

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 11AP-1036
v.	:	(C.P.C. No. 11CR-1667)
	:	
Percy Burney,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 30, 2012

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Kirk A. McVay, for appellant.

APPEAL from the Franklin County Court of Common Pleas

BRYANT, J.

{¶ 1} Defendant-appellant, Percy Burney, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to jury verdict, of one count of unlawful possession of a dangerous ordnance in violation of R.C. 2923.17 and one count of having a weapon while under disability in violation of R.C. 2923.13. Because plaintiff-appellee, the State of Ohio, did not present sufficient evidence to support defendant's convictions, we reverse.

I. Facts and Procedural History

{¶ 2} On March 30, 2011, a Franklin County Grand Jury indicted defendant on one count of unlawful possession of a dangerous ordnance with a firearm specification and one count of having a weapon while under disability.

{¶ 3} According to the State's evidence, defendant, as of September 10, 2009, was on probation and living in his mother's house at 1198 East Whittier Street in Columbus, Ohio. On that date, defendant's probation officer, Casey Gregory, received information indicating defendant and his brother, who was also on probation in Franklin County, possessed firearms at the Whittier Street address. Gregory arranged for a search of the house because, as a condition of probation, neither defendant nor his brother was permitted to have any type of weapon.

{¶ 4} On September 24, 2009, after Gregory submitted her search request within her department but prior to the search's execution, defendant informed Gregory he had a new contact address on East Hudson Street in Columbus. Gregory testified she kept the Whittier Street house as defendant's primary contact address and "utilized both addresses." (Tr. 109.)

{¶ 5} Gregory proceeded with the search, arriving at 1198 East Whittier Street around noon on October 1, 2009; two Columbus police officers accompanied her. Defendant's mother, Helen Horton, his brother, Billy Horton, and a two-year-old child were the only individuals present in the house at the time of the search. Gregory and the officers searched "[t]he common areas, living room, basement," and a bedroom, finding one shotgun in the basement and two shotguns underneath a couch in the living room. (Tr. 98.) One of the shotguns located under the couch was a Stevens shotgun with its stock and barrel sawed off.

{¶ 6} Investigators swabbed each of the three guns for DNA on the buttstocks and handrails. The officers also recovered the sawed-off Stevens shotgun barrel and a hacksaw from the basement, but they did not submit swabs from these items for DNA testing. Police department DNA analyst Dawn Fryback processed the swabs from the three shotguns and later testified at trial regarding her findings. Although swabs from one of the guns yielded no useable DNA evidence, Fryback was able to retrieve DNA from the other two. One of those guns, a Remington, contained a DNA "mixture" consisting of at least two individuals' DNA profiles. (Tr. 129.) The other gun, the sawed-off Stevens, contained a DNA mixture consisting of at least three individuals' DNA profiles. Fryback isolated partial DNA profiles from the mixtures, which she then compared to DNA samples collected from defendant and his brother.

{¶ 7} Fryback's investigation revealed defendant could be excluded as a contributor to the DNA mixture on the Remington gun, while defendant's brother could not. Analysis for the mixture found on the Stevens shotgun revealed neither defendant nor defendant's brother could be excluded as contributors to that DNA mixture. Fryback testified defendant could not be excluded from the mixture, since the mixture matching defendant appear in 1 in 29 people. The same process applied to defendant's brother revealed the genetic markers matching defendant's brother appear in 1 in 10,520 people.

{¶ 8} After the state presented its case-in-chief, defendant moved for judgment of acquittal pursuant to Crim.R. 29. The trial court denied the motion, and defendant then rested without calling any witnesses. The jury found defendant guilty of possession of a dangerous ordnance and having a weapon under disability but not guilty of the firearm specification attached to the unlawful possession charge. Prior to sentencing, defendant filed a motion to set aside the verdict and enter judgment of acquittal pursuant to Crim.R. 29. The trial court denied the motion at the sentencing hearing, merged the two offenses, and imposed a 30-month prison term to be served consecutively with defendant's sentences from three unrelated cases.

