[Cite as *State v. Rucker*, 2010-Ohio-3005.]

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

STATE OF OHIO	C.A. No. 25081
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
DEWITT RUCKER	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 2009 01 0047(C)

DECISION AND JOURNAL ENTRY

Dated: June 30, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} During a raid on a suspected drug house, police found Dewitt Rucker hiding in a closet with a baggie of cocaine on the floor near his knee. A search of the house produced additional baggies of cocaine and crack cocaine, handguns, ammunition, marijuana, a large amount of cash, and evidence the kitchen had been used to produce crack cocaine. After a jury convicted him of various charges and found him not guilty of two others, Mr. Rucker appealed.

BACKGROUND

{¶2} On January 2, 2009, officers from Akron's Street Narcotics Uniform Detail were watching a suspected drug house on Hazel Street in Akron. Officers stopped a vehicle they had seen leaving the house and arrested Marvin Shepard, a known drug dealer, who was carrying cocaine, marijuana, and hundreds of dollars in cash.

{¶3} Officers obtained a search warrant for the house, and the SWAT team assembled to execute the warrant. Officers approached the house and followed a group of children through the front door. The first officer to enter the house testified that he saw a man running through the house and gave chase. The officer found Sean Nunnally on the floor at the entrance to the first floor bathroom. He was carrying $8432 and a driver's license issued to Mr. Rucker. Upstairs, police found Dejanette Murray lying on the bed in the southeast bedroom. Mr. Rucker was found crouching in the closet in the same bedroom. Police also arrested Everett Whitfield, to whom the house was rented, who was carrying $568 in cash at the time of his arrest. Police found cocaine, marijuana, cash, and weapons in the house.

{¶4} The State charged Mr. Rucker with: (1) trafficking in crack cocaine; (2) possession of crack cocaine; (3) trafficking in cocaine, in the vicinity of a juvenile, (4) illegal manufacture of drugs in the vicinity of a juvenile, (5) possession of cocaine, (6) having weapons while under disability, (7) possession of criminal tools, and (8) possession of marijuana. Each of the first five charges carried a specification for forfeiture of more than $12,500 under Section 2941.14.17 of the Ohio Revised Code.

{¶5} The trial court found Mr. Rucker guilty of the minor misdemeanor charge of possession of marijuana and tried the felony charges to a jury. The jury found Mr. Rucker not guilty of trafficking in crack cocaine and not guilty of illegal manufacture of drugs. It found him guilty of a lesser included offense of possession of crack cocaine in an amount between one and four grams and guilty of a lesser included offense of possession of cocaine in an amount between five and twenty-four grams. The jury found him guilty as charged of trafficking in cocaine, having weapons under disability, and possessing criminal tools.

{¶6} Mr. Rucker moved for a new trial. The trial court denied his motion and sentenced him. This Court dismissed Mr. Rucker's appeal in case number 24950 for lack of a final, appealable order because the trial court's journal entry failed to reflect the disposition of the forfeiture specification. See *State v. Hayes*, 9th Dist. No. 99CA007416, 2000 WL 670672 at *1 (May 24, 2000).

{¶7} The trial court resentenced Mr. Rucker on October 6, 2009. He has timely appealed the judgment and presented five assignments of error. This Court affirms Mr. Rucker's convictions because: (1) his conviction for having weapons while under disability is based on sufficient evidence; (2) his convictions for having weapons under disability, cocaine possession, trafficking in cocaine, and possession of criminal tools are not against the manifest weight of the evidence; (3) the trial court correctly denied his motion for a new trial; (4) the trial court's failure to sua sponte order severance of the weapons charge from the drug-related offenses was not plain error; (5) Mr. Rucker did not demonstrate that the trial court denied him his Sixth Amendment right to effective assistance of counsel.

SUFFICIENT EVIDENCE

{¶8} Part of Mr. Rucker's second assignment of error is that his conviction for having weapons under disability is not supported by sufficient evidence and is against the manifest weight of the evidence. He has argued that the State failed to present evidence that he knowingly had a firearm. "Inasmuch as a court cannot weigh the evidence unless there is evidence to weigh," this Court will consider his sufficiency argument before analyzing his argument regarding the manifest weight of the evidence. *Whitaker v. M.T. Auto. Inc.*, 9th Dist. No. 21836, 2007-Ohio-7057, at ¶13.

