[Cite as *State v. Charlton*, 2010-Ohio-1683.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	**:**	
Plaintiff-Appellee	**:**	**C.A. CASE NO. 23227**
vs.	**:**	**T.C. CASE NO. 08CR2663/2**
REBECCA A. CHARLTON	**:**	**(Criminal Appeal from Common Pleas Court)**
Defendant-Appellant	**:**	

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O P I N I O N

Rendered on the 16th day of April, 2010.

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GRADY, J.:

{¶ 1} Defendant, Rebecca Charlton, appeals from her conviction and sentence for possession of cocaine, possession of criminal tools, and trafficking in cocaine.

{¶ 2} On July 3, 2008, Dayton police executed a search warrant

at 5373 Rawlins Drive in Dayton. The warrant identified two individuals, Rebecca Charlton and Michael Collins, who police suspected were selling cocaine out of that location. Although police loudly announced their identity and purpose, none of the occupants of the house answered the door. When officers heard people scrambling around inside, they forcibly entered. Inside the residence police discovered several pit bull dogs and five people, including the targets of the warrant, Rebecca Charlton and Michael Collins, Rebecca Charlton's father, Robert Charlton, Robert Charlton's girlfriend, Brenda Ward, and Phillip Hurley. After all of the occupants and the dogs were secured, police searched the residence.

{¶ 3} Police found prescription pill bottles in Robert Charlton's name, several wadded-up plastic baggies, plastic straws, and a digital scale in the bedroom used by Robert Charlton and Brenda Ward. A white powder residue was on the baggies, straws, and inside the pill bottles. Police discovered a line of cocaine and a straw on a kitchen counter. More wadded-up plastic baggies, another scale and a baggie of cocaine were found in a kitchen cupboard. Police found a third scale and two handguns on top of the cupboard. Ammunition was also found in a cupboard.

{¶ 4} A closed but unlocked safe was in the bedroom used by Rebecca Charlton and Michael Collins. Two thousand dollars in

cash and several baggies of powder cocaine in one ounce bags were in the safe. The total weight of the cocaine in the safe was just over three hundred and fifty grams. Police found a baseball hat on top of a television in the bedroom. A handwritten poem about selling cocaine and a set of keys that included a key to the safe and a key to a silver Cadillac parked in the driveway and that Rebecca Charlton frequently drove were found in the hat. The cocaine found in the kitchen weighed just over five and one-half grams.

{¶ 5} Rebecca Charlton was interviewed by police. She admitted that the cocaine in the house belonged both to her and to Michael Collins. Charlton denied that she and Collins were engaged in selling cocaine, claiming that the cocaine was for their personal use only. After police examined Charlton's cell phone, including the call history log and text messages, they questioned her again. This time Charlton admitted that she and Collins were engaged in selling cocaine out of the home. Charlton told police that buyers typically contacted them by calling on her cell phone, or on Collins' cell phone, or sending text messages to set up a drug deal. A location to meet would then be established, and Charlton often made the delivery of drugs herself. She admitted to delivering drugs earlier that day. Charlton indicated that she sold cocaine with Collins to support her own

drug habit.

{¶ 6} Both Charlton's and Collins' cell phones rang while officers were on the scene. When police answered Collins' phone, the caller asked to set up a drug buy for one thousand eight hundred dollars. The officer agreed to meet the caller at Fricker's restaurant on Woodman Drive. Two individuals were subsequently arrested by Dayton police at that location.

{¶ 7} Defendant was indicted on one count of possessing cocaine in an amount between one hundred and five hundred grams, R.C. 2925.11(A), one count of possessing criminal tools (cell phone), R.C. 2923.24(A), and one count of trafficking in cocaine in an amount between one hundred and five hundred grams, R.C. 2925.03(A)(2). Firearm specifications were attached to both drug charges. Following a jury trial, Defendant was found guilty of all charges but not guilty of the firearm specifications. The trial court sentenced Defendant to concurrent mandatory two year prison terms.

{¶ 8} Defendant timely appealed to this court from her conviction and sentence.

FIRST ASSIGNMENT OF ERROR

{¶ 9} "THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE APPELLANT'S

{¶ 10} CONVICTIONS FOR POSSESSION AND TRAFFICKING OF COCAINE

IN AN AMOUNT EQUAL OR EXCEEDING 100 GRAMS BUT LESS THAN 500 GRAMS."

SECOND ASSIGNMENT OF ERROR

{¶ 11} "THE APPELLANT'S CONVICTIONS FOR POSSESSION AND TRAFFICKING OF COCAINE IN AN AMOUNT EQUAL OR EXCEEDING 100 GRAMS BUT LESS THAN 500 GRAMS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 12} Defendant argues that the evidence is insufficient to support her convictions and that her convictions are against the manifest weight of the evidence because the State failed to prove that she knowingly possessed or transported, delivered or distributed cocaine in an amount between one hundred and five hundred grams.

{¶ 13} A sufficiency of the evidence argument challenges whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the guilty verdict as a matter of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380. The proper test to apply to such an inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259:

{¶ 14} "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."

{¶ 15} To prove a violation of R.C. 2925.11(A), the State was required to prove beyond a reasonable doubt that Defendant knowingly possessed a controlled substance, the cocaine found in the residence, including the quantity found in the safe. Defendant was also found guilty of trafficking in violation of R.C. 2925.03(A)(2) which provides:

{¶ 16} "(A) No person shall knowingly do any of the following:

{¶ 17} "(2) Prepare 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."

{¶ 18} Knowingly is defined in R.C. 2901.22(B):

{¶ 19} "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."

{¶ 20} "Possession" is defined in R.C. 2925.01(K):

{¶ 21} "Possess or possession means having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found."

{¶ 22} Possession of a drug may be either actual physical possession or constructive possession. ***State v. Butler*** **(1989), 42 Ohio St.3d 174. A person has constructive possession of an item when he is conscious of the presence of the object and able to exercise dominion and control over that item, even if it is not within his immediate physical possession.** ***State v. Hankerson*** **(1982), 70 Ohio St.2d 87;** ***State v. Wolery*** **(1976), 46 Ohio St.2d 316.**

{¶ 23} Readily usable drugs found in very close proximity to a person may constitute circumstantial evidence sufficient to support a finding that the person constructively possessed those drugs. ***State v. Miller*****, Montgomery App. No. 19174, 2002-Ohio-4197. In determining whether a defendant knowingly possessed a controlled substance, it is necessary to examine the totality of the relevant facts and circumstances.** ***State v. Teamer*****, 82 Ohio St.3d 490, 492, 1998-Ohio-193;** ***State v. Pounds*****, Montgomery App. No. 21257, 2006-Ohio-3040. The State may prove constructive possession solely through circumstantial evidence.**

State v. Barnett, Montgomery App. No. 19185, 2002-Ohio-4961. Circumstantial evidence and direct evidence have the same probative value. *Jenks, supra*.

{¶ 24} Charlton admitted to police that all of the cocaine in the house belonged to her and to Collins, that she and Collins sold cocaine from that house, and that she often assisted Collins by making the deliveries herself in the Cadillac. That evidence is probative of possession, both actual and constructive. Charlton even explained how the drug transactions were set up and carried out, and why she sold cocaine with Collins. Clearly, Charlton was an active participant in Collins' drug operation.

{¶ 25} Furthermore, there were readily usable drugs and tools of the drug trade, plastic baggies, plastic straws, digital scales and handguns, found in the residence. The vast majority of the cocaine, along with two thousand dollars in cash, was found inside an unlocked safe in a bedroom Charlton shared with Collins. The cocaine was in one ounce baggies, supporting an inference that it was prepackaged for sale. In that same bedroom, police found a set of keys that included a key to the safe and a key to the silver Cadillac in the driveway that Charlton admitted she used to make deliveries of the cocaine. Charlton's account of how the drug sales were set up and carried out was corroborated by the many calls received on Charlton's and Collins' cell phones while police were

on the premises, which resulted in the arrest of two more individuals.

{¶ 26} From a combination of the direct and circumstantial evidence, a jury could reasonably conclude that Charlton constructively possessed the cocaine found in the safe because she assisted Collins in his cocaine operation by making deliveries of cocaine, and on that same evidence that she knowingly trafficked in cocaine or at least aided and abetted Collins in doing so. *State v. Sweeney*, Lake App. No. 2006-L-252, 2007-Ohio-5223.

{¶ 27} Viewing the evidence in a light most favorable to the State, as we must, a rational trier of fact could find beyond a reasonable doubt that Charlton knowingly possessed the three hundred and fifty grams of cocaine found in the safe, and that she also knowingly transported, delivered or distributed cocaine, or aided and abetted Collins in doing so. Defendant's convictions are supported by legally sufficient evidence.

{¶ 28} A weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive. *State v. Hufnagle* (Sept. 6, 1996), Montgomery App. No. 15563, unreported. The proper test to apply to that inquiry is the one set forth in *State v. Martin* (1983), 20 Ohio App.3d 172, 175:

{¶ 29} "[t]he court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Accord: *State v. Thompkins*, *supra*.

{¶ 30} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230. In *State v. Lawson* (Aug. 22, 1997), Montgomery App.No. 16288, we observed:

{¶ 31} "[b]ecause the factfinder . . . has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness."

{¶ 32} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of facts lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997),

Champaign App. No. 97-CA-03.

{¶ 33} Defendant argues that her convictions for possessing and trafficking in cocaine in an amount between one hundred and five hundred grams is against the manifest weight of the evidence. Defendant's claim is based primarily upon the testimony of Robert Milnickel, who knew Michael Collins as a drug dealer since 2004. Milnickel testified that he began purchasing cocaine from Collins in 2006, and continued to buy from Collins right up until July 2008, when Collins was arrested. Milnickel testified that Collins alone was in control of his cocaine operation, that only Collins possessed the cocaine, and that Defendant did not have access to Collins' cocaine. Milnickel could only go through Collins to purchase cocaine, and Defendant never sold cocaine to Milnickel. Based upon Milnickel's testimony, Defendant's defense at trial was that she had no access to or control over the cocaine in the safe.

{¶ 34} As we previously concluded, the evidence presented at trial was sufficient to allow the jury to find that Defendant exercised constructive possession over the cocaine in the safe. Milnickel's testimony does not foreclose that finding. Defendant knowingly possessed the cocaine and knowingly trafficked in that cocaine, or at the very least aided and abetted Collins in doing so. An aider and abettor is guilty the same as the principal offender. R.C. 2923.03(F).

{¶ 35} We further note that the credibility of the various witnesses and the weight to be given to their testimony were matters for the trier of facts, the jury, to decide. *DeHass*. The jury did not lose its way simply because it chose to believe the State's witnesses rather than Defendant's witnesses, which it had a right to do.

{¶ 36} Reviewing this record as a whole, we cannot say that the evidence weighs heavily against a conviction, that the trier of facts lost its way, or that a manifest miscarriage of justice occurred. Defendant's convictions are not against the manifest weight of the evidence.

{¶ 37} Defendant's first and second assignments of error are overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 38} "THE TRIAL COURT PREJUDICED THE APPELLANT BY EXCLUDING THE TESTIMONY OF ERIC NYE."

{¶ 39} Defendant argues that the trial court abused its discretion by excluding the testimony of a defense witness, Eric Nye.

{¶ 40} The decision whether to admit or exclude evidence is a matter entrusted to the trial court's sound discretion and its decision in such matters will not be disturbed on appeal absent an abuse of the court's discretion. *State v. Lundy* (1987), 41 Ohio

App.3d 163. An abuse of discretion means more than a mere error of law or an error in judgment. It implies an arbitrary, unreasonable, unconscionable attitude on the part of the court. *State v. Adams* (1980), 62 Ohio St.2d 151.

{¶ 41} If allowed to testify, Eric Nye would have testified that he knew both Defendant and Michael Collins, that he had purchased cocaine from Collins from 2002 until July 2006, and that Defendant had no control over the cocaine belonging to Collins and was not involved in selling it. Nye's testimony was based upon his personal dealings with Collins up to and until 2006, when Nye quit using and purchasing cocaine. Nye's testimony was offered to show how Collins ran his cocaine operation alone, and that Defendant did not have access to the cocaine Collins possessed. According to Defendant, this testimony would have corroborated the testimony of Robert Milnickel, who purchased cocaine from Collins from 2006 up until Collins was arrested in 2008.

{¶ 42} Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Evid.R. 401. Relevant evidence is generally admissible, whereas irrelevant evidence is not admissible. Evid.R. 402. The trial court excluded Nye's testimony finding that it was not relevant.

{¶ 43} The problem with Nye's testimony is that his knowledge of Collins' cocaine operation ended in July 2006, when Nye quit using and buying cocaine from Collins. Nye's testimony was not relevant to prove whether Charlton had access to and control over the cocaine Collins possessed two years later in July 2008. As the trial court observed, "times can change in two years." How Collins' cocaine operation was run two years before was too remote in time to be relevant to how it was run in July 2008. Accordingly, the trial court did not abuse its discretion when it excluded Nye's testimony because it was not relevant.

{¶ 44} Defendant's third assignment of error is overruled.

FOURTH ASSIGNMENT OF ERROR

{¶ 45} "THE TRIAL COURT ERRED WHEN IT DID NOT MERGE COUNTS ONE AND THREE BECAUSE THE OFFENSES ARE ALLIED OFFENSES OF SIMILAR IMPORT."

{¶ 46} Pursuant to our decision and entry, the parties filed supplemental briefs addressing whether Defendant's offenses of possession of cocaine under R.C. 2925.11(A) and trafficking in cocaine under R.C. 2925.03(A)(2) are allied offenses of similar import under R.C. 2941.25 that must be merged.

{¶ 47} The State concedes in its supplemental brief that, on the authority of *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, and *State v. Fritz*, 182 Ohio App.3d 299,

2009-Ohio-2175, trafficking in cocaine under R.C. 2925.03(A)(2) and possessing that same cocaine under R.C. 2925.11(A) are allied offenses of similar import, and that the trial court committed plain error by failing to merge those two offenses. We agree.

{¶ 48} The fourth assignment of error is sustained. Defendant's sentences will be reversed, and the case will be remanded to the trial court for resentencing. ***State v. Whitfield*****, 124 Ohio St.3d 319, 2010-Ohio-2. The judgment from which the appeal is taken will otherwise be affirmed.**

DONOVAN, P.J. And BROGAN, J., concur.

Copies mailed to:

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