[Cite as *State v. Wachtel*, 2009-Ohio-5788.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

MAX WACHTEL

Defendant-Appellant

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 2008 CA 00274

O P I N I O N

CHARACTER OF PROCEEDING: Crmiinal Appeal from the Court of Common Pleas, Case No. 2008 CR 01286(A)

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: November 2, 2009

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1} Appellant Max Wachtel appeals his conviction, in the Stark County Court of Common Pleas, on two felony drug trafficking counts and one felony corrupting another with drugs count. The relevant facts leading to this appeal are as follows.

{¶2} On July 11, 2008, law enforcement officers working with the Stark County Metro Narcotics Unit arranged a controlled buy of heroin from appellant, utilizing a confidential informant, William "Uncle Bill" Heden. After the officers searched and fitted Heden with recording devices, Heden drove to appellant's apartment on South Canal Street in Canal Fulton, Ohio. According to Heden, appellant came out to the car and sold him more than a gram of heroin; Heden then returned to the metro officers, who were parked nearby.

{¶3} The aforesaid transaction was not adequately recorded on Heden's audio and video devices. Nonetheless, on the same date, a sixteen-year-old female neighbor of appellant, A.D., purchased and snorted $10.00 worth of heroin from appellant at his Canal Street apartment. A.D. felt ill after using the heroin, and later left with her boyfriend.

{¶4} On July 14, 2008, metro officers again arranged a controlled buy of heroin from appellant utilizing Heden as the CI. After the officers searched and fitted Heden with recording devices, Heden again drove to appellant's apartment on South Canal Street in Canal Fulton, Ohio. Appellant came out to the car; the two then went inside, and appellant sold him more than a gram of heroin. Heden then returned to the nearby metro officers.

{¶5} Appellant was thereafter indicted by the Stark County Grand Jury on the following counts:

{¶6} Count One: Corrupting another with drugs, one count, a second degree felony in violation of R.C. 2925.02(A)(4)(a) and/or (c),

{¶7} Count Two: Trafficking in heroin, one count, a third degree felony in violation of R.C. 2925.03(A)(1)(C)(6)(c),

{¶8} Count Three: Trafficking in heroin, one count, a fourth degree felony in violation of R.C. 2925.03(A)(1)(C)(6)(b), and

{¶9} Count Four: Trafficking in heroin, one count, a fourth degree felony in violation of R.C. 2925.03(A)(1)(C)(6)(c).

{¶10} Appellant entered pleas of not guilty, and the matter proceeded to a jury trial on October 16 and 17, 2008. The jury ultimately found appellant guilty of three of the four counts, namely Counts 1, 2, and 4.

{¶11} On October 27, 2008, the trial court sentenced appellant to a three-year prison sentence for corrupting another with drugs (Count 1, R.C. 2925.02(A)(4)(a)), five years for drug trafficking (Count 2), and twelve months for drug trafficking (Count 4), for an aggregate prison term of nine years.

{¶12} On November 26, 2008, appellant filed a notice of appeal. He herein raises the following three Assignments of Error:

{¶13} "I. THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION FOR A DISMISSAL IN ACCORDANCE WITH CRIMINAL RULE 29, AS THERE WAS INSUFFICIENT EVIDENCE TO CONVICT THE APPELLANT ON COUNTS ONE, TWO AND FOUR OF THE INDICTMENT.

{¶14} "II. THE JURY'S VERDICT AGAINST THE APPELLANT OF GULITY (SIC) ON THE CHARGES ON COUNTS ONE, TWO AND FOUR OF THE INDICTMENT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND SHOULD BE OVERTURNED.

{¶15} "III. THE TRIAL COURT ABUSED ITS DISCRETION IN NOT GRANTING A MISTRIAL WHEN PRIOR ACTS TESTIMONY REGARDING THE APPELLANT WAS PRESENTED TO THE JURY AND DENIED APPELLANT A FAIR TRIAL."

I.

{¶16} In his First Assignment of Error, appellant argues his three-count conviction was not supported by sufficient evidence. We disagree.

{¶17} In reviewing a claim of insufficient evidence, "[t]he 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.

Corrupting with Drugs Count

{¶18} Appellant first challenges the sufficiency of the evidence pertaining to his conviction on one count of corrupting another with drugs under R.C. 2925.02(A)(4)(a). This statute states in pertinent part: "No person shall knowingly * * * [b]y any means, *** [f]urnish or administer a controlled substance to a juvenile who is at least two years the offender's junior, when the offender knows the age of the juvenile or is reckless in that regard."

