

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 13AP-19
	:	(C.P.C. No. 08CR-11-8033)
Shamso Jama,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on September 3, 2013

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*Ron O'Brien*, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

*Kirk A. McVay*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, Shamso Jama ("Jama"), appeals from the December 18, 2012 amended judgment entry of the Franklin County Court of Common Pleas, finding her guilty of one count of possession of drugs, a felony of the second degree. Because we find the conviction is supported by the manifest weight of the evidence, we affirm.

**I. PROCEDURAL HISTORY**

{¶ 2} This is the third time this case has been on appeal to this court. *See State v. Jama*, 189 Ohio App.3d 687, 2010-Ohio-4739 (10th Dist.) ("*Jama I*"); *State v. Jama*, 10th Dist. No. 11AP-210, 2012-Ohio-2466 ("*Jama II*"). The procedural history underlying the prior two appeals was sufficiently stated in the *Jama II* decision as follows:

On November 12, 2008, defendant \* \* \*, Shamso Jama ("Jama"), was indicted on the following two charges: (1) Count 1 of the indictment, aggravated trafficking in drugs, to wit: cathinone, more commonly known as khat,<sup>1</sup> a Schedule I controlled substance, in an amount equal to or exceeding 3,000 grams,<sup>2</sup> a felony of the first degree; and (2) Count 2 of the indictment, aggravated possession of drugs, to wit: cathinone, more commonly known as khat, a Schedule IV controlled substance, in an amount equal to or exceeding 50 times the bulk amount but less than 100 times the bulk amount, a felony of the second degree.

A jury-waived trial began on January 20, 2009. Prior to the commencement of the trial, the trial court granted the State's motion to amend the aggravated possession of drugs charge. The amendment changed the name of the drug from cathinone to cathine, thereby properly classifying it as a Schedule IV drug. No other changes were made to the indictment.

Following the bench trial, the trial judge found appellant not guilty of the aggravated trafficking in drugs offense, but guilty of the aggravated possession of drugs offense. Specifically, the trial court found that "[o]n count two of the indictment, the Court will enter a finding of guilty." (Jan. 23, 2009 Tr. 6.) The court further stated: "So you have been found guilty of aggravated possession of drugs, a felony of the second degree." (Jan. 23, 2009 Tr. 6.) On January 23, 2009, the trial court filed an entry setting forth its verdict. The written verdict stated Jama had been found guilty of "Count Two of the Indictment, to wit: **POSSESSION OF DRUGS**, a Felony of the Second Degree." (Emphasis sic.) (R. 24-25.)

The case was scheduled for sentencing several times. On August 17, 2009, one day before the scheduled sentencing date of August 18, 2009, trial counsel for Jama filed a "motion for issuance of *nunc pro tunc* order." (Emphasis sic.) In the motion, counsel argued the trial court's January 23, 2009 entry failed to indicate that Jama had been found guilty of the

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<sup>1</sup> Khat is the popular name of an exotic plant known as *catha edulis*. It is a shrub grown in countries of Northeastern Africa. Its use is widespread in Somalia. It is typically consumed by chewing the leaves or by brewing it in tea. Fresh khat contains cathinone, a potent psychoactive stimulant, and cathine, a less potent stimulant. See *State v. Samatar*, 152 Ohio App.3d 311, 2003-Ohio-1639 (10th Dist.). As khat loses its freshness, the cathinone decomposes into the less potent cathine. See *State v. Mohamed*, 10th Dist. No. 08AP-960, 2009-Ohio-6658 (10th Dist.).

<sup>2</sup> A major drug offender specification was also included with the aggravated trafficking in drugs offense.

*amended* count two. Jama's counsel further argued the trial court failed to make a finding as to the quantity of drugs at issue, and moved the court to find Jama guilty of the amended count two as a felony of the third degree, rather than a felony of the second degree.

