[Cite as *State v. Bowling*, 2010-Ohio-3595.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93052

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DANIEL BOWLING

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED
IN PART AND REMANDED
FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-502781

BEFORE: Stewart, J., Kilbane, P.J., and Dyke, J.

RELEASED AND JOURNALIZED: August 5, 2010

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MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Daniel Bowling, appeals from a judgment of conviction finding him guilty of possession of drugs, drug trafficking, and possession of criminal tools. The charged offenses occurred when police officers investigating complaints at a hotel where Bowling stayed entered his room and, after being allowed by Bowling to "look around," discovered prepackaged cocaine under the mattress of Bowling's hotel room bed. Bowling complains, among other things, that the court erred by denying his motion to suppress evidence, that evidence did not support his convictions, that his convictions should have merged for sentencing, and that the state

engaged in misconduct. We agree that the court should have merged the drug possession and drug trafficking offenses, and order a limited remand for resentencing. We affirm the conviction in all other respects.

I

{¶ 2} The state's evidence showed that a police detective affiliated with a local crime task force, in the company of two other officers, received information about drug activity occurring at a local hotel. While walking down a hallway of the hotel, the detective smelled marijuana emanating from behind the door of a room registered to Bowling. The detective knocked on the door and Bowling partially opened it. The detective displayed his badge, identified himself as a police officer, and asked Bowling if he could "step in and speak with you for a minute." Bowling allowed the detective inside the room and the detective noticed that Bowling had a towel on the floor running the length of the gap between the door and the floor. The detective thought the towel was intended to block marijuana smoke from leaving the room. When the detective asked Bowling what he had been smoking, Bowling replied "marijuana." In response to the detective's order to point out the location of the marijuana, Bowling directed the detective to a nightstand that contained a small bag of marijuana, rolling papers, and an ashtray containing the remains of a partially-smoked marijuana joint. The detective inquired whether Bowling had any other drugs, and Bowling produced a prescription

narcotic. Bowling indicated that he had no other drugs in the room. When the detective said, "do you mind if we check," Bowling replied, "go ahead." The detective lifted the mattress and discovered a plastic bag containing five smaller bags of crack cocaine. A search of Bowling yielded a cell phone and $250 in cash. Bowling claimed that he had found the marijuana stuffed in an upholstered chair in the room, and denied any knowledge of the crack cocaine.

II

{¶ 3} The first and second assignments of error raise issues relating to Bowling's motion to suppress evidence of drugs discovered in his hotel room. He argues that the court erred by applying the wrong standard for concluding that he knowingly consented to a search and that the court erred by refusing to allow into evidence a photograph that disputed the state's claims relating to marijuana found in the room.

A

{¶ 4} Bowling first argues that the court erred by concluding that he knowingly consented to the police entering his hotel room because the police did not disclose the purpose for seeking entry or the reason for their presence. He claims he thought the police were only making a "social visit" and concealed their true purpose for seeking entry into the room.

{¶ 5} The Fourth Amendment protects individuals against unreasonable searches and seizures by the government. See *Minnesota v. Carter* (1998), 525 U.S. 83, 88, 119 S.Ct. 469, 142 L.Ed.2d 373. A person can claim the protection of the Fourth Amendment if that person has a "legitimate expectation of privacy in the invaded place." *Rakas v. Illinois* (1978), 439 U.S. 128, 143, 99 S.Ct. 421, 58 L.Ed.2d 387. There is a reasonable expectation of privacy in a hotel room. See *State v. Loyer*, 8th Dist. No. 87995, 2007-Oho-716, at ¶8; *State v. Brewster*, 1st Dist. No. C-030025, 2004-Ohio-2993, at ¶19; *State v. Norris* (Nov. 5, 1999), 2nd Dist. No. 17689.

{¶ 6} "[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara v. Mun. Court of San Francisco* (1967), 387 U.S. 523, 528-29, 87 S.Ct. 1727, 18 L.Ed.2d 930; *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854.

{¶ 7} Bowling had a reasonable expectation of privacy in his hotel room and the police did not have a search warrant, so the issue is whether Bowling validly consented to the police entering his room. In order to satisfy the consent exception, the state has the burden of showing that there was (1) effective consent, (2) given voluntarily, (3) by a party with actual or apparent authority. *United States v. Gonzales* (C.A. 5, 1997), 121 F.3d 928, 938. We

focus on the second factor — whether consent had been given voluntarily — as Bowling had authority to give consent and he makes no argument that his consent was ineffective.

{¶ 8} There is no merit to Bowling's argument that he did not give voluntary consent because the police concealed their true purpose in seeking entry to his room. The testimony at the suppression hearing showed that the plain-clothed officer wore his badge on a lanyard wrapped around his neck. The officer had been patrolling the hallways of Bowling's hotel when he smelled the scent of marijuana emanating from behind Bowling's door. The officer knocked on the hotel room door, identified himself as a police officer, and showed Bowling his badge by lifting it toward the door. He told Bowling, "we're with the police department. Do you mind if we step in to speak with you for a minute." Bowling said "okay," opened the door, and stepped back to allow the police officers to enter the room. These facts show consent to the warrantless entry into the room. See *State v. Brewster*, 1st Dist. Nos. C-030024 and C030025, 2004-Ohio-2993, at ¶21 (consent to entry in hotel room found when police identified themselves and their purpose at the door and the hotel room occupant let the officers inside).

{¶ 9} Nothing about these facts justifies Bowling's assertion that he only consented to the police entering his hotel room because he thought they were there for a "social visit." The police do not typically show up

unannounced at hotel room doors and identify themselves by name and badge for the purpose of "visiting." The circumstances indicated that the police were there on official business — a social visit would not have required them to identify themselves in their official capacity.

B

{¶ 10} We likewise reject Bowling's argument that his consent for the police to enter his hotel room was invalid because the police did not first inform him of their purpose in entering. The testimony showed that the detective told Bowling that he and the other officers wished to speak with him. Admittedly, the detective said he and the other officers smelled burning marijuana coming from Bowling's room, but their stated purpose in seeking entry to the room was not mendacious — they truly did wish to speak with him, if just to ascertain whether he had been using marijuana.

{¶ 11} In any event, absent coercion, threat, or misrepresentation of authority, the courts have recognized deception as a viable and proper tool of police investigation. The United States Supreme Court has long held that "[a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises." *Sorrells v. United States* (1932), 287 U.S. 435, 441-42, 53 S.Ct. 210, 77 L.Ed. 413. In *Hoffa v. United States* (1966), 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 and *Lewis v. United States* (1966), 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312, the Supreme Court held that the Fourth Amendment is

not violated when police obtain incriminating information through the use of undercover agents who misrepresent their identity for the purpose of enticing defendants to confide or disclose wrongdoing.

{¶ 12} Assuming that investigation of drug use was the true motive for seeking entry to Bowling's hotel room, the officers had no obligation to tell Bowling their true purpose. It was enough that they said they wished to talk to Bowling and that Bowling admitted the officers into the room for that purpose.

C

{¶ 13} Finally, we reject as irrelevant Bowling's assertion that marijuana on a nightstand had not been in plain view because he specifically pointed out the marijuana to the police. After entering the room, one of the officers asked Bowling what he had been smoking, and Bowling admitted he had been smoking marijuana. The officer replied, "where is your marijuana." Bowling pointed to a plastic bag with marijuana and rolling papers on a nightstand. Bowling voluntarily pointed to the location of the marijuana, so questions of whether the marijuana had been in plain view were immaterial.

III

{¶ 14} Bowling next argues that the court "suppressed" evidence favorable to him by denying him the opportunity to offer into evidence Defendant's Exhibit C — a photograph that depicted the plastic bag of

marijuana found on the nightstand in his hotel room. Bowling claimed that there was a minuscule amount of marijuana in the plastic bag recovered from his hotel room (he described it as "nothing but dust in it") and that his exhibit verified his claim. Yet the court refused to allow him to offer the photograph into evidence, instead allowing State's Exhibit 3, a photograph of the nightstand at the time of arrest, which he claimed showed a significantly greater amount of marijuana than depicted in Defendant's Exhibit C. This discrepancy was, in his opinion, proof that the marijuana had been tampered with: either at the scene, when logged into evidence, or prior to the start of trial.

{¶ 15} Although Bowling argues that the court erred by "suppressing" evidence favorable to him, he is simply arguing that the court abused its discretion by refusing to admit his exhibit into evidence during the suppression hearing.

{¶ 16} Evid.R. 104(A) states that preliminary questions concerning the admissibility of evidence shall be determined by the court. All relevant evidence — that is, "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence — is generally admissible. See Evid.R. 401 and 402. Relevant evidence must be excluded, however, if its probative value "is substantially outweighed by the

danger of unfair prejudice, of confusion of the issues, or of misleading the jury." See Evid.R. 403(A). The court's weighing of whether admissible evidence is substantially outweighed by the considerations stated in the rule is reviewed for an abuse of discretion. *State v. Finnerty* (1989), 45 Ohio St.3d 104, 107, 543 N.E.2d 1233.

{¶ 17} The court did not expressly state a reason for refusing to allow Defendant's Exhibit C into evidence. But assuming there was probative value to the exhibit, we find that the court could have properly excluded the exhibit because the probative value of the exhibit was substantially outweighed by its potential to confuse the issues. The *presence* of the marijuana itself was probative because it corroborated the detective's testimony that his suspicions had been aroused because he smelled the odor of burning marijuana. But the state did not charge Bowling with possession of marijuana, so the actual *quantity* of marijuana present in the room was not at issue. With no charged offense relating to the possession of marijuana, the alleged discrepancy in the quantity of marijuana depicted in State's Exhibit 3 and Defendant's Exhibit C was immaterial and could only have served to confuse the jury.

{¶ 18} Bowling presumably intended to impeach the credibility of the police by showing that they tampered with the amount of marijuana taken. But Bowling himself admitted during his testimony at the suppression

hearing that marijuana had been recovered from his hotel room, although he denied ownership of it. And it was the presence of that marijuana that caused the police to make further inquiries about the presence of any other drugs in the room, ultimately leading to his permission to search the room. With virtually no impeachment value and the possibility of confusing the issues, the court did not abuse its discretion by refusing to admit Defendant's Exhibit C.

IV

{¶ 19} In his third and eighth assignments of error, Bowling raises arguments relating to the detective's alleged affiliation with a federal crime task force. Bowling maintains that the court erred by refusing to grant a mistrial on proof that the detective had not been a member of the task force and that if the detective had been a member of the task force, that task force was run by the Federal Bureau of Investigation, thus placing subject matter jurisdiction for the offenses in federal court.

A

{¶ 20} Bowling complains that the court abused its discretion by failing to grant his posttrial motion for a mistrial on grounds that the arresting officer had committed perjury by stating during trial that he was a member of a "HIDTA" task force — an acronym for "high-intensity drug-trafficking area" — as he claimed during trial.

{¶ 21} Granting a mistrial is an extreme remedy only warranted in circumstances where a fair trial is no longer possible and the ends of justice so require. *State v. Jones* (1992), 83 Ohio App.3d 723, 737, 615 N.E.2d 713. A mistrial should not be granted "merely because some error or irregularity has intervened, unless the substantial rights of the accused or the prosecution are adversely affected." *State v. Lukens* (1990), 66 Ohio App.3d 794, 809, 586 N.E.2d 1099; *State v. Nichols* (1993), 85 Ohio App.3d 65, 69, 619 N.E.2d 80. "To affect 'substantial rights,' an error must have a 'substantial and injurious effect or influence in determining the * * * verdict.'" *United States v. Dominguez Benitez* (2004), 542 U.S. 74, 81, 124 S.Ct. 2333, 159 L.Ed.2d 157, citing *Kotteakos v. United States* (1946), 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (internal citation omitted). The decision whether to grant a mistrial rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 182, 510 N.E.2d 343.

{¶ 22} The detective testified for the state at both the suppression hearing and the trial that he had worked for the city of Brook Park Police Department, but that for six years the city "subcontract[ed] me out" to work with HIDTA, which he described as a federal task force that focuses on drug activity and money laundering. In his motion for a mistrial, Bowling claimed that the detective misrepresented his affiliation with HIDTA — or more precisely, that the detective committed perjury in that regard. Bowling's

attorney offered her own affidavit in which she claimed to have spoken with the acting director of HIDTA who allegedly verified that the detective did not work for HIDTA, but was a member of a different task force.

{¶ 23} Defense counsel's affidavit was hearsay. It offered the out-of-court statement of the acting HIDTA director for the truth of the matter asserted: that the detective had not been a member of HIDTA. See Evid.R. 810(C). Indeed, defense counsel essentially conceded that the affidavit was hearsay because she stated that the acting director "refused to provide an affidavit when written confirmation was requested." The court correctly refused to declare a mistrial based on hearsay contained in defense counsel's affidavit.

{¶ 24} Even if Bowling had offered admissible evidence to show that the detective had not been a member of HIDTA, the detective's mischaracterization of his status with that agency would not be an error that affected a substantial right. Bowling argued that this testimony would have "misled" the jury, but we fail to see how that conclusion follows. Apart from the question of his affiliation with HIDTA, there was no question that the detective was a valid law enforcement officer and that he possessed the knowledge and training necessary to perform his duties. The court could rationally conclude that the jury's verdict did not result solely because of the

detective's alleged affiliation with HIDTA. On that basis, the court would not have abused its discretion by denying the motion for a mistrial.

B

{¶ 25} Bowling next argues that the court lacked subject matter jurisdiction over the prosecution in light of the detective's testimony that HIDTA was a federal program "led by the F.B.I." and that he was assigned to HIDTA in a "subcontractor-like situation." He claims that only the federal courts could have subject matter jurisdiction of the prosecution.

{¶ 26} This assignment lacks merit because arrests made under the guise of HIDTA do not confer exclusive subject matter jurisdiction in the federal courts. "The HIDTA task force is a federally funded investigative task force composed of federal, state, and local law enforcement officers. HIDTA's stated mission is to locate, identify, and dismantle drug smuggling/trafficking organizations." *United States v. Clay* (C.A.11, 2004), 376 F.3d 1296, 1298. Certain areas of the country have been designated as high intensity drug trafficking areas in which the program coordinates drug control efforts among local, state, and federal law enforcement agencies. One of those areas is Ohio, and as stated by the Office of National Drug Control Policy:

{¶ 27} "The mission of the Ohio HIDTA is to reduce drug availability by creating intelligence-driven drug task forces aimed at eliminating or reducing

domestic drug trafficking and its harmful consequences through enhancing and helping to coordinate drug-trafficking control efforts among federal, state and local law enforcement agencies. This will be accomplished through the coordination and sharing of intelligence, unified law enforcement effort, and community cooperation, which will improve the quality of life in Ohio." Http://www.whitehousedrugpolicy.gov/hidta/ohio (Last visited on May 25, 2010).

{¶ 28} This mission statement makes clear that affiliation with the Ohio HIDTA and/or receipt of federal funds or information does not confer federal status upon those who use its resources. None of the three officers who participated in Bowling's arrest were under federal jurisdiction: two were members of the Brook Park Police Department and one was a member of the Cuyahoga County Sheriff's Department. Although the FBI may take an active role in coordinating information to law enforcement agencies within the Ohio HIDTA, the arrest in this case was made in Ohio by law enforcement officers within the territorial jurisdiction of Cuyahoga County. The court did not lack subject matter jurisdiction.

V

{¶ 29} The fourth assignment of error raises a number of objections to the chain of evidence for drugs and cash found in Bowling's hotel room, with him suggesting that the state tampered with the evidence. Although

presented as due process clause challenges to the sufficiency of the evidence, questions on the chain of custody do not go to admissibility, but to the weight the jury affords the evidence. *State v. Richey* (1992), 64 Ohio St.3d 353, 360, 595 N.E.2d 915, abrogated on other grounds by *State v. McGuire* (1997), 80 Ohio St.3d 390, 686 N.E.2d 1112. We therefore address Bowling's argument as one of admissibility.

A

{¶ 30} Evid.R. 901(A) states: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The rule sets a low standard for authenticating evidence and "does not require conclusive proof of authenticity, but only sufficient foundational evidence for the trier of fact to conclude that * * * [the evidence] is what its proponent claims it to be." *State v. Easter* (1991), 75 Ohio App.3d 22, 25, 598 N.E.2d 845.

{¶ 31} Some things, however, are by their nature fungible and indistinguishable. A pill tends to look like any other pill of the same kind, so the identification of a pill by direct observation is usually problematic. See *State v. Conley* (1971), 32 Ohio App.2d 54, 59-60, 288 N.E.2d 296. In such cases, the proponent of the evidence must establish a chain of custody to

ensure the identity of an object that is easily substituted, tampered with, or altered. *State v. Morrison* (1982), 2 Ohio App.3d 364, 368, 442 N.E.2d 114.

{¶ 32} A chain of custody essentially shows that the offered item of evidence is authentic as having been in the continuous possession of the state, thus eliminating the possibility that the item has been tampered with or altered from its original form.

{¶ 33} Given the low threshold for admissibility under Evid.R. 901(A), there is no absolute duty on the state to eliminate or negate all possibilities of substitution, alteration, or tampering — it need only establish that it is reasonably certain that substitution, alteration, or tampering did not occur. *State v. Moore* (1973), 47 Ohio App.2d 181, 183, 353 N.E.2d 866. We review the court's ruling on the adequacy of authentication for an abuse of discretion. *Easter*, 75 Ohio App.3d at 26-27.

B

{¶ 34} The detective offered testimony that showed a chain of custody that made unlikely the possibility of tampering. He said that he took the drugs to the police station, put them into a larger plastic bag, logged them into evidence, and placed an evidence tag inside the bag. The evidence then went into the evidence locker. From there, the evidence went to the Bureau of Criminal Investigations for testing and then returned to police custody. The detective verified at trial that the marijuana offered into evidence was

the same that he confiscated from Bowling's hotel room. This testimony sufficiently established the state's Evid.R. 901(C) obligation to establish a chain of custody for the marijuana.

{¶ 35} To refute the state's showing, Bowling argues that the court erred by allowing the state to mention the marijuana and rolling papers because he claimed that the state's photographs showed prima facie evidence that the marijuana had been tampered with. He argued during the suppression hearing that the bag found in his hotel room contained a mere quantity of marijuana "dust," whereas the bag offered into evidence by the police showed a far larger quantity of marijuana.

{¶ 36} To prove this assertion, he compared two photographs: State's Exhibit 3, which depicted the marijuana and rolling papers as found on the nightstand in the hotel room and his proffered Defendant's Exhibit C, which shows the marijuana and rolling papers after they were tested. He claims that Defendant's Exhibit C shows a different plastic bag, of a different size and shape, with a far larger quantity of marijuana.

{¶ 37} The discrepancies that Bowling points to are most likely the product of different camera angles and the lighting existing at the time each photograph was taken: one photograph was taken in the hotel room; the other taken after the evidence had been processed by the police. Unlike the State's Exhibit 3 in situ photograph of the evidence, Defendant's Exhibit C appears

to show the marijuana and rolling papers as photographed at the police station — they are contained in a large plastic bag with an attached evidence tag. Moreover, the bag of marijuana had no doubt been jostled during transportation and processing, perhaps explaining why the shape of the bag holding the marijuana appeared to be different. These factors explain why the marijuana bag looked different in each photograph and justified the court's decision to admit them into evidence. To the extent that a viable question of tampering existed, it became a matter of credibility for the jury to resolve.

{¶ 38} We likewise reject Bowling's argument that the photographs showed different amounts of marijuana in each bag. The bag shown in State's Exhibit 3 is lying against a white tissue or napkin, providing a contrasty background that shows the dark-colored marijuana to good effect. The bag shown in Defendant's Exhibit C is lying on a dark brown, wood-grained table, so there is no contrasting background that would allow the dark-colored marijuana to stand out. Moreover, the bag is crumpled in a way that obscures the contents of the bag, unlike the photograph in State's Exhibit 3 that shows the bag lying flatter on the nightstand. Given the different perspectives shown by the photographs, it is difficult to conclude that any tampering occurred to the contents of the bag.

{¶ 39} Even without benign explanations for Bowling's tampering theory, evidence regarding the chain of custody went to the weight the jury afforded the evidence. The state offered the actual bag into evidence, so even without the admission of Defendant's Exhibit C, the jury would have been able to compare the actual bag against the bag shown in State's Exhibit 3. In doing so, it could easily have discounted the claims of tampering by satisfying itself that the bag depicted in State's Exhibit 3 and the bag depicted in Defendant's Exhibit C, were one and the same.

C

{¶ 40} Bowling raises similar chain of custody arguments relating to the crack cocaine found underneath the mattress of his hotel room bed by disputing the authenticity of the cocaine shown in State's Exhibit 4 — a photograph of the cocaine found between the mattress and box spring of his bed. The police found the five rocks of crack cocaine separately wrapped in individual bags and then placed in a larger bag. Bowling claims that State's Exhibit 4 shows only a single bag with none of the rocks individually wrapped, so the police must have tampered with this evidence. He reaches this conclusion by noting that the "clarity" of the rocks shown in the pictures is too great for them to have been individually-wrapped.

{¶ 41} Our discussion in part B of this assignment of error applies with equal force to this argument. Bowling's chain of custody argument goes to

the weight of the evidence, not its admissibility. The detective gave ample testimony showing that he personally logged the cocaine into evidence and that the cocaine presented at trial was in substantially the same condition as when recovered from the hotel room. The laboratory technician who tested the cocaine likewise testified that the cocaine offered at trial was in substantially the same condition as when submitted to him for testing. Against this testimony, Bowling offered nothing more than his own conclusion that the rocks of cocaine shown in the photograph were not individually wrapped. As with the photograph of the marijuana, folds in the larger plastic bag are reflecting light from the camera flash, making it difficult to determine whether the rocks were individually-wrapped. The trial judge was in the best position to view this evidence and determine whether a proper chain of custody had been established. Given the strong chain of custody shown by the state and Bowling's reliance on an unclear photograph, a trier of fact could have concluded that Bowling's tampering argument deserved little weight.

D

{¶ 42} Finally, Bowling maintains that the state failed to comply with R.C. 2925.51(A) by submitting an affidavit from the police officer who tested the marijuana. The detective who recovered the marijuana from the hotel room testified that it was tested by "a sergeant in our police department" and

"came up positive[.]" This sergeant did not testify at trial nor did he offer an affidavit attesting to his results.

{¶ 43} R.C. 2925.51(A) provides that "[i]n any criminal prosecution for a violation" of Revised Code Chapter 2925, a laboratory report conducted by a qualifying laboratory that details the content, weight, and identity of a substance submitted for testing is "prima-facie evidence of the content, identity, and weight or the existence and number of unit dosages of the substance." R.C. 2925.51(A) further provides that a notarized statement by the signer of the report must be attached to the report, "giving the name of the signer and stating that the signer is an employee of the laboratory issuing the report and that performing the analysis is a part of the signer's regular duties, and giving an outline of the signer's education, training, and experience for performing an analysis of materials included under this section." Id.

{¶ 44} The detective could, on personal knowledge, testify that another police officer conducted laboratory testing on the marijuana. But any attempt by the detective to give the results of that testing would plainly be hearsay. See *State v. Heinish* (1990), 50 Ohio St.3d 231, 236, 553 N.E.2d 1026; *In re McLemore*, Franklin App. No. 03AP-714, 2004-Ohio-680, at ¶8-9; *State v. Duffy* (Apr. 1, 1996), 12th Dist. No. Ca95-03-006.

{¶ 45} Error in the detective's testimony was, nevertheless, harmless beyond a doubt. As we have repeatedly noted, the state did not charge Bowling with any offenses relating to the marijuana, so discussion about the marijuana was irrelevant, but not necessarily prejudicial. The detective himself identified the substance as marijuana, an admissible conclusion that was based on expertise he acquired from experience and training in drug interdiction. See *State v. Maupin* (1975), 42 Ohio St.2d 473, 330 N.E.2d 708, paragraph two of the syllabus. So even without an expert report, the detective could competently testify from experience and training that the substance was marijuana, thus obviating any hearsay error.

VI

{¶ 46} Bowling next raises a number of arguments relating to the sufficiency of the evidence. He claims that the state failed to prove that he had constructive possession of the crack cocaine; that he knowingly prepared the cocaine for shipment or sale, and that cash and a cell phone taken from the hotel room were criminal tools.

A

{¶ 47} When reviewing a claim that there is insufficient evidence to support a conviction, we view the evidence in a light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State*

v. Jenks (1981), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

B

{¶ 48} We first address Bowling's argument that the state failed to offer sufficient evidence to show that he constructively possessed the cocaine found under the mattress of his hotel room bed.

{¶ 49} To prove the offense of possession of drugs pursuant to R.C. 2925.11(A), the state had to show that appellant knowingly possessed a controlled substance. The state offered testimony by the laboratory technician who said that testing confirmed that the substance submitted to him tested positive for cocaine. Bowling does not dispute this conclusion, but argues that the location of the drugs — under the mattress of his hotel room bed — showed that he did not possess the cocaine.

{¶ 50} R.C. 2925.01(K) defines possession as "* * * 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 is considered a voluntary act "if the possessor knowingly procured or received the thing possessed, or was aware of the possessor's control of the thing possessed for sufficient time to have ended possession." R.C. 2901.21(D)(1).

{¶ 51} Possession can be actual or constructive. *State v. Haynes* (1971), 25 Ohio St.2d 264, 267 N.E.2d 787. Actual possession entails ownership or physical control, whereas constructive possession is defined as "knowingly exercising dominion and control over an object, even though [the] object may not be within his immediate physical possession." *State v. Hankerson* (1982), 70 Ohio St.2d 87, 434 N.E.2d 1362, syllabus; *State v. Messer* (1995), 107 Ohio App.3d 51, 56, 667 N.E.2d 1022.

{¶ 52} The state may show constructive possession of drugs by circumstantial evidence alone. *State v. Trembly* (2000), 137 Ohio App.3d 134, 141, 738 N.E.2d 93. Circumstantial evidence is defined as "[t]estimony not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions are drawn, showing indirectly the facts sought to be proved. * * * " *State v. Nicely* (1988), 39 Ohio St.3d 147, 150, 529 N.E.2d 1236, quoting Black's Law Dictionary (5 Ed.1979) 221. It possesses the same probative value as direct evidence, being indistinguishable so far as the jury's fact-finding function is concerned. *State v. Jenks* (1991), 61 Ohio St.3d 259, 272, 574 N.E.2d 492. All the jury need do is weigh all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt. Id.

