[Cite as *State v. Swain*, 2013-Ohio-5900.]

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

State of Ohio

Appellee

v.

Denarea L. Swain

Appellant

Court of Appeals Nos. E-11-087
E-11-088

Trial Court Nos. 2011-CR-174
2010-CR-282

DECISION AND JUDGMENT

Decided: December 30, 2013

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, Mary Ann Barylski and Frank Romeo Zeleznikar, Assistant Prosecuting Attorneys, for appellee.

Derek A. Farmer, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is a consolidated appeal from two judgments issued by the Erie County Court of Common Pleas, following a jury trial. In case No. E-11-087 (trial court case No. 2011-CR-174), appellant, Denarea Swain, was found guilty of one count of engaging in a

pattern of corrupt activity, in violation of R.C. 2923.32(A)(1), a first degree felony, one count of participating in a criminal gang with a firearm specification in violation of R.C. 2923.42(A), a second degree felony, and one count of preparation of marijuana for sale, in violation of R.C. 2925.03(A)(2) and (C)(3)(a), a fifth degree felony. In case No. E-11-088 (trial court case No. 2010-CR-282), appellant was convicted of two counts of having a weapon while under disability, in violation of R.C. 2923.13(A)(2), both third degree felonies, one count of preparation of crack cocaine for sale within the vicinity of a juvenile, in violation of R.C. 2925.03(A)(2) and (C)(4)(e), a first degree felony, and one count of possession of crack cocaine, in violation of R.C. 2925.11(A) and (C)(4)(d), a second degree felony. Timely appeals were filed from both judgments, and the two cases were consolidated for purposes of this appeal.

{¶ 2} On appeal, appellant sets forth the following nine assignments of error:

Assignment of Error No. 1:

The trial court, in violation of the First, Sixth and Fourteenth Amendments to the United States Constitution and § 10, Article 1 of the Ohio Constitution refused to admit the public into the courtroom during voir dire.

Assignment of Error No. 2:

The trial court committed reversible error in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the Ohio Constitution, when it failed to suppress evidence which

resulted from deficient affidavits and warrants and an unreasonable search and seizure.

Assignment of Error No. 3:

The trial court impermissibly prohibited defense counsel from advancing an argument or cross examining witnesses based upon the doctrine of res judicata.

Assignment of Error No. 4:

Insufficient evidence exists to support appellant's convictions in violation of the Fourteenth Amendment to the United States Constitution and Article I, § 10 of the Ohio Constitution and his convictions are against the manifest weight of the evidence.

Assignment of Error No. 5:

Appellant's counsel proved ineffective in violation of the Sixth Amendment to the United States Constitution.

A. Counsel failed to object to testimony which violated Ohio Rule of Evidence 403.

B. Counsel failed to request continuances to adequately prepare for trial due to late discovery.

Assignment of Error No. 6:

The trial court committed error when it ruled that in a *Batson* challenge a party must show a pattern of disrimination [sic] and when it

failed to conduct a comparative juror analysis, in violation of the Fourteenth Amendment to the United States Constitution.

Assignment of Error No. 7:

The trial court erred in violation of the Sixth and Fourteenth Amenmdnets [sic] to the United States Constitution when it permitted expert testimony and/or opinion to be given without defense counsel being provided a report pursuant to Ohio Criminal Rule 16.

Assignment of Error No. 8:

The trial court erred in joining case No. 10-282 and case No. 11-174 together for trial purposes over Mr. Swain's objections.

Assignment of Error No. 9:

The trial court erred in providing a flight instruction based [on] Mr. Swain not reporting to a probation officer.

{¶ 3} The relevant, undisputed facts are as follows. On October 22, 2006, Officer Dier of the University of Toledo Police Department questioned appellant regarding a report that a student on campus had a firearm. Appellant admitted that he was in possession of a .380 semi-automatic weapon, and was subsequently charged with and convicted of carrying a concealed weapon. On November 29, 2006, Sandusky Police Sergeant Lewis stopped appellant on Hayes Avenue in Sandusky, Ohio, in connection with a warrant stemming from the concealed carry charge in Toledo. Appellant attempted to escape from Lewis, who tackled appellant and subsequently discovered a

firearm in appellant's waistband, along with a black bandana. While he was being detained by the police, appellant stated that he should have shot at them. As a result of that encounter, appellant was convicted of two counts of intimidation and carrying a concealed weapon.

{¶ 4} On February 21, 2010, Elyria Police Officer Figula heard a gunshot near the area he was patrolling. Several people who were nearby at the time told Figula that the shooting occurred in front of Uncle Vic's nightclub. Upon approaching the club, Figula heard more shots fired, and observed a red Cadillac leaving the parking lot. Figula stopped the car, which contained five individuals, including appellant. Although there were no weapons in the car, a search of the area turned up a semi-automatic pistol and a revolver under a white pick-up truck. There also was a black bandana on the ground near the red Cadillac. All of the occupants of the vehicle, including appellant, tested positive for gunshot residue.

{¶ 5} On June 12, 2010, Sandusky police received a report that shots were fired in the 900 block of Hancock Street. One witness, Evelyn Irby, told police that she saw appellant shooting a gun. After interviewing and obtaining information from three confidential informants and two concerned citizens, police sought and obtained a search warrant for 1114 Wamajo Drive in Sandusky, a residence owned by appellant's mother, Tonya Randleman.

{¶ 6} On July 30, 2010, Sandusky police officers conducted a search at 1114 Wamajo Drive, where appellant reportedly lived with his mother. Pursuant to the

warrant, the officers were authorized to search the premises for firearms, firearms equipment, ammunition, and anything else related to firearms. While searching a closet in appellant's room, Sandusky Police Detective Eric Graybill found what appeared to be a 2-liter bottle of orange Sunkist soda. Graybill further inspected the bottle, and found that it had a concealed compartment that contained a small brown bag. At that point, Graybill halted the search and sought a second warrant to search for drugs. After that warrant was issued, police searched the bag that was inside the Sunkist bottle, and found that it contained drugs. In addition to the drugs in the Sunkist bottle, police found a 9mm handgun in the cushion of a living room chair. The gun was wrapped in a black and white bandana similar to those worn by a gang known as the Black Point Mafia ("BPM"), of which appellant was a known member. Appellant was not present at 1114 Wamajo during either of the two searches.

{¶ 7} As a result of the Hancock Street shooting, the Erie County Grand Jury indicted appellant on August 9, 2010, on one count of attempted murder, R.C. 2903.02, one count of felonious assault with a firearm specification, R.C. 2903.11(A)(2), two counts of having a weapon while under disability, R.C. 2923.13(A)(2), one count of improperly discharging a firearm into a habitation or school zone, R.C. 2923.161(A)(1), one count each of preparation of cocaine for sale, R.C. 2925.03(A)(2) and possession of crack cocaine, R.C. 2925.03(C)(4)(e). [Case No. 2010-CR-282.] Attorney Scott Ballou was appointed to represent appellant in case No. 2010-CR-282. On November 8, 2010,

appellant appeared in the Erie County Court of Common Pleas and entered a plea of not guilty to all seven counts of the indictment in that case.

{¶ 8} Because they could not find appellant during or after the search of 1114 Wamajo Drive, police obtained permission to place a pen register on appellant's cell phone. On October 30, 2010, they located him at the home of a friend, Lavar Glinsey. While taking appellant into custody, police made observations that led them to seek and obtain a search warrant to search that premises for drugs. Upon executing the search, they found 29 small plastic baggies of marijuana, along with a digital scale and some other drug paraphernalia.

{¶ 9} On March 18, 2011, appellant filed a motion to suppress the results of the two searches that were conducted at his mother's home in July 2010. (First motion to suppress.) The state filed a response in opposition on March 28, 2011.

