

[Cite as *State v. Dodson*, 2011-Ohio-1092.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-603 (C.P.C. No. 09CR-09-5596)
Ryan M. Dodson,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 10, 2011

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins, IV*,
for appellee.

Scott & Nemann Co., LPA, and *Adam Lee Nemann*, for
appellant.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Defendant-appellant, Ryan M. Dodson ("appellant"), appeals from his conviction on a charge of improperly handling a firearm in a motor vehicle. For the reasons that follow, we affirm.

{¶2} On the night of August 1, 2009, and into the morning of August 2, 2009, members of the Columbus Division of Police Strategic Response Bureau were patrolling the parking lot of a nightclub in downtown Columbus. This patrol involved looking into parked cars for visible weapons. One of the police officers, Brett Bodell, identified a gun located under the driver's seat of a white Crown Victoria. Officer Bodell notified the other

members of the team, including Officer Greg Sanderson and Detective Robert Vass. The police officers set up surveillance of the car. Some time later, appellant and two other individuals got into the car, with appellant getting into the driver's seat. The police then approached the car and detained appellant and the other occupants. They secured the gun from the car and discovered it was loaded. The police also determined that appellant owned the car.

{¶3} Appellant was charged with carrying a concealed weapon and with improperly handling a firearm in a motor vehicle. The case was tried to a jury, which found appellant not guilty of carrying a concealed weapon and guilty of improperly handling a firearm in a motor vehicle.

{¶4} Appellant appeals the jury's verdict, setting forth the following three assignments of error for this court's review:

First Assignment of Error: The trial court abused its discretion when it rejected defense counsel's requested jury instruction.

Second Assignment of Error: The verdict was against the manifest weight of the evidence.

Third Assignment of Error: The evidence was insufficient to sustain a jury verdict of guilty.

{¶5} Appellant's first assignment of error claims that the trial court abused its discretion in refusing to give a jury instruction requested by defense counsel.

{¶6} "Trial courts have the responsibility to give all jury instructions that are relevant and necessary in order for the jury to properly weigh the evidence and perform its duty as the fact-finder." *Columbus v. Aleshire*, 187 Ohio App.3d 660, 2010-Ohio-2773, ¶51. Appellate review of a trial court's refusal to give a requested instruction requires determination of whether the refusal constituted an abuse of discretion under the facts

and circumstances of the case. *Id.* at ¶52. "An appellate court will not reverse a conviction in a criminal case due to jury instructions unless it finds that the jury instructions amount to prejudicial error." *Id.* This court uses a three-part test to determine when failing to give a requested instruction constitutes reversible error: (1) the requested instruction must be a correct statement of the law; (2) the requested instruction must not be redundant of other instructions; and (3) failure to give the requested instruction must have impaired the requesting party's theory of the case. *Gower v. Conrad* (2001), 146 Ohio App.3d 200, 203.

{¶7} Appellant was charged with improperly handling a firearm in a motor vehicle. The statute defining this crime prohibits an individual from "knowingly transport[ing] or hav[ing] 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." R.C. 2923.16(B). In the instant case, the trial judge instructed the jury that finding the appellant guilty required finding "beyond a reasonable doubt that on or about the 2nd day of August, 2009, in Franklin County, Ohio, the defendant knowingly transported or had a loaded firearm, to wit an American Arms .22 caliber handgun, in a motor vehicle in such a manner that the firearm was accessible to the operator or any passenger without leaving the vehicle." (Jury Instructions at 6.)

{¶8} The prosecution was required to prove that appellant transported or had—i.e., possessed—a loaded firearm. Appellant sought a jury instruction stating that possession of an item cannot be inferred merely from ownership or control of the area where the item was found. (Tr. 66.) Appellant's requested instruction was drawn from a provision of the Ohio Jury Instructions applicable specifically to the offense of drug

possession. 4 Ohio Jury Instructions (2011), Section 417.21(6). The instruction sought is derived from the statutory definition of possession at R.C. 2925.01(K), for purposes of Chapter 2925 dealing with drug offenses. *Id.* That law defines possession 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). Appellant conceded that the requested instruction derived from the definition of drug possession, arguing that the definition should apply because the firearm in question was about the same size as a bag of drugs and that the location of the firearm in appellant's car was analogous to police finding drugs on property owned by an individual.

{¶9} The trial court declined to give appellant's requested instruction on the definition of possession, noting that the case did not involve drugs and that such an instruction would not be appropriate under the facts of the case.

{¶10} We agree with the trial court's decision and hold that there was no abuse of discretion here because the requested instruction was not a correct statement of the applicable law.

{¶11} The definitional statute from which the requested instruction was derived applies by its own terms to Chapter 2925 of the Ohio Revised Code, which defines drug offenses. R.C. 2925.01. Other courts have found that the definition of possession set forth in R.C. 2925.01(K) does not apply outside the context of drug crimes. See *State v. Pearsall* (May 21, 1985), 2d Dist. No. 84-CA-33; *State v. Pitts*, 4th Dist. No. 99 CA 2675, 2000-Ohio-1986; *State v. Galindo* (July 9, 1999), 6th Dist. No. L-98-1242; *State v. Hardy* (Oct. 24, 1980), 6th Dist. No. S-80-6; *State v. Owens*, 9th Dist. No. 23267, 2007-Ohio-49,

¶20; *State v. Najeway*, 9th Dist. No. 21264, 2003-Ohio-3154, ¶10. We are persuaded by the logic of these decisions and hold that the statutory definition of possession under R.C. 2925.01(K) applies only to drug crimes.

{¶12} Additionally, the trial court did not abuse its discretion in refusing to give the requested instruction because appellant has failed to demonstrate that refusal impaired his theory of the case. Appellant argues that the evidence presented was "purely circumstantial," making the requested definition of possession essential to his theory of the case. However, the cases appellant cites, which we discuss herein in the context of examining the sufficiency of the evidence and the element of possession, are distinguishable. Moreover, the record demonstrates that the prosecution presented both direct and circumstantial evidence. As noted by the trial court in refusing to give the requested instruction, the case against appellant consisted of more than the fact that the gun was located in his car; therefore, it did not impair appellant's theory of the case to refuse to give an instruction that possession could not be inferred from mere ownership of the area or location where the gun was found.

{¶13} We further note that appellant's complaints that the evidence against him was "entirely circumstantial" are unavailing. " 'Circumstantial evidence' is the proof of certain facts and circumstances in a given case, from which the jury may infer other connected facts which usually and reasonably follow according to the common experience of mankind." *State v. Brown*, 10th Dist. No. 07AP-244, 2007-Ohio-6542, ¶19, quoting *State v. Golden*, 8th Dist. No. 88651, 2007-Ohio-3536, ¶16 (internal citations omitted). The Supreme Court of Ohio has noted that circumstantial evidence "is not less probative than direct evidence, and, in some instances, is even more reliable," *State v.*

Jenks (1991), 61 Ohio St.3d 259, 272, superseded by constitutional amendment on other grounds as recognized in *State v. Smith*, 80 Ohio St.3d 89, 102, 1997-Ohio-355, and that circumstantial evidence "may also be more certain, satisfying and persuasive than direct evidence." *State v. Lott* (1990), 51 Ohio St.3d 160, 167, quoting *Michallic v. Cleveland Tankers, Inc.* (1960), 364 U.S. 325, 330, 81 S.Ct. 6, 10.

{¶14} Finally, we note that, in addition to refusing the requested definition of possession, the trial court did not give the jury any instruction on the element of possession. Appellant argues, and appellee agrees, that the Ohio Jury Instructions for improperly handling a firearm in a motor vehicle do not include a definition of possession. Further, appellee argues that possession is not an element of the crime charged. Both of these assertions are misplaced. The statute defining this crime prohibits "transport[ing] or hav[ing]" a firearm under certain conditions. R.C. 2923.16(B). The Ohio Jury Instructions for this specific offense, at 5 Ohio Jury Instructions (2011), Section 523.16(4) and (5), state that "had" means possessed and cross-reference the general instruction on the definition of possession under 4 Ohio Jury Instructions (2011), Section 417.21(1)-(5). Thus, possession is an element of the crime and is defined under the Ohio Jury Instructions.

