[Cite as *State v. Gaiter*, 2010-Ohio-2205.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 24758
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
RAY C. GAITER	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 08 04 1271

DECISION AND JOURNAL ENTRY

Dated: May 19, 2010

MOORE, Judge.

{¶1} Appellant, Ray Gaiter, appeals from the decision of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On April 16, 2008, Akron Police officers were working with the State Highway Patrol to conduct a gun violence sweep in targeted areas of Akron, Ohio. During this investigation, officers noticed a vehicle, which they later determined to be driven by Gaiter. Officers started to follow the vehicle, and upon observing a traffic violation, attempted to pull the vehicle over. Gaiter, however, attempted to elude the police. During the chase, he threw a baggie out of the driver's side window. Officers retrieved the item. After a foot chase, officers subdued Gaiter. The baggie contained over 175 grams of crack cocaine.

{¶3} On May 1, 2008, Gaiter was indicted as follows; Count One, possession of cocaine, in violation of R.C. 2925.11(A)(C)(4), with a major drug offender specification; Count

Two, possession of marijuana, in violation of R.C. 2925.11(A)(C)(3); Count Three, tampering with evidence, in violation of R.C. 2921.12(A)(1); and Count Four, failure to comply with an order or signal of a police officer, in violation of R.C. 2921.331(B).

{¶4} On May 19, 2008, a supplemental indictment was filed, charging Gaiter with Count Five, criminal gang activity, in violation of R.C. 2923.42(A). On November 7, 2008, another supplemental indictment was filed, charging Gaiter with Count Six, participating in a criminal gang, in violation of R.C. 2923.42(A).

{¶5} On February 11, 2009, Gaiter was pulled over for speeding. When removed from the vehicle, officers found a partially smoked marijuana blunt and a loaded semi-automatic pistol.

{¶6} On February 24, 2009, Gaiter was indicted as follows: Count Seven, having a weapon under a disability, in violation of R.C. 2923.14; Count Eight, carrying a concealed weapon, in violation of R.C. 2923.12(A)(2); Count Nine, possession of marijuana in violation of R.C. 2925.11(A)(C)(3); and Count Ten, speeding, in violation of R.C. 4511.21. On March 3, 2009, another supplemental indictment was filed, charging Gaiter with Count Eleven, participating in a criminal gang, in violation of R.C. 2923.42(A).

{¶7} Gaiter pled not guilty to the charges and on March 18, 2009, the matter proceeded to a jury trial. Prior to trial, Counts Two, Five, and Eleven were dismissed. Counts Nine and Ten were tried to the court. The court found Gaiter guilty of these charges. The jury found Gaiter guilty of the remaining charges. On April 27, 2009, Gaiter was sentenced to a total of 24 years of incarceration. He has timely appealed this decision and has raised six assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING [GAITER'S] MOTION TO SEVER TWO SEPARATE AND UNRELATED INCIDENTS FOR TRIAL."

{¶8} In his first assignment of error, Gaiter contends that the trial court abused its discretion when it denied his motion to sever.

{¶9} The trial court indicated that it denied "Defendant's Motion to Sever filed herein[.]" A review of the trial court's docket, as well as a review of the transcript, does not reveal either an oral or a written motion to sever. In his brief to this Court, Gaiter does not point to any filed motion to sever, or any oral motion to sever. Instead, he references the trial court's denial of a motion to sever, and does not indicate that he ever actually filed a motion to sever. In any event, as the record before us does not contain a motion to sever, we conclude that Gaiter has failed to preserve this argument for appeal. Further, Gaiter has failed to demonstrate why we should delve into this issue on the first time on appeal. See *In re L.A.B.*, 9th Dist. No. 23309, 2007-Ohio-1479, at ¶19 (declining to address plain error because the appellant had neither argued it nor explained why we should examine the issue for the first time on appeal.

{¶10} Gaiter's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"OHIO'S PARTICIPATING IN CRIMINAL GANG STATUTE PER R.C. 2923.42(A) IS UNCONSTITUTIONAL DUE TO ITS VAGUENESS AND BECAUSE ITS PROHIBITIONS ARE NOT CLEARLY DEFINED."

{¶11} In his second assignment of error, Gaiter contends that R.C. 2923.42(A) is unconstitutional because it is vague and its prohibitions are not clearly defined. The record reflects that Gaiter failed to raise this argument in the trial court.

{¶12} The "'[f]ailure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a [forfeiture] of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal.'" *State v. Dent*, 9th Dist. No. 23855, 2008-Ohio-660, , at ¶7, quoting *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus, limited by *In re M.D.* (1988), 38 Ohio St.3d 149. While a defendant who forfeits such an argument still may argue plain error on appeal, this court will not sua sponte undertake a plain-error analysis if a defendant fails to do so. See *State v. Hairston*, 9th Dist. No. 05CA008768, 2006-Ohio-4925, at ¶11. Because Gaiter forfeited this issue on appeal and has not raised a claim of plain error, we must conclude that his second assignment of error lacks merit. Gaiter's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

> "[GAITER'S] CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL WAS VIOLATED WHEN THE TRIAL COURT OVERRULED [GAITER'S] OBJECTION TO THE FOLLOWING INFORMATION BEING USED AND/OR GIVEN TO THE JURY DURING TRIAL AND AT THE CLOSE OF THE TRIAL PRIOR TO DELIBERATION: 1) CERTIFIED COPIES OF JUDGMENT ENTRIES WHICH NOT ONLY SHOWED [GAITER'S] CONVICTIONS, BUT ALSO REFLECTED THE MULTIPLE CHARGES AGAINST [GAITER] WHICH HAD BEEN DISMISSED; 2) A NON-EVIDENTIARY TIMELINE, WHICH INCLUDED INFORMATION REGARDING [GAITER'S] PREVIOUS PRISON TERM, CREATED BY LAW ENFORCEMENT TO BE USED IN TRIAL; AND 3) REFERENCES TO [GAITER'S] PRIOR PRISON INCARCERATION."