{¶ 10} On April 14, 2011, an evidentiary hearing was held, at which testimony was presented by Sandusky Police Detective Eric Graybill, who stated that, initially, a search for guns, ammunition and related items was authorized. However, a second warrant to search for drugs was obtained after he found a two-liter Sunkist bottle with a secret compartment that he suspected contained drugs. Upon opening the compartment, police found cocaine in a brown bag. They also found a 9mm handgun in a living room chair, wrapped in a black bandana. At the end of Graybill's testimony the trial court found that the search of 1114 Wamajo did not exceed the scope of the warrants issued, and denied the motion to suppress on that basis.

{¶ 11} On May 11, 2011, the Erie County Grand Jury issued a second indictment charging appellant with one count of engaging in a pattern of corrupt activity with predicate incidents, R.C. 2923.32(A)(1), one count of participating in a criminal gang, R.C. 2923.41 and 2923.42(A), one count of receiving stolen property, R.C. 2913.51(A), and one count of preparation of marijuana for sale, R.C. 2925.03(A)(2) and (C)(3)(a) [case No. 2011-CR-174] as a result of his arrest in October 2010. Attorney Loretta Riddle was appointed to represent appellant in case No. 2011-CR-174. On May 26, 2011, appellant entered not guilty pleas to all four counts of the second indictment. On June 15, 2011, the state filed a motion to consolidate case Nos. 2010-CR-282 and 2011-CR-174 for purposes of trial. The trial court granted the motion to consolidate on August 4, 2011.

{¶ 12} Appellant filed a second motion to suppress on August 12, 2011, in case No. 2011-CR-174. On October 17, 2011, an evidentiary hearing was held on that motion. At the outset of that hearing, the trial court ruled that any issues as to the validity of the search warrants challenged in the first motion to suppress were barred from reconsideration by the doctrine of res judicata. The hearing then proceeded, with testimony again presented by Graybill. However, the trial court limited his testimony to matters that were not explored in the evidentiary hearing held on April 14, 2011. Graybill then testified as to the basis on which the first warrants were obtained and stated that, based on the "culmination" of all the witness's statements, he believed there were

guns inside the residence at 1114 Wamajo Drive. At the close of all the evidence, the trial court denied the second motion to suppress.

{¶ 13} A jury trial began on November 1, 2011. At the beginning of voir dire, a video feed was set up in a separate room so that the proceedings could be observed by the public. During voir dire a potential alternate juror, an African-American female, Nadine Pressley, indicated that she knew appellant's family and several potential witnesses, and that she believed that one of the witnesses, Officer Dana Newell, falsely accused her nephew of dealing drugs. The stated dismissed Pressley for cause, which the defense challenged. After finding the state's reasons for removing Pressley were "race neutral," the trial court approved her dismissal.

{¶ 14} After the jury was chosen and sworn in, it was dismissed. The trial court then allowed members of the public who, up until that time, had been observing the trial via video feed, to enter the courtroom. Thereafter, defense attorney Riddle moved for a mistrial, on grounds that the two cases should not have been consolidated for trial. She also asked to have certain evidence excluded because she did not have time to review it before trial. Both motions were denied, and the jury was brought back into the courtroom for the trial to begin.

{¶ 15} University of Toledo Police Officer Andrew Dier and Elyria Police Detective Larry Bargee testified that, in 2006, appellant pled guilty to, and was convicted of, having an illegal weapon on the University of Toledo campus. Elyria Police Detective Joseph Figula testified that appellant was investigated following a shooting

incident at Uncle Vic's Nightclub in Elyria, Ohio, on February 21, 2010. Perkins Township Police Lieutenant Vincent Donald and Sandusky Police Sergeant Danny Lewis testified that on November 29, 2006, they stopped appellant on Hayes Avenue in Sandusky, Ohio, because of an outstanding warrant. After he was handcuffed, appellant threatened to shoot the arresting officers. Lewis also testified that appellant resisted arrest, became agitated and "said he should have shot us." Appellant had a .380 semi-automatic weapon and a black bandana on his person when he was arrested.

{¶ 16} Sandusky Police Officers Todd Smith and Eric Costante testified that they responded to a call on the 900 block of Hancock Street on June 12, 2010, where they found shell casings and a bullet-hole in a parked car. Smith testified that he interviewed the victim, Kevin Randleman, at the hospital, and Costante testified that he spoke to two witnesses, one of whom owned the vehicle, and that he did not see any homes that were damaged by gunfire. Sandusky Police Detective David West testified that he videotaped an interview with a witness, Evelyn Irby, on June 18, 2010. Irby was designated as a "concerned citizen" because she wanted to keep her identity confidential, however, the original search warrant for 1114 Wamajo was based partially on Irby's testimony.

{¶ 17} Sandusky County Commissioner Diedra Cole testified that she heard eight to ten gunshots fired on June 12, 2010, however, she did not see the shooter. Cole stated that she was with appellant and Elisha Cannon prior to the shooting, in a store known as "Belle's Place." She was familiar with the BPM because her godson was a former gang member, and she had seen BPM members on Hancock Street in the past.

{¶ 18} Erie County probation officer Marley Lamey testified that he supervised appellant, who lived with his mother at 1114 Wamajo Drive, and that he last saw appellant on July 28, 2010. Up to that time, appellant reported regularly to his probation officer. Lamey stated that a black bandana is paraphernalia associated with BPM members.

{¶ 19} Evelyn Irby identified appellant as one of the shooters on June 12, 2010, in spite of the fact that she was drinking that night. At that point, defense attorney Riddle reminded the court that she did not receive the recording of Irby's interview in time to review it before trial. After finding that the state complied with the rules of discovery in providing the recording, the trial resumed. On cross-examination Irby testified that she observed appellant shooting a gun. Irby said that she waited six days before coming forward because she did not want to testify, and she came to court under a subpoena.

{¶ 20} Martin Lewis, a forensic scientist at the Bureau of Criminal Investigation ("BCI"), testified that, based on gunshot residue ("GSR") tests made after the Elyria shooting on April 22, 2010, appellant either shot a gun, was in close proximity when one was shot, or had contact with something that had GSR on it. BCI scientist Todd Wharton testified that there was DNA on a 9mm cartridge and a bandana found at the Elyria scene; however, he could not say whether appellant was a DNA contributor. On cross-examination, Wharton stated that none of the five fired cartridges matched the guns that were submitted for testing. Julie Cox, a forensic scientist at Forensic Biology and DNA

Laboratory in Bowling Green, Ohio, testified that DNA tests performed on a gun and a bandana at the Elyria scene were "inconclusive."

{¶ 21} Scott Dobransky, a forensic scientist in the chemistry section of Ohio's BCI lab, stated that he tested a digital scale, a plastic cup and two plastic bags containing a white substance, on September 5, 2010, and that the bags contained 21.5 grams of cocaine, and 22.9 grams of crack cocaine, while the scale had cocaine residue, and the cup had marijuana residue. Dobransky also testified that two plastic bags taken from Lavar Glinsey's home contained 61.7 grams of marijuana, and the other containing 19.2 grams of marijuana, respectively, while an additional bag identified with appellant's name, contained 29 separate small bags of marijuana with a combined weight of 12.7 grams.

{¶ 22} Sandusky Police Lieutenant John Orzech testified that appellant is a member of BPM and lives at 1114 Wamajo Drive with his mother and her boyfriend and a ten-year-old child, and that the bandana found at that address is a BPM garment. Orzech also stated that appellant "has been named in a number of shooting related incidents in our community." Orzech stated that he obtained permission from a federal judge "to do a trace and trap" on appellant's cell phone, which resulted in appellant's arrest at Glinsey's house. After finding appellant, sleeping in a bedroom next to a "closet type" room, police found a plastic bag with 31 small plastic containers in it, along with a digital scale. As a result of the arrest, $157 in cash was taken from appellant and over $5,000 in cash was taken from Glinsey. On cross-examination, Orzech testified that the

9mm gun was found in a common area of the home, and that appellant's prints and DNA were not on the gun. Orzech also stated that appellant's arrest is the first for participation in gang activity in Sandusky.

