[Cite as *State v. Behanan*, 2010-Ohio-4403.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-10-266
	:	O P I N I O N
- vs -		9/20/2010
	:	
JAMES BEHANAN,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2009-07-1251

Robin N. Piper III, Butler County Prosecuting Attorney, Daniel G. Eichel, Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

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RINGLAND, J.

{¶1} Defendant-appellant, James Behanan, appeals his convictions for three counts of trafficking in cocaine and three counts of possession of cocaine from the Butler County Court of Common Pleas.

{¶2} In March 2009, a man named David Brown was arrested for OVI. In conducting a search of the vehicle, police found a crack pipe and marijuana in his truck. Brown told the police that the contraband was not his, but had been left in the vehicle by a woman named Deana Roy. Upset at Roy for leaving the contraband in his vehicle,

Brown agreed to work as a confidential informant for the West Chester Police Department to set up controlled purchases of drugs from Roy in exchange for a reduction of his OVI charges. Detective Joseph Buschelman of the West Chester Police Department led the investigation. The detective and Brown developed a "cover story" whereby the officer pretended to be Brown's friend "Terry," having worked together through an employment agency. The pair made two "buys" of crack cocaine from Roy on March 27 and 28 which did not involve appellant.

{¶3} The first transaction involving appellant occurred on April 16, 2009. That day, Brown and Detective Buschelman planned to buy an "eight ball" of crack cocaine for $250, with $200 to be paid to appellant and $50 paid to Roy. Brown contacted Roy and arranged to meet at Hall's Carryout, across the street from her residence on Cincinnati-Dayton Road in West Chester Township. The detective and Brown drove to the location where Roy got into the detective's vehicle and indicated that "G" (appellant's nickname) was "not there yet." Following a phone conversation with appellant, Roy stated that they needed to head toward the intersection of Paddock Road and Seymour Avenue in Hamilton County because something was wrong with appellant's vehicle. While en route, Roy had another phone conversation with appellant and indicated that they "needed to go to Sunoco down on Mitchell Avenue" to meet appellant. After arriving at the Sunoco, they waited 30-40 minutes until appellant arrived around 7:00 p.m. in a black Acura. Appellant was seated in the passenger seat of the vehicle. The driver exited the Acura, walked to the front of the Sunoco, walked back to the car, and tapped on the hood. Appellant waved to Roy, who exited the detective's vehicle and got into the back seat of the Acura. The detective observed appellant bend forward and then sit back up with a crack rock between his finger and thumb then hand it to Roy in the back seat. Roy handed appellant the cash, exited the Acura and returned to the

officer's vehicle. Roy gave the crack cocaine to the detective after wrapping it in a one dollar bill. An audio recording was made via a body wire secured on Brown.

{¶4} A second transaction was organized for May 7, 2009, once again to purchase an "eight ball" of cocaine. This time, Brown drove with Detective Buschelman in the passenger seat. The men picked up Roy at her residence then drove to the Mitchell Avenue Sunoco. Appellant arrived in the passenger seat of a Honda Accord. Like before, the driver got out of the vehicle and walked to the front of the Sunoco station, walked back to the car, and tapped on the hood. Appellant made eye contact and Roy went to the backseat of the Honda. Appellant looked down into his lap and came back up with what appeared to be crack cocaine in his fingers, handed it to Roy, who handed appellant the money. Roy returned to Brown's vehicle and handed the substance to the officer after wrapping it in plastic.

{¶5} A third transaction occurred on May 9, 2009 at the same locations for the same amount of money and drugs. The substances purchased on the three occasions were submitted for analysis and determined to be crack cocaine in the amounts of 0.8 grams, 0.9 grams, and 1.2 grams, respectively.

{¶6} On August 5, 2009, appellant was indicted for three counts of trafficking in cocaine, in violation of R.C. 2925.03(A)(1), and three counts of possession of cocaine, in violation of R.C. 2925.11. Appellant and Roy were tried jointly. Following the jury trial, appellant was found guilty as charged with an enhancement that the sales of cocaine occurred within 1,000 feet of a school. Appellant was sentenced to a total of six and one-half years in prison. The court also imposed a fine of $5,000 and suspended appellant's driver's license for five years. Appellant timely appeals, raising four assignments of error.

