[Cite as *State v. Philpott*, 2020-Ohio-5267.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	
v.	:	Nos. 109173, 109174, and 109175
DELSHAWN PHILPOTT,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED AND REMANDED
RELEASED AND JOURNALIZED: November 12, 2020

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case Nos. CR-17-623868-A, CR-17-621977-B, and CR-17-621650-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Shannon M. Raley, Assistant Prosecuting Attorney, *for appellee*.

Baker Law Office and P. Andrew Baker, *for appellant*.

KATHLEEN ANN KEOUGH, J.:

{¶ 1} In these consolidated appeals, defendant-appellant Delshawn Philpott appeals from the trial court's judgments, rendered after separate jury trials, finding him guilty of various offenses and sentencing him to an aggregate term of ten years

in prison. For the reasons that follow, we affirm Philpott's convictions but remand for resentencing.

I. Procedural Background

{¶ 2} Philpott was indicted in CR-17-621650 as follows: Count 1, having weapons while under disability in violation of R.C. 2923.13(A)(3); Count 2, improper handling of firearms in a motor vehicle in violation of R.C. 2923.16(B); and Count 3, carrying a concealed weapon in violation of R.C. 2923.13(A)(2). The charges arose from a traffic stop on September 20, 2017.

{¶ 3} In CR-17-621977, Philpott was indicted as follows: Count 1, drug trafficking in violation of R.C. 2925.03(A)(2); Counts 2 and 3, drug possession in violation of R.C. 2925.11(A); Counts 4, 5, and 6, endangering children in violation of R.C. 2919.22(A); Count 7, trafficking in or illegal use of food stamps in violation of R.C. 2913.46(B); and Count 8, having weapons while under disability in violation of R.C. 2923.13(A)(3). These charges arose after the Cleveland police executed a search warrant at Philpott's home on September 29, 2017.

{¶ 4} In CR-17-623868, Philpott was indicted as follows: Counts 1, 3, and 5, drug trafficking in violation of R.C. 2925.03(A)(2); Counts 2, 4, and 6, drug possession in violation of R.C. 2925.11(A); and Count 7, possession of criminal tools

in violation of R.C. 2923.24(A). These charges arose from a traffic stop on November 30, 2017.[1]

{¶ 5} Philpott pleaded not guilty to the charges. He was already on community control sanctions to the trial court in CR-16-604903, in which he had pleaded guilty to a drug trafficking offense. In that case and the subsequently charged cases, Philpott was represented by appointed counsel.

{¶ 6} At a pretrial hearing in May 2018, after argument, the trial court denied Philpott's motion to suppress the evidence in CR-17-621977 that was obtained as a result of the search warrant. The prosecutor then reviewed the charges and set forth the proposed plea agreement for each case. The trial judge set the matter for another hearing after advising Philpott that he should consult with his counsel about the proposed plea agreement and that if he did not plead guilty, she would set the first case for trial.

{¶ 7} At a hearing on June 5, 2018, after noting that Philpott had filed multiple pro se motions to disqualify his appointed counsel because of his "concerns" and "challenges" with counsel, the trial court granted Philpott's motions and appointed new counsel for him.

{¶ 8} The parties appeared for a plea hearing on August 29, 2018. After a lengthy discussion with the court about the plea, the court recessed, and Philpott

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[1] Philpott was also indicted in CR-18-626488 for receiving stolen property in violation of R.C. 2913.51(A). The case was later dismissed without prejudice by the state and is not relevant to this appeal.

conferred with his lawyer. When he returned, he told the court that he was ready to accept the plea agreement. The court then again reviewed the charges and associated penalties and conducted the plea colloquy. When the colloquy was nearly ended, however, Philpott suddenly said that he did not understand "none of this," violently pushed the trial table back, and attempted to exit the courtroom. The trial court ended the hearing and referred Philpott for an evaluation at Northcoast Behavioral Healthcare Hospital.

{¶ 9} At a hearing on November 27, 2018, the trial court reviewed the report it had received from Northcoast regarding Philpott's competency to stand trial. The court explained the findings of the report to Philpott, noting that the report indicated that the Northcoast doctor had listened to a sampling of over 500 recorded telephone calls made by Philpott. In the calls, Philpott discussed the plea bargaining process, joked about being at "the crazy house," had a friend read him the requirements for being found incompetent, and talked about his previous lawyers, current lawyer, and various legal strategies. In one of the calls, Philpott discussed his assumption that the charges against him would be dismissed if he were not restored to competency within a certain time. The judge explained to Philpott that in light of his conversations and demeanor on the jailhouse calls, the doctor had concluded that Philpott was indeed competent to stand trial and, further, that he was malingering.

{¶ 10} The parties stipulated to the report, which the court accepted. After the court stated that it would set a trial date for the first case to be tried, Philpott,

still disputing his competency, insisted that "I don't know nothing about the law. Ain't going to tell me that I know something about the law." When the court told Philpott that the report indicated that he was competent to understand the proceedings and it would set the case for trial, Philpott stated that he wanted to fire his attorney. The trial judge told Philpott that he had already been given a new lawyer, and firing lawyers seemed to be a tactic that he engaged in to delay proceedings. Philpott then stated, "I'm not satisfied with his counsel. I'm not willing." The court reminded Philpott that his previous lawyer was "one of the most highly respected attorneys in the county," and that Philpott had moved to disqualify him immediately before he was to accept the plea agreement or go to trial. The judge told Philpott that "it's not a revolving door. You don't get to just keep picking and deciding at the moment of trial that you don't want the lawyer that you've got. It doesn't work that way." Philpott responded, "I do not want him. I don't even know why he's still here." The court then engaged in an extended discussion with Philpott about his firing of prior counsel, his competency to stand trial, and his guilty plea in the probation case.

{¶ 11} Philpott's father, who was sitting in the back of the courtroom, then interrupted the proceedings, insisting that he would serve as co-counsel. When he continued his outburst despite the judge's admonitions, he was escorted from the courtroom. After he was gone, the trial judge told Philpott that she would set the first case for trial, but Philpott again stated, "I don't want him," referring to his counsel. When the court again told Philpott that "it's not a rotating door," and he

did not get to "conveniently decide at the time of trial that you're going to fire people," Philpott stated, "I'll represent myself then." The trial judge then asked Philpott how he could represent himself when he had just told her that he did not know anything about the law. Philpott again said, "I don't want him," but the judge reassured him that counsel was working very hard for him. When Philpott stated that his lawyer "did nothing for me," the prosecutor informed the court that Philpott's current counsel had been in constant contact with her in an effort to obtain a better plea agreement for Philpott. The prosecutor told the judge that she had had multiple conversations with Philpott's counsel, and that he had been advocating strenuously for Philpott, even though Philpott did not believe so. The prosecutor further stated that Philpott's prior counsel had also advocated vigorously for Philpott, even though Philpott requested that he be disqualified.

{¶ 12} On February 6, 2019, the parties appeared at a pretrial to again discuss a possible plea agreement. Philpott again told the court that he did not want to proceed with his current counsel because he was not satisfied with him, and he was "doing nothing" for him. When Philpott insisted that the court could not make him go to trial with a lawyer he did not want, the judge told him that he was not changing lawyers again.

{¶ 13} Case No. CR-17-623868 was tried on February 11, 2019. Before beginning jury voir dire, the trial judge reiterated that Philpott's current counsel would act as counsel at trial. The court noted that prior to current counsel, attorney Grant had represented Philpott, who had replaced attorney Brown, who was

replacement counsel for another lawyer. When Philpott again protested that he did not want to proceed with current counsel, the judge advised him that the trial was going forward because he had fired every other lawyer that had been appointed for him.

{¶ 14} Philpott then asserted repeatedly that the trial court did not have jurisdiction over him because he is from the "House of Cherokee, the House of Philpott," and the court had not responded to his "affidavit of truth." The trial court assured Philpott, over his many objections and comments, that it had jurisdiction over the case, his rights would be protected, and the case would proceed. The judge advised Philpott to sit quietly and remain calm during the proceedings.

{¶ 15} The jurors were brought into the courtroom, and proceedings began. When Philpott's lawyer introduced himself to the potential jurors, Philpott told the court that he would leave because he did not want him for his counsel. When the court again told Philpott that he could not fire every attorney he had, Philpott insisted that he would represent himself because he was "sui juris" and "competent to handle all of [his] legal affairs." Philpott then continued to argue with the judge, asserting that she did not have jurisdiction over him because she had not answered his "affidavit of truth," and insisting she was violating his due process rights. Despite the judge's admonitions to Philpott that he was being disruptive, Philpott continued to argue with the judge. The judge advised Philpott that if he continued to be disruptive, he would be escorted to a cell and proceedings would continue in his absence. Philpott then asked why he was required to proceed with his current

counsel despite telling the judge that he did not want him. When the judge again told Philpott that current counsel would remain because "you fire the lawyers every time you come up for trial," Philpott told the judge that he wanted to represent himself and would not proceed. The deputy then escorted Philpott to a cell with microphones where he could listen to the proceedings.

{¶ 16} After the jury was sworn in, the court brought Philpott back into the courtroom, outside the presence of the jury, and asked Philpott about his request to represent himself. Philpott stated that he wanted to represent himself because his current lawyer had told him things that were not true, did not produce all exculpatory evidence to him, and told him he could not see all the evidence.

{¶ 17} The judge asked Philpott what "exculpatory" meant, and Philpott said it meant "all of the evidence for my case." The judge advised Philpott that was not the correct meaning of the word, and further, that some evidence is marked for counsel only. When Philpott again said that his counsel was not representing him "the way that he's supposed to be representing me," the judge advised Philpott that he had not wanted his prior counsel either, even though prior counsel "was representing the hell out of you." The judge stated that counsel prior to that counsel had been doing the same thing, but Philpott did not want that counsel either. The court advised Philpott that "every lawyer that you've had, we've had this very same conversation." The judge further advised Philpott that in light of his inability to tell her what the word exculpatory meant and his repeated firings of excellent lawyers, she had "serious concerns" about his ability to represent himself and make good

decisions. The judge advised Philpott that trial would continue with his current counsel, he would get a fair trial, and he could appeal her decision.

{¶ 18} Trial in CR-17-621977 commenced on August 21, 2019. Immediately prior to trial, Philpott reminded the judge that he had filed a pro se motion to dismiss his counsel because counsel was not representing him properly. The judge discussed this concern with Philpott, and told him that she had watched his counsel during the first trial and observed that he had vigorously represented Philpott. The judge further reminded Philpott that he had fired every lawyer she had appointed for him, always at the last minute.

{¶ 19} Philpott then told the judge that he wanted to see her "official bond" to prove she had jurisdiction of the case. The judge stated that she would not do so, and the case would move forward. Philpott then again raised the issue of representing himself. The court again denied the request, stating that Philpott was "trying to employ every trick in the book" to delay the trial.

{¶ 20} Trial in CR-17-621650 commenced on October 2, 2019. Prior to commencement of the proceedings, Philpott again told the judge that he did not want current counsel to represent him because counsel never visited him to discuss the case. Defense counsel denied Philpott's assertion. The judge discussed Philpott's concern with him and told him she was aware that counsel had indeed visited him. The court denied the Philpott's motion, telling him that he was an "obstructionist" and that his request was "all about delay tactics."

{¶ 21} The evidence adduced in each trial, the juries' verdicts, and the trial court's sentencing will be discussed below as appropriate to the assignments of error.

II. Law and Analysis

A. Change of Counsel

{¶ 22} In his first assignment of error, Philpott contends that the trial court erred in not granting his requests to change counsel because the court did not adequately investigate his reasons for wanting new counsel before denying his requests.

{¶ 23} If a defendant demonstrates "good cause, such as a conflict of interest, a complete breakdown of communication, or an irreconcilable conflict," the court's failure to honor a timely request for new counsel constitutes a denial of effective assistance of counsel. *State v. Washington*, 1st Dist. Hamilton No. C-000754, 2001 Ohio App. LEXIS 3604, 12 (Aug. 17, 2001). Otherwise, the court's decision regarding such a motion is governed by an abuse-of-discretion standard. *State v. Petty*, 8th Dist. Cuyahoga No. 105222, 2017-Ohio-8732, ¶ 19. In exercising that discretion with regard to a day-of-trial motion, the court should attempt to balance the defendant's rights and any potential prejudice to him against the public's interest in the prompt administration of justice and the court's right to control its own docket. *State v. Frazier*, 8th Dist. Cuyahoga No. 97178, 2012-Ohio-1198, ¶ 26.

{¶ 24} Philpott relies on this court's decision in *State v. Beranek*, 8th Dist. Cuyahoga No. 76260, 2000 Ohio App. LEXIS 5868 (Dec. 14, 2000), for the

proposition that a trial court commits reversible error when it does not inquire of an indigent criminal defendant as to that defendant's reasons for requesting a change of counsel. The *Beranek* court found that a trial court has a duty to investigate the reasons behind a defendant's request for a change of counsel, however briefly or minimally, where the defendant asserts allegations specific enough to justify further inquiry. *Id.* at 12; *see also State v. Hawkins*, 8th Dist. Cuyahoga No. 91930, 2009-Ohio-4368, ¶ 52 (the defendant bears the burden of setting forth the grounds for appointment of new counsel; if the defendant alleges facts that, if true, would require relief, the trial court must inquire and make its inquiry part of the record). Nevertheless, "the limited judicial duty [to inquire into a defendant's request for new counsel] arises only if the allegations are sufficiently specific; vague or general objections do not trigger the duty to investigate further." *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, ¶ 68. '"A trial court does not abuse its discretion in finding that a general allegation of unhappiness is so vague that it does not require additional investigation."' *Petty* at ¶ 20, quoting *State v. Griffin*, 10th Dist. Franklin No. 12AP-798, 2013-Ohio-5389, ¶ 13.

{¶ 25} The majority of Philpott's requests for new counsel were so vague as to not require further inquiry by the court. Philpott's assertion at the hearing on November 27, 2018, that he wanted to fire his counsel because he was "not satisfied" with him was a vague and nonspecific assertion of his dissatisfaction with counsel. His assertion at the pretrial on February 6, 2019, that he was "not satisfied" with his lawyer because he "was doing nothing" for him was another vague and nonspecific

assertion about why he wanted to replace his counsel. His statement immediately prior to trial in CR-17-623868 on February 11, 2019, that he "did not want this attorney" gave no reason whatsoever for his alleged dissatisfaction with counsel. Thus, none of these vague, random, nonspecific requests for new counsel triggered the court's duty to inquire into Philpott's complaints about the adequacy of his assigned counsel. "Absent specific objections to counsel's performance, the trial court has no duty to investigate anything." *State v. Corder*, 10th Dist. Franklin No. 17AP-24, 2017-Ohio-7039, ¶ 15.

{¶ 26} Philpott included more details about his alleged dissatisfaction with counsel in his statement immediately prior to the commencement of trial in CR-17-621977 on August 21, 2019. He told the court that he did "not feel like he in my best interest" because counsel had not been to see him prior to trial, they had never prepared for trial, and counsel had pressured him to plead guilty. The trial judge discussed Philpott's dissatisfaction with counsel with him, noting that she disagreed with Philpott's assertion that counsel was not working in his best interest because she was aware of the work counsel was doing on the cases outside Philpott's presence. The judge also discussed with Philpott his assertion that counsel had not adequately represented him in the first trial, including her observations that counsel had represented Philpott well at trial. Thus, the record reflects that the trial court engaged in a satisfactory investigation of Philpott's reasons for replacing counsel.

{¶ 27} The judge also engaged in an adequate discussion with Philpott prior to the commencement of trial in CR-17-621650 on October 2, 2019, when Philpott

told the judge that he wanted different counsel because counsel had not visited him. The judge evaluated this claim, telling Philpott she was aware that counsel had, in fact, visited him. The judge also heard from defense counsel, who denied Philpott's assertion. Thus, the court conducted a sufficient investigation, albeit minimal, of Philpott's reasons for wanting new counsel.

{¶ 28} The majority of Philpott's general allegations of his unhappiness with counsel were so vague and nonspecific that they did not warrant further investigation by the court. Where his allegations were specific, the trial court conducted an adequate investigation and evaluation. The first assignment of error is therefore overruled.

B. Self-Representation

{¶ 29} In his second assignment of error, Philpott contends that the trial court committed reversible error when it denied his request to represent himself.

{¶ 30} Criminal defendants enjoy the constitutional right to self-representation at trial provided that the right to counsel is knowingly, voluntarily, and intelligently waived after sufficient inquiry by the trial court. *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, ¶ 89. The right is not absolute, however. A criminal defendant must "unequivocally and explicitly" invoke his right to self-representation. *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81, ¶ 38. In addition, the request must be timely. *Id.* Where the request is timely and explicitly made, the denial of the request is per se reversible error. *State v. Thigpen*, 8th Dist. Cuyahoga No. 99841, 2014-Ohio-207, ¶ 23. Self-

representation may be properly denied, however, when requested in close proximity to trial or under circumstances indicating the request is made for purposes of delay or manipulation. *State v. Armstrong*, 8th Dist. Cuyahoga No. 103088, 2016-Ohio-2627, ¶ 9, citing *State v. Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193, 790 N.E.2d 303, ¶ 50.

{¶ 31} Assuming without deciding that Philpott's statement at the hearing on November 27, 2018, that "I'll represent myself then," and his assertion at trial on February 11, 2019, that he wanted to represent himself were unequivocal and explicit requests to represent himself, it is apparent that the trial court properly denied the requests because they were made for solely for purposes of delay or manipulation.

{¶ 32} Philpott's delay tactics were apparent throughout the pendency of the cases. For example, after lengthy discussions with the trial judge and his counsel, he initially said he would accept the plea agreement and proceeded to the plea colloquy, but then refused to continue after insisting that he did not understand what was going on. As a result, he was referred to Northcoast for a competency evaluation, where he made numerous telephone calls to family and friends joking about being in "the crazy house" and discussing his legal strategies, as well as his belief that the charges would be dismissed if he were not restored to competency in a timely manner.

{¶ 33} When the proceedings later resumed, Philpott made repeated, frivolous challenges to the court's jurisdiction. In addition to his meritless jurisdictional challenges, Philpott repeatedly requested new counsel when the cases

were set for some court action or for trial. These attempts at delay were all purposeful, as the Northcoast report made clear.

{¶ 34} Philpott's requests to represent himself were simply more of the same delay tactics. His first request to represent himself was made at the pretrial hearing on November 27, 2018, after the trial court stated that he was deemed competent to stand trial and it would set the first case for trial. Philpott disputed his competency, insisting he "kn[ew] nothing about the law." When the judge again told him the case would be set for trial, Philpott immediately asked for yet another change of counsel (what would have been his fifth counsel). After Philpott's father was escorted from the courtroom due to his outburst, Philpott again said he wanted new counsel. After the judge denied the request, Philpott stated that he would represent himself, even though just minutes earlier he had told the judge that he knew "nothing" about the law. In light of these circumstances, Philpott's request can only be interpreted as another manipulative tactic in his ongoing scheme to delay the court proceedings.

{¶ 35} Philpott's second request to represent himself was made as trial proceedings commenced on February 11, 2019. When the judge denied Philpott's request for new counsel and told him that trial would be going forward, Philpott again raised repeated meritless challenges to the court's jurisdiction. When the jurors were finally brought into the courtroom, Philpott again asked for new counsel and, when that request was denied, told the judge he would represent himself, and then again repeatedly challenged the court's jurisdiction. Philpott became so disruptive as he spoke with the judge that he was finally escorted out of the

courtroom. Under these circumstances, and considered together with Philpott's other repeated delay tactics, it is apparent that Philpott's request to represent himself was merely another in an ongoing series of tactics to delay the proceedings. Accordingly, the trial court properly denied Philpott's requests for self-representation.

{¶ 36} The second of assignment of error is overruled.

C. Sufficiency of the Evidence

{¶ 37} In his third assignment of error, Philpott contends that the evidence was insufficient to support his convictions.

{¶ 38} The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Hill*, 8th Dist. Cuyahoga No. 98366, 2013-Ohio-578, ¶ 13. 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. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997).

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{¶ 39} Garfield Heights Police Officer Carlos Crespo testified that as he and his partner, Officer David Simia, were conducting traffic enforcement late in the

evening of September 20, 2017, they observed a Chevy station wagon traveling directly in front of them cross over the center line, go over the shoulder line, and then go back into its lane. The officers activated their siren and lights to make a traffic stop.

{¶ 40} Officer Crespo testified that as the station wagon was merging onto the shoulder of the road for the traffic stop, he observed the driver of the car "make a move down toward the center floorboard to the right of him, a quick hesitation move, come back up, and go back down, spend a little longer time at the floorboard, and come back up." Officer Simia likewise testified that he observed the driver of the car, later identified as Philpott, "leaning down a lot" toward the floorboard area. Officer Crespo testified there was a passenger in the front seat and a passenger in the backseat but neither passenger made any movements similar to what the driver was making.

{¶ 41} Upon speaking with Philpott, Officer Simia learned he had a suspended driver's license. Philpott was removed from the vehicle and arrested. Upon searching the vehicle prior to towing, Officer Crespo found a loaded gun in "the front portion of the vehicle in the front center console under the radio nearest the floorboard, the exact area of which Mr. Philpott was reaching." Officer Simia testified that the gun was found on the driver's side of the center console, and the driver could have easily accessed the gun. It was undisputed at trial that Philpott was under a disability prohibiting him from possessing a firearm and that the gun was loaded and operable.

{¶ 42} Philpott testified in his defense that he had borrowed the vehicle, the gun was not his, and the movements observed by the police officers were him reaching for the vehicle registration in the glove compartment.

{¶ 43} The jury found Philpott guilty of Count 1, having weapons while under disability in violation of R.C. 2923.13(A)(3), which provides that "no person shall knowingly acquire, have, carry, or use a firearm" if the person has been convicted of any felony offense involving the illegal possession, use, sale, administration, or distribution of a drug of abuse. He was also convicted of Count 2, improperly handing firearms in a motor vehicle in violation of R.C. 2923.16(B), which provides that "no person shall knowingly transport or have a loaded firearm in a motor vehicle in such a manner that the firearm is accessible to the operation or any passenger without leaving the vehicle." He was also convicted of Count 3, carrying a concealed weapon in violation of R.C. 2923.12(A)(2), which provides that "no person shall knowingly carry or have * * * concealed ready at hand * * * a handgun."

{¶ 44} Philpott contends that the evidence was insufficient to demonstrate that he possessed the gun that was found in the vehicle and, therefore, insufficient to support his convictions on all three counts. We disagree.

{¶ 45} To "have" a firearm within the meaning of the three statutes at issue, a person must have actual or constructive possession of the gun. *State v. Gardner*, 8th Dist. Cuyahoga No. 104677, 2017-Ohio-7241, ¶ 33. There was no evidence that Philpott had actual possession of the firearm at issue and, therefore, the state had to prove he had constructive possession of the gun.

{¶ 46} Constructive possession exists when an individual knowingly exercises dominion and control over an object, even though that object may not be within his or her immediate physical possession. *State v. Wolery*, 46 Ohio St.2d 316, 329, 348 N.E.2d 351 (1976); *Gardner* at ¶ 34. "Constructive possession of a firearm exists when a defendant knowingly has the power and control over [the] firearm, either directly or through others." *State v. Phillips*, 10th Dist. Franklin No. 14AP-79, 2014-Ohio-5162, ¶ 121.

{¶ 47} Possession of a firearm may be inferred when a defendant has exercised dominion and control over the area where the firearm was found. *Gardner* at ¶ 35. Nevertheless, constructive possession cannot be inferred by a person's mere presence in the vicinity of contraband or the person's mere access to the contraband. *State v. Jansen*, 8th Dist. Cuyahoga No. 73940, 1999 Ohio App. LEXIS 2060, 8 (May 6, 1999); *see also State v. Tucker*, 2016-Ohio-1353, 62 N.E.3d 903, ¶ 22 (9th Dist.) (observing that the principle that access to a weapon can establish possession does not stand in a vacuum; there must be other evidence establishing a connection between the defendant and the weapon).

{¶ 48} To establish constructive possession, there must be evidence that the person exercised or had the power to exercise dominion and control over the object. *State v. Long*, 8th Dist. Cuyahoga No. 85754, 2004-Ohio-5344, ¶ 17 ("Ohio courts have routinely held that constructive possession can be established by the fact that a defendant had access to a weapon and had the ability to control its use."). It must

also be shown that the person was conscious of the presence of the object. *State v. Hankerson*, 70 Ohio St.2d 87, 91, 434 N.E.2d 1362 (1982).

{¶ 49} Applying these standards to this case, it is apparent that Philpott had constructive possession of the firearm the police found in the vehicle he was driving. The evidence demonstrated that the police saw Philpott, and only Philpott, reaching for the floorboard as the car pulled over to the shoulder of the road during the traffic stop. The evidence further demonstrated that the gun was found in the very spot where the officers observed Philpott reaching. Both officers testified that in light of where the gun was found, it was easily accessible to Philpott from the driver's seat. "Constructive possession can be inferred when the object 'is within easy reach.'" *Gardner*, 8th Dist. Cuyahoga No. 104677, 2017-Ohio-7241 at ¶ 63, quoting *State v. McPherson*, 8th Dist. Cuyahoga No. 63168, 1993 Ohio App. LEXIS 3721, 6 (July 29, 1993).

{¶ 50} Although Philpott contends he did not own the car, thereby suggesting the gun could have been owned by someone else, the state need not prove ownership when establishing constructive possession. *State v. Davis*, 8th Dist. Cuyahoga No. 104221, 2016-Ohio-7964, ¶ 62. Likewise, Philpott's argument about the lack of DNA or fingerprints on the gun is not persuasive because there was no evidence that the gun was tested for either DNA or fingerprints.

{¶ 51} Viewing the evidence in a light most favorable to the prosecution, it is apparent that the state presented sufficient evidence to establish that Philpott had constructive possession of the gun found in the car. Thus, there was sufficient

evidence to support his convictions for having a weapon while under disability, improperly handling firearms in a motor vehicle, and carrying a concealed weapon.

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{¶ 52} Cleveland Police Sergeant Jarrod Durichko testified that in late October 2017, the Vice Unit began investigating Philpott as part of a drug investigation. During the course of the investigation, the police learned that Philpott drove a red Chevy Aveo. They also learned that his driver's license was suspended.

{¶ 53} Sgt. Durichko testified that on November 30, 2017, as he was patrolling the area of East 131st Street and Harvard Avenue, an area in Cleveland known for drug activity and prostitution, he observed a small red Chevy Aveo cross in front of him. Sgt. Durichko began following the car and after calling for backup, initiated a traffic stop. Sgt. Durichko testified that as he approached the stopped car, he saw the driver, later identified as Philpott, reach "across the center console to the passenger's side where the feet would rest, almost up under the dashboard glove box area." Sgt. Durichko said this movement caused him to believe that Philpott was either reaching for a weapon or hiding something.

{¶ 54} Sgt. Durichko drew his gun, pointed it at the driver, and opened the driver's side door. As Philpott exited the vehicle, a digital scale on his lap fell to the ground. His girlfriend, Marisa Townsend, who was sitting in the front passenger seat, was also removed from the car. Philpott was arrested and handcuffed. During the patdown, Philpott admitted that he had several bags of marijuana in his pocket. Sgt. Durichko testified that Philpott also had around $580 cash, in various

denominations, in his pocket. Sgt. Durichko testified that in his experience, the large sum of cash, combined with the digital scale that fell from Philpott's lap, was indicative of street-level drug sales.

{¶ 55} Sgt. Durichko testified that he also found several plastic hotel room keys in Philpott's pocket. Upon searching the vehicle, he found a small bag of drugs exactly "in the area where [he] saw him reaching, which would have been the passenger's foot well behind the center console." Sgt. Durichko kept searching this area and found a larger bag of drugs. He also found a roll of lottery ticket paper, which he testified is commonly used to package and distribute drugs, on the passenger's side of the vehicle. Sgt. Durichko testified that the items recovered from the car made it very apparent that Philpott was engaged in selling drugs.

{¶ 56} Cleveland Police Detective Ryan McMahon testified that he gave Philpott his *Miranda* rights as Philpott sat in the back seat of the police cruiser after his arrest. Det. McMahon said that when he asked Philpott who the drugs belonged to, Philpott eventually told him the drugs were his and were heroin. Video footage from Det. McMahon's body camera was played for the jury, including Philpott's admissions to Det. McMahon about the drugs found in the car. Sgt. Durichko testified that the drugs were not tested for DNA or fingerprints because they were found exactly where he saw Philpott reaching and because Philpott admitted the drugs were his.

{¶ 57} The police subsequently learned that the Chevy Aveo Philpott was driving was a rental vehicle. Cleveland Police Detective Matthew Pollack, who also

assisted with Philpott's arrest, testified that in his experience, drug dealers often use rental cars because the license plate numbers cannot be tracked to the dealer. He further testified that the police learned that Philpott had been staying at an Express Inn, and that drug dealers often stay at hotel rooms to keep the drugs out of their homes.

{¶ 58} The jury found Philpott guilty of all charges: Counts 1, 3, and 5, drug trafficking in violation of R.C. 2925.03(A)(2); Counts 2, 4, and 6, drug possession in violation of R.C. 2925.11(A); and Count 7, possession of criminal tools in violation of R.C. 2923.24(A).

{¶ 59} Philpott argues the state's evidence was insufficient to support his convictions because he did not have actual possession of the drugs, he was not the person in the vehicle closest to the drugs, there was no fingerprint or DNA evidence that tied him to the drugs, and his admission that the drugs belonged to him could be interpreted as merely his attempt to take the blame for his girlfriend.

{¶ 60} Philpott's arguments are without merit. "In a sufficiency analysis, we do not consider the credibility of witnesses or whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Chambers*, 10th Dist. Franklin No. 13AP-1093, 2014-Ohio-4648, ¶ 17. The state's evidence established that Philpott admitted the drugs were his. This evidence, if believed, and considered with the other evidence presented by the state, is sufficient to convince the average mind beyond a reasonable doubt of Philpott's guilt on all charges.

Case No. CR-17-621977

{¶ 61} Case No. CR-17-621977 arose after the police executed a search warrant at Philpott's home. Cleveland Police Detective Daniel Hourihan testified that the police had received complaints about drug activity at Philpott's home. He conducted surveillance of the home over several days at various times during the day, and observed Philpott repeatedly coming out of the house, walking down the street, meeting people a few streets over from his house for only a short period of time, and then returning home. Det. Hourihan testified that such behavior is typical of drug trafficking. He testified further that common indicia of drug trafficking are multiple cell phones, weapons, and scales, as well as large amounts of cash.

{¶ 62} Det. Hourihan obtained a search warrant for Philpott's home. He testified that Philpott's girlfriend and three children, all minors, lived at the home with Philpott and were at home when the warrant was executed but Philpott was not. Det. Hourihan testified that immediately upon entering the home, he observed in plain view a loaded gun sticking up between two cushions on the couch, a digital scale on the couch, and three other digital scales with a powdery residue on them on shelves in the dining room. Upon searching the bedroom obviously shared by Philpott and his girlfriend, police found a loaded assault rifle leaning against the wall in the corner of the bedroom, as well as a gun under the bed and a magazine for the gun under the mattress. The police also found a bag of heroin and fentanyl in the unlocked bedroom nightstand, along with a plastic card, paper tear-offs, and baggies. Det. Hourihan testified that such plastic cards are commonly used to cut

drugs. The police also found a stack of cash next to the drugs, and seven cell phones scattered throughout the home. Det. Hourihan testified there were no gates or locked doors anywhere in the house, the children were not restricted from any room, and all of the illicit items found in the house were accessible to everyone who lived there.

{¶ 63} Det. Hourihan testified that the police also found items in the bedroom indicating that Philpott lived at the residence, including men's clothing; men's deodorant; and multiple toothbrushes found in the bedroom; mail addressed to Philpott at that address, including a past-due notice from FirstEnergy; and a prescription bottle of pills that had Philpott's name and that address on it. Det. Matthew Pollack, who assisted in surveilling the home and with executing the search warrant, testified that he found a birth certificate and Social Security card for Philpott's son in the home. Det. Pollack identified Philpott in court as the person he had observed leaving and returning to the residence after meeting people on the street for only short periods of time. Finally, the parties stipulated that Philpott had a prior drug trafficking offense in 2016 that prohibited him from owning or carrying a gun.

{¶ 64} The jury convicted Philpott of Count 1, drug trafficking in violation of R.C. 2925.03(A)(2); Count 2, drug possession in violation of R.C. 2925.11(A); Counts 4, 5, and 6, endangering children in violation of R.C. 2919.22(A); and Count 8, having weapons while under disability in violation of R.C. 2923.13(A)(3). The jury found Philpott not guilty of Count 3, drug possession in violation of R.C. 2925.11(A);

and Count 7, trafficking in or illegal use of food stamps in violation of R.C. 2913.46(B).

{¶ 65} Philpott contends the evidence was insufficient to support his convictions on the drug and weapons charges because he was not in the home when the contraband was found, there was no DNA or fingerprint evidence linking him to the drugs or weapons, and the evidence that he lived in the home was "minimal." His argument appears to be that the evidence was insufficient to demonstrate that he possessed the drugs and weapons found in the home because he did not live there.

{¶ 66} Philpott's argument fails because there was sufficient evidence to establish beyond a reasonable doubt that he lived in the home and had constructive possession of the drugs and weapons found in the home. The evidence demonstrated that the police found men's clothing, men's personal care items, mail addressed to Philpott at that address, and a prescription bottle of pills with Philpott's name and that address on it in a bedroom that Philpott shared with his girlfriend. In addition, the testimony established that the police had observed Philpott repeatedly coming and going from the house on different days and at different times of the day. This evidence was sufficient to demonstrate that Philpott lived at the home.

{¶ 67} The evidence was also sufficient to demonstrate that Philpott had constructive possession of the drugs and weapons in the home, despite the lack of DNA or fingerprint evidence linking him to the guns or drugs. Two of the weapons were found in plain view; the drugs and another weapon were found in Philpott's

bedroom, the weapon under his bed and the drugs in an unlocked nightstand that he obviously had access to. Because of where the guns and drugs were found and Philpott's occupancy of the home, the jury could infer that he knew about the contraband. *State v. Powell*, 8th Dist. Cuyahoga No. 82054, 2003-Ohio-4936, ¶ 22. Knowledge of contraband in one's home is sufficient to show constructive possession. *Id.*, citing *Hankerson*, 70 Ohio St.2d at 91, 434 N.E.2d 1362 (1982). And although the drugs and some of the weapons were found in a bedroom that Philpott shared with his girlfriend, two or more persons may have joint constructive possession of a particular item. *State v. McCallister*, 4th Dist. Scioto No. 13CA3558, 2014-Ohio-2041, ¶ 31.

{¶ 68} Det. Hourihan's testimony about Philpott's frequent coming and going from the home for short periods of time, which he testified is one of the "common indicia" of drug trafficking, combined with the drugs, weapons, scales, and other drug paraphernalia found in the home, demonstrated that Philpott was trafficking in drugs. *See, e.g., State v. Burton*, 8th Dist. Cuyahoga No. 107054, 2019-Ohio-2431, ¶ 48 (plastic bags, digital scales, and large sums of money, when found with a large amount of drugs, are circumstantial evidence of drug trafficking); *State v. Fry*, 9th Dist. Summit No. 23211, 2007-Ohio-3240, ¶ 50 (presence of drugs and drug paraphernalia permit a reasonable inference that a person is preparing drugs for shipment). The parties also stipulated that Philpott had a prior conviction that prevented him from owning and carrying a gun. Accordingly, the state's evidence, viewed in a light most favorable to the prosecution, was sufficient to support

Philpott's convictions for drug trafficking, drug possession, and having weapons while under disability.

{¶ 69} Philpott next challenges his convictions for endangering children. R.C. 2919.22(A), regarding endangering children, provides that "no person, who is the parent * * * of a child under eighteen years of age * * * shall create a substantial risk to the health or safety of the child by violating a duty of care, protection, or support."

{¶ 70} Philpott argues the evidence was insufficient to support his convictions for endangering children because the state presented no evidence that the two teenaged children who lived in the home were not trained in firearm safety. He asserts that a violation of R.C. 2919.22(A) requires a substantial risk to children, not just a possible or theoretical risk. His argument appears to be that the children would not have been at a substantial risk of danger in the home if they had had firearm training. Philpott's argument has no merit.

{¶ 71} It is well-established that a loaded firearm is an inherently dangerous instrument. *State v. Barrow*, 8th Dist. Cuyahoga No. 101356, 2015-Ohio-525, ¶ 16. The loaded guns in Philpott's home, which were accessible to anyone in the home, obviously created a substantial risk to the health and safety of the three minors in the house. Moreover, even if we were to accept Philpott's argument, the endangering children counts were not limited solely to the danger caused by the presence of loaded firearms in the home. As pointed out in the state's closing argument, the heroin and fentanyl found in the unlocked nightstand in Philpott's

bedroom were also accessible to the children. Det. Hourihan testified that "just one little speck of [fentanyl], if it's inhaled or even [in] contact with your skin can be fatal." He further testified there were no locked doors in the house and the children were not restricted from any room in the house. This evidence, if believed, is sufficient to establish that Philpott created a substantial risk to the health and safety of the children by having potentially lethal drugs in his home that were readily accessible to them.

{¶ 72} Last, Philpott contends there was insufficient evidence to support his conviction on the juvenile specification attendant to his drug trafficking conviction. He directs us to *State v. Smith*, 3d Dist. Union No. 14-01-28, 2002-Ohio-5051, in which the Third District held there was insufficient evidence to support the juvenile specification where the defendant was not present in the home when the police executed the search warrant. But *Smith* is easily distinguishable from this case because the juvenile in *Smith* was merely a visitor to the home; she was present in the home when the warrant was executed but did not live in the defendant's house.

{¶ 73} The unrebutted testimony in this case was that the three minor children who were present when the police executed the search warrant lived in Philpott's home. Drugs and drug paraphernalia were found throughout the home. As recognized by the Twelfth District,

> drug trafficking is a crime that occurs not only at the time of the execution of the search warrant or the arrest of the defendant, but encompasses a larger time frame because it includes not only selling or attempting to sell controlled substances, but also the activities of

> preparing for shipment, shipping, transporting, delivering, preparing for distribution, or distributing controlled substances."

State v. Wilkins, 12th Dist. Clinton No. CA2007-03-007, 2008-Ohio-2739, ¶ 28. Thus, in *Wilkins*, the court found that where drugs, drug paraphernalia, and firearms were found in the defendant's home, and it was undisputed that the minor children lived in the defendant's home, the juvenile specification attached to the defendant's drug trafficking conviction was supported by sufficient evidence and not against the manifest weight of the evidence. *Id.*

{¶ 74} We agree with the reasoning of *Wilkins*. Because the minor children lived in Philpott's home, where drug trafficking occurred, the specification that the offense occurred in the presence of a juvenile is supported by sufficient evidence. *See also State v. Flores*, 6th Dist. Wood Nos. WD-04-012 and WD-04-050, 2005-Ohio-3355, ¶ 46, and *State v. Smallwood*, 9th Dist. Wayne No. 07CA0063, 2008-Ohio-2107, ¶ 26 (both holding that where children lived in a home in which drug trafficking occurred, a rational trier of fact could find that the juvenile specification attendant to a drug trafficking offense was proven beyond a reasonable doubt).

{¶ 75} The third assignment of error is overruled.

D. Manifest Weight of the Evidence

{¶ 76} In his fourth assignment of error, Philpott contends that his convictions were against the manifest weight of the evidence for the same reasons raised in his sufficiency arguments.

{¶ 77} In reviewing a claim challenging the manifest weight of the evidence, the appellate court must determine whether "there is substantial evidence upon

which jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt." *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 81. This court examines the entire record in order to determine whether the jury clearly lost its way and created such a manifest miscarriage of justice that the convictions must be reversed and a new trial ordered. A conviction should be reversed only in the most "exceptional case in which the evidence weighs heavily against the conviction." *Thompkins*, 78 Ohio St.3d at 388, 678 N.E. 2d 541.

{¶ 78} These are not those exceptional cases. After a careful review of the entire record and for the reasons discussed above, we cannot say that the juries lost their way in convicting Philpott of the offenses of which they found him guilty. The fourth assignment of error is overruled.

E. Allied Offenses

{¶ 79} In his fifth assignment of error, Philpott contends that the trial court failed to merge various offenses in each of the three cases as allied offenses.

{¶ 80} Under R.C. 2941.25, Ohio's multicount statute, where the defendant's conduct constitutes two or more allied offenses of similar import, the defendant may be convicted of only one offense. R.C. 2941.25(A). A defendant charged with multiple offenses may be convicted of all the offenses, however, if (1) the defendant's conduct constitutes offenses of dissimilar import, i.e., each offense caused separate identifiable harm; (2) the offenses were committed separately; or (3) the offenses were committed with separate animus or motivation. R.C. 2941.25(B); *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 13. Thus, to determine

whether offenses are allied, courts must consider the defendant's conduct, the animus, and the import. *Id.* at paragraph one of the syllabus.

{¶ 81} Philpott failed to raise an allied-offenses argument before the trial court and did not request merger of any of the offenses. By failing to seek the merger of allied offenses, he forfeited the right to assert an allied-offense argument on appeal except to the extent it constitutes plain error. *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 21-22; *State v. Black*, 2016-Ohio-383, 58 N.E.3d 561, ¶ 19 (8th Dist.).

{¶ 82} Plain error is that which affects the outcome of the proceedings. *Rogers* at ¶ 22, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240. It should only be found in exceptional circumstances and to prevent a miscarriage of justice. *State v. Landrum*, 53 Ohio St.3d 107, 110, 559 N.E.2d 710 (1990). To demonstrate plain error regarding the failure to merge allied offenses, "an accused has the burden to demonstrate a reasonable probability that the convictions are for allied offenses of similar import committed with the same conduct and without a separate animus." *Rogers* at ¶ 3.

{¶ 83} Regarding CR-17-621650, Philpott contends the trial court should have merged his conviction for carrying a concealed weapon and improper handling of firearms in a motor vehicle. The First District recently stated with regard to these offenses that "it is well-settled law that the offenses are committed by different conduct and, therefore, are not allied offenses." *State v. Sawyer*, 1st Dist. Hamilton

No. C-190178, 2020 Ohio App. LEXIS 1366, 6 (Apr. 8, 2020). Accordingly, we find no plain error.

{¶ 84} Regarding CR-17-621977, Philpott contends that Count 1, drug trafficking, should have merged with Count 2, drug possession because the same drug is the subject of both counts. The state concedes the error. *See State v. Stribling*, 8th Dist. Cuyahoga No. 90262, 2008-Ohio-4577, ¶ 33 (where the same drug is involved, drug trafficking and drug possession are allied offenses because one must possess the drug in order to traffic it).

{¶ 85} With respect to CR-17-623868, Philpott contends that his convictions for drug trafficking on Counts 1, 3, and 5 should have merged with his convictions for drug possession on Counts 2, 4, and 6, and that the remaining counts should then merge with each other. The state concedes that the trafficking convictions on Counts 1 and 3 should merge with the possession convictions on Counts 2 and 4, and that the remaining count from the merger of Counts 1 and 2 should merge with the remaining count from the merger of Count 3 and 4.

{¶ 86} The state likewise concedes that Philpott's convictions for drug trafficking and drug possession for cocaine in Counts 5 and 6 should merge. The state disputes that the remaining count from this merger should merge with Counts 1, 2, 3, and 4, however. We agree, because Counts 5 and 6 involved a bag of cocaine that was separate from the bag containing the heroin/carfentanil mixture that was the subject of Counts 1, 2, 3, and 4. *See State v. Price*, 8th Dist. Cuyahoga No.

107096, 2019-Ohio-1642, ¶ 82 (drug trafficking and possession offenses relating to drugs found mixed together in a single bag were allied offenses).

{¶ 87} Accordingly, the fifth assignment of error is sustained in part, and the matter is remanded for resentencing in CR-17-621977 and CR-17-623868 as set forth above.

F. Misdemeanor Sentence

{¶ 88} Under R.C. 2929.24(A)(1), a trial court may impose a jail sentence of not more than 180 days for an offense constituting a first-degree misdemeanor. In CR-17-621977, however, the trial court sentenced Philpott to a six-month term of incarceration, in excess of the 180 days permitted under the statute, on Counts 4, 5, and 6, first-degree misdemeanor offenses for endangering children. *See State v. Pierce*, 4th Dist. Meigs No. 10CA10, 2011-Ohio-5353, ¶ 10 (recognizing that "six months is not the same as one hundred eighty days because each month has a different number of days").

{¶ 89} In his sixth assignment of error, Philpott asserts that he should be resentenced on Counts 4, 5, and 6 to reflect that the sentence for these first-degree misdemeanor offenses is 180 days, and not six months. The state concedes the sentencing error but contends that remand for resentencing on these counts is not necessary because the journal entry of sentencing can be corrected by this court under the authority of App.R. 12(B) as was done in *State v. Hairston*, 8th Dist. Cuyahoga No. 102606, 2015-Ohio-4500.

{¶ 90} This court addressed a similar situation in *Hairston* and concluded:

> Because a term of six months exceeds 180 days, we can reasonably assume that the trial court intended to impose the maximum sentence permitted under R.C. 2929.24(A)(1). Because the trial court's intent is clear from the record, it is appropriate and in the best interest of judicial economy for us simply to modify the judgment entry to substitute "180 days" for "six months" under the authority of App.R. 12(B). *See State v. Polus*, 2014-Ohio-2321, 12 N.E.2d 1237, ¶ 23 (6th Dist.).

Id. at ¶ 39.

{¶ 91} *Hairston* is different from this case, however, because in *Hairston*, the trial court sentenced the defendant to six months in the county jail. *Id.* at ¶ 11. The journal entry of sentencing in this case makes no mention of Philpott serving the six-month sentence for the misdemeanor convictions on Counts 4, 5, and 6 in the county jail. Accordingly, we remand for resentencing on these counts, instead of modifying the sentencing journal entry.

{¶ 92} The sixth assignment of error is sustained.

{¶ 93} Judgment affirmed; remanded for resentencing consistent with this opinion.

It is ordered that the parties share equally 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 defendant's conviction having been affirmed, any bail pending is terminated. Case remanded to trial court for resentencing and execution of that part of the sentence that remains intact.

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

KATHLEEN ANN KEOUGH, JUDGE

MARY J. BOYLE, P.J., and
SEAN C. GALLAGHER, J., CONCUR