{¶ 23} Sergeant Eric Graybill testified that he has specialized "gang training" and knows how to identify regional gangs that operate in Ohio. Graybill stated that indicia of gang membership include the wearing of specific colors, self-admission of belonging, and arrests made in company of other gang members. Graybill said that the Sunkist bottle in appellant's closet was out of place, causing police to stop the search and get another warrant to search for drugs, and that a white shirt with "Swain" on one pocket and "BPM" on the other was in the closet. He identified photos taken from the home that showed appellant wearing the white shirt. He said that no guns were found in appellant's room, that a safe in that room was empty, and there were no fingerprints on the Sunkist bottle. He stated that the search was performed at 7 a.m. for safety reasons and because appellant might have been asleep.

{¶ 24} At that point, the defense objected to Graybill's qualifications as a gang expert. The trial court overruled the objection. Thereafter, Graybill testified that BPM members were causing trouble in Sandusky schools since 2001, and their influence is growing. He stated that pictures of appellant and other BPM members appear on social networking sites, with members wearing gang symbols such as the color black, black bandanas and black baseball caps, and making signs by extending the index finger, ring

finger and pinky to form the letters BPM. Graybill testified as to photos taken of appellant and other BPM members showing BPM tattoos.

{¶ 25} On cross-examination, Graybill testified that he took a three-day course in gang knowledge and received a certification, and that he also took an additional one-half day course. Graybill also said that, although it was his first time to testify in court as to gang activity, he had documented individual members and gang investigations for police reports in the past. He denied having a certification to teach courses on gang activity, and said he had not written any articles on the subject.

{¶ 26} Graybill stated that Elisha Cannon was not criminally charged due to a plea deal, and that appellant was not indicted as a result of the Elyria shooting incident. He further stated that police thought there would be more weapons at 1114 Wamajo, he saw appellant and other BPM members at the house several months before the search, and no large amounts of cash were found in the house. Graybill said that the BPM members went to school together, and some are related, and that several photos of BPM members appeared to be taken at a memorial service, where it would not be unusual to wear black clothing. When asked about criminal activities of the BPM members, Graybill said that there is no evidence that appellant profited from any of the other gang members' activities, and the only money recovered as a result of criminal activity was the cash taken from Glinsey at the time of appellant's arrest.

{¶ 27} As to the predicate offenses necessary to convict appellant of criminal gang activity, Graybill cited appellant's prior convictions for carrying a concealed weapon in

2007, and 2011, intimidation in 2006, and the present indictment in case No. 2010-CR-282. Graybill also testified that, within the past several years, De'Yon Swain and Bradley Wilkes were arrested for trafficking in crack cocaine, Tommie Parker was convicted of felonious assault and having a weapon under disability, Justin Stowers and De'Rell Randelman were convicted of felonious assault, and De'Rell was also found guilty of complicity to possess crack cocaine and preparation of marijuana for sale.

{¶ 28} Sandusky Police Officer Dana Newell testified that he helped investigate the Hancock Street shooting because he is African-American, was familiar with the neighborhood, and no witnesses were coming forward. Newell stated that he spoke with two confidential informants who were willing to have him document their statements. Vinko Kucinic, a security threat group investigator for the Ohio Department of Rehabilitation and Correction ("ODRC") testified that the ODRC takes pictures of tattoos upon reception to an Ohio prison. He stated that appellant had a "BPM" tattoo and also a tattoo of a crying face. Kucinic stated that, upon reception, appellant was designated as a "passive" inmate because he said that he was an "inactive" member of BPM. Kucinic also said that prison officials have classified BPM as a "security threat group."

{¶ 29} Sandusky Police Detective Gary Wichman testified that he assisted Graybill in investigating the Hancock shooting, and that witnesses did not want to come forward for fear of retaliation. Wichman stated that he had arrested appellant in the past, at which time appellant had a gun wrapped in a black bandana. Wichman said that the chair in which the bandana-wrapped gun was found was accessible to others in the home.

On cross-examination, Wichman testified that, in spite of information that appellant had an AK-47 and kept a gun under his pillow, no such weapons were found. Wichman stated that he believes the 9mm handgun belonged to appellant because it was wrapped in a black bandana. He also stated that: "the guy [appellant] likes guns. He had guns in Toledo, he had guns in Elyria PD [sic], and the reports that we had [indicated] he was in possession of guns."

{¶ 30} At the close of Wichman's testimony, the stated rested. No witnesses were presented by the defense. Attorney Riddle made a motion for a mistrial, which the trial court denied. The trial court then instructed the jury as to the state's burden of proof as to each element of the crimes charged, after which the jury retired. After a period of deliberation, as to the indictment in case No. 2010-CR-282, the jury found as follows: not guilty of attempted murder, not guilty of felonious assault, guilty of two counts of having a weapon while under disability, not guilty of improperly discharging a firearm at or into a habitation or school safety zone, guilty of preparation of crack cocaine for sale in the vicinity of a juvenile, and guilty of possession of crack cocaine. As to the indictment in case No. 2011-CR-174, the jury found as follows: guilty of engaging in a pattern of corrupt activities, guilty of participating in a criminal gang with a firearm specification, not guilty of receiving stolen property, and guilty of preparation of marijuana for sale.

{¶ 31} A sentencing hearing was held on November 21, 2011, after which the trial court sentenced appellant to serve a total of 13 years in prison and a $10,000 fine for his

convictions in case No. 2010-CR-282, and a total of 12 years in prison for his convictions in case No. 2011-CR-174. The two sentences were made consecutive, for a total prison term of 25 years and a $10,000 fine. A timely notice of appeal was filed in this court on December 21, 2011.

{¶ 32} In his first assignment of error, appellant asserts that his constitutional right to a public trial under the First, Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution was violated when the trial court refused to allow the public into the courtroom during voir dire. We disagree.

{¶ 33} The United States Supreme Court has held that "the Sixth Amendment right to a public trial extends to the *voir dire* of prospective jurors." *Pressley v. Georgia*, 558 U.S. 209, 213, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010). However, the general rule is subject to certain exceptions. *Id.* The test as to whether the closure of a courtroom deprives the accused of his constitutional rights is that:

> [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure. *Waller v. Georgia*, 467 U.S. 39, 48, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

{¶ 34} In this case, the record does not say, and appellant does not offer any evidence to show, how long it took to set up the video feed. The record contains the trial

court's statement that the biggest available courtroom was too small to accommodate the prospective jurors as well as all of appellant's family and members of the general public who wanted to observe the proceedings. Accordingly, the trial court said it was having video conferencing equipment set up in an adjacent courtroom so members of the public would not be kept from viewing the voir dire proceedings. The record also shows that, once a jury was chosen, members of the public were allowed into the courtroom to personally observe the rest of the trial.

{¶ 35} On consideration, this court finds that the trial court properly considered the limitations of the existing available facilities, and made appropriate accommodations so that the public could observe voir dire proceedings. Accordingly, appellant was not deprived of his constitutional rights under either the United States Constitution or the Ohio Constitution, and his first assignment of error is not well-taken.

{¶ 36} In his second assignment of error, appellant asserts that the trial court erred when it denied his motions to suppress evidence obtained from the searches conducted on July 29, 2010. In support, appellant argues that: (1) in case No. 2010-CR-282, the warrant did not describe items which, if found, would constitute the basis for a crime and was overbroad, and (2) in case No. 2011-CR-174, the warrant was defective because it "contained stale, unspecific and unreliable information" that gave the officers permission to go on a "fishing expedition."

{¶ 37} As to appellant's first argument, the task of the judge issuing a search warrant

> "is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him * * * there is a fair probability that contraband or evidence of a crime will be found in a particular place. The duty of a review court is simply to ensure that the magistrate had a substantial basis for * * * conclud[ing] that probable cause existed." *State v. Winningham*, 1st Dist. Hamilton No. C-120788, 2013-Ohio-4872, ¶ 11, quoting *State v. George*, 45 Ohio St.3d 325, 544 N.E.2d 640 (1989), paragraph one of the syllabus. (Additional citations omitted.)

{¶ 38} The Ohio Supreme Court has held that, in determining whether an affidavit in support of a search warrant establishes probable cause, an appellate court should not substitute its judgment for that of the judge by conducting a de novo review. Rather, the reviewing court "should accord great deference to the [judge's] determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant." *George, supra*, at paragraph two of the syllabus.

{¶ 39} The basis for appellant's first argument is that the mere presence of firearms at 1114 Wamajo Drive does not constitute a crime since appellant was not present in the home at the time of the search. We disagree.

{¶ 40} It is undisputed that, at the time of the search, appellant was a convicted felon who was prohibited from possessing firearms pursuant to R.C. 2923.13(A). The term "possession" within the context of the statute means "having control over a thing or substance." R.C. 2925.01(K). Possession of a firearm may be "actual or constructive."

State v. Troutman, 9th Dist. Lorain No. 12CA010223, 2013-Ohio-4559, ¶ 21. Constructive possession "may be proved entirely by circumstantial evidence." *Id.* It exists

> "[w]hen an individual exercises dominion and control over an object, even though that object may not be within his immediate physical possession. [M]ere access to the weapon may establish guilt, that is, ownership is not a prerequisite to determining whether someone had the weapon. Moreover, circumstantial evidence can be used to support a finding of constructive possession." *Id.*, quoting *State v. Bartee*, 9th Dist. Summit No. 25266, 2010-Ohio-5982, ¶ 9. (Internal quotations and citations omitted.)

{¶ 41} Our review of the record demonstrates that the affidavit contained sufficient information to support a finding that appellant resided at 1114 Wamajo Drive, and that firearms illegally possessed by appellant would be found at that address. Appellant's argument to the contrary is without merit.

{¶ 42} To determine whether the scope of the warrant in case No. 2010-CR-282 was unconstitutionally overbroad, we are required to conduct a de novo review. *State v. Dingess*, 10th Dist. Franklin No. 10AP-848, 2011-Ohio-5659, ¶ 32. In such cases, "[t]he degree of specificity required * * * varies with the nature of the items to be seized." *Id.*, citing *State v. Enyart*, 10th Dist. Franklin No. 08AP-184, 2010-Ohio-5623, ¶ 28. (Other citations omitted.) A description of the items to be searched and/or seized is valid if it is "as specific as circumstances and nature of the activity under investigation permit" and if

it "enables the searchers to identify what they are authorized to seize." *Id.*; *State v. Hale*, 2d Dist. Montgomery No. 23582, 2010-Ohio-2389, ¶ 71. In addition, in *Dingess*, the Tenth District Court of Appeals stated that:

> there must "be a nexus * * * between the item to be seized and criminal behavior" as well as "cause to believe that the evidence sought will aid in a particular apprehension or conviction." *Enyart* at ¶ 32, quoting *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 307, 87 S.Ct. 1642, 1650, 18 L.Ed.2d 782 (1967). *Dingess* at ¶ 33.

{¶ 43} A thorough review of the record, as set forth above, reveals that appellant had a long history with firearms. In addition, the original search warrant issued on July 29, 2010, limited the scope of that search to only firearms and related accessories. The discovery of such items in the home owned by appellant's mother, and where he was reported to reside, provided a "nexus" between the items sought and the criminal behavior that would result from appellant's illegal possession of firearms. We also note that, upon discovery of the Sunkist bottle that Graybill knew could contain drugs based on his experience and training, the search was immediately halted and an additional warrant for drugs was sought. Based on these facts, appellant's argument that the search warrant in case No. 2010-CR-282 was overbroad is without merit.

{¶ 44} As to appellant's argument that the warrant in case No. 2011-CR-174 was based on stale, unreliable information, we note initially that the test for determining whether information in an affidavit is stale is

whether the alleged facts justify the conclusion that contraband remains on the premises to be searched. *State v. Floyd*, 2d Dist. Darke No. 1389, 1996 WL 139787 (Mar. 29, 1996). If a substantial period of time has elapsed between the commission of the crime and the search, the affidavit must contain facts that would lead the judge to believe that the evidence or contraband are still on the premises before the judge may issue a warrant. *State v. Yanowitz*, 67 Ohio App.2d 141, 147, 426 N.E.2d 190 (Cuyahoga 1980). *State v. Mays*, 2d Dist. Montgomery No. 23986, 2011-Ohio-2684, ¶ 21.

{¶ 45} In determining whether information in support of an affidavit is stale, courts have considered "the character of the crime, the criminal, the thing to be seized, as in whether it is perishable, the place to be searched, and whether the affidavit relates to a single isolated incident or ongoing criminal activity." *State v. Ingold*, 10th Dist. Franklin No. 07AP-648, 2008-Ohio-2303, ¶ 23. The determination of whether the proof meets these tests is to be made on a case-by-case basis. *Id.* at ¶ 22.

{¶ 46} A review of the affidavit in question reveals that it contains accounts of events involving appellant and the use/possession of handguns that occurred in 2006 in Sandusky, Ohio, in which appellant was stopped and searched following a shooting incident, and later that same year in Toledo when appellant was arrested for and later convicted of carrying a concealed weapon near a school. The affidavit also contains an account of an incident at the Dog House Bar in Sandusky, at which an individual was

shot in the leg by a member of the Black Point Mafia. According to the affidavit, appellant was named as the shooter. That account was supported by another officer's account of a statement made by the victim's mother.

{¶ 47} The affidavit further contained accounts of a shooting incident on February 20, 2010, at Uncle Vic's Bar in Elyria, Ohio, in which Officer Figula saw appellant in a vehicle with four other individuals, all of which tested positive for GSR. It also included witness accounts of a shooting incident on June 6, 2010, after which an anonymous informant stated that appellant shot into a residence on East Madison Street in Sandusky. Finally, as to the Hancock Street shooting on June 12, 2010, the affidavit stated that although the victim, Kevin Randleman, said that appellant was not the shooter, another concerned citizen ("CC#1"), who later proved to be Evelyn Irby, stated that she saw appellant shooting a gun. The affidavit stated that CC#1 had not been tested for reliability, however, another concerned citizen who had proved reliable in the past also stated that appellant was shooting a gun at that time.

{¶ 48} On consideration of the entire record, including the affidavit in support of the search warrant issued on July 29, 2010, we find, in light of the totality of circumstances provided in the affidavit that some of the accounts in the supporting affidavit were several years old. However, there were other accounts presented as to the character of the crimes, the persons involved, the non-perishable items to be seized, the place to be searched, which was listed as appellant's permanent address, and a showing of acts constituting ongoing criminal activity. Accordingly, there was a substantial basis

established to justify the conclusion that contraband was on the premises to be searched, and that the evidence or contraband was still on the premises at the time the search was to be executed. Appellant's argument that the warrant was issued based on stale, unreliable information is without merit. For the foregoing reasons, appellant's second assignment of error is not well-taken.

{¶ 49} In his third assignment of error, appellant asserts that the trial court erred by not allowing defense counsel to argue issues at the October 17, 2011 suppression hearing that were previously argued at the hearing on April 14, 2011. In support, appellant argues that res judicata should not have been used to prohibit his attorney from arguing that the evidence pertaining to the contents of the Sunkist bottle should have been excluded because "[that] motion encompassed more than the arguments of the previous motion and addressed issues surrounding the search of the Sunkist bottle."

{¶ 50} This court has held that:

> [T]he doctrine of res judicata may be applied to bar further litigation of issues which were raised previously or *could have been raised* previously in an appeal. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus. The doctrine of res judicata has two components, issue preclusion and claim preclusion. Issue preclusion prevents parties from re-litigating facts and issues that were fully litigated in a prior suit. "[Issue preclusion] applies when the fact or issue (1) was actually and directly litigated in the prior action, (2) was passed upon and

determined by a court of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action." *Thompson v. Wing*, 70 Ohio St.3d 176, 183, 637 N.E.2d 917 (1994).

In our view, res judicata may [in the court's discretion,] be applicable to pre-trial determinations in a criminal case, even when a new trial is granted. *State v. Roberts*, 6th Dist. Wood Nos. WD-03-001, WD-02-066, 2003-Ohio-5689, ¶ 10-11.

{¶ 51} In this case, appellant does not argue that defense counsel attempted to make any arguments at the second suppression hearing that could not have been made at the first hearing, or that were based on evidence that could not have been obtained and presented at the first hearing. Accordingly, on consideration, we find that the trial court did not abuse its discretion by limiting the arguments presented at the second suppression hearing based on the doctrine of res judicata. Appellant's third assignment of error is not well-taken.

{¶ 52} In his fourth assignment of error, appellant asserts that insufficient evidence was presented to support his convictions. Appellant further argues that each conviction was against the manifest weight of the evidence.

In a criminal context, a verdict may be overturned on appeal if it is either against the manifest weight of the evidence or because there is an insufficiency of evidence. In the former, the appeals court acts as a

"thirteenth juror" to determine whether the trier of fact lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). In the latter, the court must determine whether the evidence submitted is legally sufficient to support all of the elements of the offense charged. *Id*. at 386-387. Specifically, we must determine whether the state has presented evidence which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The test is, viewing the evidence in a light most favorable to the prosecution, could any rational trier of fact have found the essential elements of the crime proven beyond a reasonable doubt. *Id*. at 390 (Cook, J., concurring); *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. *See also State v. Eley*, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978); *State v. Barnes*, 25 Ohio St.3d 203, 495 N.E.2d 922 (1986). *State v. McClellan*, 6th Dist. Lucas No. L-12-1194, 2013-Ohio-4953, ¶ 16.

{¶ 53} R.C. 2923.42 states, in relevant part, that:

(A) No person who actively participates in a criminal gang, with knowledge that the criminal gang engages in or has engaged in a pattern of criminal gang activity, shall purposely promote, further, or assist any criminal conduct, as defined in division (C) of section 2923.41 of the

Revised Code, or shall purposely commit or engage in any act that constitutes criminal conduct, as defined in division (C) of section 2923.41 of the Revised Code.

(B) Whoever violates this section is guilty of participating in a criminal gang, a felony of the second degree.

{¶ 54} R.C. 2923.41 defines a "criminal gang" as follows:

(A) "Criminal gang" means an ongoing formal or informal organization, association, or group of three or more persons to which all of the following apply:

(1) It has as one of its primary activities the commission of one or more of the offenses listed in division (B) of this section.

(2) It has a common name or one or more common, identifying signs, symbols, or colors.

(3) The persons in the organization, association, or group individually or collectively engage in or have engaged in a pattern of criminal gang activity.

{¶ 55} The offenses listed in R.C. 2923.41(B) include violations of R.C. 2907.04, 2909.06, 2911.211, 2917.04, 2919.23, 2929.24, 2923.16, 2925.03 (if the offense is trafficking in marijuana), and 2927.12. All of the enumerated offenses "include felonies and offenses of violence." *State v. Miller*, 9th Dist. Lorain Nos. 10CA-009922 and 10CA009915, 2012-Ohio-1263, ¶ 78.

{¶ 56} As set forth above, Graybill testified at trial that the members of BPM included appellant, De'Yon Swain, Bradley Wilkes, Tommie Parker, and De'Rell Randelman. Evidence was presented that each of those individuals was found guilty of crimes enumerated in R.C. 2923.41(B). Graybill also testified that BPM members wear black bandanas as a symbol of their gang affiliations, and that the gun recovered from 1114 Wamajo, appellant's residence, was wrapped in such a bandana. Photographs were entered into evidence showing individuals identified as BPM members wearing similar black bandanas and having tattoos that included the letters B, P and M. Also, clothing was taken from the closet in appellant's room at 1114 Wamajo that was personalized with the acronym "BPM." Finally, a prison report was introduced into evidence in which appellant stated that he was a member of BPM. Accordingly, on consideration, we find that, although the evidence against appellant was circumstantial,[1] it is nonetheless sufficient to support appellant's conviction for participation in a criminal gang.

{¶ 57} R.C. 2923.32(A)(1) states that "[n]o person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity * * *." A pattern of corrupt activity is defined in R.C. 2923.41 as follows:

> (B)(1) "Pattern of criminal gang activity" means, subject to division (B)(2) of this section, that persons in the criminal gang have committed,

[1] The Ohio Supreme Court has held that "circumstantial evidence and direct evidence inherently possess the same probative value * * *." *Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492, at paragraph one of the syllabus.

attempted to commit, conspired to commit, been complicitors in the commission of, or solicited, coerced, or intimidated another to commit, attempt to commit, conspire to commit, or be in complicity in the commission of two or more of any of the following offenses:

(a) A felony or an act committed by a juvenile that would be a felony if committed by an adult;

(b) An offense of violence or an act committed by a juvenile that would be an offense of violence if committed by an adult;

(c) A violation of section 2907.04, 2909.06, 2911.211, 2917.04, 2919.23, or 2919.24 of the Revised Code, section 2921.04 or 2923.16 of the Revised Code, section 2925.03 of the Revised Code if the offense is trafficking in marihuana, or section 2927.12 of the Revised Code.

(2) There is a "pattern of criminal gang activity" if all of the following apply with respect to the offenses that are listed in division (B)(1)(a), (b), or (c) of this section and that persons in the criminal gang committed, attempted to commit, conspired to commit, were in complicity in committing, or solicited, coerced, or intimidated another to commit, attempt to commit, conspire to commit, or be in complicity in committing:

(a) At least one of the two or more offenses is a felony.

(b) At least one of those two or more offenses occurs on or after January 1, 1999.

(c) The last of those two or more offenses occurs within five years after at least one of those offenses.

(d) The two or more offenses are committed on separate occasions or by two or more persons.

{¶ 58} As set forth above, evidence was presented at trial that appellant was affiliated with the BPM gang, members of the gang, including appellant, had been convicted of violent felonies in the past, and that at least two of those offenses occurred within the time frames set forth in R.C. 2943.41(B). Further, BPM members Bradley Wilkes, Marcus Campbell, Rafael Pool, Dwuan Hunter, and appellant were identified as being inside a car that was stopped on the night of the Elyria shooting, and all tested positive for gunshot residue.

{¶ 59} Appellant argues that the jury's findings of not guilty as to the additional charges of felonious assault, attempted murder, receiving stolen property and improperly discharging a weapon were the result of insufficient evidence. However, this argument is not persuasive since "[a] verdict responding to a designated count will be construed in the light of the count designated, and no other." *State v. Blackwell*, 8th Dist. Cuyahoga No. 87278, 2006-Ohio-4890, ¶ 57, citing *Browning v. State*, 120 Ohio St. 62, 165 N.E. 566 (1929). Based on the foregoing, we conclude that sufficient evidence was presented to support the jury's conclusion that appellant was guilty of engaging in a pattern of corrupt activities.

{¶ 60} R.C. 2923.13 states, in relevant part, that:

> (A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:
>
> * * *
>
> (2) The person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.

