[Cite as *State v. Jester*, 2012-Ohio-544.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-10-264
	:	O P I N I O N
- vs -		2/13/2012
	:	
GEOFFREY JESTER,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2009-10-1758

Michael T. Gmoser, Butler County Prosecuting Attorney, Lina N. Alkamhawi, Government Services Center, 315 High Street, Hamilton, Ohio 45011, for plaintiff-appellee

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HENDRICKSON, J.

{¶ 1} Defendant-appellant, Geoffrey Jester, appeals from his convictions in the Butler County Court of Common Pleas for possession of cocaine, having weapons while under disability, and illegal use or possession of drug paraphernalia. Jester argues the trial court erred by, among other things, overruling his motion to suppress evidence of the statements he made to police and the money they seized from him after they detained him. We

conclude that Jester's arguments lack merit and affirm his convictions for the offenses listed above.

{¶ 2} In 2009, the Butler County Undercover Regional Narcotics ("BURN") Task Force received a tip that a large amount of crack cocaine could be found in the residence at 606 South Fourth Street in Hamilton, Ohio. Based on this information, a search warrant was obtained for the residence. While the warrant was being processed, Agent Eric Campbell and Sergeant Todd Langmeyer of the BURN Task Force conducted surveillance of the residence from a position one block south of it. The officers had received information that Geoffrey Jester was holding and selling drugs out of the residence, and a check of Jester's criminal record revealed that he had previous drug-related convictions.

{¶ 3} Shortly after they began watching the residence, the officers saw two black males leave the residence and drive away in a dark, older model Ford. The officers attempted to follow the vehicle but immediately lost it, and then called other BURN Task Force agents in the area and asked them to start searching for the vehicle. About five to ten minutes later, Agent Campbell and Sgt. Langmeyer located the vehicle on Martin Luther King Boulevard and followed it back to the South Fourth Street residence where the vehicle parked directly in front of the residence in the same space from which it had left a short time earlier. The officers called for back-up and then pulled in front of the vehicle.

{¶ 4} When Agent Campbell got out, he saw that there was now only one occupant inside the vehicle, who he recognized as Jester. Sgt. Langmeyer ordered Jester out of the car. The officers patted down Jester and discovered several cell phones, a wad of cash in the amount of $2,423, and a set of keys that opened the back door to the South Fourth Street residence. After being advised of his Miranda rights, Jester told the officers he had just returned from taking home one of his cousins and that another of his cousins lived in the South Fourth Street residence but was currently locked up. Jester also told the officers that

he did not live at the residence, but had been there for some time that day. The police then executed the search warrant on the residence and found crack cocaine, digital scales, a box of baggies, a functional and loaded Glock .45 caliber firearm, and a police scanner.

{¶ 5} Jester was indicted for possession of cocaine, having weapons while under disability, and illegal use or possession of drug paraphernalia. Jester moved to suppress evidence of the statements he made to police and the money they confiscated after they detained him. After holding a hearing on Jester's motion to suppress, the trial court denied it. Jester was convicted by a jury on all three counts and was sentenced to an aggregate prison term of 12 years.

{¶ 6} Jester now appeals, assigning the following as error:

{¶ 7} Assignment of Error No. 1:

{¶ 8} THE PROSECUTION DID NOT PRESENT ANY EVIDENCE THAT MR. JESTER ACTUALLY OR CONSTRUCTIVELY POSSESSED THE DRUGS, GUN, OR DRUG PARAPHERNALIA. THERE WAS INSUFFICIENT EVIDENCE AS A MATTER OF LAW FOR THE CHARGES TO GO TO THE JURY, AND MR. JESTER'S CONVICTIONS MUST BE REVERSED. FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION. (MAY 3, 2010 JUDGMENT OF CONVICTION ENTRY.)

