[Cite as *State v. Mathis*, 2014-Ohio-1997.]

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

State of Ohio	Court of Appeals No. E-13-017
Appellee	Trial Court No. 2012-CR-105
v.	
Isaac Mathis	**DECISION AND JUDGMENT**
Appellant	Decided: May 9, 2014

* * * * *

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

K. Ronald Bailey, for appellant.

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JENSEN, J.

{¶ 1} Following a jury trial, defendant-appellant, Isaac Mathis, appeals his March 14, 2013 conviction for aggravated possession of drugs and possession of drugs, as well as the corresponding sentence imposed by the Erie County Court of Common Pleas. For the reasons that follow, we affirm the trial court's judgment.

Background

{¶ 2} On December 9, 2011, Jennifer Lowther and Tabetha Chapman were playing video games at the home located at 2909 Mason Road in Monroeville, Erie County, Ohio, when two men broke into the home with guns, demanding to know where the money and safes were. Lowther led them to a large safe in the bedroom closet, which the men stole. They demanded to know where the other safes were, but Lowther said she did not know. When the ordeal was over and the men left with various items from the home, the women called police.

{¶ 3} When sheriff deputies arrived to investigate the robbery, they saw drug paraphernalia and other evidence of drugs in plain view. They sought permission to search the home, but Lowther would not consent, telling deputies that it was Mathis' home. Lowther, Mathis' then-girlfriend who was pregnant with his child, had been living there with him for approximately six months. Chapman had been staying there for the past couple of weeks.

{¶ 4} Deputies obtained a search warrant. When they executed the warrant they found various drug paraphernalia including a marijuana pipe, straight edge devices, rolling papers, bongs, pinching scissors, coin sized plastic baggies, pill grinders, prescription bottles, digital scales, and drug residue. They also found a ledger and a notebook and they discovered that in the same closet from which the large safe was taken, there was another safe, referred to as "the Sentry safe." They seized that safe and obtained a second warrant authorizing them to search its contents.

{¶ 5} In the Sentry safe there was loose marijuana in mason jars, as well as marijuana in plastic bags. There was a bottle of Percocet that had been prescribed to Lowther, and a bottle of oxycodone that had been prescribed to Chapman. But in addition to these prescriptions, there were unlabeled bottles that contained a total of 51 oxycodone pills and seven buprenorphine pills. A report obtained by deputies from the Ohio Automated Rx Reporting System ("OARRS") for May 1, 2011 through February 5, 2013 revealed that Mathis had not been prescribed oxycodone or buprenorphine during that period. He had, however, been prescribed 12 oxycodone pills on May 4, 2011. Mathis was charged with aggravated drug possession with respect to the 51 oxycodone pills found in the unlabeled bottles, and possession of drugs with respect to the buprenorphine pills. He was not charged in connection with the medications prescribed to Lowther and Chapman or the marijuana.

{¶ 6} The case proceeded to a jury trial. Lowther testified, as did five of the deputies who investigated the initial armed robbery and the eventual drug possession charges. The state also called the forensic scientist for the Ohio Attorney General's Bureau of Criminal Investigation ("BCI") who identified the drugs, and an investigator from the Erie County prosecutor's office who introduced evidence of Mathis' prior conviction in the village of Richfield for possession of marijuana and drug paraphernalia.

{¶ 7} Although Mathis did not testify and did not present any witnesses or exhibits of his own, his defense revolved around raising doubt as to (1) whether Mathis actually resided at the Mason Road address, (2) whether Mathis owned the safe, and (3) whether

the drugs belonged to either of the other two occupants of the home. He attacked the deputies' failure to obtain fingerprints or a handwriting analysis linking him to the drugs, ledger, and paraphernalia found in the home, and the failure of the deputies to obtain a broader OARRS report for Mathis or OARRS reports for the other occupants of the home.