In order to "have" a firearm or dangerous ordinance within the meaning of R.C. 2923.13, an individual must either actually or constructively possess it. Actual possession requires ownership and/or physical control, while constructive possession may be achieved by means of an agent. *State v. Nero*, 5th Dist. Stark No. 2012 CA 00015, 2012-Ohio-4033, ¶ 24, citing *State v. Hardy*, 60 Ohio App.2d 325, 397 N.E.2d 773 (8th Dist.1978).

{¶ 61} In this case, evidence was presented at trial that 1114 Wamajo was owned by appellant's mother, and that he resided there. Evidence taken from the home included a gun wrapped in a black bandana of the type worn by BPM members, and a shirt from the closet in appellant's bedroom that had the initials "BPM" on it. Evidence was also presented that appellant was a BPM member. Orzech testified that none of the other

household members had a criminal history that would indicate they owned the weapon. Further, it is undisputed that appellant had prior felony convictions that would preclude his possession of a firearm. Accordingly, sufficient evidence was presented to support the jury's conclusion that appellant was guilty of possessing a weapon while under disability.

{¶ 62} R.C. 2925.03 states, in pertinent part, that:

> (A) No person shall knowingly do any of the following:
>
> * * *
>
> (2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance or a controlled substance analog, when the offender knows or has reasonable cause to believe that the controlled substance or a controlled substance analog is intended for sale or resale by the offender or another person.

{¶ 63} It is well-settled that "[p]ossession of drugs can be either actual or constructive." *State v. Bustamante*, 3d Dist. Seneca Nos. 13-12-26, 13-13-04, 2013-Ohio-4975, ¶ 25, citing *State v. Cooper*, 3d Dist. Marion No. 9-06-49, 2007-Ohio-4937, ¶ 25. Further,

> "[a] person has 'actual possession' of an item if the item is within his immediate physical possession." *State v. Williams*, 4th Dist. Ross No. 03CA2736, 2004-Ohio-1130, ¶ 23 citing *State v. Fugate*, 4th Dist. Scioto No. 97CA2546 (Oct. 2, 1998). A person has "constructive possession" if

> he is able to exercise domination and control over an item, even if the individual does not have immediate physical possession of it. *State v. Hankerson*, 70 Ohio St.2d 87, 434 N.E.2d 1362 (1982), syllabus. For constructive possession to exist, "[i]t must also be shown that the person was conscious of the presence of the object." *Id.* at 91. Finally, the State may prove the existence of the various elements of constructive possession of contraband by circumstantial evidence alone. *State v. Stewart*, 3d Dist. No. 13-08-18, 2009-Ohio-3411, ¶ 51.

{¶ 64} As to appellant's claim that there was insufficient evidence to support his convictions for drug possession, Ohio courts have held that "the discovery of readily accessible drugs in close proximity to a person constitutes circumstantial evidence that the person was in constructive possession of the drugs." *State v. Harris*, 8th Dist. Cuyahoga Nos. 98183, 98184, 2013-Ohio-484, ¶ 16. In the case of the Sunkist bottle, testimony was presented that photographs were found in appellant's room of appellant and other members of the BPM gang. Also mail addressed to appellant, with return addresses of known BPM members, was found by police during the search. A shirt with appellant's name on it was found in the closet in which the bottle was also found. Accordingly, sufficient evidence was presented to establish that appellant had constructive possession of the Sunkist bottle and its contents.

{¶ 65} As to the marijuana found at 2020 Campbell Street, the record shows that police found appellant at the home of Lavar Glinsey after obtaining a warrant to monitor

his cell phone. At the time the warrant was executed, appellant was sleeping in a room in Glinsey's home. When possible drugs containers were observed by police, a drug search warrant was obtained. Tests confirmed that those containers, which were found in close proximity to where appellant was sleeping, contained marijuana. Additional drug paraphernalia was also found along with the marijuana.

{¶ 66} On consideration, we find that sufficient evidence was presented at trial to support the jury's conclusion that appellant was in possession of the marijuana and crack cocaine as charged in the indictment. On further consideration, we determine that the trier of fact did not lose its way and create such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered. Accordingly, appellant's convictions were supported by sufficient evidence and were not against the manifest weight of the evidence. Appellant's fourth assignment of error is not well-taken.

{¶ 67} In his fifth assignment of error, appellant asserts that he received ineffective assistance of trial counsel. In support, appellant argues that his two trial attorneys were ineffective because they failed to object to testimony that is inadmissible pursuant to Evid.R. 403, and they failed to request continuances to adequately prepare for trial.

{¶ 68} In order to prevail on a claim for ineffective assistance of counsel, appellant must demonstrate that trial counsel's performance fell below an objective standard of reasonable representation and that prejudice resulted from counsel's deficient performance. *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph two

of the syllabus, following *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In Ohio, there is a strong presumption that "counsel's conduct falls within the wide range of reasonable professional assistance." *Bradley* at 142.

{¶ 69} We note initially that trial counsel's failure to make objections is often found to be within the realm of trial strategy. *State v. Burney*, 10th Dist. Franklin No. 06AP-990, 2007-Ohio-7137, ¶ 66. "[C]ompetent counsel may reasonably hesitate to object in the jury's presence because objections tend to disrupt the flow of a trial, and are considered technical and bothersome to the jury." *State v. Tolliver*, 9th Dist. Wayne No. 03CA0017, 2003-Ohio-5050, ¶ 19, citing *State v. Campbell*, 69 Ohio St.3d 38, 53, 630 N.E.2d 339 (1994). Accordingly, "the failure to object, standing alone, is insufficient to establish ineffective assistance of counsel." *State v. Taylor*, 10th Dist. Franklin No. 12AP-870, 2013-Ohio-3699, ¶ 19, citing *Burney* at ¶ 66.

{¶ 70} Appellant first claims that counsel should have objected to testimony regarding the specifics of appellant's arrest on Hayes Avenue in Sandusky. However, a review of the record shows that defense attorney Riddle did object to that testimony, and that the trial court overruled her objection. As to the rest of the allegedly objectionable testimony in the record, it is well-settled that failure to object at trial waives all but plain error on the issues on appeal. *State v. Williams*, 51 Ohio St.2d 112, 364 N.E.2d 1364 (1977). "To constitute plain error, there must be an error that is plain or obvious and that affected the outcome of the case." *State v. Gibson*, 8th Dist. Cuyahoga No. 98725, 2013-Ohio-4372, ¶ 84.

{¶ 71} Evid.R. 403, which governs the exclusion of otherwise relevant evidence, states:

> (A) Exclusion mandatory
>
> Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.
>
> (B) Exclusion discretionary
>
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.

{¶ 72} Generally, the decision to admit or exclude evidence is within the sound discretion of the trial court, which will not be reversed absent a finding of abuse of discretion. *Monroe v. Youssef*, 11th Dist. Trumbull No. 2009-T-0012, 2012-Ohio-6122, ¶ 42, citing *Cherovsky v. St. Luke's Hosp.*, 8th Dist. Cuyahoga No. 68326, 1995 WL 739608 (Dec. 14, 1995). An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 276 (1983).

{¶ 73} This court has reviewed the entire record that was before the trial court and, on consideration thereof, we cannot say that the testimony complained of was so prejudicial as to produce unfair prejudice, confusion of the issues, or mislead the jury, or

that the trial court abused its discretion by allowing such testimony to be given at trial. Accordingly, appellant has not demonstrated that counsel's performance fell outside the wide range of reasonable professional assistance, or that he was unduly prejudiced thereby.

{¶ 74} Appellant's second argument is that trial counsel was ineffective for failing to request a continuance in order to review discovery materials that were supplied shortly before the beginning of the trial, so that she could prepare for cross-examination of a key witness. Specifically, appellant argues that attorney Riddle should have asked for time to review a recording of Irby's interview that she received just before the witness was scheduled to testify.

{¶ 75} Generally, an appellate court will review the trial court's decision to grant or deny a continuance for abuse of discretion. *State v. Unger*, 67 Ohio St.2d 65, 67, 423 N.E.2d 1078 (1981). A review of the record shows that, prior to Irby's testimony, attorney Riddle told the trial court that she had just retrieved the recording from her "box" at the courthouse, and that she needed time to review Irby's recorded interview. The prosecutor responded by stating that the recording had been provided "weeks ago." The trial court resolved the issue by allowing a 20-minute break before attorney Riddle's cross-examination of Irby, so that counsel could review the recording. After the break, attorney Riddle told the trial court that she had reviewed the recording and was ready to proceed. Accordingly, the record shows that attorney Riddle did, in fact, ask for a

continuance to review the recording, and appellant's allegation to the contrary is without merit.

{¶ 76} On consideration of the foregoing, we find that appellant has not demonstrated, and the record does not otherwise show, that trial counsel's performance fell below an objective standard of reasonable representation and that prejudice resulted from counsel's deficient performance. Appellant's fifth assignment of error is not well-taken.

{¶ 77} In his sixth assignment of error, appellant asserts that the trial court erred when it overruled his objection as to the removal of prospective juror Nadine Pressley. In support, appellant argues that the trial court failed to properly analyze the removal of Pressley, the only African-American candidate for the jury, without conducting a proper analysis of the state's motive pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Appellant also argues that the trial court failed to conduct a "comparative analysis" to determine whether Pressley was wrongfully dismissed as a potential juror.

{¶ 78} At trial, during voir dire, the state used a peremptory challenge to strike Pressley. The following exchange then took place:

> Ms. Riddle: Just for the record, Ms. Pressley is black and my client is black, all right, so I just kind of want it put on the record. I don't want to be accusatory of the prosecutor, all right, but, you know, she's been the first

of I don't know how many jurors that we've gone through, you know * * * with regards to race.

Court: You're basically saying there's a *Batson* challenge?

Ms. Riddle: Yes.

Court: Okay. And there has to be a showing of a pattern of discrimination by the State of Ohio in that. She was the first African-American called to the jury box. However, the State then has the burden of proving that they have a race neutral reason for doing so. The State of Ohio indicated it was statements made here at the Bench conference and that was his race neutral reason; is that correct?

[Prosecutor]: That's correct.

Court: Any, any other reasons?

[Prosecutor]: Well, yeah, again, just the natural flow from that. She, again, she indicated that she had some concerns about Dana Newell, who happens to be a black police officer, and his credibility. She indicated a situation where she says that he had falsely accused her nephew of something and that she was very upset about it. In fact, she told her nephew to sue Dana Newell for that allegation. Whether he did or not she didn't remember, and my concern is not only harboring what she has, which is a clear issue with his testimony, any testimony he might give in

this case, but she may, in fact, the rest of the jurors, if she's in deliberations, share with them her experience with Dana Newell * * *.

Court: Well, also she was friends with the defendant's mother.

[Prosecutor]: Right

Court: She knows the mother, the father, the grandfather [of appellant]. So the State has placed on the record they're race neutral reasons, so the Court will grant that. * * *.

{¶ 79} The United States Supreme Court has held that:

[A]lthough a prosecutor ordinarily is entitled to exercise permitted peremptory challenges "for any reason at all, as long as that reason is related to his view concerning the outcome" of the case to be tried, *United States v. Robinson*, 421 F.Supp. 467, 473 (D.Conn.1976), mandamus granted *sub nom. United States v. Newman*, 549 F.2d 240 (CA2 1977), the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant. *Batson*, 476 U.S. at 89.

{¶ 80} In cases where a *Batson* challenge is raised to the removal of an African-American potential juror, a three-step test is employed to determine whether the state is seeking to purposely exclude a juror based on race:

> First, the opponent of the peremptory challenge must make a prima facie case of racial discrimination. Second, if the trial court finds this requirement fulfilled, the proponent of the challenge must provide a racially neutral explanation for the challenge. *Batson*, 476 U.S. at 96-98, 106 S.Ct. 1712, 90 L.Ed.2d 69. * * * Finally, the trial court must decide based on all the circumstances, whether the opponent has proved purposeful racial discrimination. *Id*. at 98, 106 S.Ct. 1712, 90 L.Ed.2d 69. *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶ 61. A trial court's finding of no discriminatory intent will not be reversed on appeal unless clearly erroneous. *Id*.

{¶ 81} This court has held that the defendant is not required to present evidence of a "systematic pattern or peremptory strikes against minorities" in order to establish the first prong of the *Batson* test. *State v. Graves*, 6th Dist. Lucas No. L-02-1053, 2003-Ohio-2359, ¶ 45. In this case, the trial court stated on the record that, since Pressley was the only black juror that the state sought to exclude, no such pattern could be shown. To that extent, the trial court's analysis of the issue was in error. However, the court continued by stating that, even if such a pattern were shown in this case, the record contained ample evidence to demonstrate a race-neutral reason for Pressley's removal, based on her admitted acquaintances with members of appellant's immediate family, and her belief that Officer Newell unjustly accused her nephew of a crime. In addition, the record contains no evidence that any white jurors expressed similar opinions about

Officer Newell which could have formed a basis on which to compare the state's response to her statements made during voir dire. *See U.S. v. Torres-Ramos*, 536 F.3d 542, 559 (6th Cir.2008).

{¶ 82} On consideration of the circumstances presented in this case, we agree with the trial court that the state presented sufficient evidence of a race-neutral reason to grant the state's peremptory challenge. Therefore, appellant failed to carry his burden to demonstrate that the state had a discriminatory motive in exercising its peremptory challenge against Pressley. Appellant's sixth assignment of error is not well-taken.

{¶ 83} In his seventh assignment of error, appellant asserts that the trial court erred by allowing Graybill to testify as an expert without filing an expert's report prior to trial pursuant to Crim.R. 16(K). In support, appellant states that he filed a motion in limine on November 1, 2011, in which he sought to eliminate all expert testimony that was not accompanied by an expert report. Accordingly, appellant argues that the trial court's refusal to exclude Graybill's testimony resulted in "prejudicial surprise." We disagree, for the following reasons.

{¶ 84} Crim.R.16(K) states:

> An expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications * * * no later than twenty-one days prior to trial, which period may be modified by the court for good cause shown, which does not

prejudice any other party. Failure to disclose the written report to opposing counsel shall preclude the expert's testimony at trial.

{¶ 85} The prosecution's failure to file a report pursuant to Crim.R. 16(K) was addressed in *State v. Retana*, 12th Dist. Butler No. CA2011-12-225, 2012-Ohio-5608, ¶ 52, as follows:

> In *State v. Joseph*, 73 Ohio St.3d 450, 458, [653 N.E.2d 285] (1995), the court stated that "[p]rosecutorial violations of Crim.R. 16 are reversible only when there is a showing that (1) the prosecution's failure to disclose was a willful violation of the rule, (2) foreknowledge of the information would have benefited the accused in the preparation of his defense, and the accused suffered some prejudicial effect."

{¶ 86} Even if a violation of Crim.R. 16(K) occurs, the trial court still has discretion to "order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing into evidence the material not disclosed, or it may make such other order as it deems just under the circumstances." Crim.R. 16(L). "When deciding on a sanction, a trial court must impose the lease severe sanction that is consistent with the purpose of the rules of discovery." *Retana* at ¶ 53, citing *Lakewood v. Papadelis*, 32 Ohio St.3d 1, 3, 511 N.E.2d 1138 (1987).

