[Cite as *State v. Nevins*, 2011-Ohio-389.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 24070
v.	:	T.C. NO. 09CR2175
DONTE J. NEVINS	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 28th day of January, 2011.

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DONOVAN, J.

{¶ 1} Defendant-appellant Donte J. Nevins appeals from his conviction and sentence for one count of possession of crack (greater than five grams, but less than ten), in violation of R.C. 2925.11(A), a felony of the third degree, one count of illegal manufacture

of drugs, in violation of 2925.04(A), a felony of the second degree, and one count of having weapons while under disability, in violation of R.C. 2923.13(A)(3), a felony of the third degree. Both the possession of crack and illegal manufacture counts contained one-year mandatory firearm specifications. After a jury trial held on April 5, 6, & 7, 2010, Nevins was found guilty of the above offenses and sentenced to an aggregate prison term of four years. Nevins filed a timely notice of appeal with this Court on May 28, 2010.

I

{¶ 2} At approximately 10:00 p.m. on July 6, 2008, Officer John Riegel of the Dayton Police Department, Narcotics Division, was patrolling the area in and around Gettysburg and Lenita Avenues in Dayton, Ohio. Officer Riegel was traveling in a marked police cruiser and wearing the uniform of the day. Following up on complaints of illegal drug activity, Officer Riegel decided to investigate an apartment complex located on Lenita Ave. that he personally knew to be in a high crime area. After parking his cruiser a short distance away, Officer Riegel testified that he walked through the parking lot of the complex in order to observe any potential illegal activity taking place.

{¶ 3} Upon failing to observe any suspicious activity, Officer Riegel testified that he began to walk back to his cruiser. As he was walking behind the complex, Officer Riegel testified that he observed an adult male open the back door of an apartment unit and walk towards the parking lot. The apartment unit in question was located at 1015 Lenita Ave. Officer Riegel testified that the subject closed the clear screen door to the unit but left the interior door open, allowing Officer Riegel to see inside the apartment. From approximately 30 to 40 feet away, Officer Riegel testified that he observed Nevins, whom he

recognized from a recent traffic stop, standing behind the kitchen counter. Officer Riegel testified that Nevins appeared to be mixing a white powdery substance in a large Pyrex bowl. Officer Riegel further testified that he observed Nevins weigh the white powder on a set of digital scales located on the counter before pouring the powder into the mixing bowl and placing the bowl into a microwave. Based on his observations and experience with narcotics trafficking, Officer Riegel testified that he believed that Nevins was making crack cocaine.

{¶ 4} While Officer Riegel was watching Nevins, the unidentified male returned from the parking lot, reentered the apartment, and shut the interior door behind himself. At this point, Officer Riegel called for backup. Additional officers arrived, and Officer Riegel positioned himself at the back door of the apartment in order to prevent any of the suspects from fleeing.

{¶ 5} After the officers at the front door announced themselves, Officer Riegel testified that he observed two male suspects attempt to leave the apartment through the back door. When the two suspects noticed Officer Riegel, however, they ran back into the apartment and shut the interior door. While the door was open, Officer Riegel testified that he observed Nevins empty the contents of the Pyrex mixing bowl into the kitchen sink and wash the substance down the drain. Officer Riegel testified that he kicked in the back door and entered the apartment in an effort to stop Nevins from destroying evidence. Officer Riegel testified that he and the other officers secured the scene and recovered a Pyrex mixing bowl containing crack residue, digital scales, a plastic baggie containing heroin, crack cocaine on a plate, and a .22 caliber loaded handgun on the counter in close proximity to

where Nevins was standing.[1] After using a cobalt reagent test in order to determine that the substances on the kitchen counter were, in fact, illegal drugs, Officer Riegel arrested Nevins and took him into custody.

{¶ 6} On July 14, 2009, Nevins was indicted for one count of possession of cocaine, one count of illegal manufacture of drugs, and one court of possession of heroin, each count accompanied by a one-year firearm specification. Nevins was also charged with one count of tampering with evidence and one count of having a weapon while under disability. On July 21, 2009, Nevins filed a motion to suppress the physical evidence seized by the police as a result of the warrantless search of the apartment. A hearing was held on said motion on October 8, 2009. In a written decision filed on October 23, 2009, the court overruled Nevins' motion to suppress on the basis that as a social guest with no expectation of privacy in the premises, he did not have standing to contest the entry and search of the apartment by the Dayton Police.

