[Cite as *State v. Robinson*, 2012-Ohio-6068.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio	Court of Appeals No. L-10-1369
Appellee	Trial Court No. CR0200902169
v.	
Clifford A. Robinson III	**DECISION AND JUDGMENT**
Appellant	Decided: December 21, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Michael D. Bahner, Assistant Prosecuting Attorney, for appellee.

John F. Potts, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} Appellant, Clifford A. Robinson III, appeals his convictions and sentence for possession of crack cocaine, trafficking of crack cocaine, and having a weapon under disability. For the following reasons, we affirm the judgment of the Lucas County Court of Common Pleas as it relates to Robinson's convictions, and reverse its judgment as it relates to Robinson's sentence.

{¶ 2} On June 12, 2009, Robinson was indicted by the Lucas County Grand Jury on single counts of possession of crack cocaine in violation of R.C. 2925.11(A) and (C)(4)(e), a felony of the first degree, trafficking in cocaine in violation of R.C. 2925.03(A)(2) and (C)(4)(f), a felony of the first degree, and having a weapon while under disability in violation of R.C. 2923.13(A)(3), a felony of the third degree. In the latter count, the indictment charged that Robinson was under a disability by virtue of a past conviction for possession of crack cocaine, which had been entered on July 1, 2005.

{¶ 3} On November 29, 2010, Robinson filed a motion in limine to prevent the state from disclosing the name and nature of his prior conviction. As part of his motion, Robinson offered to stipulate that he "was under a disability as defined by R.C. 2923.13(A)" and proposed a jury instruction to the same effect. He argued that his stipulation was a sufficient and less prejudicial evidentiary alternative to introducing the judgment entry of his prior conviction, which revealed that Robinson had been convicted of possession of crack cocaine in violation of R.C. 2925.11(A) and (C)(4)(b), a felony of the fourth degree. The trial court denied the motion, finding that the state is not required to accept or enter into such a stipulation. The cause then proceeded to trial on November 30, 2010.

{¶ 4} The state called four Toledo police officers and one Lucas County Sheriff's deputy to the stand, whose collective testimony is summarized as follows. Sometime prior to December 10, 2008, Detective Israel Garrett of the Toledo Police Department's Vice/Narcotics Unit "received information from a confidential informant of drugs being

sold at a location [1259 Vance Street, Toledo, Ohio] that Clifford Robinson was at." Acting on that information, Garrett conducted surveillance at 1259 Vance, along with fellow Detective Michael Moore, and researched past crime reports in an effort to "see what happens at that location, if I can ID who Clifford Robinson is." On December 10, 2008, and again on December 15, 2008, Garrett observed multiple individuals going inside the house and coming back out after only a couple of minutes, which led him to believe that drug trafficking was taking place.

{¶ 5} On December 17, 2008, Garrett facilitated a controlled purchase at the premises, utilizing a confidential informant. Garrett observed as the informant entered the premises, stayed for approximately three to five minutes, and came back with marijuana. Over Robinson's objection, Garrett then testified that when the confidential informant returned after the controlled buy, the informant indicated that "the drugs were being sold by Cliff, that sold the drugs to him." On cross-examination, Garrett admitted that the confidential informant also indicated there were two other black males present in the residence during the controlled purchase of the marijuana.

{¶ 6} On December 18, 2008, Garrett obtained a search warrant for 1259 Vance to search for evidence of drug trafficking. On December 19, 2008, Detectives Garrett and Moore, along with Officer Raymond Espinosa and Sergeant Joe Heffernan, also members of the vice/narcotics unit, executed the warrant. Upon entering the premises, they found Robinson alone in the house watching television by the front door. Upon searching Robinson, the detectives found $10 in cash on his person and $499 in his wallet, which

was laying on a table in the dining room. After securing Robinson, the detectives began to search inside the home, which they described as a very small, one-story residence with a single bathroom approximately eight square feet in size.

{¶ 7} In the bathroom, detectives located two baggies of crack cocaine packaged along with empty plastic bags behind a loose panel at the bottom right corner of the rear wall. One of the baggies contained 27.05 grams of crack cocaine and the other 1.96 grams, for a total weight of 29.1 grams. In the bedroom, they found two separate plastic baggies containing what later proved to be counterfeit crack cocaine, one of which was tucked inside a boot and the other inside a tennis shoe; a Hi-Point 9mm semiautomatic pistol along with two loaded magazines between the bed mattresses; and numerous photographs in which Robinson appeared. The detectives seized only one of the photographs, which was date-stamped November 8, 2008. They also found torn corners of plastic sandwich bags with residue in the bedroom and throughout the house.

{¶ 8} The state presented three exhibits to demonstrate Robinson's occupancy or residency at 1259 Vance. The first is a money order issued by MoneyGram Payment Systems on August 15, 2008, which was seized from Robinson's wallet during the search. The face of the MoneyGram contains preprinted lines for the purchaser's signature and address, above which is respectively handwritten "Clifford Robinson" and "1259 Vance." Sergeant Heffernan admitted on cross-examination that Robinson's wallet also contained a state identification card, which was not seized. The second exhibit is a booking sheet generated by the Lucas County Sheriff's Department, which

shows that on February 2, 2007, Robinson reported his home address as 1259 Vance. The sheet also shows that on other occasions, both before and after February 2, 2007, Robinson reported his home address as 2017 Forest. The third document is a Toledo Police Department crime report reflecting a complaint of menacing and criminal damaging made by Robinson against his former girlfriend. In that report, Robinson claimed that on May 16, 2009, his ex-girlfriend had broken the windows of his home at 1259 Vance. In addition, Detective Garrett testified that in his experience, it is not uncommon for drug dealers to maintain more than one residence or operate out of residences that are neither titled nor leased in their name.

{¶ 9} Robinson, in his defense, elicited testimony from four witnesses, specifically Pamela Walker, his mother, Kelly Hughes, his sister, and Anthony Adams and Tremaine Willis, two friends that frequent 1259 Vance. Collectively, these witnesses related that Robinson has always lived or resided with his mother or other family members at 2017 Forest Avenue, that he receives mail at that address, that he does not live or sleep at 1259 Vance, that crack cocaine is not used or sold at the Vance residence, and that the only illicit activity in which they had known Robinson to engage was gambling. Further, aside from an individual named David Parker who stayed there at some point in 2008, no one has actually lived at 1259 Vance. Instead, the residence is a neighborhood open house where, at any given time, up to 50 people congregate to gamble, smoke marijuana, and watch sports on television. The front door is always unlocked, the bedroom has no door, and personal items and pictures of many different people have been left there. Robinson

also presented his earning statements for pay periods ending November 29, 2008, and December 20, 2008, which reflect an address of 2017 Forest.

{¶ 10} On cross-examination, the prosecutor inquired as to each witness's awareness of Robinson's prior conviction for possession of crack cocaine. In its general charge to the jury, the trial court gave limiting instructions as to the proper use of Robinson's prior conviction and the booking sheet.

{¶ 11} On December 1, 2010, the jury returned a verdict of guilty on all counts, and the trial court proceeded immediately to sentencing. At the sentencing hearing, the trial court merged the first two counts (possession and trafficking) as allied offenses of similar import, imposed a mandatory prison term of five years on the trafficking count, and imposed a concurrent sentence of three years on the weapon-under-disability count. However, in its judgment entry file-stamped December 6, 2010, the trial court imposed a concurrent sentence of five years on the weapon count.

{¶ 12} Robinson now appeals his conviction and sentence, raising nine assignments of error.

I. Sufficiency and Manifest Weight of the Evidence

{¶ 13} In his first three assignments of error, Robinson asserts:

> I: Defendant's conviction for Possession of Crack Cocaine is not supported by the evidence and is against the manifest weight of the evidence.

II: Defendant's conviction for Aggravated Trafficking in Crack Cocaine is not supported by the evidence and is against the manifest weight of the evidence.

III: Defendant's conviction of having a Weapon Under Disability is not supported by the evidence and is against the manifest weight of the evidence.

{¶ 14} Although claims involving the sufficiency and weight of the evidence are often raised together, we have recognized that they "are conceptually distinct and invoke disparate standards of appellate review." *State v. Cronin*, 6th Dist. No. S-09-032, 2010-Ohio-4717, ¶ 23. A challenge to the sufficiency of evidence supporting a criminal conviction raises a question of law, "that is, whether the state has met its burden of production." *Id. See also State v. Harry*, 12th Dist. No. CA2008-01-0013, 2008-Ohio-6380, ¶ 43. In reviewing a sufficiency-of-the-evidence claim, our function

> is to examine the evidence submitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, *superseded by state*

constitutional amendment on other grounds as stated in State v. Smith, 80 Ohio St.3d 89, 102, fn. 4, 684 N.E.2d 668 (1997).

{¶ 15} In determining whether a conviction is against the manifest weight of the evidence, we do not view the evidence in a light most favorable to the state. Instead, we sit as a "thirteenth juror" and scrutinize "the factfinder's resolution of the conflicting testimony." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). In this regard, our task is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine "'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.'" *Id.* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

A. Possession

{¶ 16} Although Robinson's first assignment of error states that his conviction for possession of crack cocaine is both unsupported by and against the manifest weight of the evidence, his supporting arguments are trained exclusively on the issue of sufficiency. He compares this case to several other cases in which possession convictions were reversed for insufficient evidence, relying most heavily on this court's decision in *State v. Joyner*, 6th Dist. No. L-09-1058, 2010-Ohio-2794. He argues that he was not in close proximity to the bathroom where the crack cocaine was found, that the crack cocaine was not in plain view, that no drugs or drug paraphernalia were found on his person, that he

did not own or lease the premises at 1259 Vance, and that possession, in any event, cannot be inferred from mere ownership or occupation of the premises where drugs are found.

{¶ 17} R.C. 2925.11(A) provides, in relevant part: "No person shall knowingly * * * possess * * * a controlled substance." Possess means "having control over a thing or substance * * *." R.C. 2925.01(K). Possession of a controlled substance may be actual or constructive. *State v. Moffett*, 6th Dist. No. S-10-056, 2012-Ohio-1107, ¶ 14. Actual possession involves immediate physical control. *State v. Banks*, 182 Ohio App.3d 276, 2009-Ohio-1892, 912 N.E.2d 633, ¶ 10 (10th Dist.). Constructive possession exists when an individual exercises dominion and control over an item, even if the item is not within his or her immediate physical possession. *Harry*, *supra*, 2008-Ohio-6380 at ¶ 48; *State v. Barfield*, 4th Dist. No. 98CA2454, 1999 WL 731806, *2 (Sept. 10, 1999). 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). "In order to constructively possess an item, one must be conscious of its presence and able to exercise dominion and control over it." *State v. Lorenzo*, 9th Dist. No. 26214, 2012-Ohio-3145, ¶ 16.

{¶ 18} Constructive possession, as with the essential elements of any crime, may be proved entirely by circumstantial evidence. Absent a defendant's admission, the elements of constructive possession, including knowledge of the item purportedly possessed, can be inferred from a totality of the surrounding facts and circumstances. *See*

State v. Voll, 3d Dist. No. 14-12-04, 2012-Ohio-3900, ¶ 19; *Lorenzo*, 2012-Ohio-3145 at ¶ 16; *Banks*, *supra*, at ¶ 11; *Moffett*, *supra*, 2012-Ohio-1107 at ¶ 14; *State v. Burnett*, 10th Dist. No. 02AP-863, 2003-Ohio-1787, ¶ 20. The fact that illicit items are found among or near a defendant's personal belongings is a relevant circumstance in determining constructive possession. *See State v. Munn*, 6th Dist. No. L-08-1363, 2009-Ohio-5879, ¶ 50; *State v. Townsend*, 2d Dist. No. 18670, 2001 WL 959186, *3 (Aug. 24, 2001); *State v. Pettis*, 8th Dist. No. 59174, 1991 WL 211969, *4 (Oct. 17, 1991).

{¶ 19} In *Joyner*, police executed a search warrant at a residence where a confidential informant had previously purchased drugs. When police entered the residence, they found cocaine on a plate in the living room. At the time, a woman was standing in the living room and appellant was on the stairwell leading down to the living room. Nothing suggested that the house was appellant's residence, and appellant was not in close proximity to the drugs. We reversed appellant's conviction for cocaine possession, finding that the "mere presence of appellant in the residence where illegal drugs were found is, without more, insufficient to establish constructive possession." *Joyner*, 6th Dist. No. L-09-1058, 2010-Ohio-2794, ¶ 13.