{¶ 87} In this case, the record shows that attorney Riddle filed a motion in limine on November 1, 2011, in which she asked the trial court to preclude "the State of Ohio

from having any witness testify as an expert * * *." In support of her motion, Riddle argued that a

> "last minute" attempt to qualify anyone as an expert * * * would be highly prejudicial to the defendant as the defendant would not be in a position to obtain an expert to rebut the testimony. Additionally, at this point it would be difficult to challenge any qualifications of the person if the expert is "sprung" on the defense at trial.

{¶ 88} During the trial, attorneys Riddle and Ballou both sought to exclude Graybill's testimony on grounds that he was actually testifying as an expert, without being qualified as an expert or filing a report pursuant to Crim.R. 16(K). The trial court responded by stating that expert testimony was not required in this case. Nevertheless, because of his training and experience, the court found that Graybill could have qualified as an expert pursuant to *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, and *State v. Peterson*, 10th Dist. Franklin No. 07AP-303, 2008-Ohio-2838. The defense attorneys then urged the trial court to *require* expert testimony on the issue of gangs. After ascertaining that defense counsel received copies of Graybill's police reports, the trial court overruled the defense motion in limine and allowed Graybill to testify.

{¶ 89} At the close of testimony, attorney Riddle made a motion for a mistrial, in which she argued that appellant was prejudiced due to Graybill's "expert" testimony made in violation of Crim.R. 16(K). The trial court responded as follows:

> Officer Graybill or Sergeant Graybill testified in this case to the fact that he became involved * * * in, if you will, gang related stuff, the Black Point Mafia, in 2001 when he was a patrol officer. When he went to the Detective Bureau in 2007, that became his focus, and he testified to his training, certification, and things of that nature. The Court found that the foundation had been laid and, therefore, his testimony was an opinion testimony as a lay witness, not an expert, and that's what the defense is trying to prove is that he's an expert and he falls under [Evid.R.] 702 I believe it is not 701.
>
> So the Court is going to deny the motion for mistrial.

{¶ 90} Pursuant to Evid.R. 701,

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

{¶ 91} Lay opinion testimony is distinguished from that of an expert in that it "results from a process of reasoning familiar in everyday life," whereas expert testimony "results from a process of reasoning that only specialists in the field can master." *State v. Lewis*, 192 Ohio App.3d 153, 2011-Ohio-187, 948 N.E.2d 487, ¶ 23 (5th Dist.), citing *State v. McKee*, 91 Ohio St.3d 292, 744 N.E.2d 737 (2001). The trial court found, and a

review of the record confirms that, in spite of the defense's attempts to characterize him as such, Sergeant Graybill was not offered as an expert witness by the state. Although he had some training in how to identify and respond to gang activity, Graybill's testimony was confined to his own experiences and training, which were based on his own perceptions and were offered to assist the jury in understanding why appellant was charged with participating in a gang known as the Black Point Mafia.

{¶ 92} On consideration of the foregoing, we find that the trial court did not err by refusing to qualify Graybill as an expert, or by allowing him to testify over the defense attorney's objections. Appellant's seventh assignment of error is not well-taken.

{¶ 93} In his eighth assignment of error, appellant asserts that the trial court erred when it joined case No. 2010-CR-282 and case No. 2011-CR-174 for purposes of trial. In support, appellant argues that evidence of the predicate offenses for Count 1 of the indictment in case No. 2011-CR-174, engaging in a pattern of corrupt activities, improperly prejudiced the jury against appellant. The state responds that no such prejudice occurred because each of the predicate offenses was proved by "simple and direct" evidence, which did not confuse the jury.

{¶ 94} Generally, the law favors joining multiple criminal offenses in a single trial under Crim.R. 8(A). *State v.* Brown, 5th Dist. Richland No. 93-CA-15, 1993 WL 500336 (Nov. 22, 1993), citing *State v. Franklin*, 62 Ohio St.3d 118, 122, 580 N.E.2d 1 (1991). On appeal, the trial court's decision for or against joinder will not be overturned absent a finding that "the trial court's attitude is arbitrary, capricious or unreasonable." *Id.*

{¶ 95} Joined charges may be severed if the accused establishes prejudice to his rights. *Franklin* at 122; Evid.R. 404(B). However, the state may counter a claim of prejudice by using either the "other acts test," in which it shows that evidence of one offense could have been introduced in the trial of the other, severed offense, or the "joinder" test, in which the state shows only that the evidence of each of the crimes is "simple and direct." Further, if the state can meet the joinder test, it need not meet the other acts test. "Thus, an accused is not prejudiced by joinder when simple and direct evidence exists, regardless of the admissibility of evidence of the crimes under Evid.R. 404(B)." *Id.*

{¶ 96} In this case, the evidence for each of the predicate offenses for Count 1, engaging in a pattern of corrupt activity, in case No. 2011-CR-174, was proven by evidence that was direct, simple, and separate from evidence used to support any of the charges made in case No. 2010-CR-282, in which appellant was indicted with attempted murder, felonious assault, having weapons while under disability, improperly discharging a firearm at or into a habitation or a school safety zone, and preparation of crack cocaine for sale. Far from being confused, the jury was able to separate the evidence for each charge, as evidenced by the not-guilty verdicts for attempted murder, felonious assault, and improperly discharging a firearm at or into a habitation or school safety zone. In addition, the record shows that five of the predicate offenses involved individuals other than appellant, and the evidence as to each of those offenses was direct and specific.

{¶ 97} On consideration of the foregoing, we find that the trial court's decision to order joinder of case Nos. 2010-CR-282 and 2011-CR-174 for purposes of trial was not arbitrary, capricious or unreasonable, and did not result in undue prejudice to appellant. Appellant's eighth assignment of error is not well-taken

{¶ 98} In his ninth assignment of error appellant asserts that the trial court erred when it gave a flight instruction to the jury regarding appellant's failure to report to his probation officer after July 28, 2010. In support, appellant argues that such an instruction was prejudicial.

> A flight instruction is treated as part of the overall jury instructions and is reviewed in the context of the entire jury instructions. *State v. Price*, 60 Ohio St.2d 136, 398 N.E.2d 772 (1979), paragraph four of the syllabus. A trial court is required to give the jury all instructions that are relevant and necessary for the jury to weigh the evidence and fulfill its duty as the factfinder. *State v. Comen*, 50 Ohio St.3d 206, 210, 553 N.E.2d 640 (1990). *State v. Anderson*, 7th Dist. Mahoning No. 03MA252, 2006-Ohio-4618, ¶ 108.

{¶ 99} In this case, the trial court gave the jury the following instruction:

> Consciousness of Guilt, Flight. Testimony has been admitted indicating that the defendant fled by failing to report as required to his probation officer. You are instructed that such actions of defendant alone does not raise a presumption of guilty, but it may tend to indicate the

> defendant's consciousness of guilt. If you find that the facts do not support that the defendant fled, or if you find that some other motive prompted the defendant's conduct, or if you are unable to decide what the defendant's motivation was, you should not consider this evidence for any purpose. However, if you find that the facts support that the defendant engaged in such conduct, and if you decide that the defendant was motivated by a consciousness of guilt, you may, but are not required to, consider that evidence in deciding whether the defendant is guilty of the crimes charged. You alone will determine what weight, if any, to give this evidence.

{¶ 100} As set forth above, Marley Lamey, appellant's probation officer, testified that appellant had not missed an appointment until after July 28, 2010. In addition, Lieutenant Orzech testified as to the months-long search that was conducted for appellant between July 28, 2010, and October 2010. That testimony included statements that federal authorities were asked to authorize a tap of appellant's cell phone, which ultimately resulted in his apprehension. Accordingly, the jury heard evidence other than Lamey's testimony to show that appellant attempted to elude capture, and the trial court did not err by giving a proper flight instruction. Appellant's ninth assignment of error is not well-taken.

{¶ 101} The judgment of the Erie County Court of Common Pleas is hereby affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

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

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE