[Cite as *State v. Tillman*, 2012-Ohio-5265.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
FULTON COUNTY

State of Ohio	Court of Appeals No. F-11-006
Appellee	Trial Court No. 10CR000060
v.	
Jeremy M. Tillman	**DECISION AND JUDGMENT**
Appellant	Decided: November 9, 2012

* * * * *

Scott A. Haselman, Fulton County Prosecuting Attorney, and
Paul H. Kennedy, Assistant Prosecuting Attorney, for appellee.

Joseph J. Urenovitch and Richard A. Coble, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of conviction and sentence entered by the Fulton County Court of Common Pleas after a jury found defendant-appellant, Jeremy M. Tillman, guilty of carrying a concealed weapon. Appellant now challenges that judgment through the following assignments of error.

Assignment of Error No. 1

It was plain error for trial court to allow deputies to give opinion testimony regarding the operability and uniqueness of gun.

Assignment of Error No. 2

The jury's decision finding appellant guilty of carrying a concealed handgun was contrary to the manifest weight of the evidence.

Assignment of Error No. 3

Appellant was denied effective assistance of trial counsel to his prejudice and in violation of the U.S. and Ohio Constitutions.

{¶ 2} Appellant was indicted on May 18, 2010, on one count of carrying a concealed weapon in violation of R.C. 2923.12(A)(2), a fourth degree felony. Appellant entered a plea of not guilty, and on November 9 and 10, 2010, the case proceeded to a jury trial at which the following evidence was presented.

{¶ 3} In the early morning hours of April 24, 2010, Clifford Hallett was working the third shift at Latrobe Steel, a factory located in Dover Township, Fulton County, Ohio. While outside of the factory, Hallett observed a white car parked in the factory's parking lot. Inside of the car, a man and woman sat arguing. Upon hearing the argument, Hallett decided to call the police. Prior to the officers' arrival, however, the male occupant of the car, who was later identified as appellant, exited the car and began to walk in Hallett's direction. Appellant walked directly past Hallett and headed north

toward a nearby truck stop. The female occupant of the car, later identified as Sara Heath, remained in the vehicle, which she then drove to the factory's back yard.

{¶ 4} Immediately thereafter, Deputy Nick Rubel, of the Fulton County Sheriff's Office, arrived at the scene, where he discovered appellant walking in the factory's parking lot. Rubel stopped appellant and asked if he knew anything about an argument between two people that had recently taken place in the area. Appellant denied any knowledge of the incident. After further questioning, Rubel allowed appellant to leave. Hallett, however, then approached Rubel and informed him that appellant was one of the individuals involved in the disturbance. Rubel then reconnected with appellant and detained him for further questioning. At that point, Patrolman Kevin Knierim of the Wauseon Police Department arrived to assist Rubel.

{¶ 5} As the officers began to question appellant, they heard a long continuous blowing of a motor vehicle horn. Rubel then followed the sound to an area behind the factory, where he found Sara Heath slumped over the steering wheel. After Rubel was unable to get Heath's attention, he opened the car door and immediately smelled a very strong odor of an alcoholic beverage coming from Heath's person. Rubel then radioed Knierim and asked him to bring appellant to the location of the car. Upon questioning from Rubel, appellant admitted that Heath was his girlfriend. After learning from Heath, however, that appellant had not assaulted her in any way, and not seeing any injuries on either Heath or appellant, Rubel decided to process Heath for a DUI offense and released

appellant. Rubel also called for assistance from Deputies Bryan Coger and Rick Brock so that an inventory search of the vehicle could be conducted prior to having it towed.

{¶ 6} Appellant had indicated to Rubel that he was staying nearby at the Arrowhead Motel, which was in conflict with his earlier statement that he was staying with a friend at the Buckeye Estates mobile home park. Nevertheless, Rubel instructed Deputy Coger to drive appellant back to the motel. Appellant told Coger that he was staying in room 37 at that motel, so Coger dropped him off in the parking lot and returned to the site of Heath's arrest to assist with the inventory search of the vehicle.

{¶ 7} In the meantime, the manager of the Arrowhead Motel, who had been listening to his police scanner, contacted the police. In listening to the scanner, he had heard that an officer was dropping appellant off at the motel. The manager, however, knew that no one had rented room 37, and he had witnessed appellant walk away from the motel after being dropped off.

{¶ 8} Deputy Brock then left the inventory scene in an attempt to reacquire appellant. After looking for appellant for 10 to 15 minutes, Brock returned to assist with the inventory search. As Deputies Coger and Brock were conducting the inventory search of the vehicle, Coger came upon two pistol magazines for a Makarov pistol in the vehicle's center console. The magazines were fully loaded with 7 rounds of 9 by 18 millimeter ammunition. In addition, the officers found a black duffle bag in the trunk which contained men's clothing and two boxes of the same 9 by 18 millimeter ammunition. The boxes specified that the ammunition was for a Makarov pistol and they

were the same brand as that found in the console, Brown Bear FMJ. Officer Brock testified that that type of ammunition is unique to the Makarov pistol as the size of the shell is between a .38 caliber and a regular 9 millimeter.

{¶ 9} After finding the ammunition, the officers contacted Officer Rubel, who had left to take Heath to the station to process her for the DUI offense. Rubel confirmed that he had performed a pat-down search of Heath before taking her into custody, and that she was not carrying a weapon. Around this same time, the officers received another report of a suspicious person. This call came from Donna Ramos, the clerk at a nearby Best Western motel. Officer Brock responded to the call and drove to the motel parking lot. Although he initially did not see anyone, Ramos approached him and indicated that the person she had seen was then near a line of evergreen trees. As Brock approached the trees, he found a man, later identified as appellant, hiding underneath the trees. Brock ordered appellant to come out, but he refused. Appellant finally came out from underneath the trees when Brock threatened to use his Taser. Appellant was handcuffed and patted down, but Brock was unable to locate a weapon on him. Brock then shined his flashlight under a wooden deck that was next to where appellant was lying. Approximately five feet from where appellant's torso had been, Brock found a 9 by 18 millimeter Makarov pistol in a holster that had been hidden there. The pistol was fully loaded with a round in the chamber. The safety was off and the weapon was ready to be fired. Brock ejected the round from the chamber and removed the magazine from the pistol. Although the ammunition was the same size as that found in the car, the

ammunition found in the pistol was hollow point. The ammunition that had been found in the car was ball ammunition. Appellant was then placed under arrest.

{¶ 10} Upon review of the evidence as set forth above, the jury found appellant guilty of one count of carrying a concealed weapon. Thereafter, the court sentenced him to two years of community control with conditions and reserved a term of eight months imprisonment for appellant's failure to comply with the conditions imposed. It is from that judgment that appellant appeals.

{¶ 11} In his first assignment of error, appellant asserts that the trial court erred in allowing Officers Rubel and Brock to testify as to the type, operability, and uniqueness of the Makarov pistol. Appellant contends that because the officers were not qualified as expert witnesses, they were not qualified to give opinion testimony regarding the weapon. Appellant concedes that his trial counsel did not object to the testimony, but asserts that the admission amounted to plain error.

{¶ 12} Pursuant to Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed [by the appellate court] although they were not brought to the attention of the [trial] court." "Notice of plain error under Crim.R. 52(B) 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, 372 N.E.2d 804 (1978), paragraph three of the syllabus. Under a plain error analysis, a trial court's judgment will not be reversed on appeal unless, "but for the error, the outcome of the trial clearly would have been otherwise." *Id*. at paragraph two of the syllabus.

{¶ 13} Opinion testimony by a non-expert witness is subject to the limitations set forth in Evid.R. 701. That rule provides that, to be admissible, the opinion must be "(1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

{¶ 14} Regarding the type and uniqueness of the Makarov pistol and its ammunition, Officer Rubel testified at the trial below that while he had not had any hands-on training with the weapon, he had spent six years with the military police in the Marine Corp at various duty stations. Eighteen months of that tour he spent as an instructor specializing in light arms. Based on that history and experience, Rubel testified that the Makarov pistol was Russian made and that it was uncommon. In fact, he testified that this was the first time he had ever come across one in his all his years as a deputy police officer. We find that this testimony was rationally related to Officer Rubel's perception of the weapon and helpful to a determination of a fact in issue, that being appellant's connection to the weapon through the discovery of ammunition unique to the weapon found in the car.

{¶ 15} Regarding the operability of the weapon, we first note that "[o]perability may be established by circumstantial evidence." *State v. Messer*, 107 Ohio App.3d 51, 55, 667 N.E.2d 1022 (9th Dist.1995). The testimony of a veteran police officer that a weapon appeared operable, combined with evidence that the weapon was found loaded and hidden, along with the admission into evidence of the weapon itself, will suffice to establish operability. *Id.* Moreover, "proof of the existence of a firearm may be based on

lay testimony, and is not dependent on an empirical analysis of the gun." *State v. Murphy*, 49 Ohio St.3d 206, 209, 551 N.E.2d 932 (1990). *See also In re C.B.*, 8th Dist. No. 95256, 2010-Ohio-5620, ¶ 13-14. In the present case, Officer Brock testified that when he found the weapon, the safety was off and it was ready to fire. He removed the magazine and ejected the round from the chamber. While Brock never test fired the weapon, he testified that after emptying the Makarov, he pulled the trigger and the firing pin was working properly. Upon review, we find that this testimony was admissible to prove the weapon's operability. The first assignment of error is not well-taken.

{¶ 16} In his second assignment of error, appellant asserts that the jury erred in finding him guilty of carrying a concealed weapon because the state failed to prove beyond a reasonable doubt that he had or knew he had possession of a loaded handgun or that the gun was operable or could be made operable.

{¶ 17} When an appellant challenges the manifest weight of the evidence on appeal, the appellate court must sit as the "thirteenth juror" to determine whether the trier of fact lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). In making this determination, we review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. *Id.* A conviction will be reversed on manifest weight grounds only in the most "'exceptional case in which the evidence weighs heavily against the conviction.'" *Id.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). In addition, we

remain mindful that "'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.'" *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶ 10, quoting *State v. Long*, 10th Dist. No. 96APA04-511, 1997 WL 52911, *9 (Feb. 6, 1997).

{¶ 18} Appellant was convicted of carrying a concealed weapon in violation of R.C. 2923.12(A)(2). That statute reads:

> (A) No person shall knowingly carry or have, concealed on the person's person or concealed ready at hand, any of the following:
>
> * * *
>
> (2) A handgun other than a dangerous ordnance[.]

{¶ 19} Appellant first asserts that the state failed to prove beyond a reasonable doubt that he had or knew he had possession of a loaded handgun. Possession, for purposes of R.C. 2923.12(A), can be either physical or constructive possession. *In re Wright*, 172 Ohio App.3d 276, 2007-Ohio-2951, 874 N.E.2d 850, ¶ 10 (1st Dist.). "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." *State v. Wolery*, 46 Ohio St.2d 316, 329, 348 N.E.2d 351 (1976). "If the evidence demonstrates that the defendant was in close proximity to the contraband, such that the defendant was able to exercise dominion or control over the contraband, this constitutes circumstantial [, and thus sufficient,] evidence that the defendant was in constructive

possession of the items." *State v. Brooks*, 8th Dist. No. 94978, 2011-Ohio-1679, ¶ 17, citing *State v. Whitted*, 8th Dist. No. 88979, 2007-Ohio-5069, ¶ 11. Whether a handgun is ready at hand is a factual determination based on the unique circumstances of each case. *State v. Davis*, 115 Ohio St.3d 360, 2007-Ohio-5025, 875 N.E.2d 80, ¶ 29. It requires more than a "simple distance formulation." *Id.* Rather, "'[r]eady at hand" means so near as to be conveniently accessible and within immediate physical reach." *Id.*, quoting *State v. Miller*, 2d Dist. No. 19589, 2003-Ohio-6239, ¶ 14.

{¶ 20} Upon review of the evidence presented at the trial below, we cannot find that the jury clearly lost its way in finding appellant guilty of carrying a concealed weapon. Appellant was found hiding under bushes, with his torso approximately five feet from the loaded Makarov pistol. From this evidence, the jury could conclude that the gun was within the immediate physical reach of appellant's hand. Moreover, from the testimony that appellant told officers that he was staying at one motel, checked into another motel, and was seen walking around a third motel, the jury could conclude that appellant was either trying to find a hiding place for the handgun, or was attempting to retrieve the gun from where he had previously hidden it. Under either scenario, the evidence supports a finding that appellant was guilty of carrying a concealed weapon.

{¶ 21} Appellant further asserts that the state failed to prove beyond a reasonable doubt that the gun found under the deck meets the definition of a handgun because the evidence failed to establish that the weapon was operable. As we discussed above, the circumstantial evidence submitted at the trial below was sufficient to establish the

Makarov's operability. Accordingly, the jury's conclusion in that regard was not against the manifest weight of the evidence. The second assignment of error is not well-taken.

{¶ 22} In his third assignment of error, appellant contends that he was denied the effective assistance of counsel at the trial below because his counsel failed to object to the officers' opinion testimony regarding the operability and uniqueness of the Makarov pistol and ammunition.

{¶ 23} The standard for determining whether a trial attorney was ineffective requires an appellant to show (1) that the trial attorney made errors so egregious that the trial attorney was not functioning as the "counsel" guaranteed appellant under the Sixth Amendment, and (2) that the deficient performance prejudiced appellant's defense. *Strickland v. Washington*, 466 U.S. 668, 686-687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In essence, an appellant must show that his trial, due to his attorney's ineffectiveness, was so demonstrably unfair that there is a reasonable probability that the result would have been different absent his attorney's deficient performance. *Id.* at 693.

{¶ 24} Furthermore, a court must be "highly deferential" and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" in reviewing a claim of ineffective assistance of counsel. *Id.* at 689. A properly licensed attorney in Ohio is presumed to execute his duties in an ethical and competent manner. *State v. Hamblin*, 37 Ohio St.3d 153, 155-56, 524 N.E.2d 476 (1988). Finally, reviewing courts must not use hindsight to second-guess trial strategy, and must keep in mind that different trial counsel will often defend the same case in

different manners. *Strickland* at 689; *State v. Keenan*, 81 Ohio St.3d 133, 152, 689 N.E.2d 929 (1998).

{¶ 25} As we explained under our discussion of appellant's first assignment of error, the testimony of the officers as to the weapon's identity, uniqueness and operability was admissible under Evid.R. 701. Accordingly, appellant's trial counsel was not ineffective for failing to object to that testimony. The third assignment of error is not well-taken.

{¶ 26} On consideration whereof, the court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Fulton County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE