[Cite as *State v. Dickerson*, 2015-Ohio-938.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2013-A-0046**
- vs -	:	
WESLEY C. DICKERSON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2012 CR 172.

Judgment: Affirmed in part; reversed in part and remanded.

Nicholas A. Iarocci, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Edward M. Heindel, 450 Standard Building, 1370 Ontario Street, Cleveland, OH 44113 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This appeal is from the Ashtabula County Court of Common Pleas. Appellant Wesley C. Dickerson was found guilty of two counts of drug trafficking with two accompanying firearm specifications; carrying a concealed weapon; and possession of criminal tools. Relevant to appeal, the trial court merged the carrying concealed weapon with the other counts and therefore Dickerson was not sentenced for carrying concealed weapon. The trial court also imposed two consecutive 18 month

sentences for drug trafficking as well as a 12 month sentence for possession of criminal tools to be served concurrently with the drug trafficking convictions. Dickerson appeals his convictions on a variety of manifest weight and sufficiency of the evidence challenges. He also protests the imposition of maximum and consecutive sentences for his drug trafficking convictions and the trial court's jury instructions on aiding and abetting. For the following reasons, we affirm in part and reverse in part; and remand for further proceedings.

{¶2} On the evening of March 20, 2012, Jimmy Paul drove a silver Acura to his mother's house to pick up Kimberlynn Oliver. When Oliver got into the backseat of the car, Dickerson was sitting in the front passenger seat. Paul announced that he wanted to go to Dairy Queen and the three subsequently went toward the nearest franchise. As they were approaching a Dairy Queen, Paul noticed a Sherriff's car and drove past the restaurant. As it turned out, Deputy Matthew Johns began to tail the Acura because Paul and Dickerson had warrants out for their arrest.

{¶3} Consequently, Paul drove to a nearby McDonalds apparently to avoid apprehension. As the Acura was in a drive-thru line, Paul asked Oliver to sit in the driver's seat because, according to Paul, he did not want to get pulled over for driving without a license. She agreed and therefore Dickerson moved to the back seat, Paul to the front passenger seat and Oliver to the driver's seat.

{¶4} As the car was pulling out of McDonald's, Deputy Johns initiated a traffic stop. Upon reaching the vehicle, Deputy Johns ordered all occupants out of the car and asked if there was a gun in the car. All three responded that they did not know. Deputy Johns then asked Oliver if he could search the car and she consented. Deputy Johns found a scale and baggies near the front passenger area, as well as

approximately $2,200 in twenty dollar bills on Paul's person. The scale, baggies and the money in 20-dollar denominations are indicia of drug trafficking.

{¶5} At some point during the search, Officer Tony Mino arrived to assist Deputy Johns. Officer Mino brought his drug detecting canine partner Nala to assist him if needed. Once Officer Mino began to search the vehicle, he discovered a handgun underneath the driver's seat. According to Officer Mino, the gun was placed in a position where it was accessible to both the front and backseat passengers.

{¶6} After unloading the handgun, Officer Mino conducted a pat-down of Oliver, which included searching her shoes and socks. Thereafter, he placed her in his car seated next to Nala. While Oliver was in the car, Nala did not give any indication that she sensed drugs in the area. Oliver was then taken out of the car and transferred to another officer who had arrived at the scene. Deputy Johns then gave custody of Dickerson to Officer Mino.

{¶7} Officer Mino performed a pat-down for his own safety which did not include a search of Dickerson's shoes, socks, ankles, crotch or butt. Officer Mino noticed that Dickerson smelled of marijuana and asked him to give him any drugs he had. Dickerson did not give him any drugs. After placing a hand-cuffed Dickerson in the back of the patrol car, Nala reacted by barking and digging into her cage, a behavior consistent with Nala indicating drugs are in the area.

{¶8} After arriving at the county jail, Dickerson complained that he could not get his feet out of the car, so Officer Mino assisted him. As Officer Mino was assisting Dickerson, he saw a bag of drugs on the floor of his car. The contents of the bag later tested positive for both cocaine and heroin.

