COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
SCOTT LEE HUNT	:	Case No. 2010CA00016
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2009CR1064
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	November 8, 2010

APPEARANCES:

For Plaintiff-Appellee

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Delaney, J.

{¶1} Defendant-Appellant Scott Lee Hunt appeals his conviction and sentence for one count of possession of cocaine, a fifth degree felony in violation of R.C. 2925.11(A)(C)(4)(a). Plaintiff-Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} At 2:15 a.m. on June 29, 2009, Officer Christopher Manse of the City of Alliance Police Department stopped Appellant on Route 62 for speeding. Officer Manse approached the vehicle and asked Appellant for his driver's license. Appellant told Officer Manse that it was suspended.

{¶3} Officer Manse asked Appellant to exit the vehicle. When Appellant got out of the vehicle, the officer detected the odor of alcohol and he decided to conduct a field sobriety test on Appellant. Before the officer started the test, he patted down Appellant for weapons and found none.

{¶4} The officer did not find Appellant to be impaired. Officer Manse confirmed that Appellant's license had been suspended and he placed Appellant under arrest for driving without a valid license. Officer Manse placed Appellant in two sets of handcuffs.

{¶5} Before Officer Manse put Appellant in his patrol car, Officer Manse searched Appellant again for weapons and contraband. Appellant was wearing a tank top, shorts, and flip-flops. The officer placed his hands in Appellant's two front pockets and two back pockets. Officer Manse did not recall searching Appellant's watch pocket by the front pocket.

{¶6} Officer Manse contacted Officer Keith Phelps to transport Appellant to the jail for booking. Immediately prior to transporting Appellant, Officer Phelps had

transported another arrestee to jail. The arrestee seated in the rear of the vehicle had dropped a number of items on the floor of Officer Phelps's patrol car. Officer Phelps had cleaned out the back of the car so that nothing was left on the floor before he transported Appellant to jail.

{¶7} Before Officer Phelps transferred Appellant from Officer Manse's patrol car to his car, Officer Phelps searched Appellant for weapons and contraband and he did not find anything. Officer Phelps searched Appellant's two front pockets. He did not search Appellant's back pockets and he was not aware that Appellant had a watch pocket.

{¶8} Officer Phelps asked Appellant if he was going to make bond. Appellant responded that he could not, so Officer Phelps transported Appellant directly to the Stark County Jail. During the ten-minute ride to the Stark County Jail, Officer Phelps noticed that Appellant was very "fidgety" in the back of his patrol car and he was moving around a lot.

{¶9} Officer Phelps transported Appellant to the Stark County Jail and followed the regular booking procedure. After dropping Appellant off at the Stark County Jail, Officer Phelps failed to immediately search the backseat of the patrol car as procedurally required. Officer Phelps drove the car back to the City of Alliance Police Department, parked the car, and locked the car. Officer Phelps did not use the car to transport any other arrestees during the remainder of his shift.

{¶10} At the end of Officer Phelps's shift at 6:00 a.m. and approximately four hours after Appellant was arrested, Officer Phelps went to the patrol car to get his duty bag and clean the car. Officer Phelps shined his flashlight into the rear seat and noticed

a small plastic zip lock bag laying on the hump where the drive shaft goes from the transmission to the rear. The officer picked the bag up and field-tested the white substance in the bag. It tested positive for cocaine. Officer Phelps gave the bag to Officer Manse where the Stark County crime lab confirmed it contained 0.26 grams of cocaine.

{¶11} The Stark County Grand Jury indicted Appellant on one count of possession of cocaine. Appellant pleaded not guilty and the matter proceeded to a jury trial on November 5, 2009. The jury found Appellant guilty of possession of cocaine.

{¶12} On December 17, 2009, the trial court sentenced Appellant to two years of community control and 30 days in the Stark County Jail.

{¶13} Appellant now appeals and raises two Assignments of Error:

{¶14} "I. THE APPELLANT WAS DENIED A FAIR TRIAL DUE TO PREJUDICIAL INTERRUPTIONS BY THE TRIAL COURT.

{¶15} "II. THE TRIAL COURT'S FINDING OF GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

I.

{¶1} Appellant argues in his first Assignment of Error that the trial court's interruptions prevented Appellant from having a fair trial.

{¶2} Appellant first argues the trial court interrupted his counsel during his opening statement. During the course of Appellant's defense counsel's opening statement, the trial court made the following admonition:

{¶3} "MR. FRAME: * * * And there again there's a reason the State has the burden because you cannot prove your innocence, therefore it is up to the State to prove guilt.

{¶4} "The State made an assumption right from the beginning of this case. Instead of investigating the case further they just relied on that assumption.

{¶5} "Now they're in front of you, the jurors, and they're asking you to make an assumption as well. Ladies and gentlemen, that's not enough.

{¶6} "THE COURT: Counsel, this isn't closing argument; this is opening statement." (T. I-B, 16-17).

{¶7} In the second instance, Appellant argues the trial court interrupted defense counsel during his cross examination of Officer Manse. The details of the earlier proceedings in the trial are necessary for this Court to review Appellant's argument in context.

{¶8} The trial court granted Appellant's motion in limine to exclude evidence that Appellant's driver's license was suspended due to his failure to pay child support. (T. I, 5-9). The trial court gave the jury a qualifying instruction that Appellant was stopped for speeding and arrested because he had a suspended license. (T. I, 8).

{¶9} During the State's direct examination of Officer Manse, the State asked Officer Manse what occurred during the stop:

{¶10} "OFFICER MANSE: I had him exit the vehicle. I detected an odor of alcoholic beverage coming from him, had red, watery eyes. After he exited the vehicle, I did a - - just a quick pat down prior to doing a field sobriety test.

{¶11} "* * *

{¶12} "At that point I had confirmed he was under suspension through our dispatch and I placed him under arrest for driving under suspension.

{¶13} "THE COURT: Ladies and gentlemen, let me just interrupt at this point, the fact that this officer made the arrest for the individual driving under suspension, or any discussion with regard to whether his eyes were red, are not given to you to show the character of this Defendant or that he acted in conformity with that character at this particular time, but only as it relates to the basis for his stop of the vehicle and his arrest of the individual. In other words, you should not use that to judge this individual. With that qualification in place, you may proceed." (T. II, 8-10).

{¶14} On cross examination of Officer Manse, defense counsel inquired into the field sobriety tests Officer Manse conducted on Appellant:

{¶15} "MR. FRAME: And the whole purpose of you conducting those tests was to determine whether or not Mr. Hunt was under the influence of alcohol or drugs; is that correct?

{¶16} "OFFICER MANSE: Yes.

{¶17} "MR. FRAME: Was Mr. Hunt under the influence of alcohol or drugs?

{¶18} "OFFICER MANSE: He was under the influence of alcohol, yes.

{¶19} "MR. FRAME: You arrested him for driving under the influence of alcohol?

{¶20} "THE COURT: Counsel, I already ruled that whether or not he was or was not is not relevant to the determination of the factors in this case and I don't want the jurors to make a decision based on whether he was or was not under the influence of alcohol. That's not what's before them. So I've said to the State to stay away from that, I'm asking you to stay away from that. Let's proceed." (T. II, 24-25).

{¶21} Defense counsel asked to approach the bench and the following discussion ensued:

{¶22} "MR. FRAME: Your Honor, I just want to establish that he was not arrested for driving under the influence. That's the last question I have in this regard.

{¶23} "THE COURT: I understand what you're doing and I've already told them that he was - - the only basis was the suspended license. I will say that again, but you are opening the door. I do not want the jury making a decision and holding it against the individual that he may have had alcohol or anything like that. And so by reinforcing that, you're acting contrary to the interest of your client. Let's proceed. I'll give them a qualified instruction." (T. II, 25-26).

{¶24} Defense counsel proffered that Appellant was not arrested for being under the influence of alcohol. The trial court gave the jury a qualifying instruction that Appellant's use of alcohol was not the issue they were deciding. (T. II, 26).

{¶25} Appellant argues that the trial court's interruptions gave the trial court the appearance of partiality and bias against Appellant. In support of his argument, Appellant points to the case of *United States v. Hickman* (C.A.6, 1979), 592 F.2d 931. There, the trial judge dominated a one-day trial with "constant interruptions," exhibited a consistently anti-defense tone, interfered with defense's cross examination, and attacked the credibility of defense witnesses. Id. at 934-936.

{¶26} We find the two interruptions by the trial court in the present case in no way rises to the level of the actions of the judge in *Hickman*. The interruptions "did not pervade the trial" and "probably left little impression on the jury." *State v. Sanders* (2001), 92 Ohio St.3d 245, 278, 750 N.E.2d 90. The "interruptions" of the trial court in

the case *sub judice* served rather as instructions to defense counsel in his defense of Appellant.

{¶27} In the first instance, the trial court admonished defense counsel as to the proper form of an opening statement. Opening statements are not evidence and are intended only to advise the jury what counsel expects the evidence to show. *State v. Wilson,* Hamilton App. No. C-000670, 2002-Ohio-1854, citing *State v. Johnson* (Sept. 25, 1996), Hamilton App. No. C-950493, unreported. Counsel should be accorded latitude by the trial court in making an opening statement. *Columbus v. Hamilton* (1992), 78 Ohio App.3d 653, 657, 605 N.E.2d 1004, citing *Maggio v. Cleveland* (1949), 151 Ohio St. 136, 84 N.E.2d 912, paragraph two of the syllabus.

{¶28} We find in the case *sub judice*, defense counsel's comments went beyond the bounds of the opening statement. The trial court reminded defense counsel that the purpose of the opening statement was to comment upon the nature of the case and the evidence to be presented, not to make argument.

{¶29} In the second instance, in interrupting defense counsel's cross examination of Officer Manse, the trial court prevented defense counsel from opening the door to a matter that would prejudice Appellant. The issue before the jury was whether Appellant possessed cocaine on June 29, 2009. The trial court had previously limited inquiry into whether Appellant was driving under suspension due to his failure to pay child support and whether Appellant was under the influence of alcohol. The trial court determined that such evidence would serve to negatively influence the jury as to Appellant's character.

{¶30} The trial court's interjection cannot be characterized as an interruption in this instance, but rather an intervention to prevent defense counsel from engaging in a line of questioning that might damage Appellant's character in the eyes of the jury.

{¶31} We find Appellant's first Assignment of Error to be without merit.

II.

{¶32} Appellant argues in his second Assignment of Error that Appellant's conviction for possession of cocaine was against the sufficiency and manifest weight of the evidence.

{¶33} When reviewing a claim of sufficiency of the evidence, an appellate court's role 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. Contrary to a manifest weight argument, a sufficiency analysis raises a question of law and does not allow the court to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717, 175. 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." *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

{¶34} Conversely, when analyzing a manifest weight claim, this court sits as a "thirteenth juror" and in 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 clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed." *State v.*

Thompkins (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 548, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶35} As stated above, Appellant was convicted of possession of cocaine in violation of R.C. 2925.11(A)(C)(4)(a), which provides:

{¶36} "(A) No person shall knowingly obtain, possess, or use a controlled substance.

{¶37} " * * *

{¶38} "(C) Whoever violates division (A) of this section is guilty of one of the following:

{¶39} " * * *

{¶40} "(4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of possession of cocaine. The penalty for the offense shall be determined as follows:

{¶41} "(a) Except as otherwise provided in division (C)(4)(b), (c), (d), (e), or (f) of this section, possession of cocaine is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender."

{¶42} "Knowingly" is defined in R.C. 2901.22(B):

{¶43} "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."

{¶44} 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."

{¶45} Possession may be actual or constructive. *State v. Haynes* (1971), 25 Ohio St.2d 264, 267 N.E.2d 787; *State v. Hankerson* (1982), 70 Ohio St.2d 87, 434 N.E.2d 1362, syllabus. To establish constructive possession, the evidence must prove that the defendant was able to exercise dominion and control over the contraband. *State v. Wolery* (1976), 46 Ohio St.2d 316, 332, 348 N.E.2d 351. Dominion and control may be proven by circumstantial evidence alone. *State v. Trembly,* 137 Ohio App.3d 134, 738 N.E.2d 93. Circumstantial evidence that the defendant was located in very close proximity to readily usable drugs may show constructive possession. *State v. Barr* (1993), 86 Ohio App.3d 227, 235, 620 N.E.2d 242, 247-248; *State v. Morales,* 5th Dist. No. 2004 CA 68, 2005-Ohio-4714 at ¶ 50; *State v. Moses,* 5th Dist. No. 2003CA00384, 2004-Ohio-4943 at ¶ 9. Ownership of the drugs need not be established for constructive possession. *State v. Smith,* 9th Dist. No. 20885, 2002-Ohio-3034, at ¶ 13, citing *State v. Mann,* (1993) 93 Ohio App.3d 301, 308, 638 N.E.2d 585.

{¶46} If the State relies on circumstantial evidence to prove an essential element of an offense, it is not necessary for "such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction." *State v. Jenks* (1991), 61 Ohio St.3d 259, 272, 574 N.E.2d 492 at paragraph one of the syllabus. "Circumstantial evidence and direct evidence inherently possess the same probative value [.]" *Jenks,* 61 Ohio St.3d at paragraph one of the syllabus. Furthermore, "[s]ince

circumstantial evidence and direct evidence are indistinguishable so far as the jury's fact-finding function is concerned, all that is required of the jury is that i[t] weigh all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt." *Jenks,* 61 Ohio St.3d at 272, 574 N.E.2d 492. While inferences cannot be based on inferences, a number of conclusions can result from the same set of facts. *State v. Lott* (1990), 51 Ohio St.3d 160, 168, 555 N.E.2d 293, citing *Hurt v. Charles J. Rogers Transp. Co.* (1955), 164 Ohio St. 329, 331, 130 N.E.2d 820. Moreover, a series of facts and circumstances can be employed by a jury as the basis for its ultimate conclusions in a case. *Lott,* 51 Ohio St.3d at 168, 555 N.E.2d 293, citing *Hurt,* 164 Ohio St. at 331, 130 N.E.2d 820.

{¶47} The question in this case is whether, from the totality of the circumstantial evidence, the trier of fact could find, beyond a reasonable doubt, that Appellant had possessed the cocaine before Officer Phelps found it in his patrol car. See *State v. Byrd*, Montgomery App. No. 23323, 2010-Ohio-2128, ¶16. Upon our review of the record, we find Appellant's conviction for possession of cocaine was not against the sufficiency of the evidence because, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found that Appellant knowingly possessed cocaine.

{¶48} Testimony was adduced at trial that Officer Manse and Officer Phelps patted Appellant down and searched Appellant's pockets looking for weapons and contraband after Appellant was arrested. There is no testimony that the officers searched beyond Appellant's pants pockets and they did not search the watch pocket in Appellant's pants.

{¶49} Officer Phelps testified that he had cleaned the rear of his patrol car before transporting Appellant to the Stark County Jail. (T. II, 39). Appellant was handcuffed with two sets of handcuffs allowing Appellant greater range of movement. (T. II, 10). While Officer Phelps transported Appellant to the Stark County Jail, Appellant was fidgety in the back seat and was moving around. (T. II, 36).

{¶50} After Officer Phelps transported Appellant to the jail, Officer Phelps drove his patrol car back to the City of Alliance Police Department and locked the car. He did not transport anyone else during the remainder of his shift. (T. II, 40). At the end of his shift, Officer Phelps came back to his car to clean it out and get his duty bag. He shined his flashlight in the rear seat and he noticed the plastic baggie containing cocaine in the rear of the car. (T. II, 40).

{¶51} From the circumstantial evidence presented, a jury could reasonably infer that Appellant knowingly possessed the baggie of cocaine and then removed it from his person while he was transported to the Stark County Jail, leaving it in Officer Phelps's patrol car. Based upon the testimony set forth above, we find that, after viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of possession of cocaine was proven beyond a reasonable doubt. Therefore, Appellant's conviction is supported by legally sufficient evidence.

{¶52} Moreover, upon review of the record, this Court cannot conclude that the jury lost its way and created a manifest miscarriage of justice when it found Appellant guilty of possession of cocaine.

{¶53} The circumstantial evidence in this case could allow the jury to reasonably infer that Appellant knowingly possessed the small, plastic baggie of cocaine before he left it in the police cruiser. Officer Phelps testified that before Appellant was placed in his patrol car, the plastic baggie of cocaine was not there. After transporting Appellant, Officer Phelps did not transport any more arrestees during his shift. When Officer Phelps searched the patrol car at the end of his shift, he found the plastic baggie of cocaine in the rear of his patrol car. This Court must afford the decision of the trier of fact concerning credibility issues the appropriate deference. We will not substitute our judgment for that of the trier of fact on the issue of witness credibility unless it is patently clear that the fact finder lost its way. *State v. Parks,* 3rd Dist. No. 15-03-16, 2004-Ohio-4023, at ¶ 13, citing *State v. Twitty,* 2nd Dist. No. 18749, 2002-Ohio-5595, at ¶ 114.

{¶54} Appellant's second Assignment of Error is therefore overruled.

{¶55} The judgment of the Stark County Court of Common Pleas is affirmed.

By Delaney, J.

Hoffman, P. J. and

Farmer, J. concur.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
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	:	
-vs-	:	JUDGMENT ENTRY
	:	
SCOTT LEE HUNT	:	
	:	
Defendant-Appellant	:	Case No. 2010CA00016

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER