[Cite as *State v. Wright*, 2004-Ohio-2811.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2003-05-127
	:	O P I N I O N
- vs -		6/1/2004
	:	
STACY WRIGHT,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR02-08-1236

Robin N. Piper, Butler County Prosecuting Attorney, Daniel G. Eichel and Megan E. Shanahan, Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

Schad & Cook, Kevin M. Schad, 8240 Beckett Park Drive, Indian Springs, Ohio 45011, for defendant-appellant

VALEN, J.

{¶1} Defendant-appellant, Stacy Wright, appeals his conviction by the Butler County Court of Common Pleas for possession of cocaine. We affirm the judgment for the reasons outlined below.

{¶2} Hamilton police officers on bike patrol approached a van stopped in the middle of the street during the early morning hours of July 21, 2002. Appellant was sitting in the front passenger seat of

the van and one individual was sitting behind the wheel and a third was sitting on the back bench seat, but closer to the driver in front of him.

{¶3} Appellant provided his name and social security number to the officer who approached the passenger window. Police decided to arrest appellant after they learned that he had an outstanding warrant. As appellant exited the vehicle, the arresting officer observed in plain view an "off-white rock" on the floor of the van where appellant had been seated. The rock was determined to be cocaine from a field test and subsequent lab test.

{¶4} Appellant was charged with possession of cocaine and tried before a jury. The jury returned a verdict of guilty. Appellant appeals his conviction, setting forth two assignments of error.

{¶5} Assignment of Error No. 1:

{¶6} "THE EVIDENCE PRESENTED WAS INSUFFICIENT/THE CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶7} In resolving the sufficiency of the evidence argument, the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Jenks (1991), 61 Ohio St.3d 259, paragraph two of syllabus.

{¶8} Appellant argues that no one could place the cocaine rock in appellant's possession, no one testified that appellant made furtive movements in the van, and two other individuals in the van could have possessed the rock.

{¶9} R.C. 2925.11(A) states that no person shall knowingly obtain, possess, or use a controlled substance. A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or be of a certain nature, and a person has knowledge of circumstances when he is aware that such circumstances probably exist. R.C. 2901.22(B).

{¶10} "Possession" is defined as having control over a thing or substance, but possession 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. R.C. 2925.01(K).

{¶11} Knowing possession of an object can be actual or constructive. State v. Scalf (1998), 126 Ohio App.3d 614, 619. Constructive possession exists when one is conscious of the presence of the object and able to exercise dominion and control over it, even if it is not within his immediate physical possession. State v. Hankerson (1982), 70 Ohio St.2d 87, syllabus; State v. Gaefe, Clinton App. No. CA2001-11-043, 2002-Ohio-4995, at ¶9.

{¶12} Dominion and control can be proven by circumstantial evidence alone. Gaefe at ¶10; see State v. Hooks (Sept. 18, 2000), Warren App. No. CA2001-01-006; State v. Pruitt (1984), 18 Ohio App.3d 50, 58. Although mere presence in the vicinity of drugs does not prove dominion and control, readily accessible drugs in close proximity to an accused may constitute sufficient circumstantial evidence to support a finding of constructive possession. See Hooks; see, e.g., State v. Scalf, 126 Ohio App.3d at 620.

{¶13} The arresting officer testified that the rock of cocaine was found on the passenger floorboard "directly between his [appellant's] feet if they [the feet] were close towards the seat." The jury also heard testimony that a full console separated the driver from the front passenger area and the back passenger was sitting on a bench seat behind the front occupants.

{¶14} Reviewing the evidence in the light most favorably for the state, any rational trier of fact could have found the essential elements of the crime of possession of cocaine beyond a reasonable doubt.

{¶15} In determining whether a conviction is 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 trier of fact 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. Thompkins, 78 Ohio St.3d 380, 387, 1997-Ohio-52. We must be mindful that the original trier of fact was in the best position to judge the credibility of witnesses and the weight to be given the evidence. State v. DeHass (1967), 10 Ohio St.2d 230, paragraph one of syllabus. A unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required to reverse a judgment of a trial court on the weight of the evidence in a jury trial. Thompkins at 389.

{¶16} The arresting officer testified that he observed the van

stopped in the middle of the road at approximately 1:30 in the morning. After learning of appellant's outstanding warrant, police asked appellant to exit the vehicle. As appellant was exiting the vehicle, the officer observed the rock of cocaine on the passenger floorboard area.

{¶17} Appellant showed on cross-examination that no one saw appellant with the cocaine, appellant was not observed making furtive movements inside the van, there were two other individuals in the van, and none of the individuals present made a statement about who owned the cocaine.

{¶18} Reviewing the entire record, we cannot say that the jury clearly lost its way and created such a manifest miscarriage of justice that appellant's conviction must be reversed. Appellant's first assignment of error is overruled.

{¶19} Assignment of Error No. 2:

{¶20} "THE STATE COMMITTED MISCONDUCT DURING OPENING AND CLOSING ARGUMENT."

{¶21} Appellant raises three specific instances where he alleges the prosecutor's arguments were prejudicially improper. Appellant alleges that the prosecutor expressed her personal belief on appellant's guilt when she stated, "He did what he did, but I'm telling you what he did. He dropped that piece of crack cocaine."

{¶22} Appellant also alleges improper argument when the prosecutor argued, "The defendant was charged with crack cocaine because he had it in his possession and he dropped it between his feet."

{¶23} The test for prosecutorial misconduct is whether remarks

are improper and whether those improper remarks prejudicially affected substantial rights of the accused. State v. Smith, 87 Ohio St.3d 424, 442, 2000-Ohio-450.

{¶24} Both the prosecution and the defense have wide latitude in summation as to what the evidence has shown and what reasonable inferences may be drawn therefrom. State v. Lott (1990), 51 Ohio St.3d 160, 165. Prosecutors must avoid insinuations and assertions calculated to mislead, they may not express their personal beliefs or opinions regarding the guilt of the accused, and they may not allude to matters not supported by admissible evidence. Lott, at 166; State v. Smith, 80 Ohio St.3d 89, 111, 1997-Ohio-355.

{¶25} Appellant also asserts misconduct in the prosecutor's comment while reading the language of the indictment on opening remarks. The prosecutor stated, "[t]he grand jury convened and found probable cause that this defendant, Stacy Wright, committed these acts; therefore, an indictment was handed down that reads ***."

{¶26} First, we note that appellant failed to object at trial to the alleged improper comments of the prosecutor. A failure to object to alleged prosecutorial misconduct waives all but plain error. State v. Smith, 80 Ohio St.3d at 110. An alleged error does not constitute plain error unless, but for the error, the outcome of the trial clearly would have been otherwise. State v. Stojetz, 84 Ohio St.3d 452, 455, 1999-Ohio-464. Notice of plain error must be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. State v. Long (1978), 53 Ohio St.2d, 91, 94-95.

{¶27} The two comments made by the prosecutor in closing arguments concerning appellant dropping the cocaine rock are inferences reasonably drawn from the evidence and constitute permissible argument. The prosecutor's comment about the grand jury finding probable cause does not rise to the level of plain error. Therefore, appellant's second assignment of error is overruled.

{¶28} Judgment affirmed.

POWELL, P.J., and WALSH, J., concur.

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