{¶9} Dickerson was charged with two counts of drug trafficking in violation of R.C. 2925.03, both fourth-degree felonies, carrying a concealed handgun in violation of R.C. 2923.12, a fourth-degree felony, possession of criminal tools in violation of R.C. 2923.12, a fifth-degree felony, and illegal possession of a dangerous weapon in a school safety zone in violation of 2923.122. The drug trafficking charges each included a firearm specification pursuant to R.C. 2941.141.

{¶10} At trial, the defense concentrated their efforts on refuting the drug trafficking charges. Specifically, the defense called three witnesses: Paul, Paul's half-sister, and Dickerson's girlfriend who all testified that Oliver told each of them that when she was in Officer Mino's police car, she removed a bag of drugs from her sock. Dickerson also refuted the firearm charges and specifications by claiming he did not know the gun was in the car.

{¶11} The state contended the drugs could not have come from Oliver because she was wearing tight pants and was handcuffed when she was in the back of the police cruiser and Nala did not alert the officers that drugs were present.

{¶12} The jury convicted Dickerson of all charges except illegal possession of a dangerous weapon in a school safety zone.

{¶13} Appellant's first and second assignments of error concern manifest weight and sufficiency of the evidence challenges to the convictions and firearm specifications. The first assignment of error concerns the conviction on the firearm specifications. The second assignment of error concerns convictions for drug trafficking, possession of criminal tools and carrying of a concealed handgun. For ease of analysis, we will first review the second assignment error first.

{¶14} As his second assignment of error, Dickerson asserts:

{¶15} "The convictions for drug trafficking, possession of criminal tools and carrying a concealed weapon were against the manifest weight of the evidence and not supported by sufficient evidence.

{¶16} "Sufficiency" challenges whether the prosecution has presented evidence on each element of the offense to allow the matter to go to the jury, while "manifest weight" contests the believability of the evidence presented.

{¶17} "The test [for sufficiency of the evidence] is whether after viewing the probative evidence and the inference drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all of the elements of the offense beyond a reasonable doubt. *The claim of insufficient evidence invokes an inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence.*

{¶18} "In other words, the standard to be applied on a question concerning sufficiency is: when viewing the evidence in a light most favorable to the prosecution, [a] reviewing court [should] not reverse a jury verdict where there is substantial evidence upon which the jury could reasonably conclude that all of the elements of an offense have been proven beyond a reasonable doubt.

{¶19} "On the other hand, 'manifest weight' requires a review of the weight of the evidence presented, not whether the state has offered sufficient evidence on each element of the offense.

{¶20} "In determining whether the verdict was against the manifest weight of the evidence, 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." *State v. Schlee*, 11th Dist. Lake No. 93-L-082, 1994 Ohio App. LEXIS 5862, *13-15 (Dec. 23, 1994) (citations and quotations omitted).

{¶21} Pertaining to drug trafficking, R.C. 2925.03(A)(2) states:

{¶22} "No person shall knowingly do any of the following * * * (2) [p]repare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance or a controlled substance analog, when the offender knows or has reasonable cause to believe that the controlled substance or a controlled substance analog is intended for sale or resale by the offender or another person."

{¶23} Pertinent to possession of criminal tools, R.C. 2923.24(A) states: "No person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally."

{¶24} As for the drug trafficking convictions, Dickerson contends that the testimony of his defense witnesses establish that the drugs came from Oliver. He also claims that the drugs were not found on his person or that he had intent to distribute them. These arguments, however, ignore Officer Mino's testimony that the scale and baggies found at the scene are evidence of drug trafficking, Oliver's and the police officers' testimony that the found drugs did not come from Oliver, and Nala did not alert when Oliver was placed next to her. As we defer to the jury to weigh evidence and the witnesses' credibility, appellants' assignment is without merit.

{¶25} Dickerson also challenges his conviction for possession of criminal tools because the scale was present in the front passenger seat area while Dickerson was in the back of the car when he was arrested. This ignores the undisputed testimony that

Dickerson began the journey as a front seat passenger. Accordingly, the verdict is supported.

{¶26} Finally, although the jury found Dickerson guilty of carrying a concealed weapon, he was not *convicted* of that offense. A conviction requires *both* a finding of guilt and a sentence. *State v. Goff*, 82 Ohio St.3d 123, 135-36 (1998). Here, the trial court found that the carrying a concealed weapon conviction merged with the other counts for sentencing purposes and therefore no sentence for carrying a concealed firearm was imposed.

{¶27} The second assignment of error is without merit.

{¶28} As his first assignment of error, Dickerson asserts that:

{¶29} "The convictions for the firearm specifications were against the manifest weight of the evidence and not supported by sufficient evidence because the state did not prove the firearm was operable and/or that Dickerson used or possessed it."

{¶30} The manifest weight and sufficiency of the evidence standards in the Dickerson's second assignment of error are applicable here.

{¶31} Although not explicitly stated in the indictment or the sentencing entry, Dickerson was convicted of a firearm specification pursuant to R.C. 2941.141. Under this statute, the prosecution must show beyond a reasonable doubt that "the offender had a firearm on or about the offender's person or under the offender's control while committing the offense." If a jury finds the specification is applicable, the offender is sentenced to a one year mandatory prison term. R.C. 2941.141(A).

{¶32} Within this assignment of error, Dickerson contends the jury relied upon the mere appearance of the gun to prove of its operability and the firearm's mere presence in the vehicle to show that Dickerson possessed the firearm. The State

meanwhile claims it is undisputed that the firearm was located under the driver's seat and that it was loaded. The State further alleges that Dickerson knew Paul frequently carried a gun with him and that there was a photograph of Dickerson and Paul together with Paul holding the firearm in question.

{¶33} The first question is whether the firearm was operable. R.C. 2941.141(D) states, "As used in this section, 'firearm' has the same meaning as in section 2923.11 of the Revised Code." R.C. 2923.11 defines a firearm as the following:

{¶34} "(B)(1) 'Firearm' means any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. 'Firearm' includes an unloaded firearm, and any firearm that is inoperable but that can readily be rendered operable.

{¶35} "(2) When determining whether a firearm is capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant, the trier of fact may rely upon circumstantial evidence, including, but not limited to, the representations and actions of the individual exercising control over the firearm."

{¶36} Evidence that a gun was loaded combined with the submission of that gun into evidence is sufficient to prove operability. *See, e.g.*, *State v. Messer*, 107 Ohio App.3d 51, 55 (9th Dist.1995). Because the firearm was loaded when Officer Mino found it, and the firearm was submitted into evidence, a reasonable jury could conclude the firearm was operable.

{¶37} We now address whether Dickerson possessed the firearm. In order to show the offender possessed the weapon in question, the prosecution must show actual or constructive possession. "Constructive possession exists when an individual

exercises dominion and control over an object, even though the object may not be within his immediate physical possession." *State v. Wolery*, 46 Ohio St.2d 316, 329 (1976). However, the presence of a firearm in the same area of the defendant without more is insufficient to support an inference of constructive possession. *State v. Teague*, 11th Dist. Trumbull No. 2011-T-0012, 2012-Ohio-983, ¶57.

{¶38} The photograph of Paul holding the gun with Dickerson next to him and Dickerson's alleged knowledge of Paul's propensity to carry firearms are insufficient to support the jury's conclusion that Dickerson possessed the gun because this evidence fails to prove Dickerson was aware that a firearm was in the Acura at the time of the offense.

{¶39} Thus, the next issue is whether Dickerson can be convicted under a complicity theory. In Ohio, there is no error in finding an accomplice guilty of a firearm specification when the accomplice was unarmed and unaware that an accomplice possessed a firearm. *See State v. Chapman*, 21 Ohio St.3d 41, 42-43 (1986); *State v. Tuggle*, 6th Dist. Lucas No. L-09-1317, 2010-Ohio-4162, ¶138-39; *State v. Kimble*, 7th Dist. Mahoning No. 06 MA 190, 2008-Ohio-1539, ¶42; *State v. Letts*, 2d Dist. Montgomery No. 15681, 2001 Ohio App. LEXIS 2749, *9-10 (June 22, 2001). Under R.C. 2923.03(F), whoever is guilty of complicity "shall be prosecuted *and punished* as if he were a principal offender." (Emphasis added). Therefore, if the evidence shows that Paul was an accomplice in drug trafficking and Paul possessed the gun, Dickerson is guilty of the specification.

{¶40} A reasonable jury could have concluded that Paul possessed the handgun while trafficking drugs. Although Paul denied knowing the gun was in the car, the gun was located underneath the driver seat where he initially sat and Paul admitted

ownership of the gun. Additionally, the jury could conclude that both Paul and Dickerson knew of the scale and baggies; $2,200 dollars in twenty dollar bills were found on Paul's person; and Dickerson possessed the drugs. Accordingly, a reasonable jury could conclude Paul possessed the gun and Dickerson was Paul's accomplice in trafficking drugs. Therefore, the jury's verdict is supported by the evidence.

{¶41} Accordingly, the first assignment of error is without merit.

{¶42} As his third assignment of error, Dickerson asserts:

{¶43} "The trial court erred when it refused to provide the jury with an aiding and abetting instruction that contained a[n] explanation that the mere presence of Dickerson at the scene was not sufficient to prove aiding and abetting."

{¶44} When giving its jury instructions on complicity, the trial court stated the jurors could consider that Dickerson aided and abetted Paul in the commission of the five counts of the indictment. The court defined aided or abetted to mean "supported, assisted, encouraged, cooperated with, advised or incited another to commit the offense." The court further clarified that it was not a defense to complicity that the principal had not been convicted of an offense.

{¶45} The defense sought to add a jury instruction that the mere presence of the defendant was insufficient to prove complicity. The trial court denied this jury instruction.

{¶46} The decision to employ a particular jury instruction in a given criminal case lies within the sound discretion of the trial court, and cannot form the grounds to reverse a conviction unless an abuse of discretion took place. *State v. Nichols*, 11th Dist. Lake No. 2005-L-017, 2006-Ohio-2934, ¶28. As a general proposition, a jury

instruction is proper if it sets forth a plain and unambiguous statement of the law that is pertinent to the case in light of the pleadings and the evidence presented at trial. *Id.* at ¶30.

{¶47} As the jury instruction itself demonstrates, some action is required. Accordingly the instruction already encompasses the concept that "mere presence" is not sufficient. The third assignment of error is without merit.

{¶48} As his fourth assignment of error, Dickerson asserts that: "The trial court erred when it sentenced Dickerson to maximum and consecutive sentences."

{¶49} In reviewing felony sentences, this court no longer uses the standard of review in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912; instead, we use R.C. 2953.08(G)(2). *State v. Long*, 11th Dist. Lake No. 2013-L-102, 2014-Ohio-4416, ¶71. R.C. 2953.08(G)(2) states:

{¶50} "The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

{¶51} "The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

{¶52} "(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

{¶53} "(b) That the sentence is otherwise contrary to law."

{¶54} R.C. 2929.14(C)(4) governs the requirements to impose consecutive sentences and it states:

{¶55} "If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender *and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct* and to the danger the offender poses to the public, and if the court also finds any of the following:

{¶56} "(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

{¶57} "(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

{¶58} "(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender." (Emphasis added).

{¶59} If a defendant does not object to the imposition of consecutive sentences at his sentencing hearing, an appellate court can only grant relief for plain error. *State v. Jirousek*, 11th Dist. Geauga Nos. 2013-G-3128 and 2013-G-3130, 2013-Ohio-5267,

¶38. Pursuant to Crim.R. 52(B), "[p]lain errors or defects affecting rights may be noticed although they were not brought to the attention of the court." An error is "plain" when it is an obvious defect in the trial proceedings. Because Dickerson did not object to the imposition of consecutive sentences at his sentencing hearing, his appeal can only succeed if plain error is shown.

