[Cite as *State v. Williams*, 2009-Ohio-5553.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 92009 and 92010

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANDREW WILLIAMS and KEVIN GYLES

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-499580

BEFORE: Kilbane, J., Rocco, P.J., Sweeney, J.

RELEASED: October 22, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY EILEEN KILBANE, J.:

{¶ 1} Appellants, Andrew Williams ("Williams") and Kevin Gyles ("Gyles") (collectively known as "appellants"), appeal their convictions for drug possession, drug trafficking, and possession of criminal tools. In separate but identical briefs, they argue that the verdicts are against the manifest weight and sufficiency of the evidence, and they were denied effective assistance of counsel. They further argue that the trial court erred in failing to suppress evidence found in their vehicle, that the trial court erred in declaring a mistrial, and by allowing hearsay. For the reasons set forth below, we remand these matters to the trial court to merge appellants' convictions for possession of drugs and drug trafficking and to impose a single conviction and sentence for those allied offenses. We affirm the convictions in all other respects.

Facts

{¶ 2} The following facts are gleaned from the record. On July 30, 2007, the Cleveland Police Department's First District Vice Unit was conducting surveillance on a residence located at 3487 West 100th Street, upstairs,[1] Cleveland, Ohio. Based upon information they received from a confidential reliable informant ("CRI"), the Cleveland police believed that Anthony Scarton was selling large quantities of marijuana out of the upstairs residence. This

[1]The residence is a double occupancy structure.

information was confirmed through a controlled buy conducted by the First District Vice Unit.

{¶ 3} According to vice detectives, the CRI also relayed to the police that Scarton received regular shipments of marijuana to the West 100th Street address in three- to ten-pound quantities, that Scarton paid $1,050 per pound, and that the marijuana was delivered by two Jamaican nationals in a black Nissan or Infiniti sedan regularly between Monday and Friday throughout the course of any given week. These individuals were later identified as Gyles and Williams.

{¶ 4} Based upon the controlled buy and the information from the CRI, the police obtained a search warrant for the premises, which they executed on August 1, 2007, at approximately 8:30 p.m. After the warrant was executed and the police were conducting an inventory of the house, one of the officers on the scene, Detective Moran, observed a black sedan pulling into the backyard of the premises. Aware that the vehicle matched the description that the police had previously been given as the delivery vehicle driven by the suspected drug couriers, Detective Moran and his fellow officers descended the stairs of the premises and met the vehicle as it came to a stop in the backyard. Inside the vehicle were Williams, who was driving, and Gyles, who was sitting in the front passenger's seat. After exiting the vehicle, they were detained by the police. A search of the vehicle revealed approximately 11½ pounds of fresh marijuana in the trunk, prepared in one pound blocks for sale.

{¶ 5} An investigation by the police officers determined that the vehicle was registered to Sean Brown ("Brown"). Brown is the brother of Gyles and an acquaintance of Williams. After searching the car, detectives obtained a search warrant for Brown's home at 11714 Iowa Avenue on Cleveland's east side. At Brown's home, the police found over $8,000 in cash and a large quantity of packaging material commonly used to ship marijuana cross-country, some of which bore mailing labels from Arizona and California. This packaging material was identical to that found at the West 100th Street address and matched the packaging material on the marijuana found in the trunk of the car. Police also found mail and personal paperwork that indicated Gyles and Brown lived at the Iowa address together, including Gyles's Jamaican birth certificate.

{¶ 6} On August 15, 2007, Gyles and Williams were indicted by the Cuyahoga County Grand Jury with two additional codefendants, Anthony Scarton and Sean Brown. The counts in the indictment pertaining to Gyles and Williams included one count of drug possession, a third degree felony, in violation of R.C. 2925.11; one count of drug trafficking, a third degree felony, in violation of R.C. 2925.03(A)(2); and one count of possession of criminal tools, a fifth degree felony, in violation of R.C. 2923.24(A).

{¶ 7} Appellants were represented by a single trial counsel.

{¶ 8} On October 16, 2007, their trial counsel filed a motion to suppress evidence seized as a result of the vehicle search in this matter.

{¶ 9} On December 5, 2007, the trial court held a hearing on the motion to suppress, which was denied on the same day.

{¶ 10} On June 11, 2008, the case proceeded to trial. During the voir dire of the initial jury panel, the court declared a mistrial over defense counsel's objection because the entire venire was tainted by those jurors who were "not taking marijuana seriously at all." (Tr. 137.)

{¶ 11} On June 18, 2008, the court reconvened a new jury venire, from which a jury was empaneled and sworn.

{¶ 12} On June 20, 2008, the jury convicted Gyles and Williams of the offenses outlined above.

{¶ 13} This appeal followed.

{¶ 14} The appellants set forth the identical facts, arguments, and assignments of error in their briefs. For the sake of judicial economy, we therefore address their assignments of error jointly. Their first assignment of error states:

> **"The trial court erred when it denied appellant's motion to suppress evidence."**

{¶ 15} A reviewing court is bound to accept the trial court's findings of fact in ruling on a motion to suppress if the findings are supported by competent, credible evidence. *State v. Klein* (1991), 73 Ohio App.3d 486, 597 N.E.2d 1141. However, the reviewing court must independently determine, as a matter of law, without deference to the trial court's conclusion, whether the

trial court's decision meets the appropriate legal standard. *State v. Claytor* (1993), 85 Ohio App.3d 623, 627, 620 N.E.2d 906.

{¶ 16} The Fourth Amendment to the United States Constitution reads in part:

> **"[T]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."**

{¶ 17} Article I, Section 14 of the Ohio Constitution is nearly the same.

{¶ 18} Gyles and Williams argue that the trial court failed to suppress the marijuana found in the trunk of their vehicle. They argue that the warrant for the West 100th Street premises was limited to the house only and not applicable to them and their vehicle. In support of their contention, they argue that the instant case is factually analogous to *Ybarra v. Illinois* (1979), 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238, where the United States Supreme Court disallowed the searches of tavern customers patronizing an establishment at the time the police executed a warrant at the tavern based solely on the bartender's alleged illegal activities. However, we find *Ybarra* is easily distinguished from the instant case. In *Ybarra*, the court found that the search warrant at issue did not extend to the general public patronizing a bar. In this case, the warrant was limited solely to the "described premises" of 3487 West 100th Street, "its curtilage, common and storage areas, and the persons present therein * * *."

{¶ 19} The appellants point to the testimony of Detective Michael Duller ("Detective Duller") as evidence that this case is factually similar to *Ybarra*.[2] Detective Duller stated under cross-examination at the suppression hearing that he believed all persons entering the home or in the home were subject to search.

{¶ 20} The Ohio Supreme Court enunciated the standard for proper issuance of an "all persons" search warrant in *State v. Kinney* (1998), 83 Ohio St.3d 85, 698 N.E.2d 49, syllabus:

> **"A search warrant authorizing the search of 'all persons' on a particular premises does not violate the Fourth Amendment requirement of particularity if the supporting affidavit shows probable cause that every individual on the subject premises will be in possession of, at the time of the search, evidence of the kind sought in the warrant."**

{¶ 21} Furthermore, the court noted that probable cause will more likely exist to support the search of all persons within a private residence than it would for a search of all persons in a place open to the public. Id. at 91.[3] In this case,

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[2]Specifically, appellants point to the following exchange between Detective Duller and their trial counsel:

> "Q: So if anybody came into the house, they were going to get arrested?
> A: Anyone that – again, because it's a trafficking search warrant, anyone coming into the house, anyone present in the house is subject to search." (Tr. 22.)

[3]The *Kinney* court reasoned that when executing an "all persons" warrant in a public place, there exists a substantial likelihood that a person with no connection to the

the warrant was not related to a search of all persons in a public place, but was limited by its terms to the common areas, curtilage, and people present at the private residence. It is therefore entirely distinguishable from *Ybarra*.

