[Cite as *State v. Moore*, 2015-Ohio-2466.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2014-10-121
	:	O P I N I O N
- vs -		6/22/2015
	:	
DEWAND L. MOORE, JR.,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 14CR30104

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

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HENDRICKSON, J.

{¶ 1} Defendant-appellant, Dewand L. Moore, Jr., appeals his conviction in the Warren County Court of Common Pleas for possession of cocaine.

{¶ 2} On the evening of May 17, 2014, Moore was a passenger in a four-door sedan that was the subject of a traffic stop initiated by Lebanon Police Officer Dustin Kurilko. Upon searching the vehicle, Officer Kurilko discovered a sandwich bag containing several rocks of crack cocaine stuffed inside a cigarette box on the floorboard behind the driver's seat. After

interviewing all of the occupants of the vehicle, Officer Kurilko placed Moore under arrest.

{¶ 3} In June 2014, Moore was indicted on one count of possession of cocaine in violation of R.C. 2925.11. The case proceeded to a jury trial on July 31, 2014. At trial, the state presented two witnesses, Officer Kurilko and Patrolman Daniel Fry, also of the Lebanon Police Department.

{¶ 4} Officer Kurilko testified that after initiating the traffic stop of the sedan, he approached the vehicle and observed three occupants, none of whom exhibited any suspicious behavior. Moore was seated in the rear of the vehicle, directly behind the driver's seat. Officer Kurilko spoke with the driver, and obtained his consent to search the vehicle.

{¶ 5} Officer Kurilko further testified that it is standard department procedure for an officer to be assisted by another member of the department while conducting a vehicle search. One officer watches the occupants of the vehicle, while the other officer performs the search. In this instance, Patrolman Fry arrived at the scene to monitor the vehicle's occupants while Officer Kurilko performed the search.

{¶ 6} Officer Kurilko stated that he removed all three occupants from the vehicle one-by-one, searched their respective persons, and seated them on a nearby curb without observing any indication they were involved in illegal activity. However, Officer Kurilko stated that after he searched Moore, Patrolman Fry approached and "advised that * * * [Moore] in the backseat [was] apparently shuffling his feet or trying to kick something underneath the seat." Thereafter, Officer Kurilko directed his search to the backseat of the vehicle.

{¶ 7} Defense counsel objected to Officer Kurilko's testimony regarding Patrolman Fry's statement, but the trial court overruled the objection. The court explained to the jury, "I am going to allow [the testimony] for the limited purpose of explaining what the officer was doing and why he was doing it."

{¶ 8} In the remainder of his testimony, Officer Kurilko stated that he found a

cigarette box on the floor – next to a blue duffel bag and partially under the driver's seat – beneath where Moore was sitting. He stated that inside the box was a bag containing what appeared to be six or seven rocks of crack cocaine. Officer Kurilko then authenticated two photos of the box and its contents, and the parties stipulated that the substance in the bag was, in fact, over ten grams of crack cocaine. Officer Kurilko opined that the crack in the bag had a street value of between $800 and $1,500.

{¶ 9} Next, Patrolman Fry was called to the stand, and his testimony corroborated Officer Kurilko's account of the search and subsequent arrest. Patrolman Fry indicated that while Officer Kurilko was removing the occupants from the vehicle and searching their persons, he positioned himself outside the rear driver's side window to monitor the passengers that remained inside. While Officer Kurilko was taking the driver from the car, Patrolman Fry observed Moore "continually move back and forth with his feet," not in a side to side motion but "more of a kicking motion." Additionally, although Moore was seated behind the driver's seat, Patrolman Fry noted that he "was leaning towards the other side * * * [a]s if he were resting on an elbow."

{¶ 10} Patrolman Fry stated that he advised Officer Kurilko of what he had observed because "[t]here was no real reason for [Moore] to be moving that way." Still, Patrolman Fry admitted that it was hard to see what was on the floor of the vehicle, and that he did not personally see the cigarette box that Officer Kurilko recovered. When asked what he thought Moore was trying to do by shuffling his feet, Patrolman Fry responded that he believed Moore was "[t]rying to conceal something that may be on the floor."

{¶ 11} After Patrolman Fry's testimony, the state rested and the defense declined to present any evidence or testimony. The jury found Moore guilty on one count of possession of cocaine in violation of R.C. 2925.11. On September 9, 2014, the trial court sentenced Moore to 12 months in prison.

{¶ 12} Moore now appeals, raising two assignments of error.

{¶ 13} Assignment of Error No. 1:

{¶ 14} THE STATE OF OHIO FAILED TO PROVE THE ELEMENTS OF POSSESSION OF COCAINE IN VIOLATION OF O.R.C. [sic] §2925.11(A) BEYOND A REASONABLE DOUBT AND THE CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 15} In his first assignment of error, Moore argues the state failed to supply sufficient evidence to support the charge of possession of cocaine, and that his conviction was against the manifest weight of the evidence. We disagree.

{¶ 16} At the outset, we note that "weight of the evidence and sufficiency of the evidence are clearly different legal concepts." *State v. Thompkins*, 78 Ohio St.3d 380, 389 (1997). Sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 25. In reviewing a challenge to 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." (Citations omitted.) *Barberton v. Jenney*, 126 Ohio St.3d 5, 2010-Ohio-2420, ¶ 14.

{¶ 17} By contrast, the criminal manifest-weight-of-the-evidence standard addresses the evidence's effect of inducing belief. *Wilson* at ¶ 25. In reviewing a weight of the evidence challenge, the appellate court "review[s] 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 clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins*, 78 Ohio St.3d at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st

Dist.1983). Although the appellate court acts as a "thirteenth juror" when reviewing a manifest weight challenge, it must give great deference to the fact finder's determination of the witnesses' credibility. *State v. McCree*, 12th Dist. Butler Nos. CA2010-02-029 and CA2010-02-030, 2011-Ohio-1993, ¶ 22.

{¶ 18} Because legal sufficiency is required to take a case to the jury, the finding that a conviction is supported by the weight of the evidence necessarily includes a finding of sufficiency. *State v. Moshos*, 12th Dist. Clinton No. CA2009-06-008, 2010-Ohio-735, ¶ 29. Thus, a finding that an appellant's conviction is supported by the manifest weight of the evidence is also dispositive of the issue of sufficiency. *State v. Jones*, 12th Dist. Butler No. CA2012-03-049, 2013-Ohio-150, ¶ 19. We therefore begin with an examination of whether Moore's conviction for possession of cocaine under R.C. 2925.11 is supported by the manifest weight of the evidence.

{¶ 19} R.C. 2925.11(A) states that "[n]o person shall knowingly * * * possess * * * a controlled substance or a controlled substance analog." Further, R.C. 2925.11(C)(4)(c) provides that "[i]f the amount of the drug involved equals or exceeds ten grams but is less than twenty grams of cocaine, possession of cocaine is a felony of the third degree * * *." It is undisputed that the substance Officer Kurilko discovered in the sedan was cocaine, and that the amount of cocaine exceeded ten grams. Therefore, the only issue the jurors had to decide was whether Moore "possessed" the cocaine in violation of the statute.

{¶ 20} Pursuant to R.C. 2925.01(K),

> "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.

Possession may be actual or constructive. *State v. Stringer*, 12th Dist. Butler No. CA2012-04-095, 2013-Ohio-988, ¶ 32. An individual has "constructive possession" of an item when

he or she is (1) conscious of the item's presence, and (2) able to exercise dominion and control over it, even if the item is not within his or her immediate physical possession. *State v. Hankerson*, 70 Ohio St.2d 87 (1982), syllabus; *State v. Jester*, 12th Dist. Butler No. CA2010-10-264, 2012-Ohio-544, ¶ 25.

{¶ 21} Constructive possession may be proven by circumstantial evidence alone. *State v. Williams*, 12th Dist. Butler No. CA2014-09-180, 2015-Ohio-2010, ¶ 15. Absent a defendant's admission, the surrounding facts and circumstances, including the defendant's actions, are evidence that the trier of fact can consider in determining whether the defendant had constructive possession. *Id.* The discovery of readily accessible drugs in close proximity to the accused constitutes circumstantial evidence that the accused was in constructive possession of the drugs. *Jester* at ¶ 25.

{¶ 22} There was ample evidence in the record from which the jury could have concluded that Moore had constructive possession. Patrolman Fry testified that he observed Moore "continually move back and forth with his feet," making "more of a kicking motion." Fry also testified that "there was no real reason for [Moore] to be moving that way," and that Fry believed Moore was trying to conceal something on the floor. Moreover Officer Kurilko testified that he found the cigarette box containing the bag of cocaine "on the floor where [Moore] was sitting."

{¶ 23} Moore notes that he was only one of three passengers present in the car that evening, and that the cocaine could have belonged to one of the other passengers. However, "[w]e must be mindful that the original trier of fact was in the best position to judge the credibility of witnesses and the weight to be given the evidence." *State v. Wright*, 12th Dist. No. CA2003-05-127, 2004-Ohio-2811, ¶ 15, citing *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. After reviewing the entire record, we find that Moore's conviction is supported by the weight of the evidence; the jury clearly did not lose its way and

create such a manifest miscarriage of justice that Moore's conviction must be reversed. *See, e.g., Wright* at ¶ 13-18 (affirming appellant's conviction for possession of cocaine, even where "no one saw appellant with the cocaine, appellant was not observed making furtive movements inside the van, [and] there were two other individuals in the van"). This finding is also dispositive of the issue of sufficiency. *Jones*, 2013-Ohio-150, ¶ 19.

{¶ 24} Therefore, Moore's first assignment of error is overruled.

{¶ 25} Assignment of Error No. 2:

{¶ 26} THE TRIAL COURT ERRED BY ALLOWING INADMISSABLE HEARSAY AFTER PROPER OBJECTION BY DEFENDANT AND SUBSEQUENT LIMITING INSTRUCTION FAILED TO CURE THE DAMAGE CAUSED BY THE TESTIMONY.

{¶ 27} In his second assignment of error, Moore argues the trial court committed reversible error when it allowed Officer Kurilko to testify that "[Patrolman] Fry advised that, as he was standing next to the vehicle * * * [Moore] in the backseat [was] apparently shuffling his feet or trying to kick something underneath the seat." Moore contends that Officer Kurilko's statements in this regard constituted inadmissible hearsay, and that Moore was prejudiced by the impact these hearsay statements had on the jury.

{¶ 28} The admission or exclusion of relevant evidence lies within the sound discretion of the trial court. *State v. Robb*, 88 Ohio St.3d 59, 68 (2000). Consequently, a trial court's ruling as to the admissibility of evidence will not be reversed absent an abuse of discretion. *State v. Echavarria*, 12th Dist. Butler No. 2003-11-300, 2004-Ohio-7044, ¶ 8. An abuse of discretion connotes more than an error of law or judgment; it implies the trial court's attitude was unreasonable, arbitrary, or capricious. *State v. Adams*, 62 Ohio St.2d 151, 157 (1980).

{¶ 29} Evid.R. 802 prohibits the use of hearsay evidence at trial absent a recognized exception. Evid.R. 801(C) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the

matter." Where an out-of-court statement is offered without reference to its truth, that statement is not hearsay. *Echavarria* at ¶ 9.

{¶ 30} It is well-settled that "where statements are offered into evidence to explain an officer's conduct during the course of investigating a crime, such statements are generally not hearsay." *State v. Blevins*, 36 Ohio App.3d 147, 149 (10th Dist.1987). The Ohio Supreme Court recently re-examined this principle in *State v. Ricks*, 136 Ohio St.3d 356, 2013-Ohio-3712, ¶ 20-27. In so doing, the court reiterated the Tenth Appellate District's observation that "'[t]here are limits * * * to this general rule because of the great potential for abuse and potential confusion to the trier of fact.'" *Ricks* at ¶ 24, quoting *State v. Humphrey*, 10th Dist. Franklin No. 07AP-837, 2008-Ohio-6302, ¶ 11. Nevertheless, the court affirmed that testimony offered to explain police conduct is admissible as nonhearsay, provided that "the conduct to be explained [is] relevant, equivocal, and contemporaneous with the statements; the probative value of [the] statements must not be substantially outweighed by the danger of unfair prejudice; and the statements [do not] connect the accused with the crime charged." *Ricks* at ¶ 27.

{¶ 31} Here, Officer Kurilko's testimony regarding Patrolman Fry's statement was offered to explain Officer Kurilko's search of the backseat of the vehicle in which Moore was a passenger. Immediately prior to the alleged hearsay statement, Officer Kurilko testified that he had taken all three occupants – including Moore – out of the vehicle, searched them, and discovered nothing illegal. According to Officer Kurilko's account, it was Patrolman Fry's information about Moore's movements while the other two passengers were being removed that prompted Officer Kurilko to direct his search to the backseat of the vehicle.

{¶ 32} In other words, the testimony elicited from Officer Kurilko regarding Patrolman Fry's statement was intended to explain Officer Kurilko's conduct during his investigation of the crime (i.e., his search of the backseat). *Echavarria* at ¶ 9. Moreover, the statement did

not present a danger of unfair prejudice or connect Moore with the crime charged; it merely suggested behavior that merited further investigation. *Compare Humphrey* at ¶ 12 (finding unfair prejudice where the alleged hearsay statement involved the reading of an entire crime-stoppers tip that identified the accused as the killer). Hence Officer Kurilko's testimony in this respect was not hearsay.

{¶ 33} Lastly, we note that even if the admission of Officer Kurilko's testimony was error, such error was harmless, as the testimony regarding Patrolman Fry's statement was cumulative. The admission of hearsay evidence is harmless error where it is merely cumulative. *State v. Pence*, 12th Dist. Warren No. CA2012-05-045, 2013-Ohio-1388, ¶ 38. Immediately after Officer Kurilko's testimony, Patrolman Fry took the stand and offered his own testimony regarding Moore's movements in the backseat of the vehicle, which involved the observation that Moore was making "more of a kicking motion."

{¶ 34} For these reasons, Moore's second assignment of error is overruled

{¶ 35} Judgment affirmed.

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