{¶ 8} Ultimately the jury found Mathis guilty on both counts of the indictment, both of which were fifth degree felonies. The court sentenced him to 11 months' incarceration on both counts to be served consecutively. Mathis now appeals and assigns the following errors for our review:

> I. THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO CONSECUTIVE TERMS OF IMPRISONMENT WHEN HE HAD NOT BEEN CONVICTED OF A FELONY OFFENSE OR A MISDEMEANOR OFFENSE OF VIOLENCE IN THE TWO YEARS IMMEDIATELY PRECEDING THE INSTANT OFFENSES.
>
> II. THE VERDICT WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE.
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> III. THE VERDICT WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE.

Law and Analysis

A. First Assignment of Error

{¶ 9} In his first assignment of error, Mathis claims that the court improperly imposed consecutive prison sentences in contravention of R.C. 2929.13(B)(1)(a) as it existed at the time of his sentencing. He claims that that statute required the court to impose community control in lieu of a prison sentence because the most serious charge against him was a fifth degree felony, and he had not been convicted of a felony or an offense of violence within the two years before the offense for which he was being sentenced. The court explained, however, that it was imposing a prison sentence, as permitted under R.C. 2929.13(B)(1)(b), because Mathis "violated a term of conditions of bond set by [the] court," causing the court to revoke his bond.

{¶ 10} The terms of the bond required Mathis to appear before the court on March 7, 2012, at 10:30 a.m. and thereafter as directed by the court. The court ordered Mathis to appear in court for trial on February 6, 2013, at 8:30 a.m. Mathis was late. The trial court warned him that if he was late again, his bond would be revoked. The very next day, although scheduled to be in court at 8:30 a.m., Mathis did not appear until approximately 9:00 a.m. As promised, the court revoked his bond.

{¶ 11} Mathis claims that he met all the terms of his bond. We disagree. The terms specifically required Mathis to appear as ordered by the court. He was late two days in a row. This was a violation of his bond and it was within the court's discretion to

revoke his bond. Having done so, it was also within the court's discretion to order incarceration instead of community control.

{¶ 12} Mathis next claims that consecutive prison terms were not appropriate because the trial court did not consider the proportionality between the consecutive prison terms and the level of danger Mathis posed and whether the harm caused by Mathis was so great or unusual that no single prison term could reflect the seriousness of his conduct.

{¶ 13} Under R.C. 2929.14(C)(4), the court may order a defendant to serve consecutive sentences if the court finds that:

> [T]he consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing * * * or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶ 14} "Under R.C. 2929.14(C)(4), the trial court must state its findings in support of consecutive sentences on the record at the sentencing hearing." *State v. Bratton*, 6th Dist. Lucas Nos. L-12-1219, L-12-1220, 2013-Ohio-3293, ¶ 17, citing *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, 793 N.E.2d 473, paragraph one of the syllabus. But it is not required to recite any "magic" or "talismanic" words when imposing consecutive sentences so long as it is "clear from the record that the trial court engaged in the appropriate analysis." *Id*., quoting *State v. Murrin*, 8th Dist. Cuyahoga No. 83714, 2004-Ohio-3962, ¶ 12.

{¶ 15} The March 14, 2013 judgment entry specifically states that the court "finds that Consecutive sentences are applicable based on O.R.C. 2929.14 et seq." and that it had considered, weighed and made findings for sentencing" under R.C. 2929.12, 2929.13, and 2929.14.

{¶ 16} At the March 11, 2013 sentencing hearing, the trial court provided its rationale for imposing consecutive sentences. It explained:

This court, on Count One, is imposing 11 months prison sentence; and Count Two, 11 months prison sentence. This Court finds that based on the defendant's past criminal record, and the Court will place it on the record, guilty of drug abuse and drug paraphernalia, 2000; drug abuse,

2003; Ohio – operating a vehicle while intoxicated, 2003; petty theft, 2004; possession of dangerous ordnance, 2004; discharging a firearm, 2004; drug abuse, 2004; having a weapon under disability, 2005; inducing panic, 2005; burglary, 2006; drug abuse, 2011; and in the instant case of aggravated possession of drugs and possession of drugs.

