

[Cite as *State v. Fleming*, 2015-Ohio-5382.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 2014-CA-136
Plaintiff-Appellee	:	
	:	Trial Court Case No. 14-CR-250
v.	:	
	:	(Criminal Appeal from
JERMAINE FLEMING	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 22nd day of December, 2015.

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FAIN, J.

{¶ 1} Defendant-appellant Jermaine Fleming appeals from his conviction and

sentence for Having Weapons While Under Disability. He contends that the trial court did not properly instruct the jury on the definition of possession. He also contends that the State did not present evidence sufficient to sustain the conviction, and that the conviction is against the manifest weight of the evidence. Finally, Fleming claims that the trial court erred in sentencing.

{¶ 2} We conclude that the trial court gave an appropriate and correct definition of possession, and that it did not abuse its discretion in denying Fleming's requested alternate instruction, which did not set forth a definition applicable to this case. We further conclude that there is sufficient evidence in the record to sustain the conviction, and that the conviction is not against the manifest weight of the evidence. Finally, we conclude that the trial court did not err in sentencing.

{¶ 3} Accordingly, the judgment of the trial court is Affirmed.

I. Fleming Is Found Sleeping in a Car, with a Handgun on his Lap

{¶ 4} Early one morning in early April 2015, Springfield Police Officer Tyler McCarty and his partner, Josh Clark, were on routine patrol on West Southern Avenue when they spotted a red Dodge Magnum legally parked on the side of the road, with its brake lights on. The officers drove by the car, noting that its windows were tinted so that they could not observe what was inside. The officers ran a check of the license plate, and determined that it did not belong to that vehicle. The officers then pulled a bit down the street, and sat and watched the vehicle for about fifteen minutes. During that time, no one exited, or returned to, the vehicle. The officers then approached the vehicle, shined a light into the window, and observed Fleming in the driver's seat, with the seat reclined,

sleeping with a handgun in his lap. The motor was running, and the doors were locked.

{¶ 5} The officers called for backup. Once other officers arrived, they placed stop sticks around the car, activated their overhead lights, and knocked on the vehicle window. Fleming woke up, and, as instructed, raised his hands and unlocked the doors. Fleming was taken into custody, and was advised of his rights. At that point, he stated that he could not believe that he had that “little dumb sh*t” on him.

II. Course of the Proceedings

{¶ 6} Fleming was indicted on one count of Having Weapons While Under Disability, in violation of R.C. 2923.13(A)(2), one count of Having Weapons While Under Disability, in violation of R.C. 2923.13(A)(3), and one count of Improper Handling of a Firearm in a Motor Vehicle, in violation of R.C. 2923.16(B).

{¶ 7} During trial, the parties stipulated that Fleming had prior convictions for Possession of Drugs and Aggravated Burglary. The parties also stipulated that the gun found on Fleming was operable. Robert Benton testified on behalf of Fleming. He testified that he and Fleming had been at a bar together, where Benton met a girl. According to Benton, he made plans to meet the girl at Fleming’s home later that night. At some time later, Fleming drove Benton to Fleming’s home. Benton testified that Fleming fell asleep while the two were parked beside Fleming’s home, waiting for the girl to arrive. Benton testified that when the girl arrived, he put his handgun on Fleming’s lap. Benton testified that he did this because the neighborhood was dangerous, and he was concerned for Fleming’s safety.

{¶ 8} Following trial, Fleming was acquitted on the charge of Improper Handling of

a Firearm in a Motor Vehicle, but was convicted on the remaining two charges. The trial court merged the two charges of Having Weapons While Under Disability, and sentenced Fleming to a prison term of thirty-six months. Fleming appeals.

III. The Trial Court Gave the Jury an Appropriate Instruction Concerning “Possession” for Purposes of Having a Weapon while Under a Disability; it Was Not Required to Give an Instruction Appropriate for a Drug Possession Charge

{¶ 9} Fleming’s First Assignment of Error states as follows:

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY AS TO THE DEFINITION OF POSSESSION BECAUSE POSSESSION WAS AN ELEMENT OF THE OFFENSES.

{¶ 10} Fleming contends that the trial court did not properly instruct the jury with regard to the definition of “possession.” His argument is somewhat convoluted, but hinges upon the claim that he lacked knowledge that the gun was in his lap, because it was placed there while he was asleep. He claims that he could not have knowingly possessed the gun. Therefore, he argues that the proper definition of possession is the one set forth in R.C. 2925.01(K), which provides that possession cannot be inferred from having mere access to the weapon without a showing of intent to possess.

{¶ 11} We begin by noting that Fleming orally requested the trial court to utilize his instruction on possession right after the trial court finished reading the instructions to the jury, but before the jury was sent out to deliberate. There is nothing in this record setting forth the exact language to be used in the requested instruction. Normally, we

would conclude that this constituted a forfeiture of this argument. However, the State appears to concede that Fleming asked for the definition set forth in R.C. 2925.01(K), which states: “ ‘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.”

{¶ 12} R.C. 2925.01(K) is a definitional statute located in the Ohio Revised Code Chapter dealing with drug offenses. There is no indication in the Code that the provisions of R.C. 2925.01(K) are applicable to violations of R.C. 2923.13. Indeed, at least one court has held that it is not error to fail to include the drug offense “mere access” definition of possession in jury instructions during a trial for Having a Weapon While Under a Disability. See *State v. Houston*, 1st Dist. Hamilton No. C-090536, 2010-Ohio-2367, ¶ 20.

{¶ 13} More importantly, this is not a case involving mere access, or close proximity, to a weapon, as, for example, where a gun is located under the driver’s seat of a vehicle operated by the person accused of possessing the weapon. Regardless, in his attempt to argue that he did not knowingly have the weapon in his lap, Fleming improperly interjects mere access or close proximity into this case. In other words, there is no dispute that the gun in this case was located on Fleming’s lap. The only issue is whether he knew it was there. Thus, common sense dictates that an instruction on mere access is inapplicable, and might only have served to confuse the jury.

{¶ 14} “The giving of jury instructions is within the sound discretion of the trial court and will not be disturbed upon appeal unless the record reflects that the trial court abused

its discretion.” *State v. Houston*, 1st Dist. Hamilton No. C-090536, 2010-Ohio-2367, ¶ 20, citing *State v. Guster*, 66 Ohio St.2d 266, 271-272, 421 N.E.2d 157 (1981). The trial court instructed the jury on the definition of “to possess” exactly as set forth in the Ohio Jury Instructions, Section CR 417.21(3). This instruction was applicable to the facts of this case, and was an appropriate description of the legal significance of the word. Thus, we conclude that the trial court did not abuse its discretion by denying the requested instruction.

{¶ 15} The First Assignment of Error is overruled.

IV. The Trial Court Did Not Err in Imposing a Maximum Prison Sentence

{¶ 16} Fleming’s Second Assignment of Error is as follows:

THE TRIAL COURT ERRED IN IMPOSING A MAXIMUM SENTENCE UPON FLEMING.

{¶ 17} Fleming contends that the trial court improperly imposed a maximum sentence.

{¶ 18} We have held, however, that “[a] trial court is not required to state that it considered R.C. 2929.11 and R.C. 2929.12. Unless the sentence is contrary to law, a trial court is presumed to have considered them.” *State v. Neff*, 2d Dist. Clark No. 2012–CA–31, 2012–Ohio–6047.

{¶ 19} Fleming was convicted, pursuant to R.C. 2923.13(A)(2), of Having a Weapon While Under Disability, which is a felony of the third degree. Pursuant to R.C. 2929.14(A)(3)(b), the basic prison term for a felony of the third degree shall be nine, twelve, eighteen, twenty-four, thirty, or thirty-six months. The sentence imposed was

within this range, and thus, was not contrary to law. The trial court indicated in the judgment entry of conviction that it considered the purposes and principles of felony sentencing set forth in R.C. 2929.11, and the seriousness and recidivism factors in R.C. 2929.12. Fleming had prior convictions for Possession of Cocaine and Aggravated Robbery, for which he served a prison term of seven years. Fleming denied responsibility for the offense, and showed no remorse therefor. We conclude that the trial court did not abuse its discretion in imposing the maximum sentence.

{¶ 20} Fleming claims that the trial court improperly considered a firearm specification that had been dismissed in the prior Aggravated Burglary prosecution. However, the trial court, when reviewing the past criminal history, merely noted that a firearm had been used in the commission of the offense. There is nothing to indicate that this fact improperly influenced the sentence. Also, there is nothing in the record to support Fleming's claim that the trial court did not consider letters presented on his behalf with regard to sentencing.

{¶ 21} The Second Assignment of Error is overruled.

**V. There Is Sufficient Evidence to Support the Conviction, which Is Not
Against the Manifest Weight of the Evidence**

{¶ 22} The Third Assignment of Error states:

THE EVIDENCE WAS INSUFFICIENT THAT FLEMING HAD
POSSESSION OF THE FIREARM.

{¶ 23} Fleming contends that the State failed to produce evidence sufficient to sustain the conviction. He further claims that the conviction is against the manifest

weight of the evidence. In support, he argues that the State failed to prove that he knowingly possessed the gun, because the evidence presented indicated that he was asleep, and there was no evidence to indicate that he was aware the gun was in his lap.

{¶ 24} 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 to sustain the verdict as a matter of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1999). The proper test to apply to such an inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991): “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.” In contrast, when reviewing a judgment under a manifest-weight standard of review “ [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 [factfinder] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.’ ” *Thompkins* at 387, 678 N.E.2d 541, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1982).

{¶ 25} Fleming was convicted of Having a Weapon While Under a Disability, in violation of R.C. 2923.13, which states, in pertinent part: “Unless relieved from disability under operation of law or legal process, no person shall knowingly acquire, have, carry,

or use any firearm or dangerous ordnance * * *.” “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.” R.C. 2901.22(B).

{¶ 26} “In order to ‘have’ a firearm, one must either actually or constructively possess it.” *State v. Ridley*, 10th Dist. Franklin No. 03AP-1204, 2005-Ohio-333, ¶ 18, citing *State v. Hardy*, 60 Ohio App.2d 325, 327, 397 N.E.2d 773 (8th Dist. 1978); *State v. Messer*, 107 Ohio App.3d 51, 56, 667 N.E.2d 1022 (9th Dist. 1995). Actual possession requires ownership and/or physical control. *State v. Long*, 8th Dist. Cuyahoga No. 85754, 2005-Ohio-5344, ¶ 16. Constructive possession can be established by the fact that an individual had access to the gun and the ability to control its use. *Id.*, ¶ 17.

{¶ 27} Fleming cites *In re: Montgomery*, 10th Dist. Franklin No. 99AP-749, 2000 WL 329074 (Mar. 30, 2000), and *State v. Thomas*, 11th Dist. Trumbull No. 95-T-5253, 1996 WL 648947 (Oct. 11, 1996), for the proposition, that without more evidence, the mere fact that a gun is found near the defendant is not sufficient to demonstrate the element of possession. We find those two cases inapplicable to the facts herein, since both involved guns that were not on the defendant’s person, but were rather, near the defendant.

{¶ 28} In this case, the gun was in Fleming’s lap. Although he was asleep, there was no evidence that he was intoxicated or under the influence of drugs. He was in his running car, with the doors locked, beside his house. Benton did not claim to have locked the car doors; thus, the jury could reasonably infer that Fleming was awake, and locked the car doors, some time after Benton exited the vehicle. Furthermore, while Benton’s

testimony presents a possible alternative construction of the evidence that, if believed, might support a conclusion that Fleming did not knowingly possess the gun, the jury was free to discredit that testimony. Without Benton's testimony, the evidence would permit a reasonable jury to infer that Fleming knowingly possessed the gun in his lap at some time before he fell asleep.

{¶ 29} The Third Assignment of Error is overruled.

VI. Conclusion

{¶ 30} All of Fleming's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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FROELICH, P.J., and HALL, J., concur.

Copies mailed to:

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