[Cite as *State v. Hancovsky*, 2015-Ohio-2602.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2013-L-123**
- vs -	:	
ADAM R. HANCOVSKY,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 12 CR 000715.

Judgment: Affirmed in part, reversed in part, and remanded.

Charles E. Coulson, Lake County Prosecutor, and *Karen A. Sheppert*, Assistant Prosecutor, Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Charles R. Grieshammer, Lake County Public Defender, and *Vanessa R. Clapp,* Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Adam R. Hancovsky, appeals from the November 1, 2013 judgment of the Lake County Court of Common Pleas, sentencing him for improperly handling firearms in a motor vehicle following a jury trial. For the reasons that follow, we affirm in part, reverse in part, and remand.

{¶2} On March 18, 2013, appellant was indicted by the Lake County Grand Jury on two counts: count one, improperly handling firearms in a motor vehicle, a felony of the fifth degree, in violation of R.C. 2923.16(D)(1), with forfeiture specifications; and count two, disorderly conduct, a misdemeanor of the fourth degree, in violation of R.C. 2917.11(A)(2). Appellant retained counsel, waived his rights to be present at the arraignment, and to a speedy trial. The trial court entered a not guilty plea on his behalf.

{¶3} On June 17, 2013, appellant filed a motion to suppress any and all evidence obtained as the result of an unconstitutional stop, search, and seizure. The state filed a response the following month. A hearing was held on August 26, 2013. At the hearing, appellant made an oral motion to suppress any statements made to police based upon a *Miranda* violation.

{¶4} The sole witness to testify at the suppression hearing was Lieutenant Dennis Corbett ("Lieutenant Corbett"), a 33-year law enforcement veteran with the Willoughby Police Department. Around 2:30 a.m. on August 24, 2012, Lieutenant Corbett was driving through the parking lot of Willoughby Brewing Company, the largest bar in the area which can house several hundred patrons. Because it was "Ladies Night," it was a very busy evening. As it was closing time, which frequently involves drunken disturbances, Lieutenant Corbett and other officers were present in the area. Lieutenant Corbett noticed appellant opening all four doors of a vehicle parked near the front doors of the establishment and blasting loud music from the car's stereo. Lieutenant Corbett observed appellant in and out of the vehicle, particularly leaning into the driver's side door. Numerous people were walking out of the bar and passing by the

car. Back-up officer William Bernakis ("Patrolman Bernakis") was also at the scene and assisted Lieutenant Corbett.

{¶5} Lieutenant Corbett approached appellant. He asked appellant several times to either turn the stereo down or off, as the loud music was causing a disturbance and was a violation of a city noise ordinance. Appellant, and others, were dancing around the vehicle. Appellant refused to comply with the officer's repeated requests. Based on his experience and training, Lieutenant Corbett believed appellant was highly intoxicated. Appellant exhibited slurred speech, was unsteady on his feet, had bloodshot and glassy eyes, and smelled of an odor of an alcoholic beverage.

{¶6} Lieutenant Corbett reached into the vehicle and turned off the loud music. He then walked appellant to the back of his car and patted him down. Lieutenant Corbett asked appellant if he had any weapons. Appellant replied that he had a CCW license and that he had a gun in the center console of his car.

{¶7} The officers escorted appellant and placed him in the rear of Patrolman Bernakis' patrol car in order to detain him for further investigation. As appellant was not under arrest at that point, he was not placed in handcuffs. In the meantime, appellant's friend, Timothy Sloban ("Sloban"), began to enter appellant's vehicle. Because there was a firearm inside, the officers ordered Sloban to step away from the vehicle. Sloban complied with the officers' request and walked away. Lieutenant Corbett retrieved the firearm from the unlocked center console of appellant's vehicle and secured the gun in the locked trunk of his patrol car.

{¶8} Appellant became increasingly agitated while seated in the back of the cruiser. He was kicking, screaming, pounding, and rocking the patrol car. He was

beating on the partition. The officers requested several times that he calm down. However, appellant did not comply. As a result, the officers removed appellant from the patrol car, handcuffed him, and placed him under arrest for disorderly conduct. Since this was not an OVI arrest, appellant was never asked to submit to field sobriety testing or a breathalyzer.

{¶9} Following his arrest, the officers told appellant that he could either have his vehicle towed from the scene or he could lock his car and leave it in the parking lot overnight. Appellant chose the latter option. He was then taken to the station.

{¶10} At the station, Lieutenant Corbett inspected the firearm, a Smith and Wesson Walther P22, a .22 caliber semiautomatic handgun. The firearm was loaded with one round in the chamber and six rounds in the magazine.

{¶11} Following the hearing, the trial court overruled appellant's motions to suppress.

{¶12} The matter proceeded to a jury trial which commenced on September 9, 2013. Prior to trial, count two of the indictment, disorderly conduct, was dismissed. Thus, the matter proceeded on count one, improperly handling firearms in a motor vehicle. Appellee, the state of Ohio, presented the testimony of two witnesses, Lieutenant Corbett and Patrolman Bernakis. In all major respects, Lieutenant Corbett's testimony at the suppression hearing was consistent with his trial testimony.

{¶13} In addition, Patrolman Bernakis testified to a similar fact pattern and chain of events as did Lieutenant Corbett. As stated, Patrolman Bernakis assisted at the scene on the night at issue. Like Lieutenant Corbett, Patrolman Bernakis also indicated appellant was blaring loud music outside Willoughby Brewing Company and did not

comply with repeated requests to either turn down or shut off the music. He indicated that appellant had a weapon inside his vehicle. Patrolman Bernakis detected a strong odor of alcohol emanating from appellant, noticed his speech was slurred, and observed him stumbling. While seated in the back of the cruiser, appellant began yelling, kicking, and beating the partition. Appellant would not calm down. Patrolman Bernakis was of the opinion that appellant was highly intoxicated. After testing the gun, Patrolman Bernakis was also of the opinion that it was an operable weapon. When Patrolman Bernakis shot two rounds at the range, he said it did not have any jams or anything. He stated that the weapon could cause someone's death.

{¶14} At the close of the state's case, defense counsel moved for an acquittal pursuant to Crim.R. 29, which was overruled by the trial court.

{¶15} The defense presented the testimony of three witnesses, Christopher Lucskay ("Lucskay"), Sloban, and appellant. The defense also played the video of appellant's booking for the jury, admitted into evidence as Defense Exhibit A.

{¶16} Lucskay and appellant were former high school classmates. They had known each other for about 15 years. Lucskay testified he was at Willoughby Brewing Company on the night at issue. He spoke briefly with appellant several times during the night. Lucskay did not see appellant with alcohol and did not think appellant appeared intoxicated.

{¶17} Sloban accompanied appellant to the bar on the night in question. Sloban testified that he and appellant had two drinks of vodka and Red Bull before they went to Willoughby Brewing Company. Sloban did not later see appellant drink alcohol at the bar. Sloban did not think appellant appeared intoxicated. Sloban indicated appellant

was asked by law enforcement to either turn down or shut off the loud music. On cross-examination, Sloban said appellant and the officer went "back and forth a few times." Sloban agreed that appellant was giving the officer a "hard time."

{¶18} Lastly, appellant testified he had two alcoholic beverages before going to Willoughby Brewing Company. However, appellant claimed he consumed no additional alcohol after arriving at the bar and that he was not intoxicated. Appellant could not recall if he or Sloban went out to his car, opened the doors, or turned on the radio. However, he did recall seeing Lieutenant Corbett talking with Sloban on the passenger side of his car. Although Lieutenant Corbett told appellant to either turn the music down or off, appellant testified the officer did not give him ample opportunity to do so. On cross-examination, appellant stated he had a loaded gun in his car all day.

{¶19} At the close of all the evidence, defense counsel renewed its motion for an acquittal pursuant to Crim.R. 29, which was overruled by the trial court.

{¶20} Following trial, the jury found appellant guilty of count one, improperly handling firearms in a motor vehicle. On November 1, 2013, the trial court sentenced appellant to one year of community control. The court imposed various sanctions and conditions, including ten days in jail, with five days of credit for time served, and revoked his concealed carry permit. The court also ordered the forfeiture of appellant's firearm, magazine, and ammunition. Appellant filed a timely appeal and asserts the following five assignments of error:

{¶21} "[1.] The trial court erred when it overruled the defendant-appellant's motion to suppress any evidence gained as part of an unlawful search of his vehicle, in violation of his right to due process and to be free from unreasonable search and

seizure as guaranteed by the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 14 of the Ohio Constitution.

{¶22} "[2.] The defendant-appellant was deprived of his constitutional rights to fair trial and due process when the trial court failed to give an accurate jury instruction regarding the definition of constructive.