{¶7} Assignment of Error No. 1:

{¶8} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT OVERRULED HIS CRIM.R. 29 MOTION REGARDING THE DRUG TRANSACTION TAKING PLACE WITHIN 1000 FEET OF A SCHOOL."

{¶9} In his first assignment of error, appellant argues that insufficient evidence was presented to establish that the sale of cocaine occurred within 1,000 feet of a school zone. Specifically, appellant argues that the distance must be measured from the point of sale. Appellant argues that the point of sale in this case is where he was located, not where the officer was positioned or the boundary line of the gas station.

{¶10} Whether the evidence presented is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52. An appellate court, in reviewing the sufficiency of the evidence supporting a criminal conviction, examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Carroll,* Clermont App. Nos. CA2007-02-030, CA2007-03-041, 2007-Ohio-7075, ¶117. After examining the evidence in a light most favorable to the prosecution, the appellate court must then determine if "any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id. Proof beyond a reasonable doubt is "proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs." R.C. 2901.05(D).

{¶11} "An offense is 'committed in the vicinity of a school' if the offender commits the offense on school premises, in a school building, or within one thousand feet of the boundaries of any school premises, regardless of whether the offender knows the offense is being committed on school premises, in a school building, or within one thousand feet of the boundaries of any school premises." R.C. 2925.01(P). "School premises" means "[t]he 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." R.C. 2925.01(R)(1).

{¶12} After review of the record, we find sufficient evidence to support the enhancement provision in this case. Even if we accept appellant's argument that the offense occurred in the vehicle occupied by him, not the vehicle occupied by Brown and the detective, the state presented sufficient evidence to show that appellant was within 1,000 feet of the school premises.

{¶13} The state presented evidence of three separate measurements at trial to establish the distance from Roger Bacon High School. Appellant does not contest that Roger Bacon High School satisfies the definition of "school premises." The state submitted an aerial photograph of the area between the Sunoco station and the school furnished by the Cincinnati Police Department to Detective Buschelman. According to the map, the direct line from the gas station to the school measures 840 feet. In addition, Detective Buschelman testified that he personally made two separate measurements of the area on foot. The detective could not measure the direct line between the properties on the ground due to heavy foliage and other buildings located within the block. As a result, the detective measured two indirect routes along the perimeter of the block between the locations using a traffic wheel. Detective Buschelman testified that he began his measurements from the "exact location where we were parked all three times." Measuring along the west and north perimeter of the block, the distance totaled 975.06 feet. The officer also measured along the south and east, which totaled 1,009.16 feet.

{¶14} The detective's indirect measurements along the borders of the city block support the aerial measurement. One of the detective's indirect measurements was still

within the 1,000-foot threshold. Detective Buschelman testified that he was positioned 20 to 30 feet from appellant when parked at the Sunoco station. When combining this distance with the direct aerial measurement, the state clearly presented sufficient evidence for a jury to conclude that the transactions in the vehicle occupied by appellant occurred within 1,000 feet of the school.

{¶15} Appellant's first assignment of error is overruled.

{¶16} Assignment of Error No. 2:

{¶17} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT FAILED TO DISMISS THE CASE FOR LACK OF PROPER VENUE."

{¶18} Appellant claims that the trial court erred in denying his Crim.R. 29 motion for acquittal because proper venue was not established in Butler County, Ohio, since each transaction he was involved in occurred in Hamilton County, Ohio. Appellant urges that there was "no evidence that Behanan committed any element of the offenses in Butler County."

{¶19} Pursuant to Section 10, Article I of the Ohio Constitution, a criminal defendant is to be tried in "the county in which the offense is alleged to have been committed." "In the prosecution of a criminal case, it is not essential that the venue of the crime be proved in express terms, provided it be established by all the facts and circumstances, beyond a reasonable doubt, that the crime was committed in the county and state as alleged in the affidavit." *State v. Chintalapalli*, 88 Ohio St.3d 43, 45, 2000-Ohio-266, citing *State v. Gribble* (1970), 24 Ohio St.2d 85, paragraph two of the syllabus. "Venue is satisfied where there is a sufficient nexus between the defendant and the county of the trial." *Chintalapalli* at 45, citing *State v. Draggo* (1981), 65 Ohio St.2d 88, 92. The venue of a criminal case shall be provided by law. Crim.R. 18(A).