{¶13} In his third assignment of error, Gaiter contends that the trial court violated his right to due process and a fair trial when it overruled his objections to evidence presented by the State.

{¶14} Although Gaiter's assignment of error references a constitutional issue, the substance of his argument relates to the trial court's discretion to admit evidence. A trial court possesses broad discretion with respect to the admission of evidence. *State v. Maurer* (1984), 15

Ohio St.3d 239, 265. An appellate court will not disturb evidentiary rulings absent an abuse of discretion. *State v. Roberts*, 156 Ohio App.3d 352, 2004-Ohio-962, at ¶14. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶15} Despite listing several pieces of evidence in his assigned error that he alleges were improperly admitted, Gaiter's argument focuses solely on his contention that the trial court abused its discretion when it admitted certified copies of journal entries of his prior convictions that reflected multiple charges against Gaiter that had been dismissed. Thus, we limit our discussion to this issue.

{¶16} Gaiter points to a discussion prior to trial in which he made an oral

> "motion in limine to prohibit any reference or disclosure to the jury that [] Gaiter served prison time as a result of the previous gang conviction and was released from prison in 2007. I don't think it's relevant in any way to any of the matters at issue in this case. *** It would be my intention if and when the prosecution intends to submit a certified copy of the journal entries of the convictions that led to the prison term to move the Court to redact *portions relative to reflect incarceration*." (Emphasis added.)

{¶17} Our review of this discussion reveals that Gaiter did not move to redact the journal entries with respect to the inclusion of charges that had been dismissed. He did not even mention the dismissed charges. Instead, his motion in limine focused on the portions of the entries that reflected his terms of incarceration. It appears Gaiter was concerned about the jury hearing evidence that he had been incarcerated. Therefore, Gaiter did not raise this specific issue in his motion in limine.

{¶18} Further, Officer Rodney Criss testified to the certified journal entries. He identified them, explaining that State's exhibit eight was a certified journal entry in which Gaiter was convicted of domestic violence, exhibit nine was a certified journal entry in which Gaiter was convicted of domestic violence and criminal gang activity, and exhibit ten was a certified journal entry in which Gaiter was convicted of possession of cocaine. Gaiter did not object to this testimony. Thus, a review of the record reveals that Gaiter did not object to the journal entries at the time they were testified to during trial. "This Court need not consider a claimed error that an appellant failed to bring to the trial court's attention at a time when that court could have avoided or corrected the supposed error." (Citation omitted.) *State v. Goff*, 9th Dist. No. 23292, 2007-Ohio-2735, at ¶47; *State v. McDonald* (1970), 25 Ohio App.2d 6, 11 ("when a question is asked and answered without objection, the error, if any, will be considered to have been [forfeited]"). Gaiter does not argue plain error, nor does he explain why we should delve into this issue for the first time on appeal. Therefore, Gaiter's third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

> "THE TRIAL COURT ERRED IN DENYING [GAITER'S] CRIM.R. 29 MOTION FOR ACQUITTAL DUE TO THE INSUFFICIENCY OF THE EVIDENCE PRESENTED BY THE [STATE] DURING TRIAL REGARDING THE CHARGES IN ISSUE."

{¶19} In his fourth assignment of error, Gaiter contends that the trial court erred in denying his Crim.R. 29 motion for acquittal based on insufficiency of the evidence. We do not agree.

{¶20} When considering a challenge to the sufficiency of the evidence, the court must determine whether the prosecution has met its burden of production, while a manifest weight challenge requires the court to examine whether the prosecution has met its burden of

persuasion. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). To determine whether the evidence in a criminal case was sufficient to sustain a conviction, an appellate court must view that evidence in a light most favorable to the prosecution:

> "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. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

Trial Testimony

{¶21} The State presented the testimony of Akron Police Officer Donald Schismenos, a certified gang specialist in gang homicides and gang profiles. The trial court qualified him as an expert with regard to gangs. Officer Schismenos testified that criminal activity, graffiti, hand signs, and colors are indicators of gang activity. He stated that the officers also look at the persons with whom an individual associates and at continued criminal conduct. When determining that an area is controlled by a specific gang, he looks at which members of which gangs are being identified in that particular area, loitering for a particular purpose, and who commits the crime in the area. He stated that oftentimes, the area is marked by graffiti. Officer Schismenos verified that when a gang controls a particular area, it attempts to control the criminal activity in terms of things that would generate money or power. He stated that the Kaika Klan Outlaws' ("KKO") territory was the South Arlington Street corridor, Interstate 76-77 down to Waterloo Road to Ellet and Firestone Park.

{¶22} Officer Schismenos testified that the KKO's primary purpose was to earn money. "[T]hey engage in a variety of different criminal activity to make money. Their main focus is

drug trafficking, sale of crack cocaine, marijuana, and such, and that is what we commonly arrest a lot of the members for out of that gang."

{¶23} Officer Schismenos testified that he had been involved in an investigation of the KKO in 2001. He stated that he was aware of Morris Gaiter, Gaiter's brother, and that Morris Gaiter was involved with the KKO. Officer Schismenos testified to a photo of several members of the KKO at Morris Gaiter's gravesite. He stated that there were two red hats on either side, indicating the colors of the gang. According to Officer Schismenos, Gaiter is in the photo along with Deonte Brunson, Andrew Burnett, Ronald Lewis, Shawn Arbon, Eddie Smith, and Raphael Griffin. Deonte Brunson, Ronald Lewis, and Eddie Smith were convicted of participating in a criminal gang. Officer Schismenos further testified that Gaiter was convicted in 2004 for participating in a criminal gang. Officer Schismenos explained that officers obtained the photo when they arrested Damien Stafford, who was also convicted for participating in the KKO. Officer Schismenos testified that the photograph was significant because of the red and black worn by the individuals, and the fact that the individuals were together. "Association is a major factor in criminal gangs. There's strength in numbers. The more members they have within a gang, the more things they can do, and fighting rivals, also. The fact that they're all hanging out with the colors and the hats draped over the tombstone shows their affiliation and representing their gang activity or gang affiliation." He further explained that it is important in gang culture to honor fallen gang members, notably with a teardrop tattoo, or other rest-in-peace tattoos.

{¶24} Officer Schismenos testified that his personal contact with Gaiter began in 1996-97. He testified to a photo of Gaiter wearing a red bandana around his head. He explained that Gaiter was standing with Jonte Johnson and Michael Smith. Both men wore red bandanas on their heads. Officer Schismenos testified that Gaiter was "throwing up a gang hand sign, which

is the five-point crown[.]" He stated that he seized the photo in 1997. He testified that it was possible to leave a criminal gang. He explained that to do so, usually the person will "disassociate themselves with the gang members because there's always the peer pressure to continue the criminal activity. They usually leave the area, the city. They'll cover over their tattoos to show that they're no longer associated. They'll stop wearing those type of colors, because then they're still associated with that group, and they're oftentimes still associated by rival gang members as part of that group." He stated that the single biggest indicator that a person has left a gang would be "[t]o stop engaging in criminal conduct." When asked what evidence he had that related Gaiter to criminal gang activity, Officer Schismenos testified that "through his continual ties to the gang, continual activity within the gang, continual criminal conduct, and his length of stay within the gang that he's a higher-ranking member of this gang, and provides, I guess, the criminal activity to the other gang members in the form of crack cocaine." He opined that based upon his investigation of Gaiter and all the evidence he had reviewed in this case, that Gaiter was a member of the KKO.

{¶25} The State presented the testimony of Akron Police Officer Rodney Criss. Officer Criss testified that he worked in the gang unit. He testified to the history of the KKO. He explained that he had been involved in two lengthy investigations of the KKO. The most recent investigation which included the FBI had been initiated in 2007 and ended in January of 2009. He explained that the goal of the investigation was to buy crack cocaine at the street level from known drug dealers. He explained that Lovers Lane, Crosier and Inman Streets represented the heart of the KKO territory. Officer Criss testified that gang members sometimes have tattoos that relate directly to the gang. He explained that the tattoos could be general gang tattoos or could be in memorial of fallen gang members. He verified that it is very important in gang

culture to honor fallen gang members. Officer Criss stated that Gaiter had two significant tattoos. The first was a tear drop under his left eye with the initials MG, for Morris Gaiter, Gaiter's brother, a KKO member. According to Officer Criss, Morris Gaiter was involved in the first investigation by the FBI and was arrested at that time for street-level narcotic sales. Officer Criss stated that on Gaiter's back, he had a rest in peace tattoo for Olski, also known as Omar Daewood, who was Vernon Singleton's brother and was a known KKO member. Officer Criss explained that Omar Daewood had also been arrested as a result of the first investigation by the FBI.

{¶26} Officer Criss testified that other factors of participating in a criminal gang are a common color, common hand signs and names. He explained that the primary color associated with the KKO was red. He testified to a photo of Omar Daewood, who was with two other individuals, one of whom was a convicted KKO member. They were both wearing red. Officer Criss next testified to a photo of Gaiter taken in a search warrant during Gaiter's first charge of participating in a criminal gang, in which he was wearing all red. He further testified to three certified journal entries in which Gaiter was convicted of domestic violence, criminal gang activity, and possession of cocaine.

{¶27} On cross-examination, Officer Criss stated that not everyone who travels through the KKO territory is a member of the gang. He further testified that the photo of Gaiter was taken in early 2000.

{¶28} On re-direct examination, Officer Criss explained that Gaiter was not charged in the latest investigation of the KKOs because the primary focus of that investigation was street-level narcotic sales, not wholesalers.

{¶29} Finally, Officer Criss testified as to how one would know that a person had left gang life. He explained that

> "if an individual is trying to turn his life around, he's not going to have any police contacts. On top of that he's going to stay out of the area that's controlled by the gang, especially areas that he's aware of that drug sales are going on in those areas, stay away from other known gang members, other known convicted drug dealers, try to leave the life as much as possible."

He further explained that the person would not continue to commit crimes.

April 16, 2008

{¶30} Akron Police Officer Joe Danzy testified that on April 16, 2008, he was working with State Highway Patrol Officers to conduct a gun violence sweep in targeted areas of Akron, Ohio. The targeted areas were areas of Akron with higher incidents of crime. Specifically, Officer Danzy was working in east Akron. At approximately 7:30 p.m., Officer Danzy noticed a vehicle traveling in the opposite direction on Inman Street, approaching Lovers Lane. He turned his marked police cruiser to follow the vehicle. As he was following the vehicle, it turned without using a turn signal. Further, Officer Danzy explained that the vehicle was traveling at a high rate of speed, and therefore brushed the curb during the turn. Officer Danzy activated the siren of his police cruiser. He testified that the vehicle started to pick up speed and that "[i]t was pretty evident at that point that the car was trying to elude us." He stated that the vehicle continued to accelerate and drive through stop signs without stopping. Officer Danzy testified that the driver was the only person in the vehicle.

{¶31} Officer Danzy stated that while on Inman Street he observed a baggie, a little bigger than a softball, thrown out of the driver's side window. Due to his experience as an officer, he believed the item to be contraband. Officer Danzy stopped his police cruiser to allow his partner to recover the item. After letting his partner out of the cruiser, Officer Danzy

continued to pursue the vehicle. Officer Danzy testified that he observed the vehicle drive through three more stop signs without stopping, traveling at a rate of about 30-35 mph. Officer Danzy testified that he observed a pedestrian jump out of the way of the vehicle he was following because "[h]e was close to getting hit." The vehicle eventually stopped in a driveway and the driver attempted to run. Officer Danzy chased him and was able to tackle him a few houses away. Officer Danzy identified Gaiter as the driver.

{¶32} Officer Danzy stated that the baggie he observed thrown out of the driver's side window field tested positive for crack cocaine and weighed approximately 176 grams. He indicated that on the street, the drugs would sell for about $20 a rock, which would total about $40,000 to $50,000. He testified that this amount of crack cocaine indicated that it was not for personal use but was instead a wholesale amount. He testified that it was rare to encounter that much crack cocaine at one time. On cross-examination, Officer Danzy stated that he did not see the drugs until his partner later caught up with him, and he did not see a hand throw the baggie out of the vehicle or see it land on the street.

{¶33} The State presented the testimony of Trooper Vernon Pickering of the Wooster State Highway Patrol Post. Trooper Pickering testified that on April 16, 2008, he was working with the Akron Police Department, specifically Officer Danzy, in the area of Lovers Lane, in Akron, Ohio. He was riding with Officer Danzy. He testified that Officer Danzy thought the driver of the vehicle was suspicious because he would not make eye contact. Therefore, Officer Danzy turned around to follow the vehicle. Trooper Pickering testified that the vehicle picked up speed and ran over a right-hand curb on a right-hand turn without using a turn signal. He stated that as the driver picked up speed, he continued to turn around to look at the officers to see where

they were. Trooper Pickering testified that the driver appeared to be trying to evade a marked police cruiser.

{¶34} Trooper Pickering stated that the area through which they were driving was a residential area and people were outside. Once Officer Danzy activated the siren, Trooper Pickering observed an object thrown from the driver's side window. He testified that the driver was alone in the vehicle. Trooper Pickering testified that he could see the item in the road. Officer Danzy stopped the cruiser to allow Trooper Pickering to retrieve the item. Trooper Pickering stated that when he first observed the item coming out of the window, he attempted to keep watch on it. He stated that he visually assessed the item and suspected it to be crack cocaine. Trooper Pickering testified that there was no one in the street when he retrieved the baggie and that he was able to keep his eye on it after it was thrown out of the vehicle and before he was able to retrieve the baggie.

Gaiter's post 2007 Police Contacts

{¶35} Officer Criss testified that when he heard about Gaiter's April 16, 2008 arrest, he immediately knew who Gaiter was "and he was one of our convicted Kaika Klan Outlaws gang members."

{¶36} Because Officer Criss recognized Gaiter as a previously convicted KKO member, he began researching Gaiter's background, using field interrogation cards and looking at his previous contacts with police. He explained that as part of his research he looked at the individuals with whom Gaiter was associated to determine if those other individuals were members of a gang. Officer Criss testified to an exhibit that illustrated the timeline of Gaiter's police contacts. He testified Gaiter had been released from prison in February of 2007. Therefore, Officer Criss stated, he began his research into Gaiter's police contacts at that point.

{¶37} With regard to Gaiter's police contacts, Officer Criss testified that the first contact was on July 28, 2007, and he was stopped for loitering at Lovers Lane "which is a known drug area." He stated that this was significant because Lovers Lane was in the heart of the KKO territory, and the main area on which the Akron Police Department focused during its investigation regarding drug sales. Officer Criss further explained the meaning of "territory" for purposes of a gang. He stated that "[b]asically, that's their turf. That's the area that they were the most comfortable in, the area that they will be the most free to be walking around, pretty much the area they control. Anybody else who would come in there and sell drugs would have to be known to them or have their permission to be there." He further emphasized that the area in which Gaiter was found loitering was KKO territory.

{¶38} Also in regard to the July 28, 2007 incident, the jury heard from Akron Police Officer Jason McKeel. Officer McKeel testified that he was familiar with gangs in Akron, particularly the KKO. He testified that the Lovers Lane and Talbot area is "the central location on the east side for gang activity." He stated that the KKO generally operates in this area. He further explained that the area is a drug location. Officer McKeel testified that as part of their procedure, officers attempt to stop, speak with and identify individuals in the area. The officer would fill out a field interrogation card, in part, to document individuals that are congregating together. He stated that the police department attempted to link individuals together for a variety of reasons, most notably to know whom to contact if they were looking for a specific individual and that detectives use the cards during investigation of certain crimes.

{¶39} On July 28, 2007, Officer McKeel received a call to check possible drug dealing at the corner of Lovers Lane and Talbot. When he responded to the call, he found Gaiter, along with Raphael Griffin, Darrell Terry, James Clancy and Eddie Smith. Officer McKeel testified

that he had previously had contact with the four men that were with Gaiter and he knew them to be KKO. On cross-examination, Officer McKeel testified that after a search of the men, no drugs or weapons were found.

{¶40} Officer Criss testified that he found significant that the four men with whom Gaiter was found were all known members of the KKO, one of whom had already been convicted of participating in a criminal gang. Further, Officer Criss explained, controlled drug buys were made from the individuals with whom Gaiter was associating during the Akron Police Department's investigation into the KKO. On redirect examination, Officer Criss further explained that, with regard to Gaiter's police contact for loitering on July 28, 2007,

> "it was found quite frequent within our investigation when an individual was approached by the undercover officer, the individual would usually not have dope on him. We would usually have to trip with him. He would drive us someplace else to get them[.] *** It was rare they actually had the drugs on their person. We became aware of drug trends and things that happened on the street corners in cities and so forth, I think actually the drug dealers have become aware of what not to do to keep from getting arrested to the best of their ability, as well."

{¶41} The next police contact to which Officer Criss testified was on March 19, 2008, when Gaiter was stopped with Damario McCall. Akron Police Officer Michael Orrand testified that on March 19, 2008, he pulled Gaiter over at Lovers Land and Inman Street. He stated that there were two other passengers in the vehicle, McCall and another individual whose name he could not recall. Officers searched the trunk of the vehicle and found bullets. Officer Criss explained that the Akron Police Department had completed a controlled buy from McCall during its investigation of the KKO and their drug activity, and that McCall was a known KKO member. Officer Criss again found significant the fact that Gaiter was stopped with McCall at Lovers Lane and Inman, the heart of the KKO territory.

{¶42} The next incident of police contact was the April 16, 2008 crack cocaine arrest. Officer Criss testified that the amount of drugs found

> "are not the quantity that would be at street level, would not be the kind of weight, and never the weight we encounter when we get with all these individuals. Being that our investigation primarily concentrated on was the street-level narcotics, we were never able to get that much drugs at one time. I will say that amount and that weight would probably be either the primary dealer or the middle man. He would not be the kind of guy that would be standing on the corner slinging dope. He would be the guy that would be giving the dope to the guys on the corner slinging it."

{¶43} Officer Criss testified Gaiter was 29 years old and that the individuals he was associated with were in their early 20's.

{¶44} Next, Officer Criss testified that on May 22, 2008, he was conducting a bar check at an east Akron bar. He explained that the purpose of a bar check was to "identify[] the individuals in the bar, see[] if anybody had warrants, see[] if there were any kind of criminal violations, any alcohol violations[.]" He stated that he observed Gaiter in the bar with Aaron Fuqua and Jerry Stallings. Officer Criss explained that he was familiar with Aaron Fuqua because he investigated him for criminal gang activity in 2006. Officer Criss explained that the criminal gang charge was dismissed as part of a plea negotiation. However, through the course of his investigation, Officer Criss learned of Aaron Fuqua's gang involvement. Officer Criss stated that Jerry Stallings was a convicted felon and that his brother was one of the first members of the KKO.

{¶45} The next police contact was on May 26, 2008, when Gaiter was stopped by police at Crosier Street and Yale. Officer Criss testified that this location was outside of the KKO territory, and was controlled by a younger gang. According to Officer Criss, the KKO controlled the younger gang, and therefore, he had arrested KKO members with the younger gang members. Akron Police Patrolman Tito Corral testified that on May 26, 2008, he observed a

vehicle pass him at a high rate of speed while playing excessively loud music. He attempted to initiate a traffic stop, and the vehicle quickly pulled into a driveway. Gaiter was in the vehicle with Aaron Fuqua, Vernon Singleton and Constanel Witherspoon. A pat down search of Gaiter revealed $1000. Gaiter informed the officers that he was unemployed. Officer Criss explained that Constanel Witherspoon had previously been convicted of gang related charges as a member of the KKO and Vernon Singleton was a convicted felon.

{¶46} The last police contact was on February 11, 2009, when Gaiter was stopped at Chittenden and 7th Avenue, again in the heart of the KKO territory. According to Officer Criss, Gaiter was arrested with a gun. The jury also heard testimony from Akron Police Detective Tim Harvey with regard to the February 11, 2009 contact. Detective Harvey stated that on that date, he was wearing plain clothes, in an unmarked police car, checking on a drug complaint on the east side of Akron. He stated that Detective Danzy notified him that he had observed a vehicle stop at the intersection of 7th Ave. and Chittenden. According to Detective Harvey, this was a well known drug area. He observed the vehicle and proceeded to follow it. He stated that the vehicle was traveling in excess of 50 mph on a residential street. He continued to follow the vehicle until a marked police vehicle could stop it. Detective Harvey stated that he determined the estimated speed of the vehicle by following it and using his own speedometer, a method known as pacing.

{¶47} Akron Police Officer Ted Male testified that on February 11, 2009 he was working on a drug complaint near Arlington Rd. He stated that he was in uniform and in a marked police cruiser. He testified that he received information from Detective Harvey regarding a speeding vehicle. Accordingly, he stopped the vehicle and determined that Gaiter was the driver and sole occupant. Gaiter informed him that he had come from an address on

Whitney. Officer Male stated that this information was significant because he knew him to have stopped at the intersection of 7th and Chittenden. Officer Male stated that he smelled marijuana and asked Gaiter to step out of the vehicle. Gaiter asked Officer Male "why?" several times before Officer Male eventually cuffed him in the driver's seat. As Officer Male was pulling Gaiter from the vehicle, he discovered a partially smoked marijuana blunt beneath Gaiter's leg. Upon checking the vehicle, Officer Male located a gun "in the center console where [Gaiter] had been sitting and leaning his elbow on the center console. I opened it up and right in the top of the center console compartment was a loaded P22 Walther semi-automatic pistol." Officer Male testified that he had personal knowledge that Gaiter was under indictment.

{¶48} On cross examination, Officer Male stated that the vehicle was titled to a female and that there were female items in the car. He verified that Gaiter had a valid license and that he did not check the gun for fingerprints.

POSSESSION OF COCAINE-MAJOR DRUG OFFENDER

{¶49} Initially, Gaiter contends that his conviction for possession of cocaine and the major drug offender specification was not based upon sufficient evidence.

{¶50} Pursuant to R.C. 2925.11(A), "[n]o person shall knowingly obtain, possess, or use a controlled substance." R.C. 2925.11(A). Further, "[i]f the amount of the drug involved *** equals or exceeds one hundred grams of crack cocaine, possession of cocaine is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code." R.C. 2925.11(C)(4)(f).

{¶51} R.C. 2901.22(B) defines "knowingly" as follows:

> "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

"Possession" is defined as

> "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." R.C. 2925.01(K).

{¶52} R.C. 2901.21(D)(1) sets forth the requirements for criminal liability and provides: "Possession is a voluntary act if the possessor knowingly procured or received the thing possessed, or was aware of the possessor's control of the thing possessed for a sufficient time to have ended possession."

{¶53} Gaiter contends that the State failed to show that he knowingly possessed the crack cocaine. The testimony revealed that Gaiter was in the process of running from police, in a clear attempt to avoid being stopped. It is well established that evidence of flight is admissible evidence of a "'consciousness of guilt.'" *State v. Brady*, 9th Dist. No. 22034, 2005-Ohio-593, at ¶9, quoting *State v. Taylor* (1997), 78 Ohio St.3d 15, 27. Therefore, a rational juror could conclude that Gaiter's attempt to evade the marked police vehicle established that he knew the item in the baggie was crack cocaine. Gaiter further contends that because the baggie was found in the street and not on Gaiter's person, the State failed to show that he possessed it. The testimony clearly indicated that Detective Danzy observed the baggie come out the driver's side window and that the driver was the sole occupant of the vehicle. Trooper Pickering also testified that he observed the item thrown out the window, and that he kept his eye on it until he was able to get out of his vehicle to retrieve the item. Prior to trial, the parties stipulated to the BCI report that indicated that the substance in the baggie was crack cocaine. At trial, Detective Danzy

testified that the baggie contained 176 grams of crack cocaine. Accordingly, Gaiter's contention that the State failed to present sufficient evidence with regard to possession of crack cocaine and his designation as a major drug offender is without merit.

{¶54} To the extent that Gaiter contends that the trial court erred in making findings to label Gaiter a major drug offender, this argument is not properly before us. Gaiter has failed to separately assign this issue as error, and therefore, we decline to address it here. See App.R. 16(A), App.R. 12(A)(2); see, also, Loc.R. 7(B)(7).

TAMPERING WITH EVIDENCE

{¶55} Gaiter was convicted of tampering with evidence, in violation of R.C. 2921.12. This section states, in part, that "[n]o person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall *** [a]lter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation[.]" R.C. 2921.12(A)

{¶56} Gaiter contends that the State failed to present evidence that the item thrown out of Gaiter's window was indeed the crack cocaine that was brought into Court. As we explained above, a reasonable juror could conclude that the baggie thrown out of Gaiter's window and retrieved by Trooper Pickering was the same baggie that was subsequently determined by BCI to contain crack cocaine. Accordingly, Gaiter's argument is without merit.

FAILURE TO COMPLY

{¶57} R.C. 2921.331(B) states that "[n]o person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring his motor vehicle to a stop." Pursuant to R.C. 2921.331(C)(5)(a), "[a] violation of division (B) of this section is a felony of the third degree if the jury or judge as trier of fact

finds any of the following by proof beyond a reasonable doubt: *** (ii) The operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property."

{¶58} Gaiter contends that the State failed to show that he caused a substantial risk of serious physical harm to person or property. This argument is without merit. Detective Danzy and Trooper Pickering testified that Gaiter ran through several stop signs without stopping and was traveling at a high rate of speed on residential streets. Finally, Detective Danzy testified that he observed a pedestrian jump out of the way of Gaiter's vehicle to avoid getting hit. Accordingly, this portion of Gaiter's assigned error is overruled.

PARTICIPATING IN A CRIMINAL GANG

{¶59} R.C. 2923.42(A) states:

> "(A) No person who actively participates in a criminal gang, with knowledge that the criminal gang engages in or has engaged in a pattern of criminal gang activity, shall purposely promote, further, or assist any criminal conduct, as defined in division (C) of section 2923.41 of the Revised Code, or shall purposely commit or engage in any act that constitutes criminal conduct, as defined in division (C) of section 2923.41 of the Revised Code."

{¶60} We have explained that "there is no criminal liability under Section 2923.42(A) unless the defendant actively participated in a gang, knew the gang engaged in criminal gang activity, and promoted, furthered, or assisted criminal conduct, or engaged in criminal conduct himself." *State v. Hairston*, 9th Dist. Nos. 23663, 23680, 2008-Ohio-891, at ¶15.

{¶61} The State presented sufficient evidence to support Gaiter's conviction. Officer Schismenos and Officer Criss testified to the history of the KKO and explained that Gaiter was a known member of the KKO. See *State v. Stafford*, 9th Dist. No. 24144, 2009-Ohio-701, at ¶43. The trial court qualified Officer Schismenos as an expert on gangs.

> "The Ohio Supreme Court has held that a police officer may be qualified as an expert on gangs if he has gained knowledge and experience about gangs through investigating gang activities and if his testimony shows that he possesses specialized knowledge about gang symbols, cultures, and traditions, beyond that of the trier of fact. *State v. Drummond*, 111 Ohio St.3d 14, [] 2006-Ohio-5084, ¶116; *State v. Jones* (June 13, 2000), 10th Dist. No. 99AP-704." *State v. Hairston*, 10th Dist. No. 08AP-735, 2009-Ohio-2346, at ¶58.

Gaiter does not contend on appeal that that the State failed to show that the KKO was a criminal gang with respect to R.C. 2923.42(A). Further, Gaiter does not contend that the State failed to present evidence that Gaiter had "knowledge that the criminal gang engages in or has engaged in a pattern of criminal gang activity."

{¶62} On appeal, Gaiter mentions that the State failed to show that he actively participated in a criminal gang. However, with regard to this element, Gaiter has failed to present this Court with anything more than a bare assertion. He has failed to develop this argument. App.R. 16(A)(7); App.R. 12(A)(2). Regardless, to the extend that Gaiter references *Hairston* for the proposition that the State must show that he actively participated in the KKO, we conclude that the State satisfied its burden. Several officers testified to Gaiter's police contacts, including his pattern of criminal history, involving previous convictions of domestic violence, participating in a criminal gang, and possession of cocaine. *Hairston* at ¶58. Further, testimony of several officers revealed that Gaiter had extensive connections to and interaction with several known and/or convicted members of the KKO. Almost all of Gaiter's contacts with the police occurred within the heart of the KKO territory. Officer Criss and Officer Schismenos testified that territory is very important to a gang, and therefore, they attempted to control who could come into their territory to sell drugs. Testimony revealed that the KKO was a profit-oriented gang, thus engaged in criminal activity to make money. Therefore, members were often arrested selling or offering to sell crack cocaine and other controlled substances. Officer

Schismenos testified that Gaiter was a higher ranking member of the KKO, which was corroborated by Officer Criss' statement that most of the individuals police observed Gaiter associating with were much younger than he. Further, testimony revealed that the amount of crack cocaine attributed to Gaiter indicated that he was the wholesaler of the drugs, thus supplying the younger members with crack cocaine to sell at the street level.

{¶63} Although it is important to note that standing on a street corner is not a criminal offense in and of itself, in light of Officer Criss' testimony that the mode of operation of the KKO was not to carry the drugs on their person in an effort to avoid getting caught by police, Gaiter's loitering with members of the KKO on a street corner in the heart of the KKO territory provides evidence of his active association with the KKO. Officer Schismenos further testified to the importance of associations within the gang culture, as well as the importance of remembering the deaths of fellow gang members. To this end, testimony revealed that Gaiter had strong ties with several known and/or convicted KKO members. He had two tattoos representative of deceased KKO members. He was depicted in photos wearing all red, the KKO's primary color; was in a photo with KKO members in which he was making the KKO hand sign; and had been photographed at his brother's grave with other KKO members who were in red. In light of all of the evidence presented, we find that the State presented sufficient evidence that Gaiter actively participated in the gang.

{¶64} Lastly, the State had to show that Gaiter himself engaged in criminal conduct. *Hairston*, supra, at ¶15. Gaiter's argument that the State presented no evidence to show that Gaiter was "aiding and abetting anyone or that he supported, assisted, encouraged, cooperated with advised or incited any other person in the commission of [] the crimes in issue[,]" is without merit. This argument fails to acknowledge that, pursuant to R.C. 2923.42, the State was required

to show that Gaiter *either* "promoted, furthered, or assisted criminal conduct, *or* engaged in criminal conduct himself." (Emphasis added.) *Hairston*, supra, at ¶15. The State presented ample evidence that Gaiter engaged in criminal conduct himself.

{¶65} R.C. 2923.42(A) refers to R.C. 2923.41(C) to define criminal conduct. This section defines criminal conduct as "the commission of *** an offense listed in division (B)(1)(a), (b), or (c)[.]"

{¶66} Pursuant to R.C. 2923.41(B);

> "(B)(1) 'Pattern of criminal gang activity' means, subject to division (B)(2) of this section, that persons in the criminal gang have committed, attempted to commit, conspired to commit, been complicitors in the commission of, or solicited, coerced, or intimidated another to commit, attempt to commit, conspire to commit, or be in complicity in the commission of two or more of any of the following offenses:
>
> "(a) A felony or an act committed by a juvenile that would be a felony if committed by an adult;
>
> "(b) An offense of violence or an act committed by a juvenile that would be an offense of violence if committed by an adult[.]"

{¶67} The State presented sufficient evidence, as we explained above, that Gaiter engaged in the crime of possession of cocaine, a felony offense. Further, the State presented Gaiter's former convictions for possession of cocaine, criminal gang activity, and domestic violence, thus establishing a pattern of criminal gang activity. Accordingly, there was sufficient evidence to establish that Gaiter himself engaged in criminal conduct. See *Hairston*, supra, at ¶15.

{¶68} Despite Gaiter's contention, the testimony revealed that he was actively participating in the gang and not merely committing a crime in an area that happened to be known for gang activity. Accordingly, this portion of Gaiter's assigned error is overruled.

WEAPON

{¶69} Gaiter was convicted of having a weapon while under disability. R.C. 2923.13(A) states, in pertinent part:

> "no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:
>
> "(2) The person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.
>
> "(3) The person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been an offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse."

{¶70} Gaiter contends that the State failed to present sufficient evidence that he knowingly possessed the gun in the vehicle on February 11, 2009, when he was stopped for speeding.

{¶71} "Possession may be actual or constructive." *State v. Kobi* (1997), 122 Ohio App.3d 160, 174. Constructive possession has been defined as "knowingly [exercising] dominion and control over [the drugs], even though [they] may not be within his immediate physical possession." *State v. Hankerson* (1982), 70 Ohio St.2d 87, syllabus; see also, *State v. Wolery* (1976), 46 Ohio St.2d 316, 329. Furthermore, ownership need not be proven to establish constructive possession. *State v. Mann* (1993), 93 Ohio App.3d 301, 308. Circumstantial evidence is sufficient to support the elements of constructive possession. See *Jenks*, 61 Ohio St.3d at 272-73. Officer Male indicated that when he stopped Gaiter, Gaiter refused to get out of the car, and that he was leaning on the center console. Upon searching the center console, Officer Male located a loaded gun. A reasonable juror could conclude beyond a reasonable

doubt that Gaiter knew the gun was in the center console of the vehicle in which he was the sole occupant and that his refusal to exit the car was intended to further conceal the weapon. Accordingly, this portion of Gaiter's assignment of error is overruled.

{¶72} Gaiter's fourth assignment of error is overruled.

ASSIGNMENT OF ERROR V

> "THE TRIAL COURT ERRED IN SENTENCING [GAITER] TO SEPARATE AND CONSECUTIVE TIME REGARDING THE PARTICIPATING IN A CRIMINAL GANG AND THE OTHER OFFENSES WHICH ALLEGEDLY OCCURRED ON APRIL 16, 2009, BECAUSE [GAITER'S] ACTS WERE NOT COMMITTED SEPARATELY AND NOR DID HE HAVE A SEPARATE ANIMUS FOR EACH ALLEGED OFFENSE; WHEREFORE, THE SENTENCING FOR THE PARTICIPATING IN A CRIMINAL GANG OFFENSE SEPARATELY AND CONSECUTIVELY CONSTITUTES A VIOLATION OF [GAITER'S] RIGHT TO BE FREE FROM DOUBLE JEOPARDY WHICH MANDATES THAT NO PERSON SHALL 'FOR THE SAME OFFENCE TO BE TWICE PUT IN JEOPARDY OF LIFE OR LIMB.'"

{¶73} In his fifth assignment of error, Gaiter contends that the trial court erred in sentencing him on the conviction for participating in a criminal gang and the conviction of possession of cocaine, which both occurred on April 16, 2008, because they are allied offenses.

{¶74} A defendant cannot be convicted of two separate offenses if they are "allied offenses of similar import." R.C. 2941.25(A). The Ohio Supreme Court has

> "recognized that R.C. 2941.25 requires a two-step analysis. In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's conduct is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses." (Emphasis sic.) (Internal citations omitted.) *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, at ¶14.

{¶75} With regard to the first step in the analysis, the Court explained that a court is required "to compare the elements of offenses in the abstract, i.e., without considering the

evidence in the case, but does not require an exact alignment of elements." Id. at ¶27. Gaiter contends that possession of cocaine and participating in a criminal gang are allied offenses. He concedes, however, that "the elements are not the same for Participating in a Criminal Gang and Possession of Cocaine[.]" He, however, urges this Court to look at the facts of this case to determine that irrespective of the elements, the offenses are allied offenses. As we have explained, we are not to consider the evidence in this particular case when comparing the elements of the offenses. The elements of the two statutes, as discussed in our disposition regarding the sufficiency of the evidence, do not compare to such a degree that the commission of one results in the commission of the other. It is clear that, in the abstract, one can possess drugs without participating in a criminal gang and that one can participate in a criminal gang without possession drugs. Accordingly, Gaiter's fifth assignment of error is overruled.

ASSIGNMENT OF ERROR VI

"THE TRIAL COURT ERRED IN IMPROPERLY INSTRUCTING THE JURY ON THE PARTICIPATING IN A CRIMINAL GANG."

{¶76} In his sixth assignment of error, Gaiter contends that the trial court erred in improperly instructing the jury on the charge of participating in a criminal gang activity.

{¶77} After reading the jury instructions to the jury, the trial court asked trial counsel if they had any additions or corrections to the jury instructions. Gaiter's counsel requested a side bar during which he discussed a provision of the jury charge with regard to possession of cocaine. He did not mention any issue with regard to the charge of participating in a criminal gang activity. He indicated that he had no other issues with regard to the instructions. "[W]aiver is the 'intentional relinquishment or abandonment of a known right.'" *State v. Hairston*, 9th Dist. No. 05CA008768, 2006-Ohio-4925, at ¶9, quoting *United States v. Olano* (1993), 507 U.S. 725, 733, quoting *Johnson v. Zerbst* (1938), 304 U.S. 458, 464. The waiver of an objection

precludes this Court from reviewing it on appeal. *Hairston*, supra, at ¶9. Gaiter has affirmatively waived any alleged error with regard to the jury instructions, and has thus waived this argument on appeal. *State v. Zander*, 9th Dist. No. 24706, 2010-Ohio-631, at ¶58; *Hairston*, supra, at ¶9. As we are precluded from addressing it on appeal, Gaiter's sixth assignment of error is overruled

III.

{¶78} Gaiter's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

JANA DELOACH, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.