{¶23} "[3.] The defendant-appellant's constitutional rights to due process and fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution were prejudiced by the ineffective assistance of trial counsel.

{¶24} "[4.] The trial court erred to the prejudice of the defendant-appellant when it denied his Crim.R. 29(A) motion for judgment of acquittal in violation of his rights to fair trial and due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution.

{¶25} "[5.] The trial court erred to the prejudice of the defendant-appellant when it returned a verdict of guilty against the manifest weight of the evidence."

{¶26} At the outset, this court finds that the trial court committed no error regarding the jury instruction's validity and the related ineffective assistance of counsel issue under appellant's second and third assignments of error. However, this court finds that the trial court committed error with respect to appellant's first, fourth, and fifth assignments of error as there was no probable cause for police to retrieve appellant's gun from the vehicle and the evidence did not support a finding that appellant was in possession of the gun while intoxicated.

{¶27} For ease of discussion, we will address appellant's assignments of error out of numerical order.

{¶28} In his second assignment of error, appellant contends the trial court failed to give an accurate jury instruction regarding the definition of constructive possession. Although the instruction given by the court was a standard Ohio Jury Instruction, appellant claims that the instruction in conjunction with the indicted charge was misleading. Appellant stresses the jury did not return a quick verdict in this case, thereby surmising that the impasse was likely due to the misleading jury instruction regarding the definition of constructive possession.

{¶29} "For purposes of appellate review, '(t)he decision to issue a particular jury instruction rests within the sound discretion of the trial court.'" *State v. Nichols*, 11th Dist. Lake No. 2005-L-017, 2006-Ohio-2934, ¶28, quoting *State v. Huckabee*, 11th Dist. Geauga No. 99-G-2252, 2001 Ohio App. LEXIS 1122, *18 (Mar. 9, 2001).

{¶30} "'When reviewing a trial court's jury instructions, an appellate court must examine the entire jury charge. *State v. Porter* (1968), 14 Ohio St.2d 10, 13 * * *. (***) One sentence or one phrase should not be looked at in isolation. Id. (***) Further, generally, jury instructions are viewed in their entirety to determine if they contain prejudicial error. *State v. Fields* (1984), 13 Ohio App.3d 433, 436 * * *. (***)' (Parallel citations omitted.) Thus, even if a jury instruction was inappropriate, if it did not materially affect the outcome of the case, a reversal of the judgment is not justified. *Id.* at 15." *State v. Shaffer*, 11th Dist. Trumbull No. 2001-T-0036, 2003-Ohio-6701, ¶52, quoting *State v. Norwood*, 11th Dist. Lake No. 2000-L-146, 2002 Ohio App. LEXIS 1325, *12-15 (Mar. 22, 2002). (Parallel citations omitted.)

{¶31} In the instant matter, the record does not reflect that appellant ever objected to the jury instruction at issue. Thus, we will review the alleged error for plain error. "An alleged error constitutes plain error only if the error is obvious and, but for the error, the outcome of the trial clearly would have been different." *State v. Boles*, 11th Dist. Ashtabula No. 2013-A-0026, 2014-Ohio-744, ¶30, citing *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶108.

{¶32} Consistent with the indictment, the jury had to find appellant guilty beyond a reasonable doubt of the following:

{¶33} "On or about the 24th day of August, 2012, in the City of Willoughby, Lake County, State of Ohio, one ADAM R. HANCOVSKY did knowingly transport or have a loaded handgun in a motor vehicle when, at the time of the transportation or possession, ADAM R. HANCOVSKY was under the influence of alcohol, a drug of abuse or a combination of them."

{¶34} The court instructed the jury pursuant to standard Ohio Jury Instructions. With regard to having a loaded handgun, after the court instructed the jury on "knowingly," the court proceeded as follows:

{¶35} "Had means possessed.

{¶36} "Possession is a voluntary act if the possessor knowingly procured or received the loaded handgun, or was aware of his control thereof for a sufficient period of time to have ended his possession. A person has possession when he knows that he has the object on or about his person or property, or places it where it is accessible to his use or direction, and he has the ability to direct or control its use."