{¶ 53} Dominion and control over premises sufficient to allow an inference of possession can be shown not only by ownership of the premises,

but by occupancy. Bowling rented the hotel room for five consecutive days and had been the sole occupant of the room during that time, leading to the inference that he exercised dominion and control over the room. See, e.g., *State v. Brown* (1995), 107 Ohio App.3d 194, 668 N.E.2d 514 (gun found under mattress in bedroom); *State v. Travis*, 9th Dist. No. 22737, 2006-Ohio-1048 (gun found in mattress). Other testimony showed that the hotel housekeeping staff regularly flipped mattresses, creating the inference that the room had been free of drugs at the time Bowling rented it.

{¶ 54} Bowling claims that he "testified that the crack was not his." See Appellant's Brief at 32. This is not true — while Bowling testified during the suppression hearing, he did not testify at trial. The jury heard no evidence from him on the issue of possession, so the state's circumstantial evidence went unchallenged. We conclude that the state offered evidence from which a rational trier of fact could conclude that Bowling constructively possessed the cocaine found underneath the mattress of his hotel room bed.

C

{¶ 55} Bowling next argues that the state failed to offer sufficient evidence to show that he knowingly prepared a controlled substance for distribution or sale because the mere presence of cocaine in his hotel room did not support an inference that the substance was intended for resale.

{¶ 56} The state charged Bowling with drug trafficking under R.C. 2925.03(A)(2): that he had prepared the cocaine for transport or delivery knowing that the cocaine had been intended for sale or resale by himself or another person. Intent to traffick can be found from drugs packaged in individual doses. See, e.g., *State v. Carroll*, 9th Dist. No. 24109, 2009-Ohio-331, at ¶21.

{¶ 57} The detective testified that the crack cocaine found underneath the mattress of the bed consisted of a large plastic bag containing five smaller plastic bags, each containing a single rock of crack cocaine. He said that in his experience in drug interdiction, drug sellers usually packaged individual rocks of crack cocaine for sale.

{¶ 58} Bowling argues that the small amount of crack cocaine found underneath the mattress — five rocks weighing four grams — suggested that it had been for personal use, not resale. This argument is belied not only by the way the drugs were packaged, but by the $250 in cash recovered from Bowling — an amount of cash that could suggest to a rational trier of fact that Bowling had been selling the crack cocaine rather than buying it.

D

{¶ 59} Bowling next complains that the state did not prove that he possessed the $250 in cash and a cell phone with the intent to use them illegally.

{¶ 60} R.C. 2923.24(A) states: "[n]o person shall have or possess under the person's control any substance, device, instrument, or article, with the purpose to use it criminally." Otherwise, innocuous objects such as bags, wrapping devices, money and cell phones can be used as criminal tools. See *State v. Alexander*, 8th Dist. No. 90509, 2009-Ohio-597. In *State v.* Powell (1993), 87 Ohio App.3d 157, 168, 621 N.E.2d 1328, we stated that "* * * evidence the defendant knowingly transported, delivered or distributed drugs may be used by the jury to reasonably conclude that money possessed by the defendant was used to facilitate drug transactions as a criminal tool * * * in violation of R.C. 2923.24." We further concluded that "[t]he prosecution's failure to introduce the actual currency seized from the defendant into evidence * * * is not fatal to the conviction."

{¶ 61} In *State v. Williams*, 8th District Nos. 92009 and 92010, 2009-Ohio-5553, we found adequate proof that Williams possessed criminal tools on evidence that the police found 12, individual, prepackaged bags of marijuana in his car and $340 on his person. Id. at ¶75. In this case, the police found five prepacked bags of crack cocaine and $250 on Bowling's person. The detective testified that this amount of cash was suspicious because Bowling claimed to be unemployed and had no receipts or other means to account for the cash being in his possession.

{¶ 62} Bowling offered testimony to show that he had been contracted to paint a house and that he had been paid $500 in cash for the work. By deducting the cost of the hotel room and value of the cocaine found in his room, he claims he would only have had roughly $50 to spend on incidentals like marijuana, cigarettes, and soft drinks found in his room; hence, he claims that the $250 in cash could not have been drug money.

{¶ 63} Bowling's argument goes to the weight, not the sufficiency, of the evidence. But the argument is easily refuted in any event, for it presupposes that Bowling otherwise possessed no money at all prior to being paid for the painting work. The evidence showed that prior to staying as a guest at the hotel during the five-day period leading to his arrest, he had stayed at the hotel in two other weeks during the preceding month and presumably paid for those stays despite being unemployed and having no source of income. So Bowling's argument fails to take into account the possibility that he had, in line with the state's trafficking theory, sold drugs to accumulate that amount of cash. A rational trier of fact could have found that despite the expense of paying for the hotel room, Bowling's possession of $250 in cash constituted receipts from drug trafficking.

{¶ 64} For the same reasons, we find that the circumstantial evidence showed that the cell phone recovered from Bowling had been used to further the drug trafficking. Bowling argues that the police tampered with the cell

phone offered into evidence — the state offered a Nokia brand cell phone into evidence, but Bowling offered testimony to show that the couple who hired him to do the house painting gave him an LG brand cell phone that he had been using at the time of his arrest. This argument is easily refuted, however, because it merely raised the possibility that Bowling used two different cell phones and did not have the LG cell phone with him at the time of his arrest. The witness who gave Bowling the LG cell phone conceded that he didn't know whether Bowling owned a second cell phone. In any event, to the extent that Bowling argues that the police tampered with the cell phone, it raises a question going to the weight, not the sufficiency, of the evidence.

VII

{¶ 65} For his fifth assignment of error, Bowling complains that the court erred by failing to merge his convictions for drug possession and drug trafficking. The state concedes this assignment and we agree. In *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, paragraph two of the syllabus states: "2. Trafficking in a controlled substance under R.C. 2925.03(A)(2) and possession of that same controlled substance under R.C. 2925.11(A) are allied offenses of similar import under R.C. 2941.25(A), because commission of the first offense necessarily results in commission of the second." We sustain this assignment of error and remand to the trial court for the limited purpose of resentencing, at which time the state has the

right to elect which allied offense to pursue. See *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, paragraph three of the syllabus.

VIII

{¶ 66} The sixth assignment of error is that the court committed a "clerical" error because its judgment entries failed to describe the property subject to forfeiture. This assignment of error is moot because the court has since complied with its duties in response to our January 20, 2010 sua sponte order remanding the case to the trial court for correction of the record. The corrected journal entry specifically orders the forfeiture of the $250 seized from Bowling at the time of his arrest.

IX

{¶ 67} The seventh assignment of error complains that the state committed prosecutorial misconduct by referring to the detective as a member of HIDTA, by knowing that State's Exhibit 2 had been tampered with, and by making false statements to the jury about the existence of a second cell phone. Having disposed of each of these arguments on the merits against Bowling, there is no basis for claiming that the state engaged in misconduct.

Judgment affirmed in part, reversed in part, and remanded for resentencing.

Costs to be divided equally between appellee and appellant.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed in part, any bail pending appeal is terminated. Case remanded to the trial court for resentencing.

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

MELODY J. STEWART, JUDGE

MARY EILEEN KILBANE, P.J., CONCURS

ANN DYKE, J., CONCURS WITH SEPARATE OPINION

ANN DYKE, J., CONCURRING:

{¶ 68} I concur with the judgment rendered this day but I write separately to address the issue of a law enforcement "knock and talk." The "knock and talk" is essentially a form of a consensual encounter wherein officers approach a residence in which they suspect illegal activity is occurring, knock on the door, and then attempt to gain consent to enter. *United States v. Adeyeye* (C.A. 7 2004), 359 F.3d 457. See, also, *United States v. Cormier* (C.A. 9, 2000), 220 F.3d 1103; *Ewolski v. City of Brunswick* (C.A.6, 2002), 287 F.3d 492; *United States v. Thomas* (6th Cir. 2005), F.3d 274, 277.

{¶ 69} In *Adeyeye,* the court noted that as a general matter, officers may approach a willing person in a public place and ask that person questions without violating the Fourth Amendment, unless the person would not have felt free to leave. Where officers approaching a person in a confined space, such as a hotel room, however, the court should consider whether under the totality of the circumstances, an objective person would feel free to decline the officers' request that they come to the door, or would feel free to otherwise terminate the encounter. Id. Circumstances that courts will consider in assessing whether a person would feel free to decline the officers' request or otherwise terminate the encounter include the location, the knock, the talk, the time of day, the duration, the number of officers present, whether the officers wore plain clothes, the use of physical force, the display of weapons, and the situation of the occupant. Id.

{¶ 70} The existence of coercive circumstances may transform the encounter into an investigatory stop that must then be justified by reasonable suspicion. *United States v. Jerez* (C.A. 7, 1997), 108 F.3d 684.

{¶ 71} I agree with the majority's analysis that a consensual encounter occurred herein.