[Cite as *State v. New* , 2009-Ohio-2632.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
GALLIA COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 08CA9
	:	
vs.	:	**Released: May 19, 2009**
	:	
TYLINA R. NEW,	:	DECISION AND JUDGMENT
	:	ENTRY
Defendant-Appellant.	:	

APPEARANCES:

James H. Banks, Dublin, Ohio, for Appellant.

C. Jefferey Adkins, Gallia County Prosecuting Attorney, Gallipolis, Ohio, for Appellee.

McFarland, J.:

{¶1} Appellant appeals her conviction and sentence entered by the trial court for first degree felony possession of drugs, after a jury found her guilty of possession of drugs, in violation of R.C. 2925.11(A). On appeal, Appellant contends that 1) the evidence presented at trial is insufficient to support her conviction, which she contends is against the manifest weight of the evidence; 2) the trial court erred in the admission of evidence such to require reversal of her conviction; and 3) the verdict form on the charge of possession of drugs does not support her conviction. Because we conclude

that Appellant's conviction was supported by substantial evidence upon which the jury could conclude that all elements of the charged offense were proven, we overrule Appellant's first assignment of error. Likewise, because we conclude that the trial court did not abuse its discretion in admitting certain evidence over the objection of Appellant, we overrule Appellant's second assignment of error.

{¶2} However, in light of the State's concession and our conclusion that the verdict form signed by the jury does not support Appellant's conviction for first degree felony possession of crack cocaine, the matter must be reversed and remanded with instructions to the trial court to sentence Appellant on the least serious form of the offense contained in R.C. 2925.11, in this case, possession of drugs, a third degree misdemeanor. Thus, we sustain Appellant's third assignment of error and reverse and remand the matter to the trial court for further proceedings consistent with this opinion.

FACTS

{¶3} On January 18, 2008, Appellant's boyfriend, Kevin Brown, was arrested and charged with drug trafficking. As a result, a search warrant was obtained to search the residence that Brown shared with Appellant and her two children. The search warrant was executed on January 18, 2008.

During the search, police officers recovered 34 grams of crack cocaine hidden in various places, including a coffee can with a false bottom, and a men's athletic shoe that was sitting on top of a dresser. Police additionally recovered a plate and razor with residue that later was identified as cocaine residue, as well as what appeared to be a handwritten recipe for making crack cocaine that was contained in a locked safe, later determined to be owned by Appellant. Further, police recovered photographs depicting Appellant, Brown and another individual posing with large sums of cash.

{¶4} Appellant was subsequently arrested and charged with possession of drugs, in violation of R.C. 2925.11(A), a felony of the first degree. Appellant pled not guilty and the matter proceeded to trial on July 15, 2008. At trial, the State presented two witnesses, Detective Wallace and Trooper Johnson. The State also introduced into evidence a recorded telephone conversation between Appellant and Brown that took place after Brown's arrest, while he was in jail, the photos of Appellant and Brown holding cash, and various other lab reports identifying the substance recovered from the residence as crack cocaine.

{¶5} Detective Wallace testified that he obtained a warrant to search Appellant's residence and was present when the search was conducted. He testified that he had received a tip about the coffee can that was eventually

recovered. He also testified that after drugs were recovered from Appellant's home, he decided to monitor Brown's telephone conversations from the jail. A recording of one conversation was played for the jury, which included statements made by Appellant, which will be more fully discussed below, indicating that she had knowledge of the fact that drugs, crack cocaine in particular, were being kept in her home. Detective Wallace also testified that a piece of paper that was found in the safe belonging to Appellant contained what appeared to be a recipe for making crack cocaine. Trooper Johnson also testified at trial. He testified that he was present during the search and was the officer that actually found the coffee can and the drugs stashed in the shoe.

{¶6} Appellant did not testify in her own defense at trial, but did offer testimony by Kevin Brown and her mother, Janice New. Janice New testified that Appellant was unemployed and that she was supporting her daughter and grandchildren with credit cards. She also testified that she had never seen any evidence of drugs or drug use when visiting Appellant's home. Kevin Brown, who had already been convicted and was serving a nine year prison term, testified that the drugs recovered from Appellant's home were his and that Appellant had no knowledge that they were there. He testified that the photos of himself and Appellant holding cash were

taken in November when he was released from prison. He testified that the cash only amounted to $700.00, and was comprised of his $200.00 gate fee paid to him upon his release from prison, and $500.00 sent to him via Western Union from his brother, in order to help him get back on his feet.

