[Cite as *State v. Houston*, 2010-Ohio-2367.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO, Plaintiff-Appellee, vs. MICHAEL HOUSTON, Defendant-Appellant.	: : : : :	APPEAL NO. C-090536 TRIAL NO. B-0809604 *D E C I S I O N.*

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: May 28, 2010

Joseph T. Deters, Prosecuting Attorney, and *Rachel Lipman Curran*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Louis Rubenstein, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

WILLIAM L. MALLORY JR., Judge.

I. Statement of Facts and Procedural Posture

{¶1} On the afternoon of December 5, 2008, the Cincinnati Police Department's Mid-level Drug Unit, in conjunction with the department's SWAT Unit, executed a search warrant at 1308 William Howard Taft Road, within the East Walnut Hills section of the city of Cincinnati. The building at that location was a bi-level house that was being used as an apartment complex. Law enforcement authorities arrived at the scene, announced their presence, and were admitted into the building minutes later. After SWAT officers had secured the location, members of the drug unit entered the building.

{¶2} The building contained a common hallway. In the hallway, standing outside the apartment the officers were going to search, was an individual named Eric Philpot. Officers questioned Philpot and checked his background. Philpot did not have any outstanding warrants, so the officers asked him to leave the premises. The police then entered the apartment.

{¶3} Inside the apartment were two individuals, both of whom had been previously handcuffed by SWAT officers. One of the individuals was the defendant-appellant, Michael Houston. Officers began their search of the apartment. In the bedroom, hanging on a closet door, was a robe. Inside one of the pockets of the robe was an identification card belonging to Houston. Inside the other pocket was a loaded .380 automatic handgun. In addition, on the floor, near the bed, officers discovered a set of keys to the apartment. They also discovered two handgun magazines, one that was compatible with the .380 and one that was not, personal

papers belonging to Houston, and prescription medication belonging to Philpot. Houston, who was also discovered with marijuana on his person, was arrested and subsequently indicted for having a weapon while under a disability.

{¶4} Prior to his trial, Houston filed a motion in limine, asking the court to exclude any testimony or evidence regarding his marijuana arrest. Although it is unclear from the record if Houston's motion was ever granted, throughout the trial, the only mention of marijuana came by way of a joint stipulation from Houston and the prosecution regarding Houston's prior 1998 marijuana-possession conviction that made Houston initially eligible for the weapon-under-disability charge.[1] The jury eventually returned a guilty verdict.

{¶5} At the conclusion of the trial, the prosecutor spoke informally to the jurors concerning the trial. The prosecutor soon discovered that a police report that had not been admitted into evidence had inadvertently been given to the jury along with the evidence that had actually been admitted. This police report contained information concerning not only the weapon-possession charge, but also Houston's most recent marijuana-possession arrest. The prosecutor immediately informed Houston's attorney, who filed a motion for a new trial. The trial court overruled this motion and entered judgment upon the jury's guilty verdict. Houston has timely appealed, asserting six assignments of error.

II. Actual Prejudice and Houston's Motion for a New Trial

{¶6} In his first assignment of error, Houston argues that the trial court erred when it denied his motion for a new trial. Specifically, Houston asserts that the copy of the unadmitted police report erroneously submitted to the jury for consideration tainted the trial and prejudiced the eventual outcome. According to

[1] Hamilton C.P. No. B-9807892-A.

Houston, prejudice from unadmitted evidence, such as the police report in this case, is presumed and can only be rebutted by a showing from the state that the evidence was harmless.[2] Even if prejudice is not presumed, Houston argues, the police report gave rise to actual prejudice in many ways. First, the report mentioned that Houston had been cited for marijuana possession, in spite of the fact that this was never brought out in the trial testimony. Second, the report listed Philpot as Houston's next-of-kin. One of Houston's trial strategies was an attempt to distance himself from Philpot, to the point of attempting to demonstrate that Philpot was the true owner of the gun with a motive to plant the gun on Houston. Third, the report listed 1308 William Howard Taft Road as Houston's residence. Houston attempted to argue that he did not live at that address. Finally, the report also mentioned that Houston had an outstanding warrant for a traffic violation.

{¶7} To prevail on a motion for a new trial, a defendant must demonstrate that the trial court abused its discretion, which in turn prevented the defendant from having a fair trial.[3] When reviewing a trial court's decision regarding a motion for a new trial, an appellate court cannot reverse the decision of the trial court unless there has been a gross abuse of discretion.[4] "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable."[5]

{¶8} "Ohio law is not particularly instructive on the subject of unadmitted evidence that is mistakenly submitted to a jury."[6] Unlike federal law, and contrary to Houston's argument, Ohio law does not presume prejudice for unadmitted evidence,

[2] *United States v. Howard* (C.A.5, 1975), 506 F.2d 865.
[3] Crim.R. 33(A)(1).
[4] *State v. Lopa* (1917), 96 Ohio St. 410, 411, 117 N.E. 319.
[5] *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.
[6] *State v. Westwood* (May 15, 2002), 4th Dist. No. 01CA50, 2002-Ohio-2445, at ¶24.

but rather takes a case-by-case approach, examining (1) whether the record reflects whether the exhibits were actually given to the jury, and (2) whether the error was harmless in light of the cumulative nature of the evidence in relation to the other evidence adduced at trial.[7] In this case, there is no question that Houston's police report was actually given to the jury. Therefore, we must determine whether this error may be deemed harmless because the information contained in the report was cumulative of other, properly admitted evidence.

{¶9} We hold that the information contained in the police report was cumulative of other evidence adduced at trial, and, therefore, that the error in submitting it to the jury was harmless. A thorough review of the record reveals the following: (1) the jury did not hear any testimony regarding Houston's marijuana-possession citation during the trial; (2) testimony revealed that Houston had lived at the address in question and paid rent to the owner; (3) Houston's personal papers, including a birth certificate, paperwork from the bureau of motor vehicles, and a business letter addressed from Philpot to Houston, were discovered on the premises; (4) a set of keys to the apartment was discovered near Houston during the apartment's initial search; and (5) Houston was found in the room where the police discovered the robe containing the gun.

{¶10} Based upon this evidence, there were ample grounds for findings that Houston lived in the apartment, and that Houston and Philpot did not have as antagonistic a relationship as Houston would have had the jury believe. Additionally, the evidence shed doubt on Houston's theory that the gun was planted in his robe. Further, the marijuana-possession charge and the outstanding warrant for a traffic violation were not similar to the charged offense of having a weapon under a

[7] Id., citing *State v. Cooper* (1977), 52 Ohio St.2d 163, 180, 370 N.E.2d 725.

disability. Prejudice based on such dissimilarities was highly unlikely. Houston simply did not demonstrate any prejudice caused by the erroneously submitted police report, and the trial court did not abuse its discretion when it overruled his motion for a new trial. We accordingly overrule Houston's first assignment or error.

III. The Right to Remain Silent and Houston's Motion for a Mistrial

{¶11} While testifying about the search of the apartment at 1308 William Howard Taft Road and the discovery of the gun located in the robe, Officer Jonathan Gordon, the lead investigator, made the following statement: "Mr. Houston had been read his rights, so he wasn't going to talk anymore." Houston made an immediate objection. At a sidebar conference, Houston's attorney requested a mistrial. The trial court offered to give the jury a limiting instruction regarding the statement; however, Houston's attorney refused, indicating that he did not want the court to draw any more attention to the statement.

{¶12} In his second assignment of error, Houston asserts that, under *Doyle v. Ohio*[8] and *Chapman v. California*,[9] for a constitutional error to be ignored as nonprejudicial, the state has the burden to prove beyond a reasonable doubt that the error complained of did not contribute to the jury's verdict.[10] Houston argues that constitutional errors are only considered harmless beyond a reasonable doubt "if the [properly admitted] evidence, standing alone, constitutes overwhelming proof of the defendant's guilt."[11]

{¶13} Mistrials need only be declared when a fair trial is no longer possible.[12] After reviewing the record, we note that the state did not solicit Gordon's

[8] (1976), 426 U.S. 610, 96 S.Ct. 2240.
[9] (1967), 386 U.S. 18, 87 S.Ct. 824.
[10] Id. at 24.
[11] *State v. Williams* (1983), 6 Ohio St.3d 281, 452 N.E.2d 1323, paragraph six of the syllabus.
[12] *State v. Herring*, 94 Ohio St.3d 246, 254, 2002-Ohio-796, 762 N.E.2d 940

statement and never referred to it again during the trial. In addition, Houston's own attorney, presumably for strategic purposes, requested that the court not give any limiting instruction to the jury to ignore Gordon's statement. And as the state argues, many Ohio cases with factual situations similar to this case, have failed to recognize *Doyle* violations.[13] We have previously deemed unsolicited statements such as Gordon's to be "unfortunate," but not egregious, and certainly not intended to deprive the defendant of a fair trial.[14]

{¶14} Because Gordon's comment was unsolicited by the prosecution and not commented on again, and because Houston's attorney refused the trial court's offer of a limiting instruction, we hold that no *Doyle* violation occurred. Accordingly, we overrule Houston's second assignment of error.

IV. Possession

{¶15} In the trial court's initial jury instructions, the term "possession," a necessary element of having a weapon under a disability, was not defined. Along with the court, neither the prosecution nor the defense realized this. During deliberations, the jury submitted three written questions to the court: (1) "What is meant by 'knowingly acquired or had or carried or used?' "; (2) "If the defendant knows someone else with him has a weapon, does that make him guilty?"; and (3) "What does 'knowingly had' under the law mean?"

{¶16} In response to these questions, the court provided the following definitions: (1) " 'Had.' Had means possessed."; and (2) " 'Possession.' A person has possession when he knows that he has the object on or about his person, property, or

[13] See id. (motion for new trial overruled when the state's witness spontaneously identified the defendant as his assailant without being prompted by the prosecution); *State v. Ross*, 5th Dist. No. 2004CA00233, 2005-Ohio-1435 (no error when, under questioning by the prosecution, the interrogating officer made a comment about the defendant refusing to answer questions, when the line of questioning was stopped and the subject not referred to again).
[14] *State v. Watson*, 1st Dist. No. C-010691, 2002-Ohio-4046, at ¶41.

places it where it is accessible to his use or direction and he has the ability to direct or control its use."

{¶17} Houston objected to the court's definition of "possession" and requested one of the following alternative definitions: (1) "Possession is a voluntary act if the possessor knowingly procured or received the handgun, or was aware of his control thereof for a sufficient period of time to have ended his possession."; or (2) " 'Possess' or 'possession' means having control over a thing or substance but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found."

{¶18} The trial court rejected both of these definitions, specifically determining that Houston's second proposed definition was intended to be used in cases involving drug violations under R.C. Chapter 2925.

{¶19} In his third assignment of error, Houston questions the trial court's rejection of only his second proposed definition. Houston asserts that this definition was a better statement of the law as it applied to the facts of his case, and that the trial court abused its discretion by not including the proposed definition.

{¶20} The giving of jury instructions is within the sound discretion of the trial court and will not be disturbed upon appeal unless the record reflects that the trial court abused its discretion.[15] A jury instruction must be viewed in the context of the entire charge rather than in "artificial isolation."[16] Upon review of the record, it is clear that the trial court did not abuse its discretion by giving its definition of "possession." The definition given was an appropriate description of the legal significance of the term. It was taken straight from the Ohio Jury Instructions[17] and

[15] *State v. Guster* (1981), 66 Ohio St.2d 266, 271-272, 421 N.E.2d 157.
[16] *State v. Price* (1979), 60 Ohio St.2d 136, 398 N.E.2d 772, paragraph four of the syllabus.
[17] Ohio Jury Instructions (2009), Section CR 417.21(3).

it was applicable to the facts of the case. Further, the definition requested by Houston, also taken straight from the Ohio Jury Instructions,[18] was specifically intended to be used for drug offenses. This is demonstrated by the fact that the requested definition as used in the Ohio Jury Instructions is the same as the definition for "possession" provided by R.C. 2925.01(K). We cannot say that the trial court abused its discretion by providing its definition of "possession." Therefore, Houston's third assignment of error is overruled.

V. Sufficiency and Weight of the Evidence

{¶21} In his fourth assignment of error, Houston argues that his conviction was not supported by sufficient evidence, and in his fifth assignment of error, Houston argues that his conviction was contrary to the manifest weight of the evidence. Specifically, Houston argues that Philpot had a motive to plant the gun on Houston. We examine both assignments of error together.

{¶22} "The test [for the sufficiency of the evidence] is whether after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt."[19] Even if a reviewing court determines that a conviction is sustained by sufficient evidence, the judgment may still be against the manifest weight of the evidence. When examining the manifest weight of evidence, a reviewing court "review[s] 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 [trier of fact] clearly

[18] Ohio Jury Instructions (2009), Section CR 417.21(6).
[19] *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered."[20]

{¶23} R.C. 2923.13(A)(3) establishes the elements that must be proved to support a conviction for having a weapon under a disability. It provides, "Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply: The person * * * has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse." During the trial, Houston stipulated that he had the requisite prior conviction. And, as we have previously discussed, Houston was discovered in the same room where the gun was found. The gun was found in the pocket of a robe that also contained identification belonging to Houston. Houston's personal effects were found in the same room, and testimony was given that Houston had paid rent to live in the apartment. Taken together, this evidence was sufficient to prove that Houston had knowingly acquired, had, carried, or used a firearm. We hereby overrule Houston's fourth assignment of error.

{¶24} In his argument regarding the manifest weight of the evidence, Houston contends that the testimony and evidence should have led the trier of fact to believe that the gun actually belonged to Philpot, who had "planted" the gun in Houston's robe. Houston asserts that Philpot was scheduled to be sentenced on federal charges the next day, and also that Philpot's father actually owned the house. But the jury heard all the testimony and reviewed all the evidence, and it rejected Houston's theory. The weight to be given the evidence and the credibility of the

[20] *State v. Thompkins* (1977), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

witnesses were primarily for the trier of fact.[21] Even if Philpot did "plant" the handgun in Houston's robe as Houston asserts, he would have done it while Houston was in the same room, presumably aware of what was happening. Considering all the evidence and the testimony previously recited, we cannot say that Houston's conviction was against the manifest weight of the evidence. We therefore overrule his fifth assignment of error.

VI. Ineffective Assistance of Counsel

{¶25} In his sixth assignment of error, Houston argues that he was denied a fair trial because his trial counsel was ineffective. Specifically, Houston contends that his attorney erred by not properly reviewing the exhibits submitted to the jury as evidence. By not checking the exhibits, Houston reasons, counsel allowed the police report to be inadvertently submitted to the jury, even though it had not been admitted into evidence. Houston argues that if this error had not occurred, there was a reasonable probability that the outcome of his trial would have been different.

{¶26} To show ineffective assistance of counsel, a defendant must prove that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense.[22] When a defendant complains of ineffective assistance of counsel, the defendant must show, under all the circumstances, that counsel's representation fell below an objective standard of reasonableness.[23] When attempting to prove prejudice, the defendant must show that there was a reasonable probability that, but for counsel's unprofessional errors, the outcome of the case would have been different.[24]

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[21] *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.
[22] *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052.
[23] Id.
[24] Id.

{¶27} Houston's claim of ineffective assistance fails under both prongs of the *Strickland* test. First, Houston has not demonstrated that his attorney was deficient. Houston's attorney elicited testimony that attempted to convey that the gun belonged to someone else. He was able to show that Philpot's father owned the building, that Philpot had prescription medication on the premises, and that Philpot had the motivation to "plant" the gun in Houston's robe. Simply because the jury failed to believe Houston's version of the events does not mean that his attorney was deficient. After considering all the circumstances, we cannot say that Houston's representation fell below an objective standard of reasonableness.

{¶28} Additionally, Houston suffered no prejudice when his attorney failed to review the exhibits submitted to the jury. As we have previously discussed, the police report erroneously submitted to the jury was a harmless error. The evidence against Houston was more than ample to sustain a guilty verdict despite the inadvertently submitted police report. Houston's sixth assignment of error is overruled.

VII. Conclusion

{¶29} We find no merit in any of Houston's six assignments of error. The judgment of the trial court is affirmed.

Judgment affirmed.

HILDEBRANDT, P.J., and **DINKELACKER, J.,** concur.

Please Note:

The court has recorded its own entry this date.