[Cite as *State v. McMurray*, 2015-Ohio-2827.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

PREBLE COUNTY

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| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | CASE NO. CA2014-08-008 |
| | : | O P I N I O N |
| - vs - | | 7/13/2015 |
| | : | |
| MARY L. MCMURRAY, | : | |
| Defendant-Appellant. | : | |

CRIMINAL APPEAL FROM PREBLE COUNTY COURT OF COMMON PLEAS
Case No. 14CR11450

Martin P. Votel, Preble County Prosecuting Attorney, Gractia S. Manning, 101 East Main Street, Eaton, Ohio 45320, for plaintiff-appellee

Brian A. Muenchenbach, 200 West Main Street, Eaton, Ohio 45320, for defendant-appellant

**HENDRICKSON, J.**

**{¶ 1}** Defendant-appellant, Mary L. McMurray, appeals from her convictions in the Preble County Court of Common Pleas for the illegal assembly or possession of chemicals for the manufacture of drugs and aggravated possession of drugs. For the reasons set forth below, we affirm her convictions.

## I. FACTS

**{¶ 2}** On February 3, 2014, appellant was indicted on one count of illegal assembly or

possession of chemicals for the manufacture of drugs in violation of R.C. 2925.041(A), a felony of the third degree (count one), one count of aggravated possession of drugs in violation of R.C. 2925.11(A)(C)(1)(a), a felony of the fifth degree (count two), one count of obstructing official business in violation of R.C. 2921.31(A), a misdemeanor of the second degree (count three), and one count of drug paraphernalia in violation of R.C. 2925.14(A)(C)(1), a misdemeanor of the fourth degree (count four). The charges arose out of allegations that on January 15, 2014, appellant was in possession of methamphetamine and chemicals used in the manufacture of methamphetamine, including pseudoephedrine pills, cans of Drano containing lye, and lithium batteries.

**{¶ 3}** A jury trial was held on June 9, 2014, at which time the state dismissed counts three and four. At trial, the state presented testimony from Paul Plaugher, a deputy with the Preble County Sheriff's Office, who testified he worked the "midnight shift" from 11:30 p.m. on January 14, 2014, to 8:00 a.m. on January 15, 2014. While patrolling during his shift, Plaugher noticed a maroon Pontiac Grand Prix parked in the driveway of a known drug house in Preble County. Plaugher ran the plates through dispatch and was informed the car was registered to a female, Angela Middleton.

**{¶ 4}** Plaugher testified that later in his shift, sometime before 12:20 a.m., he saw the same maroon Grand Prix traveling southbound on State Route 503. Plaugher recognized the license plate on the Grand Prix as the same license plate he ran earlier in the evening. Plaugher pulled over to allow the vehicle to pass him, and when the vehicle went by him, it sped up. At this time, Plaugher noticed the vehicle only had one working brake light. Plaugher attempted to catch up to the vehicle and he activated his overhead lights. The driver of the Grand Prix, later identified as appellant, pulled into a private driveway and fled from the vehicle. Appellant ran in an easterly direction, running on a path between a pickup truck and a trailer parked on the property.

**{¶ 5}** Plaugher did not chase after appellant, but instead secured the passenger riding in the Grand Prix and called for backup. Once additional officers responded to the scene, Plaugher walked the property on the path that appellant had fled. Plaugher testified he was familiar with the property as he had attempted to serve a warrant on the person who lives on the property on January 12, 2014, two days before appellant's flight. Plaugher explained that due to the numerous trash piles located on the property, there is only one path that appellant could have used to flee. While walking this path, Plaugher found a full, unopened can of Drano lying between the pickup truck and trailer. Farther along the path, Plaugher found a red makeup bag and a purse. Appellant's Indiana driver's license and dog tags containing appellant's name had fallen out of the purse and were laying nearby. Plaugher testified these items had not been on the property's path on January 12, 2014.

**{¶ 6}** Plaugher collected the items dropped on the path and found that the makeup bag held a small black container with a "chunky crystalized substance" inside. This substance field-tested positive for methamphetamine. Plaugher also inventoried and collected evidence left in the Grand Prix. Under the front passenger seat of the vehicle, Plaugher found another unopened can of Drano, a four-pack of Energizer lithium batteries, and a plastic container filled with over 400 loose pseudoephedrine pills. Plaugher testified about the significance of finding these items, explaining that these items are used in the manufacture of methamphetamine, a schedule II controlled substance.

**{¶ 7}** After inventorying the vehicle, Plaugher spoke with the vehicle's passenger, Woody Hubbard, and learned that the vehicle was registered to Hubbard's significant other, Middleton.[1] After talking with Hubbard, Plaugher discovered appellant and Hubbard had

1. At trial, Plaugher testified he did not know whether Hubbard was merely "involved" with Middleton or whether the two were legally married.

been at a Preble County Walmart together earlier in the evening. Plaugher was able to obtain surveillance video of Hubbard and appellant's trip to Walmart.

**{¶ 8}** A few days after she fled, appellant was located and arrested. Plaugher spoke with appellant upon her arrest, and the conversation was recorded. On the recording, which was entered into evidence, appellant admitted to the possession of methamphetamine, stating that "the fucking possession of meth in my purse, okay, I'll take that all day long. Yep, that was mine." Appellant denied, however, that she possessed the chemicals to manufacture methamphetamine. On cross-examination, Plaugher testified there was no fingerprint or DNA evidence to link appellant to the items found under the passenger seat of the Grand Prix.

**{¶ 9}** Corey Mowen, an asset protection employee at Walmart, testified he reviewed Walmart's security footage from January 14, 2014. Appellant and Hubbard were recorded entering the store at 11:54 p.m. The two walked around the store together and went down the aisle containing Drano. Neither appellant nor Hubbard made a purchase at Walmart before leaving the store at 12:02 a.m. When they left, security footage showed appellant getting into the driver's seat of a maroon Grand Prix.

**{¶ 10}** The state also presented evidence from Todd Yoak, a forensic chemist employed by the Miami Valley Crime Laboratory. Yoak was declared an expert in the field of forensic chemical analysis without objection. He testified he had weighed and tested the crystalized substance found in the black container in appellant's makeup bag using a gas chromatography mass spectrometry and found it "had a weight of .06 gram plus or minus .02 gram" and was methamphetamine, a schedule II substance. Yoak also testified he examined the pills found in the plastic container under the passenger seat of the Grand Prix and was able to identify them as pseudoephedrine by their markings.

**{¶ 11}** The state rested its case-in-chief after presenting the forgoing testimony and

evidence. The defense then rested without calling any witnesses, admitting any exhibits into evidence, or making a Crim.R. 29 motion for acquittal. The matter was submitted to the jury, who returned a guilty verdict on both counts. Appellant was subsequently sentenced to a total of two years in prison.

**{¶ 12}** Appellant timely appealed, raising two assignments of error. For ease of discussion, we will address appellant's assignments of error out of order.

## II. ANALYSIS

### A. Sufficiency and Manifest Weight

**{¶ 13}** Assignment of Error No. 2:

**{¶ 14}** THE JURY VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

**{¶ 15}** Although the caption of appellant's second assignment of error indicates she is only challenging whether her convictions were supported by the manifest weight of the evidence, the body of her brief sets forth arguments pertinent to both a sufficiency and a manifest weight challenge. Because "[a] determination that a conviction is supported by the manifest weight of the evidence will also be dispositive of the issue of sufficiency," we consider both of appellant's arguments. *State v. Jones*, 12th Dist. Butler No. CA2012-03-049, 2013-Ohio-150, ¶ 19.

**{¶ 16}** Whether the evidence presented at trial is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997); *State v. Grinstead*, 194 Ohio App.3d 755, 2011-Ohio-3018, ¶ 10 (12th Dist.). When reviewing the sufficiency of the evidence underlying a criminal conviction, an appellate court examines the evidence in order to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Paul*, 12th Dist. Fayette No. CA2011-10-026, 2012-Ohio-3205, ¶ 9. Therefore, "[t]he 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." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

**{¶ 17}** A manifest weight of the evidence challenge, on the other hand, examines the "inclination of the greater amount of credible evidence, offered at a trial, to support one side of the issue rather than the other." *State v. Barnett*, 12th Dist. Butler No. CA2011-09-177, 2012-Ohio-2372, ¶ 14. To determine whether a conviction is against the manifest weight of the evidence, the reviewing court must look at the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether in resolving the 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. Graham*, 12th Dist. Warren No. CA2008-07-095, 2009-Ohio-2814, ¶ 66. "While appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, 'these issues are primarily matters for the trier of fact to decide.'" *State v. Barnes*, 12th Dist. Brown No. CA2010-06-009, 2011-Ohio-5226, ¶ 81, quoting *State v. Walker*, 12th Dist. Butler No. CA2006-04-085, 2007-Ohio-911, ¶ 26. An appellate court, therefore, will overturn a conviction due to the manifest weight of the evidence only in extraordinary circumstances when the evidence presented at trial weighs heavily in favor of acquittal. *Id.*, citing *Thompkins*, 78 Ohio St.3d at 387. Furthermore, as stated above, "[a] determination that a conviction is supported by the manifest weight of the evidence will also be dispositive of the issue of sufficiency." *Jones*, 2013-Ohio-150 at ¶ 19.

**1. Illegal Assembly of Chemicals for the Manufacture of Drugs**

**{¶ 18}** Appellant argues the state failed to prove "each and every element" of illegal assembly of chemicals for the manufacture of drugs. Pursuant to R.C. 2925.041(A), "[n]o person shall knowingly assemble or possess one or more chemicals that may be used to

manufacture a controlled substance in schedule I or II with the intent to manufacture a controlled substance in schedule I or II." "[A] person acts knowingly, regardless of [her] purpose, when [s]he is aware that [her] conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when [s]he is aware that such circumstances probably exist." Former R.C. 2901.22(B).

**{¶ 19}** Prosecution of a defendant for the illegal assembly of chemicals for the manufacture of drugs does not require the state "to prove that the offender assembled or possessed *all* chemicals necessary to the manufacture of a controlled substance." (Emphasis added.) R.C. 2925.041(B). Rather, "assembly or possession of a single chemical that may be used in the manufacture of a controlled substance in schedule I or II, with the intent to manufacture a controlled substance * * * is sufficient to violate [R.C. 2925.041(A)]." *Id.* With respect to proving an offender's intent, the Ohio Supreme Court has recognized that "intent, lying as it does within the privacy of a person's own thoughts, is not susceptible [to] objective proof." *State v. Garner*, 74 Ohio St.3d 49, 60 (1995). "Intent must often instead be inferred from the act itself and from the surrounding circumstances, including the acts and statements of the defendant surrounding the time of the offense." *State v. Wilson*, 12th Dist. Warren No. CA2006-01-007, 2007-Ohio-2298, ¶ 41.

**{¶ 20}** Possession is defined as "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). A person may be in actual or constructive possession of a substance. *State v. Arrone*, 12th Dist. Madison No. CA2008-04-010, 2009-Ohio-1456, ¶ 13, citing *State v. Wolery*, 46 Ohio St.2d 316, 329 (1976). "An accused has 'constructive possession' of an item when the accused is conscious of the item's presence and is able to exercise dominion and control over it, even if the item is not within the accused's immediate physical possession." *State v.*

*Jester*, 12th Dist. Butler No. CA2010-10-264, 2012-Ohio-544, ¶ 25. "A person may knowingly possess or control property belonging to another; the state need not establish ownership to prove constructive possession." *State v. Williams*, 12th Dist. Butler CA2014-09-180, 2015-Ohio-2010, ¶ 14. Furthermore, constructive possession may be proven by circumstantial evidence alone. *Id.* at ¶ 15. The surrounding facts and circumstances, as well as the defendant's actions, are evidence that a trier of fact may consider in determining whether the defendant had constructive possession. *Id.*

**{¶ 21}** After reviewing the entire record, weighing inferences, and examining the credibility of witnesses, we find appellant's conviction for the illegal assembly of chemicals for the manufacture of drugs was not against the manifest weight of the evidence and was supported by sufficient evidence. The state presented testimony and evidence from which the jury could have found all elements of the offense proven beyond a reasonable doubt.

**{¶ 22}** Here, the state presented evidence that appellant was in possession of one or more chemicals used to manufacture methamphetamine with the intent of manufacturing methamphetamine. Evidence was presented that appellant had visited the aisle containing Drano at Walmart less than a half-an-hour before she fled from Plaugher. An unopened bottle of Drano was found in the car from which she fled, along with over 400 loose pseudoephedrine pills and lithium batteries—all of which she was able to exercise dominion and control over. Another unopened bottle of Drano was found along the path appellant fled. According to Plaugher, the bottle of Drano had not been on the path when he last visited the property. The jury was entitled to reasonably infer from these facts that appellant dropped the bottle of Drano that was in her possession while fleeing from the police.

**{¶ 23}** The jury was also entitled to find appellant possessed the Drano and other chemicals with the intent of manufacturing methamphetamine. Testimony from Plaugher indicated methamphetamine was manufactured through the use of pseudoephedrine, lye

found in Drano, and lithium strips from lithium batteries. Appellant was in possession of not only the chemicals needed to manufacture methamphetamine, but also the completed product or controlled substance. The jury was entitled to reasonably infer from the circumstances surrounding appellant's possession of the chemicals that she intended to use the chemicals to manufacture additional methamphetamine. *See, e.g., State v. Bowling*, 12th Dist. Butler No. CA2013-08-159, 2014-Ohio-1690.

**{¶ 24}** Accordingly, given the evidence presented, it is clear the jury did not lose its way and create such a manifest miscarriage of justice that appellant's conviction for the illegal assembly of chemicals for the manufacture of drugs must be reversed and a new trial ordered. As appellant's conviction was not against the manifest weight of the evidence, we necessarily conclude that the state presented sufficient evidence to support the jury's finding of guilt. *See Jones*, 2013-Ohio-150 at ¶ 19.

**2. Possession of Drugs**

**{¶ 25}** Appellant also challenges whether her conviction for aggravated possession of drugs was supported by the manifest weight and sufficiency of the evidence. Pursuant to R.C. 2925.11(A), "[n]o person shall knowingly, obtain, possess, or use a controlled substance or a controlled substance analog."

**{¶ 26}** Here, the state presented evidence establishing beyond a reasonable doubt appellant was in actual possession of methamphetamine. The state introduced into evidence Yoak's testimony that the substance found in the black container in appellant's bag was methamphetamine, a schedule II substance. The state also introduced into evidence appellant's recorded statement to Plaugher that the methamphetamine found in her bag was hers "all day long."

**{¶ 27}** Given this evidence, we conclude appellant's conviction for aggravated possession of drugs was not against the manifest weight of the evidence and was supported

by sufficient evidence. *See Jones*, 2013-Ohio-150 at ¶ 19.

**{¶ 28}** Accordingly, appellant's second assignment of error is overruled.

### B. Ineffective Assistance of Counsel

**{¶ 29}** Assignment of Error No. 1:

**{¶ 30}** THE APPELLANT WAS DENIED HER RIGHT TO A FAIR TRIAL WHEN HER TRIAL ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE OHIO AND UNITED STATES CONSTITUTIONS.

**{¶ 31}** In her first assignment of error, appellant argues that her trial counsel committed errors which prejudiced her right to a fair trial. Specifically, appellant contends her trial counsel erred (1) by failing to voir dire Yoak before he was admitted as an expert and (2) by failing to move for a directed verdict at the end of the state's case-in-chief. She also argues these errors, "when considered cumulatively," negatively impacted her right to a fair trial.

**{¶ 32}** To prevail on an ineffective assistance of counsel claim, an appellant must establish (1) her trial counsel's performance was deficient and (2) that such deficiency prejudiced the defense to the point of depriving the appellant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687-688, 104 S.Ct. 2052 (1984); *State v. Vore*, 12th Dist. Warren Nos. CA2012-06-049 and CA2012-10-106, 2013-Ohio-1490, ¶ 14. Trial counsel's performance will not be deemed deficient unless it "fell below an objective standard of reasonableness." *Strickland* at 688. To show prejudice, the appellant must prove there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. An appellant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other. *State v. Madrigal*, 87 Ohio St.3d 378, 389 (2000).

#### 1. Failure to Voir Dire Expert

**{¶ 33}** Appellant concedes that a proper foundation was laid by the state regarding Yoak's expert qualifications, but she nonetheless argues that her trial counsel should have voir dired Yoak in order to "adequately inquire as to the details of the witnesses [sic] expertise in the given field." She also contends that trial counsel's failure to voir dire Yoak was prejudicial as counsel did not make inquiries into Yoak's "possible past connection[s] to the prosecutor, personally or professionally."

**{¶ 34}** At trial, Yoak testified he has been employed as a forensic chemist for nine years and obtained bachelor's degrees in biochemistry and chemistry as well as masters degrees in science and forensic science. He stated he received formal training in controlled substance analysis and has used his training to test controlled substances, including methamphetamine, in thousands of cases. He also testified he is a member of the Clandestine Laboratory Investing Chemist Association and has been recognized as an expert in the field of forensic chemical analysis in numerous courts in Ohio, including courts in Greene County and Montgomery County, and in the state of Virginia. Following this testimony, the state moved to have Yoak declared as an expert. The trial court asked defense counsel if he wanted to voir dire Yoak, and defense counsel responded, "Do not, Judge. No objection."

**{¶ 35}** We find that trial counsel's performance was not deficient for choosing not to voir dire Yoak. From Yoak's direct testimony, it was apparent he was qualified to render an expert opinion in the area of forensic chemical analysis. Further questioning about Yoak's expertise in the given field was likely to result in duplicative information and a delay in proceedings. Trial counsel was not ineffective for choosing, for tactical reasons, not to disrupt the flow of trial to voir dire Yoak. As we have recognized on numerous occasions, trial counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *State v. Hendrix*,

12th Dist. Butler No. CA2012-05-109, 2012-Ohio-5610, ¶ 14. It is not the role of the appellate court to second guess the strategic decisions of trial counsel. *State v. Lloyd*, 12th Dist. Warren Nos. CA2007-04-052 and CA2007-04-053, 2008-Ohio-3383, ¶ 61.

**{¶ 36}** Additionally, appellant failed to demonstrate any prejudice from trial counsel's decision not to voir dire Yoak about his qualifications or his "possible" connection to the prosecutor. Although appellant asserts there is a "possibility" that Yoak may have a prior connection to the prosecutor, this speculative and unknown possibility is not sufficient to show prejudice. As appellant has not demonstrated a reasonable probability that the result of trial would have been different had trial counsel questioned Yoak about a prior connection to the prosecutor or about his qualifications in the field of forensic chemical analysis, we reject appellant's argument that she received ineffective assistance of counsel.

**2. Failure to Move for Acquittal**

**{¶ 37}** Appellant also contends trial counsel was ineffective for failing to move for acquittal under Crim.R. 29 at the close of the state's case-in-chief. A Crim.R. 29 motion is asserted to test the sufficiency of the evidence. A trial court is required to order an acquittal of "one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses." Crim.R. 29(A); *State v. Annor*, 12th Dist. Butler No. CA2009-10-248, 2010-Ohio-5423, ¶ 20. As set forth above, when considering the sufficiency of the evidence, "[t]he 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." *Jenks*, 61 Ohio St.3d at 259-260.

**{¶ 38}** This court has previously recognized that "[t]he failure to assert a Crim.R. 29 motion is not, per se, ineffective assistance of counsel." *Annor* at ¶ 21. While it is customary for defense counsel to make a Crim.R. 29 motion to test the sufficiency of the state's

evidence, the failure to make such a motion does not mean that trial counsel's performance fell below a reasonable standard of representation. *State v. Scott*, 6th Dist. Sandusky No. S-02-026, 2003-Ohio-2797, ¶ 21. As discussed above in our resolution of appellant's second assignment of error, there was sufficient evidence presented at trial to support appellant's convictions. Therefore, any Crim.R. 29 motion made by trial counsel would have been futile. *See Annor* at ¶ 21; *State v. Miller*, 12th Dist. Clermont No. CA2011-04-028, 2012-Ohio-995, ¶ 28. Accordingly, we conclude appellant's trial counsel did not provide ineffective assistance by failing to move for acquittal under Crim.R. 29.

### 3. Cumulative Error

**{¶ 39}** Having found no instances of ineffective assistance of counsel, we conclude that there was no cumulative error prejudicing appellant's right to a fair trial. *See State v. Freeze*, 12th Dist. Butler No. CA2011-11-209, 2012-Ohio-5840, ¶ 100.

**{¶ 40}** Appellant's first assignment of error is, therefore, overruled.

**{¶ 41}** Judgment affirmed.

S. POWELL, P.J., and RINGLAND, J., concur.