{¶15} It is unclear why the trial court did not instruct the jury on the definition of had—i.e., possession—found at 5 Ohio Jury Instructions (2011), Section 523.16. Nevertheless, "a trial court's failure to separately and specifically charge the jury on every element of each crime with which a defendant is charged does not per se constitute plain error nor does it necessarily require reversal of a conviction." *State v. Adams* (1980), 62 Ohio St.2d 151, 154. The Supreme Court of Ohio has stated that

"terms of common usage * * * need not be defined for the jury." *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, ¶106, quoting *State v. Riggins* (1986), 35 Ohio App.3d 1, 8. "Had" is a term of common usage, requiring no further definition. See *State v. Curtis*, 3d Dist. No. 9-02-11, 2002-Ohio-5409, ¶21 (holding that both "have" and "possessed" are words of common usage that require no definition); *Riggins* at 8 (holding that the terms "acquiring, having or carrying" were terms of common usage requiring no definition); *State v. Miller* (Nov. 22, 1996), 11th Dist. No. 95-A-0077 (holding that "have" is a term of common usage, needing no further definition in jury instructions in a case involving a charge of improperly handling a firearm in a motor vehicle). Thus, we hold that the trial court did not err by not defining the term "had" in the jury instructions.

{¶16} Appellant's first assignment of error is without merit and is overruled.

{¶17} Appellant's second and third assignments of error challenge the weight and sufficiency of the evidence, respectively. Because a challenge to the sufficiency of the evidence involves the prosecution's burden of production, while a challenge to the weight of the evidence involves the prosecution's burden of persuasion, we will consider appellant's remaining assignments of error out of order. See *State v. Frazier*, 10th Dist. No. 05AP-1323, ¶8, citing *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52 (Cook, J., concurring).

{¶18} Appellant's third assignment of error asserts that the evidence was insufficient to sustain a guilty verdict.

{¶19} In reviewing a challenge to the sufficiency of the evidence, an appellate court must determine "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*, at paragraph two of the syllabus.

{¶20} As noted above, appellant complains that the evidence against him was "entirely circumstantial." (Appellant's brief at 12.) The Supreme Court of Ohio has established that circumstantial evidence "is not less probative than direct evidence, and, in some instances, is even more reliable." *Jenks* at 272. Additionally, it is "well-settled under Ohio law that a defendant may be convicted solely on the basis of circumstantial evidence." *State v. Nicely* (1988), 39 Ohio St.3d 147, 151.

{¶21} The prosecution was required to prove "beyond a reasonable doubt that on or about the 2nd day of August, 2009, in Franklin County, Ohio, the defendant knowingly transported or had a loaded firearm, to wit an American Arms .22 caliber handgun, in a motor vehicle in such a manner that the firearm was accessible to the operator or any passenger without leaving the vehicle." (Jury Instructions at 6.) There is uncontroverted police testimony establishing the date and location of the events, along with the fact that the weapon was an operable firearm, that it was loaded, that it was located in a motor vehicle, and that it was accessible to the driver without leaving the vehicle. The only elements potentially subject to dispute were whether the appellant acted knowingly and whether the appellant had the gun.

{¶22} First, we will consider the element that appellant acted knowingly. "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B); *State v. Beatty*, 10th Dist. No. 08AP-52, 2008-Ohio-5063, ¶12.

Accordingly, the trial court instructed the jury that a person "has knowledge of circumstances when he is aware that such circumstances probably exist." (Jury Instructions at 5.) Appellant stipulated that he owned the car in which the gun was located. (Tr. 27-28.) Further, there was uncontroverted testimony that appellant was in the driver's seat of the car and that the gun was located under the driver's seat. It would be reasonable for the jury to infer that the individual who owned the car and was sitting in the driver's seat was aware of the items located inside the car. Although the testimony was mixed as to how visible the gun was from outside the car, each of the three police officers testified that he saw the gun from outside the car. A reasonable juror could conclude that, even if appellant had not previously known the gun was present, he could have seen it upon approaching or entering the car. Viewing all this evidence in the light most favorable to the prosecution, a juror could find beyond a reasonable doubt that appellant knew the gun was in the car.

{¶23} Next, we look at the element of whether appellant had the gun. In considering other types of firearm offenses that require proof of possession, this court has held that "having" a firearm means actual or constructive possession of the firearm. *State v. Dorsey*, 10th Dist. No. 04AP-737, 2005-Ohio-2334, ¶32. "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.*, quoting *State v. Wolery* (1976), 46 Ohio St.2d 316, 329. This reasoning applies with equal force to the crime of improperly handling a firearm in a motor vehicle, which prohibits a person from knowingly having a loaded firearm in a motor vehicle under certain conditions. R.C. 2923.16(B).

{¶24} Appellant cites the Eighth District Court of Appeals' decision in *State v. Duganitz* (1991), 76 Ohio App.3d 363, in support of his argument that it was necessary to give his requested instruction on the definition of possession. We address the decision here, however, because his argument that the evidence was insufficient to sustain a conviction in essence goes to the element of possession. In *Duganitz*, the defendant was convicted of carrying a concealed weapon and having a weapon under disability, after a traffic stop where police found a gun hidden under a blanket in the car defendant was driving. *Id.* at 366. On review, the appellate court noted that the defendant did not own the vehicle in which the gun was found, that the gun was in a location between the defendant who was driving the car and a passenger in the car, which made it ready at hand to either the driver or the passenger, and that, because the arresting officer left the passenger alone in the car while searching the driver, the passenger could have placed the gun under the blanket. *Id.* at 368. The court held that the evidence was insufficient to sustain a finding that the defendant possessed the weapon.

{¶25} However, this court's decision in *Dorsey* is a more appropriate analogy to the present case. In *Dorsey*, the defendant was convicted of carrying a concealed weapon, having a weapon while under disability, and drug possession. *Dorsey* at ¶8. The defendant and two passengers had been stopped for a traffic violation. After giving the police officer a false name, the defendant was arrested; a subsequent search of the car located a loaded firearm wedged in a piece of carpet between the console and the passenger seat in close proximity to the gear shift. *Id.* at ¶4-5. On appeal, this court found that the location of the gun demonstrated the driver's ability to exercise dominion and control over it and that a jury could conclude that defendant constructively possessed

the gun. *Id.* at ¶33. Viewing the evidence in a light most favorable to the prosecution, there was a sufficient basis for a jury to reasonably conclude that the defendant was guilty. *Id.* at ¶34.

{¶26} Similarly, although appellant was charged with improperly handling a firearm, in the present case the evidence demonstrates that the gun was located beneath the driver's seat where appellant was sitting. The gun was present before appellant and his passengers got into the car and, unlike in *Duganitz*, there was no suggestion that one of the passengers might have placed the gun under the driver's seat while appellant was out of the car. "Thus, it appears that appellant had the ability to easily exercise dominion and control over the firearm, and a jury could properly conclude that appellant constructively possessed the firearm." *Dorsey* at ¶33. Despite the lack of a specific jury instruction on constructive possession, a reasonable juror could infer that the driver "had" the gun that was located under his seat.

{¶27} Additionally, we are unpersuaded by the cases appellant cites from other jurisdictions. In *Nguyen v. State* (Ala.App. 1991), 580 So.2d 122, the appellant was convicted of unlawful possession of a weapon that was located under the passenger seat of a car he was driving. The Alabama appellate court overruled the conviction, holding that mere presence in a car where contraband was located was insufficient to support a conviction for possession of the contraband. *Id.* at 123. The appellant in *Nguyen* did not own the car, and the gun was not found under his seat. By contrast, in the instant case, the appellant owned the car and the gun was located under his seat. Thus, the facts of *Nguyen* are distinguishable from the present case. In *Hill v. District of Columbia* (D.C.App. 1970), 264 A.2d 145, the appellant was convicted of possession of an

unregistered pistol; however, he was not present in the car at the time that the gun was found. The reviewing court noted that the only direct connection between the appellant and the gun was the appellant's possession of the registration card for the car in which the gun was found. The court went so far as to state that "[h]ad appellant been present in the automobile when arrested then the circumstances may well have supported a finding that he knew the gun and ammunition were in the car and he had possession of them." *Id.* at 146. The facts of the instant case are exactly those hypothesized by the District of Columbia appellate court. The appellant was present in the car when the gun was found, and it was located under the seat directly below him. If anything, the *Hill* decision supports affirmation of the jury's verdict in this case.

{¶28} Accordingly, appellant's third assignment of error is without merit and is overruled.

{¶29} Appellant's second assignment of error claims that the jury's verdict was against the manifest weight of the evidence.

{¶30} "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *Thompkins* at 387, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 2220. "The 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 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*, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. This discretionary

authority "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶31} As explained above, the only two elements of the crime that could be disputed were whether appellant acted knowingly and whether appellant possessed the gun. Appellant notes that there was no evidence that the gun belonged to him, but ownership of the firearm is not a required element of improperly handling a firearm in a motor vehicle—appellant need only have possessed the gun, regardless of who owned it. See R.C. 2923.16 (defining the elements of the offense and not including any requirement of ownership); 5 Ohio Jury Instructions (2011), Section 523.16 (establishing jury instruction for improperly handling a firearm in a motor vehicle and not including any requirement of ownership); 4 Ohio Jury Instructions (2011), Section 417.21(5) (specifying that ownership is not required to establish possession). See also *State v. Melton*, 11th Dist. No. 2009-L-078, 2010-Ohio-1278 (defendant was convicted of, inter alia, improperly handling a firearm in a motor vehicle where evidence established that he possessed the gun but was not the owner of the gun). There was evidence tending to demonstrate constructive possession of the gun, and we cannot conclude that the jury clearly lost its way in finding that appellant possessed the gun. Likewise, although the testimony is mixed as to how visible the gun would be to someone entering the car, there is no indication that the jury clearly lost its way in finding that appellant acted knowingly.

{¶32} Moreover, we note that we cannot conclude that the jury clearly lost its way by convicting appellant of improperly handling a firearm in a motor vehicle while acquitting him on the charge of carrying a concealed weapon. Establishing that appellant was guilty of carrying a concealed weapon required the prosecution to show that appellant

"knowingly carried or had, concealed on his person or concealed ready at hand" a weapon. (Jury Instructions at 4.) Although this charge shares a common element with improperly handling a firearm in a motor vehicle—i.e., knowledge—a key distinction is the requirement that the weapon be concealed. The jury was instructed that "[a] handgun is concealed when it is out of sight or so hidden that it cannot be seen by ordinary observation by others near enough to see it." (Jury Instructions at 5.) Given the testimony of the police officers that they saw the gun from outside the car, it is plausible that the jury could have concluded that the knowledge element was satisfied but the concealment element was not. Because concealment is not an element of improperly handling a firearm in a motor vehicle, it is not inconsistent to acquit appellant of carrying a concealed weapon while convicting him of improperly handling a firearm in a motor vehicle.

{¶33} Finally, appellant argues that the jury relied on prejudicial and irrelevant character evidence in convicting appellant. Officer Bodell and Detective Vass testified that patrolling the club parking lot was part of the police force's gang-suppression efforts. All three police officers testified to the effect that there had been prior gun-related arrests, shootings, and violence at that location. Appellant argues that this testimony "implied to the jury * * * that [appellant] was a member of a violent gang and was involved in past criminal violence at the club where he was arrested." (Appellant's brief at 10.)

{¶34} This type of testimony is not necessarily prejudicial to a defendant. *State v. Draper*, 10th Dist. No. 02AP-1371, 2003-Ohio-3751, ¶22-25. "The evidence challenged here refers to the character of the neighborhood and the general acts of the people in the neighborhood, not the character or other acts of the defendant." *Id.* at ¶21.

{¶35} Although appellant asserts that trial counsel objected to this evidence and that the court sustained those objections, we note that only part of the allegedly prejudicial testimony was subject to objection at trial. When appellant objected, the trial judge instructed the jury that the testimony about gang activity and prior complaints or violence in the area could be considered only for the purpose of explaining why the police were patrolling the club parking lot that night. (Tr. 21, 39.) At the close of the trial, the judge instructed the jury that statements or answers they were instructed to disregard were not evidence and must be treated as though they had never been heard. (Tr. 79.)

{¶36} "Juries are presumed to follow the court's instructions, including instructions to disregard testimony." *State v. Lowe*, 164 Ohio App.3d 726, 2005-Ohio-6614, ¶14, quoting *State v. Jones* (2000), 90 Ohio St.3d 403, 414. In *Lowe*, this court noted that the jury "appear[ed] to have been discerning in its review of the evidence" because it only found the defendant guilty on two of the five counts charged against her. *Id.* Likewise here, the jury only convicted appellant on one of two counts; had the jury been tainted by the testimony about gang activity or prior violence at the club, presumably they would have convicted appellant on both crimes he was charged with committing.

{¶37} Accordingly, appellant's second assignment of error is without merit and is overruled.

{¶38} For the foregoing reasons, both of appellant's assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

TYACK and CONNOR, JJ., concur.