At the sentencing hearing, the trial court clarified that the guilty finding previously entered should have been a finding of guilt as to possession of drugs, rather than to *aggravated* possession of drugs. The trial court went on to grant the motion, reducing the offense from a second-degree felony to a third-degree felony based upon the theory that it had the authority to do so using a nunc pro tunc order. This judgment was journalized on August 21, 2009. The relevant portion of that judgment states as follows:

Prior to the sentencing hearing the Court considered Defendant's Motion for Issuance of a *Nunc Pro Tunc* Order. After consideration of the arguments of counsel and a review of the Transcript of the Proceedings, the Court amended the finding of guilty to **GUILTY** to **POSSESSION OF DRUGS IN AN AMOUNT GREATER THAN BULK BUT LESS 50 TIMES THE BULK**, in violation of R.C. 2925.11, a Felony of the Third Degree.

(Emphasis sic.) (R. 61, 63, 65-67.)

The trial court imposed a sentence which included community control, but failed to provide the required findings to rebut the presumption for prison on a third-degree felony drug offense. The State filed a combined appeal of right and an appeal seeking leave to appeal, asserting two assignments of error. One assignment of error involved the trial court's failure to make the necessary findings for sentencing. The second assignment of error involved the use of the nunc pro tunc order to amend the guilty verdict. Jama also filed an appeal. Jama's assignments of error challenged the trial court's failure to evaluate the credentials of her interpreter and its failure to ensure she received adequate translations. We overruled Jama's two assignments of error. However, we granted the State's leave to appeal, sustained its assignment of error as to the misuse of the nunc pro tunc order, and found its assignment of error on sentencing moot. As a result, we reversed the trial court's judgment, vacated the amended verdict, and reinstated the original verdict of January 23, 2009, in which Jama was found guilty of a second-degree

felony. We limited our decision to the improper use of the nunc pro tunc order and expressed no opinion as to whether there could be another procedure used to amend the original verdict. See *State v. Jama*, 189 Ohio App.3d 687, 2010-Ohio-4739 (10th Dist.) ("*Jama I*").

Following remand, the trial court held a status conference on October 19, 2010. In order to address Jama's concerns created by the reinstatement of the original verdict, it was agreed that counsel for Jama would file a written motion and the State would have an opportunity to respond, followed by a reply brief filed on Jama's behalf. Jama's counsel further indicated Jama intended to file a motion for new trial. The State objected, stating it did not believe such a motion was the proper method by which to proceed in the case. The trial court reiterated its belief that a method did exist by which it could modify the original guilty finding to one involving a lesser included offense.

On November 18, 2010, counsel for Jama filed a motion for new trial and/or modification of the verdict, citing Crim.R. 33(A)(4) and (B). The defense argued the verdict was not sustained by sufficient evidence and was contrary to law because the trial court failed to make a specific finding as to the quantity of cathine involved. The defense also argued the motion should be permitted, despite counsel's failure to file it within 14 days of the verdict, due to unavoidable prevention, claiming her original trial counsel were ineffective in discovering the insufficiency of the form of the verdict and that the State's filing of an appeal caused the trial court to lose jurisdiction, thereby preventing it from hearing the motion. The State, on the other hand, argued unavoidable prevention could not be shown for two reasons. First, the State asserted the purported flaw in the verdict could have easily been raised within 14 days and counsel's ineffectiveness was not a basis for unavoidable prevention. Second, the State submitted it did not file its appeal until well after the 14-day time frame had expired.

On February 3, 2011, a hearing was held to address Jama's motion for new trial. Defense counsel reiterated the arguments made in Jama's brief, while the State continued to argue that the motion was procedurally improper. The trial court stated it had reviewed the testimony in the case, specifically the testimony of the chemist who weighed and analyzed the khat. The trial court determined the khat at

issue weighed 4,634.9 grams, which was less than 50 times the bulk amount needed to constitute a felony of the second degree (i.e., 6,000 grams or more). Concluding that the evidence in the case did not support a conviction for possession of drugs as a felony of the second degree, the trial court announced it was correcting its error and finding Jama guilty of a felony of the third degree. The State objected to the trial court's "amendment" of the verdict.

