

[Cite as *State v. Walker*, 2010-Ohio-2125.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 23302
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-CR-4422
v.	:	
	:	
GREGORY ROCHELLE WALKER, JR.	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 14th day of May, 2010.

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FAIN, J.

{¶ 1} Defendant-appellant Gregory Walker appeals from his conviction and sentence for Improperly Handling a Firearm in a Motor Vehicle, Having Weapons While Under Disability, Carrying a Concealed Weapon (CCW), and Possession of a

Counterfeit Controlled Substance. He argues that the trial court erred both in allowing the State to amend the indictment on the first day of trial and in denying his motion for a mistrial. Walker maintains that his convictions are against the manifest weight of the evidence and that they are not supported by sufficient evidence. He also argues that his CCW and Improperly Handling a Firearm convictions are allied offenses of similar import, which should have been merged for sentencing.

{¶ 2} We conclude that the trial court did not err in permitting the State to amend the indictment, nor did the court abuse its discretion in denying Walker's motion for a mistrial. We conclude that Walker's convictions are supported by sufficient evidence and that they are not against the manifest weight of the evidence.

We also conclude that his CCW and Improper Handling convictions are not allied offenses of similar import. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 3} One evening in November, 2008, a car in which Walker was a passenger was stopped by Dayton Police Officer August for running a red light. Officer August focused his spotlight on the car and could see the front seat passenger, Walker, moving around while the other three occupants remained still. The officer called for backup before approaching the driver of the vehicle. As he spoke to the driver, Officer August shined his flashlight on the passengers and saw a bullet on the floor at Walker's feet. He proceeded to collect identification from the occupants. Because Walker had offered just the lower half of a state identification card, Officer August asked him for additional identification. Officer August walked around the car to retrieve Walker's

social security card and saw a second bullet at Walker's feet.

{¶ 4} By this time Officer Saylor had arrived. He asked the driver and the two backseat passengers to exit the car, while Officer August removed Walker. Officer August patted Walker down for safety and found another bullet in his right, front pants pocket. Officer August placed Walker in the rear of his cruiser and returned to the car he had stopped. He illuminated the front passenger floorboard and could see the butt of a gun peeking out from under the seat. As Officer August looked closer, he also found more bullets, and a bag of what appeared to be cocaine, but was later determined to be "fleece," a counterfeit drug. He found three live rounds in the magazine, and one round chambered and ready to be fired. The bullet in Walker's pocket was the same brand and size as those found on the floor and in the gun.

{¶ 5} Walker was indicted on one count each of Improper Handling a Firearm in a Motor Vehicle, Weapons Under Disability, CCW, and Possession of a Counterfeit Controlled Substance. Walker filed a motion to suppress, which the trial court overruled. He waived his right to a jury trial on the Weapons Under Disability charge. A jury found Walker guilty of the remaining three counts, and the trial court found him guilty of Weapons Under Disability. The trial court imposed a one-year sentence for the CCW conviction, one year for the Improper Handling conviction, and 180 days for the Possession charge, all to be served concurrently. The court also imposed a four-year sentence for the Weapons Under Disability conviction, to be served consecutively with the other sentences. From his conviction and sentence, Walker appeals.

II

{¶ 6} Walker's First Assignment of Error is as follows:

{¶ 7} "THE TRIAL COURT ERRED BY ALLOWING THE STATE TO AMEND THE INDICTMENT ON THE DAY OF TRIAL."

{¶ 8} In his First Assignment of Error, Walker maintains that the trial court erred when it granted the State's motion to amend the indictment on the first day of trial. Walker insists that the amendment of the indictment prejudiced him because it "precluded * * * any chance to develop a defense and gave * * * no notice of the actual charge the state relied on." He concludes that the amendment "changed the identity of the offense." We disagree.

{¶ 9} As a result of a prior Possession of Cocaine conviction, Walker was indicted for Weapons Under Disability, in violation of R.C. 2923.13(A)(3). The prior conviction was alleged to have occurred in September, 2004, in the Montgomery County Common Pleas Court under case number 04CR1918, in the case of State v. Walker. However, the State learned that although the charge was correct, the caption, date, and case number were wrong. The case was actually a Montgomery County Juvenile Court adjudication in February, 2004, in the case of In re Walker, case number A 2004-070802. On the first day of trial, the State made an oral motion to amend the indictment. The trial court granted the State's motion, over Walker's objection.

{¶ 10} Criminal Rule 7(D) provides: "The court may at any time before, during, or after a trial amend the indictment * * * in respect to any defect, imperfection, or omission in form or substance, or of any variance within the evidence, provided no change is made in the name or identity of the crime charged." Thus, we must determine whether

the change in the indictment has the effect of changing the name or identity of the crime with which Walker was charged.

{¶ 11} As we have previously explained, R.C. 2941.22 “states that an indictment alleging a prior conviction should ‘allege that the accused was, at a certain stated time, in a certain stated court, convicted of a certain stated offense, giving the name of the offense, or stating the substantial elements thereof.’ On the other hand, Crim.R. 7(B) requires that, ‘[t]he indictment shall * * * be made in ordinary and concise language without technical averments or allegations not essential to be proved. The statement may be * * * in words sufficient to give the defendant notice of all of the elements of the offense with which the defendant is charged.’ Clearly Crim.R. 7(B) demands less specificity than R.C. 2941.22. To the extent that the statute and the rule are in conflict, Ohio courts have found that ‘Crim.R. 7(B) effectively supersedes R.C. 2941.22.’ *State v. Midwest Pride IV, Inc.* (1998), 131 Ohio App.3d 1, 21, citation omitted. Therefore, compliance with Crim.R. 7(B) merely requires that the defendant be put on notice that the State intends to prove the existence of a prior conviction. *Id.*, citing *State v. Larsen* (1993), 89 Ohio App.3d 371, 379.” *State v. Tooson*, Montgomery App. No. 23290, 2009-Ohio-6269, ¶20.

{¶ 12} Although Walker’s indictment did contain some wrong information regarding the details of his prior conviction, the name of the offense was accurate. If any doubt remained in Walker’s mind as to what prior conviction the State intended to prove, we point out that Walker had two previous Weapons Under Disability convictions as an adult, both based upon the same juvenile court adjudication. Moreover, his discovery packet contained his criminal history, which included his prior adjudication for

Possession of Cocaine. Therefore, the amendment did not change the name or identity of the offense with which Walker was charged. We conclude the indictment complied with Crim.R. 7(B), sufficiently putting Walker on notice of the State's intent to prove his prior adjudication for Possession of Cocaine.

{¶ 13} Walker's First Assignment of Error is overruled.

III

{¶ 14} Walker's Second Assignment of Error is as follows:

{¶ 15} "THE TRIAL COURT ERRED BY SENTENCING APPELLANT ON BOTH THE CARRYING A CONCEALED WEAPON CHARGE AND IMPROPER USE OF A FIREARM IN A MOTOR VEHICLE BECAUSE THE CHARGES ARE ALLIED OFFENSES OF SIMILAR IMPORT."

{¶ 16} In his Second Assignment of Error, Walker contends that his CCW and Improper Handling charges were allied offenses of similar import, which should have been merged for sentencing. However, we conclude that the offenses are not allied offenses of similar import.

{¶ 17} The Ohio Supreme Court has established a two-part test for determining whether multiple offenses are allied offenses of similar import pursuant to R.C. §2941.25. First, the court must compare the elements of the offenses in the abstract to determine whether the offenses are so similar that the commission of one offense will necessarily result in the commission of the other. *State v. Cabrales*, 118 Ohio St.3d 54, 61, 2008-Ohio-1625, ¶ 26. If so, then the offenses are allied offenses of similar import, and the defendant may only be convicted of and sentenced for both offenses if

he committed the crimes separately or with a separate animus. *Id.* at ¶ 31.

{¶ 18} Walker was convicted of CCW in violation of R.C. 2923.12(A)(2), which states: “No person shall knowingly carry or have, concealed on the person’s person or concealed ready at hand * * * a handgun * * *.” He was also convicted of Improper Handling in violation of R.C. 2923.16(B), which provides: “No 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.”

{¶ 19} When we compare the offenses, we conclude that each offense can be committed without committing the other. A CCW conviction under R.C. 2923.12(A)(2) does not require the firearm to be loaded, while an Improper Handling conviction under R.C. 2923.16(B) does. See, e.g., *State v. Baker* (Aug. 18, 1997), Warren App No. CA96-12-123. Therefore, a person possessing an unloaded firearm may be guilty of CCW, but cannot be guilty of Improper Handling. Also, R.C. 2923.16(B) addresses transport or possession while in a motor vehicle, but motor vehicles are not necessarily a part of a CCW conviction under R.C. 2923.12(A)(2). Therefore, a person carrying a firearm, but not in a vehicle, may be guilty of CCW, but cannot be guilty of Improper Handling under R.C. 2923.16(B).

{¶ 20} Conversely, concealment is an element of a conviction pursuant to R.C. 2923.12(A)(2), but is not an element of R.C. 2923.16(B). See, e.g., *Id.* Therefore, a person carrying an unconcealed weapon may be guilty of Improper Handling, but cannot be guilty of CCW.

{¶ 21} Because each offense may be committed without committing the other offense, the offenses of CCW as proscribed by R.C. 2923.12(A)(2) and Improper

Handling in violation of R.C. 2923.16(B) are not allied offenses of similar import. See, generally, *State v. Wilson* (Oct. 18, 1983), Franklin App. No. 83AP-634. The offenses not being allied offenses, we need not turn to the second “separate animus” step of the analysis.

{¶ 22} Walker’s Second Assignment of Error is overruled.

IV

{¶ 23} Walker’s Third Assignment of Error is as follows:

{¶ 24} “THE TRIAL COURT ERRED IN CONVICTING THE APPELLANT BECAUSE THE EVIDENCE PRESENTED BY THE STATE WAS INSUFFICIENT TO SUPPORT HIS CONVICTIONS.”

{¶ 25} Walker’s Fourth Assignment of Error is as follows:

{¶ 26} “THE APPELLANT’S CONVICTIONS FOR POSSESSION OF A COUNTERFEIT CONTROLLED SUBSTANCE WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶ 27} In these assignments of error, Walker maintains that his conviction for Possession of a Counterfeit Controlled Substance is not supported by sufficient evidence and that it is against the manifest weight of the evidence. In support, he insists the State failed to prove he had constructive possession of the baggie containing the counterfeit controlled substance.

{¶ 28} 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 to sustain the verdict as a matter of law. *State v. Thompkins*, 78 Ohio St.3d

380, 386, 1997-Ohio-52. 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, 574 N.E.2d 492: "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."

{¶ 29} In contrast, when reviewing a judgment under a manifest-weight standard of review "[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 [factfinder] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which evidence weighs heavily against the conviction." *Thompkins*, supra, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶ 30} Revised Code 2925.37(A) provides: "No person shall knowingly possess any counterfeit controlled substance." Walker claims that since there was no evidence he placed the items under his seat and because there were three other people in the car, the State could not prove constructive possession.

{¶ 31} "[P]ossession 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.’ R.C. 2925.01(K). Possession may be actual or constructive. *State v. Wolery* (1976), 46 Ohio St.2d 316, 329, * * *. ‘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.’ *Id.* A finding of constructive possession may be supported by evidence that shows that the accused was in close proximity to readily usable drugs [or counterfeit controlled substances]. *State v. Gray*, Montgomery App. No. 19493, 2003-Ohio-2822, ¶22, citing *State v. Barnett*, Montgomery App. No. 19185, 2002-Ohio-4961.” *State v. Neal*, Montgomery App. No. 23298, 2010-Ohio-1128, ¶17. When drugs are within easy access of a passenger in a vehicle, a trier of fact may reasonably find constructive possession. See, e.g., *State v. Engle*, Montgomery App. No. 22934, 2009-Ohio-4787, citing *State v. Cherry*, 171 Ohio App.3d 375 (defendant in constructive possession of gun under his seat in car).

{¶ 32} The evidence in the record includes Officer August having seen Walker moving around. He then saw bullets in plain view at Walker’s feet. After Walker was removed from the vehicle, Officer August saw a gun, more bullets, and the “fleece” under the seat in which Walker was sitting. Walker was in possession of another bullet that matched the gun. Officer August explained that the gun was placed with the handle toward the front of the car and the barrel facing away, consistent with having been placed there by the person sitting in the seat under which the gun was hidden. The gun was easily accessible to Walker, but not to other occupants of the car. Moreover, the baggie of “fleece” was located immediately next to the gun under Walker’s seat, thus the “fleece” was also immediately accessible to Walker, but not to

the other occupants.

{¶ 33} Based on the record before us, we conclude there was sufficient evidence to warrant submitting the charge to the jury. Moreover, we do not conclude that the jury clearly lost its way or that there was a manifest miscarriage of justice. Consequently, we will not disturb the jury's verdict. Walker's Third and Fourth Assignments of Error are overruled.

V

{¶ 34} Walker's Fifth Assignment of Error is as follows:

{¶ 35} "THE TRIAL COURT ABUSED ITS DISCRETION BY OVERRULING APPELLANT'S MOTION FOR A MISTRIAL."

{¶ 36} In his Fifth Assignment of Error, Walker alleges that the trial court abused its discretion in denying his motion for a mistrial after the jury had access to a certified copy of his juvenile record, which was not admitted into evidence and which was irrelevant to the three charges before the jury. Thirty minutes into the jury's deliberations, the trial court realized the exhibit had been mistakenly given to the jury along with the admitted exhibits. The bailiff immediately retrieved the juvenile court record. The court asked the jurors if, prior to the bailiff's removal of an exhibit, the jurors had looked at any of the paper exhibits. They had not; they had only looked at the jury instructions. Therefore, the trial court denied Walker's motion for a mistrial.

{¶ 37} It is well-settled that "the trial judge is in the best position to determine whether the situation in the courtroom warrants the declaration of a mistrial." *State v. Glover* (1988), 35 Ohio St.3d 18, 19. See, also, *State v. Franklin* (1991), 62 Ohio St.3d 118, 127. Therefore, "[t]he decision whether to grant a mistrial lies within the sound

discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.” *State v. Brown*, 100 Ohio St.3d 153, 2003-Ohio-5059.

{¶ 38} The record demonstrates that the trial court asked the jurors if they had reviewed the exhibits prior to the bailiff’s entry into the room, thirty minutes into their deliberations. The jurors indicated they had only reviewed the jury instructions. Under these circumstances, we conclude that it was not necessary for the trial court to place the jurors under oath or to individually poll them. Accordingly, we conclude that the trial court did not abuse its discretion in denying Walker’s motion for a mistrial. Walker’s Fifth Assignment of Error is overruled.

VI

{¶ 39} All of Walker’s assignments of errors having been overruled, the judgment of the trial court is Affirmed.

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DONOVAN, P.J., and GRADY, J., concur.

Copies mailed to:

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