

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-09-036
- vs -	:	<u>OPINION</u> 12/6/2010
TAMMY S. DOWNING,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. 2006-2305

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

Julie D. Steddom, 134 North Front Street, Ripley, Ohio 45167, for defendant-appellant

BRESSLER, J.

{¶1} Defendant-appellant, Tammy Downing, appeals her convictions in the Brown County Court of Common Pleas for single counts of manufacturing methamphetamine and possession of chemicals for the manufacturing of methamphetamine. We affirm the decision of the trial court.

{¶2} Chief Deputy John Schadle of the Brown County Sheriff's Office received information from an inmate that Christopher and Tammy Downing were engaged in drug

activities specific to manufacturing methamphetamines. The inmate informed Chief Schadle that before his transfer from prison to the Brown County jail, he had participated with the Downings in manufacturing methamphetamines and that while he was in prison, Christopher had "stolen his kitchen." According to Chief Schadle, "kitchen" is a slang term "meth cooks use indicating their various paraphernalia that they use to manufacture the meth."

{¶3} A few days after receiving information from the inmate, Deputy Don Stone received an anonymous tip that the Downings were "cooking meth" at their residence, and that there had been an explosion that caught the couple's couch on fire. According to the informant's call, Tammy's leg had been burned in the explosion. Chief Schadle also received information from an informant that a chemical smell of ammonia surrounded the Downings' residence. According to Schadle, the odor of ammonia is a main indicator of methamphetamine manufacturing because it is a key ingredient.

{¶4} Chief Schadle shared the information with Sergeant Dave Johnson of the Brown County Sheriff's Office. Chief Schadle asked Sergeant Johnson to perform a "knock-and-talk," at the Downings' residence. According to Johnson's testimony, he arrived at the Downings' home and encountered Tammy sitting on the porch. After Christopher joined the conversation, Johnson informed the Downings of the suspicions that they were engaged in the manufacturing of methamphetamines, and then requested permission to search the residence for evidence of drug manufacturing. Christopher then permitted Johnson to look through the house.

{¶5} Once inside, Johnson saw glass pipes on a desk and marijuana plants growing in an aquarium. Johnson continued to walk around the house, and came upon a chest freezer in which was located an anhydrous ammonia tank wrapped in a blanket. After viewing the tank, Johnson asked the Downings to accompany him outside where he requested written permission to search the house. Both refused Johnson's request.

Johnson then gave the Downings their *Miranda* rights, and directed them not to enter their residence while he contacted Chief Schadle to obtain a warrant to search the premises.

{16} Johnson and Schadle executed the search warrant on both the residence and the outlying building and vehicles. Officers found several liquid starting fluid cans with holes punched in the bottom, mason jars filled with a clear flammable liquid, and stripped lithium batteries. Within Tammy's purse, officers located drug paraphernalia, and "a sizeable amount of" cash. Officers also found a shopping list for batteries, which specified "lithium" within parenthesis next to the word "batteries". Upon further examination of the residence, Chief Schadle also noticed that the tank found in the freezer had a modified valve, that in his experience, made it possible to use the ammonia in the manufacture of methamphetamines.

{17} The Downings were arrested and re-*Mirandized* before speaking with Chief Schadle at the police station. Tammy waived her rights and told Schadle that she had used methamphetamines before, that the glass pipes and straws located in her home were for ingesting her methamphetamine, and that she had purchased cold pills before. According to Schadle's testimony, Tammy also admitted that she smelled ether at her home. Tammy later told Schadle that she was the "lady of the house" in that she performed the cooking and cleaning duties. However, Tammy denied knowing that the altered tank was located in the freezer. Tammy also stated that her leg was injured after a can exploded while she and Christopher were burning their couch outside.

{18} Christopher also spoke with Chief Schadle, and stated that he manufactured methamphetamines due to his addiction to the substance, and that he normally "cook[ed]" in an old car that set outside the Downings' home. However, he denied Tammy's involvement in the manufacturing process.