The trial court further stated it was denying the motion for new trial, but it was modifying the guilty verdict in order to conform to the evidence. In proceeding to sentencing, the trial court again placed Jama on community control for three years. The trial court did not state any sentencing findings to overcome the presumption for prison for the third-degree felony drug offense.

On February 3, 2011, the trial court entered a modified judgment entry. The relevant portion of that entry reads as follows:

**On February 3, 2011, the Defendant appeared for resentencing. \* \* \* The Court GRANTED the modification of the Judgment of Guilty to conform to the evidence. Defendant was found GUILTY to the lesser included offense of Count Two of the Indictment, to wit: AGGRAVATED POSSESSION OF DRUGS IN AN AMOUNT LESS THAN 50 TIMES THE BULK AMOUNT, in violation of R.C. 2925.11, a Felony of the Third Degree.**

(Emphasis sic.) (R. 102, 104, 105.)

*Jama II* at ¶ 2-12.

{¶ 3} In *Jama II*, the State of Ohio appealed the trial court's modified judgment entry on May 3, 2011. Also in that case, we sustained a portion of the State's assignments of error and "remanded for reinstatement of the original verdict and for further proceedings." *Id.* at ¶ 55. On remand, the trial court sentenced Jama based on the original second-degree felony verdict and imposed the minimum two-year mandatory prison term. The court delayed enforcement of the sentence until a later date.

## II. FACTS

{¶ 4} The evidence presented at trial established the following facts: on January 20, 2009, Columbus Police Officers, Frank Miller and John Kuntupis both testified that they responded to a report of a robbery in the vicinity of the Midnight Cafe ("cafe"), located at 3071 Cleveland Avenue, Columbus, Ohio. They met the victim at the back door of the cafe and were informed that the robbery suspect had just entered the cafe. Before they entered the cafe, the back door opened and the robbery suspect stepped outside and then stepped back inside the cafe. Officer Kuntupis recognized the suspect as Farah Abdi. At that time, Officers Miller and Kuntupis entered the cafe. They did not have their guns drawn nor did they give any special instructions as they entered. Officer Miller testified that, as he entered, he saw Jama sitting on a couch. Officer Kuntupis testified that, as they entered the cafe, everyone froze. Officer Kuntupis estimated that there were 40 to 50 people inside and that, because he kept his focus on Abdi, he did not see Jama at that time.

{¶ 5} Officer Kuntupis testified further that, during the few years that the cafe was open, he had been sent to that location several times. He testified that it was common to find khat and khat stems in the trash in the morning. Officer Kuntupis also testified that he had known Jama before that night, that he had seen her cleaning the parking lot at around 4:00 a.m. at least once a week, and that he had never seen another female at the cafe. Officer Kuntupis further testified that, for the past one and one-half years before the incident, the cafe was known to him to be a "khat place." (Tr. Vol. I 65.)

{¶ 6} Columbus Police Officer Adam Barton testified that he was also dispatched to the cafe on the night in question. Officer Barton entered the front door and he and Officer Miller apprehended the robbery suspect. Officer Barton testified that he saw Jama sitting in the corner of the couch, noted several small baggies in front of her as well as shucks from khat in the trash. Officer Barton testified that he had been deployed to Somalia and was familiar with khat. Officer Barton observed two bundles of khat sticking out from underneath Jama. Officer Barton indicated that the cafe had a reputation for khat chewing. Forty-nine bundles of khat were recovered from underneath a blanket upon which Jama had been sitting.

{¶ 7} Gregory Kiddon, a forensic scientist working for the Ohio Bureau of Criminal Identification testified that he was the person responsible for analyzing the drugs seized at the cafe. Kiddon's January 24, 2008 report contained his findings:

1. Eighteen (18) plastic bags containing vegetation – 1467.2g – found to contain Cathinone and Cathine.
2. A white plastic bag containing vegetation – 31.9g – found to contain Cathinone and Cathine.
3. Nine (9) bundles of vegetation – 548.5g – found to contain Cathinone and Cathine.
4. A white plastic bag containing vegetation – 77.4g – found to contain Cathinone and Cathine.
5. A white plastic bag containing vegetation – 46.1g – found to contain Cathinone and Cathine.
6. A white plastic bag containing vegetation – 74.0g – found to contain Cathinone and Cathine.
7. A plastic bag containing vegetation – 19.4g – found to contain Cathinone and Cathine.
8. Forty-nine (49) bundles of vegetation and loose shoots and leaves – 4634.9g – found to contain Cathinone and Cathine.