{¶ 20} In this case, Robinson was not merely present in the house when the search warrant was executed. According to the state's evidence, Robinson was the only one present in a very small house that he listed on various documents as his place of residence, his wallet was laying out in the open, and his photographs were found in a small bedroom where counterfeit crack cocaine and torn corners of plastic baggies with

residue were also found. Viewing the totality of the evidence in a light most favorable to the prosecution, we find that there was sufficient circumstantial evidence in this case to convince a rational jury that the elements of constructive possession were established beyond a reasonable doubt.

{¶ 21} Moreover, having examined the record and considered the credibility of the witnesses, we are not persuaded that the evidence weighs heavily against a conviction on this count. While Robinson's witnesses testified that he neither sleeps nor lives at 1259 Vance, and that the home is essentially a community open house, we cannot say that the jury lost its way in disbelieving their testimony. A jury could certainly conclude that the greater amount of credible evidence supported the prosecution's case. Thus, Robinson's conviction for knowingly possessing crack cocaine is not against the manifest weight of the evidence.

{¶ 22} Accordingly, Robinson's first assignment of error is not well-taken.

B. Trafficking

{¶ 23} With regard to his trafficking conviction, Robinson's arguments under the second assignment of error are also limited to the sufficiency of the evidence. According to Robinson, "[t]he evidence presented to support [his] conviction on Count Two [of the indictment] is not merely insufficient, it is non-existent." Essentially, Robinson argues that the state presented no evidence that he engaged in any of the conduct proscribed under R.C. 2905.03(A)(2), such as shipping or distributing the crack cocaine, or preparing it for shipment or distribution.

{¶ 24} R.C. 2925.03(A)(2) provides that no person shall knowingly "[p]repare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person." Numerous courts have determined that items such as plastic baggies, digital scales, and large sums of money are often used in drug trafficking and may constitute circumstantial evidence of conduct proscribed by R.C. 2925.03(A)(2). *State v. Garrett*, 12th Dist. No. CA2008-08-076, 2009-Ohio-2806, ¶ 23; *Harry*, *supra*, 12th Dist. No. CA2008-01-0013, 2008-Ohio-6380, ¶ 50; *State v. Floyd*, 8th Dist. No. 90705, 2008-Ohio-5262, ¶ 16; *State v. Malott*, 12th Dist. Nos. CA2007-02-006, CA2007-02-007, CA2007-02-008, 2008-Ohio-2114, ¶ 20; *State v. Smallwood*, 9th Dist. No. 07CA0063, 2008-Ohio-2107, ¶ 23; *State v. Kutsar*, 8th Dist. No. 89310, 2007-Ohio-6990, ¶ 20; *State v. Fain*, 5th Dist. No. 06CAA120094, 2007-Ohio-4854, ¶ 38; *State v. Fry*, 9th Dist. No. 23211, 2007-Ohio-3240, ¶ 50; *State v. Williams*, 1st Dist. No. C-040747, 2005-Ohio-6772, ¶ 19.

{¶ 25} In this case, the detectives testified that in searching the premises, they found 29.1 grams of crack cocaine packaged along with empty plastic bags, numerous corners of torn plastic baggies with residue inside, $499 in cash in Robinson's wallet, more than one cellular phone, and a total of 56.09 grams of counterfeit crack cocaine. They also testified that from their experience, each of those items is indicative of drug trafficking. This evidence is sufficient to establish the elements of drug trafficking

beyond a reasonable doubt and we cannot say that the jury lost its way in disbelieving Robinson's evidence to the contrary.

{¶ 26} Accordingly, Robinson's second assignment of error is not well-taken.

C. Weapon Under Disability

{¶ 27} In regard to his conviction for having a weapon while under disability, Robinson raises the same arguments regarding the element of possession that he advanced in his first assignment of error, and we reject them for the same reasons. In so doing, we agree with appellee that the salient facts in this case are similar to those considered by this court in *Munn*, *supra*, 6th Dist. No. L-08-1363, 2009-Ohio-5879, ¶ 48 and 50, and by the Fifth District Court of Appeals in *State v. Brack*, 5th Dist. No. 2010CA00061, 2011-Ohio-2949, ¶ 26 and 27.

{¶ 28} Accordingly, Robinson's third assignment of error is not well-taken.

II. Admissibility of Evidence

A. Statement by Confidential Informant

{¶ 29} In his fourth assignment of error, Robinson asserts:

> It constituted error to admit into evidence out-of-court statements attributed to a confidential informant that illegal drugs had been purchased from a person named "Cliff" at the location at which the search warrant was executed.

{¶ 30} In this assignment of error, Robinson challenges the admissibility of Detective Garrett's testimony regarding what the confidential informant told him after the

controlled purchase of marijuana from 1259 Vance, specifically that "the drugs were being sold by Cliff." Robinson argues that the informant's statement should have been excluded pursuant to Evid.R. 403(A), because it "directly implicates [him] as being involved in the same sort of criminal activity for which he was on trial." The state argues that the testimony was not hearsay, relying on this court's decision in *State v. Munn*. We agree with Robinson that this portion of Detective Garrett's testimony should have been excluded, but find that the admission of the informant's statement did not contribute to his conviction.

{¶ 31} It is well-established that extrajudicial statements made by an out-of-court declarant are properly admissible to explain the actions of a witness, and particularly to explain the conduct of a police officer during the course of a criminal investigation. To the extent that such statements are offered and used to establish a foundation for the officer's subsequent conduct, rather than for the truth of the matter asserted, they are not hearsay. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 117; *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶ 98; *State v. Thomas*, 61 Ohio St.2d 223, 232, 400 N.E.2d 401 (1980); *State v. Aaron*, 6th Dist. No. OT-10-043, 2011-Ohio-6309, ¶ 17; *State v. Rossbach*, 6th Dist. No. L-09-1300, 2011-Ohio-281, ¶ 130; *State v. Ector*, 6th Dist. No. L-10-1002, 2010-Ohio-6515, ¶ 59-60; *Munn*, *supra*, 6th Dist. No. L-08-1363, 2009-Ohio-5879, ¶ 26.

{¶ 32} In *Munn*, the defendant was charged with a single count of having a weapon while under disability in violation of R.C. 2923.13(A)(2). During trial, a Toledo

police detective testified as to a statement made to him by a confidential informant. The content of the informant's statement was that the defendant had shown him guns, including a camouflage rifle and body armor, and that this occurred at a particular residence. In considering the admissibility of the informant's statement, this court recognized the general rule that when extrajudicial "statements are offered to explain an officer's conduct while investigating a crime, such statements are not hearsay." *Id*. at ¶ 26. We then found:

> In this case, the statements of the informant were not admitted for the truth of the matter asserted, i.e., that appellant was in possession of a weapon. Rather, the informant told the detective that he had seen appellant who had shown him some guns, including a "camouflage sniper rifle and body armor" in a residence at 31 Pearl Street, Toledo, Ohio. As a result, the statements were admitted merely to explain why the police sought a search warrant for that address and investigated where appellant was currently living. Therefore, the trial court did not err in permitting the detective to testify as to the statements made by the confidential informant. *Id*. at ¶ 27.

{¶ 33} As Robinson correctly points out, however, our decision in *Munn* did not address the issue of admissibility under Evid.R. 403(A). In *State v. Maurer*, 15 Ohio St.3d 239, 263, 473 N.E.2d 768 (1984), the Ohio Supreme Court explained that when an out-of-court statement "is offered for some purpose other than to prove the truth of the

matter asserted, admissibility should be governed by the standards of relevancy and prejudice [under Evid.R. 401-403]." In *State v. Richcreek*, 196 Ohio App.3d 505, 2011-Ohio-4686, 964 N.E.2d 442 (6th Dist.), we recognized that there is a substantial potential for abuse where an out-of-court statement purportedly offered to explain the conduct of a witness contains demonstrative evidence of the defendant's guilt. *Id*. at ¶ 24. Accordingly, we held that before "an extrajudicial statement of this type [may be admitted], a secondary assessment under Evid.R. 403(A) is required. The trial court must consider whether the risk that the jury will prejudicially misuse the content for its truth exceeds the probative value of the statement for the nonhearsay purpose." *Id*. at ¶ 26. Moreover, we adopted the view that "'*when the [out-of-court] statements connect the accused with the crime charged, they should generally be excluded.*'" (Emphasis sic.) *Id*. at ¶ 25, quoting *State v. Blanton*, 184 Ohio App.3d 611, 2009-Ohio-5334, 921 N.E.2d 1103, ¶ 39 (10th Dist.). *See also State v. Jones*, 6th Dist. Nos. L-00-1231, L-00-1232, L-00-1233, 2003-Ohio-219, ¶ 49.

{¶ 34} In this case, the confidential informant's out-of-court statement that he purchased marijuana from a person named "Cliff" should have been excluded under Evid.R. 403(A). The content of the informant's statement carried a danger of unfair prejudice to Robinson and confusion by the jury, as it implicated Robinson in the trafficking of marijuana from the premises. While the statement did not directly connect Robinson with the crime charged, which is trafficking in crack cocaine, it nevertheless contained a potentially prejudicial accusation of criminality. On the other hand, the

statement had only minimal probative value in regard its purported foundational purpose. Detective Garrett's testimony that the informant had purchased drugs from the residence was more than sufficient to explain what prompted him to secure a search warrant. The informant's statement identifying the seller of the drugs by name added little in terms of giving definite character to Garrett's actions.

{¶ 35} Having found that the informant's statement was improperly admitted, we must now determine whether the error was harmless or prejudicial. "Error in the admission of evidence in criminal proceedings is harmless if there is no reasonable possibility that the evidence may have contributed to the accused's conviction." *State v. Bayless*, 48 Ohio St.2d 73, 357 N.E.2d 1035 (1976), paragraph seven of the syllabus, *vacated in part on other grounds*, 438 U.S. 911, 98 S.Ct. 3135, 57 L.Ed.2d 1155 (1978). A finding of harmless error is not appropriate unless there is "either overwhelming evidence of guilt or some other indicia that the error did not contribute to the conviction." *State v. Rahman*, 23 Ohio St.3d 146, 151, 492 N.E.2d 401 (1986), quoting *State v. Ferguson*, 5 Ohio St.3d 160, 166, 450 N.E.2d 265 (1983), fn. 5. In making the determination, "the appellate court must read the record and decide the probable impact of the error on the minds of the average jury." *State v. Young*, 5 Ohio St.3d 221, 226, 450 N.E.2d 1143 (1983).

{¶ 36} Having examined the record, we cannot say that the admission of the informant's statement had any effect on the outcome of the trial. Read in its full context, the testimony regarding the informant's statement was made in the midst of Detective

Garrett's description of the steps he took after commencing the investigation. It constituted a single, short sentence, and Garrett immediately moved on to the subsequent steps he took during the investigation. None of the other witnesses referred to the informant's statement, and the only other time it was mentioned during Garrett's testimony was by defense counsel upon cross-examination. *See State v. Blevins*, 36 Ohio App.3d 147, 150, 521 N.E.2d 1105 (10th Dist.1987) (finding that in light of additional evidence, "it is unreasonable to believe that a juror would rely on two [hearsay] statements, made over the course of three days of testimony, in reaching the jury's verdict"). *See also Richcreek, supra*, 196 Ohio App.3d 505, 2011-Ohio-4686, 964 N.E.2d 442, ¶ 76 ("the admission of an isolated hearsay statement may be deemed harmless error * * * when there is substantial and independent admissible evidence, other than the hearsay, to prove the elements of the crime").[1]

{¶ 37} Contrary to Robinson's assertions, the record discloses that the state presented substantial evidence, independent of the informant's statement, to prove the essential elements of trafficking in crack cocaine. Although the evidence presented by

[1] Robinson also argues that the prosecutor referred to the informant's statement during his opening and closing remarks, and no curative or limiting instruction was given by the court. During his opening remarks, the prosecutor mentioned the statement briefly and only in the context of describing what prompted Detective Garrett to secure a search warrant. The prosecutor never mentioned the statement in his initial closing argument. The prosecutor did refer to the statement during his rebuttal, but only in response to the closing argument of defense counsel that the jury should consider the "testimony from Detective Garrett [on cross-examination] about a confidential informant * * * [who] noted that there were two other black males present in the home." This is a far cry from the switch-of-purpose tactic that this court held to be prejudicial prosecutorial misconduct in *State v. Kirk*, 6th Dist. No. H-09-006, 2010-Ohio-2006.

the state was circumstantial for the most part, the Supreme Court of Ohio has long recognized that "[c]ircumstantial evidence and direct evidence inherently possess the same probative value." *Jenks*, 61 Ohio St.3d at 272, 574 N.E.2d 492. Based on the particular circumstances of this case, we conclude that the informant's out-of-court statement did not contribute to Robinson's conviction.