II. Assignments of Error

{¶ 9} Defendant appeals, assigning the following errors:

First Assignment of Error

THE TRIAL COURT ERRED, DEPRIVING DEFENDANT-APPELLANT OF HIS RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION WHEN IT DENIED DEFENDANT-APPELLANT'S CRIM.R. 29 MOTION FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT WHEN THE WEIGHT AND SUFFICIENCY OF THE EVIDENCE WOULD NOT SUPPORT THE CONVICTIONS.

Second Assignment of Error

DEFENDANT-APPELLANT WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 10 OF THE

OHIO CONSTITUTION WHEN HIS COUNSEL (1) PERMITTED THE INTRODUCTION OF EVIDENCE OF DEFENDANT-APPELLANT'S PRIOR ADULT CRIMINAL RECORD AND HIS THEN-RECENT ARREST ON OTHER GUN POSSESSION CHARGES WITHOUT OBJECTION; (2) DEFICIENTLY CROSS-EXAMINED THE STATE'S DNA EXPERT; AND, (3) FAILED TO OBJECT TO, AND MOVE TO STRIKE, THE TESTIMONY OF THE STATE'S DNA EXPERT WHEN SHE TESTIFIED WITHOUT PROVIDING A REPORT OF HER FINDINGS IN VIOLATION OF CRIM.R. 16(K).

III. First Assignment of Error - Sufficiency and Manifest Weight of the Evidence

{¶ 10} Defendant's first assignment of error contends neither sufficient evidence nor the manifest weight of the evidence supports his convictions for possession of a dangerous ordnance and having a weapon while under disability and, as a result, the trial court erred in denying his Crim.R. 29 motion for acquittal.

{¶ 11} Crim.R. 29(A) provides that a trial court "shall order the entry of a judgment of acquittal of one or more offenses * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." Because a Crim.R. 29 motion questions the sufficiency of the evidence, "[w]e apply the same standard of review to Crim.R. 29 motions as we use in reviewing the sufficiency of the evidence." *State v. Hernandez*, 10th Dist. No. 09AP-125, 2009-Ohio-5128, ¶ 6; *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, ¶ 37.

{¶ 12} Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). Sufficiency is a test of adequacy. *Id.* We construe the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found the offense's essential elements proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus; *State v. Conley*, 10th Dist. No. 93AP-387 (Dec. 16, 1993).

{¶ 13} Even though sufficient evidence supports it, a conviction still may be reversed as being against the manifest weight of the evidence. *Thompkins* at 387. When presented with a manifest weight argument, appellate courts engage in a limited weighing of the evidence to determine whether sufficient competent, credible evidence supports the

jury's verdict to permit reasonable minds to find guilt beyond a reasonable doubt. *Conley; Thompkins* at 387 (noting "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony"). Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, (1967), paragraph one of the syllabus. Thus, the jury may take note of inconsistencies and resolve them accordingly, "believ[ing] all, part, or none of a witness's testimony." *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶ 21, citing *State v. Antill*, 176 Ohio St. 61, 67 (1964).

A. The Charged Offenses and Applicable Law

{¶ 14} Defendant's indictment charged him with violating R.C. 2923.13 and 2923.17.

- R.C. 2923.13, defining the offense of having a weapon while under disability, states "no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if * * * [t]he person * * * has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence." R.C. 2923.13(A)(2).
- R.C. 2923.17, defining possession of a dangerous ordnance, provides that "[n]o person shall knowingly acquire, have, carry, or use any dangerous ordnance." A "dangerous ordnance" is "[a]ny automatic or sawed-off firearm, zip-gun, or ballistic knife." R.C. 2923.11(K)(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).

