

[Cite as *State v. Morten*, 2010-Ohio-117.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23103
vs.	:	T.C. CASE NO. 07CR3537
JAY MORTEN	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 15th day of January, 2010.

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Mathias H. Heck, Jr., Pros. Attorney; Michelle D. Phipps, Atty.
Reg. No.0069829, Asst. Pros. Attorney, P.O. Box 972, Dayton, OH
45422

Attorney for Plaintiff-Appellee

Andrea G. Ostrowski, Atty. Reg. No. 0075318, 20 South Main Street,
Springboro, OH 45066

Attorney for Defendant-Appellant

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GRADY, J.:

{¶ 1} Defendant, Jay Morten, appeals from his conviction and
sentence for possession of cocaine.

{¶ 2} On August 22, 2007, at around 5:00 p.m., Dayton Police
Officer Matthew Kennard initiated a traffic stop of Defendant's

vehicle near Keowee and Leo streets in Dayton, because the vehicle had no front license plate. Officer Michael Lally assisted on the traffic stop. Defendant, the owner of the vehicle, was sitting in the front passenger seat and his friend, Michael Vanderpool, was driving the vehicle.

{¶3} As Officer Lally approached the passenger side of the vehicle he observed Defendant turn in the seat and face the driver, moving his hands between the left edge of his seat and the center console down toward the floor. Concerned that Defendant might be retrieving a weapon or hiding contraband, Officer Lally drew his weapon and ordered Defendant from the vehicle. After patting Defendant down for weapons, the officers placed Defendant in Officer Kennard's cruiser. Vanderpool was then removed from the vehicle, patted down for weapons, and also placed in Kennard's cruiser.

{¶4} Officer Lally asked Defendant if he could search the vehicle. Defendant consented to the search. Officer Lally searched the area between the passenger's seat and the center console and discovered a plastic baggie with a white powdery substance that Lally suspected was powder cocaine. Field tests confirmed that the substance was cocaine. Laboratory testing revealed that the substance was cocaine and weighed 12.43 grams.

{¶5} Defendant was indicted on one count of possession of

cocaine, between five and twenty-five grams, a fourth degree felony. R.C. 2925.11(A). Following a jury trial Defendant was found guilty as charged. The trial court sentenced Defendant to seventeen months in prison.

{¶ 6} Defendant timely appealed to this court from his conviction and sentence.

FIRST ASSIGNMENT OF ERROR

{¶ 7} "THE TRIAL COURT ERRED WHEN IT OVERRULED DEFENDANT'S MOTION FOR ACQUITTAL BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CHARGE AGAINST THE DEFENDANT."

SECOND ASSIGNMENT OF ERROR

{¶ 8} "APPELLANT'S CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 9} Defendant argues that the trial court erred in overruling his Crim.R. 29 motion for acquittal based upon insufficient evidence, and that his conviction is against the manifest weight of the evidence, because the State failed to prove that he knowingly possessed the cocaine police found in his vehicle.

{¶ 10} When considering a Crim.R. 29 motion for acquittal, the trial court must construe the evidence in a light most favorable to the State and determine whether reasonable minds could reach different conclusions on whether the evidence proves each element

of the offense charged beyond a reasonable doubt. *State v. Bridgeman* (1978), 55 Ohio St.2d 261. The motion will be granted only when reasonable minds could only conclude that the evidence fails to prove all of the elements of the offense. *State v. Miles* (1996), 114 Ohio App.3d 738.

{¶ 11} A Crim.R. 29 motion challenges the legal sufficiency of the evidence. A sufficiency of the evidence argument challenges whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law. *State v. Thompkins*, (1997), 78 Ohio St.3d 380. The proper test to apply to such an inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259:

{¶ 12} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt."

{¶ 13} In order to prove a violation of R.C. 2925.11(A), the

State was required to prove beyond a reasonable doubt that Defendant knowingly possessed a controlled substance, the baggie containing 12.43 grams of powder cocaine that police found in Defendant's vehicle. "Knowingly" is defined in R.C. 2901.22(B):

{¶ 14} "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶ 15} "Possession" is defined in R.C. 2925.01(K):

{¶ 16} "Possess or possession 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."

{¶ 17} Possession of a drug may be either actual physical possession or constructive possession. *State v. Butler* (1989), 42 Ohio St.3d 174. A person has constructive possession of an item when he is conscious of the presence of the object and able to exercise dominion and control over that item, even if it is not within his immediate physical possession. *State v. Hankerson* (1982), 70 Ohio St.2d 87; *State v. Wolery* (1976), 46 Ohio St.2d 316.

{¶ 18} Readily usable drugs found in very close proximity to

a defendant may constitute circumstantial evidence sufficient to support a conclusion that he constructively possessed those drugs.

State v. Miller, Montgomery App. No. 19174, 2002-Ohio-4197. In determining whether a defendant knowingly possessed a controlled substance, it is necessary to examine the totality of the facts and circumstances surrounding its discovery. *State v. Teamer*, 82 Ohio St.3d 490, 492, 1998-Ohio-193; *State v. Pounds*, Montgomery App. No. 21257, 2006-Ohio-3040.

{¶ 19} Defendant points out that his fingerprints were not found on the baggie of cocaine, and that the driver of the vehicle, a three time convicted felon, was left alone in the vehicle while police escorted Defendant to a police cruiser. According to Defendant, the only evidence of possession was the mere fact that he was sitting inside the vehicle, near where the cocaine was found, and that mere proximity to the drugs, standing alone, is insufficient to prove possession. R.C. 2925.01(K).

{¶ 20} The evidence presented by the State demonstrates that the baggie of cocaine was found by police between the center console and the passenger seat where Defendant had been sitting, in the exact area where Officer Lally said he saw Defendant putting his hands. Furthermore, Michael Vanderpool, the driver of the vehicle, testified that he saw Defendant remove the cocaine from his pocket and put it under the seat. That evidence is probative

of possession, constructive as well as actual.

{¶ 21} Viewing the totality of this evidence in a light most favorable to the State, a rational trier of facts could find beyond a reasonable doubt that Defendant constructively possessed the cocaine police found in his vehicle. Defendant's conviction is supported by legally sufficient evidence and the trial court properly overruled Defendant's Crim.R. 29 motion for acquittal.

{¶ 22} A weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive. *State v. Hufnagle* (Sept. 6, 1996), Montgomery App. No. 15563, unreported. The proper test to apply to that inquiry is the one set forth in *State v. Martin* (1983), 20 Ohio App.3d 172, 175:

{¶ 23} "[t]he court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Accord: *State v. Thompkins, supra*.

{¶ 24} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230. In *State*

v. *Lawson* (Aug. 22, 1997), Montgomery App.No. 16288, we observed:

{¶ 25} “[b]ecause the factfinder . . . has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder’s determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness.”

{¶ 26} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of facts lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 27} Defendant argues that the testimony of the police officers in this case is not credible due to inconsistencies, and that the testimony of the driver of the vehicle, Michael Vanderpool, is not credible because his testimony that he was removed from the vehicle before Defendant was refuted by both police officers.

Defendant points out that Vanderpool is a three-time convicted felon, and that the testimony of Defendant’s former girlfriend, Melissa Fewless-Gordon, that Vanderpool told her that he had

planted the cocaine in the vehicle to get Defendant in trouble, and that Defendant did not know it was there, undermines Vanderpool's credibility. Further, Defendant denied knowledge of the cocaine that was found in his vehicle.

{¶ 28} The jury was well aware of Vanderpool's criminal record and the contradictions and inconsistencies in his testimony, and that of the police officers as well, because Defendant's counsel brought those matters to the jury's attention during cross-examination of the witnesses. Still, the jury chose to believe the police officers and Vanderpool. The credibility of the witnesses and the weight to be given to their testimony were matters for the trier of facts, the jury, to decide. *DeHass*. The jury did not lose its way simply because it chose to believe the State's version of the events, which it had a right to do. Reviewing this record as a whole, we cannot say that the evidence weighs heavily against a conviction, that the trier of facts lost its way in choosing to believe the State's witnesses, or that a manifest miscarriage of justice has occurred. Defendant's conviction is not against the manifest weight of the evidence.

{¶ 29} Defendant's first and second assignments of error are overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 30} "THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION

FOR A MISTRIAL DUE TO MISCONDUCT BY THE BAILIFF AND JURY.”

{¶ 31} Defendant argues that the trial court abused its discretion when it overruled the motion for a mistrial he made as a result of the jury’s revealing to the bailiff and the trial judge the status of its deliberations and its numerical division, 9-3, in favor of a guilty verdict.

{¶ 32} The decision whether to grant or deny a motion for a mistrial rests within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion.

State v. Garner, 74 Ohio St.3d 49, 1995-Ohio-168. Mistrials need be declared only when the ends of justice so require and a fair trial is no longer possible. *Id.* An abuse of discretion means more than a mere error of law or an error in judgment. It implies an arbitrary, unreasonable, unconscionable attitude on the part of the trial court. *State v. Adams* (1980), 62 Ohio St.2d 151.

{¶ 33} If a trial judge questions a jury regarding its numerical division, that is deemed to be coercive per se and the jury’s verdict must be reversed. *Brasfield v. United States* (1926), 272 U.S. 448, 450, 47 S.Ct. 135, 71 L.Ed.345. However, the trial court’s receipt of such information when it is unsolicited and given by the jury in violation of the court’s instruction to the jurors not to reveal the status of their deliberations until their verdict is announced, is not per se error. *State v. Trussell* (May 16,

1979), Montgomery App. No. 5927. Instead, an unauthorized communication between an officer of the court and the jury during deliberations, in violation of Crim.R. 24(G)(4)(b) and R.C. 2945.33, is presumed to be prejudicial to a defendant against whom, after such communication, a guilty verdict is returned. *State v. Adams* (1943), 141 Ohio St. 423; *State v. King* (1983), 10 Ohio App.3d 93.

{¶ 34} A review of this record reveals that the jury notified the bailiff that they had a question. While requesting to hear opening statements, closing arguments and the testimony of the police officers, the jury sua sponte revealed to the bailiff its numerical division. The bailiff did not respond to that and made no comment except to tell the jury to put their request in writing, which they did. In their written note to the trial judge, the jury again revealed their numerical division, 9-3 for guilty. The court did not comment on the status of the jury's deliberations, but responded to their request by telling the jury that they could not hear opening statements and closing arguments again because that is not evidence. The court also responded to the jury's request to hear the testimony of the police officers again by asking them to narrow their request to which officer they wanted to hear and what it was they wanted to hear. Approximately five minutes after receiving the court's response to their inquiry, the jury

informed the bailiff that they had reached a verdict.

{¶ 35} Defendant moved for a mistrial, arguing that the jurors violated their oath and the court's instructions to them not to reveal the status of their deliberations until their verdict was announced, and that revealing the status of their deliberations placed undue pressure on the jury to reach a verdict and prejudiced Defendant. The State responded that in the absence of anyone responding to or discussing with the jury the status of their deliberations, there was no tainting of either the jury or their deliberation process that would warrant a mistrial. The trial court overruled Defendant's motion for a mistrial, concluding that while the jurors had violated the court's instructions regarding disclosure of their deliberations, Defendant did not suffer any prejudice as a result. We agree.

{¶ 36} Without question, what the jurors did in revealing to the bailiff and the trial judge their numerical division, 9-3 for guilty, violated the instructions the trial court gave them to not disclose to anyone the status of their deliberations until their verdict is announced. Nevertheless, neither the bailiff nor the trial judge solicited this information from the jury concerning the status of their deliberations, nor responded to or commented upon that information in any way after the jury revealed it. Furthermore, unlike the cases cited by Defendant,

this is not a situation where a court officer engaged in unauthorized communications with the jury. See, e.g., *City of Urbana v. Ferrell* (March 9, 1990), Champaign App.No. 89-CA-12. Under those circumstances, the mere receipt of the information was not coercive and prejudicial per se, and Defendant has failed to demonstrate how, if at all, his right to a fair trial was prejudiced as a result. Indeed, the way in which the court handled the matter was exemplary. Therefore, the trial court did not abuse its discretion in overruling Defendant's motion for a mistrial.

{¶37} Defendant's third assignment of error is overruled. The judgment of the trial court will be affirmed.

BROGAN, J. And FROELICH, J., concur.

Copies mailed to:

Michele D. Phipps, Esq.
Andrea G. Ostrowski, Esq.
Hon. A.J. Wagner