Whether Gyles and Williams Fall Within the Terms of the Search Warrant

{¶ 22} We need not address the trial court's decision to deny the motion to suppress on the grounds that the car and its passengers came within the ambit of the warrant for the West 100th Street premises, because separate grounds exist for denying suppression independent of the warrant requirement. In this case, the search and seizure of marijuana in appellants' vehicle falls under the automobile exception to the warrant requirement.

{¶ 23} Probable cause exists where the facts and circumstances within the arresting officer's knowledge, and of which he had reasonably trustworthy information, are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been or is being committed. *Carroll v. United States* (1925), 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543; *Henry v. United States* (1959), 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134; *Ker v. California* (1963), 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726; *Beck v. Ohio* (1964), 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142; *State v. Fultz* (1968), 13 Ohio St.2d 79, 234 N.E.2d 593.

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criminal wrongdoing might be subjected to a search without probable cause. The court also found a search for illegal drugs is more likely to support a search of all persons rather than a search for evidence of many other crimes.

{¶ 24} In this case "the facts available at the moment of the arrest" included a vehicle and occupants matching the exact description of suspected drug couriers arriving at the West 100th Street home being searched by police. This, coupled with the strong smell of fresh marijuana emanating from the car contemporaneously with the officers' approach, would warrant a person of reasonable caution in the belief that an offense has been committed. *Beck* at 96, quoting *Carroll* at 162.

{¶ 25} We note further that a search of the vehicle was justified by the exigent circumstances presented by Williams and Gyles by virtue of their presence in the vehicle matching the drug courier description. In such cases, the mobility of the vehicle and its passengers, coupled with the danger that suspected contraband could be disposed of or distributed before a warrant is obtained, clearly justifies the search of the vehicle without a warrant. See *State v. Moore,* 90 Ohio St.3d 47, 2000-Ohio-10, 734 N.E.2d 804, citing *Cupp v. Murphy* (1973), 412 U.S. 291, 294-296, 93 S.Ct. 2000, 2003-2004, 36 L.Ed.2d 900, 905-906.

{¶ 26} Also, the strong smell of marijuana emanating from the vehicle justified a search of the vehicle without a warrant based upon the "plain smell doctrine" under the automobile exception to the warrant requirement adopted in Ohio by *Moore*, holding "that the smell of marijuana, alone, by a person qualified to recognize the odor, is sufficient to establish probable cause to search a motor

vehicle, pursuant to the automobile exception to the warrant requirement." Id. at 47.

{¶ 27} Based upon the exigent circumstances surrounding their encounter with the police and the plain smell of marijuana emanating from the vehicle, no warrant was needed to search this vehicle.

{¶ 28} Appellants' first assignment of error is overruled.

{¶ 29} Appellants' second assignment of error states:

> **"The trial court erred by declaring a mistrial during the first jury trial selection process."**

{¶ 30} Within this assignment of error, Gyles and Williams argue that the trial court erred by sua sponte declaring a mistrial because the prospective jurors on the case were "not taking marijuana seriously at all." (Tr. 137.) They contend that the State never asked for a mistrial and that it did not demonstrate the material prejudice necessary to warrant the declaration of a mistrial. We disagree.

{¶ 31} The decision to grant or deny a mistrial rests within the sound discretion of the trial court. *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E. 2d 637. A trial court has the discretion to sua sponte declare a mistrial where: (1) manifest necessity or a high degree of necessity dictate; (2) the trial judge has no reasonable alternative to declaring a mistrial; and (3) the public interest in fair trials designed to end in just judgments is best served by ordering a mistrial. *State v. Widner* (1981), 68 Ohio St.2d 188, 190, 429 N.E.2d 1065.

Here, the trial court was in the best position to determine whether the situation at hand warranted the declaration of a mistrial. *State v. Glover* (1988), 35 Ohio St.3d 18, 19, 517 N.E.2d 900.

{¶ 32} The situation in this case included two prospective jurors who thought marijuana should be legal, and that fellow prospective jurors were openly laughing between themselves at the prospect of serving on the case. Despite this, the court tried at length to rehabilitate one of the jurors on this issue, only to find his beliefs shared by other potential jurors. In such an instance, it was not an abuse of discretion to declare a mistrial. *Widner*, supra.

{¶ 33} Appellants' second assignment of error is overruled.

{¶ 34} Appellants' third assignment of error states:

"The trial court erred by allowing hearsay into the record over defense counsel's objections."

{¶ 35} Within this assignment of error, Gyles and Williams claim that the trial court erred in admitting several statements into the record that they characterize as hearsay. These "statements" include Gyles's Jamaican birth certificate and certain statements by Detective Duller, who testified on direct examination during the State's case-in-chief about the process for obtaining fingerprint evidence.

{¶ 36} In Ohio, hearsay is defined as a "statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Ohio Evid.R. 801(C). The admissibility of a birth

record is controlled by Evid.R. 803. However, Evid.R. 803(9) creates an exception for records of births, deaths, marriages or fetal deaths, which are generated pursuant to law. In this case, a properly certified birth certificate for Kevin Gyles was introduced and accepted into evidence.

{¶ 37} Appellants cloak their hearsay argument within a chain of custody claim with respect to this document's production. They argue that there was conflicting testimony among the investigating officers concerning who actually found Gyles's birth certificate at Sean Brown's residence on Iowa Avenue, where they located it, and who presented it to the supervising officer. However, the availability or unavailability of the declarant is not relevant to the admissibility of records such as this one. Under Evid.R. 902(4), the properly certified official public record (birth certificate) is self-authenticating and does not require additional testimonial foundation. Further, regardless of which officer found the Jamaican birth certificate, there is no challenge to the chain-of-custody of the document that would affect its validity or admissibility in court. It was therefore not error to admit this document into evidence.

{¶ 38} With respect to Detective Duller's fingerprint testimony, Gyles and Williams argue that it was error to admit Detective Duller's testimony about what the Scientific Investigation Unit ("SIU") would have done in terms of processing the home if they had been called to the scene, and also that it was error for Detective Duller to testify about the difficulty of obtaining fingerprints from certain surfaces, such as plastic bags.

{¶ 39} Despite the fact that appellants characterize these as hearsay arguments, they really contend that Detective Duller improperly speculated about what the SIU would have done if they were on scene when the warrant was being executed, and that Detective Duller was not properly qualified as a forensic expert before giving testimony on fingerprint evidence. We reject both of these arguments.

{¶ 40} First, we note that Detective Duller was never offered as an expert witness, nor was he required to be in order to give testimony on this case. Evid.R. 701 states that "if the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue."

{¶ 41} Detective Duller testified about his 15 years of experience on the Cleveland Police Department, including his five years of service as a detective on the vice squad, his arrest record, and his skill and training as a detective who specializes in street crimes, including drug interdiction and arrests. Detective Duller testified strictly from his experience and his perceptions. The mere fact that some of this testimony was opinion testimony does not make it more likely to be hearsay. In this case, no expert testimony was necessary on the fingerprint issue, not only because fingerprint evidence was never even a tertiary issue in the case, but also because such testimony fell squarely within the ambit of

Evid.R. 701. Finally, Detective Duller's first-hand testimony helped the jury understand the evidence he did find at the scene.

{¶ 42} Appellants' third assignment of error is overruled.

{¶ 43} Appellants' fourth assignment of error states:

"Appellant was Prejudiced by Ineffective Assistance of Counsel."

{¶ 44} Within this assignment of error, Gyles and Williams claim that their counsel was deficient because he was not paying attention to the case and he demonstrated a lack of knowledge about the facts of the case. In support of this, appellants cite their trial counsel's motion for mistrial at the close of the State's case-in-chief. They claim that this motion relied on evidence that was not in the record, or in the alternative, misstated evidence in the record.

{¶ 45} Appellants' counsel moved for mistrial on the basis of Detective Duller's testimony about who made the marijuana deliveries to the West 100th Street address. Specifically, their trial counsel contended that Detective Duller's testimony that the Cleveland Police Department was forewarned that the deliveries were being made by two Jamaican nationals constituted hearsay, since the information could only have come through either the Cleveland Police Department's CRI or a codefendant.

{¶ 46} To prevail on a claim of ineffective assistance of defense counsel, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness and (2) that counsel's deficient performance resulted

in real prejudice. See *Strickland v. Washington* (1984), 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.E.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. Judicial scrutiny of defense counsel's performance must be highly deferential. *Strickland* at 689. A strong presumption exists that a licensed attorney is competent and that the challenged action is the product of sound trial strategy and falls within the wide range of professional assistance. Id. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 687.

{¶ 47} However, outside of the blanket assertion that their counsel failed to properly argue the motion for mistrial, Gyles and Williams offer nothing to rebut the presumption that their counsel's actions were the product of a sound trial strategy. Appellants speculate that the motion inferred to the jury that "defense counsel has no idea what the evidence is in the case," and that because of that, the jury would assume that they should not pay attention to the evidence. We reject this argument.

{¶ 48} What Gyles and Williams really argue is not that the motion was made. Instead, they take issue with how the motion was made. However, there are numerous ways to provide effective assistance of counsel, and debatable trial tactics and strategies do not constitute a denial of that assistance. *State v. Clayton* (1980), 62 Ohio St.2d 45, 49, 402 N.E.2d 1189. "A reviewing court may not second-guess decisions of counsel which can be considered matters of trial

strategy." *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128. Indeed, it is hard to discern how counsel would be deficient for moving for mistrial.

{¶ 49} "A properly licensed attorney in Ohio is presumed competent. Thus, the burden of proving ineffectiveness is on the defendant." Id. at 100. Outside of suggesting that their trial counsel improperly argued a motion by incorrectly misstating a detective's testimony, Gyles and Williams cannot show that this, or raising the motion itself, constituted ineffective assistance of counsel.

{¶ 50} Finally, we note that even assuming arguendo that their counsel's representation fell below the objective standard of reasonableness found in *Strickland*, we find that appellants' arguments still fail under the second prong of *Strickland* because they have not shown that their counsel's performance at trial resulted in any demonstrable prejudice, or that the outcome of the trial would have been different.

{¶ 51} Appellants' fourth assignment of error is overruled.

{¶ 52} Appellants' fifth assignment of error states:

> **"The jury's verdict is against the manifest weight of the evidence."**

{¶ 53} Gyles argues that the State failed to prove that he knowingly possessed and trafficked the subject marijuana, or that he knowingly possessed criminal tools in this case, because he was a passenger, merely riding along with Williams to collect a gambling debt. This argument goes to the elements of the

crimes Gyles was charged with committing, which challenges the sufficiency of the evidence, not its manifest weight.

{¶ 54} Williams argues that he asked codefendant Brown to borrow Brown's vehicle to collect a gambling debt from Anthony Scarton. According to Williams, this story exonerates him and Gyles by removing any possibility that either of them had knowledge of drugs in the car, since Williams merely borrowed the car from its true owner for a short time.

{¶ 55} In Ohio, sufficiency of the evidence arguments present questions of law, while claims based upon the manifest weight of the evidence present questions of fact. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. In *Thompkins*, the Supreme Court illuminated its test for manifest weight of the evidence as follows:

> **"Weight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other.' It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in***

***inducing belief.*" Id., quoting Black's Law Dictionary (6 Ed. 1990) 1594. (Emphasis in original.)**

{¶ 56} This court, reviewing the entire record, essentially sits as a "thirteenth juror," weighing the evidence and all reasonable inferences. See *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720-721. In so doing, we 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." Id. 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. Id.

{¶ 57} In this matter, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice by convicting Gyles and Williams of the instant offenses. After reviewing their arguments, we are not persuaded that the evidence in this matter weighs heavily against conviction.

{¶ 58} In this case, appellants' arguments ignore the State's evidence as outlined above. Gyles and Williams would have this court believe that they were merely unwitting occupants of a car bearing a large quantity of fresh marijuana to a known drug house, that they had no idea of the contents of the vehicle or its purpose. On the other hand, the State's evidence, in addition to

that provided by the CRI regarding the identity of the drug couriers and the description of their vehicle, was that the odor of marijuana emanating from the trunk of the vehicle Gyles and Williams occupied was so strong that it could be distinctly smelled from as far as ten feet away from the vehicle.

{¶ 59} When assessing witness credibility "the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123, 489 N.E.2d 547. The fact-finder is free to believe all, part, or none of the testimony of each witness appearing before it. *Hill v. Briggs* (1996), 111 Ohio App.3d 405, 412, 676 N.E.2d 547. Indeed, the court below is in a much better position than an appellate court "to view the witnesses, to observe their demeanor, gestures and voice inflections, and to weigh their credibility." *Briggs*, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

{¶ 60} Here, the jury, as the trier of fact, weighed the evidence, considered the facts and the credibility of the witnesses, and found Gyles and Williams guilty.

{¶ 61} Because the evidence does not weigh heavily against conviction for any of the offenses of drug possession, drug trafficking or possession of criminal tools for either Gyles or Williams, we will not order a new trial.

{¶ 62} Appellants' fifth assignment of error is overruled.

{¶ 63} Appellants' sixth assignment of error reads:

"The Verdict is Not Supported by Sufficient Evidence."

{¶ 64} Gyles and Williams argue that the State failed to prove they were guilty of each and every element of the offenses they were charged with. We disagree.

{¶ 65} "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 person of 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." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492.

{¶ 66} "Sufficiency is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." *Thompkins* at 386. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio St. 486, 124 N.E.2d 148.

{¶ 67} To be guilty of drug possession under R.C. 2925.11(A), one must "knowingly obtain, possess or use a controlled substance." Possession may

be actual or constructive. Possession means "having control over a thing or substance," but it may not be inferred solely from "mere access to a thing or substance through ownership or occupation of the premises upon which the thing or substance is found." R.C. 2925.01(K).

{¶ 68} Possession may be actual or constructive. *State v. Haynes* (1971), 25 Ohio St.2d 264, 269-270. Constructive possession exists when an individual knowingly exercises dominion and control over an object, even though that object may not be within the individual's immediate physical possession. *State v. Hankerson* (1982), 70 Ohio St.2d 87, syllabus. It is not necessary to establish ownership of a controlled substance to establish constructive possession. *State v. Mann* (1993), 93 Ohio App.3d 301, 308. A sizable amount of readily usable drugs found in close proximity to the defendant may be sufficient circumstantial evidence to support the conclusion that the defendant was in constructive possession of such drugs. *State v. Gilbert*, Cuyahoga App. No. 86773, 2006-Ohio-3595, ¶39, citing *State v. Pruitt* (1984), 18 Ohio App.3d 50, 480 N.E.2d 499.

{¶ 69} There was clearly sufficient evidence that both Gyles and Williams knew that marijuana was in the car. The evidence presented at trial, when viewed in a light most favorable to the prosecution, could convince a juror that appellants also had, at the very least, constructive possession of the drugs found in the car.

{¶ 70} Accordingly, we find that the State produced sufficient evidence to support appellants' convictions for drug possession. Given that we find sufficient evidence to support the elements of knowledge and possession, appellants' argument against the drug trafficking charge on the same grounds, namely, that the State failed to prove knowledge or possession, also fails. See R.C. 2925.03.

{¶ 71} Pursuant to R.C. 2925.03(A)(2), "no person shall knowingly * * * prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person." Id.

{¶ 72} In this case, with respect to Gyles, in addition to all of the evidence presented above, the State also presented Gyles's birth certificate from his brother, Sean Brown's Iowa Avenue home. Packaging material from both the Iowa Avenue home and the trunk of the black Nissan was consistent with that found at the home located at 3487 West 100th Street. This circumstantial evidence, when coupled with the considerable amount of evidence already in the record, confirms Gyles's level of knowledge regarding the activity at the West 100th Street house. It also confirms his interest in the preparation, transport, and delivery of marijuana to the West 100th Street

home. The State presented sufficient evidence that Gyles was knowingly transporting marijuana in the trunk of his vehicle.

{¶ 73} With respect to Williams, he argues that he did not smell any marijuana in the car and maintains that he had no idea that such a large quantity of marijuana was in the car he was driving. Based upon the evidence outlined above, this argument is simply not credible and not likely to convince a juror that Williams was not guilty of drug trafficking.

{¶ 74} The elements of the crime of possession of criminal tools are defined by R.C. 2923.24(A). A person is guilty of possession of criminal tools if a person possesses or has under his control a "substance, device, instrument, or article, with the purpose to use it criminally." R.C. 2923.24. This charge, as it relates to Gyles, pertained to the $200 and the cell phone found on Gyles's person, and the plastic wrapping and packaging materials found in the trunk of the car that he used to transport and possess the marijuana in this case.

{¶ 75} The possession of criminal tools charge as it relates to Williams includes the money, packaging material, and other wrapping material that was found around the marijuana in the trunk of the car he was driving. The evidence at trial revealed that Williams had $340 on his person, and that he and Gyles had cell phones in their possession. The marijuana found in the trunk of the car was separated into 12 different plastic packages and placed

inside a black plastic garbage bag. In such instances where drugs are prepared, shipped, and sold, ordinarily innocuous objects such as bags, wrapping devices, money and cell phones can be used as criminal tools. See *State v. Alexander*, Cuyahoga App. No. 90509, 2009-Ohio-597.

{¶ 76} Appellants' sixth assignment of error is overruled.

Allied Offenses of Similar Import: Merging Appellants' Convictions for Drug Trafficking and Drug Possession

{¶ 77} Finally, we note that the trial court failed to merge appellants' convictions for drug trafficking under R.C. 2925.03(A)(2) and drug possession under R.C. 2925.11(A), as it is required to do, because they are allied offenses of similar import. See *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181. In *Cabrales*, the Supreme Court held, inter alia, that drug trafficking, in violation of R.C. 2925.03(A)(2), and drug possession, in violation of R.C. 2925.11(A), are allied offenses of similar import. In so holding, the *Cabrales* court reasoned:

> **"The test under R.C. 2941.25(A) for whether two offenses are allied offenses of similar import is that if the elements of the crimes correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import. It is then required that the elements be compared in the abstract, i.e., without consideration of the evidence in a**

particular case. However, nowhere is it mandated that the elements of compared offenses must exactly align in order to be allied offenses of similar import under R.C. 2941.25(A)." Id. at 59

{¶ 78} The court also stated that "if in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import." Id. at 61. Finally, the court held: "Thus, 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 because commission of the first offense necessarily results in the commission of the second." Id.

{¶ 79} Accordingly, we find that appellants' convictions for possession of drugs and drug trafficking are allied offenses, and the trial court erred when it failed to merge those counts with respect to the sentences of Gyles and Williams. See *State v. Seljan*, Cuyahoga App. No. 89845, 2009-Ohio-340; *State v. Goss*, Cuyahoga App. No. 91160, 2009-Ohio-1074; *State v. Darling*, Cuyahoga App. No. 92120, 2009-Ohio-4198. These matters are remanded to the trial court to merge appellants' convictions for possession of drugs and drug trafficking and to impose a single conviction and sentence for those allied offenses. In all other respects, these matters are affirmed.

Judgment affirmed and remanded.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendants' convictions having been affirmed, any bail pending appeal is terminated.

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

MARY EILEEN KILBANE, JUDGE

KENNETH A. ROCCO, P.J., and
JAMES J. SWEENEY, J., CONCUR