{¶ 15} The parties stipulated at trial that defendant "was adjudicated a delinquent minor having committed the offense of robbery * * *, an offense that, if committed by an adult, would be a felony offense of violence." (Tr. 148.) They also stipulated the Stevens shotgun was an "operable firearm." (Tr. 147.) Moreover, defendant does not contest that

the State offered adequate evidence of the "nature and dimensions" of the sawed-off Stevens shotgun to establish it as a "dangerous ordnance." (Appellant's brief, at 8.) The sole issue defendant raises is whether the State presented sufficient evidence to establish beyond a reasonable doubt that he "acquired, had, carried or used" a prohibited weapon in the time frame alleged. (Appellant's brief, at 8.)

{¶ 16} To "have" a gun within the meaning of R.C. 2923.13 and 2923.17, "one must either actually or constructively possess" it. *State v. Dorsey*, 10th Dist. No. 04AP-737, 2005-Ohio-2334, ¶ 32. " 'Actual possession exists when the circumstances indicate that an individual has or had an item within his immediate physical possession.' " *State v. Swalley*, 11th Dist. No. 2010-A-0008, 2011-Ohio-2092, ¶ 54, quoting *State v. Kingsland*, 177 Ohio App.3d 655, 2008-Ohio-4148, ¶ 13 (4th Dist.). See also R.C. 2925.01(K). Constructive possession exists when an individual knowingly exercises dominion or control over an object, even though the object may not be within that person's immediate physical possession. *State v. Banks*, 10th Dist. No. 11AP-592, 2012-Ohio-1420 ¶ 6.

B. Actual Possession

{¶ 17} Defendant initially contends the State failed to prove defendant actually possessed the Stevens shotgun after his disability occurred or after it was modified to a dangerous ordnance.

{¶ 18} The State did not present evidence that defendant physically handled the weapon after the occurrence of one or both of the events that made possession illegal. *Cf. State v. Wilkins*, 2d Dist. No. 20982, 2006-Ohio-315, ¶ 16 (deciding the state presented sufficient evidence to support conviction where, "although neither the firearm nor fingerprint expert could testify as to when the latent print had been left, [the firearm expert] testified that the gun at issue was not made until 1999" and "[b]ecause Wilkins was incarcerated between 1999 and 2003, there was evidence that the latent print could only have been left while Wilkins was not permitted to lawfully have a firearm"). Further hampering the State's efforts to pinpoint the time of possession, the DNA expert indicated DNA "is fairly stable over time," so an investigator could recover DNA evidence from a weapon decades after its use, barring exposure to adverse environmental conditions. (Tr. 118-20.)

{¶ 19} The State, on appeal, acknowledges "the exact timing of when defendant handled the shotgun would be important to prove actual possession." (Appellee's brief, at 4.) Recognizing it did not present timeline evidence at trial, the State instead seeks to establish defendant's constructive possession of the shotgun.

C. Constructive Possession

{¶ 20} The State contends "the jury reasonably found that defendant constructively possessed the shotgun" because not only did defendant's parole officer discover "the shotgun underneath the couch in 1198 Whittier Street—the address that defendant had previously identified to [his parole officer] as his residence," but also the forensic evidence indicated "defendant could not be excluded as a contributor to the DNA mixture found on the shotgun." (Appellee's brief, at 4.)

{¶ 21} In terms of his living arrangements, defendant asserts he informed his parole officer no later than September 24, 2009 that he "had begun residing at his girlfriend's residence" on East Hudson Street and, though he "still could be contacted through his mother's residence," he was no longer living there. (Appellant's brief, at 9.) His parole officer at trial acknowledged defendant's so informing her, but testified she kept the Whittier Street address as his "primary address" in her documentation and interpreted defendant's statement to mean "he could also be located at" his girlfriend's residence. (Tr. 109-10.) Construing the parole officer's testimony in the light most favorable to the State, the jury reasonably could find defendant maintained contact with the Whittier Street house even after he provided the new address.

{¶ 22} Possession, however, may not be inferred solely from "mere access" to contraband or occupation of the premises upon which contraband is found, particularly "where such premises are also regularly occupied by others as co-tenants and the [contraband is] found in an area ordinarily accessible to all tenants." R.C. 2925.01(K); *State v. Haynes*, 25 Ohio St.2d 264, 270 (1971). In *Haynes*, a police search of Haynes' residence, rented and occupied jointly with three other people, revealed narcotics in the general living area. No additional evidence connected defendant to the drugs, and defendant testified without contradiction that he left the home a week before the search because of a dispute with another occupant.

{¶ 23} The Supreme Court of Ohio held in *Haynes* that when contraband is discovered "in the general living area of jointly occupied premises, one can only speculate as to which of the joint occupiers have possession" *Id.* Accordingly, "no inference of guilt in relation to any specific tenant may be drawn from the mere fact of the presence of [contraband] on the premises." *Id.* See also *State v. Dawson*, 10th Dist. No. 97APA10-1300 (Aug. 13, 1998) (holding that when the defendant is not present for the search and does not have sole access to the premises where contraband is found, his occupancy as owner or lessee of the residence is not sufficient in itself to prove possession); *State v. Weber*, 2d Dist. No. 17800 (Mar. 24, 2000) (determining evidence insufficient to prove knowledge or possession of firearms and drugs where the defendant shared the premises with a co-tenant, the defendant was away for several days at the time of the search, and no fingerprints or other forensic evidence proving that the defendant had ever had any contact with the drugs or guns were found at the residence).

{¶ 24} Here, the parole officer's testimony suggests defendant's mother owned and occupied the Whittier Street house, while defendant stayed there. The record further connects at least two of defendant's siblings, as well as an unidentified child, to the house during the same time period. On those facts, defendant's occupancy alone is insufficient to support an inference of possession, meaning the "state is required to adduce additional other evidence to establish possession." *State v. Hall*, 8th Dist. No. 66206 (Dec. 1, 1994).

{¶ 25} Beyond the weapon's discovery under the couch in the Whittier Street house's living room, the only evidence connecting defendant to the Stevens shotgun is the DNA evidence and related expert testimony. The DNA expert testified defendant could not be excluded as a contributor to a DNA mixture recovered from the sawed-off Stevens shotgun, though her calculations indicated the genetic markers in the mixture matching defendant appear in 1 in 29 people.

{¶ 26} Defendant asserts the 1-in-29 match constitutes insufficient evidence "to base a finding that the weapon was actually or constructively possessed * * * due to the reasonable doubt in that scientific evidence." (Appellant's brief, at 13.) Questions concerning the certainty and reliability of DNA results go to the weight of the evidence and not to its admissibility. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, ¶ 77.

Construing the DNA evidence in a light most favorable to the State, a reasonable trier of fact arguably could conclude defendant's DNA was found on the Stevens shotgun.

{¶ 27} Combining the DNA evidence with the Supreme Court's decision in *State v. Hankerson*, 70 Ohio St.2d 87 (1982), the State contends it presented sufficient evidence to prove constructive possession. *Hankerson* considered whether the defendants there constructively possessed stolen items found in their minor son's bedroom. To demonstrate they did, the State presented evidence that the stolen "speakers and turntable were not hidden, were in plain view in [the son's] room, were large and bulky, and were connected and operable." *Id.* at 91. Witnesses also testified the son's bedroom "contained more than the usual amount of electronic equipment" and defendants knew "that various neighbors believed their son to be a neighborhood thief." *Id.* Further, both parents' comments to the police suggested they understood or suspected the property was stolen. *Id.* at 93.

{¶ 28} *Hankerson* determined the State's evidence was sufficient to prove constructive possession because, in addition to the defendants' ability to exercise dominion and control over their son's room, they clearly knew about the contraband. *Id.* The Supreme Court emphasized the importance of this latter finding, as "the mere fact that property is located within premises under one's control does not, of itself, constitute constructive possession." *Id.* Instead, "[i]t must also be shown that the person was conscious of the presence of the object." *Id.* As the court explained, "[w]ithout this element one could be found to be in illegal possession of stolen property surreptitiously placed in or upon his property by another." *Hankerson* at 91, citing *State v. Motyka*, 111 R.I. 38 (1973); *Amaya v. United States*, 373 F.2d 197 (10th Cir.1967); *Commonwealth v. Davis*, 444 Pa. 11 (1971).

{¶ 29} *Hankerson* does not assist the State here. *Hankerson* noted that although defendants there lived in a multiple-member household, they "exercised parental custody, control and responsibility" over the only other individual occupying the premises. Moreover, the court stressed that the contraband was conspicuous and clearly apparent to defendants throughout the period in question and up until the search. *Id.* By contrast, here the record indicates multiple adults lived in, or had access to, the Whittier Street house, and the gun was not in plain view in the common area but instead was hidden

under furniture. *Cf. State v. Molina*, 8th Dist. No. 83731, 2004-Ohio-4347, ¶ 27 (determining "the casual and pervasive presence of heroin and tools of trafficking" in defendant's apartment "provided ample evidence that [she] must have been aware that her apartment was being used for drug trafficking").

{¶ 30} The State, however, contends the DNA evidence satisfies the "awareness" aspect of *Hankerson* and supports the State's argument that defendant constructively possessed the guns. The State explains its failure to provide evidence regarding when defendant might have handled the weapon by asserting "the exact timing" of the event "is not essential to prove constructive possession," since a "person's dominion and control over an object can last long after he or she handles it (and indeed can exist even if the person does not handle the object at all)." (Appellee's brief, at 4.) According to the State, discovery of the weapon "in defendant's residence," in conjunction with the DNA evidence, indicates defendant's dominion and control of the weapon extended from its handling "up to when Gregory found it on October 1st." (Appellee's brief, at 4.)

{¶ 31} The State's reliance on DNA evidence to prove constructive possession takes the State back to the same problems presented in its actual possession argument. Although the DNA on the gun supports an inference that defendant touched the gun at some point, and thus was aware of it, the evidence does not allow the inference that he touched it while it was in his mother's home and thus was aware of its presence there, facts the State seeks to infer to advance its constructive possession argument. Nor did the State prove the touching or awareness, necessary to support constructive possession, occurred after defendant's disability came to be or after the shotgun became a dangerous ordnance.

{¶ 32} In the final analysis, the legal standard for defendant's convictions required additional evidence of either defendant's physically handling the gun after he incurred his legal disability and after the weapon was modified, or, alternatively, defendant knowingly exercising dominion or control over the gun during the same period. The State presented insufficient evidence to allow the jury to decide whether defendant knowingly possessed or exercised dominion or control over the weapon found hidden in the Whittier Street household's common area. "On review for sufficiency, courts are to assess not whether the state's evidence is to be believed, but whether, if believed, the evidence against a

defendant would support a conviction." *Thompkins*, supra, at 390 (Cook, J., concurring). In this case, the evidence, even if believed, does not support a conviction as a matter of law. The trial court either should have granted defendant's Crim.R. 29 motion for acquittal, or acquitted appellant at the conclusion of trial. Defendant's first assignment of error is sustained.

IV. Second Assignment of Error - Ineffective Assistance of Counsel

{¶ 33} Defendant's second assignment of error contends he was denied his right to the effective assistance of counsel. Our resolution of defendant's first assignment of error renders moot his second assignment of error, and we need not address it.

V. Disposition

{¶ 34} Having sustained defendant's first assignment of error and rendered his second assignment of error moot, we reverse the judgment of the Franklin County Court of Common Pleas and remand with instructions to enter a judgment of acquittal on the charges in the indictment.

*Judgment reversed and
cause remanded with instructions.*

BROWN, P.J., and DORRIAN, J., concur.