{¶ 8} Plaintiff-appellee, the State of Ohio ("the State"), also presented testimony from Abdi and Abdiaziz Isse. Abdi testified that he was at the cafe that night and that he was questioned about a robbery. Abdi testified that he knew Jama through the cafe, that she was there that evening and he identified where she was sitting. Abdi also testified that Jama gave him two sticks or branches of khat that night.

{¶ 9} Isse testified that he was a partial owner of the cafe and that he sold partial interest to Jama in July 2007. Isse testified that he managed one part of the business and that Jama managed the other. Isse testified that Jama sold khat to the Somali community. According to Isse, Jama sold khat at the cafe on a regular basis. Isse testified that Jama would keep the khat right next to her or on her lap while she sat on the couch. Isse identified the silver refrigerators and testified that Jama stored khat in those

refrigerators. According to Isse, before Jama became a part owner of the cafe, khat was not sold there.

{¶ 10} Jama testified that she had been in Columbus for 11 years and that she had a good reputation for preparing pastries. Jama testified that she met Jamal Aziz while she was selling some of her pastries. He spoke about her pastries and Jama indicated that she could sell pastries at the cafe. Aziz spoke to Jama about the problems they were having paying the rent and two weeks later, Jama signed a document and became a partner. According to the purchase agreement, Jama paid \$7,000 for her share of the cafe. Jama's plans were to sell her pastries from the cafe.

{¶ 11} According to Jama, she did not have keys, did not clean the parking lot, and was unaware that the cafe had a reputation for selling khat. Jama testified that when the police came into the cafe that evening, she was standing near the sofas and only sat because the police officers ordered everyone to sit. Jama testified that she would never sit on khat because people eat khat.

### **III. ASSIGNMENT OF ERROR**

{¶ 12} Jama presents a single assignment of error for our review:

THE TRIAL COURT ERRED, DEPRIVING DEFENDANT-APPELLANT OF HER RIGHTS TO DUE PROCESS OF LAW AND A FAIR TRIAL UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENT[S] TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION WHEN IT PRONOUNCED APPELLANT GUILTY WHEN THE MANIFEST WEIGHT OF THE EVIDENCE WOULD NOT SUPPORT SAID VERDICT.

{¶ 13} In the amended verdict, Jama was found guilty of possession of 6,899.4 grams of khat. Jama contends that this ignores all the testimony which suggests that she had no control and no possessory interest over any of the khat in excess of the 4,634.9 grams on which she was found sitting. Jama contends that she had no managerial authority, the majority of the khat was found in places to which she did not have immediate access, and she had only been a partial owner in the cafe for a couple of months. Jama contends that the court's decision ignores that testimony.

{¶ 14} "The weight of the evidence concerns the inclination of the greater amount of credible evidence offered in a trial to support one side of the issue rather than the

other." *State v. Brindley*, 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶ 16, citing *State v. Gray*, 10th Dist. No. 99AP-666 (Mar. 28, 2000); *see also State v. Chandler*, 10th Dist. No. 05AP-415, 2006-Ohio-2070, ¶ 8. The weight to be given to the evidence, as well as the credibility of the witnesses, are issues which are primarily to be determined by the trier of fact. *State v. Hairston*, 10th Dist. No. 05AP-366, 2006-Ohio-1644, ¶ 20, citing *State v. DeHass*, 10 Ohio St.2d 230 (1967).

{¶ 15} A defendant is not entitled to a reversal on manifest weight grounds simply because there was inconsistent evidence presented at trial. *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶ 21; *State v. Stewart*, 10th Dist. No. 08AP-33, 2009-Ohio-1547, ¶ 17. The trier of fact is in the best position to take into account any inconsistencies, along with the witnesses' demeanor and manner of testifying, and determine whether or not the witnesses' testimony is credible. *Chandler* at ¶ 9, citing *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶ 58. *Stewart* at ¶ 17.

{¶ 16} "While the jury may take note of the inconsistencies and resolve or discount them accordingly, *see DeHass*, such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Nivens*, 10th Dist. No. 95APA09-1236 (May 28, 1996). A jury, as the finder of fact and the sole judge of the weight of the evidence and the credibility of the witnesses, may believe or disbelieve all, part, or none of a witness's testimony. *State v. Antill*, 176 Ohio St. 61, 67 (1964); *State v. Jackson*, 10th Dist. No. 01AP-973 (Mar. 19, 2002); *Chandler* at ¶ 13; *Raver* at ¶ 21.

{¶ 17} A conviction is not against the manifest weight of the evidence merely because the jury believed the prosecution testimony. *State v. Houston*, 10th Dist. No. 04AP-875, 2005-Ohio-4249, ¶ 38 (reversed and remanded in part on other grounds); *Stewart* at ¶ 22. An appellate court must give great deference to the fact finder's determination of the witness credibility. *Chandler* at ¶ 19; *State v. Webb*, 10th Dist. No. 10AP-189, 2010-Ohio-5208, ¶ 16.

{¶ 18} Jama was charged with and found guilty of violating R.C. 2925.11, which provides in relevant part:

(A) No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog.

\* \* \*

(C) Whoever violates division (A) of this section is guilty of one of the following:

\* \* \*

(2) If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule III, IV, or V, whoever violates division (A) of this section is guilty of possession of drugs. The penalty for the offense shall be determined as follows:

\* \* \*

(d) If the amount of the drug involved equals or exceeds fifty times the bulk amount, possession of drugs is a felony of the second degree, and the court shall impose upon the offender as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

Pursuant R.C. 2925.01(D)(2), 120 grams constitutes a bulk amount of khat as a schedule IV substance. More than 50 times the bulk would therefore be in excess of 6,000 grams.

{¶ 19} As the records establishes, Columbus police officers confiscated 6,899.4 grams of khat. As such, there is no question that more than 50 times the bulk amount was seized. Jama argues that the manifest weight of the evidence demonstrated that she could not have had control over any more of the khat than that which was recovered from the immediate vicinity where she was sitting.

{¶ 20} Two different scenarios were presented by the evidence. Either the testimony of Officers Miller and Kuntupis was to be believed or the testimony of Jama was to be believed. The police officers testified that for the few years that the cafe had been open, the police had numerous dealings there. Trash behind the building routinely had khat and khat stems in it in the morning. Officer Kuntupis had seen Jama in the parking lot at 4:00 a.m. at least once a week cleaning up the khat debris. He further testified that, for approximately one and one-half years before this incident, the cafe was known to be a khat place and had never seen another female other than Jama there.

{¶ 21} By comparison, Jama testified that she had a reputation for baking pastries. In early July 2007, while selling some of her pastries, she meet Aziz. He asked her about her pastries and whether she was interested in selling them at the cafe. He further

informed her that they had difficulties paying the rent. Two weeks later, Jama paid \$7,000 to become a part owner of the cafe and brought in her pasties once a day to be sold. Jama testified that she did not sell khat at the cafe.

{¶ 22} After reviewing the record, this court finds that the verdict was not against the manifest weight of the evidence. Jama denied that she was involved with khat at the cafe. However, the trial court did not accept her argument that she was not involved and the testimony was not inherently or manifestly incredible in demonstrating that Jama was responsible for all of the amounts of khat found on the premise. As the State notes in its brief, Jama appears to concede that the evidence was strong enough to support her involvement at the level of a third-degree felony. It is not manifestly against the weight of the evidence to conclude that she was actually responsible for all of the khat, making her guilty of a second-degree felony. Therefore, Jama's single assignment of error is overruled.

#### **IV. DISPOSITION**

{¶ 23} Having overruled Jama's single assignment of error, the judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

BROWN and SADLER, JJ., concur.

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