{¶ 38} Accordingly, Robinson's fourth assignment of error is not well-taken.

B. Prior Conviction

{¶ 39} In his fifth assignment of error, Robinson maintains:

> It constituted error to admit evidence of Defendant's prior conviction for Possession of Crack Cocaine.

{¶ 40} Robinson's arguments under this assignment of error are directed at two distinct uses of his prior conviction. First, Robinson challenges the admission of his prior conviction to prove the element of disability under R.C. 2923.13(A)(3). Second, he challenges the use of his prior conviction for purposes of impeachment.

1. Disability

{¶ 41} Robinson contends that in light of his proffered stipulation to being under a disability for purposes of R.C. 2923.13(A), the trial court should have excluded the judgment entry of his prior conviction for possession of crack cocaine on the authority of *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997). He argues that although "*Old Chief* has not been uniformly followed by the Ohio courts, at least three justices of the Ohio Supreme Court have recently indicated that Ohio should

adopt the holding in *Old Chief*." Specifically, in *State v. Baker*, 126 Ohio St.3d 1215, 2010-Ohio-3235, 931 N.E.2d 122, ¶ 6, three members of the Ohio Supreme Court (two current and one former), in their dissent from the majority's decision to dismiss the certified appeal for want of conflict, stated that they "would adopt the holdings in *Old Chief* and apply the reasoning in *Old Chief* to the Ohio statute." (Lundberg Stratton, J., dissenting, joined by Brown, C.J., and Pfeifer, J.)

{¶ 42} We note initially that while two current members of the Ohio Supreme Court have expressed their opinion on this issue, the other five have not. We also note that the Ohio Supreme Court has recently granted a motion for leave to file a delayed appeal from the Twelfth District's decision in *State v. Jones*, 12th Dist. No. CA2011-05-044, 2012-Ohio-1480 (132 Ohio St.3d 1530, 2012-Ohio-4381, 974 N.E.2d 1208), which declined to extend the reasoning in *Old Chief* to the prior-conviction element under R.C. 2919.25(D)(2) and (3). However, until the Supreme Court of Ohio decides the issue, the application of *Old Chief* to R.C. 2923.13(A) remains an open question in Ohio.

{¶ 43} The Eighth, Ninth, and Twelfth Appellate Districts have declined to adopt the reasoning of *Old Chief*, finding it clearly inapposite to Ohio's statute. *See Jones* at ¶ 17-18; *State v. Peasley*, 9th Dist. No. 25062, 2010-Ohio-4333, ¶ 12; *State v. Johnson*, 8th Dist. No. 91900, 2009-Ohio-4367, ¶ 22-23; *State v. Russell*, 12th Dist. No. CA-98-02-018, 1998 WL 778312, *3-4 (Nov. 9, 1998). Our analysis confirms that the high court's opinion in *Old Chief* is carefully tailored to the peculiarities of the federal statute.

{¶ 44} In *Old* Chief, the defendant was charged with possession of a firearm while under disability in violation of 18 U.S.C. 922(g)(1), as well as assault with a dangerous weapon. Excepting certain misdemeanors and business-related offenses, 18 U.S.C. 922(g)(1) prohibits the possession of a firearm by anyone "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." The defendant, who had been convicted of assault with serious bodily injury, filed a motion in limine to exclude any evidence disclosing the name and nature of his prior offense. As an evidentiary alternative, the defendant offered to stipulate that he "has been convicted of a crime punishable by imprisonment for a term exceeding one year," and proposed a jury instruction to the same effect. The district court rejected the stipulation and allowed the government to introduce the judgment entry of defendant's prior conviction for assault.

{¶ 45} In a sharply divided 5-4 decision, the high court held that the judgment entry, to the extent it revealed the name and character of defendant's prior offense, should have been excluded pursuant to Fed.R.Evid. 403. The court essentially concluded that for purposes of proving the prior-conviction element of section 922(g)(1), the name and nature of defendant's prior offense had no more probative value than defendant's stipulation, but carried a substantially higher danger of unfair prejudice.

{¶ 46} It is clear, however, that the court's conclusion hinged on the singularly broad definition of the prior-conviction element contained in the federal statute. At the threshold, the court found that even if no evidentiary alternative was available, evidence

of the name and nature of the prior conviction had only minimal relevance in placing the defendant within the statute's broad class of disqualified offenders. Thus, the court explained that while "its demonstration was a step on one evidentiary route to the ultimate fact," the name of defendant's prior conviction "was not itself an ultimate fact, as if the statute had specifically required proof of injurious assault." *Old Chief*, 519 U.S. at 178, 117 S.Ct. 644, 136 L.Ed.2d 574.

{¶ 47} The court then compared the evidentiary alternatives offered by the government and the defendant and found them to have equivalent probative value in proving the prior-conviction element of the statute. In so doing, the court again laid stress on the particularly broad category of offenses covered by the statute:

> The statutory language in which the prior-conviction requirement is couched shows no congressional concern with the specific name or nature of the prior offense beyond what is necessary to place it within the broad category of qualifying felonies * * *. As a consequence, although the name of the prior offense may have been technically relevant, it addressed no detail in the definition of the prior-conviction element that would not have been covered by the stipulation or admission." *Id*. at 186.

{¶ 48} Further emphasizing the point, the court observed that the prior-conviction element of statute does not make "distinctions among generic felonies," but covers crimes "ranging from possession of short lobsters * * * to the most aggravated murder." (Citation omitted.) *Id*. at 190. The court then concluded:

> *Given these peculiarities* of the element of felony-convict status * * *, there is no cognizable difference between the evidentiary significance of an admission and of the legitimately probative component of the official record the prosecution would prefer to place in evidence. (Emphasis added.) *Id*. at 191.

{¶ 49} Unlike the federal statute at issue in *Old Chief*, the Ohio statute does not contain a single and practically all-encompassing definition of the prior-conviction element. While 18 U.S.C. 922(g)(1) prohibits firearm possession by all but two narrow classes of felons, R.C. 2923.13(A) does just the opposite—it prohibits only two narrow classes of felons from possessing a firearm, and delimits these classes under separate subdivisions. Thus, subsection (A)(2) specifies that no person indicted or convicted of a "felony offense of violence" shall knowingly possess a firearm; and subsection (A)(3), at issue here, specifies that no person indicted or convicted of a "felony offense involving the illegal possession * * * or trafficking in any drug of abuse" shall knowingly possess a firearm.

{¶ 50} Clearly, the language and structure of R.C. 2923.13(A) manifests a legislative concern with the specific name and nature of the prior offense. The fact that Robinson's prior conviction involved the possession of crack cocaine is an ultimate fact to be proved under the Ohio statute. Thus, in direct contrast to the prior-conviction language in 18 U.S.C. 922(g)(1), the language of R.C. 2923.13(A)(3) reflects that the

General Assembly envisioned jurors learning the name and basic nature of the defendant's prior offense.

2. Impeachment

{¶ 51} Robinson also argues that the prejudicial effect of the trial court's refusal to accept his stipulation and exclude the name of his prior offense "was very far reaching in the instant case," as the prosecution "gratuitously used [this] evidence in its cross examination of defense witnesses." However, it is well-established that the prosecution may impeach a defendant's character witness with evidence of the defendant's prior convictions. *See, e.g., State v. Thomas*, 12th Dist. No. CA2010-10-099, 2012-Ohio-2430, ¶ 54; *State v. Ogletree*, 8th Dist. No. 84446, 2004-Ohio-6297, ¶ 45; *State v. Crawley*, 8th Dist. No. 70687, 1997 WL 232623, *3-4 (May 8, 1997); *State v. Bailey*, 8th Dist. No. 51968, 1987 WL 9620, *3 (Apr. 9, 1987).

{¶ 52} Here, Robinson's witnesses testified that they had known Robinson for all or most of their lives, that they were familiar with his activities and associations, that Robinson had a gambling problem and frequented 1259 Vance only to gamble, and that they never saw or heard about crack cocaine being used or sold at the Vance residence. In addition, Robinson's first witness, Pamela Walker, was asked by defense counsel if she thought that Robinson had made mistakes in his life, if she considered him a perfect son, if she had been disappointed with him at times, and if his gambling problem was one of those things that frustrated or disappointed her. Robinson's sister testified it was not surprising that her brother had $500 in cash on his person, since he is a good gambler.

Robinson's friends testified that that they were not aware of Robinson ever hiding drugs at the Vance residence and were surprised that drugs were found hidden in the bathroom.

{¶ 53} The testimony of these witnesses did not simply relay the fact that Robinson and others frequented the Vance residence "to watch sports, play video games, socialize, and gamble," as Robinson suggests. The clear import and general design of this testimony was to also depict Robinson as a known gambler who had no inclination toward or association with the use or sale of crack cocaine. Thus, defense counsel placed Robinson's character in issue, and the prosecutor was permitted to rebut the testimony of these witnesses with evidence of Robinson's prior conviction.

{¶ 54} Accordingly, Robinson's fifth assignment of error is not well-taken.

C. Prior Arrest and Post-Arrest Silence

{¶ 55} In his sixth assignment of error, Robinson contends:

> It constituted error to admit evidence of Defendant's post arrest silence and Defendant's prior arrest on charges that were dismissed.

{¶ 56} The disputed testimony originated during defense counsel's cross-examination of Detective Garrett:

> Q. You indicated to the jury that * * * in the course of your investigation you look[ed] at other reports from that location, being 1259 Vance; correct?
>
> A. Yes, sir.
>
> Q. Had there been prior reports of activity there?

A. Yes, sir.

Q. Have there been prior raids of that location?

A. Yes, sir.

Q. Had there been prior arrests as a result of raids performed at that location?

A. Yes, sir.

Q. Um, and were people taken into custody from prior raids at that location?

A. Yes, sir.

* * *

Q. Were there multiple defendants associated with those cases?

A. On one of them I'm sure it was.

Q. Okay. Throughout the investigation of this case did you look at that person as suspect?

A. Well, that person wasn't there, for one; and for two, Clifford Robinson didn't want to talk to me about anything. So I could not investigate.

Q. I'm not talking about Cliff. I'm talking about a prior suspect that was arrested relative to drug activity at 1259 Vance.

A. Well –

Q. Did you do any follow up?

A. One of the prior arrests was made, there was a another suspect along with Clifford Robinson where the drugs could not be placed on either one of them because the drugs were found outside the residence. And again, as I arrested Clifford Robinson, to give him opportunity to clear himself and talk to me, he did not want to name anybody else.

MR. MARKS: Objection.

A. Well he asked me did I investigate.

THE COURT: Already. Go ahead, Mr. Marks.

{¶ 57} On redirect examination, the prosecutor questioned Detective Garrett about the prior case, eliciting additional testimony that crack cocaine was involved, that the case was dismissed, and that unlike the present case, no drugs were found inside the premises where Robinson and his co-defendant were located.

{¶ 58} Robinson argues that the "trial court's failure to sustain Defendant's objection to the improper references to Defendant's post arrest silence and Detective Garrett's description of Defendant's prior arrest constituted error." He also contends that the prejudicial impact of this evidence was exacerbated because the trial court gave no curative instruction in regard to post-arrest silence and the prosecutor used the prior arrest in cross-examining a defense witness. We are not convinced.

{¶ 59} First, it was Robinson's trial counsel, not the prosecutor, who initiated the testimony of which Robinson now complains. Detective Garrett did not testify on direct examination about Robinson's post-arrest silence or prior arrest, and the jury would not

have known of these matters but for defense counsel's questions to Detective Garrett during cross-examination. *See, e.g., State v. Reed*, 10th Dist. No. 08AP-20, 2008-Ohio-6082, ¶ 21 (no violation of due process where defense counsel invites or facilitates the reference to defendant's post-arrest silence on cross-examination). This is not a situation where the state's witness injects inflammatory testimony, either deliberately or inadvertently, by giving a nonresponsive answer to an otherwise innocuous question. The answers given by Detective Garrett were responsive to the questions posed by Robinson's trial counsel, although they were not what counsel had hoped for. Moreover, the defense did not request a curative or limiting instruction with regard to Robinson's post-arrest silence, so any error in the trial court's failure to give one is waived. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 182; *State v. Schaim*, 65 Ohio St.3d 51, 61, 600 N.E.2d 661 (1992), fn. 9.; *State v. Davis*, 62 Ohio St.3d 326, 339, 581 N.E.2d 1362 (1991).

{¶ 60} Second, defense counsel did not object to Detective Garrett's redirected testimony in regard to the prior arrest, as Robinson contends. Indeed, it does not appear from the above-quoted colloquy that defense counsel's initial objection during cross-examination was directed at the issue of Robinson's prior arrest. In any event, an objection to Garrett's further testimony on redirect would not have been properly sustained. Robinson's counsel clearly opened the door to this testimony on cross-examination by suggesting that persons known through previous arrests to be associated with drug activity at 1259 Vance should have been considered suspects in this case.

Further, this line of questioning was apparently used to bolster Robinson's defense that he was being unfairly targeted, that he did not have exclusive control of the premises, and that he was only coincidentally present when the crack cocaine was found. In eliciting further testimony from Detective Garrett as to the nature and circumstances of the prior arrest, the state did no more than walk through a door that was opened by the defense. *See State v. Tufts*, 8th Dist. No. 94276, 2011-Ohio-73, ¶ 13; *State v. Brooks*, 9th Dist. No. 07 CA 0111-M, 2008-Ohio-3723, ¶ 52-53; *State v. Hammons*, 12th Dist. No. CA2004-01-008, 2005-Ohio-1409, ¶ 12; *State v. Waver*, 8th Dist. No. 73976, 1999 WL 632902, *8 (Aug. 19, 1999); *State v. Short*, 8th Dist. No. 58676, 1991 WL 144325, *2 (July 18, 1991). *Compare State v. Wright*, 4th Dist. No. 00CA39, 2001 WL 1627643, *12 (Dec. 6, 2001), fn. 7 (evidence of uncharged misconduct is admissible to disprove defendant's assertion that he was "merely present" when the charged offense occurred).

{¶ 61} Finally, for the reasons already expressed in addressing Robinson's fifth assignment of error, the prosecutor's use of the prior arrest in cross-examining one of the defense's witnesses was not improper. *See, e.g., State v. Sim*s, 3 Ohio App.3d 321, 323-324, 445 N.E.2d 235 (8th Dist.1981).

{¶ 62} Accordingly, Robinson's sixth assignment of error is not well-taken.

D. Contemporaneous Limiting Instructions

{¶ 63} Robinson's seventh assignment of error reads:

It constituted plain error not to give contemporaneous limiting instructions restricting evidence received for limited purposes to its proper scope.

{¶ 64} In this assignment of error, Robinson refers to the evidence of his prior conviction for possession of crack cocaine and the extrajudicial statement made by the confidential informant after the controlled purchase of marijuana. According to Robinson, the trial court was obligated to give a limiting instruction at the time the evidence was received. We disagree.

{¶ 65} First, as to the informant's statement, we have already determined that this evidence should have been excluded, but that the error had no prejudicial impact on the jury under the circumstances of this case.

{¶ 66} Second, Ohio law does not require the trial court to issue contemporaneous limiting instructions where none are requested. "Where no request for such instruction is made at the time such evidence is received, it has been held to be an error of omission and, therefore, nonprejudicial if the trial court covers the matter properly and adequately in the general charge." *State v. Crafton*, 15 Ohio App.2d 160, 165, 239 N.E.2d 571 (5th Dist.1968). *See also State v. Kidd*, 2d Dist. No. 96-CA-62, 1997 WL 381179, *11 (July 11, 1997); *State v. Jones*, 2d Dist. No. 14592, 1995 WL 259189, *7 (May 3, 1995). *See also Schaim, supra*, 65 Ohio St.3d at 61, 600 N.E.2d 661, fn. 9 (rejecting argument that plain error occurs where the trial court fails to sua sponte give a limiting instruction on the use of other-acts evidence).

{¶ 67} In this case, Robinson did not request a limiting instruction at the time the evidence of his prior conviction was admitted. Further, the trial court appropriately and sufficiently covered the limited evidentiary use of Robinson's prior conviction in its general charge to the jury.

{¶ 68} Accordingly, Robinson's seventh assignment of error is not well-taken.

III. Effective Assistance of Counsel

{¶ 69} In his eighth assignment of error, Robinson alleges:

> Defendant's constitutional rights to effective assistance of counsel were violated by the cumulative effect of trial counsel's omissions to object and/or request limiting instructions during the course of the trial.

{¶ 70} Robinson argues that his trial counsel was constitutionally ineffective because he failed to make timely objections or requests for limiting instructions in regard to the evidence that forms the subject matter of his previous four assignments of error. Specifically, he contends that the following actions or inactions by counsel, considered separately or cumulatively, amount to prejudicial deficient performance: (1) failure to interpose timely objections to the admission of his prior arrest and conviction, the statement attributed to the confidential informant, and the reference to his post-arrest silence, (2) failure to request limiting and contemporaneously limiting instructions with regard to his prior arrest and the informant's statement, (3) failure to request contemporaneous limiting instructions with regard to the booking sheet and upon each

use of his prior conviction, and (4) opening the door to Detective Garrett's testimony describing the circumstances of his prior arrest.

{¶ 71} In order to prevail on an ineffective assistance of counsel claim, a defendant must satisfy the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

{¶ 72} Under Ohio law, a properly licensed attorney is presumed competent. *Vaughn v. Maxwell*, 2 Ohio St.2d 299, 301, 209 N.E.2d 164 (1965). There is "'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989), quoting *Strickland* at 689. Trial tactics and strategies do not constitute ineffective assistance merely because they appear questionable or ineffective in retrospect. *State v. Clayton*, 62 Ohio St.2d 45, 49, 402 N.E.2d 1189 (1980). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the

conduct from counsel's perspective at the time." *Strickland* at 689. "Accordingly, we are inclined to presume that a broad range of choices, perhaps even disastrous ones, are made on the basis of tactical decisions and do not constitute ineffective assistance." *State v. Carpenter*, 116 Ohio App.3d 615, 626, 688 N.E.2d 1090 (2d Dist.1996).

{¶ 73} Applying these standards in light of our previous evidentiary findings, we cannot conclude that counsel was constitutionally ineffective. First, there is no improperly admitted evidence to which Robinson's trial counsel failed to object. The only evidence improperly admitted was the informant's statement to Garrett following the controlled buy, and trial counsel interposed a timely and lengthy objection to the admission of this evidence.

{¶ 74} Second, defense counsel's selective use of limiting instructions in this case fell entirely within the permissible gambit of strategic choices. A competent attorney could well have considered the repetitive array of limiting and contemporaneously limiting instructions that Robinson now proposes to be counterproductive. The references to Robinson's post-arrest silence and the informant's statement were isolated, and counsel could reasonably have preferred not to draw further attention to these matters. Also, considering that nonexclusive control and coincidental presence were the mainstay of the defense, it was not unreasonable for counsel to consider a limiting instruction on the proper use of Robinson's prior arrest as doing more harm than good. *See State v. Bankston*, 2d Dist. No. 24192, 2011-Ohio-6486, ¶ 28; *State v. Barnes*, 11th

Dist. No. 92512, 2010-Ohio-1659, ¶ 69; *State v. Kinney*, 4th Dist. No. 07CA2996, 2008-Ohio-4612, ¶ 20; *State v. Essinger*, 3d Dist. No. 5-03-15, 2003-Ohio-6000, ¶ 34.

{¶ 75} Finally, while counsel's decision to open the door to testimony about Robinson's prior arrest may appear questionable in hindsight, it was part of a legitimate trial strategy to cast doubt on Robinson's culpable presence inside the premises when the drugs were found. *See, e.g., State v. H.H.*, 10th Dist. No. 10AP-1126, 2011-Ohio-6660, ¶ 25; *State v. Hankison*, 4th Dist. No. 09CA3326, 2010-Ohio-4617, ¶ 136; *State v. Reed*, 10th Dist. No. 08AP-20, 2008-Ohio-6082, ¶ 23-24. "Counsel chose a strategy that proved ineffective, but the fact that there was another and better strategy available does not amount to a breach of an essential duty to his client." *Clayton*, *supra*, 62 Ohio St.2d at 49, 402 N.E.2d 1189.

{¶ 76} Accordingly, Robinson's eighth assignment of error is not well-taken.

IV. Sentencing Disparity

{¶ 77} In his final assignment of error, Robinson asserts:

> It constituted error to journalize a sentence that is different from the sentence originally pronounced in open court.

{¶ 78} Robinson argues that the variance between the concurrent sentence of three years on the weapon-under-disability count, as pronounced at the sentencing hearing, and the concurrent sentence of five years on the same count, as subsequently imposed by the trial court's journal entry, constitutes a violation of Crim.R. 43(A). We agree.

{¶ 79} Crim.R. 43(A) provides that "the defendant must be physically present at every stage of the criminal proceeding and trial, including * * * the imposition of sentence." Because a defendant is required to be present when sentence is imposed, it constitutes reversible error for the trial court to impose a different sentence in its judgment entry than was announced at the sentencing hearing in defendant's presence. Thus, "'if there exists a variance between the sentence pronounced in open court and the sentence imposed by a court's judgment entry, a remand for resentencing is required.'" *State v. Hardison*, 6th Dist. No. L-10-1282, 2011-Ohio-4859, ¶ 9, quoting *State v. Pfeifer*, 6th Dist. No. OT-10-013, 2011-Ohio-289, ¶ 8. *See also State v. Quinones*, 8th Dist. No. 89221, 2007-Ohio-6077, ¶ 5.

{¶ 80} In this case, the trial court announced at the sentencing hearing that it was imposing a three-year term of imprisonment for the offense of having a weapon under disability to be served concurrently with a mandatory term of five years on the trafficking count. In its judgment entry, the trial court imposed a concurrent sentence of five years for the offense of having a weapon under disability. Because the modification of Robinson's sentence was not made in his presence, the judgment entry reflecting that modification is, to that extent, invalid.

{¶ 81} The state argues that a remand for resentencing is not required in this case, because the modification did not change or increase the total period of actual incarceration. In other words, since the sentences run concurrently, Robinson's total time in prison will be five years regardless of whether he receives a three-year or a five-year

prison term on the weapon-under-disability count. However, Robinson's right of physical presence under Rule 43(A) applies to the imposition of sentence on each conviction. *See State v. Searcy*, 9th Dist. No. 22575, 2005-Ohio-5948, ¶ 13. Moreover, the error cannot be considered harmless, as there may be collateral considerations.

{¶ 82} In any event, judgment entries imposing different sentences than were pronounced in open court have been held invalid, even when they did not change or increase the period of actual incarceration. Thus, in *State v. Kovach*, 7th Dist. No. 08-MA-125, 2009-Ohio-2892, the defendant was sentenced in open court to concurrent terms of two years for attempted burglary and possessing criminal tools, but the sentence was subsequently modified in an amended judgment entry to concurrent terms of two years for the attempted burglary and 12 months for possessing criminal tools. The modification of defendant's sentence did not change the total time of actual imprisonment and actually decreased the prison term on the latter count. Nevertheless, the court held, "Because the sentence in the court's amended sentencing entry is not the same sentence that the court imposed at the sentencing hearing, the amended sentencing entry was improper." *Id*. at ¶ 29.

{¶ 83} In *State v. Zelinko*, 6th Dist. No. L-05-1345, 2006-Ohio-5106, this court held that even a downward modification of the sentence cannot be made in absentia. In that case, the trial court announced at the sentencing hearing that it was imposing a sentence of 60 days, with 55 days suspended, on a single count of domestic violence. In its written judgment, however, the trial court imposed a sentence of 30 days, with 25 days

suspended. We held that even though the defendant benefited from the lower term, the judgment entry of sentence was void "[b]ecause the modification of appellant's sentence was not made in his presence." *Id*. at ¶ 6. Similarly, in *Pfeifer*, 6th Dist. No. OT-10-013, 2011-Ohio-289, we held that the trial court acted in violation of Crim.R. 43(A) by imposing consecutive prison terms on multiple counts at the sentencing hearing, but ordering the same sentences to run concurrently in its judgment entry.

{¶ 84} Accordingly, Robinson's ninth assignment of error is well-taken and the matter must be remanded for resentencing on the weapon-under-disability count. However, in the event that the judgment entry's stated five-year term on that count was merely a clerical mistake, it may be corrected by a nunc pro tunc entry to reflect the three-year concurrent term imposed on that count at the sentencing hearing.

{¶ 85} For the foregoing reasons, the judgment of the Lucas Court of Common Pleas is affirmed as it relates to Robinson's convictions, and reversed as it relates to Robinson's sentence. The cause is remanded to that court for resentencing in accordance with this decision. Costs of this appeal are assessed equally against the parties pursuant to App.R. 24(A).

Judgment affirmed in part
and reversed in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE