[Cite as *State v. Hurse*, 2015-Ohio-2656.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 14AP-687
v.	:	(C.P.C. No. 12CR-6127)
Jason Hurse,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 30, 2015

Ron O'Brien, Prosecuting Attorney, and *Michael P. Walton*, for appellee.

Todd W. Barstow, for appellant.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Defendant-appellant, Jason Hurse ("appellant"), appeals from the August 11, 2014 judgment of the Franklin County Court of Common Pleas convicting him of possession of cocaine, in violation of R.C. 2925.11, a felony of the first degree, and tampering with evidence, in violation of R.C. 2921.12, a felony of the third degree. For the reasons that follow, we affirm.

{¶ 2} On December 4, 2012, appellant was indicted by the Franklin County Grand Jury on one count of possession of cocaine in an amount equal to or exceeding 27 grams but less than 100 grams, and one count of tampering with evidence. Arising out of the same incident, appellant's co-defendant, Grover Solomon, was indicted on possession of cocaine, in an amount equal to or exceeding 27 grams but less than 100 grams, in violation of R.C. 2925.11, a felony of the first degree; aggravated possession of

benzylpiperazine, in violation of R.C. 2925.11, a felony of the second degree, and tampering with evidence, in violation of R.C. 2921.12, a felony of the third degree.

{¶ 3} On December 13, 2013, Solomon pled guilty to possession of cocaine, a felony of the first degree, and tampering with evidence, a felony of the third degree (Defense Exhibit 1, proffered). On June 23, 2014, appellant went to jury trial. On June 24, 2014, the jury found appellant guilty of both charges. Specifically, the jury found appellant guilty of possessing an amount of cocaine that was greater than or equal to 27 grams but less than 100 grams and tampering with evidence. At sentencing on August 8, 2014, the trial court imposed eight years in prison on the possession charge to run concurrent with two years in prison on the tampering charge. Appellant timely appealed on September 8, 2014.

{¶ 4} Appellant alleges the following assignments of error:

> I. THE TRIAL COURT ERRED AND DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION BY FINDING HIM GUILTY OF POSSESSION OF COCAINE AND TAMPERING WITH EVIDENCE AS THOSE VERDICTS WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WERE ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
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> II. THE TRIAL COURT ABUSED ITS DISCRETION BY PROHIBITING APPELLANT FROM INTRODUCING EVIDENCE THAT A CO-DEFENDANT HAD PLEAD [SIC] GUILTY TO THE SAME CHARGES AND CONDUCT AS APPELLANT.

{¶ 5} We begin our analysis with the second assignment of error. Appellant asserts that the trial court erred by excluding from the evidence the judgment of conviction of Solomon (Defense Exhibit 1, proffered). Appellant offered the conviction to show that Solomon, by pleading guilty, had admitted that the 28 gram package of cocaine was his and, therefore, could not have been possessed by appellant. Plaintiff-appellee, State of Ohio ("the state"), objected to its admission on the grounds of (1) hearsay, (2) impropriety of the jury having knowledge of sentencing matters, and (3) relevance of the

co-defendant's admission. The trial court sustained the state's objection and excluded the evidence. Appellant proferred the judgment entry of conviction of co-defendant Solomon (Defense Exhibit 1, proffered).

{¶ 6} Appellant argues that Solomon's conviction was not hearsay, was relevant, and was admissible. Appellant points to Evid.R. 803(8)[1] and 902(1) and (4)[2] to support his argument that Solomon's conviction was not hearsay. Appellant also argues that

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[1] Evid.R. 803(8) states:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
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> * * *
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> (8) **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness.

[2] Evid.R. 902(1) and (4) state:

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
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> (1) **Domestic public documents under seal.** A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.
>
> * * *
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> (4) **Certified copies of public records.** A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any law of a jurisdiction, state or federal, or rule prescribed by the Supreme Court of Ohio.

Solomon's conviction was relevant pursuant to Evid.R. 401[3] and 402[4]. Finally, although he acknowledges that, pursuant to *Kazer v. State*, 5 Ohio 280 (1831), the admission of a co-defendant's guilty plea or conviction is not favored, appellant argues that the court should have applied the test in *United States v. Casto*, 889 F.2d 562, 567 (5th Cir.1989), to determine whether, in this case, Solomon's conviction was admissible.

