

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JOSEPH GROVE,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY **Case No. 18 MA 0145**

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 18 CR 292

BEFORE:

Cheryl L. Waite, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:

Affirmed.

Remanded for Limited Sentencing Hearing.

Atty. Paul J. Gains, Mahoning County Prosecutor and *Atty. Ralph M. Rivera*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee

Atty. Adam V. Buente, 841 Boardman-Poland Road, Suite 307, Boardman, Ohio 44512, for Defendant-Appellant.

Dated: May 29, 2020

WAITE, P.J.

{¶1} Appellant Joseph Grove appeals a November 30, 2018 Mahoning County Common Pleas Court judgment entry convicting him of four gun-related charges. Appellant argues that his convictions are not supported by sufficient evidence and are against the manifest weight of the evidence because the state failed to prove that he possessed the gun at issue. For the reasons provided, Appellant’s argument is without merit and the judgment of the trial court is affirmed. However, although not raised by the parties, the trial court failed to conduct a merger analysis at the sentencing hearing. Thus, the matter is *sua sponte* remanded for the trial court to conduct a limited sentencing hearing to determine whether the offenses in question should merge.

Factual and Procedural History

{¶2} On February 25, 2018, a house located in Youngstown was burglarized. Among the items taken from the house was a loaded “FN Five-seven handgun.” (10/22/18 Trial Tr. Vol. II, p. 282.) The gun had a custom made grip. The gun was loaded and stored in an armoire for personal protection.

{¶3} On March 5, 2018, Officer Thomas Phillips of the Youngstown Police Department was patrolling on the north side of Youngstown. (10/22/18 Trial Tr. Vol. II, p. 324.) Officer Phillips noticed a black Pontiac driving near Wirt Boulevard and Belmont Avenue. He ran the license plate and determined that the car was registered to a female with a suspended license. Officer Phillips did not initiate a traffic stop, however, because the driver was male. An hour or two later, Officer Phillips encountered the car again. This time the car was on Superior Street moving in the opposite direction as Officer Phillips’ cruiser. Officer Phillips observed the car abruptly pull into a driveway. As Officer Phillips

turned his cruiser around, the car pulled out of the driveway and proceeded to Delaware Avenue with Officer Phillips following behind.

{¶4} The car pulled into a driveway on Delaware Avenue and drove up to the garage, which was described as being located deep into the driveway. Officer Phillips parked his cruiser on the street and made eye contact with Appellant as he exited the Pontiac. He noticed that Appellant appeared to be clutching the right side of his jacket as he walked behind the car and towards the house. Officer Phillips temporarily lost sight of Appellant, who walked behind the house.

{¶5} Officer Phillips exited his cruiser when he saw the homeowner exit her house. Officer Phillips was concerned for her safety due to the developing situation and because the house was located in a “high crime area with several gun and drug-related arrests.” (10/22/18 Trial Tr. Vol. II, p. 334.) According to Officer Phillips, there also were several breaking and entering reports filed in the area. As Officer Phillips approached the homeowner, he saw Appellant reappear from behind the house. Officer Phillips asked the homeowner if she recognized Appellant or his vehicle and she replied that she had never seen Appellant or his vehicle before. Officer Phillips asked her to go back inside the house.

{¶6} Appellant approached Officer Phillips and volunteered that he did not have a driver’s license. Appellant’s admission, coupled with the fact that Officer Phillips had seen him driving a car, allowed Officer Phillips to detain him for driving with a suspended license. Appellant consented to a pat down. During the pat down, Officer Phillips felt a “hard, sharp object” in Appellant’s pocket. (10/22/18 Trial Tr. Vol. II, p. 340.) When he retrieved the object from Appellant’s pocket, he discovered it was a pen that had been

cut at one end and contained a white powder residue. Officer Phillips placed Appellant under arrest for suspected drug paraphernalia and called for back-up to allow him to search the area behind the house.

{¶7} Officer Phillips retraced Appellant's footprints, which were visible in the snow that had been in the process of melting. They were described as being recently made with sharp and crisp edges. The footprints led to a trashcan located behind the house. Officer Phillips opened the trashcan and saw a gun. The trashcan was otherwise empty. When he retrieved the gun Officer Phillips noticed the steel handle was warm to the touch. He had expected the steel to be cold, as it was thirty or forty degrees outside.

{¶8} Officer Phillips knocked on the homeowner's backdoor and asked her if she owned a gun, and she replied that she did not. When he asked her if the trashcan had been empty, she responded that her trash company had picked up the trash a few hours before and that she checked to ensure it was empty before bringing it back to its position behind the house. Appellant also denied ownership of the gun.

{¶9} Greg Miller of the Youngstown Police Department Crime lab test-fired the gun and determined that it was operable. He explained that he did not send the gun for testing with the Ohio Bureau of Criminal Investigation because BCI does not fingerprint or conduct a DNA analysis of weapons that were not involved in a violent offense.

{¶10} On April 5, 2018, Appellant was indicted on the following: one count of having weapons under disability, a felony of the third degree in violation of R.C. 2923.13(A)(2)(3), (B); one count of carrying a concealed weapon, a felony of the fourth degree in violation of R.C. 2923.12(A)(2), (F); one count of improperly handling of a firearm in a motor vehicle, a felony of the fourth degree in violation of R.C. 2923.16(B);

and one count of tampering with evidence, a felony of the third degree in violation of R.C. 2921.12(A)(1), (B).

{¶11} After a jury trial, Appellant was convicted on all counts as charged in the indictment. On November 30, 2018, Appellant was sentenced to two years on his conviction for possessing weapons under disability, one year on the concealed weapon conviction, one year for improper handling of a firearm, and two years for tampering with the evidence. At the sentencing hearing, defense counsel argued that counts two and three (concealed weapon and improper handling) merge for sentencing purposes. The trial court noted that the convictions would run concurrent if they did not merge, but never specifically determined whether the counts should merge. The court ordered counts one and two (weapons under a disability and possessing a concealed weapon) to run consecutive to one another and concurrent to counts three and four (improper handling and tampering) for an aggregate sentence of three years. The court credited Appellant with 245 days served. It is from this sentencing entry that Appellant timely appeals.

Sua Sponte Sentence Issue

{¶12} Although not raised by the parties, it is apparent from the record that the trial court failed to conduct a merger analysis. At the sentencing hearing, defense counsel argued that the improper handling conviction should merge with Appellant's weapons disability and concealed weapons convictions. The trial court stated "Court Three, improper handling of a firearm in a motor vehicle, sentenced to one year in prison. That shall run concurrently if it does not merge with the sentence imposed in Counts One and Two." (11/30/18 Sentencing Hrg., p. 29.) However, mere mention of possible merger does not equate to conducting a merger analysis or making a determination as to merger.

{¶13} “[W]here two offenses must be merged, this must be performed prior to sentencing so that a sentence is only entered on one offense.” *State v. Gardner*, 7th Dist. Mahoning No. 10 MA 52, 2011-Ohio-2644, ¶ 24, *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶ 17-18. A trial court cannot impose concurrent sentences when the offenses have merged. *State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234. “Rather, the court must refrain from entering a sentence on one of the merged offenses. ‘Sentencing concurrently on merged counts does not satisfy the merger doctrine as no sentence at all should be entered on one of the two merged counts.’ ” *State v. Tapscott*, 2012-Ohio-4213, 978 N.E.2d 210, ¶ 48 (7th Dist.), citing *Gardner*, supra, ¶ 24; *Whitfield*, supra, ¶ 17.

{¶14} The trial court’s imposition of concurrent sentences where at least two offenses may merge without conducting a merger analysis was erroneous. We remand the matter for the limited purpose of allowing the trial court to determine whether the counts in question merge for sentencing purposes and, if so, to allow the state to elect on which conviction Appellant is to be sentenced.

ASSIGNMENT OF ERROR NO. 1

The State Submitted Insufficient Evidence to Support a Conviction Because the State Failed to Prove Beyond a Reasonable Doubt That Defendant Actually or Constructively Possessed a Firearm.

ASSIGNMENT OF ERROR NO. 2

The Jury Returned a Verdict Against the Manifest Weight of the Evidence.

{¶15} Appellant presents the same arguments to support both his sufficiency and manifest weight of the evidence arguments. As such, they will be jointly addressed. While Appellant contests each of his four convictions, he attacks only whether the evidence supports a finding that he possessed the gun; an element of each offense. Appellant contends it is clear from the record that he did not have actual possession of the gun because no one testified that they saw him with the gun. As to constructive possession, Appellant argues that neither Officer Phillips nor the homeowner saw him handle the gun or saw his actions once he went behind the house. Appellant points out that the house is located within a high crime area and no DNA or fingerprints were taken to prove that it was he who placed the gun in the trashcan.

{¶16} In response, the state argues that there is a plethora of evidence supporting the jury's determination that Appellant possessed the gun before it was found in the trashcan. The state focused its argument on Appellant's behavior after he pulled into the homeowner's driveway. Appellant clutched the right side of his jacket, made eye contact with Officer Phillips, and then disappeared behind the house. His footprints led directly to the trashcan where the gun was recovered, and the gun's steel handle was warm to the touch despite the fact that the temperature was between thirty and forty degrees that day.

{¶17} "Sufficiency of the evidence is a legal question dealing with adequacy." *State v. Pepin-McCaffrey*, 186 Ohio App.3d 548, 2010-Ohio-617, 929 N.E.2d 476, ¶ 49 (7th Dist.), citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.3d 541 (1997). "Sufficiency is a term of art meaning that legal standard which is applied to determine whether a case may go to the jury or whether evidence is legally sufficient to support the

jury verdict as a matter of law.” *State v. Draper*, 7th Dist. Jefferson No. 07 JE 45, 2009-Ohio-1023, ¶ 14, citing *State v. Robinson*, 162 Ohio St. 486, 124 N.E.2d 148 (1955). When reviewing a conviction for sufficiency of the evidence, a reviewing court does not determine “whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction.” *State v. Rucci*, 7th Dist. Mahoning No. 13 MA 34, 2015-Ohio-1882, ¶ 14, citing *State v. Merritt*, 7th Dist. Jefferson No. 09 JE 26, 2011-Ohio-1468, ¶ 34.

{¶18} In reviewing a sufficiency of the evidence argument, the evidence and all rational inferences are evaluated in the light most favorable to the prosecution. *State v. Goff*, 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). A conviction cannot be reversed on the grounds of sufficiency unless the reviewing court determines that no rational juror could have found the elements of the offense proven beyond a reasonable doubt. *Id.*

{¶19} 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.” (Emphasis deleted.) *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). It is not a question of mathematics, but depends on the effect of the evidence in inducing belief. *Id.* Weight of the evidence involves the state's burden of persuasion. *Id.* at 390 (Cook, J. concurring). The appellate court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, citing *Thompkins*, at 387. This discretionary power of the appellate court to reverse a conviction is to be

exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Id.*

{¶20} “[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.” *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 118, quoting *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact is in the best position to weigh the evidence and judge the witnesses’ credibility by observing their gestures, voice inflections, and demeanor. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). The jurors are free to believe some, all, or none of each witness’ testimony and they may separate the credible parts of the testimony from the incredible parts. *State v. Barnhart*, 7th Dist. Jefferson No. 09 JE 15, 2010-Ohio-3282, ¶ 42, citing *State v. Mastel*, 26 Ohio St.2d 170, 176, 270 20 N.E.2d 650 (1971). When there are two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, we will not choose which one is more credible. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999).

{¶21} Appellant specifically contests whether the evidence shows that he possessed the gun. In order to “have” a gun, a defendant must either have actual or constructive possession of the firearm. *State v. Hudson*, 2017-Ohio-645, 85 N.E.3d 371, ¶ 14 (7th Dist.), citing *State v. Haslam*, 7th Dist. Monroe No. 08 MO 3, 2009-Ohio-1663, ¶ 41. Actual possession can be established by proving that the defendant owned or physically controlled the firearm. *State v. Riley*, 7th Dist. Mahoning No. 13 MA 180, 2015-Ohio-94, ¶ 25. Constructive possession is where a defendant knowingly exercises dominion and control over an object regardless of whether the object is within his or her

immediate physical possession. *State v. Wolery*, 46 Ohio St.2d 316, 329, 348 N.E.2d 351 (1976).

{¶22} While there is no direct evidence that Appellant possessed the gun, the record contains substantial circumstantial evidence. “Circumstantial evidence and direct evidence inherently possess the same probative value.” *State v. Prieto*, 7th Dist. Mahoning No. 15 MA 0200, 2016-Ohio-8480, ¶ 34, citing *In re Washington*, 81 Ohio St.3d 337, 340, 691 N.E.2d 285 (1998); *State v. Jenks*, 61 Ohio St.3d 259, 272-273, 574 N.E.2d 492 (1991), paragraph one of the syllabus. In fact, “[e]vidence supporting the verdict may be found solely through circumstantial evidence.” *State v. Smith*, 7th Dist. Belmont No. 06 BE 22, 2008-Ohio-1670, ¶ 49.

{¶23} Here, Appellant abruptly pulled into the driveway after noticing a police cruiser following his vehicle. He pulled his car to the end of the driveway and up to the garage, which was described as deep into the property. He did not know the owner of the house. He exited his vehicle and clutched his right side as he walked. He made eye contact with Officer Phillips yet continued to travel behind the house. He did not make verbal contact with Officer Phillips until he reappeared from behind the house. Officer Phillips was able to retrace Appellant’s footprints which were visible in the snow. The footprints led directly to the trashcan. The gun was the only item inside the trashcan and, despite the fact that the outside temperature was quite cold, the steel gun handle was warm to the touch. The homeowner informed Officer Phillips that her trash company had collected the trash a few hours before the incident and that she had checked the trashcan to ensure it was empty before she brought it back to the area behind the house. Appellant

did not offer an explanation as to why he pulled into the driveway or why he exited his car and walked behind a stranger's house.

{¶24} Appellant appears to attack the officer's credibility when he argues that Officer Phillips did not photograph the footprints in the snow. Officer Phillips explained at trial that he did not stop to photograph the area because he was involved in a developing situation. Because there was the possibility that a weapon was involved, he did not think to stop and photograph Appellant's footprints. Again, this presents a credibility issue, and from the jury's verdict, it appears that the jury found Officer Phillips' testimony to be credible.

{¶25} Based on this record, Appellant's first and second assignments of error are without merit and are overruled.

Conclusion

{¶26} Appellant argues that his convictions are not supported by sufficient evidence and are against the manifest weight of the evidence. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed. However, we *sua sponte* remand the matter for purposes of a limited sentencing hearing to determine whether the relevant offenses merge.

Donofrio, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. However, we hereby *sua sponte* remand the matter for purposes of conducting a limited sentencing hearing to determine whether the relevant offenses merge according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.