[Cite as *State v. Curiale*, 2010-Ohio-6018.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94290

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BRITTANY CURIALE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-513247-B

BEFORE: Stewart, J., Kilbane, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: December 9, 2010

ATTORNEY FOR APPELLANT

Edward M. Heindel
450 Standard Building
1370 Ontario Street
Cleveland, OH 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Kerry A. Sowul
Assistant County Prosecutor
The Justice Center
1200 Ontario Street, 9th Floor
Cleveland, OH 44113

MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Brittany Curiale, appeals the judgment of the Cuyahoga County Court of Common Pleas convicting her of four counts of drug trafficking with schoolyard specifications. Appellant challenges both the weight and sufficiency of the state's evidence relating to the schoolyard specifications and the effectiveness of her defense counsel's representation. Upon review, we affirm.

{¶ 2} According to the testimony presented at trial, in early June 2008, the Lakewood Police received complaints of unusual foot and vehicular traffic occurring at the downstairs unit of a duplex located at 1327 Lakewood Avenue, that suggested to them possible drug activity. Det. Guzik of the narcotics unit investigated the matter. His investigation revealed that Eric Manlet, co-defendant in this case, and his brother lived in the downstairs unit.

{¶ 3} On June 18, 2008, Guzik called in a confidential reliable informant ("CRI") to the police station. When Guzik told the CRI of the focus of the investigation, the CRI indicated a familiarity with the address and indicated he knew who to call to arrange a contraband purchase there. While Guzik monitored and recorded the call, the CRI telephoned appellant and told her he wanted to purchase some marijuana. Appellant told him to pick her up at her home.

{¶ 4} Prior to sending the CRI out, Guzik searched the CRI and his car and provided him with $25 in marked currency. Guzik kept the CRI under constant surveillance. Another detective kept the duplex under surveillance. After picking appellant up, the CRI drove to the duplex and pulled into the driveway. Appellant got out, went into the downstairs unit, remained inside for less than five minutes, then returned to the CRI's car. The CRI drove appellant home, then met with Guzik and handed over a bag of marijuana

that weighed more than four grams. The CRI indicated he gave the marked money to appellant who made the purchase and kept five dollars of the money as her fee for "middle-manning the deal."

{¶ 5} On July 9, 2008, Guzik arranged another controlled buy using the same CRI. He followed a similar procedure, but this time, the CRI wore a "wire." In addition, the CRI asked appellant if he could also "purchase a firearm." The CRI picked up appellant, drove her to the duplex, gave her the marked money, and waited for her. She returned with approximately ten grams of marijuana. The CRI inquired about the availability of the firearm. Appellant said she "forgot," so she immediately made a telephone call. Upon speaking with her contact, she indicated a purchase would cost $70. The CRI told her he would get the money. He drove appellant home and met with Guzik to give him the marijuana.

{¶ 6} Twenty minutes later, with money supplied by Guzik, the CRI again picked up appellant and went to the duplex. This time, the CRI went into the house with appellant. When they came out, the CRI drove appellant home. He then met with Guzik and handed Guzik a semiautomatic pistol. The police obtained a search warrant for the duplex. The search recovered additional marijuana, scales, phones, and other drug paraphernalia.

{¶ 7} Appellant was indicted on charges of drug trafficking with firearm and schoolyard specifications, unlawful transaction in weapons, and

possessing criminal tools. Following a bench trial, appellant was found guilty of two counts each of drug trafficking in violation of R.C. 2925.03(A)(1) and (A)(2) with schoolyard specifications. The court sentenced appellant to one year of community control sanctions. Appellant timely appeals presenting three assignments of error for our review.

{¶ 8} In her first two assignments of error, appellant challenges the sufficiency and the manifest weight of the state's evidence supporting her convictions for the schoolyard specifications. Appellant argues that the state failed to support the schoolyard specifications attached to the drug trafficking counts with sufficient evidence and, therefore, the trial court should have granted her motion for acquittal as to those specifications. Appellant further argues that, even if the state provided sufficient evidence of the specifications, they were not supported by the manifest weight of the evidence. We will address these assignments of error together.

{¶ 9} "The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, paragraph two of the syllabus. Sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. Id. at 386. 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." (Emphasis deleted.) Id. at 387. Weight is not a question of mathematics, but depends on its effect in inducing belief. Id.

{¶ 10} When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court examines 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. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 11} The manifest weight of the evidence standard of review requires us to 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 and a new trial ordered. *State v. Otten* (1986), 33 Ohio App.3d 339, 515 N.E.2d 1009, paragraph one of the syllabus. The discretionary power to grant a new trial should be exercised only in exceptional cases where the evidence weighs heavily against the conviction. *Thompkins*, 78 Ohio St.3d at 387.

{¶ 12} We are mindful that the weight to be given the evidence and the credibility of the 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. The trier of fact has the authority to "believe or disbelieve any witness or accept part of what a witness says and reject the rest." *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.