{¶ 7} In *Casto*, the court stated: " 'Factors to be considered in evaluating the impact of a witness' guilty plea are [1] the presence or absence of a limiting instruction, [2] whether there was a proper purpose in introducing the fact of the guilty plea, [3] whether the plea was improperly emphasized or used as a substantive evidence of guilt, and [4] whether the introduction of the plea was invited by defense counsel.' " *Id.* at 567, quoting *United States v. Black*, 685 F.2d 132, 135 (5th Cir.1982). While *Casto* is not binding on this court, we will nonetheless discuss why it is inapplicable here. In *Casto*, the court assumed that the guilty plea was put before the jury by the prosecutor, not the defendant. Similarly, the case law we have found applying *Casto* addresses the question of whether a trial court erred by admitting evidence of a co-defendant's guilty plea or conviction, rather than the question of whether a trial court erred by excluding evidence of a co-defendant's guilty plea or conviction. Appellant has not presented any case law or other authority indicating the *Casto* test should be applied where the defendant attempts to put into evidence the conviction of his co-defendant. We are not convinced that the *Casto* test applies to the facts of this case.

{¶ 8} "The admission of evidence is generally within the sound discretion of the trial court, and a reviewing court may reverse only upon the showing of an abuse of that discretion." *Peters v. Ohio State Lottery Comm.*, 63 Ohio St.3d 296, 299 (1992). An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is

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[3] Evid.R. 401 states: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

[4] Evid.R. 402 states: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio. Evidence which is not relevant is not admissible."

unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 9} Assuming, without deciding, that the court did not abuse its discretion in excluding Solomon's conviction from the evidence, the trial court did not err because such exclusion would not be prejudicial to appellant.

{¶ 10} The trial court instructed the jury that appellant could be convicted of possession of cocaine as an aider and abettor or a complicitor. The court instructed the jury that "[a]n aider and abettor is one who aids, assists, encourages or cooperates with another to commit a crime and participates in the commission of the offense by some act, word or gesture." (Tr. 142.)

{¶ 11} Under Ohio's complicity statute, R.C. 2923.03, the law will treat an accomplice as though the accomplice had committed every act of the underlying principal offense. The accomplice may, therefore, be charged under the statute defining the principal offense, and the law will impute the elements of the offense committed by the principal actor to the accomplice as an aider and abettor, as if the accomplice had committed those acts. *State v. Thompson*, 10th Dist. No. 10AP-593, 2011-Ohio-6725.

{¶ 12} By moving to admit Solomon's judgment of conviction, appellant hoped to negate the allegation that he possessed the cocaine. Even if the jury had determined that appellant did not actually possess the cocaine, pursuant to Ohio's complicity law, it still could have found appellant guilty of complicity to possessing cocaine. Therefore, any exclusion would not have been prejudicial.

{¶ 13} The trial court also instructed the jury that "[t]wo or more persons may have possession if together they have the ability to control it, exclusive to others." (Tr. 141.) This instruction, to which there was no objection or allegation of error, clearly contemplates that appellant and his co-defendant together could have possessed the cocaine. Accordingly, we find the trial court did not abuse its discretion in excluding Solomon's conviction from the evidence.

{¶ 14} Appellant's second assignment of error is overruled.

{¶ 15} In appellant's first assignment of error, he alleges that the verdicts of guilty of possession of cocaine and tampering with evidence were not supported by sufficient evidence and were against the manifest weight of the evidence.

{¶ 16} Sufficiency of evidence is a "legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict." *State v. Cassell*, 10th Dist. No. 08AP-1093, 2010-Ohio-1881, ¶ 36, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). When judging the sufficiency of the evidence to support a criminal conviction, an appellate court must decide if, "after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. Where the evidence, "if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt," it is sufficient to sustain a conviction. *Id.* at 263.

{¶ 17} "While sufficiency of the evidence is a test of adequacy regarding whether the evidence is legally sufficient to support the verdict as a matter of law, the criminal manifest weight of the evidence standard addresses the evidence's effect of inducing belief." *Cassell* at ¶ 38, citing *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 25. *See also Thompkins* at 386. "When 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." *Id.*, citing *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). " 'The court, reviewing 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 and a new trial ordered.' " *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). This authority " 'should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.' " *Id.*, quoting *Martin* at 175.