{¶ 9} Assignment of Error No. 2:

{¶ 10} MR. JESTER CANNOT BE GUILTY OF POSSESSING CRACK COCAINE, A GUN, OR DRUG PARAPHERNALIA UNLESS THE PROSECUTION PROVES THAT MR. JESTER HAD DOMINION AND CONTROL OVER THE ITEMS THAT WERE IN THE HOUSE AND THAT HE KNEW THE ITEMS WERE THERE. THERE WAS NO CREDIBLE EVIDENCE PROVING EITHER. FIFTH AND FOURTEENTH AMENDMENTS TO THE

UNITED STATES CONSTITUTION; SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION. (MAY 3, 2010 JUDGMENT OF CONVICTION ENTRY.)

{¶ 11} Assignment of Error No. 3:

{¶ 12} THE PROSECUTOR ENGAGED IN MISCONDUCT WHEN HE USED HIS OFFICE TO VOUCH FOR THE CREDIBILITY OF THE STATE'S WITNESSES AND EXPRESSED HIS PERSONAL BELIEF AS TO MR. JESTER'S CREDIBILITY. IT CANNOT BE SAID THAT THE PROSECUTOR'S INAPPROPRIATE REMARKS DID NOT CONTRIBUTE TO MR. JESTER'S CONVICTIONS. FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION; SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION. (JURY TRIAL TR. 214-15 [sic]; MAY 3, 2010 JUDGMENT OF CONVICTION ENTRY.)

{¶ 13} Assignment of Error No. 4:

{¶ 14} AT THE TIME THAT THE POLICE DETAINED MR. JESTER, HE WAS NEITHER A RESIDENT OF THE SOUTH FOURTH STREET PROPERTY NOR WAS HE AN OCCUPANT OF THE PROPERTY. BECAUSE THE POLICE CANNOT ESTABLISH A SUBSTANTIAL LAW ENFORCEMENT INTEREST FOR DETAINING MR. JESTER, HIS STATEMENT MADE DURING THE DETENTION AND THE MONEY FOUND ON HIM MUST BE SUPPRESSED. FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION; SECTION 14, ARTICLE I OF THE OHIO CONSTITUTION. (DEC. 16, 2009 ORDER DENYING DEF.'S MOT. TO SUPPRESS; MAY 3, 2010 JUDGMENT OF CONVICTION ENTRY.)

{¶ 15} We shall begin by addressing Jester's fourth assignment of error in order to facilitate our analysis of the issues presented in this appeal.

{¶ 16} In his fourth assignment of error, Jester argues the trial court erred in overruling his motion to suppress evidence of the statements he made to police and the money the

police confiscated after they detained him. Jester asserts that the police had no right to detain him because he was not a resident or occupant of the property that was the subject of the search warrant, and the police had no "substantial law enforcement interest" for detaining him.[1] We disagree with this argument.

{¶ 17} As we stated in *State v. Christopher*, 12th Dist. No. CA2009-08-041, 2010-Ohio-1816, appeal not allowed, 2010-Ohio-4542, 126 Ohio St. 3d 1583, ¶ 10:

> An appeal from a ruling on a motion to suppress "presents a mixed question of law and fact." *State v. Burnside,* 100 Ohio St.3d 152, * * * 2003-Ohio-5372, ¶ 8. When considering a motion to suppress, the trial court is the primary judge of the credibility of witnesses and the weight of the evidence. *London v. Dillion* (Mar. 29, 1999), Madison App. No. CA98-07-026, at 2. If the trial court's findings are supported by competent and credible evidence, then the appellate court must accept them. Id. Relying on the trial court's factual findings, the appellate court then determines "without deference to the trial court, whether the court has applied the appropriate legal standard." Id.

{¶ 18} "[S]ome seizures admittedly covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause, so long as police have an articulable basis for suspecting criminal activity." *Michigan v. Summers*, 452 U.S. 692, 699, 101 S.Ct. 2587 (1981). The "substantial law enforcement interests" that justify the police's decision to detain, on less than probable cause, an occupant of premises that have been named in a search warrant when the police execute

1. Jester has not challenged, either at trial or now on appeal, the validity of the search warrant on the South Fourth Street residence, but instead, challenges the validity of his detention and the pat-down search conducted on him after he was detained. The hearing held on Jester's motion to suppress was conducted over two days. The record before us contains a transcript of the second day of the suppression hearing, but not the first. The state represents in its brief that Jester's trial counsel acknowledged on the first day of the suppression hearing that Jester was not challenging the validity of the search warrant that was executed on the residence, but only the search that was conducted on Jester, himself. At the conclusion of the first day of the suppression hearing, Jester's trial counsel stated, "[w]e are not challenging that warrant. We do not have standing to challenge the warrant." Jester does not dispute the state's representations as to what was said during the first day of the suppression hearing.

said warrant, include (1) preventing the flight of the occupant of the premises in the event that evidence incriminating to the occupant is found, (2) minimizing the risk of harm to the officers as well as the occupant, and (3) the orderly completion of the search, which might be facilitated by the occupant's presence during the search. *Id.* at 702–703. In evaluating the reasonableness of the police's decision to detain the occupant, courts must consider the nature of "the articulable and individualized suspicion" on which the police base their decision to detain the occupant. *Id.* at 703.

{¶ 19} Courts in this state have held that "'[a] warrant for the search of premises implicitly confers a limited authority on police officers to conduct investigative detentions of individuals found on the premises who can be *reasonably connected* to the property.'" (Emphasis added.) *State v. Jacobs*, 4th Dist. No. 08CA3028, 2009-Ohio-68, ¶ 17, quoting *State v. Forts*, 107 Ohio App.3d 403, 405 (9th Dist.1995), quoting *State v. Cancel*, 8th Dist. No. 56727, 1990 WL 88743 (June 28, 1990), in turn, citing *State v. Schultz*, 23 Ohio App.3d 130, 133 (10th Dist.1985). These courts have also held that law enforcement officers "'executing a search warrant for a known drug house may detain individuals observed leaving the house who may be reasonably connected to drug activity.'" *Jacobs*, quoting *Forts* at 405, quoting *Cancel*, *supra*, in turn, citing *State v. Bridges*, 8th Dist. No. 55954, 1989 WL 117339 (Oct. 5, 1989), dismissed, 51 Ohio St.3d 703 (1990).

{¶ 20} Here, Jester was "reasonably connected" to the South Fourth Street residence named in the search warrant. Prior to executing the search warrant, the police observed Jester exit the residence and then return to it shortly thereafter. The police knew that Jester is a known drug dealer with prior criminal convictions for various drug offenses, and had received information from a confidential informant that Jester was selling crack cocaine out of the residence. Moreover, the fact that Jester had keys to the South Fourth Street residence while his cousin who lived at the residence was in jail establishes that Jester had dominion

and control over the residence where the drugs, drug paraphernalia, and firearm were found by police. When the totality of the circumstances is viewed through the eyes of a reasonable and cautious police officer, the decision of the police in this case to detain Jester was proper.

{¶ 21} Jester requests that we follow *State v. Doane*, 1st Dist. No. 08CA3028, 2009-Ohio-68, in which the court found that Doane's detention was improper where he was detained on a sidewalk four blocks away from his house. Doane is distinguishable from the case at bar because there was no testimony that Doane was returning to the house or had recently left it, and there was no evidence of any substantial law enforcement interest present in the case. Unlike the facts in *Doane*, Jester was seen coming and going from the South Fourth Street residence and was detained directly in front of it. While the search warrant did not include Jester's name, the officers were aware of Jester's connection to the residence, since they had seen Jester coming and going from the residence. Moreover, while no substantial law enforcement interest was found to be present in *Doane,* such interests were present in this case, as the police detained Jester because of their legitimate concerns about their safety and their reasonable belief that Jester would flee. Thus, *Doane* is clearly distinguishable from this case.

{¶ 22} In light of the foregoing, Jester's fourth assignment of error is overruled.

{¶ 23} In his first assignment of error, Jester argues the state failed to present sufficient evidence to support his convictions for possession of cocaine, having weapons while under disability, and illegal use or possession of drug paraphernalia because the state failed to prove that he actually or constructively possessed the items that formed the basis of those charges. We find this argument unpersuasive.

{¶ 24} In reviewing an insufficient evidence claim, "[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.

{¶ 25} 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. Walker*, 12th Dist. No. CA2004-07-181, 2006-Ohio-1894, ¶ 21. The accused's "dominion and control" over the item can be proven by circumstantial evidence, alone. *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. *Id.*

{¶ 26} Here, Jester's constructive possession of the items in question was sufficiently established by circumstantial evidence. The police observed Jester leaving the South Fourth Street residence with another man and then returning to that residence, alone, parking in front of the residence in the same space from which he had departed a short time earlier. After being advised of his Miranda rights, Jester admitted to police that he had been inside the residence that day, and the police found $2,423 on Jester as well as the keys to the back door of the residence.

{¶ 27} Inside the residence, the police found a Doritos can containing a large rock of crack cocaine on the kitchen counter, along with a box of baggies and a digital scale with white residue on it. They also found a police scanner on a table in the middle room which was the only room in the house that had furniture. The police found the other evidence in nearby closets resting in plain view when the doors were opened. After viewing the evidence in its totality and in a light most favorable to the prosecution, a reasonable jury could infer from this evidence that Jester had constructive possession of the items in question, and thus could reasonably find that the state had proven beyond a reasonable doubt the essential elements of the offenses with which he was charged. *Jenks*, 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 28} Therefore, Jester's first assignment of error is overruled.

{¶ 29} In his second assignment of error, Jester argues his convictions are against the manifest weight of the evidence because there was no credible evidence proving that he had dominion and control over the items in question and that he knew the items were at the South Fourth Street residence. We do not agree.

{¶ 30} In considering a manifest weight challenge, a reviewing court must review the entire record, weigh the evidence and all reasonable inferences that may be drawn from it, and consider the credibility of the witnesses in determining whether the jury "lost its way" in resolving conflicts in the evidence. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st.Dist.1983). "'The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" *Thompkins*, quoting *Martin*.

{¶ 31} Jester contends that this case is similar to *State v. Hupp*, 5th Dist. No. 2007CA00091, 2008-Ohio-879, in which the court of appeals reversed Hupp's convictions for possession of cocaine and marijuana as being against the manifest weight of the evidence because there was a lack of credible evidence that Hupp lived at the apartment and thus was in possession of the drugs. *Id.* at ¶73 and 74. The court acknowledged that the police had found a key in Hupp's possession that unlocked the door to the apartment where the drugs were found. However, the court noted that the police did not find anything in the apartment that would indicate Hupp was a resident of the apartment.

{¶ 32} In this case, by contrast, the fact that the police found a key on Jester that unlocked the back door to the South Fourth Street residence was not the only evidence that tied Jester to the residence. Agent Campbell and Sgt. Langmeyer testified that they saw Jester leave the residence and then return to it immediately prior to the execution of the search warrant. Thus, *Hupp* is distinguishable from this case.

{¶ 33} Consequently, Jester's second assignment of error is overruled.

{¶ 34} In his third assignment of error, Jester argues that during closing arguments, the prosecutor engaged in misconduct by vouching for and bolstering the credibility of the police officers involved in the case and by providing the jurors with his personal belief as to Jester's credibility. Jester asserts that the prosecutor's "remarks were highly improper, and it cannot be said, beyond a reasonable doubt, that they did not contribute to his conviction." This argument is without merit.

{¶ 35} Initially, by arguing that it cannot be said, beyond a reasonable doubt, that the prosecutor's remarks did not contribute to his conviction, Jester is referencing the standard of review for harmless error involving matters of constitutional significance. See *California v. Chapman*, 386 U.S. 18, 22-24, 87 S.Ct. 824 (1967). However, there were no objections at trial to the remarks Jester is now challenging on appeal, and therefore he has waived all but plain error with respect to those remarks. *State v. Jones*, 12th Dist. No. CA2009-05-140, 2011-Ohio-2097, ¶ 57. An alleged error does not constitute plain error unless, but for the error, the outcome of the trial clearly would have been different. *Id.* "Notice of plain error must be taken with the utmost caution, under exceptional circumstances, and only to prevent a miscarriage of justice." *Id.* Here, the prosecutor's remarks that Jester is now challenging for the first time on appeal were not improper, and even if they were, they do not raise to the level of plain error.