{¶7} A motion for acquittal by Appellant was denied by the trial court and the matter submitted to jury, which ultimately returned a finding of guilt. The verdict form signed by the jury stated as follows:

"Indictment for Possession of Drugs Ohio Revised Code Section 2925.11(A) We the jury in this case, duly impaneled, sworn and affirmed, find the Defendant, Tylina R. New, * Guilty of Possession of Drugs in a manner and form as she stands charged in the Indictment."

On July 28, 2008, the trial court sentenced Appellant to a ten year term of imprisonment for Possession of drugs, a violation of Section 2925.11(A) of the Ohio Revised Code and a felony of the first degree."

{¶8} It is from this judgment entry that Appellant now brings her timely appeal, assigning the following errors for our review.

ASSIGNMENTS OF ERROR

"I. THE EVIDENCE PRESENTED AT TRIAL IS INSUFFICIENT TO SUPPORT DEFENDANT'S CONVICTION, WHICH CONVICTION IS MANIFESTLY AGAINST THE WEIGHT OF THE EVIDENCE AND MUST BE REVERSED.

II. THE TRIAL COURT ERRED IN THE ADMISSION OF EVIDENCE SUCH TO REQUIRE REVERSAL OF DEFENDANT'S CONVICTION.

III. THE VERDICT FORM ON THE CHARGE OF POSSESSION OF DRUGS DOES NOT SUPPORT DEFENDANT'S CONVICTION." ASSIGNMENT OF ERROR I

{¶9} In her first assignment of error, Appellant contends that the evidence presented at trial is insufficient to support her conviction and that her conviction is manifestly against the weight of the evidence and must be reversed. Specifically, Appellant argues that the State failed to prove that Appellant knowingly had either actual or constructive possession of the drugs at issue and that the trial court should have entered a judgment of acquittal at the close of the State's case. The State counters Appellant's argument with its own argument that the evidence offered at trial was not only sufficient, but that it overwhelmingly proved constructive possession by Appellant.

{¶10} When reviewing the sufficiency of the evidence, an appellate court examines the evidence admitted at trial to determine whether that evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, superseded by state constitutional amendment on other grounds. This is a test of legal adequacy, not rational persuasiveness. The relevant inquiry is whether, 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. Id., citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781.

{¶11} Our function when reviewing the weight of the evidence, on the other hand, is to determine whether the greater amount of credible evidence supports the verdict. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. In order to undertake this review, we must sit as a "thirteenth juror" and review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether 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. Id., citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. We will order a new trial only in the exceptional case in which the evidence weighs heavily against the conviction. *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, at ¶ 100, citing *Martin*, at 175. We will not reverse a conviction so long as the prosecution presented substantial evidence for a reasonable trier of fact to conclude that all of the essential elements of the offense were established beyond a reasonable doubt. *State v. Getsy* (1998), 84 Ohio St.3d 180, 193-194, 1998-Ohio-533, 702 N.E.2d 866; *State v. Eley* (1978), 56 Ohio St.2d 169, 383

N.E.2d 132, syllabus, superseded by state constitutional amendment on other grounds in State v. Smith, 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668.

{¶12} Further, the trier of fact is free to believe or disbelieve a witness's testimony in whole or in part. *State v. Wagner* (Feb. 29, 2000), Pickaway App. No. 99CA23, citing *Swanson v. Swanson* (1976), 48 Ohio App.2d 85, 97. Whether the evidence supporting a defendant's conviction is direct or circumstantial does not bear on our determination. "Circumstantial evidence and direct evidence inherently possess the same probative value and therefore should be subjected to the same standard of proof." *State v. Jenks* at paragraph one of the syllabus.

{¶13} R.C. 2925.11(A) provides, "No person shall knowingly * * * possess* * * a controlled substance." The term "possession" is defined as having "control over a thing or substance." R.C. 2925.01(K); see, also, *State v. Remy*, Ross App. No. 03CA2731, 2004-Ohio-3630, ¶ 56. Possession may be actual or constructive. *State v. Butler* (1989), 42 Ohio St.3d 174, 176, 538 N.E.2d 98; *State v. Fry*, Jackson App. No. 03CA26, 2004-Ohio-5747, ¶ 39. "Actual possession exists when the circumstances indicate that an individual has or had an item within his immediate physical possession. Constructive possession exists when an individual is able to exercise dominion or control

of an item, even if the individual does not have the item within his immediate physical possession." *Fry* at ¶ 39, citing *State v. Hankerson* (1982), 70 Ohio St.2d 87, 434 N.E.2d 1362, syllabus, and *State v. Wolery* (1976) 46 Ohio St.2d 316, 329, 348 N.E.2d 351.

{¶14} This court has held that, "[f]or constructive possession to exist, '[i]t must also be shown that the person was conscious of the presence of the object.' " *State v. Harrington*, Scioto App. No. 05CA3038, 2006-Ohio-4388, ¶ 15, citing *Hankerson* at 91. Further, "two or more persons may have joint constructive possession of a particular item." *State v. Cooper*, Marion App. No. 9-06-49, 2007-Ohio-4937, ¶ 25, citing *State v. Mann* (1993), 93 Ohio App.3d 301, 308, 638 N.E.2d 585; *State v. Riggs* (Sept. 13, 1999), Washington App. No. 98CA39, 1999 WL 727952. "[T]he crucial issue is not whether the accused had actual physical contact with the article concerned, but whether the accused was capable of exercising dominion or control over it." *State v. Reed*, Champaign App. No.2002-CA-30, 2003-Ohio-5413, ¶ 19.

{¶15} Here, Appellant did not have actual possession of the crack cocaine that was recovered from her residence. Instead, the drugs were found in the home she shared with her boyfriend, Kevin Brown, who had been arrested earlier that day for drug trafficking. Despite Appellant's

testimony that she was unaware of the existence of the drugs in her home, as well Brown's testimony that the drugs belonged to him and that Appellant knew nothing about them, the State presented evidence to the contrary. Specifically, the State presented evidence in the form of a recorded telephone conversation between Appellant and Brown, which occurred after his arrest while he was being housed in jail, and which indicated Appellant had knowledge of Brown's activities and was aware that the drugs at issue were in her home. For instance, the following exchanges took place between Appellant and Brown:[1]

"Mr. Brown: * * * What did they take?

Ms. New: They took *that coffee can*.

* * *

Ms. New: They went straight to that, to *the coffee can*.

Mr. Brown: What?

Ms. New: They had the dogs in there; they had two dogs.

Mr. Brown: They went straight to the coffee can?

Ms. New: Yeah. You should see the house. They opened up everything. They opened up the top of the coffee can.

Mr. Brown: …inaudible…

[1] The trial court's admission into evidence of this recorded telephone conversation, as well as photographs of Appellant holding large sums of cash, will be discussed more fully in our response to Appellant's second assignment of error.

Ms. New: They took your pictures. Remember the pictures we took?

Mr. Brown: Yeah.

Ms. New: They took those.

Mr. Brown: What pictures we took?

Ms. New: *Remember where we had, you um, me you and Sarah*.

Mr. Brown: Yeah.

Ms. New: *Like right before Christmas* when we went out. The first night we went out to the, the bar.

Mr. Brown: Right.

Ms. New: Those pictures. Remember they were … Oh yeah, they got um, *the plate with the razor blade* as residue.

Mr. Brown: The have the plate with the razor blade.

Ms. New: The plate, yeah, they got a plate with residue.

* * *

Ms. New: You know that other thing that was right there?

Mr. Brown: Yeah.

Ms. New: They didn't even take it.

Mr. Brown: You said that other thing? On the bench?

Ms. New: Yeah.

Mr. Brown: Cause it was upside down, right?

Ms. New: I don't, they didn't even open that drawer. *That's, it's, it's, it's like somebody knew exactly, I don't know*. You

> should see our, our bedroom. Oh my God, it is destroyed. They popped open and like a little safe and everything." (Emphasis added).

{¶16} We note the importance of the wording Appellant chose to employ during this phone conversation. For instance, Appellant stated that they took "*that* coffee can," not "*a* coffee can," implying that she was aware of the existence of that particular coffee can. She also stated that they "went straight to that, to the coffee can." She also stated they took "*the* plate with *the* razor blade," as opposed to stating that they had simply found *a* plate with *a* razor blade. Though they are subtle, these language choices are important and could, in fact, have convinced the jury that Appellant had knowledge that these items were in her home.