{¶ 18} We begin by noting, again, that appellant was tried not only as the principal offender but also as an aider or abettor. R.C. 2923.03(A)(2) reads: "No person, acting

with the kind of culpability required for the commission of an offense, shall do any of the following: * * * (2) Aid or abet another in committing the offense." "A person aids or abets another when he supports, assists, encourages, cooperates with, advises or incites the principal in the commission of the crime and shares that criminal intent of the principal." *State v. Lett*, 160 Ohio App.3d 46, 2005-Ohio-1308, ¶ 28 (8th Dist.). Such intent may be inferred from the circumstances surrounding the crime. *Id.*; *State v. Buelow*, 10th Dist. No. 07AP-317, 2007-Ohio-5929, ¶ 30. Mere presence at the scene of the crime is not enough, by itself, to prove that the defendant aided and abetted. *State v. Johnson*, 93 Ohio St.3d 240, 243 (2001). Aiding and abetting may be shown by both direct and circumstantial evidence, and participation may be inferred from presence, companionship, and conduct before and after the offense is committed. *Id.* at 245; *Buelow* at ¶ 29; *Lett* at ¶ 29. The state must establish that the defendant took some role in causing the offense. *Id.* at ¶ 27; *Buelow*.

{¶ 19} Appellant was charged with possession of cocaine. R.C. 2925.11 prohibits any person from knowingly obtaining, possessing, or using cocaine. There is no dispute that the substance in question was cocaine. Nor does appellant dispute the element of knowingly. Rather, appellant argues that the evidence did not support (1) that he possessed the cocaine, (2) that, if he did possess the cocaine, that the amount of the cocaine was greater than or equal to 27 grams but less than 100 grams, and (3) that he was complicit in possessing the cocaine.

{¶ 20} Pursuant to R.C. 2925.01(K) "possess" or "possession" means having control over a thing or substance but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found. Possession of a controlled substance may be actual or constructive. *State v. Saunders*, 10th Dist. No. 06AP-1234, 2007-Ohio-4450, ¶ 10, citing *State v. Burnett*, 10th Dist. No. 02AP-863, 2003-Ohio-1787, ¶ 19, citing *State v. Mann*, 93 Ohio App.3d 301, 308 (8th Dist.1993). A person has actual possession of an item when it is within his immediate physical control. *Saunders; State v. Norman*, 10th Dist. No. 03AP-298, 2003-Ohio-7038, ¶ 29; *State v. Messer*, 107 Ohio App.3d 51, 56 (9th Dist.1995). Constructive possession exists when a person knowingly exercises dominion and control

over an object, even though the object may not be within the person's immediate physical possession. *State v. Hankerson*, 70 Ohio St.2d 87 (1982), syllabus. Because the crack cocaine here was not found on appellant's person, the state was required to prove that he constructively possessed it.

{¶ 21} Circumstantial evidence alone may be sufficient to support the element of constructive possession. *Jenks* at 273. Absent a defendant's admission, the surrounding facts and circumstances, including the defendant's actions, constitute evidence from which the trier of fact can infer whether the defendant had constructive possession over the subject drugs. *State v. Stanley*, 10th Dist. No. 06AP-323, 2007-Ohio-2786; *Norman* at ¶ 31; *State v. Baker*, 10th Dist. No. 02AP-627, 2003-Ohio-633, ¶ 23. The mere presence of an individual in the vicinity of illegal drugs is insufficient to establish the element of possession, but if the evidence demonstrates that the individual was able to exercise dominion or control over the drugs, he or she can be convicted of possession. *Saunders* at ¶ 11, citing *State v. Wyche*, 10th Dist. No. 05AP-649, 2006-Ohio-1531, ¶ 18, and *State v. Chandler*, 10th Dist. No. 94APA02-172 (Aug. 9, 1994).

{¶ 22} Appellant was also charged with tampering with evidence. R.C. 2921.12(A)(1) reads: "No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following: (1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation."

{¶ 23} The evidence reveals that, on May 16, 2012, around 10:00 p.m., Columbus police officers, Lamar Booker, Shawn Perrigo, and Steven Dyer, were patrolling in the parking lot of the Kozy Inn on South High Street in Columbus, Ohio. The officers were dressed in full uniform and riding in a marked cruiser. Officer Booker was driving, with Officer Dyer in the front seat and Officer Perrigo in the back. The cruiser headlights were on. The Kozy Inn was illuminated by multiple lights, and the parking lot had a couple of lights as well.

{¶ 24} As the officers were approaching the Kozy Inn, they observed Solomon, Nicholas Ealy, and appellant. Officer Booker testified that he had known the three individuals for numerous years as they lived in the neighborhood which he patrolled. He

witnessed the three individuals come out of a room on the second floor of the hotel onto the balcony. This seemed unusual to Officer Booker because he knew that the three individuals lived in houses within six miles of the hotel. The individuals milled around at the door as the officers slowly drove north past them. At that point, the individuals walked toward the southern stairwell. Officer Perrigo then witnessed Solomon throw something over the balcony railing.

{¶ 25} Officer Booker then turned the cruiser around and was heading back toward the hotel. Officer Booker then saw appellant throw something over the balcony "toward the grassy area at the southern portion of [the] hotel." (Tr. 39.) Officer Booker testified that there was no doubt in his mind who he saw throwing the object. (Tr. 49.)

{¶ 26} Officer Booker observed Solomon, Ealy, and appellant come down the stairs in that order. The officers parked the cruiser and exited. Officer Booker testified that "Mr. Solomon and Mr. Ealy kind of did something unusual. Every time I have dealt with Mr. Solomon, he always greeted me, how are you doing, so on and so forth. He immediately walked past me, really didn't have a lot of conversation for me." (Tr. 42.) Officer Booker then engaged appellant in a conversation.

{¶ 27} Officer Perrigo testified that, while Officer Booker was talking with appellant, he "looked in the grassy area where [he] believed * * * something was thrown." (Tr. 73.) Officer Booker testified that Officer Perrigo "walked directly in the area where he saw the throwing motion." (Tr. 42.) He returned to Officer Booker within a minute with one baggie which contained two plastic bags of powder cocaine. He later found another bag approximately 50 feet away, as well as another bag and scale. The first bag was approximately 30 feet from the railing, the second bag was approximately 40-50 feet from the railing. Officer Perrigo testified that he used his flashlight while searching, but he did not have to move anything to see the bags because "they were laying right on the grass." (Tr. 79.) The officers detained the three individuals and proceeded to conduct a pat down search. Before Officer Booker could search appellant, appellant told him "I got weed in my pocket." (Tr. 43.) Officer Booker found marijuana in appellant's pocket. Each baggie was weighed. One baggie came back at 13.458 grams net weight. The other came back at 28.005 grams net weight.

{¶ 28} Very succinctly, appellant argues that the evidence is weak because, while Officer Booker saw appellant throw something over the balcony, he could not testify as to what it was. He further argues that the state did not present any evidence that appellant aided, assisted, encouraged, or cooperated with Solomon in committing an offense.

{¶ 29} In *State v. Pilgrim*, 184 Ohio App.3d 675, 2009-Ohio-5357 (10th Dist.), the state presented the following evidence:

> Defendant admitted that he was a crack cocaine addict with two prior convictions for drug possession, admitted that the [4.8 grams of] crack cocaine and marijuana cigarette found during the pat-down search were his, and admitted that he had smoked marijuana laced with crack cocaine shortly before Officer Shepard arrived at the scene. The police found the 22.8 grams of crack cocaine in the location where defendant was standing when Officer Shepard arrived at the scene, the drugs appeared to have been placed in that location shortly before police discovered them, and no one other than defendant was in the area. Although the location where the drugs were found was a "common area" of the apartment complex, it was not one where people usually would be present, as it was in a corner behind some bushes outside of defendant's apartment.

Id. at ¶ 29.

{¶ 30} In *Pilgrim*, this court found that this evidence was sufficient to support the defendant's conviction of possession of crack cocaine in an amount exceeding 25 grams but less than 100 grams. *Id.* at ¶ 30. We further found that the conviction was not against the manifest weight of the evidence. *Id.* at ¶ 37.

{¶ 31} This case differs from *Pilgrim* in that, here, we have no evidence before the jury of prior convictions for drug possession, or evidence of addiction to drugs, or use of drugs that evening. There is evidence, however, of appellant's admission to and the officer's finding of marijuana in appellant's pocket. Additionally, Officer Booker testified that it was unusual that appellant, Solomon, and Ealy were at the hotel because they lived very close by. Officer Booker also testified as to the unusual behavior of Solomon and Ealy of immediately walking by him, rather than greeting him and stopping to converse as they had done in the past. Finally, and most significantly, there is Officer's Booker's testimony that he witnessed appellant throw something from the second floor balcony,

and Officer Perrigo's finding of the cocaine in the grassy area where Officer Booker saw the object being thrown.

{¶ 32} Construing this evidence and reasonable inferences drawn therefrom in a light most favorable to the prosecution, we find that there was sufficient evidence to convict appellant of, at the very least, aiding and abetting the possession of cocaine in an amount greater than or equal to 27 grams but less than 100 grams and tampering with the evidence. We also cannot say that the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed.

{¶ 33} Appellant's first assignment of error is also overruled.

{¶ 34} For the foregoing reasons, both of appellant's assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

LUPER SCHUSTER and HORTON, JJ., concur.
