[Cite as *State v. Bartee*, 2010-Ohio-5982.]

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

STATE OF OHIO	C.A. No. 25266
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
JONTE C. BARTEE	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 09 09 2744

DECISION AND JOURNAL ENTRY

Dated: December 8, 2010

BELFANCE, Presiding Judge.

{¶1} Defendant-Appellant Jonte Bartee appeals from his convictions in the Summit County Court of Common Pleas. For the reasons set forth below, we affirm.

BACKGROUND

{¶2} On September 8, 2009 at approximately 12:30 a.m., Akron Police Officers Beech and Mazzei were patrolling in a marked cruiser. They encountered a tan Impala and decided to run its plates. After learning that the registered owner of the vehicle had a suspended license, the officers initiated a traffic stop. Officer Mazzei approached the driver's side and Officer Beech approached the passenger side. The driver was Mr. Bartee and the passenger was Tiffany Williams. As Officer Beech was speaking with Ms. Williams, he noticed that there was a gun on the rear floorboard on the passenger side of the vehicle leaning against the center hump. Officer Beech then drew his weapon and ordered Mr. Bartee and Ms. Williams to put their hands on the dashboard.

{¶3} While Officer Mazzei was handcuffing Mr. Bartee, he noticed that Mr. Bartee smelled of alcohol. An open bottle of LaSalle Long Island Iced Tea was found in the center console of the vehicle. The gun found in the vehicle was loaded and contained a round in the chamber ready to fire.

{¶4} Mr. Bartee was indicted on several counts related to the incident, and the case proceeded to a jury trial. The jury found Mr. Bartee guilty of having weapons under disability, improperly handling firearms in a motor vehicle, and possession by underage persons. Mr. Bartee was sentenced to two years in prison. Mr. Bartee has appealed, raising three assignments of error for our review.

CRIMINAL RULE 29

{¶5} In Mr. Bartee's second assignment of error, he asserts that the trial court erred in denying his Crim.R. 29 motion. He states that the trial court erred in doing so with respect to all his convictions; however, he presents no argument with respect to his conviction for possession by underage persons. See App.R. 16(A)(7). With respect to his convictions for having weapons under disability and improperly handling firearms in a motor vehicle, he argues only that the State failed to prove actual or constructive possession of the gun. Thus, this Court will focus its analysis on those charges and elements.

{¶6} Crim.R. 29(A) provides that a trial court "shall order the entry of a judgment of acquittal * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." A Crim.R. 29 motion is asserted to test the sufficiency of the evidence. "Whether a conviction is supported by sufficient evidence is a question of law that [we] review[] de novo." *State v. Williams*, 9th Dist. No. 24731, 2009-Ohio-6955, at ¶18, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. The relevant inquiry is whether the prosecution has met its burden of

production by presenting sufficient evidence to sustain a conviction. *Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring). In reviewing the evidence, we do not evaluate credibility and make all reasonable inferences in favor of the State. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273. The evidence is sufficient if, when viewing the evidence in a light most favorable to the prosecution, it allows the factfinder to reasonably conclude that the essential elements of the charged crime were proven beyond a reasonable doubt. Id.

{¶7} Mr. Bartee was convicted of having weapons while under disability in violation of R.C. 2923.13(A)(2)/(3) and improperly handling a firearm in violation of R.C. 2923.16(B),(I)(2). R.C. 2923.13(A)(2),(3) provides that:

> "(A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:
>
> "* * *
>
> "(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."

Mr. Bartee does not dispute that he was under disability, instead he challenges whether the evidence supports that he had actual or constructive possession of a firearm.

{¶8} R.C. 2923.16(B) provides that "[n]o person shall knowingly transport or have a loaded firearm in a motor vehicle in such a manner that the firearm is accessible to the operator or any passenger without leaving the vehicle." Again, Mr. Bartee only challenges whether the evidence supports that he had actual or constructive possession of a firearm. We conclude that

sufficient evidence was presented to establish that Mr. Bartee constructively possessed a loaded firearm; and thus, the trial court did not err in denying his Crim.R. 29 motion.

{¶9} When analyzing constructive possession under R.C. 2923.13, this Court has stated that:

> "[i]n order for an individual to have a firearm within the meaning of R.C. 2923.13, he must actually or constructively possess it. Constructive possession exists when an individual exercises dominion and control over an object, even though that object may not be within his immediate physical possession. [M]ere access to the weapon can establish guilt, that is, ownership is not a prerequisite to determining whether someone had the weapon. Moreover, circumstantial evidence can be used to support a finding of constructive possession." (Internal citations and quotations omitted.) *State v. Dent*, 9th Dist. No. 22567, 2005-Ohio-5498, at ¶11.

{¶10} In the instant matter, both Officers Beech and Mazzei testified. Officer Beech testified that as he was speaking with the female passenger, Ms. Williams, he noticed a gun on the floorboard of the car. He testified that

> "[i]t was on the rear passenger's side floorboard in the Impala that was being driven. There's a hump between the driver's and the passenger's side of the rear seats on the floor and the handgun was leaning up against the hump on the – right in the middle, basically right behind where the armrest of the passenger's seat would be with the butt of the gun up in the air."

{¶11} He further testified that it was accessible to the driver, Mr. Bartee. Officer Beech stated that the gun was a Lorcin .25 caliber semiautomatic pistol that was loaded and had a round in the chamber. Officer Mazzei further indicated that there was no evidence that Mr. Bartee had a license to carry a concealed weapon. Further, while Mr. Bartee was not the registered owner of the vehicle, Officer Mazzei offered testimony that he had stopped Mr. Bartee approximately a month before in the same vehicle. Michael Roberts, an expert in firearms from the Bureau of Criminal Identification and Investigation, testified that the gun found in the Impala was operable. In addition, the passenger, Ms. Williams, testified that the gun did not belong to her.

{¶12} In light of the foregoing, we conclude that when the evidence is viewed in a light most favorable to the prosecution, sufficient evidence was presented, if believed, to establish that Mr. Bartee constructively possessed the loaded firearm found in the car he was driving. Mr. Bartee was the driver of the vehicle and had driven it on at least one other prior occasion. The gun was located in the car, on the floorboard on the passenger's side; a position that would make the weapon easily accessible to Mr. Bartee without him even exiting the vehicle. The gun was in plain view and clearly visible to Officer Beech as he was interviewing Ms. Williams, thus it could be reasonably inferred that Mr. Bartee was aware that the gun was in the vehicle. Mr. Bartee was exercising control over the vehicle, and thus, a jury could have reasonably concluded that Mr. Bartee also had constructive possession of the loaded and accessible firearm found inside of it. See *Dent* at ¶¶12-19; *State v. Najeway*, 9th Dist. No. 21264, 2003-Ohio-3154, at ¶14. We therefore overrule Mr. Bartee's second assignment of error.

MANIFEST WEIGHT

{¶13} In Mr. Bartee's first assignment of error, he asserts that his convictions for possession by underage persons, having weapons while under disability, and improperly handling a firearm in a motor vehicle are against the manifest of the evidence. We disagree.

{¶14} In reviewing a challenge to the weight of the evidence, the appellate 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 must be reversed and a new trial ordered.'" *State v. Thomas*, 9th Dist. Nos. 22990, 22991, 2006-Ohio-4241, at ¶7, quoting *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

{¶15} In reversing a conviction as being against the manifest weight of the evidence, "the appellate court sits as the 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *Thomas* at ¶8, citing *Thompkins*, 78 Ohio St.3d at 387. Accordingly,

"this Court's 'discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" *Thomas* at ¶8, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶16} With respect to Mr. Bartee's conviction for possession by underage persons, he argues that no evidence was presented to support the conviction, essentially making a sufficiency argument. However, this Court concludes that his conviction was based upon sufficient evidence and was not against the manifest weight of the evidence.

{¶17} R.C. 4301.69(E)(1) provides that:

> "[n]o underage person shall knowingly order, pay for, share the cost of, attempt to purchase, possess, or consume any beer or intoxicating liquor in any public or private place. No underage person shall knowingly be under the influence of any beer or intoxicating liquor in any public place. The prohibitions set forth in division (E)(1) of this section against an underage person knowingly possessing, consuming, or being under the influence of any beer or intoxicating liquor shall not apply if the underage person is supervised by a parent, spouse who is not an underage person, or legal guardian, or the beer or intoxicating liquor is given by a physician in the regular line of the physician's practice or given for established religious purposes."

Pursuant to the statute, an underage person is one who is under the age of twenty-one years old. R.C. 4301.69(H)(5). Mr. Bartee does not dispute that the LaSalle Long Island Iced Tea found in the vehicle he was driving constitutes an intoxicating liquor. See R.C. 4301.01(A)(1). Instead, Mr. Bartee's argument focuses on whether the alcohol can be connected to him; he asserts that because Ms. Williams testified that she purchased the alcohol and no field sobriety or blood alcohol testing was performed on Mr. Bartee, he could not be convicted of the offense.

{¶18} While it is true that Ms. Williams testified that she purchased the bottle of alcohol, Mr. Bartee still could be convicted under R.C. 4301.69(E)(1) if he possessed or consumed the alcohol, as Mr. Bartee was nineteen at the time of the incident. Officer Mazzei testified that the open bottle of alcohol was found in the center console of the vehicle driven by

Mr. Bartee. After Officer Mazzei removed Mr. Bartee from the vehicle Officer Mazzei noticed that he "smelled a little bit of alcohol[]" on Mr. Bartee. Based upon the foregoing, a jury could reasonably conclude that Mr. Bartee consumed and/or possessed the alcohol in question. The fact that the bottle was open, was located in easy reach of Mr. Bartee, and Mr. Bartee smelled of alcohol leads to a reasonable inference that Mr. Bartee did consume and/or possess the alcohol. Further, despite the fact that Ms. Williams admitted that she purchased the alcohol, she did not state that it was hers, allowing the inference that she purchased it for Mr. Bartee. After reviewing the evidence, we cannot say that the jury lost its way in convicting Mr. Bartee of possession by underage persons.

{¶19} Mr. Bartee also contends that his convictions for having a weapon while under disability and improperly handling a firearm in a motor vehicle are against the manifest weight of the evidence. Mr. Bartee again maintains that the evidence did not establish that Mr. Bartee possessed the gun. Mr. Bartee also appears to challenge whether the evidence established that he knowingly possessed the gun. "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." R.C. 2901.22(B). Mr. Bartee's knowledge of the weapon can be inferred from the circumstantial evidence present. The weapon was present in a car that Mr. Bartee was driving; thus, Mr. Bartee had control of the vehicle and its contents. Moreover, it was located in a position that made the weapon easily accessible to him without exiting the vehicle, and the weapon was in plain view. Based upon those circumstances, it was not unreasonable for the jury to conclude the Mr. Bartee knowingly had possession of the weapon at issue. In addition, because it was not unreasonable for the jury to conclude that Mr. Bartee constructively possessed

the loaded firearm, as discussed above, we cannot say that the jury lost its way of convicting Mr. Bartee of these two offenses.

{¶20} While it is true that Mr. Bartee told Officer Beech that "[h]e did not know the gun was in the vehicle[,]" the jury was free to disbelieve this statement. Additionally, while Ms. Williams also claimed to not know that the gun was in the vehicle, the gun was in plain view. Further, Ms. Williams denied ownership of the gun. Given that Mr. Bartee was the driver of the vehicle, and thus in control of it, and given that the gun was in plain view and in a location accessible to Mr. Bartee, it was not unreasonable for the jury to conclude that Mr. Bartee constructively possessed the loaded firearm. See *Dent* at ¶11. We therefore determine Mr. Bartee's argument is without merit and overrule his first assignment of error.

HEARSAY

{¶21} In his third assignment of error, Mr. Bartee argues that "the trial court committed reversible error when it admitted a hearsay statement of the Appellant even though a later instruction to the jury to disregard the statement was given."

{¶22} Mr. Bartee takes issue with the following statement Officer Beech claims that Mr. Bartee made to him: "[I] make[] more money than both of [you] in a year and [I don't] even have a job." The testimony reveals that while this statement was initially allowed to come in, over defense objection, immediately after it was made the trial court held a side bar conference and then on the record ordered that the statement be stricken and gave a curative instruction.

> "[The State]: Okay. Did Mr. Bartee make any statements to you during the traffic stop?
>
> "[Officer Beech]: He said that –
>
> "[Mr. Bartee's counsel]: I'll object, Your Honor.
>
> "The Court: I'll allow it.

> "[Officer Beech]: He said that the gun – he didn't know the gun was in the vehicle.
>
> "The Court: I'm sorry, he did or did not?
>
> "[Officer Beech]: He did not know the gun was in the vehicle and that whatever we were going to do, go ahead and do it, charge him with it. And he also said that he makes more money than both of us in a year and doesn't even have a job."

At that point the trial court had a side bar off the record and then stated:

> "Ladies and gentlemen of the jury, the last statement that the Defendant just made I'm striking from the record. The Court has ruled that it's not relevant to this case; so, the statement, which I don't want to repeat so its in your mind – I'll keep the statement in where he says he did not know the gun was in his car, but any other statement you are to disregard."

{¶23} Mr. Bartee contends that because the trial court did not reiterate the statements it was striking, the trial court's instruction did not cure any error. We do not agree with Mr. Bartee's characterization of the trial court's instruction.

{¶24} The trial court, by specifying and repeating the statement it was allowing into evidence, and by stating that it was striking the remainder of the statements, made it clear to the jury what it was to consider and what it was to disregard. This is especially so since the trial court gave the curative instruction in close proximity to the objectionable testimony. Further, Mr. Bartee did not object to the curative instruction, nor did he move for a mistrial. "A jury is presumed to follow the curative instructions given by the trial court." *State v. Maple* (Dec. 5, 2001), 9th Dist. No. 20514, at *8; see, also, *State v. Feliciano*, 9th Dist. No. 09CA009595, 2010-Ohio-2809, at ¶26. Mr. Bartee has not argued that the jury did not follow the curative instruction and has not further articulated how his right to a fair trial was denied. Accordingly, we overrule his third assignment of error.

CONCLUSION

{¶25} In light of the foregoing, we affirm the judgment of the Summit County Court of Common Pleas.

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.

EVE V. BELFANCE
FOR THE COURT

CARR, J.
WHITMORE, J.
CONCUR

APPEARANCES:

LEONARD J. BREIDING, II, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.