For those the defendant has received fines and jail time, suspended jail time, future good behavior or condition of community control sanctions on one, two, three, four different times. He has been to prison before. He was granted judicial release and placed on five years of community control sanctions and also placed on five years probation after that in 2006. So he's had numerous times probation, then to prison a couple of times, had fines and suspended jail time.

Based on his past record, based on the type of drugs and the event, this Court runs – finds that it's necessary to protect the public from future crimes by this individual and runs Counts One and Two consecutive for a total of 22 months.

{¶ 17} We conclude that the trial court made the appropriate findings under R.C. 2929.14(C)(4). It found that the type of drugs involved and the event itself posed danger to the community, it found that there was a need to protect the public from Mathis' behavior, and it found that Mathis had numerous prior offenses for which he had served prison sentences, paid fines, and been ordered to community control or probation. These

findings, though perhaps not stated in the identical words provided in the statute, demonstrate that the trial court conducted the proper analysis. We find Mathis' first assignment of error not well-taken.

B. Second and Third Assignments of Error

{¶ 18} In his second and third assignments of error, Mathis challenges both the sufficiency and weight of the evidence. We will address those assignments together.

{¶ 19} Whether there is sufficient evidence to support a conviction is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997), *superseded by constitutional amendment on other grounds as stated by State v. Smith*, 80 Ohio St.3d 89, 684 N.E.2d 668. In reviewing a challenge to the sufficiency of evidence, "[t]he 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." (Internal citations omitted.) *Smith* at 113. In making that determination, the appellate court will not weigh the evidence or assess the credibility of the witnesses. *State v. Walker*, 55 Ohio St.2d 208, 212, 378 N.E.2d 1049 (1978).

{¶ 20} When reviewing a claim that a verdict is against the manifest weight of the evidence, the appellate court must weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether the jury clearly lost its way in resolving evidentiary conflicts so as to create such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins at* 387. 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. Robinson*, 6th Dist. Lucas No. L-10-1369, 2012-Ohio-6068, ¶ 15, citing *Thompkins* at 388. Reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *Thompkins* at 387, quoting *State v. Martin, 20 Ohio App.3d 172*, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 21} Under R.C. 2925.11(A), "[n]o person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog." There is no dispute that oxycodone and buprenorphine are controlled substances. The dispute revolves around whether Mathis "possessed" the drugs.

{¶ 22} "Possession," as defined in R.C. 2925.01(K), "means having control over a thing or substance, but 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." Possession may be actual or constructive. *Robinson* at ¶ 17, citing *State v. Moffett*, 6th Dist. Sandusky No. S-10-056, 2012-Ohio-1107, ¶ 14. "Actual possession involves immediate physical control." *Id.*, citing *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." (Internal citations omitted.) *Id.* Like the elements of any crime, constructive possession may be proved

entirely by circumstantial evidence and can be inferred from the totality of the circumstances. *Id.* at ¶ 18.

{¶ 23} Mathis argues that there was no evidence that he lived or regularly resided at the Mason Road address or that the safe, drugs, ledger, or notebook belonged to him. He claims that no fingerprints or handwriting samples were taken to confirm that the drugs or ledger was his. He claims that the safe belonged to Lowther and that Chapman had a valid prescription for oxycodone for more pills than what was actually found in the safe, thus the pills in the unlabeled bottles could have been hers. He also suggests that the OARRS report obtained by deputies did not date back far enough.

{¶ 24} With respect to Mathis' occupancy at the Mason address, the state elicited testimony indicating that (1) deputies had had prior dealings with Mathis dating back to 2005 and at the time of those prior dealings, Mathis lived at 2909 Mason Road; (2) mail addressed to Mathis and medications prescribed to him listed his address as 2909 Mason; (3) when Lowther refused deputies' request to search the home, she indicated that it was because it was not her house—it was Mathis'—and that he was in Michigan for a poker tournament; and (4) when deputies provided Lowther with a copy of the inventory of items they had taken from the home, she indicated that she would leave the inventory for Mathis. Although he claims in his brief that he resides in Michigan, Mathis provided no affirmative evidence establishing that he lived anywhere other than 2909 Mason. Also, because of Lowther's relationship with Mathis and her desire to protect him, the jury

could have found that her testimony—that Mathis only occasionally resided there—was not credible.

{¶ 25} Concerning the ownership of the Sentry safe, although Lowther testified at trial that the safe belonged to her, she also, in reference to the robbery, stated that she did not know where the safe was kept. It was ultimately discovered in a closet in the bedroom that Mathis shared with her. And although it contained drugs prescribed to Lowther, it also contained oxycodone prescribed to Chapman, who did not share that room, as well as pills that had apparently not been prescribed to anyone in the residence. Before trial, Lowther never indicated to the deputies that she owned the Sentry safe.

{¶ 26} The ledger and notebook that was found contained abbreviations and the street names for various drugs, weights or dosages, payments received, and other information that appears to detail drug transactions. Lowther indicated that it was not her handwriting in those books. One of the deputies testified that the handwriting did not match Lowther's or Chapman's handwriting as it appeared in the statements they provided to police following the robbery (which were admitted as exhibits at trial).

{¶ 27} We conclude that this evidence was sufficient for a rational trier of fact to conclude that Mathis "possessed" the substances contained in the safe, an element of the crimes with which he was charged.

{¶ 28} We next turn to Mathis' challenge to the weight of the evidence. He claims that the previously-described evidence "proves innocence much more than guilt." Again, he denies living at the home, he claims there were valid prescriptions for the oxycodone

to other occupants of the home, there was no fingerprint or handwriting analysis implicating him, and Lowther said she owned the Sentry safe.

{¶ 29} In *State v. Willis*, 6th Dist. Wood No. WD-88-38, 1989 WL 90636 (Aug. 11, 1989), we considered a similar issue. There, evidence of drug abuse was found in the defendant's bedroom and in a desk in his office. He claimed that the items were already in the desk when he acquired ownership of it and that his girlfriend, with whom he shared a bedroom, had placed other items in a box in his closet so that the kids would not get into it. We noted that the items were found in areas under the control of the defendant and not in the general living quarters of the household, his girlfriend was the only other person with unlimited access to the area, and the girlfriend's uncontroverted testimony was that she never abused drugs. We concluded that it could be inferred from those facts that the defendant was in constructive possession of the drug paraphernalia and the drugs found in his residence.

{¶ 30} In *Willis,* there was testimony from other witnesses who claimed that the defendant abused drugs and the defendant did not deny that he resided at the home. Certainly, those were factors that influenced the outcome. But here, the state presented evidence that Mathis resided at the home and it presented additional evidence that could lead to the inference that the drugs belonged to him. For instance, the drugs were found in the bedroom he shared with Lowther. Lowther, who was pregnant, denied that she used drugs and she denied that the ledger was hers. The handwriting in the ledgers did

not look like Lowther's or Chapman's. And Lowther originally did not know where the safe was.

{¶ 31} Lowther's credibility surely played a major role in the jury's verdict. She displayed an interest in protecting Mathis, the father of her child. She also denied ever seeing drug paraphernalia around the house. This factor alone may have affected her credibility given the deputies' testimony detailing the numerous items they found, much of which was in plain sight.

{¶ 32} Under a manifest-weight standard we consider the credibility of witnesses, but we also extend special deference to the jury's credibility determinations given that it is the jury who has the benefit of seeing the witnesses testify, observing their facial expressions and body language, hearing their voice inflections, and discerning qualities such as hesitancy, equivocation, and candor. *State v. Fell*, 6th Dist. Lucas No. L-10-1162, 2012-Ohio-616, ¶ 14. Here, the jury apparently disbelieved Lowther and instead believed that Mathis resided in the home and exercised control over the contents of the safe. We will not disturb its conclusion.

{¶ 33} We find Mathis' second and third assignments of error not well-taken.

Conclusion

{¶ 34} We find all three of Mathis' assignments of error not well-taken and affirm the March 14, 2013 judgment of the Erie County Court of Common Pleas. The costs of this appeal are assessed to Mathis 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

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE