

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BROWN COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2010-06-013
 :
 - vs - : OPINION
 : 7/18/2011
 :
 DAVID S. STUTZ, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. 2009-2211

Jessica A. Little, Brown County Prosecuting Attorney, Mary McMullen, 200 East Cherry Street, Georgetown, Ohio 45121, for plaintiff-appellee

Katherine M. Kelly, Brown County Public Defender, Julie Steddom, 134 North Front Street, Ripley, Ohio 45167, for defendant-appellant

HUTZEL, J.

{¶1} Defendant-appellant, David S. Stutz, appeals his conviction in the Brown County Court of Common Pleas for aggravated trafficking in drugs.

{¶2} The Brown County Sheriff's Department, utilizing a confidential informant (the informant), conducted a large scale drug investigation in the summer of 2009. As a result of the investigation, appellant was indicted on three counts of aggravated trafficking in drugs in violation of R.C. 2925.03(A)(1), felonies in the fourth degree. As a part of a

two-day jury trial, Chief Deputy John Schadle from the Brown County Sheriff's Department testified as the sole witness because the informant died prior to trial. Schadle testified on behalf of the state and described prearranged drug buys between the informant and appellant.

{¶3} In regard to count one, Schadle testified that the first drug buy occurred on August 6, 2009, on Fishing Gut Road. Prior to the scheduled buy, Schadle, along with the sheriff, met with the informant. They searched the informant and gave him a digital recorder and money for the drug purchase. They followed the informant at a discrete distance to Fishing Gut Road in a separate vehicle. Schadle and the sheriff tried to keep the informant within their view, but once they reached Fishing Gut Road, they allowed the informant more distance and lost sight of his vehicle. When Schadle and the sheriff rounded a curve, the informant's vehicle came back into view and they observed the informant driving towards them and a red Jeep driving away in the opposite direction. Schadle and the sheriff followed the informant to a designated meeting place where they recovered three pills and the digital recorder from the informant.

{¶4} In regard to count two, Schadle testified that the second drug buy occurred on August 7, 2009, at a gas station. Prior to arriving at the gas station, Schadle, along with another deputy, searched the informant and gave him a digital recorder and \$120. Once at the gas station, the informant parked in front and Schadle and the deputy parked around the corner. From this location, Schadle observed the informant interacting with appellant, who was sitting inside of a red Jeep. Schadle also observed the informant interacting with appellant outside of appellant's vehicle in the parking lot. At one point, appellant went inside the gas station for a minute or two, then came out of the gas station and again interacted with the informant. Schadle and the deputy followed the informant to a designated meeting place where they recovered two pills, which Schadle recognized as

IR30 pills, the digital recorder, and \$15 in change. The pills were later submitted to a crime laboratory. One of the pills tested positive for oxycodone.

{¶5} In regard to count three, Schadle testified that the third drug buy occurred on August 10, 2009, on Balcony Hill. Schadle was accompanied by another deputy. Prior to the drug buy, the informant was searched, and Schadle gave the informant a digital recorder and \$100. The drug buy was scheduled to occur on Fishing Gut Road, but the informant turned and drove up Balcony Hill instead. Schadle and the deputy followed the informant up Balcony Hill, then pulled over on the side of the road and let the informant gain distance. Schadle testified that he knew there were no houses in close proximity. They waited a few minutes, and then Schadle observed appellant in a red Jeep driving down the hill past their vehicle. Schadle testified he did not see anyone else in the vehicle. Soon thereafter, Schadle and the deputy caught up with the informant and followed him to a designated meeting place. According to Schadle's testimony, the informant was out of their sight for four minutes, at the most. The informant gave Schadle one pill, which Schadle recognized as an 80 milligram OxyContin, the digital recorder, and \$5 in change. The pill tested positive for oxycodone at the crime lab.

{¶6} A warrant for appellant's arrest was issued for the drug offenses. At the time of appellant's arrest, he was driving the same red Jeep. Schadle testified that when he interviewed appellant, appellant waived his Miranda rights and then stated "he had sold a lot of drugs in the past, but he quit about five years ago" and "had recently either lost his job or been laid off and money was tight, and he had reverted back to what he knew."

{¶7} At the conclusion of the state's case, appellant moved for a Crim.R. 29(A) dismissal based on insufficient evidence for all three counts. The trial court granted the Crim.R. 29(A) motion in regard to count one, because there was no identification of appellant by Schadle at the first scheduled buy. The trial court overruled the Crim.R.

29(A) motion for counts two and three, the defense presented no evidence, and counts two and three went to the jury. Appellant was convicted on two counts of aggravated trafficking in drugs in violation of R.C. 2925.03(A)(1).

{¶8} Appellant appeals his conviction and raises one assignment of error:

{¶9} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT DENIED HIS MOTION FOR ACQUITTAL ON TWO COUNTS OF AGGRAVATED TRAFFICKING IN DRUGS BECAUSE THE EVIDENCE AGAINST HIM WAS INSUFFICIENT TO SUPPORT A CONVICTION, THEREBY DENYING DEFENDANT-APPELLANT HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION."

{¶10} Appellant argues there was a lack of credible evidence that he sold or offered to sell any controlled substance to the informant, because the informant died prior to trial and Schadle's testimony was not strong enough to support a conviction.

{¶11} Crim.R. 29(A) provides, "[t]he court on motion of the defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." Crim.R. 29(A). A Crim.R. 29(A) motion tests the sufficiency of the evidence. *State v. Aughpin* (Nov. 9, 1998), Warren App. No. CA98-01-005, at 4.

{¶12} Generally, if a judge denies a Crim.R. 29(A) motion at the end of the state's case, a jury trial requires a renewing of the Crim.R. 29(A) motion at the end of all the evidence. *Dayton v. Rogers* (1979), 60 Ohio St.2d 162, 163, overruled on other grounds by *State v. Lazzaro*, 76 Ohio St.3d 261, 1996-Ohio-397. However, if the defense does not present evidence on its own behalf, the Crim.R. 29(A) motion made at the end of the

state's case is preserved. *State v. Widder*, Summit App. No. 21383, 2003-Ohio-3925, ¶6. See, also, *Aughpin* at 5.

{¶13} Here, appellant moved for a Crim.R. 29(A) dismissal of all three counts of aggravated trafficking in drugs at the conclusion of the state's case. Thereafter, the defense rested and presented no evidence. Accordingly, no renewal of the Crim.R. 29(A) motion was needed to preserve the motion for appeal.

{¶14} Regarding sufficiency, "'sufficiency' is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, quoting Black's Law Dictionary (6th Ed.Rev.1990) 1433. The proper inquiry for an appellate court is, "after viewing the evidence in a light most favorable to the state, whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, ¶113, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. "A conviction based on legally insufficient evidence constitutes a denial of due process." *Thompkins* at 386.

{¶15} Appellant was convicted of aggravated trafficking in drugs in violation of R.C. 2925.03(A)(1). To be found guilty of aggravated trafficking in drugs, the offender must "knowingly * * * sell or offer to sell a controlled substance * * * [.]" R.C. 2925.03(A)(1). "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). For the purpose of selling controlled substances, the definition of sale "includes delivery, barter, exchange, transfer, or gift or offer thereof, and each transaction of those natures made by any person * * *." R.C. 3719.01(AA).

Oxycodone is listed as a schedule II controlled substance. R.C. 3719.41.

{¶16} Here, Schadle was present for both the August 7 and August 10 scheduled buys. Schadle testified that he could not be 100 percent certain that the informant did not possess any drugs prior to the scheduled buys, because Schadle did not perform a body cavity search or pull back the carpet in the informant's vehicle. However, Schadle testified that the informant was searched before each scheduled buy for contraband, and he regarded the informant as trustworthy. At the scheduled buy that occurred on August 7 at a gas station, Schadle personally observed the informant and appellant interacting in the parking lot, and he observed "a couple things" exchange hands. At the scheduled buy on August 10, Schadle followed the informant to a remote area where Schadle knew there were no houses in close proximity. While Schadle did not personally observe the informant and appellant interact during that transaction, he observed the informant drive up the road to the remote location and observed appellant, in the same red Jeep from the previous scheduled drug buy, drive down the same road soon thereafter. At both the August 7 and August 10 scheduled buys, Schadle identified appellant and the red Jeep, and on both occasions Schadle received change and pills that tested positive for oxycodone from the informant. In addition, Schadle testified that appellant admitted to selling drugs in the past and he had "reverted back to what he knew" after losing his job.

{¶17} A rational trier of fact could infer from these facts that money exchanged hands between the informant and appellant for oxycodone, a schedule II controlled substance, and that appellant knew his conduct would probably result in a sale. While the evidence supporting these elements is largely circumstantial, its probative value is not diminished. See *State v. Barnett*, Butler App. No. CA2008-03-069, 2009-Ohio-2196, ¶ 53 ("A conviction based on circumstantial evidence is no less sound than one based on direct evidence").

{¶18} Viewing this evidence in a light most favorable to the state, we conclude a rational trier of fact could find that the elements of aggravated trafficking in drugs were proved beyond a reasonable doubt. Appellant's convictions are therefore supported by sufficient evidence. Appellant's sole assignment of error is overruled.

{¶19} Judgment affirmed.

HENDRICKSON, P.J., and PIPER, J., concur.