{19} Tammy was indicted for single counts of manufacturing methamphetamine and possession of chemicals for the manufacturing of methamphetamine. She pled not guilty,

and she and Christopher were jointly tried before a jury. While Tammy did not testify in her own defense, Christopher testified and denied having manufactured or using methamphetamines on a regular basis. Instead, Christopher testified that he told Chief Schadle that he had used and manufactured the drugs because as the head of his household he took "full responsibility for everything that has happened at my house."

{¶10} The Downings' defense at trial was that someone other than themselves had manufactured methamphetamine at their residence, including their daughter's boyfriend and another man who was on their property regarding car repairs. The Downings moved for a Crim.R. 29 motion for acquittal, and the court denied it. The jury then found the Downings guilty, and the trial court sentenced Tammy to a three-year term on the manufacturing charge and a two-year term on the possession of chemicals charges, to be served concurrently.

{¶11} Tammy's appeal was submitted to this court for decision on September 1, 2010. However, in reviewing the official file, we found that the transcript from the jury trial had not been forwarded to us. The disposition of this case was delayed until this court received the full record. Having a complete record, we now turn to Downing's assignments of error.

{¶12} Assignment of Error No. 1:

{¶13} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT DENIED HER MOTION FOR ACQUITTAL ON THE CHARGES OF ILLEGAL POSSESSION OF CHEMICALS FOR MANUFACTURE AND ILLEGAL MANUFACTURE OF METHAMPHETAMINE BECAUSE THE EVIDENCE AGAINST HER WAS INSUFFICIENT TO SUPPORT SUCH CONVICTIONS."

{¶14} In her first assignment of error, Downing asserts that the trial court erred in denying her Crim.R. 29 motion for acquittal because there was insufficient evidence to support the convictions. This argument lacks merit.

{¶15} Pursuant to Crim.R. 29(A), "[t]he court on motion of a defendant or on its own

motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged * * *, if the evidence is insufficient to sustain a conviction of such offense or offenses." On review, "an appellate court will not reverse the trial court's judgment unless reasonable minds could only reach the conclusion that the evidence failed to prove all elements of the crime beyond a reasonable doubt." *State v. Adams*, Butler App. No. CA2006-07-160, 2007-Ohio-2583, ¶19.

{¶16} In order to affirm the convictions, we need only find that there was legally sufficient evidence to sustain the guilty verdicts. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt; the relevant inquiry is whether, after viewing the evidence in a light most favorable to the state, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Gomez-Silva*, Butler App. No. CA2000-11-230, 2001-Ohio-8649, 2001-WL-1525316, *5.

{¶17} According to R.C. 2925.041 "(A) no person shall knowingly assemble or possess one or more chemicals that may be used to manufacture a controlled substance in schedule I or II with the intent to manufacture a controlled substance in schedule I or II ***. (B) In a prosecution under this section, it is not necessary to allege or prove that the offender assembled or possessed all chemicals necessary to manufacture a controlled substance in schedule I or II. The assembly or possession of a single chemical that may be used in the manufacture of a controlled substance in schedule I or II, with the intent to manufacture a controlled substance in either schedule, is sufficient to violate this section."

{¶18} Under the statute, the state was required to prove that Downing either actually or constructively possessed the chemicals used in the manufacturing of methamphetamines.

Constructive possession exists when one is conscious of the presence of the object and able to exercise dominion and control over it, even if it is not within one's immediate physical possession. *State v. Gaefe*, Clinton App. No. CA2001-11-043, 2002-Ohio 4995, at ¶9.

{¶19} During the trial, the jury heard testimony from Chief Schadle that, when viewed in a light most favorable to the prosecution, established that Downing had constructive possession of the chemicals necessary to manufacture methamphetamines. Schadle testified that when officers executed the search warrant on Downing's home, they seized various chemicals and equipment that in his experience were indicative of the manufacture of methamphetamines. Specifically, the jury heard evidence that law enforcement seized a tank of anhydrous ammonia from the freezer that had an altered valve, and further heard Chief Schadle explain that ammonia is one of the major ingredients in the manufacture of methamphetamines.

{¶20} The jury also heard evidence that police seized the following from Downing's property: several liquid starting fluid cans with holes punched in the bottom, mason jars filled with a clear flammable liquid, and stripped lithium batteries. Chief Schadle testified that these chemicals, or their derivatives, are also ingredients used in the manufacture of methamphetamines. The jury also heard evidence that Downing admitted that she had purchased cold pills in the past, in conjunction with Schadle's testimony that cold pills contain chemicals used in the manufacturing of methamphetamines.

{¶21} The jury heard testimony that Downing was close enough to chemicals used during the manufacture of methamphetamines that she was burned during an explosion. Chief Schadle also testified that Downing admitted that she was the "lady of the house," and as such, would have access to the freezer in which the ammonia tank was located. Schadle also testified that Downing had admitted that she had smelled ether around her home, and planned on purchasing more lithium batteries as demonstrated by the store list in her purse.

{¶22} This evidence established that Downing was able to exercise dominion and control over the chemicals seized from her home, even though she was not in physical possession of the chemicals. This evidence, if believed, would establish beyond a reasonable doubt that Downing had constructive possession of chemicals necessary for the manufacture of methamphetamines.

{¶23} According to R.C. 2925.04(A), "no person shall *** knowingly manufacture or otherwise engage in any part of the production of a controlled substance." In addition to the evidence regarding Downing's possession of the ammonia and lighter fluid used in the manufacturing of methamphetamines, the jury also heard testimony that Downing admitted to having purchased cold pills, and that a derivative of those pills is used in the manufacturing process. The jury also heard evidence that Downing had a shopping list with lithium batteries written on it, and that the chemical components gathered after stripping the batteries is used in the manufacturing of the drugs. Officers also seized "a sizable amount" of cash from Downing's purse, and Sergeant Dave Johnson testified that he witnessed a burn on Downing's leg consistent with a can hitting her from a fire or explosion.

{¶24} This evidence admitted at trial, if believed, would convince the average mind of Downing's active participation in the manufacture of methamphetamines beyond a reasonable doubt, and any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. As both convictions are supported by sufficient evidence, the trial court did not err in denying Downing's Crim.R. 29 motion, and her first assignment of error is overruled.

{¶25} Assignment of Error No. 2:

{¶26} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT ACCEPTED THE JURY'S GUILTY VERDICT BECAUSE IT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶27} Downing argues in her second assignment of error that the convictions were against the manifest weight of the evidence. There is no merit to this argument.

{¶28} "In determining whether a conviction is against the manifest weight of the evidence, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the tier 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. Cummings*, Butler App. No. CA2006-09-224, 2007-Ohio-4970, ¶12.

{¶29} While appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, "these issues are primarily matters for the trier of fact to decide since the trier of fact is in the best position to judge the credibility of the witnesses and the weight to be given the evidence." *State v. Walker*, Butler App. No. CA2006-04-085, 2007-Ohio-911, ¶26. Therefore, an appellate court will overturn a conviction due to the manifest weight of the evidence only in extraordinary circumstances to correct a manifest miscarriage of justice, and only when the evidence presented at trial weighs heavily in favor of acquittal. *Thompkins*, 78 Ohio St.3d 387.

{¶30} Downing's defense at trial was that she did not manufacture the methamphetamines and that she was unaware that the chemicals used to manufacture the drugs were located in her house. While Downing argued that she was unaware of the existence of the tank, Schadle testified that Downing told him that she was the "lady of the house" and was in charge of cooking. As such, the jury was free to infer that as the person who prepared the food, Downing would be aware of a large tank in the freezer.

{¶31} The jury also heard evidence that Downing admitted to having purchased cold pills in the past, that she possessed a shopping list reminding her to buy lithium batteries, and that she had a burn on her leg consistent with a can exploding in a fire. The jury was

free to infer from these facts that Downing was an active participant in the manufacturing of methamphetamines.

{¶32} While Christopher Downing testified that Tammy did not possess or know that the chemicals were located on their property, by virtue of the jury's verdict, it chose to find that his testimony lacked credibility. Determining the witnesses' credibility and what weight to give the testimony is well within the province of the jury, and we do not find the extraordinary circumstances necessary to disturb the verdict or any manifest miscarriage of justice in this case. Downing's second assignment of error is overruled.

{¶33} Judgment affirmed.

YOUNG, P.J., and POWELL, J., concur.

[Cite as *State v. Downing*, 2010-Ohio-5957.]