

[Cite as *State v. Ousley*, 2010-Ohio-3116.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23496, 23506
v.	:	T.C. NO. 06CR4771, 08CR3779
KEITH A. OUSLEY	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

**OPINION**

Rendered on the 2<sup>nd</sup> day of July, 2010.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notices of Appeal of Keith A. Ousley, filed June 16, 2009 and June 22, 2009. Following a jury trial, Ousley was convicted of one count of trafficking in drugs, in violation of R.C. 2925.03(A)(1), a felony of the fifth degree, in case number 2008-CR-3779/1. The trial court sentenced Ousley to an 11 month prison

term to be served consecutively to a community control revocation sentence of six years in case number 2006-CR-4771, in which Ousley had been convicted of robbery. Although Ousley filed notices of appeal in both cases, his sole assigned error is addressed to his conviction for trafficking in drugs. Having thoroughly reviewed the record before us, we affirm Ousley's conviction.

{¶ 2} The events giving rise to this matter began around 5:00 p.m. on September 18, 2008. Joey Myers, a narcotics detective for the City of Dayton Police Department, was conducting undercover surveillance on a drug house on the east side of Dayton, when he received a radio transmission from Keith Coberly, a detective in the Vice Crimes Unit. Coberly had observed suspected drug sales at 840 South Patterson Blvd., in the parking lot of the Other Place, a homeless shelter. Myers proceeded to Coberly's location, informing him that he was "willing to make a hand to hand buy with the individual that he saw in the parking lot."

{¶ 3} Upon arrival, Myers obtained a \$20.00 bill from Coberly, the serial number of which was noted by Coberly. According to Myers, as he approached an individual later identified as Johnny Caldwell, Ousley came up to him first. Myers testified that Ousley "walked up to me and asked me what I wanted. I told him that I wanted some hard. He then stated that he doesn't have any crack. Hard is a street term for crack cocaine." Myers then "told him that I would take anything, referring to I would take anything he could get. At that point, he told me to calm down, that he would take care of me." Myers stated, "Mr. Ousley asked me how much I had in my hand, because I'd had money in my hand. I handed him the \$20. At this time, he turned around and started toward \* \* \* Johnny Caldwell, the

main target of this investigation. I followed closely behind. \* \* \* it was a short walk \* \* \*. We [were] all three kind of standing in like a little circle. \* \* \* and I said, 'Take care of me'" to both men.

{¶ 4} Myers testified, Caldwell then "reached into his right pocket, pulled out a pill bottle, opened up the lid, and poured an assortment of pills into his hand, his open palm." Myers told the men he wanted some Xanax, and "Mr. Ousley started picking out Xanax's out of Caldwell's hand. As he was doing it, I was also counting to see how many he was picking out of there. He picked out several Xanax's for me. He then turned around and put them in my hand. And then he immediately said, 'You owe me a dollar.' And I said, 'I don't have a dollar.'" Ousley then told Myers, "Do not worry about it," and Ousley handed the \$20.00 bill to Caldwell. Myers then left the scene and met Coberly to discuss the transaction approximately 20 minutes later. Myers gave the pills to Coberly. Myers was not involved in the arrest of Ousley, although both Ousely and Coberly were arrested that night.

{¶ 5} Myers testified, based upon his six years' experience as a narcotics detective, that drug dealers, when conducting open air drug sales, "often work with someone that could be a lookout, someone who basically watches for police while the main drug dealer deals \* \* \* . They go out and solicit customers. Once they find them, they are kind of like the middleman. \* \* \* They would take the money from the person \* \* \* who wants the drug. They would take it back to the drug dealer and the drugs that were requested, or the amount, and then take that back.

{¶ 6} "And also, it's for security too. A lot of drug dealers work together for

security reasons, safety, in case they are going to get robbed or something happens. \* \* \* I hardly ever see drug dealers working alone.”

{¶ 7} Coberly’s testimony established that he had been with the Dayton Police Department for over 19 years, and he had participated in thousands of drug arrests. Coberly testified that he was conducting surveillance of the parking lot at the Other Place, on September 18, 2008, an area known for drug activity, in an unmarked car. He observed Caldwell “acting suspiciously, suspected that he was selling drugs.” Caldwell was behind a dumpster, and Coberly observed people meet with him there briefly on foot and then leave. Coberly watched “Caldwell walk away from the dumpster and over on Catherine Street. And he pulled a plastic baggie out of his pants pocket, and he showed it to man that he was with. In my years of experience dealing with drugs and drug suspects, it’s overwhelmingly common that drug dealers and drug suspects/drug users store their drugs in plastic bags.” Coberly had an unobstructed view, it was light out, and he was using binoculars. Coberly relayed his observations over the radio, and Myers responded to assist Coberly.

{¶ 8} Before Myers arrived, Coberly observed Caldwell meet Ousley, and “Mr. Caldwell handed something to Mr. Ousley, and Mr. Ousley put it in his pocket.” Coberly was unable to identify the object from his vantage point. When Myers arrived, Coberly gave him the \$20.00 bill, and he testified that the serial number ended in “36B.” Consistent with Myers’ testimony, Coberly stated that Ousley approached Myers, and then the two of them approached Caldwell. Coberly could not hear the men’s conversation, as he was approximately 20 yards away. According to Coberly, “Mr. Ousley and Detective Myers walked over to where Mr. Caldwell was. They stood together in the shape of like a triangle.

I saw movements. I'm not going to tell you that I saw a hand-to-hand drug transaction. I did [see] movement that, in my 20 years of experience, led me to believe that a hand-to-hand drug transaction was taking place. I did not see the exchange of the money. I did not see the exchange of the drugs. But I did see all of the indications that led me to believe that a drug transaction was taking place." After that, "Myers walked away \* \* \* . There's a universal signal that we use to indicate that, yes, we do have an arrestable offense. Detective Myers gave me that signal, and he went ahead and walked out of the area. And that's when I told the other detectives to move in."

{¶ 9} When Caldwell was apprehended, he dropped the \$20.00 bill that Myers gave him. Coberly read both men their rights, and he told Ousley what he had observed. According to Coberly, "Ousley stated, 'I told him I could help him out. I told him that I could get it. He asked me if I could help him out. I told him I could get it.'" Coberly later wrote a report regarding the incident, with input from Myers.

{¶ 10} Prior to closing arguments, the trial court read a stipulation of the parties into the record as follows in part: "If called to testify at trial, Jennifer Watson of the \* \* \* [Miami Valley Regional Crime Laboratory], an expert in forensic chemistry, would testify to a reasonable degree of scientific certainty that all 13 pills recovered on September 18<sup>th</sup>, 2008, at 840 South Patterson Boulevard, Dayton, Ohio, were analyzed on November 12<sup>th</sup>, 2008, and found to contain alprazolam, which is Xanax, a schedule four controlled substance. In addition, there is no issue with chain of custody with respect to the above-mentioned pills."

{¶ 11} Ousley asserts one assignment of error as follows:

{¶ 12} "THE JURY CLEARLY LOST ITS WAY WHEN IT FOUND THE

DEFENDANT GUILTY OF VIOLATING O.R.C. 2925.03(A)(1), AS THAT FINDING IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶ 13} “When an appellate court analyzes a conviction under the manifest weight of the evidence standard it must review the entire record, weigh all of the evidence and all the reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the fact finder 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 omitted). Only in exceptional cases, where the evidence ‘weighs heavily against the conviction,’ should an appellate court overturn the trial court’s judgment.” *State v. Dossett*, Montgomery App. No. 20997, 2006-Ohio-3367, ¶ 32.

{¶ 14} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1997), 10 Ohio St.2d 230, 231.

“Because the factfinder \* \* \* has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder’s determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness.” *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288.

{¶ 15} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of fact lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 16} We note that in the body of his brief, Ousley also argues that the evidence presented at trial was insufficient to support his conviction. “In reviewing a claim of insufficient evidence, ‘[t]he relevant inquiry is whether, after reviewing 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, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560; see, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, \* \* \* .” *State v. McKnight*, 107 Ohio St.3d 101, 112, 2005-Ohio-6046, ¶ 70.

{¶ 17} R.C. 2925.03(A)(1) provides: “No person shall knowingly do any of the following: (1) Sell or offer to sell a controlled substance.” “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. A person has knowledge of circumstances when he is aware that such circumstances probably exist.” R.C. 2901.22(B). “‘Sale’ includes delivery, barter, exchange, transfer, or gift, or offer thereof, and each transaction of those natures by any person, whether as principal, proprietor, agent, servant, or employee.” R.C. 2925.01(A), incorporating definition of “sale” in R.C. 3719.01(AA).

{¶ 18} The trial court instructed the jury on complicity. “R.C. 2923.03(A)(2), the complicity statute, provides: ‘No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following: \* \* \* (2) Aid or abet another in committing the offense.’ A person who is complicit in an offense may be charged and punished as if he were the principal offender, and a charge of complicity may be stated under

R.C. 2923.03 or in terms of the principal offense. R.C. 2923.03(F). ‘To support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal. Such intent may be inferred from the circumstances surrounding the crime.’ *State v. Johnson*, 93 Ohio St.3d 240, 245, 2001-Ohio-1336; *State v. Wilson*, Montgomery App. No. 22581, 2009-Ohio-525, ¶ 27.” *State v. Hancher*, Montgomery App. No. 23515, 2010-Ohio-2507, ¶ 50.

{¶ 19} Having reviewed the entire record, weighed all of the evidence and reasonable inferences, and having considered the credibility of the witnesses, we conclude that the jury did not lose its way and create a manifest miscarriage of justice. Further, after reviewing the evidence in a light most favorable to the State, we conclude that any rational juror could have found the essential elements of trafficking in drugs proven beyond a reasonable doubt.

{¶ 20} The jury clearly found Myer’s and Coberly’s testimony to be credible, and we defer to the factfinder’s assessment of credibility. Coberly’s testimony established that Caldwell’s behavior behind the dumpster and at the time he approached Ousley, in an area known for drug activity, was in fact consistent with drug activity. Ousley approached Myers and asked him what he “wanted.” In response to Myers’ request, Ousley informed Myers that he did not have any “hard,” or crack, and when Ousley indicated that he would “take anything,” Ousley responded that he would “take care” of him. Ousley then took the \$20.00 from Myers and led Myers to Caldwell, to whom Ousley gave the money. Ousley retrieved



the pills from Caldwell's hand and gave them to Myers, and he asked Myers for another dollar. The sequence of events described by Myers and Coberly is wholly consistent with Myers' experience with open air drug sales; Caldwell and Ousley worked together in the manner Myers described, with Ousley soliciting Myers, taking his money to Caldwell, retrieving the drugs from Caldwell, and giving them to Myers. The partial serial number of the \$20.00 bill that Caldwell dropped matched the bill Coberly gave to Myers. Upon being apprehended, Ousely stated, "I told him I could help him out. I told him that I could get it. He asked me if I could help him out. I told him I could get it." It was undisputed that the drugs sold were Xanax, a schedule IV controlled substance. Based upon the evidence, the jury could reasonably conclude at a minimum that Ousley knowingly supported, assisted or cooperated with Caldwell in the sale of Xanax to Myers. In other words, Ousley's conviction is not against the manifest weight of the evidence, and it is supported by sufficient evidence.

{¶ 21} The judgment of the trial court is affirmed.

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FAIN, J. and KLINE, J., concur.

(Hon. Roger L. Kline, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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