[Cite as *State v. Biggert*, 2004-Ohio-4146.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

State of Ohio

Appellee

v.

Lavette D. Biggert

Appellant

Court of Appeals No. OT-03-044

Trial Court No. 01-CR-131

DECISION AND JUDGMENT ENTRY

Decided: August 6, 2004

* * * * *

Andrew R. Mayle, for appellant.

* * * * *

HANDWORK, P.J.

{¶1} This appeal is from the October 17, 2003 judgment of the Ottawa County Court of Common Pleas, which sentenced appellant, Lavette Biggert, following her conviction of drug abuse, in violation of R.C. 2925.11(A), and possession of drug paraphernalia, in violation of R.C. 2925.14(C)(1). Pursuant to the guidelines set forth in *Anders v. California* (1967), 386 U.S. 738, appellant's court-appointed counsel has filed an appellate brief and motion to withdraw as counsel. He mailed a copy of the brief and motion to appellant and informed her that she had a right to file her own brief.

{¶2} Appellant's counsel states in his motion that he carefully reviewed the record in this case and concluded that the trial court did not commit any error prejudicial

to appellant. However, in compliance with the requirements of *Anders v. California*, supra, appellant's counsel has submitted a brief setting forth the following possible assignments of error:

{¶3} "A. It is arguable that appellant's conviction under Count One was against the manifest weight and/or the evidence was insufficient to support conviction regarding the element that appellant 'knowingly' possessed any illegal substance as argued by trial counsel on page 114 of the trial transcript.

{¶4} "B. It is arguable that a mistrial should have been granted because of prosecutorial misconduct when the prosecutor stated in his closing argument on page 137 of the trial transcript, "What is likely to have happened is (appellant) used most of it" as stating such was not supported by the evidence and was unduly prejudicial."

{¶5} Appellant's appointed counsel included arguments regarding these assignments of error, but he concludes that they are unsupported by the record and/or by the law. Therefore, he concludes that an appeal would be frivolous. Appellant has not submitted her own brief.

{¶6} In his first proposed assignment of error, appellant's counsel argues that there was insufficient evidence to support the conviction because there was insufficient evidence to establish that appellant knew that she possessed cocaine. At trial, the defense moved for an acquittal on the ground that there was insufficient evidence to establish that appellant knew that she possessed drugs. The trial court overruled appellant's motion finding that the totality of the evidence was sufficient to establish that appellant knew she possessed drugs.

{¶7} At trial, officers testified that they executed a search warrant at appellant's home because they had evidence that she was running a crack house. When asked if there were any drugs or drug paraphernalia in the house, appellant led the officers to a room containing women's clothing. She directed them to a drawer that contained a pouch, and told the officers that what they wanted could be found in the pouch. Appellant was asked what was in the test tubes in the pouch and she responded, "baking soda and gin." One of the officers testified that powdered cocaine is heated with water and baking soda to make crack cocaine. However, he had never heard of adding gin to the mixture. After testing by the Bureau of Criminal Investigation, the test tubes were found to contain cocaine residue. Also in the pouch were a plastic baggie, parts of a chore boy pad, and a pipe. An officer testified that these items are drug paraphernalia. Appellant told the officers that she obtained the pouch from the home of Rita Eisenhour. Eisenhour had been the subject of an earlier investigation that led to the search of appellant's home. Biggert's husband, Calvin, testified that Eisenhour gave them the pouch and some other items in payment for building a deck on her house. He also testified that neither appellant nor he opened the pouch at the time.

{¶8} In this case, we find that appellant's response indicating the location of the pouch that contained cocaine after the officers inquired about the location of drugs and drug paraphernalia was direct evidence that she knew that the pouch contained cocaine. Therefore, we find that there was evidence admitted at trial, that "if believed, would convince the average mind beyond a reasonable doubt that appellant knew that she possessed cocaine. *State v. Smith* (1997), 80 Ohio St.3d 89, certiorari denied (1998), 523

U.S. 1125. Furthermore, upon a review of the entire record, after weighing the evidence and all reasonable inferences from the evidence, and after considering the credibility of the witnesses, we find that a greater amount of credible evidence supported the conviction than not and that the jury did not lose its way and create a manifest miscarriage of justice. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386-390. Therefore, the first proposed assignment of error is not well-taken.

{¶9} In his second proposed assignment of error, appellant's counsel argues that it is arguable that a mistrial should have been granted because of prosecutorial misconduct when the prosecutor stated in his closing argument, "What is likely to have happened is (appellant) used most of it---." After the comments were made, appellant objected, and the court sustained the objection. The court also instructed the jury to disregard the remarks. Appellant's counsel contends that this statement was not supported by the evidence and was unduly prejudicial despite the corrective action taken by the court.

{¶10} Because appellant objected to the prosecutor's comments at trial, we review the comments on appeal to determine whether there were improper and, if so, whether they prejudicially affected substantial rights of the appellant. *State v. Thomas*, 97 Ohio St.3d 309, 2002-Ohio-6624, at ¶59, certiorari denied (2003), 539 U.S. 916; *State v. Jones* (2000), 90 Ohio St.3d 403, 420; and *State v. Smith* (1984), 14 Ohio St.3d 13, 14. A trial will not be deemed "unfair if, in the context of the entire trial, it appears clear beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments." *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, at ¶121,

certiorari denied (2002), 531 U.S. 1055, and *State v. Fears* (1999), 86 Ohio St.3d 329, 336, certiorari denied (2000), 529 U.S. 1039. We must consider, for example, whether this was an "isolated incident in an otherwise properly tried case," whether the errors were trivial, whether the trial court took corrective action, and whether the other evidence of guilt was overwhelming. *State v. Keenan* (1993), 66 Ohio St.3d 402, 410.

{¶11} During closing arguments, the prosecution may make fair comments on the evidence and reasonable inferences that the jury could draw from the evidence. *State v. Myers,* 97 Ohio St.3d 335, 2002-Ohio-6658, at ¶145, certiorari denied (2003), 539 U.S. 906, and *State v. Tibbetts* (2001), 92 Ohio St.3d 146, 169, certiorari denied (2002), 534 U.S. 1144.

{¶12} Clearly, the prosecutor's comments were improper. Therefore, the issue becomes whether these comments unfairly prejudiced appellant. Considering the other evidence of guilt and the corrective action by the trial court, we find that it is clear beyond a reasonable doubt that the jury would have found appellant guilty even without the improper comments. Therefore, the second proposed assignment of error is not well-taken.

{¶13} This court now has the obligation to fully examine the record in this case to determine whether the appeal is frivolous. *Anders v. California* (1967), 386 U.S. 738, 744. We have reviewed the entire lower court's proceedings and have determined that there is no merit to the errors alleged by appellant's appointed counsel. In addition, our review of the record does not disclose any other errors by the trial court which would justify a reversal of the judgment. Therefore, we find this appeal to be wholly frivolous.

Counsel's request to withdraw as appellate counsel is found well-taken and is hereby granted.

{¶14} Having found that the trial court did not commit error prejudicial to appellant and that substantial justice has been done, the judgment of the Ottawa County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is hereby ordered to pay the court costs incurred on appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Peter M. Handwork, P.J. ____________________ JUDGE

Richard W. Knepper, J.

Judith Ann Lanzinger, J. ____________________ JUDGE
CONCUR.

____________________ JUDGE