

[Cite as *State v. Clark*, 2010-Ohio-4354.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94050

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

UMAR CLARK

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-524666

BEFORE: McMonagle, J., Gallagher, A.J., and Cooney, J.

RELEASED AND JOURNALIZED: September 16, 2010

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CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Umar Clark, appeals from the trial court's judgment, rendered after a bench trial, convicting him of drug trafficking. We affirm.

I

{¶ 2} Clark was charged in a one-count indictment with drug trafficking in violation of R.C. 2925.03(A)(2). The matter was tried to the court after Clark waived his right to a jury trial. At the conclusion of the state's case, the defense made a Crim.R. 29 motion, which was denied. Clark

then testified; at the conclusion of his case, he renewed his Crim.R. 29 motion, which was again denied. The court found him guilty as charged and sentenced him to six months of community control sanctions with conditions.¹

II

{¶ 3} The following was established through the trial testimony. Officer Joseph Digregorio of the Cleveland Police Department stopped Clark in the vehicle he was driving for “illegal window tint.” The officer approached the vehicle, advised Clark of the reason for the stop, and asked for identification. Clark told Digregorio that his license was suspended. Clark exited the vehicle, and as he did so, Digregorio saw a small bag of marijuana fall to the ground. Digregorio escorted Clark to the rear of Clark’s car to arrest him for driving under suspension and saw another small bag of marijuana fall to the ground. Upon searching Clark, the officer found an additional ten bags of marijuana in the front of his waistband. In total, the marijuana weighed 71.83 grams. Digregorio testified that, in his experience, the amount and packaging of the marijuana was indicative that it was for sale. According to the officer, the street value of the marijuana was approximately \$500.

¹ Clark subsequently twice violated the conditions of his community control sanctions. The first time, the sanctions were continued and extended, and Clark was ordered to a 60-day jail term. The second time, the sanctions were terminated and Clark was sentenced to a one-year prison term.

{¶ 4} Clark admitted to possessing the marijuana. He contended that it was for his personal use and that he had no intent to sell or otherwise distribute it. Clark testified that at the time of the incident, he was “stressed” because he had been laid off from a job he loved and was having financial difficulties. Thus, on the day of the incident, he contacted an acquaintance to purchase marijuana. According to Clark, he had intended to purchase only an ounce or two, but his acquaintance offered to sell him everything he had for \$200, and Clark agreed.

{¶ 5} Clark testified that after he purchased the drugs, he planned to buy beer and “cigarillos” (to smoke the marijuana with), and then go to a party to watch a Cavaliers basketball game. Clark’s testimony about the use of the marijuana at the party conflicted: at one point, he said that some of the friends would bring food and he was “bringing a 12-pack and also some weed [to] puff-puff-pass” with his friends; at another point, he said “I wasn’t never going to distribute marijuana. I was going to smoke marijuana. So I don’t know who was going to smoke. I know me personally, I was going to smoke and I was going to drink.”

{¶ 6} Clark testified that, about a week prior to this incident, he purchased a half-ounce of marijuana for \$40 for personal use. He further testified that at the time he purchased the drugs for \$200 in this case, his monthly income was only \$600 in unemployment compensation. He stated

that he put the drugs in his waistband because he had shorts on and did not have any other place to put them.

III

{¶ 7} In his first assignment of error, Clark contends that the evidence was insufficient to sustain a drug trafficking conviction.

{¶ 8} An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt.

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. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

{¶ 9} R.C. 2925.03(A)(2), governing drug trafficking, provides in pertinent part that “[n]o person shall knowingly * * * [p]repare 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.”

{¶ 10} Clark contends that the state failed to prove that the marijuana was for sale. We disagree.

{¶ 11} R.C. Chapter 3719.01 is the definitional section for controlled substances and defines “sale” to include “delivery, barter, exchange, transfer, or gift, or offer thereof.” R.C. 3719.01(AA). Relying on that definition, several courts, including this court, have upheld drug trafficking convictions based on gifts of marijuana.²

{¶ 12} Although Clark testified that the marijuana was for his personal use because he was “stressed,” he also testified that he was planning on taking the marijuana to a party that day so that he and his friends could “puff-puff-pass” it. He admitted that, in contrast to the \$200 he spent on the drugs here, about a week prior, he purchased a half-ounce of marijuana for \$40 for personal use.

{¶ 13} Further, Officer Digregorio testified that, in his experience, the amount and packaging of the marijuana was indicative that it was for sale. According to the officer, the street value of the marijuana was approximately \$500.

{¶ 14} On this record, sufficient evidence was presented that Clark was going to sell the marijuana, and therefore, supports the drug trafficking conviction.

IV

²See *State v. Gates* (May 17, 2001), Cuyahoga App. No. 78120; *State v. Brownlow* (1991), 75 Ohio App.3d 88, 598 N.E.2d 888; *State v. Smith* (Sept. 21, 1998), Clermont App. No. CA97-08-074.

{¶ 15} In his second assignment of error, Clark contends that his conviction was against the manifest weight of the evidence.

{¶ 16} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether “there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether 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.” (Internal citations and quotations omitted.) *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶81.

{¶ 17} In this assignment, Clark contends that the marijuana was for his personal use, rather than for sale, and argues his testimony was “just as credible as the officer’s testimony * * *.” Although we consider the credibility of the witnesses in a manifest weight challenge, we are mindful that the determination regarding witness credibility rests primarily with the trier of fact. *State v. Hill* (1996), 75 Ohio St.3d 195, 205, 661 N.E.2d 1068. The trier of fact is in the best position to view the witnesses and observe their demeanor, gestures, and voice inflections. Those observations are critical to

a resolution of each witness's credibility. *State v. Antill* (1964), 176 Ohio St. 61, 66, 197 N.E.2d 548.

{¶ 18} The trial judge found Clark's testimony incredible, stating: "It's very hard to accept that you would spend \$200 from your meager funds for marijuana to entertain a bunch of friends. Little easier to understand that you might do that because it's an investment in making more money.

{¶ 19} "There was no real solid explanation why he was buying so much marijuana that week, given he bought a much smaller quantity in prior weeks. First he said he was going to share it with friends, then he said he didn't know if anyone was going to smoke it.

{¶ 20} "* * *

{¶ 21} "There was no good reason provided why * * * it was in your waistband for easier retrieval for quick sale."

{¶ 22} Upon review, we do not find that the trial court's resolution of the conflicting testimony was such that it "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Leonard*, supra at ¶81. The second assignment of error is therefore overruled.

Judgment affirmed.

It is ordered that appellee recover from 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

CHRISTINE T. McMONAGLE, JUDGE

SEAN C. GALLAGHER, A.J., and
COLLEEN CONWAY COONEY, J., CONCUR