{¶37} Appellant asserts on appeal that while the charge of improperly handling firearms in a motor vehicle requires him to have exercised simultaneous dominion and control of the firearm at the time he was under the influence, the instructions mislead the jury into believing that he could have the ability to direct or control the gun's use at some point in the future. However, nowhere in the jury instructions does the phrase "ability to direct or control its use" indicate action in the future. Rather, the charge specifically indicates that the jury must find that he possessed the gun at the time he was under the influence of alcohol.

{¶38} We determine the evidence does not support a finding that appellant was in possession of the gun while intoxicated. However, the jury instruction regarding constructive possession was accurate and complied with standard Ohio Jury Instructions. *Boles, supra*, at ¶30; *Yarbrough, supra*, at ¶108.

{¶39} Appellant's second assignment of error is without merit.

{¶40} In his third assignment of error, appellant alleges his trial counsel was ineffective.

{¶41} With respect to an ineffective assistance of counsel claim, this court stated in *State v. Henry*, 11th Dist. Lake No. 2007-L-142, 2009-Ohio-1138, ¶50-52:[1]

{¶42} "Preliminarily, we note that *Strickland v. Washington* (1984), 466 U.S. 668, 687 * * * states:

{¶43} "'(a) convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction (* * *) has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel"

1. *See also State v. Peoples*, 11th Dist. Lake No. 2005-L-158, 2010-Ohio-2523, ¶17-30.

guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction (* * *) resulted from a breakdown in the adversary process that renders the result unreliable.'

{¶44} "'(* * *) When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.' *Id.* at 687-688. *State v. Bradley* (1989), 42 Ohio St.3d 136, 142 * * *, quoting *Strickland*, *supra,* at 694, states: '(t)o warrant reversal, "(t)he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."'

{¶45} In this case, appellant reiterates that the jury instruction regarding constructive possession is misleading because while the crime of improperly handling firearms in a motor vehicle requires at the time of the transportation or possession the defendant was under the influence of alcohol, the court instructed the jury that appellant was guilty of possession for the firearm if he had the ability to direct or control its use. As addressed in appellant's second assignment of error, we determine the evidence does not support a finding that appellant was in possession of the gun while intoxicated. **However**, the jury instruction regarding constructive possession was accurate. The

language in the indictment and the language provided to the jury in the jury instructions were consistent with the Ohio Jury Instructions.

{¶46} Nevertheless, appellant asserts his trial counsel was ineffective because he did not object to the jury instruction regarding constructive possession. We note, however, that "[t]rial tactics (including a failure to object) do not substantiate a claim of ineffective assistance of counsel." *Henry, supra,* at ¶78.

{¶47} Upon consideration, the jury instruction regarding constructive possession was proper. Appellant was not prejudiced by any alleged deficient conduct on the part of his trial counsel with respect to this assignment.

{¶48} Appellant's third assignment of error is without merit.

{¶49} In his first assignment of error, appellant argues the trial court erred in overruling his motions to suppress. He alleges the public safety exception to the search warrant requirement does not apply to his case. He claims his gun was neither loose in a public area nor unattended.

{¶50} "'Appellate review of a motion to suppress presents a mixed question of law and fact.' *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8 * * *. During a hearing on a motion to suppress, the trial judge acts as the trier of fact and, as such, is in the best position to resolve factual questions and assess the credibility of witnesses. *State v. Mills*, 62 Ohio St.3d 357, 366 * * * (1992). The appellate court must accept the trial court's factual findings, provided they are supported by competent, credible evidence. *Burnside* at ¶8. Thereafter, the appellate court must determine, without deference to the trial court, whether the applicable legal standard has been met. *Bainbridge v. Kaseda*, 11th Dist. No. 2007-G-2797, 2008-Ohio-2136, ¶20. Thus, we

review the trial court's application of the law to the facts de novo. *State v. McNamara*, 124 Ohio App.3d 706, 710 * * * (4th Dist.1997)." *State v. Haynes*, 11th Dist. Ashtabula No. 2012-A-0032, 2013-Ohio-2401, ¶36. (Parallel citations omitted.)

{¶51} "The Fourth Amendment to the U.S. Constitution, as applied to the states through the Fourteenth Amendment, and Ohio Constitution, Article I, Section 14 requires adherence to judicial processes and proscribes unreasonable searches and seizures. *U.S. v. Ross*, 456 U.S. 798, 825 * * * (1982); *State v. Ford*, 10th Dist. No. 07AP-803, 2008-Ohio-4373, ¶19. Searches conducted outside the judicial process, without a warrant, are 'per se unreasonable' under the Fourth Amendment and '(e)vidence is inadmissible if it stems from an unconstitutional search or seizure.' *Ford* at ¶19, citing *Minnesota v. Dickerson*, 508 U.S. 366, 372 * * * (1993), quoting *Thompson v. Louisiana*, 469 U.S. 17, 20 * * * (1984); *Wong Sun v. U.S.*, 371 U.S. 471, 484-85 * * * (1963). However, the warrant requirement is subject to a ""few specifically established and well delineated exceptions."" *Dickerson* at 372. 'Those seeking exemption from the warrant requirement bear the burden of establishing the applicability of one of the recognized exceptions.' *State v. Fisher*, 10th Dist. No. 10AP-746, 2011-Ohio-2488, ¶17, citing *State v. Lowry*, 4th Dist. No. 96CA2259, 1997 Ohio App. LEXIS 2694 (June 17, 1997)." *State v. Bazrawi*, 10th Dist. Franklin No. 12AP-1043, 2013-Ohio-3015, ¶13. (Parallel citations omitted.)

{¶52} "The automobile exception is a 'specifically established and well delineated' exception to the warrant requirement. *Ross* at 825, citing *Carroll v. U.S.*, 267 U.S. 132 * * * (1925). '(U)nder the automobile exception to the warrant requirement, the police may search a motor vehicle without a warrant if they have

probable cause to believe that the vehicle contains contraband.' *State v. Battle*, 10th Dist. No. 10AP-1132, 2011-Ohio-6661, ¶33. Courts define probable cause in the context of an automobile search as '"a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction."' *State v. Parrish*, 10th Dist. No. 01AP-832, 2002-Ohio-3275, ¶27, quoting *State v. Kessler*, 53 Ohio St.2d 204, 208 * * * (1978), quoting *Carroll* at 149. Accordingly, '(t)he determination of probable cause is fact-dependent and turns on what the officer knew at the time he made the stop and/or search.' *Battle* at ¶34." *Bazrawi*, *supra,* at ¶18. (Parallel citations omitted.)

{¶53} This court notes the great importance of protecting public safety. However, we also note that the public safety exception to the warrant requirement is "narrow." *See, e.g., New York v. Quarles*, 467 U.S. 649 (1984). The record reveals that any risk to the public was extremely limited. As such, based on the facts and circumstances in the case at bar, the public safety exception does not apply.

{¶54} It is the state's position that permitting the gun to remain inside the car presented a risk to the public. The state stresses that numerous bar patrons were leaving the establishment as it was closing time and they were walking by the vehicle. However, the record reveals that officers were informed that a gun was inside the vehicle. Thus, the officers could have immediately removed the gun and/or locked the car at that time. They could have supervised the vehicle which would have eliminated any risk to the public. They did not. The record establishes that appellant was in the police cruiser when the gun was removed, which clearly shows there was no risk of him accessing the gun.

{¶55} The state cites to *State v. Hoyer*, 30 Ohio App.3d 130 (9th Dist.1986) for the proposition that a gun should not be left "loose in a public area" or in an unattended automobile. However, the state's reliance on that case is misplaced as there is no evidence that the gun was "loose." Rather, the record reveals the gun was inside of the car's center console. The record further reveals that police presence in the area was high and police monitored the vehicle following appellant's arrest. Contrary to the state's position, we find that the mere existence of a firearm in a vehicle should not automatically be characterized as a threat to public safety.

{¶56} Upon consideration, the trial court erred in overruling appellant's motions to suppress and we reverse the trial court's decision with respect to this assignment.

{¶57} Appellant's first assignment of error is with merit.

{¶58} In his fourth assignment of error, appellant asserts the trial court erred in denying his Crim.R. 29(A) motion for judgment of acquittal.

{¶59} In his fifth assignment of error, appellant maintains his conviction is against the manifest weight of the evidence. He alleges the jury lost its way in finding that he possessed a loaded firearm in a motor vehicle and that he was under the influence of alcohol.

{¶60} Because this court is also reversing as to the sufficiency/manifest weight of the evidence on the issue of whether appellant had the gun in his possession while he was intoxicated, we will address appellant's fourth and fifth assignments of error together.

{¶61} With regard to sufficiency, in *State v. Bridgeman*, 55 Ohio St.2d 261 (1978), the Supreme Court of Ohio established the test for determining whether a

Crim.R. 29 motion for acquittal is properly denied. The Court stated that "[p]ursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." *Id*. at syllabus. "Thus, when an appellant makes a Crim.R. 29 motion, he or she is challenging the sufficiency of the evidence introduced by the state." *State v. Patrick*, 11th Dist. Trumbull Nos. 2003-T-0166 and 2003-T-0167, 2004-Ohio-6688, ¶18.

{¶62} As this court stated in *State v. Schlee*, 11th Dist. Lake No. 93-L-082, 1994 Ohio App. LEXIS 5862, *13-15 (Dec. 23, 1994):

{¶63} "'Sufficiency' challenges whether the prosecution has presented evidence on each element of the offense to allow the matter to go to the jury, while 'manifest weight' contests the believability of the evidence presented.

{¶64} "'"* * * The test (for sufficiency of the evidence) is whether after viewing the probative evidence and the inference[s] drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all of the elements of the offense beyond a reasonable doubt. *The claim of insufficient evidence invokes an inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence*."'

{¶65} "In other words, the standard to be applied on a question concerning sufficiency is: when viewing the evidence 'in a light most favorable to the prosecution,' '(a) reviewing court (should) not reverse a jury verdict where there is substantial evidence upon which the jury could reasonably conclude that all of the elements of an offense have been proven beyond a reasonable doubt.'" * * *

{¶66} "On the other hand, 'manifest weight' requires a review of the weight of the evidence presented, not whether the state has offered sufficient evidence on each element of the offense.

{¶67} "'In determining whether the verdict was against the manifest weight of the evidence, "(* * *) the court reviewing the entire record, *weighs the evidence* and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. (* * *)"' (Citations omitted.) * * *" (Emphasis sic.) (Citations omitted.)

{¶68} Regarding sufficiency, "a reviewing court must look to the evidence presented * * * to assess whether the state offered evidence on each statutory element of the offense, so that a rational trier of fact may infer that the offense was committed beyond a reasonable doubt." *State v. March*, 11th Dist. Lake No. 98-L-065, 1999 Ohio App. LEXIS 3333, *8 (July 16, 1999). The evidence is to be viewed in a light most favorable to the prosecution when conducting this inquiry. *State v. Jenks*, 61 Ohio St.3d 259, paragraph two of the syllabus (1991). Further, the verdict will not be disturbed on appeal unless the reviewing court finds that reasonable minds could not have arrived at the conclusion reached by the trier of fact. *State v. Dennis*, 79 Ohio St.3d 421, 430 (1997).

{¶69} Regarding manifest weight, a judgment of a trial court should be reversed as being against the manifest weight of the evidence "'only in the exceptional case in which the evidence weighs heavily against the conviction.'" *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997).

{¶70} With respect to the manifest weight of the evidence, we note that the jury is in the best position to assess the credibility of witnesses. *State v. DeHass*, 10 Ohio St.2d 230, paragraph one of the syllabus (1967).

{¶71} In this case, appellant was charged with, convicted of, and sentenced for improperly handling firearms in a motor vehicle, in violation of R.C. 2923.16(D)(1). On appeal, appellant stresses the state presented no evidence that he possessed a loaded handgun in a motor vehicle while under the influence of alcohol.

{¶72} R.C. 2923.16(D)(1) states in part: "[n]o person shall knowingly transport or have a loaded handgun in a motor vehicle if, at the time of that transportation or possession, * * * [t]he person is under the influence of alcohol, a drug of abuse, or a combination of them."

{¶73} Possession can be either actual or constructive. *State v. Campbell*, 11th Dist. Ashtabula No. 2014-A-0005, 2014-Ohio-4305, ¶23. "The Ohio Supreme Court has held that '(c)onstructive possession exists when an individual exercises dominion and control over an object, even though that object may not be within his immediate physical possession.'" *Id.*, quoting *State v. Wolery*, 46 Ohio St.2d 316, 329 (1976). "Circumstantial evidence alone is sufficient to support the element of constructive possession." *Campbell, supra,* at ¶23.

{¶74} The standard Ohio Jury Instruction on possession, OJI CR 417.21(3), states: "[a] person has possession when he knows that he has the object on or about his (person) (property) or (places it where it is accessible to his use or direction) and he has the ability to direct or control its use." The foregoing instruction was provided to the jury in the instant matter.

{¶75} It is the state's position that appellant possessed a gun while under the influence of alcohol, thereby determining that such possession was constructive. However, based on the facts presented, we disagree with the state's position.

{¶76} R.C. 2923.16(D)(1), the section under which appellant was convicted, does not specify that he must be in the car to be found in possession. However, the title of the statute is "Improperly handling firearms in a motor vehicle." (Emphasis added.) R.C. 2923.16. The other crimes listed in R.C. 2923.16 relate to an individual having or using a gun while inside of a car. R.C. 2923.16(D)(1) also creates a crime for transporting a gun, which requires presence in a car. Thus, we determine the crime for which appellant was convicted also requires presence inside of the car.

{¶77} It is uncontroverted that no officer ever saw appellant inside the car. Rather, appellant merely reached into the vehicle to turn down the radio. As stated, the gun was inside of the center console. Thus, appellant could not immediately grab it as if it were just lying on the seat. As there was no risk of a potentially intoxicated individual from using a firearm, R.C. 2923.16(D)(1) does not apply.

{¶78} This case does not involve constructive possession. The question here is not merely whether appellant was the owner of the gun. Rather, the question is whether appellant's possession was such that his intoxication increased the risk of danger related to use of the gun. As stated, the facts presented do not clearly show that appellant actually possessed the gun or had intent to possess it while intoxicated for the purposes of R.C. 2923.16(D)(1). Constructive possession is not meant to include "anyone" who is intoxicated and near a firearm. As such, we decline to expand the

definition as courts must ensure that the legal rights of licensed owners to carry firearms are preserved.

{¶79} Pursuant to *Schlee, supra*, there is not sufficient evidence upon which the jury could reasonably conclude beyond a reasonable doubt that the elements of R.C. 2923.16(D)(1), improperly handling firearms in a motor vehicle, were proven. Thus, the trial court erred in overruling appellant's Crim.R. 29 motion. In addition, based on the evidence presented, the jury clearly lost its way in finding appellant guilty of improperly handling firearms in a motor vehicle. *Schlee, supra*, at *14-15; *Thompkins, supra*, at 387.

{¶80} Appellant's fourth and fifth assignments of error are with merit.

{¶81} For the foregoing reasons, appellant's second and third assignments of error are not well-taken and his first, fourth and fifth assignments of error are with merit. The judgment of the Lake County Court of Common Pleas is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

DIANE V. GRENDELL, J., concurs, with a Concurring Opinion,

TIMOTHY P. CANNON, P.J., concurs in part and dissents in part with a Concurring/Dissenting Opinion

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DIANE V. GRENDELL, J., concurs, with a Concurring Opinion.

{¶82} I concur in the judgment of the court, reversing the trial court's denial of the motion to suppress the firearm, since there was no proper justification for a search

of Hancovsky's vehicle, and the verdict as being against the weight and sufficiency of the evidence. I write separately to expand upon and clarify a few key points.

{¶83} As an initial matter, while I recognize the great importance of protecting the public's safety, an issue which is raised by the State, the specific circumstances of this case do not call for the application of the "public safety" exception to justify the search of Hancovsky's vehicle, as any risk to the public from the presence of Hancovsky's gun in his vehicle was extremely limited. *See State v. Koren*, 100 Ohio App.3d 358, 361-362, 654 N.E.2d 131 (11th Dist.1995). Rather than immediately removing the gun from the vehicle once they were informed about its existence, officers could have easily locked the car doors and supervised the vehicle, preventing any passersby from entering it and accessing the gun. It is hard to imagine that any risk of a bar patron entering a locked car, with police supervision, to obtain the gun in the center console, truly existed.

{¶84} The risk to the public was further diminished by the testimony that the police "kept an eye" on the car following the incident to ensure that "nobody went back to the car to try to drive the car intoxicated." The mere existence of a firearm in a vehicle, in the absence of a legitimate danger, should not automatically be characterized as a threat to public safety, as it runs contrary to the ability of gun owners to exercise their rights.

{¶85} Regarding the issue of constructive possession, the writing judge properly emphasizes that the crime for which Hancovsky was convicted is found in a statute entitled "Improperly handling firearms **in** a motor vehicle." (Emphasis added.) R.C. 2923.16. It is important to recognize that the title is a valid method of interpreting a

statute, since it "adds credence" to the statute's construction and application. *State v. Kiser*, 13 Ohio St.2d 126, 128, 235 N.E.2d 126 (1968); *Wickens v. Dunn*, 71 Ohio App. 177, 179, 48 N.E.2d 662 (9th Dist.1942) (the title "is an element which may be considered in arriving at a proper interpretation of the statute"). Since each of the crimes contained in the statute require a defendant to be *inside* the car, it is illogical that the crime for which Hancovsky was convicted would not also require presence inside the car. There was no evidence that police saw Hancovsky inside the car, such that he could be said to have exercised control over or handled the firearm located inside the center console. While R.C. 2923.16(D)(1) exists to prevent a potentially intoxicated individual from using a firearm, such a risk must first exist.

{¶86} Cases involving constructive possession generally include different circumstances than those present here. For example, this court has noted that a person can be in constructive possession due to his "presence at a residence where drugs were found." (Citation omitted.) *State v. Morris*, 11th Dist. Lake Nos. 2013-L-057 and 2013-L-058, 2014-Ohio-4293, ¶ 42; *State v. Boczar*, 11th Dist. Ashtabula No. 2007-A-0034, 2008-Ohio-834, ¶ 45. Here, the question is not whether Hancovsky was the owner of the gun, but whether his possession was such that his intoxication increased the risk of danger related to use of the gun. When he was outside of the car and made no attempt to reach toward the center console or the gun, it is difficult to say he actually possessed the weapon or had intent to possess it while intoxicated for the purposes of R.C. 2923.16(D)(1). Under the State's position, it is impossible to determine where the line should be drawn; an individual standing 10 feet from his car may be "in

possession." Similarly, this position raises the question of whether *anyone* who is intoxicated and near a firearm may be deemed in constructive possession.

{¶87} The dissenting judge contends that Hancovsky's proximity to the car was such that he was "present" in the vehicle pursuant to R.C. 2923.16(D)(1) and that his proximity and access to the firearm were clear. However, regardless of whether Hancovsky was able to actually reach the firearm from his position standing outside of the vehicle, the facts of this case do not satisfy the statutory requirements for Improperly Handling Firearms In a Motor Vehicle. The statute does not speak of proximity to the vehicle but requires possession of the firearm **in** a motor vehicle. The dissenting judge's interpretation of "presence" creates a slippery slope in which any intoxicated individual who has a firearm in his nearby vehicle can be convicted, even if he has no intent to enter the vehicle or exercise possession of the gun. It stretches the purpose of the statute and interprets constructive possession in a manner that is not logical for this offense.

{¶88} Further, the dissenting judge's discussion of the officer's retrieval of the firearm by "reaching into the vehicle" is of no relevance to whether Hancovsky committed the crime of Improperly Handling Firearms **In** a Motor Vehicle or was in a position to exercise possession over the firearm. The issue is not whether there was a firearm in Hancovsky's car that he could have retrieved; there is no question that this was the case.

{¶89} Finally, the concerns with ensuring that individuals' legal rights to carry firearms are preserved must be emphasized. It was argued in this case that a person who may intend to drink alcohol could leave his firearm at home to prevent this type of

conviction. Such a position is unsupportable, since that individual should be able to exercise his right to carry his gun while travelling to the bar, as long as he does not possess the weapon after imbibing alcohol. *Dist. of Columbia v. Heller*, 554 U.S. 570, 592, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) (the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation"); *Arnold v. Cleveland*, 67 Ohio St.3d 35, 43, 616 N.E.2d 163 (1993). Instead, possession should be properly established, rather than expanding the definition to encompass anyone who carries a gun in his vehicle to a bar and happens to stand near his vehicle.

{¶90} I concur in the majority's judgment, for the reasons outlined above.

TIMOTHY P. CANNON, P.J., concurring in part and dissenting in part.

{¶91} I concur with the majority opinion regarding assignments of error two and three, relating to the trial court's jury instructions.

{¶92} However, I dissent with regard to assignments of error one, four, and five. Respectfully, I disagree with the majority's determination that appellant's act of reaching into the vehicle does not constitute "presence" in the vehicle under R.C. 2923.16. Under the facts of this case, as evidenced in the record, I find that appellant's actions satisfy the "presence" requirement. The majority finds that "appellant could not immediately grab" the firearm because he "merely reached into the vehicle to turn down the radio." The officer's testimony about appellant's proximity and access to the firearm inside the vehicle was clear. It is additionally worth noting that the officer later retrieved

the firearm from the center console, where appellant stated it would be, by also merely "reaching" into the vehicle.