{¶ 7} After a jury trial, Nevins was found guilty of possession of cocaine and illegal manufacture of drugs, each with a one-year firearm specification. The jury found Nevins not guilty of possession of heroin and tampering with evidence. The remaining count of having weapons under disability was tried to the bench, and the court found Nevins guilty. Nevins was subsequently sentenced to an aggregate term of four years in prison.

{¶ 8} It is from this judgment that Nevins now appeals.

II

[1]At trial, Officer Riegel testified that he located the handgun on the top of the refrigerator within arm's reach of where Nevins was standing in the kitchen, rather than next to the plate on the counter.

{¶ 9} Nevins' first assignment of error is as follows:

{¶ 10} "THE TRIAL COURT ERRED IN OVERRULING MR. NEVINS' MOTION TO SUPPRESS."

{¶ 11} In his first assignment, Nevins contends that the trial court erred when it overruled his motion to suppress. Specifically, Nevins argues that he had standing to challenge the warrantless entry and subsequent search of the apartment located at 1015 Lenita Ave. Further, Nevins argues that no exigent circumstances existed which would justify Officer Riegel's warrantless entry and search of the apartment.

{¶ 12} In regards to a motion to suppress, "the trial court assumes the role of trier of facts and is in the best position to resolve questions of fact and evaluate the credibility of witnesses." *State v. Hopfer* (1996), 112 Ohio App.3d 521, 548, quoting *State v. Venham* (1994), 96 Ohio App.3d 649, 653. The court of appeals must accept the trial court's findings of fact if they are supported by competent, credible evidence in the record. *State v. Isaac,* Montgomery App. No. 20662, 2005-Ohio-3733, citing *State v. Retherford* (1994), 93 Ohio App.3d 586. Accepting those facts as true, the appellate court must then determine, as a matter of law and without deference to the trial court's legal conclusion, whether the applicable legal standard is satisfied. Id.

{¶ 13} As we stated in *State v. Glover*, Montgomery App. No. 20692, 2005-Ohio-4509, at ¶9:

{¶ 14} "The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution secure an individual's right to be free from unreasonable searches and seizures. Warrantless entry by law enforcement

personnel into premises in which an individual has a reasonable expectation of privacy is per se unreasonable, unless it falls within a recognized exception to the warrant requirement. *Minnesota v. Olson* (1990), 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85; *State v. Miller* (1991), 77 Ohio App.3d 305, 602 N.E.2d 296. A criminal defendant is not required to have an ownership or possessory interest in premises in order to complain of a Fourth Amendment violation with respect to a law enforcement officer's entry into those premises. *State v. Moore*, Montgomery App. No. 20198, 2004-Ohio-3783, ¶10. However, Fourth Amendment rights are personal rights which may not be asserted vicariously by third parties. *Rakas v. Illinois* (1978), 439 U.S. 128, 133-34, 99 S.Ct. 421, 58 L. Ed.2d 387; *State v. Caldwell* (Feb. 26, 1999), Montgomery App. No. 17175. Thus, in order to challenge a search as violative of the Fourth Amendment, a defendant must demonstrate (1) that he personally had an expectation of privacy in the place searched and (2) that his expectation was reasonable. *Minnesota v. Carter* (1998), 525 U.S. 83, 119 S.Ct. 469, 142 L.Ed.2d 373; *State v. Williams* (1995), 73 Ohio St.3d 153, 166, 652 N.E.2d 721. A defendant has a legitimate expectation of privacy only if it is 'one that society is prepared to recognize as "reasonable." ' *Olson*, 495 U.S. at 95-96 (citations omitted); *State v. Little*, Montgomery App. No. 19976, 2004-Ohio-1814, ¶9."

{¶ 15} Moreover, an individual must have standing to challenge the legality of a search or seizure. *Rakas v. Illinois* (1978), 439 U.S. 128, 99 S.Ct. 421; *State v. Coleman* (1989), 45 Ohio St.3d 298. The person challenging the search bears the burden of proving standing. *State v. Williams*, 73 Ohio St.3d 153,

1995-Ohio-275. That burden is met by establishing that the person has an expectation of privacy in the place searched that society is prepared to recognize as reasonable. Id.; *Rakas v. Illinois, supra*. Property ownership is only one factor to be considered. *U.S. v. Salvucci* (1980), 448 U.S. 83, 100 S.Ct. 2547.

{¶ 16} Overnight guests have a reasonable expectation of privacy in the home in which they are staying. *Minnesota v. Olson* (1990), 495 U.S. 91, 110 S.Ct. 1684. On the other hand, a person who is merely present in a home with the consent of the owner may not be able to claim the protection of the Fourth Amendment. *Minnesota v. Carter* (1998), 525 U.S. 83, 119 S.Ct. 469.