{¶ 13} Appellant was convicted of a schoolyard specification in violation of R.C. 2925.03(C)(2)(b), that elevated the degree of the drug trafficking offenses from fifth degree felonies to fourth degree felonies. In order to convict on a schoolyard specification, the state must prove beyond a reasonable doubt that the drug transaction occurred "on school premises, in a school building, or within one thousand feet of the boundaries of any school premises."

{¶ 14} "School" is defined as "any school operated by a board of education, any community school established under Chapter 3314 of the Revised Code, or any nonpublic school for which the state board of education prescribes minimum standards under section 3301.07 of the Revised Code, whether or not any instruction, extracurricular activities, or training provided by the school is being conducted at the time a criminal offense is committed." R.C. 2925.01(Q).

{¶ 15} R.C. 2925.01(R) defines "School premises" as either of the following: "(1) The parcel of real property on which any school is situated, whether or not any instruction, extracurricular activities, or training provided by the school is being conducted on the premises at the time a criminal offense is committed;

{¶ 16} "(2) Any other parcel of real property that is owned or leased by a board of education of a school, the governing authority of a community school established under Chapter 3314 of the Revised Code, or the governing body of a nonpublic school for which the state board of education prescribes minimum standards under section 3301.07 of the Revised Code and on which some of the instruction, extracurricular activities, or training of the school is conducted, whether or not any instruction, extracurricular activities, or training provided by the school is being conducted on the parcel of real property at the time a criminal offense is committed."

{¶ 17} According to R.C. 2925.01(S), school building means "any building in which any of the instruction, extracurricular activities, or training provided by a school is conducted, whether or not any instruction, extracurricular activities, or training provided by the school is being conducted in the school building at the time a criminal offense is committed."

{¶ 18} At trial, on direct examination, the prosecutor asked Guzik about the location of the duplex and, specifically, whether there were any schools

nearby. Guzik testified, "There's a day care, a licensed day care, right on the corner." He stated the facility's name was "Faith Presbyterian Head Start Day Care," and that it was "a stone's throw" from the duplex.

{¶ 19} The prosecutor asked Guzik if the facility was "within a thousand feet," and Guzik responded, "Oh, yes." The prosecutor then asked Guzik if he knew whether the facility was "State certified." Guzik answered, "It is."

{¶ 20} This court recently reviewed and rejected a challenge to the sufficiency and manifest weight of the evidence supporting schoolyard specifications under these same facts in co-defendant Manlet's appeal. See *State v. Manlet*, 8th Dist. No. 93309, 2010-Ohio-3305. Following the Ohio Supreme Court's decision in *State v. Manley*, 71 Ohio St.3d 342, 1994-Ohio-440, 643 N.E.2d 1107, we found that the state was not required to present direct evidence that the school was operated by a board of education. Additionally, we noted that another appellate district had "determined that the manifest weight of the evidence supported the finding of guilt on a drug-trafficking charge with a schoolyard specification based, in part, on the officer's testimony that the residence was '780 feet' from 'Highland Head Start.'" *Manlet* at ¶37, quoting *State v. Taylor*, Scioto App. No. 07CA3147, 2007-Ohio-7174, fn. 3. Accordingly, appellant's first two assignments of error are overruled.

{¶ 21} In her third assignment of error, appellant argues that she was denied the right to effective assistance of counsel due to her counsel's failure to raise an entrapment defense at trial. She contends that it was the government's idea to place her in a position to commit the crime and that there was no evidence that she was predisposed to commit the crime.

{¶ 22} In order to substantiate a claim of ineffective assistance of counsel, an appellant must demonstrate (1) that the performance of the defense counsel was seriously flawed and deficient, and (2) the result of the appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 647; *State v. Brooks* (1986), 25 Ohio St.3d 144, 147, 495 N.E.2d 407.

{¶ 23} Here, the outcome of the trial would not have been different had defense counsel asserted entrapment as a defense. The Supreme Court of Ohio established the test for entrapment in *State v. Doran* (1983), 5 Ohio St.3d 187, 192 N.E.2d 1295. The *Doran* court stated that "[w]here the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order to prosecute, the defense of entrapment is established and the accused is entitled to acquittal." Id. at 192. But, "entrapment is not established when government officials 'merely

afford opportunities or facilities for the commission of the offense' and it is shown that the accused was predisposed to commit the offense." Id., quoting *Sherman v. United States* (1958), 356 U.S. 369, 372, 78 S.Ct. 819, 2 L.Ed.2d 848.

{¶ 24} The record shows that appellant was predisposed to commit the crimes for which she was convicted. Guzik testified that the CRI had appellant's phone number and contacted her on two occasions to buy marijuana. On each occasion, appellant then contacted her supplier, co-defendant Manlet, and set up the drug deal with her acting as the middleman. She instructed the CRI to pick her up at her home, and she kept a portion of the marked "buy" money as payment for her part in the drug deal. Under these facts, it is clear that the police did not induce appellant to commit the crimes, they merely afforded appellant an opportunity to do so. Thus, failure to raise the affirmative defense of entrapment did not constitute ineffective assistance of counsel. Appellant's third assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its 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 Cuyahoga County Court of Common Pleas to carry this judgment into execution. 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.

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MELODY J. STEWART, JUDGE

MARY EILEEN KILBANE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR