[Cite as *State v. Adkins*, 2014-Ohio-5350.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. W. Scott Gwin, J.
	:	Hon. Sheila G. Farmer, J.
-vs-	:	
	:	
RANDALL E. ADKINS	:	Case No. 13-CA-126
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 13 CR 00406
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	November 25, 2014

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
KENNETH W. OSWALT 20 South Second Street Fourth Floor Newark, OH 43055	PAUL E. MORRISON 100 East Main Street Columbus, OH 43215

Farmer, J.

{¶1} On July 18, 2013, the Licking County Grand Jury indicted appellant, Randall Adkins, on one count of having weapons under disability in violation of R.C. 2923.13(A)(3) and one count of possession of drug paraphernalia in violation of R.C. 2925.14(C)(1). Said charges arose from a search of appellant's motel room which appellant had consented to after a traffic stop.

{¶2} A jury trial commenced on December 12, 2013. At the close of the state's case-in-chief, appellant made a motion for acquittal pursuant to Crim.R. 29. The trial court denied the motion. The jury found appellant guilty of the weapons count and not guilty of the possession count. By judgment entry filed December 13, 2013, the trial court sentenced appellant to thirty months in prison.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE TRIAL COURT ERRED IN FAILING TO UPHOLD APPELLANT'S RIGHTS AGAINST UNREASONABLE SEARCH AND SEIZURE UNDER THE FOURTH AND FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE I, SECTION 14 OF THE OHIO CONSTITUTION."

II

{¶5} "THE TRIAL COURT'S FINDING OF GUILT IS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE AND IS A VIOLATION OF THE DUE PROCESS CLAUSE OF THE 5TH AND 14TH AMENDMENTS OF THE U.S. CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION."

III

{¶6} "INEFFECTIVE ASSISTANCE OF COUNSEL."

IV

{¶7} "INCONSISTENT JURY VERDICTS."

{¶8} At the outset, we note this matter originally came before this court as an *Anders* appeal. *Anders v. California,* 386 U.S. 738 (1967). In appellant's brief filed March 10, 2014, appellate counsel stated "[t]here is no colorable issue to support an appeal in this case," and set forth three assignments of error that were originally listed in the docketing statement: (1) an unreasonable search and seizure argument; (2) a sufficiency and manifest weight of the evidence argument; and (3) an ineffective assistance of counsel claim. By judgment entry filed August 11, 2014, this court stated the following in pertinent part:

> This matter came before the Court upon review of the Motion to Withdraw and *Anders* brief filed by counsel for Appellant. The Court stresses there is a difference between an assignment of error upon which a litigant is not certain to prevail and one which is wholly frivolous.
>
> ***
>
> Only the first potential assignment of error relating to search and seizure is wholly frivolous. The remainder of the assignments of error is not wholly frivolous. Further, Appellee has identified an additional issue which can and should be raised by counsel relative to inconsistent verdicts.

For this reason, the motion to withdraw is denied. Counsel shall file a brief containing the second and third assignments of error identified by Appellant as well as the issue of inconsistent verdicts.

{¶9} Appellant's brief was re-filed on August 27, 2014, and again included the aforementioned "no colorable issue" language and the assignment of error on an unreasonable search and seizure (Assignment of Error I above). Pursuant to this court's judgment entry of August 11, 2014, we will not address Assignment of Error I.

II

{¶10} Appellant claims his conviction was against the sufficiency and manifest weight of the evidence. Appellant also claims the trial court erred in denying his Crim.R. 29 motion for acquittal. We disagree.

{¶11} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks,* 61 Ohio St.3d 259 (1991). "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia,* 443 U.S. 307 (1979). On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin,* 20 Ohio App.3d 172, 175 (1st Dist.1983). *See*

also, State v. Thompkins, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶12} We note the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison,* 49 Ohio St.3d 182 (1990). The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger,* 77 Ohio St.3d 415, 418, 1997-Ohio-260.

{¶13} Crim.R. 29 governs motion for acquittal. Subsection (A) states the following:

> The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

{¶14} The standard to be employed by a trial court in determining a Crim.R. 29 motion is set out in *State v. Bridgeman,* 55 Ohio St.2d 261 (1978), syllabus: "Pursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."

{¶15} Appellant was convicted of having weapons under disability in violation of R.C. 2923.13(A)(3) which states:

> (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:
>
> (3) The person is under indictment for or has been convicted of any felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse 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 involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.

{¶16} Detective Todd Green with the Central Ohio Drug Task Force set up surveillance of appellant and his vehicle and Room 202 at America's Best Value Inn, an area of "suspicious activity," "people selling drugs." T. at 90, 121, 135-136. Detective Green observed appellant drive out of the Inn parking lot. T. at 121, 136. Detective Adam Hoskinson stopped appellant a few miles from the Inn for failure to use his turn signal. T. at 90, 103. Appellant was questioned about his residency in Room 202 at the Inn. T. at 91. Appellant told Detective Hoskinson he rented the room for a friend, Michah Lear, "so that he could sell drugs out of the room." T. at 93. Appellant consented to a search of his vehicle and the room at the Inn. T. at 92, 157. During the

search of the room, a firearm was discovered in a cubbyhole underneath a countertop. T. at 124-125.

{¶17} Appellant told Detective Hoskinson the firearm was not his, but Mr. Lear's who was staying in another room. T. at 94-95. Appellant admitted to Detective Hoskinson that he knew the firearm was in the motel room. T. at 95-96, 105-106. Detective Green testified appellant told him "I just let him [Mr. Lear] store it in my room." T. at 139.

{¶18} During opening statement, defense counsel argued appellant did not know the firearm was in the room. T. at 85. Appellant testified he rented a room for Mr. Lear and he did not know there was a firearm in the room. T. at 156-158, 168. He did not know that Mr. Lear had a firearm. T. at 167. Appellant denied telling Detective Hoskinson he knew that a firearm was in the room. T. at 158.

{¶19} Appellant stipulated to his prior conviction for a felony drug offense. T. at 109, 145-146, 154; State's Exhibit 5A.

{¶20} The jury was given two versions on the issue of knowledge of the firearm, two police officers versus appellant. From the verdict, it is clear the jury chose to believe the police officers.

{¶21} Upon review, we find sufficient evidence, if believed, to support the conviction, and find no manifest miscarriage of justice. The trial court did not err in denying appellant's Crim.R. 29 motion for acquittal.

{¶22} Assignment of Error II is denied.

III

{¶23} Appellant claims he was denied effective assistance of trial counsel because his counsel's Crim.R. 29 argument was deficient, and his counsel failed to ensure the definition of "dominion and control" was included in the jury instructions, failed to argue against the state's objection to incoherent testimony, failed to object to speculation questioning, and failed to object to the jury's verdict or demand a judgment notwithstanding the verdict. We disagree.

{¶24} The standard this issue must be measured against is set out in *State v. Bradley,* 42 Ohio St.3d 136 (1989), paragraphs two and three of the syllabus. Appellant must establish the following:

> 2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)
>
> 3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.

{¶25} The sole issue on the weapons charge was appellant's knowledge of the firearm in the motel room. Defense counsel made a Crim.R. 29 motion for acquittal at the close of the state's case-in-chief. T. at 146-147. At this time, the only testimony as to appellant's knowledge was from Detectives Green and Hoskinson. Both detectives stated appellant admitted to knowing there was a weapon in the room. T. at 95-96, 105-106, 139.

{¶26} As for defense counsel's failure to demand a judgment notwithstanding the verdict, our brethren from the Eighth District explained the following in *Cleveland Heights v. Watson,* 8th Dist. Cuyahoga No. 85344, 2005-Ohio-3595, ¶ 18:

> Because this matter is criminal in nature, however, the Civil Rules of Procedure are inapplicable. As this court has held, "A Civ.R. 50(B) motion for judgment notwithstanding the verdict has no applicability to final judgments rendered in criminal proceedings" and such motion is a "nullity" in the context of a criminal case. *State v. Skaggs* (Feb. 8, 1990), Cuyahoga App. No. 56570.

{¶27} We have reviewed the entire transcript and find no deficiency by defense counsel as to the jury instructions and objections made or not made.

{¶28} Upon review, we find no deficiency of defense counsel.

{¶29} Assignment of Error III is denied.

IV

{¶30} Appellant claims there were inconsistent verdicts as the firearm and the drug paraphernalia were found in the same location and the jury found him guilty of the weapons count, but not guilty of the possession count. We disagree.

{¶31} The items were found hidden in a cubbyhole underneath a countertop. T. at 124-125; State's Exhibit 2. The countertop was lifted because the doors to the cabinet were jammed. T. at 124. No drug paraphernalia was found in appellant's vehicle. T. at 103.

{¶32} Appellant's position was that the firearm and the drug paraphernalia were not his, but Mr. Lear's, as he had rented the room for Mr. Lear "so that he could sell drugs out of the room." T. at 93. Appellant testified he had no knowledge of either the firearm or the drug paraphernalia. T. at 156-158.

{¶33} Appellant was charged with possession of drug paraphernalia in violation of R.C. 2925.14(C)(1) which states, "no person shall knowingly use, or possess with purpose to use, drug paraphernalia." The jury could have found there was sufficient evidence that appellant "possessed" the drug paraphernalia, but there was insufficient evidence that appellant "used" it or was "planning to use it." The jury could have found appellant's denial of the drug paraphernalia was more believable than his denial of the firearm.

{¶34} Upon review, we find the verdicts were not inconsistent.

{¶35} Assignment of Error IV is denied.

{¶36} The judgment of the Court of Common Pleas of Licking County, Ohio is hereby affirmed.

By Farmer, J.

Hoffman, P.J. and

Gwin, J. concur.

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