[Cite as *State v. Horne*, 2010-Ohio-350.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. TYRONE HORNE Appellant	C.A. No. 24672 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 08 09 3091(A)

DECISION AND JOURNAL ENTRY

Dated: February 3, 2010

MOORE, Presiding Judge.

{¶1} Appellant, Tyrone Horne, appeals from the judgment of the Summit County Court of Common Pleas. We affirm.

I.

{¶2} In September of 2008, detectives with the Akron Police Department were conducting an investigation of Tyrone Horne. To further their investigation, the detectives used a confidential informant to set up a meeting to purchase drugs from Horne. According to trial testimony, prior to the meeting, the informant was searched for money, drugs, or other contraband. Once the search was complete, the detectives gave him money with which to purchase the cocaine. After the purchase was complete, the detectives again searched him for money, drugs, or other contraband.

{¶3} On September 17, Detective Kandy Shoaff, who was working undercover, drove the informant to a prearranged location to purchase cocaine from Horne. Detective Shoaff

parked in the parking lot of the location, a McDonald's, and waited for Horne. Horne arrived and parked next to Detective Shoaff's vehicle. The informant entered Horne's vehicle and purchased a baggie of cocaine. Detective Shoaff testified that she observed the drug transaction from her vehicle. After the transaction was completed, Horne drove out of the lot. Several undercover officers followed him. Horne drove to a residence on Bertha Avenue. He parked his vehicle and entered the home.

{¶4} On September 18, Detective Shoaff drove the informant to another prearranged drug buy. She drove him to the Bertha Avenue residence. Again, the detectives searched the informant prior to, and after the drug transaction. Detective Shoaff observed the informant enter and exit the home through the back door. She further observed Horne at the home during the drug transaction. The Akron Police Department continued surveillance of the home and of Horne while awaiting a search warrant. The police then executed the warrant and arrested Horne. The drug-buy money was not recovered.

{¶5} On September 29, 2008, Horne was indicted on two counts of trafficking in cocaine, in violation of R.C. 2925.03(A)(C)(4). Count one was a fourth-degree felony; count two, a second-degree felony. On February 4, 2009, a supplemental indictment was filed, charging Horne with another count of trafficking in cocaine, a violation of R.C. 2925.03(A)(C)(4), a third-degree felony. Horne pled not guilty to all the charges. At the time of the jury trial, the prosecutor dismissed the second-degree felony count of trafficking in cocaine.

{¶6} On February 17, 2009, the jury found Horne guilty of the remaining two counts. On March 6, 2009, the trial court sentenced Horne to a total of four years of incarceration. He has timely appealed, and has raised two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

"THE EVIDENCE PRESENTED WAS INSUFFICIENT AND [HORNE'S] CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶7} In his first assignment of error, Horne contends that the evidence presented was insufficient and his convictions were against the manifest weight of the evidence. We do not agree. Although he assigns error to the sufficiency of the evidence, Horne has failed to adequately present this Court with any argument to support this contention. He has failed to state the standard of review for sufficiency, failed to state the elements of the charges he contends the State failed to prove, and finally, his conclusion to this assignment of error only mentions manifest weight. We decline to create a sufficiency argument for him. *Cardone v. Cardone*, (May 6, 1998), 9th Dist. No. 18349, at *8 ("If an argument exists that can support [Appellant's contentions], it is not this court's duty to root it out"). Instead, this assignment of error solely focuses on the manifest weight of the evidence. Accordingly, we will limit our discussion to the argument regarding the manifest weight of the evidence.

{¶8} "While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. CA19600, at *1, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390.

{¶9} A determination of whether a conviction is against the manifest weight of the evidence does not permit this Court to view the evidence in the light most favorable to the State to determine whether the State has met its burden of persuasion. *State v. Love*, 9th Dist. No. 21654, 2004-Ohio-1422, at ¶11. Rather,

> "an appellate 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 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, 340.

{¶10} Horne was convicted of two counts of trafficking in cocaine, in violation of R.C. 2925.03. Pursuant to R.C. 2925.03(A)(1), "[n]o person shall knowingly *** [s]ell or offer to sell a controlled substance[.]" Specifically, with regard to the September 17, 2008 drug buy, Horne was convicted of R.C. 2925.03(C)(4)(c), a fourth-degree felony, because the amount "equal[ed or exceed[ed] one gram but [was] less than five grams of crack cocaine[.]" This section further states that if the offense occurred within the vicinity of a school, it is a third-degree felony. At trial, the State provided evidence to show that the September 18, 2008 drug buy was in the vicinity of a school.

{¶11} Horne contends that due to several inconsistencies in the testimony, his convictions were against the manifest weight of the evidence. However, a review of the record reveals that any inconsistencies in the testimony are minor. Horne points to Detective Shoaff's testimony that there were no parking spaces between her car and Horne's car during the September 17, 2008 drug buy. Detective Payne, on the other hand, testified that Detective Shoaff's vehicle was "I believe two spots, real close." He could not recall if there were any vehicles between Detective Shoaff's and Horne's. Although Horne contends that the detectives' testimonies are inconsistent, this Court notes that Detective Payne's testimony was not as definite as Horne urges. Detective Payne states that he *believed* there were two spots between the vehicles, not that there *were* two spots between the vehicles. Further, he testified that Detective Shoaff was the only detective in the parking lot, and that he was situated some distance away. He explained that he could not see the transaction from where he was situated. Detective

Shoaff's testimony that there were no spots between the vehicles simply clarifies Detective Payne's previous testimony. The testimony revealed that Detective Shoaff was located in the parking lot, in position to observe the drug transaction, while Detective Payne was situated farther away, unable to view the drug transaction. The jury could have reasonably considered this fact in deciding to believe Detective Shoaff's testimony that her vehicle was next to Horne's. Any alleged minor inconsistency in the testimony does not support a claim that the evidence at trial weighed heavily against the conviction.

{¶12} Horne further points to Detective Shoaff's testimony to support his contention that, although she testified that she observed the September 17, 2008 drug buy, because she did not recall several small details, her testimony must be discounted. Horne contends that due to Detective Shoaff's lack of recall and minor inconsistencies in her testimony, she did not actually witness the drug buy. Instead, Horne contends, "[m]ore likely, she assumed there was a transaction because the [informant] came back with cocaine- [an informant] who was a several time prior felon and a paid informant." This argument is without merit.

{¶13} Detective Shoaff clearly testified that she observed the informant hand Horne the drug-buy money and Horne hand the informant a baggie of crack. She cannot recall several details, including what Horne was wearing or the length of his hair. She admits that she was not staring at the car the whole time the drug buy was taking place, but explained that she did not want to appear obvious, thus arousing Horne's suspicion. This Court concludes that the jury could find that Detective Shoaff's explanation for her inability to recall minor details was reasonable.

{¶14} Horne further contends that because there was no testimony that the detectives observed the September 18, 2008 drug buy, that his conviction for the drug buy was against the

manifest weight of the evidence. Detective Shoaff testified that she drove the informant to a house on Bertha Avenue. She explained that through the investigation, the detectives learned that Horne lived at the Bertha Avenue residence. Detective Horne and Detective Shoaff testified that prior to the drug buy, the informant was searched and given drug-buy money. Detective Shoaff explained that upon arrival, the informant entered and exited the home from the back entrance. After the informant exited the home, Detective Shoaff observed Horne come from the back of the house, stand in the driveway and look to the front of the house. Detective Shoaff testified that the informant gave her cocaine that he had purchased in the home.

{¶15} Horne contends that in the absence of direct evidence that someone observed Horne sell the informant cocaine, "[a]nyone else could have been there and completed the drug transaction then quietly slip out the back door." Circumstantial and direct evidence "possess the same probative value[.]" *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph one of the syllabus. "Furthermore, if the State relies on circumstantial evidence to prove any essential element of an offense, it is not necessary for 'such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction.'" (Internal quotations omitted.) *State v. Tran*, 9th Dist. No. 22911, 2006-Ohio-4349, at ¶13, quoting *State v. Daniels* (June 3, 1998), 9th Dist. No. 18761, at *2. Accordingly, we conclude that the jury could reasonably infer from the detectives' testimony that Horne sold the informant the cocaine.

{¶16} Lastly, Horne contends that "[m]ost intriguing is the fact that the buy money was never retrieved from Mr. Horne if he did indeed give the [informant] the drugs." Although the testimony at trial revealed that the drug-buy money was never recovered, Detective Payne and Detective Shoaff testified that they seldom recover drug-buy money.

{¶17} Accordingly, we conclude that this is not a case where the evidence weighs heavily in favor of reversal. Therefore, Horne's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"THE [TRIAL] COURT ERRED AS A MATTER OF LAW INCLUDING THE COMPLICITY INSTRUCTION IN THE JURY INSTRUCTIONS."

{¶18} In his second assignment of error, Horne contends that the trial court erred as a matter of law by including a complicity instruction in the jury instructions.

{¶19} In reviewing jury instructions, this Court has stated:

> "[A]n appellate court reviews the instructions as a whole. If, taken in their entirety, the instructions fairly and correctly state the law applicable to the evidence presented at trial, reversible error will not be found merely on the possibility that the jury may have been misled. Moreover, misstatements and ambiguity in a portion of the instructions will not constitute reversible error unless the instructions are so misleading that they prejudicially affect a substantial right of the complaining party." (Internal citations omitted.) *Wozniak v. Wozniak* (1993), 90 Ohio App.3d 400, 410.

{¶20} This Court, therefore, must affirm the trial court's jury instructions absent an abuse of discretion. *State v. Franklin*, 9th Dist. No. 22771, 2006-Ohio-4569, at ¶10. The phrase "abuse of discretion" connotes more than an error of judgment; rather, it implies that the trial court's attitude was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶21} The Ohio Supreme Court has held that "a defendant charged with an offense may be convicted of that offense upon proof that he was complicit in its commission, even though the indictment is stated in terms of the principal offense and does not mention complicity." (Quotations and alterations omitted.) *State v. Herring* (2002), 94 Ohio St.3d 246, 251. R.C.

2923.03(F) puts defendants on notice that the jury may be instructed on complicity, even when the charge is stated in terms of the principal offense. Id. Accordingly, Horne could have been convicted of the principal offense of trafficking *or* being complicit in the crime of trafficking.

{¶22} In our discussion of Horne's first assignment of error, we concluded that Horne's convictions for trafficking were not against the manifest weight of the evidence. This analysis involved the principal offense. We specifically concluded that Horne's convictions for the *principal* offenses were not against the manifest weight of the evidence. Further, the trial court's sentencing entry indicates that Horne was convicted of the principal offense, not complicity. Therefore, assuming any error with respect to the complicity instruction, such error would be harmless. Crim.R. 52(A). Horne's second assignment of error is overruled.

III.

{¶23} Horne's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
BELFANCE, J.
CONCUR

APPEARANCES:

RICHARD A. REECE, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.