{¶ 36} "It is improper for an attorney to express a personal belief or opinion as to the credibility of a witness." *Jones*. However, in order for a prosecutor to be found to have improperly vouched for the credibility of a witness, it must be shown that the prosecutor's remarks implied that the prosecutor had knowledge of facts outside the record or that the remarks placed the prosecutor's personal credibility in issue. *Id*. Additionally, both parties are entitled to latitude in responding to the arguments made by opposing counsel, and

therefore a prosecutor is entitled to rebut statements made by defense counsel in closing arguments. *State v. Isreal*, 12th Dist. No. CA2010-07-170, 2011-Ohio-1474, ¶ 62. A conviction will not be reversed on the basis of prosecutorial misconduct unless the misconduct so taints the proceedings that it deprives the defendant of a fair trial. *State v. Smith*, 87 Ohio St.3d 424, 442, 2000-Ohio-450.

{¶ 37} During closing argument, Jester's counsel stated:

{¶ 38} "[T]he state talked about access to the [the South Fourth Street residence] and that there were a set of keys [that the police found on Jester] and you saw through my cross-examination – I personally think and I believe that the keys are important elements to try to show that he had access to the house. It's evidence. They acknowledge – the State acknowledged that that is evidence. Where are they? Where are the keys? Don't get caught up in that.

{¶ 39} "Where is the evidence? Where is the evidence? If you remember the testimony of each one of the police officers, each one of them said I think I saw someone else open that door with those keys. Not one of them testified that, yes, I took the keys and I opened the door. Did you pick up on that? Every one of them said, well, he did it, well he did it, well he did it. Well, who got rid of the keys? I don't know, I didn't. That is because it didn't happen.

{¶ 40} "Now, I know these police officers. They are good police officers. Don't get me wrong. But in this particular instance, they have failed and it is not even close. It is one thing if there is a real question of fact. This isn't even close."

{¶ 41} The prosecutor responded in his closing argument as follows:

{¶ 42} "[Defense counsel] questions the veracity of the officers' ability to know whether or not that key, which seems to have somehow become instrumental in your determination of the guilt or non-guilt of this defendant because we failed to take it. He questions the veracity

of whether or not that key even worked in that door. He is challenging you to basically say these people did not give you the straight scoop. They were misstating it. And ladies and gentlemen, I take offence [sic] because these are the same ones that stood there with their hands held high and said to you very clearly, no, I did not see that man with those drugs. No, I did not see that man with that gun. No, I did not see that man with that drug paraphernalia. If they are going to come in here and make stuff up for you, let's start off with the easiest one. Yes, we did. Pure and simple. The fact that these are honest, hard working [sic] police officers, and they are not here to deceive you." [Sic.]

{¶ 43} When the prosecutor's remarks are viewed in context with those made by defense counsel, it is apparent that the prosecutor was rebutting defense counsel's suggestion that the police lied about whether the key they seized from Jester unlocked the door to the South Fourth Street residence. Thus, the prosecutor's remarks during closing argument did not amount to prosecutorial misconduct. *Isreal*, 12th Dist. No. CA2010-07-170, 2011-Ohio-1474, at ¶ 62. Moreover, even if some of the prosecutor's remarks were improper, they do not rise to the level of plain error since the outcome of the trial would not have been clearly different absent the allegedly improper remarks. *Jones*, 12th Dist. No. CA2009-05-140, 2011-Ohio-2097, at ¶ 57.

{¶ 44} Accordingly, Jester's third assignment of error is overruled.

{¶ 45} Judgment affirmed.

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