{¶9} Whether a conviction is supported by sufficient evidence is a question of law that this Court reviews de novo. *State v. Thompkins*, 78 Ohio St. 3d 380, 386 (1997); *State v. West*, 9th Dist. No. 04CA008554, 2005-Ohio-990, at ¶33. This Court must determine whether, viewing the evidence in a light most favorable to the prosecution, it could have convinced the average finder of fact of Mr. Rucker's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St. 3d 259, paragraph two of the syllabus (1991).

{¶10} Mr. Rucker has challenged the sufficiency of the evidence supporting his conviction for having a weapon while under disability. Section 2923.13(A)(3) of the Ohio Revised Code provides that, "[u]nless 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 . . . [t]he person . . . has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse . . . ."

{¶11} At trial, Mr. Rucker stipulated to the admission of the journal entry reflecting his 2004 convictions for aggravated trafficking in marijuana and possession of cocaine. He has not argued that he was not under disability at the time of the 2009 raid on Hazel Street. He has argued that the State failed to present evidence that he "knowingly acquire[d], ha[d], carr[ied], or use[d]" either of the two handguns found in the house. Mr. Whitfield, the man who rented the house on Hazel Street, testified that the guns belonged to him. Mr. Whitfield also testified that he saw Mr. Rucker handle the guns in order to guard the house. Therefore, there was direct evidence that Mr. Rucker had or used the guns. Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to have convinced the average finder of fact of Mr. Rucker's guilt beyond a reasonable doubt. See *State v. Jenks*, 61 Ohio St. 3d 259, paragraph

two of the syllabus (1991). To the extent that Mr. Rucker's second assignment of error addressed the sufficiency of the evidence, it is overruled.

MANIFEST WEIGHT OF THE EVIDENCE

{¶12} The second part of Mr. Rucker's second assignment of error is that his conviction for having weapons under disability is against the manifest weight of the evidence. His first assignment of error is that his convictions for drug possession, trafficking in cocaine, and possession of criminal tools are against the manifest weight of the evidence. If a defendant argues that his convictions are against the manifest weight of the evidence, this Court "must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction[s] must be reversed and a new trial ordered." *State v. Otten*, 33 Ohio App. 3d 339, 340 (1986).

The Evidence

{¶13} Officers testified that they found illegal drugs in five rooms of the house: the kitchen, living room, first floor bathroom, and both second floor bedrooms. In plain view, on the kitchen counters and in the sink, police found a digital scale and razor blade, a kitchen knife, and a cooking pot all coated with cocaine residue. On top of the kitchen cabinet, police found a loaded handgun. Inside the cabinets, police found a baggie containing approximately six grams of crack cocaine, a plate with approximately eight grams of crack cocaine on it, and ammunition for the handgun. They also identified items such as a large quantity of baking soda and small clear plastic baggies that police testified are commonly used in producing and selling cocaine. They found a small amount of marijuana on the kitchen counter and a large amount behind the microwave oven.

{¶14} In the first floor bathroom, police found two baggies of cocaine on the floor beside the toilet. One baggie contained approximately 75 grams of powder cocaine and the other contained approximately 36 grams of crack cocaine. Police found a few grams of marijuana on the living room floor. The rest of the drugs were found upstairs.

{¶15} In the southwest bedroom, police found five baggies of cocaine "scattered" around a television set that was on the floor of the closet. The baggies contained a total of approximately 145 grams of powder cocaine. Under the pillow on the bed, police found a loaded handgun. Officers did not find anyone in the southwest bedroom.

{¶16} Across the hallway in the southeast bedroom, police found Ms. Murray on the bed and Mr. Rucker hiding in the closet. One officer testified that, after removing Mr. Rucker from the closet, he found a baggie containing approximately 12 grams of cocaine on the floor near where Mr. Rucker's knee had been. Another officer testified that, as he was coming through the front door, he looked up the stairs and saw a woman running from the southwest bedroom to the southeast bedroom where Ms. Murray was found. On the dresser in the southeast bedroom, police found $95 in cash and a second driver's license issued to Mr. Rucker. Inside the dresser, police found personal papers addressed to Mr. Rucker at three different addresses, $3220 in cash, and three digital scale covers coated with residue. In a purse in the same bedroom, police found a small amount of marijuana and, on the floor, they found approximately two grams of crack cocaine and more marijuana.

{¶17} Mr. Whitfield admitted that he had prior felony drug convictions and that, at the time of this incident, he was serving house arrest for domestic violence and nonpayment of child support. Although he did not have a job, he testified that, in order to go sell cocaine on the day of the raid, he had planned to call his caseworker to report that he was leaving his house to go to

work. He also said that, in exchange for truthful testimony about the raid on Hazel Street, the prosecutor agreed to recommend a five-year sentence, despite the fact that he faced twenty to thirty years in prison if convicted as charged.

{¶18} Mr. Whitfield testified that, prior to the raid, Mr. Rucker and his girlfriend, Ms. Murray, were living in the Hazel Street house and had been using the southeast bedroom. According to Mr. Whitfield, on the day of the raid, he had seen Mr. Rucker deliver powder cocaine to Marvin Shepard, the man police identified as a known drug-dealer whose car they had stopped on the afternoon of the raid after he had left the Hazel Street house. Mr. Whitfield described Mr. Shepard as Mr. Rucker's friend and said he watched Mr. Rucker accept payment for the drugs.

{¶19} Mr. Whitfield also testified that, minutes before the raid, Mr. Rucker had gone upstairs to get some cocaine for Mr. Whitfield to sell. According to him, all of the powder cocaine found in both bedrooms belonged to Mr. Rucker. A police officer testified that, as the SWAT team was coming through the front door, he saw Ms. Murray running from Mr. Whitfield's bedroom to Mr. Rucker's bedroom. Police went directly upstairs and found that there was nobody in Mr. Whitfield's bedroom. The only two people on the second floor were both found in the southeast bedroom. The vast majority of the drugs on the second floor, however, were found in Mr. Whitfield's empty bedroom, scattered around the floor and precariously perched on the edge of a television in the closet.

{¶20} In the southeast bedroom with Ms. Murray, police found mail addressed to Mr. Rucker, thousands of dollars in cash, and a small amount of marijuana and crack. They found Mr. Rucker in the closet and, after removing him, they found a baggie on the closet floor that contained approximately 12 grams of powder cocaine. Mr. Rucker testified that the cocaine had

not been in the closet when he was and accused the police of lying about finding it there. Mr. Rucker testified that he had not had a job in quite some time, but that he owned all of the money found in the southeast bedroom. He said that the $3220 that was in the dresser with his mail was left over from an insurance settlement. He also claimed to know nothing about the digital scale covers that police reported finding inside the same dresser.

{¶21} Mr. Rucker testified that, after his sister kicked him out of her house, he went to stay temporarily with Mr. Whitfield and just happened to be present five days later when police raided the house. Mr. Rucker's sister testified that he had been staying with her until just after Christmas. Mr. Rucker said that he had not been at the Hazel Street house the night before the raid and, after returning to Hazel Street in the late morning, had been sleeping in the southeast bedroom until Ms. Murray woke him to tell him that police were there. Mr. Rucker said that he was scared and immediately jumped into the nearest closet, although he could not say why he was scared of the police.

Having Weapons While Under Disability

{¶22} Although Mr. Whitfield's testimony was sufficient to support Mr. Rucker's conviction for having weapons while under disability, it was for the jury to determine what weight, if any, to give that testimony. Mr. Rucker has argued that Mr. Whitfield's testimony is not evidence that Mr. Rucker knowingly acquired, had, carried, or used the guns. He seems to be attacking Mr. Whitfield's testimony for being vague. Mr. Rucker cross-examined the witness, however, and had the opportunity to show the jury that Mr. Whitfield's testimony was not credible for any reason, including its lack of detail. Mr. Whitfield's testimony that he saw Mr. Rucker "handle" the guns in order to protect the house, if believed, is evidence that Mr. Rucker knowingly had, carried, or used them. The jury had to decide how to resolve the conflict

between Mr. Whitfield's testimony and Mr. Rucker's statement that he "hate[d] guns" and had never touched the handguns that were in the house. Mr. Rucker also testified that Mr. Whitfield had "lied about everything that came out of his mouth." Having reviewed the record, this Court cannot say that, 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." *State v. Otten*, 33 Ohio App. 3d 339, 340 (1986). Mr. Rucker's second assignment of error is overruled.

Possession of Cocaine

{¶23} The jury found Mr. Rucker guilty of possessing at least one, but less than five, grams of crack cocaine and at least five, but less than twenty-five, grams of powder cocaine. Mr. Rucker has argued that he did not know how the cocaine got into the bedroom with him and that Mr. Whitfield's testimony was not credible because he admitted he was a liar and he had traded his testimony for a plea deal.