{¶ 17} At the motion to suppress hearing, Nevins provided the following testimony during cross-examination:

{¶ 18} "The State: Sir, you would agree with me that you were just walking down the street when this person invited you in, correct?

{¶ 19} "Nevins: Yeah, I know him. Yeah.

{¶ 20} "Q: And you'd only been there a little while when the police showed up; is that right?

{¶ 21} "A: Yes.

{¶ 22} "Q: Okay. And you would agree with me, you don't rent that apartment, right?

{¶ 23} "A: Right.

{¶ 24} "Q: And you'd agree with me you hadn't spent the night there?

{¶ 25} "A: Right.

{¶ 26} "Q: And you didn't have any clothes there?

{¶ 27} "A: Right.

{¶ 28} "Q: You would agree with me that you wouldn't be an overnight guest at that apartment?

{¶ 29} "A: Right.

{¶ 30} "Q: You'd only been there just a few minutes?

{¶ 31} "A: Right.

{¶ 32} "Q: And you were just there, you would agree with me, for social reasons?

{¶ 33} "A: Right."

{¶ 34} Nevins testified that he did not rent the apartment, did not keep clothing there, and was not an overnight guest at the apartment. Additionally, Nevins testified that he was merely a social guest at the apartment and had only been there for a short time when the police raided the premises. Accordingly, Nevins has failed to establish that his expectation of privacy was one "that society is prepared to recognize as reasonable." *State v. Glover*, Montgomery App. No. 20692, 2005-Ohio-4509. Because Nevins did not possess a legitimate expectation of privacy in the apartment, he had no standing to challenge the entry and search of the premises where he was arrested. Id. Thus, the trial court did not err when it overruled Nevins' motion to suppress for lack of standing. Since Nevins did not have standing to challenge the search of the apartment, we need not address his argument regarding whether the search was unlawful because it did not fall within an exception to the warrant requirement.

{¶ 35} Nevins' first assignment of error is overruled.

III

{¶ 36} Nevins' second assignment of error is as follows:

{¶ 37} "NEVINS' CONVICTIONS WERE AGAINST THE SUFFICIENCY AND WEIGHT OF THE EVIDENCE."

{¶ 38} In his second assignment, Nevins argues that there was insufficient evidence to convict him of possession of cocaine, illegal manufacture of drugs, and having a weapon while under disability. Additionally, Nevins asserts that his convictions were against the manifest weight of the evidence.

{¶ 39} "A challenge to the sufficiency of the evidence differs from a challenge to the manifest weight of the evidence." *State v. McKnight*, 107 Ohio St.3d 101,112, 2005-Ohio-6046. "In reviewing a claim of insufficient evidence, '[t]he relevant inquiry is whether, after reviewing 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.' (Internal citations omitted). A claim that a jury verdict is against the manifest weight of the evidence involves a different test. '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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" Id. (Internal citations omitted).

{¶ 40} The credibility of the witnesses and the weight to be given to their

testimony are matters for the trier of facts to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231. "Because the factfinder * * * has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288.

{¶ 41} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of fact lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 42} From his vantage point outside the apartment at 1015 Lenita Ave., Officer Riegel testified that he observed Nevins through a clear glass screen door as he stood behind the kitchen counter. Officer Riegel further testified that as he watched, Nevins measured out varying amounts of a white powder onto a digital scale located on the counter. Officer Riegel testified that Nevins then poured the powder into a Pyrex mixing bowl and added water and baking powder. Officer Riegel testified that he observed Nevins place the Pyrex bowl in what appeared to be a microwave for a short time before removing the mixture. Based on his training and experience, Officer Riegel testified that Nevins' actions were consistent with the manufacture of crack cocaine. Once he entered the apartment, Officer

Riegel testified that he found all of the items that he had observed Nevins use to make crack cocaine, including the digital scale and the Pyrex mixing bowl with crack residue, as well as baking soda and cocaine powder on a plate on the kitchen counter.

{¶ 43} Additionally, Officer Riegel testified that he located a .22 caliber handgun on the top of the refrigerator within arm's reach of where Nevins was working. "Constructive possession exists when an individual exercises dominion and control over an object, even though that object may not be within his immediate physical possession." *State v. Wolery* (1976), 46 Ohio St.2d 316, 329. The State may prove dominion and control solely through circumstantial evidence. *State v. Barnett*, Montgomery App. No. 19185, 2002-Ohio-4961. Although Officer Riegel's trial testimony differed slightly from his testimony at the suppression hearing regarding the location of the gun, it is undisputed that a loaded handgun was found in the same area where Nevins was making crack. We also note that Officer Riegel testified that in his experience as a police officer in the narcotics division, it was common to find guns on or near individuals involved in illegal drug sale or manufacture in order to protect them because they are frequently robbed for the drugs or money. Clearly, the evidence adduced at trial supports a finding that Nevins was in constructive possession of the handgun. Thus, a review of the record convinces us that the State's evidence, taken in its entirety, was sufficient to sustain Nevins' convictions for possession of cocaine, illegal manufacture of drugs, and having a weapon while under disability.

{¶ 44} Lastly, Nevins' conviction is also not against the manifest weight of

the evidence. The credibility of the witnesses and the weight to be given their testimony are matters for the jury to resolve. Nevins failed to present any evidence at trial. Rather, Nevins chose to attack the State's case through cross-examination of the State's witnesses. The jury did not lose its way simply because it chose to believe the testimony of the State's main witness, Officer Riegel. Having reviewed the entire record, we cannot clearly find that the evidence weighs heavily against a conviction, or that a manifest miscarriage of justice has occurred.

{¶ 45} Nevins' second assignment of error is overruled.

IV

{¶ 46} Nevins' third assignment of error is as follows:

{¶ 47} "MR. NEVINS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 48} In his third and final assignment of error, Nevins contends that he received ineffective assistance of counsel during his trial. Specifically, Nevins argues that his counsel was deficient for failing to request that a fingerprint analysis be performed on the evidence seized from the kitchen in the apartment. Nevins also asserts that defense counsel was ineffective for failing to properly cross-examine Officer Riegel regarding his testimony about the location of the loaded handgun discovered in the kitchen.

{¶ 49} "When considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential

duties to his client. Next, and analytically separate from the question of whether defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness." *State v. Bradley* (1989), 42 Ohio St.3d 136, citing *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397, vacated in part on other grounds (1978), 438 U.S. 910, 98 S.Ct. 3135.

{¶ 50} For a defendant to demonstrate that he has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, absent counsel's errors, the result of the trial would have been different. *Bradley*, at 143. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, at 694.

{¶ 51} Initially, Nevins argues that he was provided ineffective assistance when defense counsel failed to request a fingerprint analysis of the items seized from the kitchen. At trial, however, defense counsel attempted to use the absence of any fingerprint evidence to Nevins' advantage in order to establish that there was no physical evidence linking him to the gun and the other drug manufacturing paraphernalia recovered from the kitchen. Ostensibly, defense counsel's failure to request fingerprint analysis was intentional and a matter of trial strategy. Thus, defense counsel's actions in this regard do not constitute ineffective assistance.

{¶ 52} Lastly, Nevins asserts that he was afforded ineffective assistance when his counsel failed to cross-examine Officer Riegel with respect to the discrepancy between his testimony regarding the location of the handgun in the kitchen. At the suppression hearing, Officer Riegel testified that the gun was found next to a plate on the counter in the kitchen where Nevins was mixing the drugs.

At trial, however, Officer Riegel testified that the gun was found on top of the refrigerator where Nevins was working.

{¶ 53} Trial counsel's decision to cross-examine a witness and the extent of such cross-examination are tactical matters. *State v. Shells,* Montgomery App. No. 20802, 2005-Ohio-5787; See *State v. Flors* (1987), 38 Ohio App.3d 133, 139. Thus, decisions regarding cross-examination are within trial counsel's discretion and cannot form the basis for a claim of ineffective assistance of counsel. *Id*. (concluding that the extent of trial counsel's cross-examination is a matter of trial strategy and does not constitute ineffective assistance of counsel).

{¶ 54} It is undisputed that a loaded .22 caliber handgun was located within arm's reach of where Nevins was manufacturing crack cocaine. Moreover, defense counsel's line of questioning with respect to the cross-examination of Officer Riegel was fully within his discretion. His decision to not question Officer Riegel regarding the discrepancy in his testimony about the exact location of the gun was a failure that does not rise to the level of ineffective assistance of counsel.

{¶ 55} Nevins' third and final assignment of error is overruled.

V

{¶ 56} All of Nevins' assignments of error having been overruled, the judgment of the trial court is affirmed.

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FAIN, J. and FROELICH, J., concur.

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