in the passenger seat of the dealer’s car, acting as a “look out.” There were a lot of people at the location and the dealer attempted to leave the scene before the sale took place. However, the police officers used their cars to block the dealer and Miller in. Subsequently, a jury found Miller guilty of drug trafficking under an aiding and abetting theory.

{¶ 67} On appeal, this court reversed Miller’s trafficking conviction, finding that the trafficking occurred when the dealer offered to sell the drugs via his cellular phone, and that there was no evidence that Miller played a part in that offer.

{¶ 68} “At best, in alleging that Miller participated in a crime by acting as a look-out, the State presented evidence that amounted to rather tenuous proof that he engaged in *attempted* trafficking, because no sale was consummated and there was no proof introduced that Miller made any offer to sell anything. No attempt was alleged, and no guilty finding was predicated on any attempt charge. Accordingly, the State did not, in any circumstance, prove beyond a reasonable

doubt that Miller engaged in actual trafficking based on a look-out theory.” *Id.*, at ¶25 (emphasis in original).

{¶ 69} A review of the record in the instant case shows that the state presented the following evidence: Stokes took Detective Stepic to buy a rock of crack cocaine from Hightower. When Hightower was not available, Stokes brought defendant to the scene. Stokes testified that he was unsure if he told defendant why a stranger was looking for Hightower. Stokes further testified that he had never engaged in drug transactions with defendant, he never saw defendant with drugs that night, and he could not recall defendant saying anything to Detective Stepic.

{¶ 70} Detective Stepic testified that defendant walked up to the passenger side of the car Detective Stepic was driving. Defendant had something in his hand; however, Detective Stepic did not identify - or even speculate - as to what this object was. Defendant leaned into the car window and said something; however, Detective Stepic could not recall what defendant said. Detective Stepic held out a \$20 bill and asked defendant if he had the “dope”; however, Detective Stepic could not recall if defendant responded. Detective Stepic testified that “That’s about where we were at when the troops showed up,” although in his opinion, defendant “sure seemed like” he knew that the \$20 was for drugs.

{¶ 71} Defendant argues that no drugs were found, there was no evidence as to what, if anything, was in his hand at the time, and because Stokes went to

the apartment to get Hightowe, rather than defendant, there is no evidence that defendant knew that the man in the car was looking to buy drugs. Defendant further argues that there was no evidence that he “offered to sell the undercover police detective anything, let alone crack cocaine.”

{¶ 72} In reviewing this evidence in a light most favorable to the state, as we must, we conclude that this is insufficient to prove the elements of drug trafficking via an offer to sell a controlled substance. There is no evidence whatsoever that defendant made a verbal offer to sell drugs to Detective Stepic. Although the testimony showed that an offer to sell may be non-verbal, nothing in the record has defendant gesturing clandestinely or presenting money or drugs for acceptance. Simply put, the state failed to present evidence that defendant knowingly offered to sell drugs.

{¶ 73} Additionally, we find that the state did not present sufficient evidence to show that defendant tampered with evidence in violation of R.C. 2921.12. There was no evidence that anyone saw any type of drugs that day, and no drugs were recovered from the scene. Testimony that defendant had an unidentified object in his hand that he tossed to the ground is not sufficient to show that he altered, destroyed, concealed, or removed any “thing, with purpose to impair its value or availability as evidence in [a] proceeding or investigation * * *.” In other words, in looking at the evidence in a light most favorable to the state, nothing in the record links the unidentified object that defendant threw to the ground to the state’s accusation that he offered to sell Detective Stepic crack cocaine. Cf.

State v. Like, Montgomery App. No. 21991, 2008-Ohio-1873 (holding that there was insufficient evidence to support a conviction of tampering with evidence when the state contended that 1) the absence at the scene of the crime of the gun used as the murder weapon proved that the defendant improperly disposed of the gun; and 2) the absence of fingerprints found at the scene proved that the defendant improperly wiped them away); *State v. Schmitz*, Franklin App. No. 05AP-200, 2005-Ohio-6617, at ¶19 (holding that there was insufficient evidence to support an argument that the defendant purposely deleted digital photographs to make them unavailable as evidence when it was found that the photos were no longer on defendant's digital camera disc. "No additional direct or circumstantial evidence linked defendant to the deletion process besides a theoretical motive and opportunity * * * [which], without more, do not prove an act").

{¶ 74} We do not mean to say that the recovery of the evidence in question is necessary to sustain a tampering with evidence conviction. Clearly, if the evidence is destroyed, recovery is impossible. However, the state must show, inter alia, that the evidence existed, and it must identify that evidence as the same "thing" that the defendant tampered with. See, e.g., *State v. Williams*, Cuyahoga App. No. 83574, 2004-Ohio-4476 (holding that sufficient evidence was presented to prove the elements of tampering with evidence when officers testified that they "observed Williams put something in his mouth before he started running"; "they observed Williams chewing and trying to swallow something" after they caught him; "when they were able to get Williams' mouth

open, they observed crack cocaine particles” inside; and drug fragments were recovered from Williams’ stomach after it was pumped with a gastric lavage).

{¶ 75} In summary, the evidence was insufficient to prove defendant’s drug trafficking and tampering with evidence convictions. Accordingly, we sustain defendant’s first assignment of error. Defendant’s second assignment of error is moot. App. R. 12(A)(1)(C). Defendant’s convictions are reversed and his two year prison sentence is vacated.

{¶ 76} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellee his costs herein.

It is ordered that a special mandate be sent to said 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.

JAMES J. SWEENEY, JUDGE

MELODY J. STEWART, P.J., and
MARY J. BOYLE, J., CONCUR