{¶24} Section 2925.11(A) provides that "[n]o person shall knowingly obtain, possess, or use a controlled substance." "Possess" means "having control over a thing or substance . . . ." R.C. 2925.01(K). Possession may be actual or constructive and either individual or joint. *State v. McShan*, 77 Ohio App. 3d 781, 783 (1991); *State v. Gibson*, 9th Dist. No. 18540, 1998 WL 225037 at *2 (May 6, 1998). Possession "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). "[R]eadily useable drugs found in very close proximity to a defendant may constitute circumstantial evidence and support a conclusion that the defendant had constructive possession of such drugs." *State v. Brown*, 2d Dist. No. 17891, 2000 WL 966161 at *9 (July 14, 2000) (quoting *State v. Kobi*, 122 Ohio App. 3d 160, 174 (1997)).

"[T]he crucial issue is not whether the accused had actual physical contact with the article concerned, but whether the accused was capable of exercising dominion or control over it." *State v. Ruby*, 149 Ohio App.3d 541, 2002-Ohio-5381, at ¶30 (citing *State v. Brooks*, 113 Ohio App. 3d 88, 90 (1996)). "Circumstantial evidence has the same probative value as direct evidence. *State v. Jenks*, 61 Ohio St. 3d 259, 272 (1991). Additionally, "[i]t is well established that evidence of flight . . . tends to show consciousness of guilt." *State v. Lamb*, 9th Dist. 23418, 2007-Ohio-5107, at ¶16 (citing *Sibron v. New York*, 392 U.S. 40, 66 (1968)).

{¶25} Mr. Rucker testified that he had been staying with Mr. Whitfield for several days and that he had been using the bedroom where police found a small amount of crack and a single baggie of powder cocaine. Mr. Rucker testified that he did not live there and did not know that there was any cocaine in the house. Mr. Rucker said that neither he nor his girlfriend smoked crack and that he had never seen any crack in the bedroom they had been using. When asked about the small amount of crack found on the floor of that bedroom, he said he had no idea where it could have come from. He testified that he was shocked to hear that his girlfriend had pleaded guilty to possession of cocaine. Although Mr. Rucker said that he had no idea there were drugs in the house, he also said that, when he learned that police were downstairs, he ran to hide in the closet. Despite the inference of bias arising from Mr. Whitfield's plea deal, the jury was not required to believe Mr. Rucker's testimony over Mr. Whitfield's.

{¶26} The cocaine and crack cocaine possession verdicts are compatible with convictions for the quantity of drugs that were found in the bedroom where Mr. Rucker was found. The record supports the conclusion that Mr. Rucker was able to exercise dominion or control over the drugs found in the bedroom he admitted he had been using for several days before the raid, especially in light of the fact that he was found hiding in the same room. The

jury rejected the State's efforts to prove that Mr. Rucker possessed all of the cocaine found in the house and convicted him of lesser included offenses based on smaller quantities. This is not a case of the jury losing its way in resolving conflicts in the evidence. To the extent that Mr. Rucker's first assignment of error addressed the manifest weight of the evidence regarding the cocaine possession convictions, it is overruled.

Trafficking in Cocaine

{¶27} Section 2925.03(A)(1) provides that "[n]o person shall knowingly . . . [s]ell or offer to sell a controlled substance." Section 2925.03(A)(2) provides that "[n]o person shall knowingly . . . [p]repare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person." Mr. Rucker has argued that his mere presence during the raid is not evidence of trafficking and that Mr. Whitfield lied to the jury.

{¶28} Mr. Whitfield admitted that he was selling illegal drugs out of the Hazel Street house, but said that Mr. Rucker, Ms. Murray, and Mr. Nunnally were doing the same. When asked how he knew that to be true, Mr. Whitfield testified that he had seen them do it. He also testified that Mr. Rucker was supplying him with powder cocaine to sell on the streets. According to Mr. Whitfield, moments before the police arrived, Mr. Rucker had gone upstairs to get some powder cocaine to give to Mr. Whitfield to sell. In his brief, Mr. Rucker has argued that, because there was no evidence of a buyer being present in the home, Mr. Whitfield must have been lying about why Mr. Rucker was upstairs when police arrived. Mr. Whitfield testified, however, that he intended to leave the house that evening to sell about seven grams of powder cocaine. According to Mr. Whitfield, all of the cocaine found on the second floor of the

Hazel Street house belonged to Mr. Rucker. Additionally, police found Mr. Rucker crouching beside a baggie containing nearly double the amount of powder cocaine that Mr. Whitfield said he was waiting for Mr. Rucker to bring him. It was up to the jury to determine the credibility of Mr. Whitfield's testimony. In any event, the jury was not required to believe Mr. Rucker's testimony. Mr. Rucker said that he was not aware of any illegal drugs or drug dealers being in that house. He testified that, had he realized there was cocaine in that house, he would not have been willing to stay there. It does not appear that the jury believed him.

{¶29} Mr. Whitfield provided direct evidence that Mr. Rucker was guilty of trafficking in cocaine. The jury may have believed Mr. Whitfield's testimony that he saw Mr. Rucker sell powder cocaine to Mr. Shepard and to others inside the Hazel Street house. See R.C. 2925.03(A)(1). The jury may also have believed that Mr. Rucker was responsible for the digital scale and razor blade covered in cocaine residue and the large number of baggies that police found in the kitchen. Based on direct and circumstantial evidence, the jury may have believed that all of the cocaine found upstairs belonged to Mr. Rucker and that he was supplying it to Mr. Whitfield so that it could be sold to others. See R.C. 2925.03(A)(2). The jury did not lose its way by finding Mr. Rucker guilty beyond a reasonable doubt of trafficking in cocaine. To the extent that it addressed Mr. Rucker's conviction for trafficking in cocaine, his first assignment of error is overruled.

Possession of Criminal Tools

{¶30} Under Section 2923.24(A) of the Ohio Revised Code, "[n]o person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally." "Possession or control of any substance, device, instrument, or article commonly used for criminal purposes, under circumstances indicating the item is intended for

criminal use" "constitutes prima-facie evidence of criminal purpose" under Section 2923.24(B)(3). Constructive possession is demonstrated if the items are under a defendant's dominion or control. *State v. Wolery*, 46 Ohio St. 2d 316, 329 (1976); *State v. McShan*, 77 Ohio App. 3d 781, 783 (1991). The State may prove dominion and control through circumstantial evidence. See *State v. Jenks*, 61 Ohio St. 3d 259, 272 (1991). Furthermore, "[a] conviction is not against the manifest weight of the evidence merely because there is conflicting evidence before the trier of fact." *State v. Urbin*, 148 Ohio App. 3d 293, 2002-Ohio-3410, at ¶26 (quoting *State v. Haydon*, 9th Dist. No. 19094, 1999 WL 1260298 at *7 (Dec. 22, 1999)).

{¶31} In plain view in the kitchen of the Hazel Street house, police found a large box of baking soda, a cooking pot, a knife, and a digital scale heavily coated with cocaine residue. Police testified that these items are commonly used to produce crack cocaine. Mr. Whitfield corroborated that evidence by testifying that, not long before the raid, he had seen Mr. Rucker use those items to "cook" crack in the kitchen. Mr. Rucker testified that he did not know anything about what was going on in the kitchen. In fact, according to Mr. Rucker, he had never used the kitchen nor had he ever even walked through it.

{¶32} Mr. Rucker has argued that, based on his testimony, he could not have possessed any of the criminal tools police found in the kitchen. In support of his argument, he has cited this Court's opinion in *State v. Hairston*, 9th Dist. Nos. 23663, 23680, 2008-Ohio-891, at ¶13-14. In response, the State has argued that the house Mr. Rucker had been occupying was "chock full of cocaine and items used to prepare drugs for sale."

{¶33} In *Hairston*, a SWAT team found dishes, scales, and baggies similar to those used in the distribution of crack cocaine, but the State failed to present any evidence that the defendants had any connection to those items or to the distribution of drugs from the house. This

Court held that "[t]he mere fact that the[ ] [defendants] were present in the house at the time of the raid does not support a finding that they were trafficking in drugs." *State v. Hairston*, 9th Dist. Nos. 23663, 23680, 2008-Ohio-891, at ¶14. This Court also wrote that, "[i]f a defendant 'neither owns, leases, nor occupies the premises, his mere presence in [a place where] drugs and criminal tools are found is insufficient evidence of his possession of the contraband.'" *Id.* at ¶12 (quoting *State v. Mann*, 93 Ohio App. 3d 301, 309 (1993)). *Hairston* is not applicable to this case. In *Hairston*, there was not sufficient evidence of trafficking because there was no evidence that, of the many people arrested in the house, the defendants had any connection to the incriminating evidence. *Id.* at ¶11-12. The defendants did not live there and one had arrived just ten minutes before the police.

{¶34} In this case, there was evidence that Mr. Rucker was not merely present when police arrived, but that he had occupied the Hazel Street house for days. Police found Mr. Rucker's mail, thousands of dollars in cash, and three digital scale covers in a dresser in his bedroom. Mr. Rucker has testified that the cash was left over from an insurance settlement and has pointed out that none of the mail was addressed to him at the Hazel Street address.

{¶35} Mr. Rucker not only disclaimed any knowledge of the evidence of illegal activity in the kitchen, he testified that he was not aware of the presence of any cocaine in Mr. Whitfield's home. The jury may have found that difficult to believe in light of Mr. Rucker's admissions that he had experience with both taking drugs and trafficking in them, coupled with the fact that police found illegal drugs in five different rooms of the house including the closet where they found Mr. Rucker. The jury did not lose its way and create a manifest miscarriage of justice in resolving the conflicts in the evidence before it. See *State v. Otten*, 33 Ohio App. 3d 339, 340 (1986). Mr. Rucker's first assignment of error is overruled.

DENIAL OF MOTION FOR NEW TRIAL

{¶36} Mr. Rucker's third assignment of error is that the trial court incorrectly denied his motion for a new trial because "the verdict is not sustained by sufficient evidence or is contrary to law." Crim. R. 33(A)(4). Mr. Rucker based his new trial motion on a conflict he perceived between the jury's verdict finding him guilty of trafficking between 100 and 499 grams of powder cocaine while finding him guilty of possessing less than 25 grams of it.

{¶37} This Court's standard of review for a new trial motion depends on whether the motion required an exercise of discretion by the trial court. "If the motion for new trial required the lower court to exercise its discretion, this Court's review of the order granting or denying that motion is limited to determining whether it abused its discretion." *Cooper v. Nadeau*, 9th Dist. No. 09CA0032, 2010-Ohio-2150, at ¶7 (citing *Rohde v. Farmer*, 23 Ohio St. 2d 82, paragraph one of the syllabus (1970)). If the grant or denial of a new trial required resolution of a legal question, this Court's review is de novo. *Id.* (citing *Rohde*, 23 Ohio St. 2d 82 at paragraph two of the syllabus).

{¶38} The Ohio Supreme Court has held that "each count of an indictment charges a complete offense [and] that the separate counts of an indictment are not interdependent, but are, and necessarily must be, each complete in itself . . . ." *Browning v. State*, 120 Ohio St. 62, 71 (1929). Therefore, a perceived inconsistency between verdicts on separate counts must be ignored. *Id.* There is no meaningful inconsistency unless the jury renders inconsistent responses to the same count. *Id.* at 71-72.

{¶39} Mr. Rucker has not argued that there is any internal inconsistency in the jury's response to any one count of the indictment. He has focused on whether there is an inconsistency between verdicts on different counts. Therefore, under Ohio Supreme Court

precedent, the perceived inconsistency would not permit a new trial under Rule 33(A) of the Ohio Rules of Criminal Procedure. The jury's verdicts are not inconsistent, and the trial court correctly denied Mr. Rucker's motion for a new trial. His third assignment of error is overruled.

JOINDER OF OFFENSES

{¶40} Mr. Rucker's fifth assignment of error is that the trial court's failure to sua sponte order severance of the weapons charge from the drug-related charges was plain error because trying the counts together "invited" juror confusion. Mr. Rucker is limited to arguing plain error because his trial counsel did not move for severance and, thereby, forfeited all but plain error for purposes of appeal. *State v. Ross*, 9th Dist. No. 92CA005422, 1993 WL 120364 at *3 (Apr. 21, 1993).

{¶41} Rule 52(B) of the Ohio Rules Criminal Procedure permits appellate courts to take notice of plain errors, but such notice is to be taken "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St. 2d 91, 97 (1978). In order to prevail on a claim of plain error, the defendant must show that, "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Murphy*, 91 Ohio St. 3d 516, 532 (2001) (quoting *State v. Campbell*, 69 Ohio St. 3d 38, 41 (1994)).

{¶42} Under Rule 8(A) of the Ohio Rules of Criminal Procedure, joinder of offenses is proper if the offenses "are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct." Although the law favors joinder for the sake of judicial economy, the trial court may grant a motion for severance "[i]f it appears that a defendant or the state is prejudiced by a joinder of offenses." Crim. R. 14. "[T]he jury is believed capable of segregating the proof on multiple charges when

the evidence as to each of the charges is uncomplicated." *State v. Brooks*, 44 Ohio St. 3d 185, 193 (1989). "Joinder may be prejudicial when the offenses are unrelated and the evidence as to each is very weak, . . . but [will not be prejudicial] . . . when the evidence is direct and uncomplicated and can reasonably be separated as to each offense . . . ." *Id.*

{¶43} Mr. Rucker has not explained how the jury could have become confused, nor has he pointed to any evidence that the jury actually became confused. App. R. 16(A)(7). Additionally, as the State has argued, the evidence tending to prove the drug-related charges and the weapons charge was "direct and uncomplicated and can reasonably be separated as to each offense." *State v. Brooks*, 44 Ohio St. 3d 185, 193 (1989). Regarding the drug-related charges, police found varying amounts of cocaine, crack cocaine, and criminal tools evidencing efforts to distribute both drugs in five different rooms of the house, much of it in plain view and/or in close proximity to Mr. Rucker. Regarding the weapons charge, Mr. Rucker stipulated to his prior conviction placing him under disability and police found two handguns in the house he was occupying. Mr. Whitfield testified that he had seen Mr. Rucker use the guns to protect the house. Thus, the evidence of the relevant charges was direct and uncomplicated and could reasonably be separated by the jury. Therefore, Mr. Rucker was not prejudiced by the joinder of the offenses. See *id.* Mr. Rucker's fifth assignment of error is overruled.

INEFFECTIVE ASSISTANCE OF COUNSEL

{¶44} Mr. Rucker's fourth assignment of error is that he was denied his Sixth Amendment right to effective assistance of counsel. He has argued that he was prejudiced by his lawyer's withdrawal of his motion to suppress, failure to object to the State's exhibits at trial, and failure to move to sever offenses.

{¶45} "To obtain a reversal of a conviction on the basis of ineffective assistance of counsel, the defendant must prove (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding." *State v. Madrigal*, 87 Ohio St. 3d 378, 388-89 (2000) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). In order to demonstrate that the deficient performance caused him prejudice, a 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." *State v. Bradley*, 42 Ohio St. 3d 136, 142 (1989) (quoting *Strickland*, 466 U.S. at 694).

Suppression / Exclusion of Evidence

{¶46} Mr. Rucker has argued that his lawyer's withdrawal of the suppression motion was a substantial violation of his duties to his client that prejudiced Mr. Rucker by failing to preserve "possible Fourth Amendment issues" arising from the execution of the search warrant. Lawyers are not required to move for suppression of evidence in every case. *State v. Madrigal*, 87 Ohio St. 3d 378, 389 (2000) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986)). "To establish ineffective assistance of counsel for failure to file a motion to suppress, a defendant must prove that there was a basis to suppress the evidence in question." *State v. Brown*, 115 Ohio St. 3d 55, 2007-Ohio-4837, at ¶65. Even if there is a reasonable probability that the motion would have been granted, the failure to pursue it cannot be prejudicial unless there is also a reasonable probability that, without the excluded evidence, the defendant would have been acquitted. *Madrigal*, 87 Ohio St. 3d at 389 (citing *Strickland v. Washington*, 466 U.S. 668, 695 (1984)); *State v. Santana*, 90 Ohio St. 3d 513, 515-16 (2001) (Pfeifer, J., dissenting).

{¶47} In this case, Mr. Rucker's lawyer filed a motion to suppress "any and all evidence obtained following the illegal search of [Mr. Rucker] and the premises at 649 Hazel Street . . . ." The grounds in support of the motion were that, according to Mr. Rucker, "the affidavit filed in support of the warrant for search was insufficient to establish probable cause" and "the executing officers made forced entry into the premises prior to obtaining the search warrant." Our review of the record has not revealed any evidence to support either of the grounds stated in the motion Mr. Rucker's lawyer filed before the trial. On appeal, Mr. Rucker has offered an alternative ground for suppression, that is, that police improperly executed the search warrant. Specifically, he has argued that, had his lawyer pursued the suppression motion, he would have learned before trial that "the SWAT team followed a group of children into the house, and did not reveal to the occupants that they had a search warrant until after everyone had been secured."

{¶48} Mr. Rucker's argument seems to be that, had his lawyer pursued the motion to suppress, his lawyer would have learned that the police violated Mr. Rucker's Fourth Amendment rights by failing to follow the knock-and-announce rule. Although there are exceptions, the knock-and-announce rule generally requires "police officers executing a search warrant at a residence to first knock on the door, announce their purpose, and identify themselves before they forcibly enter the home." *State v. Oliver*, 112 Ohio St. 3d 447, 2007-Ohio-372, at ¶9 (citing *Wilson v. Arkansas*, 514 U.S. 927, 935-36 (1995)); R.C. 2935.12; see also *Wilson*, 514 U.S. at 934 ("[I]n some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment.").

{¶49} It is not clear from the record that a motion to suppress based on improper execution of the search warrant would have had a reasonable probability of success. Although the trial transcript permits an inference that the SWAT team entered the Hazel Street house

without first knocking and announcing their presence, there is no definitive evidence that that is what happened. Furthermore, in some circumstances police may permissibly enter a residence to execute a search warrant without first knocking and announcing their presence. *State v. Smith*, 9th Dist. No. 21069, 2003-Ohio-1306, at ¶35-39; R.C. 2933.231. Generally, "[i]n order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Id.* at ¶36 (quoting *Richards v. Wisconsin*, 520 U.S. 385, 394-95 (1997)).

{¶50} In this case, "this Court has no way of knowing what testimony might [have been] elicited" on these issues at a suppression hearing. *State v. Mitchell*, 9th Dist. No. 24730, 2009-Ohio-6950, at ¶20. The record developed at trial is generally inadequate to determine the validity of a suppression argument on appeal. *State v. Siders*, 4th Dist. No. 07CA10, 2008-Ohio-2712, at ¶11 (quoting *State v. Culbertson*, 5th Dist. No. 2000CA00129, 2000 WL 1701230 at *4 (Nov. 13, 2000)). "[If] the record is not clear or lacks sufficient evidence to determine whether [there is a reasonable probability that] a suppression motion would have been successful, a claim for ineffective assistance of counsel cannot be established." *State v. Parkinson*, 5th Dist. No. 1995CA00208, 1996 WL 363435 at *3 (May 20, 1996)).

{¶51} In this case, the record lacks sufficient evidence to permit this Court to determine the validity of Mr. Rucker's suppression argument. Therefore, this "claim is more suitable to postconviction relief, where . . . additional evidence could be presented." *Mitchell*, 2009-Ohio-6950, at ¶20 (quoting *State v. Ushry*, 1st Dist. No. C-050740, 2006-Ohio-6287, at ¶43). Mr. Rucker has not shown that his lawyer's performance was deficient or that the result would have been different if his lawyer would have pursued the suppression motion before trial. Therefore,

to the extent it addressed his lawyer's failure to pursue the motion to suppress, Mr. Rucker's fourth assignment of error is overruled.

{¶52} Mr. Rucker has also argued that his lawyer's performance fell below an objective standard of reasonableness because he failed to object to the introduction of tangible evidence at trial on the basis that police had illegally executed the search warrant. Under Rule 12(C)(3) of the Ohio Rules of Criminal Procedure, "[m]otions to suppress evidence . . . on the ground that it was illegally obtained" "must be raised before trial." If a defendant fails to timely move for suppression as required by Rule 12(C) and (D), he has forfeited the objection. Crim. R. 12(H); *Metro Parks, Summit County v. Kinnett*, 9th Dist. No. 24875, 2010-Ohio-881, at ¶2. Therefore, if Mr. Rucker's lawyer's performance was deficient because he failed to pursue exclusion of the tangible evidence, it was because he failed to move for suppression before trial not because he failed to object at trial.

{¶53} Regardless of the validity of his suggested basis for suppression, Mr. Rucker cannot demonstrate that he was prejudiced by his lawyer's failure to object at trial to the admission of evidence that he had not timely moved to suppress. See Crim. R. 12(H). To the extent that it addressed the suppression or exclusion of the evidence obtained via the search warrant, Mr. Rucker's fourth assignment of error is overruled.

Motion to Sever Offenses

{¶54} The final part of Mr. Rucker's fourth assignment of error is that his lawyer's performance was deficient because he did not move to sever the weapons offenses from the drug-related offenses. As discussed in relation to the fifth assignment of error, joinder of offenses is not prejudicial if the evidence is "direct and uncomplicated and can reasonably be separated as to each offense" as it was in this case. *State v. Brooks*, 44 Ohio St. 3d 185, 193

(1989). Mr. Rucker has not shown that he was prejudiced by his lawyer's failure to move to sever the offenses, therefore, his fourth assignment of error is overruled.

CONCLUSION

{¶55} This Court affirms Mr. Rucker's convictions because his conviction for having weapons under disability is based on sufficient evidence and is not against the manifest weight of the evidence and none of the other convictions he challenged are against the manifest weight of the evidence. The trial court correctly denied his motion for a new trial because there is no internal inconsistency in the jury's responses to any one count of the indictment. The trial court's failure to sua sponte order severance of the weapons offense from the drug-related offenses was not plain error because the evidence of the offenses was uncomplicated and easily separable. Finally, Mr. Rucker did not demonstrate he was denied his sixth amendment right to effective assistance of counsel. The judgment of the Summit County Common Pleas Court 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.

CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
BELFANCE, J.
CONCUR

APPEARANCES:

JACQUENETTE S. CORGAN, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and RICHARD S. KASAY, assistant prosecuting attorney, for appellee.