{¶17} Further, the State presented photographic evidence of Appellant and Brown posing for the camera while holding large sums of cash. In connection with these photos, the State offered testimony by Detective Wallace, indicating that the third party appearing in the pictures was Sarah Burns. Appellant essentially identified these photos during her taped telephone conversation with Brown, referencing the fact that law enforcement had taken "[t]hose pictures" that had been taken "right before Christmas" that included Appellant, Brown and another individual named Sarah. Appellant argues that multiple pictures were taken during the raid

and that she could have been referring to other pictures during that conversation; however, we are not persuaded. Further, while Appellant argues that the only inference to be drawn from these photos is that Appellant was selling drugs, a crime for which she was not charged, we disagree. The jury also could have inferred that Appellant was aware of Brown's drug involvement and that drugs were kept in their shared residence, with her knowledge.

{¶18} Thus, based upon the evidence presented at trial, it was not unreasonable for the jury to conclude that Appellant was conscious of the existence of the drugs in her residence and that she had the ability to exercise dominion or control over them. Accordingly, based on this evidence, the jury could conclude that Appellant was in constructive possession of the drugs. In addition, the jury, as the trier of fact, was free to believe or disbelieve Brown's testimony in whole or in part. Therefore, we cannot say that Appellant's conviction was supported by insufficient evidence or that in resolving conflicts in the evidence, that the jury clearly lost its way and created such a manifest miscarriage of justice that the possession of drugs conviction must be reversed and a new trial granted. Because we conclude that Appellant's conviction was not against the manifest weight of the evidence, her first assignment of error is overruled.

ASSIGNMENT OF ERROR II

{¶19} In her second assignment of error, Appellant contends that the trial court erred in the admission of evidence such to require reversal of her conviction. In support of her assigned error, Appellant argues that the trial court erred in admitting photographs of her and her boyfriend, Kevin Brown, holding large sums of cash, claiming that the State's only purpose in introducing such evidence was to convict her based upon "other bad acts." Appellant also argues that the trial court's admission of taped telephone conversations between herself and her boyfriend, Kevin Brown, was erroneous, claiming that the conversations were not relevant.[2]

{¶20} The State counters by arguing that the photos did not relate to Appellant's commission of "other bad acts," but rather, were introduced as proof of Appellant's constructive possession of the drugs at issue, by demonstrating Appellant's possession of large sums of cash, despite being unemployed, as well as her knowledge of Brown's drug related activities. The State further argues that the taped telephone conversations are relevant with respect to establishing that Appellant knew that the drugs were in her home, in effect proving the knowledge element of constructive possession.

[2] Because Appellant does not challenge the legality of recording incoming and outgoing jail calls, and does not argue that any expectation of privacy on her part was violated by the recording, we limit our analysis of this argument, as did Appellant, to the admissibility of the recording, based upon questions of relevancy only.

For the following reasons, we find that the photos and taped telephone conversation at issue were relevant and that the trial court did not err in admitting them into evidence.

{¶21} The admissibility of relevant evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of the syllabus. Absent an abuse of discretion, an appellate court will not disturb a trial court's ruling as to the admissibility of evidence. *State v. Martin* (1985), 19 Ohio St.3d 122, 129, 483 N.E.2d 1157. Even assuming Appellant's argument to be true, that the State offered the evidence at issue as "other acts evidence," while evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that a person acted in conformity therewith on a particular occasion, such evidence may be used for other purposes, however, including proof of motive, opportunity, intent, preparation, plan, *knowledge*, identity, or absence of mistake or accident. Evid.R. 404(B); *State v. Walker*, Butler App. No. CA2006-04-085, 2007-Ohio-911, ¶ 11, citing *State v. Curry* (1975), 43 Ohio St.2d 66, 68-69, 330 N.E.2d 720; *State v. Crutchfield*, Warren App. No. CA2005-11-121, 2006-Ohio-6549, ¶ 34 (testimony that appellant was aware that bullets fired from his property could reach houses one-half mile away was evidence of knowledge) (Emphasis added). As with other types of

evidence, admission of other acts testimony must not only meet the prerequisites of Evid.R. 404(B), but it also must pass muster under Evid.R. 403(A), which requires the exclusion of unfairly prejudicial evidence. *State v. Patterson*, Butler App. No. CA2001-01-011, 2002-Ohio-2065.

{¶22} In this case, we conclude that the trial court did not abuse its discretion in admitting the photos and the tape recorded conversation. The jury convicted Appellant of possession of drugs, in violation of R.C. 2925.11(A), based upon instructions that included constructive possession, which required the State to prove Appellant was conscious of the presence of the drugs in her home. Appellant's knowledge of the fact that drugs were in her home was in dispute during trial. The evidence at issue was relevant in determining whether Appellant, in fact, had knowledge of the presence of the drugs at issue in her home. Therefore, although such evidence was unfavorable to Appellant, it was relevant to show Appellant had knowledge of the fact that the drugs were in her home and was capable of exercising dominion and control over them such that she was in constructive possession of them. Thus, because we conclude that the admission of the photos and tape recording was relevant and was not unduly prejudical to Appellant, Appellant's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

{¶23} In her third assignment of error, Appellant contends that the verdict form on the charge of possession of drugs does not support her conviction. The State concedes Appellant's argument and agrees that this Court must reverse Appellant's conviction and remand the matter to the trial court with instructions to sentence Appellant on the least serious offense under R.C. 2925.11(A), in accordance with R.C. 2945.75(A)(2), as well as the holding in *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735.

{¶24} Although Appellant failed to object to the verdict forms in the trial court, we have previously noted that a defendant's failure to "raise the inadequacy of the verdict form" does not forfeit this argument on appeal. *State v. Huckleberry*, Scioto App. No. 07CA3142, 2008-Ohio-1007, ¶18; citing *State v. Pelfrey* at ¶ 14.

{¶25} As set forth above, here, the wording in issue on the verdict form provided as follows:

"Indictment for Possession of Drugs Ohio Revised Code Section 2925.11(A) We the jury in this case, duly impaneled, sworn and affirmed, find the Defendant, Tylina R. New, * Guilty of Possession of Drugs in a manner and form as she stands charged in the Indictment."

Appellant maintains that this wording does not meet the requirements for felonies of the first degree. In support, she cites R.C. 2945.75(A)(2) and *Pelfrey*, supra. R.C. 2945.75(A)(2) provides as follows:

"When the presence of one or more additional elements makes an offense one of more serious degree * * * [a] guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged."

Further, in *Pelfrey*, supra, the Supreme Court of Ohio interpreted R.C. 2945.75(A)(2) and held that "a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense." Id. at syllabus.

{¶26} Here, the verdict form failed to specifically set forth the degree of the crime charged. In addition, the verdict form contained nothing regarding any aggravating element, i.e., that the substance was either crack cocaine or that it exceeded a certain weight. While the State presented evidence that the drug involved was crack cocaine, the jury made no specific finding in that regard. Further, although the State presented evidence that the amount of crack cocaine involved exceeded twenty-five grams, the jury made no specific finding in that regard. Therefore, the possession of drugs

verdict supports a misdemeanor of the third degree conviction.[3] *Huckleberry* at ¶24; See, also *State v. Hoover*, Scioto App. No. 07CA3164, 2008-Ohio-6136.

{¶27} Accordingly, we sustain Appellant's third assignment of error, vacate her sentence; and remand this cause to the trial court for further proceedings consistent with this opinion.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART.

[3] We note that under the current version of the R.C. 2925.11(C)(2)(a), the least degree of the offense of possession of drugs is a first degree misdemeanor; however, the former version of R.C. 2925.11(C)(2)(a), with an effective date of May 17, 2006, applies to Appellant's conviction and provides that the least degree of the offense of possession of drugs is a third degree misdemeanor. Appellant argues that she should be sentenced on a minor misdemeanor only; however, a review of the statute indicates that possession of marijuana, not drugs, is a minor misdemeanor. The least degree of offense for possession of drugs, as opposed to marijuana, is a third degree misdemeanor under the prior, applicable statute.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED IN PART AND REVERSED IN PART and that the Appellee and Appellant split the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Gallia County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.
Exceptions.

Kline, P.J.: Concurs in Judgment and Opinion as to Assignments of Error II and III, and Concurs in Judgment Only as to Assignment of Error I.
Harsha, J.: Concurs in Judgment and Opinion.

For the Court,

BY: _____
Judge Matthew W. McFarland

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.