{¶19} Appellant's challenge to the corrupting with drugs conviction is essentially two-fold. First, he urges that there was no evidence that he knew the age of A.D. at the time of the drug transaction. However, as the State responds in its brief, A.D., who had just turned 17 at the time of the trial, took the stand and was able to be observed by the jury. A.D.'s best friend, B.C., later testified that both girls knew appellant, and that he had asked them how old they were. See Tr. at 320. Finally, we reiterate that the above statute includes a "reckless" standard regarding a defendant's knowledge of the age of the juvenile.

{¶20} Appellant secondly asserts that the State is required to show that the substance furnished to the juvenile contains some detectable amount of the relevant controlled substance before a person can be convicted under the above statute. In support, appellant cites *State v. Chandler* (2006), 109 Ohio St.3d 223, 2006-Ohio-2285, wherein the Ohio Supreme Court held that a substance offered for sale must contain some detectable amount of the relevant controlled substance before a person can be sentenced as a major drug offender under R.C. 2925.03(C)(4)(g). Id. at syllabus. Our reading of *Chandler* indicates that the Court was concerned with drug offender *sentencing*, rather than reversing the underlying convictions for trafficking (which involved a substance that turned out to be baking soda). Indeed, the Court therein stated that a person can be convicted under Ohio law for offering to sell a controlled substance without actually transferring a controlled substance to the buyer. See *Chandler* at ¶ 9, citing *State v. Patterson* (1982), 69 Ohio St.2d 445. We thus find *Chandler* inapplicable in this case.

{¶21} In the case sub judice, the State concedes that it presented no scientific evidence regarding the nature of the substance appellant provided to A.D. Nonetheless, A.D. testified at trial that appellant himself had identified the substance as heroin, which later caused her to get sick and pass out. Furthermore, when A.D.'s boyfriend, a heroin user, saw her after she woke up, he was angry at her for getting high.

{¶22} Accordingly, viewing the evidence before us in a light most favorable to the prosecution, we hold reasonable triers of fact could have found, beyond a reasonable doubt, that appellant committed the crime of corrupting another with drugs.

Drug Trafficking Counts

{¶23} Appellant was also convicted of two counts of trafficking in drugs. R.C. 2925.03(A)(1) sets forth the essential elements of the offense of trafficking in drugs: "No person shall knowingly sell or offer to sell a controlled substance." See *State v. Moore*, Stark App.No. 2008-CA-00228, 2009-Ohio-4958, ¶ 12.

{¶24} The gist of appellant's argument is that the CI in this case, "Uncle Bill" Heden, was unreliable as he was allegedly motivated by financial gain in making the undercover buys. We thus find appellant's argument should be properly addressed under our "manifest weight" analysis, infra. See App.R. 16(A)(7).

{¶25} Appellant's First Assignment of Error is therefore overruled.

II.

{¶26} In his Second Assignment of Error, appellant maintains his three-count conviction was against the manifest weight of the evidence. We disagree.

{¶27} Our standard of review on a manifest weight challenge to a criminal conviction is stated as follows: "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." *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. See also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175, 485 N.E.2d 717.

{¶28} In regard to the corrupting with drugs count, appellant attacks the credibility of A.D., the minor female who purchased the heroin. Appellant maintains that A.D. admittedly lied to the police on two occasions and had difficulty on the stand describing what heroin is. However, upon review, we are unwilling under the circumstances of this case to second-guess the jury's credibility determinations regarding appellant's provision of heroin to A.D.

{¶29} The next focus of appellant's manifest weight argument is on the drug trafficking convictions. As noted in our recitation of the facts, the two counts stemmed from separate incidents on July 11 and July 14, 2008, in which Heden's person and car were searched by metro officers, following which he was wired and given cash to purchase heroin. In the first instance, Heden returned from the car with what was later identified as 1.22 grams of heroin. Heden testified that he was then debriefed by the officers and searched again. In the second instance, Heden similarly returned from appellant's apartment with what was later identified as 1.69 grams of heroin.

{¶30} Appellant points out that Heden testified he first became an informant for the police in 2006 when he was arrested for felony drug trafficking and gave information

to the police in exchange for a lesser sentence. Tr. at 193-195. Heden also admitted he was a past drug user, and had once been addicted to pain killers. Id. at 196. The officers did not test Heden for drug usage prior to his involvement in the transactions on which this case is based, nor did they check his telephone records. Id. at 184, 242. According to Sergeant Greenfield, one of the testifying officers, Heden is paid on a per-buy basis. Id. at 181-182.

{¶31} Appellant also questions the apparent discrepancy between Heden's claim of knowing nothing about drugs, except what he picked up from appellant or television shows, and what was revealed during trial questioning. For example, Heden was aware that the type of heroin sold by appellant was called "Mexican brown" heroin on the street, that a "G" is a gram, and he knew heroin can be snorted, smoked or injected. Id. at 210-220, 228. Appellant argues that "[t]here is no reason to believe the CI's testimony based on his involvement in drugs, drug trafficking, and the way in which these alleged transactions took place." Appellant's Brief at 11.

{¶32} However, we again recognize that the jurors were in the best position to gauge Heden, and it is often necessary for law enforcement to utilize informants who have questionable involvement with the drug trade. Upon review, we find the jury did not clearly lose its way and create a manifest miscarriage of justice requiring that appellant's convictions for drug trafficking be reversed and a new trial ordered.

{¶33} Appellant's Second Assignment of Error is therefore overruled.

III.

{¶34} In his Third Assignment of Error, appellant maintains the trial court erred in not granting a mistrial based on a State's witness' "prior acts" testimony. We disagree.

{¶35} The admission or exclusion of evidence rests in the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 180, 31 OBR 375, 510 N.E.2d 343. As a general rule, all relevant evidence is admissible. Evid.R. 402. Our task is to look at the totality of the circumstances in the particular case and determine whether the trial court acted unreasonably, arbitrarily, or unconscionably in its redress of the disputed evidence. See *State v. Oman* (Feb. 14, 2000), Stark App.No. 1999CA00027.

{¶36} Evid.R. 403(A) states as follows: “Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.” In addition, Evid.R. 404(A) provides, with certain exceptions, that evidence of a person's character is not admissible to prove the person acted in conformity with that character. Evid.R. 404(B) sets forth an exception to the general rule against admitting evidence of a person's other bad acts. Said rule states as follows: “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.”

{¶37} At trial in the case sub judice, B.C. (the 17-year-old friend of A.D.), a witness for the State, was generally asked how she knew of appellant:

{¶38} "Q: And how did you end up going to his [appellant's] apartment or who did you go there with?

{¶39} “A: I went there with [A.D.] and we went over there because he wanted to like hang out.

{¶40} “Q: So you hung out there, you said you went twice?

{¶41} “A: Uh-huh.

{¶42} “Q: When you were there did you or [A.D.] do any drugs?

{¶43} “A: I didn't do any drugs there.

{¶44} “Q: When you say you didn't do any drugs there, what does that mean?

{¶45} “A: I bought marijuana from him.

{¶46} “MR. JAKMIDES: I would object, Your Honor. Ask that be stricken.

{¶47} “THE COURT: Stricken." Tr. at 314-315.

{¶48} Later, at the close of the direct examination, and at appellant's request, the court held a conference at the bench at which time appellant moved for a mistrial. The motion was overruled. The court thereupon gave the following instruction to the jury:

{¶49} "THE COURT: Ladies and Gentlemen, during the direct examination of this witness the question was asked, initial question, I am sure you will recall, was: Did you do any drugs there? And the answer was, I didn't do any drugs there. And then the Prosecutor asked, Did you do drugs somewhere or something to that effect, and her response was I bought marijuana from him.

{¶50} "That is not relevant to this case, and you are instructed to disregard it and not consider it for any purpose whatsoever.

{¶51} "Thank you." Id. at 322.

{¶52} Appellant maintains that B.C.’s comment most likely affected the jury and its decision to find the appellant guilty of selling drugs and corrupting another with drugs. We have frequently recognized that juries are presumed to follow and obey the

limiting instructions given them by the trial court. *State v. DeMastry,* 155 Ohio App.3d 110, 127, 799 N.E.2d 229, 2003-Ohio-5588, citing *State v. Franklin* (1991), 62 Ohio St.3d 118, 127, 580 N.E.2d 1. Here, the trial court duly instructed the jury, having already sustained the defense objection and granted the motion to strike. The jury furthermore ultimately refused to convict appellant on one of the four counts.

{¶53} In light of the overall record before us in this matter, we find no abuse of discretion in this case in the trial court's decision to deny a mistrial based on the single statement by B.C.

{¶54} Appellant's Third Assignment of Error is overruled.

{¶55} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Stark County, Ohio, is hereby affirmed.

By: Wise, J.

Gwin, P. J., and

Delaney, J., concur.

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

/S/ PATRICIA A. DELANEY_____

JUDGES

JWW/d 106

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
MAX WACHTEL	:	
	:	
Defendant-Appellant	:	Case No. 2008 CA 00274

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

Costs assessed to appellant.

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

/S/ PATRICIA A. DELANEY_____

JUDGES