The venue statute provides that venue lies in any jurisdiction in which an offense or any element thereof is committed. R.C. 2901.12(A).

{¶20} A review of the record reveals that the facts and circumstances in evidence are sufficient to demonstrate that venue properly exists for both Butler and Hamilton counties. Although the transactions occurred at the Sunoco station in Hamilton County, a sufficient nexus exists for Butler County. Roy and appellant arranged the drug sale by phone. Once Brown and Detective Buschelman picked Roy up at Hall's Carryout in West Chester, she received a phone call from appellant informing her that he was having vehicle trouble and instructed them to drive towards Hamilton County. En route, Roy received a second call from appellant instructing them to meet at the Sunoco station. See *State v. Giffin* (1991), 62 Ohio App.3d 396, 399-400.

{¶21} Appellant next argues that even if the evidence demonstrates that the first transaction originated in Butler County, there is no evidence linking the remaining transactions to Butler County. Appellant submits that each transaction must be reviewed separately since they were "discrete and separate acts, each occurring on a different day over three weeks."

{¶22} The venue statute provides that when an offender commits offenses in different jurisdictions as part of a course of criminal conduct, venue lies for all the offenses in any jurisdiction in which the offender committed one of the offenses or any element thereof. R.C. 2901.12(H). See, also, *State v. Clelland* (1992), 83 Ohio App.3d 474, 483-484. The state in this case provided sufficient evidence that all three drug-trafficking offenses constituted a "course of criminal conduct" under the venue statute.

{¶23} Offenses "committed as part of the same transaction or chain of events, or in furtherance of the same purpose or objective" serves as prima facie evidence of a course of criminal conduct. R.C. 2901.12(H)(3). Other prima facie indicators of a

course of criminal conduct include offenses involving the same or similar modus operandi. R.C. 2901.12(H)(5).

{¶24} Although the transactions occurred over a three-week period, the transactions were identical and had the same purpose or objective: for appellant to sell an "eight ball" of crack cocaine to Brown and the detective with Roy's assistance. See *State v. Meridy*, Clermont App. No. CA2003-11-091, 2005-Ohio-241. Moreover, all transactions contained the same modus operandi. Brown and Detective Buschelman would pick up Roy in Butler County and drive to the Sunoco station in Hamilton County to meet appellant. Once appellant arrived, he signaled Roy. Roy would get in the backseat of the car occupied by the appellant and they would exchange $200 for the drugs. The state presented sufficient evidence to establish a clear "course of conduct" in this case. As a result, we find no abuse by the trial court for finding Butler County as a proper venue for the case at bar. *Chintalapalli* at 45.

{¶25} Appellant's second assignment of error is overruled.

{¶26} Assignment of Error No. 3:

{¶27} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT OMITTED CERTAIN INSTRUCTIONS TO THE JURY AND WHEN IT DID NOT DECLARE CERTAIN OF THE OFFENSES TO BE ALLIED OFFENSES OF SIMILAR IMPORT."

{¶28} In his third assignment of error, appellant raises two issues for review. First, appellant argues he was prejudiced by the trial court's failure to provide a limiting instruction to the jury during the final jury instructions. Second, appellant argues that trafficking and possession are allied offenses of similar import and should have been merged. Appellant failed to object to both issues at trial. As a result, we will apply a plain error standard of review.

{¶29} "[P]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52. Ohio law recognizes that plain error does not exist unless, but for the error, the outcome of the trial would have been different. *State v. Cox*, Butler App. No. CA2005-12-513, 2006-Ohio-6075, at ¶21, citing *State v. Haney,* Clermont App. No. CA2005-07-068, 2006-Ohio-3899, ¶50. "[N]otice of plain error is to be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." Id.