{¶60} At his sentencing hearing, the trial court sentenced Dickerson to consecutive prison terms of 18 months for the drug trafficking counts and stated the following in regard to the imposition of consecutive sentences:

{¶61} "The court finds that consecutive sentences are necessary for – pursuant to Revised Code 2929.14(C)(4). That the defendant's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the defendant.

{¶62} "And, further, that these multiple offenses were committed as part of a course of conduct that no single prison term adequately effects (sic) the seriousness of the conduct."

{¶63} Within the sentencing entry, the trial court stated in regard to 2929.14(C)(4) that: "Further pursuant to R.C. 2929.14(C)(4), the Court finds that consecutive sentences are necessary to protect the public from future crime and that the defendant has a history of criminal conduct."

{¶64} Nothing within the quoted passages indicates that the court made the required finding that the consecutive sentences are not disproportionate to the seriousness of Dickerson's conduct. Failure to make this particular finding constitutes plain error. *State v. Carter*, 2d Dist. Champaign No. 2005-CA-24, 2006-Ohio-984, ¶3.

{¶65} Dickerson also argues that the trial court erred in imposing the maximum sentences for drug trafficking because there were a variety of mitigating factors justifying lower sentences. Although not entirely clear, it appears Dickerson alleges that the trial court did not consider the mitigating and recidivism factors in R.C. 2929.12.

{¶66} In evaluating R.C. 2929.12 appeals, we note though that the sentencing court is required to *consider* the R.C. 2929.12 factors. Such a consideration does not require the sentencing court to "'use specific language or make specific findings on the record in order to evince the requisite consideration of the applicable seriousness and recidivism factors (of R.C. 2929.12).'" *State v. Webb*, 11th Dist. Lake No. 2003-L-078, 2004-Ohio-4198, ¶10, quoting *State v. Arnett*, 88 Ohio St.3d 208, 215, 2000-Ohio-302, 724 N.E.2d 793. In *State v. Greitzer*, 11th Dist. Portage No. 2006-P-0090, 2007-Ohio-6721, ¶28, this court acknowledged its adoption of the pronouncement of the Ohio Supreme Court in *State v. Adams*, 37 Ohio St.3d 295, 525 N.E.2d 1361 (1988). The Ohio Supreme Court in *Adams* held: "[a] silent record raises the presumption that a trial court considered the factors contained in R.C. 2929.12." *Adams*, supra, paragraph three of the syllabus. Moreover, in *State v. Cyrus*, 63 Ohio St.3d 164, 586 N.E.2d 94 (1992), the Ohio Supreme Court held that the burden is on the defendant to present evidence to rebut the presumption that the court considered the sentencing criteria. *Id.* at 166. Other courts of appeals have found that in order to rebut this presumption, "'a defendant must either affirmatively show that the court failed to [consider the statutory factors], or that the sentence the court imposed is "strikingly inconsistent" with the statutory factors as they apply to his case.'" *State v. Bigley*, 9th Dist. Medina No.

08CA0085-M, 2009-Ohio-2943, ¶14, quoting *State v. Rutherford*, 2d Dist. No. 08CA11, 2009-Ohio-2071, ¶34.

{¶67} Here, the trial court stated that it considered the R.C. 2929.12 factors in imposing its sentence on Dickerson. Therefore, Dickerson has not demonstrated the trial court committed reversible error in imposing maximum sentences.

{¶68} The fourth assignment of error has merit as to the imposition of consecutive sentences.

{¶69} Accordingly, we affirm in part and reverse in part the judgment of the Ashtabula County Court of Common Pleas and remand for further proceedings.

TIMOTHY P. CANNON, P.J.,

COLLEEN MARY O'TOOLE, J.,

concur.