Jury Instruction

{¶30} On several occasions during trial, the trial court instructed the jury that certain evidence was admissible against co-defendant Roy, but was inadmissible against appellant. During final instructions, the trial court failed to charge the jury with a similar instruction. Appellant argues that he was prejudiced by the trial court's failure to provide a final limiting instruction.

{¶31} "[A] trial court's failure to separately and specifically charge the jury on every element of each crime with which a defendant is charged does not per se constitute plain error nor does it necessarily require reversal of a conviction." *State v. Adams* (1980), 62 Ohio St.2d 151, 154. A reviewing court must review the record to determine if the defendant sustained "substantial prejudice" as a result of the erroneous or omitted instruction thereby resulting in a manifest miscarriage of justice. Id.

{¶32} Although it would have been better practice for the trial court to provide a cautionary instruction during its final instructions to the jury, after review of the record, we find no evidence that appellant suffered substantial prejudice from the trial court's failure to provide an instruction in this case. See *State v. Comen* (1990), 50 Ohio St.3d 206, 210. On several occasions during trial, the court instructed the jury that evidence for which appellant was not involved was admissible only against Roy, and inadmissible

against appellant. We find no indication that the jury failed to follow this instruction or were confused by the evidence. A jury is presumed to have followed the trial court's instructions. *State v. Ashcraft*, Butler App. No. CA2008-12-305, 2009-Ohio-5281, ¶26. See, also, *State v. Williams*, 73 Ohio St.3d 153, 159, 1995-Ohio-275.

Allied Offenses of Similar Import

{¶33} Appellant next claims that trafficking and possession are allied offenses of similar import in this case and should be merged.

{¶34} Appellant was convicted of three counts of trafficking in cocaine in violation of R.C. 2925.03(A)(1) and three counts of possession of cocaine in violation of R.C. 2925.11. The controlling authority on this issue is *State v. Cabrales*, 118 Ohio St.3d 54, 2009-Ohio-1625. In *Cabrales*, the Ohio Supreme Court clearly found that trafficking under R.C. 2925.03(A)(1) and possession pursuant to R.C. 2925.11 are not allied offenses of similar import and therefore do not merge. Id. at ¶1, ¶29. See, also, *State v. Fritz*, 182 Ohio App.3d 299, 2009-Ohio-2175, ¶13; *State v. Minifee*, Cuyahoga App. No. 91017, 2009-Ohio-3089, ¶82.

{¶35} Based upon the foregoing, we find no plain error by the trial court on the issues raised by appellant. Appellant's third assignment of error is overruled.

{¶36} Assignment of Error No. 4:

{¶37} "DEFENDANT-APPELLANT RECEIVED THE INEFFECTIVE ASSISTANCE OF COUNSEL."

{¶38} In his final assignment of error, appellant argues that his trial counsel's failure to (1) request a final jury instruction to limit the inadmissible evidence of his co-defendant, and (2) object to his conviction of allied offenses constituted ineffective assistance.

{¶39} In an ineffective assistance of counsel claim, a defendant must (1)

demonstrate that his counsel's performance fell below an objective standard of reasonable representation, and if so (2) show that he was prejudiced by such deficient performance, i.e., that there was a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington* (1984), 466 U.S. 668, 687-694, 104 S.Ct. 2052; *State v. Raleigh*, Clermont App. Nos. CA2009-08-046, CA2009-08-047, 2010-Ohio-2966, ¶13.

{¶40} In order to prevail on a claim of ineffective assistance of counsel in a case involving a failure to make a motion on behalf of a defendant, the defendant must show "(1) that the motion * * * was meritorious, and (2) that there was a reasonable probability that the verdict would have been different had the motion been made[.]" *Raleigh* at ¶14, quoting *State v. Kring*, Franklin App. No. 07AP-610, 2008-Ohio-3290, ¶55.

{¶41} Having found no error in our review of these issues under the previous assignment of error, we cannot say that appellant's trial counsel was deficient or ineffective.

{¶42} Appellant's fourth assignment of error is overruled.

{¶43} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.