[Cite as *State v. Bowshier*, 2009-Ohio-6387.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2008 CA 101
v.	:	T.C. NO. 2005 CR 1113
JEFFREY BOWSHIER	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 4th day of December, 2009.

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FROELICH, J.

{¶ 1} Jeffrey Bowshier was convicted after a jury trial in the Clark County Court of Common Pleas of trafficking in cocaine in an amount more than 500 grams, possession of cocaine in an amount more than 500 grams, and possession of marijuana in an amount more than 1,000 grams. The court sentenced Bowshier to an aggregate term of fifteen years in

prison and fines totaling $30,000. The court ordered the forfeiture of four vehicles and that $21,196 in cash, which was in the possession of the police, be seized and applied to the fines.

{¶ 2} Bowshier appeals from his convictions and sentence. For the following reasons, the trial court's judgment will be reversed and remanded for further proceedings as to the forfeiture specifications. In all other respects, the judgment will be affirmed.

I

{¶ 3} In September 2005, Detective Scott Woodruff, an officer assigned to the Narcotics Unit of the Springfield Police Department, was contacted by Detective Jorge Delrio, a Dayton police officer who was assigned to the Dayton Drug Enforcement Administration (DEA) task force. Delrio told Woodruff that an individual named Scott Snook wanted to provide information to the narcotics unit regarding criminal activity by Bowshier. Woodruff met with Snook on September 29, 2005.

{¶ 4} Based on information from Snook, Woodruff contacted Delrio about initiating an undercover investigation of Bowshier using Snook as a confidential informant. Beginning on October 1, several telephone conversations occurred between Snook and Bowshier. Snook told Bowshier that he had located a source of a supply of drugs from Arizona and he asked if he could give Bowshier's telephone numbers to the source. Based on those conversations, Woodruff and Delrio decided that Delrio would pose as a marijuana and cocaine trafficker from Arizona and would offer to sell 200 pounds of marijuana for $800 per pound, for a total of $160,000. Delrio would accept $40,000 and two kilograms of cocaine as

an initial payment.[1] Each kilogram of cocaine would be in lieu of $20,000 in cash.

{¶ 5} On October 10, 2005, Delrio called Bowshier at one of his telephone numbers and arranged a meeting on October 14. On October 14, Delrio called Bowshier and told him to meet him at the Sam's Club parking lot on Miller Road in Dayton, Ohio, near the intersection of Interstates 75 and 70. Approximately 20 minutes later, Bowshier left his residence at 315 North Burnett Road in Springfield, Ohio, and drove directly to the meeting location. Woodruff, who was conducting surveillance of Bowshier's residence, followed Bowshier to Sam's Club. At Sam's Club, Delrio showed Bowshier 200 pounds of marijuana that he supposedly was selling to another buyer.

{¶ 6} In late October and early November, Delrio made several additional telephone calls to Bowshier. When Bowshier indicated that he did not have $40,000 in cash, the agreement was modified to allow Bowshier to pay with the two kilograms of cocaine and $21,000 in cash and to provide two vehicle titles (one for a pickup truck and one for a motorcycle) as collateral. Bowshier agreed to pay an additional $80,000 on the next load of drugs that Delrio would supply at a later time. According to Woodruff, the investigation did not terminate after Bowshier stated that he could not get $40,000 in cash because "Mr. Bowshier wanted to continue

[1] Woodruff testified that the idea of the cocaine in exchange for the marijuana originated with Bowshier. Woodruff stated that they went "along with the plan that was initiated from Jeffrey Bowshier through the informant. We were following the same plan." Delrio testified that cocaine was part of the original plan that he discussed with Woodruff. At an October 14 meeting, Bowshier stated that "Snooky" had told him the deal was $40,000 and two kilos. It is unclear whether the cocaine was suggested by Bowshier, the detectives, or Snook.

completing the deal."

{¶ 7} On November 14, 2005, Delrio contacted Bowshier and told him that he would be in the area on November 17 to make the exchange and that he would call around noon on that day to let him know exactly where he would be. Delrio also told Bowshier not to bring anything to haul away the drugs, because he (Delrio) would provide something for him.

{¶ 8} On November 17, before the meeting time, a U-Haul truck containing the marijuana (which was seized from prior investigations) was placed to the rear of the hotel. Several members of the SWAT team waited in the parking lot in a larger rental vehicle. Woodruff and Detective Keri Frasco also conducted surveillance of the residence at 315 North Burnett Road. At approximately 10:30 a.m., Delrio contacted Bowshier, who advised him (Delrio) that he (Bowshier) was 20-35 minutes from Springfield and was returning to the area. At 11:03 a.m., Delrio contacted Bowshier again, and notified him that the meeting place would be the Days Inn Hotel on Leffel Lane. At 11:24 a.m., Bowshier came to the residence on North Burnett in a white van, entered the home for a few minutes, and returned to the van carrying a white plastic grocery bag.

{¶ 9} Bowshier drove directly to the Days Inn parking lot. Woodruff followed him from his residence to the hotel and stopped on the west side of the hotel. Other police units were situated on each side of the hotel to prevent any escape by Bowshier.

{¶ 10} Bowshier provided the white grocery bag to Delrio. The bag contained two kilograms of powder cocaine, an Ohio title certificate for a 2001

Suzuki motorcycle, an Ohio title certificate for a 2001 Chevrolet truck, and $20,975. Delrio walked Bowshier to the U-Haul and showed him the marijuana that he had brought. Bowshier entered the U-Haul and commented about the poor quality of the marijuana. Delrio told Bowshier to drive the marijuana wherever he was going to take it and to bring back the U-Haul. Bowshier got in the driver's seat of the U-Haul, which had been intentionally disabled by the police, and attempted unsuccessfully to drive away. Bowshier was surrounded and arrested.

{¶ 11} After Bowshier's arrest, Woodruff advised him of his *Miranda* rights and informed him that he would be preparing a search warrant for 315 North Burnett Road. Bowshier told Woodruff that the address was not his residence, but he (Bowshier) provided a key for the front door. After a search warrant was obtained, a black duffel bag containing seven gallon-size ziplock baggies of marijuana and some cocaine was located in the basement. Additional cocaine was found between mattresses in an upstairs bedroom and in a red purse. Officers also located a bowl with "shake," which consisted of marijuana seeds and branch stems, on top of the refrigerator in the kitchen. A high-dollar money paper bill counting machine was also seized from the residence.

{¶ 12} In December 2005, Bowshier was indicted for trafficking in powder cocaine in an amount exceeding 1,000 grams, with seven specifications (Count I); possession of powder cocaine in an amount exceeding 1,000 grams, with seven specifications (Count II); possession of marijuana in an amount exceeding 25 grams, with six specifications (Count III); trafficking in powder cocaine in an amount exceeding 25 grams but less than 100 grams, with two specifications (Count IV);

possession of marijuana in an amount exceeding 1,000 grams but less than 5,000 grams, with two specifications (Count V); and possession of powder cocaine in an amount exceeding 25 grams but less than 100 grams, with one specification (Count VI). Counts III and IV were dismissed before trial.

{¶ 13} A jury trial was held on March 27, 2006, on the four remaining counts. Bowshier was convicted of each, and he was sentenced to an aggregate term of thirty years in prison and fines totaling $30,000. Bowshier's personal property in the amount of $21,196 was ordered to be forfeited and applied toward the fines.

{¶ 14} Bowshier appealed from his conviction and sentence. We concluded that Bowshier's conviction on Count VI was against the manifest weight of the evidence, and we identified other prejudicial errors at trial. *State v. Bowshier*, Clark App. No. 06-CA-41, 2007-Ohio-5364. Accordingly, we reversed his convictions and remanded for further proceedings. Id.

{¶ 15} In April 2008, Bowshier entered a negotiated plea of guilty to Count I (trafficking in cocaine), including a major drug offender specification. Under the plea, he forfeited $21,196 and any vehicles in the possession of the Springfield Police Department; all other counts were to be dismissed. Prior to sentencing, Bowshier moved to withdraw his plea. That request was granted, and the case proceeded to trial on Counts I, II, and V.

{¶ 16} In September 2008, a second jury convicted Bowshier of the three remaining counts. With respect to Counts I and II, the jury found that the amount of cocaine involved was greater than 500 grams. The jury further found that the amount of marijuana involved in Count V was greater than 1,000 grams. The court

merged Counts I and II, and sentenced Bowshier to ten years on Count I and to five years on Count V, to be served consecutively, for a total of fifteen years in prison.[2] The court also imposed fines of $20,000 for Count 1 and $10,000 for Count V, for a total of $30,000; the $21,196 in cash that was in the possession of the Springfield Police Department was ordered to be seized and applied to the fines. In addition, Bowshier was ordered to forfeit four vehicles.

{¶ 17} Bowshier appeals, raising five assignments of error.

II

{¶ 18} Bowshier's first assignment of error states:

{¶ 19} "THE VERDICT OF THE JURY WITH RESPECT TO COUNTS I, II, AND V WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 20} Bowshier claims that his convictions for trafficking in cocaine, possession of cocaine, and possession of marijuana were against the manifest weight of the evidence.

{¶ 21} "[A] weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive." *State v. Wilson*, Montgomery App. No. 22581, 2009-Ohio-525*,* at ¶12. When evaluating whether a conviction is contrary to the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness

[2]We note that the judgment entry states that Bowshier was convicted of trafficking in crack cocaine and possession of crack cocaine, even though Counts I and II in the indictment (and the evidence at trial) refer to powder cocaine.

credibility, and determine whether, in resolving 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. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 22} Because the trier of fact sees and hears the witnesses at trial, we must defer to the factfinder's decisions whether, and to what extent, to credit the testimony of particular witnesses. *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288. However, we may determine which of several competing inferences suggested by the evidence should be preferred. Id.

{¶ 23} The fact that the evidence is subject to different interpretations does not render the conviction against the manifest weight of the evidence. *Wilson* at ¶14. A judgment of conviction should be reversed as being against the manifest weight of the evidence only in exceptional circumstances. *Martin,* 20 Ohio App.3d at 175.

{¶ 24} With respect to the trafficking and possession of cocaine charges (Counts I and II), Bowshier claims that he demonstrated, by a preponderance of the evidence, that he was entrapped by law enforcement officers. He states that "it is clear that the criminal design was implanted in the mind of Mr. Bowshier by agents of the state."

{¶ 25} Entrapment is an affirmative defense, which is established where "the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and

induce its commission in order to prosecute." *State v. Doran* (1983), 5 Ohio St.3d 187, paragraph two of the syllabus. "However, entrapment is not established when government officials 'merely afford opportunities or facilities for the commission of the offense' and it is shown that the accused was predisposed to commit the offense." Id. at 192.

{¶ 26} "For the entrapment defense to apply, police officers must plant in the mind of the defendant the original idea or purpose, thus furnishing from the start the incentive or motivation to commit an offense that the defendant had not considered, and which he would not have carried out except for that incentive. The law permits a police officer to go as far as to suggest an offense and provide the opportunity for the defendant to commit the offense. If the defendant is already disposed to commit the offense and acts pursuant to a criminal idea or purpose of his own, then there is no entrapment." *State v. Burg*, Greene App. No. 04CA94, 2005-Ohio-3666, ¶21-22 (internal citations omitted).

{¶ 27} Bowshier emphasizes that his contacts with Delrio and Snook were initiated by agents of the State. Woodruff and Delrio testified that, on October 3, 2005, they formulated the plan to sell 200 pounds of marijuana to Bowshier for $40,000 and two kilograms of cocaine. Delrio was flexible with terms, except the amount of marijuana to be purchased, to allow the deal to go through. Delrio testified that he would not give Bowshier his telephone number, and he acknowledged that he had set all meeting times and locations and had initiated all of the telephone calls to Bowshier using one of the numbers he had obtained from Snook. Based on this evidence, the jury could have concluded that "the criminal

design originate[d] with the officials of the government." *Doran*, supra.

{¶ 28} Bowshier's entrapment argument falls short, however, with respect to his predisposition to commit the offense. Although the evidence supports the conclusion that Delrio, Woodruff, and Snook (their agent) provided an opportunity for Bowshier to commit trafficking and possession of cocaine, Bowshier has presented no evidence that he was not already predisposed to commit these crimes.

{¶ 29} The State, on the other hand, presented evidence that Bowshier was a willing participant in the agreed sale of marijuana for cash, cocaine, and vehicle titles, and that Bowshier was not an innocent person who was induced by the State to commit the offenses. Woodruff and Delrio both testified that Bowshier never expressed an unwillingness to participate in the planned large-scale sale of marijuana. To the contrary, Delrio testified that he "made the calls to Mr. Bowshier at the request of Mr. Bowshier." Although Bowshier told Delrio that he did not have $40,000 in cash, Bowshier stated that he would attempt to get that amount. When he was unable to do so, Bowshier suggested that he provide vehicle titles as a form of payment for the marijuana. Moreover, Bowshier repeatedly indicated that he had access to two kilograms of cocaine, worth $40,000, and $21,000 in cash. Additionally, when Bowshier was presented with the marijuana in the U-Haul, Bowshier commented to Delrio about the poor quality of the marijuana, suggesting that Bowshier had significant prior experience with marijuana. Woodruff further testified that Bowshier had no legal source of income.

{¶ 30} Based on the evidence, the jury could have reasonably concluded that

Bowshier was predisposed to participate in the State's proposed sale of 200 pounds of marijuana for cash and two kilograms of cocaine. Bowshier's convictions for trafficking in cocaine and possession of cocaine, as set forth in Counts I and II, and the jury's rejection of Bowshier's entrapment defense for those Counts were not against the manifest weight of the evidence.

{¶ 31} As to Count V, possession of marijuana, Bowshier asserts that the State failed to prove that he possessed – actually or constructively – the drugs found in the black duffel bag.

{¶ 32} R.C. 2925.11(A), which defines drug possession, states: "No person shall knowingly obtain, possess, or use a controlled substance." Possession means "having control over a thing or substance," R.C. 2925.01(K), and possession may be either actual or constructive. *State v. Mabry*, Montgomery App. No. 21569, 2007-Ohio-1895.

{¶ 33} "Constructive possession exists when an individual exercises dominion and control over an object, even though that object may not be within his immediate physical possession." *State v. Sisson*, Montgomery App. No. 22173, 2008-Ohio-3490, at ¶10. For constructive possession to exist, the person must be aware of the presence of the object. *State v. Hankerson* (1982), 70 Ohio St.2d 87, 91; *State v. Givens*, Clark App. No. 2005-CA-42, 2005-Ohio-6670, at ¶10. The State may prove constructive possession solely through circumstantial evidence. *State v. Trembly* (2000), 137 Ohio App.3d 134, 141; *State v. Townsend* (Aug. 24, 2001), Montgomery App. No. 18670. However, possession may not be inferred solely from the defendant's ownership or occupation of the premises upon which

the object is found. R.C. 2925.01(K).

{¶ 34} In Bowshier's prior appeal, we addressed whether the jury could have reasonably inferred, based on the circumstances, that he had constructive possession of the drugs in the duffel bag found in the basement. Focusing on whether Bowshier could have had constructive possession of the cocaine within the duffel bag for purposes of Count VI, we stated:

{¶ 35} "The State contends that Bowshier's visit to the home before the alleged sale to retrieve cocaine and the fact that cocaine was in plain view are circumstantial evidence that the cocaine belonged to Bowshier. We have already rejected the 'plain view' argument, because it is factually incorrect. Unlike the items in Jakes's bedroom, however, the duffel bag was found in an area that was apparently accessible to all occupants of the house. Therefore, the issue would be whether other evidence indicated that Bowshier had constructive possession of the duffel bag.

{¶ 36} "In *State v. Scalf* (1998), 126 Ohio App.3d 614, 710 N.E.2d 1206, the defendant was present on the steps of his home when his son sold a confidential informant a bag of cocaine. After obtaining a search warrant, the police searched the home three days later and found five rocks of cocaine in the common area of the kitchen and a bag, spoon, and tray with suspected cocaine residue in an upstairs sitting room. The defendant's personal papers were also found in the sitting room. 126 Ohio App.3d at 617. Although the defendant denied that the drugs were his, the Eighth District Court of Appeals concluded that the conviction for possession was supported by sufficient evidence. Id. at 619.

{¶ 37} "In a subsequent case, we discussed *Scalf* and other decisions where the defendant was not present when drugs or illegal items were found, and, therefore, raised the issue of constructive possession. See *State v. Weber* (Mar. 14, 2000), Montgomery App. No. 17800, 2000 WL 299564 (reversing conviction based on the fact that the evidence was insufficient as a matter of law to support defendant's conviction for possession of drugs and weapons). We noted in *Weber* that there was no evidence that the defendant in *Scalf* had been present during the search. However, there was additional evidence of his participation in a controlled drug sale three days earlier. Id. at *5. We distinguished this from situations in which the only evidence linking a defendant to constructive possession is ownership or leasing of a property. Id .

{¶ 38} "As in *Scalf,* there is additional evidence in this case in the form of Bowshier's participation in an alleged drug sale. The police staked out Bowshier's residence and saw Bowshier enter the house empty-handed about twenty minutes before the proposed exchange. Bowshier was inside for about five minutes and then exited, carrying a white plastic grocery bag. A female had entered the residence and had stayed inside that morning, but no one entered or exited after Bowshier left. Bowshier then drove directly to the exchange site and showed Del Rio a white plastic bag containing money and the suspected cocaine.

{¶ 39} "In view of these facts, we agree with the State that Bowshier's trip to the house was circumstantial evidence that could have supported a charge connected with the contents of the black duffel bag. A jury could reasonably infer under the circumstances that Bowshier had constructive possession of the drugs in

the duffel bag. ***" *Bowshier* at ¶78-82.

{¶ 40} The evidence upon retrial likewise could support a reasonable inference that Bowshier had constructive possession of the drugs within the duffel bag. Woodruff testified that he believed that Bowshier resided at 315 North Burnett Road, that address was listed as Bowshier's residence on a traffic ticket that Bowshier had received in November 2005, and Bowshier had a key to the residence. On November 17, Bowshier went to the residence, entered for a few minutes, and returned to his vehicle carrying a white plastic grocery bag with $20,975 in cash, two kilograms of cocaine, and two vehicle titles. Bowshier then drove directly to a Days Inn Hotel, where he attempted to trade the contents of the grocery bag for nearly 200 pounds of marijuana.

{¶ 41} Woodruff testified that 200 pounds of marijuana is more than one would purchase for personal use, and the jury could have reasonably inferred that Bowshier would package the marijuana for sale. The duffel bag in the basement contained marijuana packaged in seven gallon-size zip-lock bags and some cocaine. "Shake" was found openly in the kitchen. In the first trial, we found that Bowshier's trip to the house in connection with his attempted purchase of marijuana from Delrio was circumstantial evidence that he had constructive possession of the duffel bag and the cocaine within it; similarly, the facts would support the inference that he had constructive possession of the marijuana that was in the duffel bag with the cocaine.

{¶ 42} The first assignment of error is overruled.

III

{¶ 43} Bowshier's second assignment of error states:

{¶ 44} "THE TRIAL COURT ERRED IN ORDERING THE FORFEITURE OF PERSONAL PROPERTY OF APPELLANT."

{¶ 45} In his second assignment of error, Bowshier claims that the trial court erred in ordering the forfeiture of property seized from him. The State concedes error by the trial court.

{¶ 46} R.C. 2981.04(A) provides that contraband or instrumentalities that are used in an offense or proceeds from an offense may be forfeited if the complaint, indictment, or information charging the offense contains a forfeiture specification. If a person is convicted of a crime and the indictment included a forfeiture specification, "the trier of fact shall determine whether the person's property shall be forfeited." R.C. 2981.04(B).[3]

{¶ 47} Counts I and II of Bowshier's indictment contained specifications stating that $21,196 in cash, a 2001 Chevrolet 3500 truck, a 1995 Chevrolet van, a 2001 Suzuki GSX1300R, and a 2000 Pontiac Bonneville were subject to forfeiture. At sentencing, the court ordered that "all of the property enumerated in the indictments be forfeited, including the $21,196 and the enumerated vehicles and/or other property."

{¶ 48} The State agrees with Bowshier that, following the jury's guilty verdicts, the trial court did not submit the forfeiture specifications to the jury for further findings, as required by statute. It states: "While there is ample evidence

[3]Effective July 1, 2007, R.C. 2981.04 governs forfeiture specifications.

supporting the finding of forfeiture, the trial court failed to follow [proper] procedures in not holding a forfeiture hearing or requiring the jury to make findings on the forfeiture specifications." The State recommends that we reverse the forfeiture order and remand for further proceedings. We agree.

{¶ 49} Bowshier's second assignment of error is sustained.

IV

{¶ 50} Bowshier's third assignment of error states:

{¶ 51} "THE TRIAL COURT ERRED IN THE IMPOSITION OF SENTENCE ON APPELLANT."

{¶ 52} In his third assignment of error, Bowshier asserts that the trial court erred in imposing maximum and consecutive sentences without making specific findings. In support of his assertion, Bowshier relies on *State v. Friend*, 165 Ohio App.3d 43, 2005-Ohio-7069, citing *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165.

{¶ 53} In 2006, the Supreme Court of Ohio held that parts of Ohio's felony sentencing scheme were unconstitutional because they "require[d] judicial finding of facts not proven to a jury beyond a reasonable doubt or admitted by the defendant." *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at ¶83. The supreme court severed the provisions that it found to be unconstitutional, leaving trial courts with full discretion to impose a prison sentence within the statutory range without making findings or giving reasons for imposing maximum, non-minimum, or consecutive sentences. Id.; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, at ¶37. In exercising its discretion, however, the trial court must carefully consider the statutes

that apply to every felony offense, including R.C. 2929.11 and 2929.12. *Mathis* at ¶38; *State v. Gabbard*, Clark App. No. 07 CA 133, 2009-Ohio-2739, at ¶6.

{¶ 54} Because the trial court was no longer required to make statutory findings, the trial court did not err in sentencing Bowshier to maximum and consecutive sentences without making statutory findings, which has been held unconstitutional. Accordingly, Bowshier's assignment of error is without merit.

V

{¶ 55} Bowshier's fourth assignment of error states:

{¶ 56} "THE TRIAL COURT ERRED BY ALLOWING THE TESTIMONY OF WILLIAM LITTERAL."

{¶ 57} In his fourth assignment of error, Bowshier claims that the trial court erred by allowing the State to present the testimony of William Litteral, an employee of the Clerk's Office of the Springfield Municipal Court in Clark County. Bowshier argues that Litteral's testimony should have been excluded under Evid.R. 404 and as an undisclosed witness pursuant to Crim.R. 16.

{¶ 58} The State called Litteral to testify at the beginning of the second day of trial as the last witness in its case-in-chief. Bowshier objected to Litteral's testimony, arguing that he had not been disclosed on a witness list by the State, that his evidence would violate Evid.R. 404, and that his testimony would be hearsay and irrelevant. The State confirmed that Litteral had not been disclosed to defense counsel. It argued, however, that he was being called "in direct rebuttal to a line of questioning that was done by defense counsel yesterday." The prosecutor elaborated that Litteral was being called to show that Bowshier had

received a speeding ticket two weeks prior to the execution of the search warrant for 315 North Burnett Road, and that Bowshier had given that address as his residence. The prosecutor indicated that, before trial that morning, he had discovered the speeding ticket, contacted Litteral, and turned the speeding ticket over to defense counsel. Defense counsel argued that the State could have and should have looked for the speeding ticket earlier.

{¶ 59} The trial court permitted Litteral to testify. The court found that the State had learned of the speeding ticket that morning and brought it to the attention of the Court and defense counsel "at the earliest possible time." The court stated that it did not believe that the State could have anticipated that Bowshier would deny residing at 315 North Burnett Road at trial, and the court found no bad faith on the part of the prosecution. As to Evid.R. 404, the court found that "it's pretty preposterous that a speeding ticket would prejudice a defendant." The court further found that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The court indicated, however, that it would give an instruction to the jury not to consider the traffic ticket for any reason related to his character.

{¶ 60} During his testimony, Litteral stated that he had brought to court a traffic ticket received by Bowshier on November 4, 2005. Litteral stated that the address on the ticket was 315 North Burnett Road in Springfield, Ohio. During cross-examination, Litteral stated that the citation was for speeding, a seatbelt violation, and having plates not registered to the vehicle. Litteral testified that he could not substantiate whether the address on the citation was accurate.

Following Litteral's testimony, the court gave a limiting instruction, as follows:

{¶ 61} "The evidence that was just presented was presented for purposes of establishing or for the purpose of showing from the State's position the residence of the defendant.

{¶ 62} "It can only be considered for that purpose. It cannot be considered – The fact that the defendant was cited for any kind of a traffic offense, you can't consider that as bad character of the defendant in order to show that he acted in conformity with that bad character on the date in question.

{¶ 63} "It can only be considered as evidence of whether or not he resided at a particular place, and that's for you to determine whether or not he resided at that location."

{¶ 64} Under Evid.R. 404(A), evidence of a person's character or a trait of character is not admissible to prove conforming conduct on a particular occasion. Evidence of other crimes, wrongs or acts by a person is also not admissible to prove that the person acted in conformity with those prior acts. Evid.R. 404(B). However, prior crimes, wrongs, or acts may be admissible for other purposes, such as to prove motive, opportunity, identity, preparation, plan, knowledge, intent, or absence of mistake or accident. Id.

{¶ 65} Relevant evidence must also be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or of misleading the jury. Evid.R. 403(A). The trial court has broad discretion in determining whether the probative value of evidence is substantially outweighed by its prejudicial effects. *State v. Diaz*, Montgomery App. No. 22604,

2009-Ohio-2738, at ¶58, citing *State v. Jones*, 91 Ohio St.3d 335, 2001-Ohio-57.

{¶ 66} Bowshier argues that he was prejudiced by Litteral's testimony regarding the speeding ticket. He argues that "[a]ll three of the citations testified to are crimes against the state in and of themselves. Coupled with the inference that the jury might make based upon such conduct, Mr. Bowshier respectfully submits that this evidence should have been excluded as evidence of prior bad acts ***." We fail to see how evidence of three moving violations, all of which were minor misdemeanors, was prejudicial to Bowshier, particularly in the context of a trial on large-scale drug offenses. Moreover, the State did not ask Litteral to identify the specific violations that Bowshier had committed; that information was brought out by defense counsel on cross-examination. To the extent that such evidence was prejudicial, the trial court specifically instructed the jury that it could only consider Litteral's evidence for purposes of determining whether Bowshier resided at 315 North Burnett Road. The jury can be presumed to have followed the court's limiting instruction. *Jones*, 91 Ohio St.3d at 344.

{¶ 67} Bowshier's second – and stronger – argument is that Litteral should have been excluded as a witness due to the State's failure to identify him as a potential witness on its witness list. Crim.R. 16(B) requires, upon motion by the defendant, that the prosecutor disclose the names and addresses of all witnesses whom the prosecutor intends to call at trial. The parties have a continuing duty to promptly disclose witnesses and other matter which would have been subject to discovery as they are discovered, even during trial. Crim.R. 16(D). "The imposition of sanctions for a discovery violation is generally within the sound

discretion of the trial court." *State v. Sinkfield* (Nov. 11, 2001), Montgomery App. No. 18663, citing *State v. Parson* (1983), 6 Ohio St.3d 442, 445.

{¶ 68} The State argues that Litteral was a rebuttal witness since there was cross-examination of witnesses by defense counsel questioning whether Bowshier lived at 315 North Burnett. However, "[r]ebuttal evidence is that which is given 'to explain, refute, or disprove new facts introduced by the adverse party.'" *State v. Wright*, Hamilton App. No. C-080437, 2009-Ohio-5474, at ¶56, citing *State v. McNeill*, 83 Ohio St.3d 438, 446, 1998-Ohio-293. Litteral was not a rebuttal witness and his name and the document he tendered, if it were known to the State, should have been disclosed. Further, even if it were rebuttal, "[e]vidence admissible in the prosecution's case-in-chief *** [cannot] be reserved for rebuttal to avoid the [discovery/disclosure] rule." *State v. Musselman*, Montgomery App. No. 22210, 2009-Ohio-424, at 13 (internal citations omitted).

{¶ 69} Moreover, the question of whether Bowshier resided at or had a sufficient connection with a particular address could hardly have been a surprise to the State. It had been argued in the prior trial and, as we discussed above, was specifically mentioned in our previous opinion. "The criterion for determining whether the state should have provided the name of a witness called for rebuttal is whether the state reasonably should have anticipated that it was likely to call the witness, whether during its case in chief or in rebuttal." *State v. Lorraine* (1993), 66 Ohio St.3d 414, 423, citing *State v. Howard* (1978) 56 Ohio St.2d 328, 333.

{¶ 70} The question, therefore, is not whether the State should have thought of this witness (or the existence of a possible traffic violation) before trial, but rather

whether the court abused its discretion in permitting the witness to testify. The court accepted the prosecutor's explanation and found no bad faith; the court would have been similarly justified in excluding the witness or, if it were requested, perhaps in granting a continuance.

{¶ 71} Bowshier argues that if he had known of this witness before trial, he could have looked for other witnesses who might have shown that he (Bowshier) had only a tenuous connection to the residence, had moved after the ticket and before the search, or the like. However, as with the prosecution, the question of constructive possession of the drugs at North Burnett was always at issue and, if such evidence existed, its importance and relevance pre-existed the State's last-minute disclosure. It is difficult to ascertain how foreknowledge of the statement would have benefitted Bowshier in the preparation of his defense. Most evidence introduced by the prosecution is adverse to a defendant, but here the court did not abuse its discretion or unfairly prejudice Bowshier by permitting the witness to testify.

{¶ 72} Although we find no abuse of discretion, we do not sanction the prosecutor's eleventh-hour recognition and disclosure of new evidence when that evidence could have been discovered and disclosed long before trial. "The purpose of discovery rules is to prevent surprise and the secreting of evidence favorable to one party." *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 3. In other words, a primary goal is to prevent gamesmanship. *State v. Howard* (1978), 56 Ohio St.2d 328, 333. The overall purpose of the discovery rules, however, is to produce a fair trial. *Papdelis*, 32 Ohio St.3d at 3. Counsel should make every

effort to anticipate the evidence that will be needed at trial and obtain it in a timely manner. Nevertheless, in this case, we do not believe that the late disclosure and the admission of Litteral's testimony resulted in an unfair trial.

{¶ 73} The fourth assignment of error is overruled.

VI

{¶ 74} Bowshier's fifth assignment of error states:

{¶ 75} "THE TRIAL COURT ERRED BY DISMISSING A POTENTIAL JUROR DURING VOIR DIRE."

{¶ 76} In his fifth assignment of error, Bowshier claims that the trial court erred in dismissing for cause a potential juror who indicated that she knew Bowshier's father.

{¶ 77} The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to be tried by an impartial jury. *Morgan v. Illinois* (1992), 504 U.S. 719, 726-27, 112 S.Ct. 2222, 119 L.Ed.2d 492. R.C. 2313.42 sets forth ten grounds to challenge a prospective juror for cause, including that the prospective juror "disclose[d] by his answers that he cannot be a fair and impartial juror or will not follow the law as given to him by the court." R.C. 2313.42(J). R.C. 2313.43 further states:

{¶ 78} "In addition to the causes listed under section 2313.42 of the Revised Code, any petit juror may be challenged on suspicion of prejudice against or partiality for either party, or for want of a competent knowledge of the English language, or other cause that may render him at the time an unsuitable juror. The validity of such challenge shall be determined by the court and be sustained if the

court has any doubt as to the juror's being entirely unbiased." Id.; See, also, *State v. White*, 82 Ohio St.3d 16, 20, 1998-Ohio-363.

{¶ 79} Because the trial court sees and hears the prospective jurors, the trial court has broad discretion to decide whether a potential juror is able to be impartial, and we will not reverse that decision absent an abuse of discretion. *State v. Williams* (1983), 6 Ohio St.3d 281, 288; *White*, 82 Ohio St.3d at 20.

{¶ 80} Toward the end of jury selection, a prospective juror informed the court that her former stepfather had been friends with Bowshier's father when she was young. The prospective juror stated: "I'm sorry. I just really don't think that I would be a good juror. I just don't." When asked if something about this case made her uncomfortable, she responded: "Just because I do know the family. I couldn't vote guilty for people that I know." At that time, the State challenged the prospective juror for cause.

{¶ 81} The court allowed defense counsel to question the prospective juror.

{¶ 82} "MR. ADAMS: I guess I would inquire as to whether or not if the Court instructs you to follow the law whether you could or not.

{¶ 83} "***

{¶ 84} "JUROR #9: Well, yeah. because I'm an honest person. I don't want to – I mean, I would judge and try to be open-minded about it for the prosecution and the defense.

{¶ 85} "MR. ADAMS: And you heard earlier from the lady that was actually sitting in your seat that said she had misgivings and had some fears. I think she used the words innards, which I haven't heard in years.

{¶ 86} "JUROR #9: Right. She had the smoke and fire thing.

{¶ 87} "MR. ADAMS: Right. Same theory though. If the Judge asks you and gives you instructions by the Court, could you do so?

{¶ 88} "JUROR #9: Yes.

{¶ 89} "MR. DRISCOLL: I need to re-inquire. The last thing you said to me was you couldn't find someone guilty that you were friends with; is that correct?

{¶ 90} "JUROR #9: I'm not friends with him.

{¶ 91} "MR. DRISCOLL: Someone in his family you're friends with?

{¶ 92} "JUROR #9: I guess I would have to listen more carefully and pay more attention, I suppose.

{¶ 93} "MR. DRISCOLL: Now, you had told me – I mean, these were your words, 'I couldn't find this person guilty.' Do you understand why this might be a concern?

{¶ 94} "JUROR #9: Absolutely.

{¶ 95} "MR. DRISCOLL: Now you're telling me that you can set all of that aside?

{¶ 96} "JUROR #9: I believe that I'm an honest enough person to –

{¶ 97} "MR. DRISCOLL: Honest to goodness, I'm not questioning your honesty at all. I'm just questioning, you know, each one of us – It would be hard for me to sit here with a friend of mine or a family who I was friends with, one of their family memebers are here and for me to honestly sit there and listen to the testimony and be fair and impartial. That's what we're looking for. The twelve people in this community that can be the best jurors for this case.

{¶ 98} "JUROR #9: Yes.

{¶ 99} "MR. DRISCOLL: Do you feel that you would be one of those best twelve, knowing what you know?

{¶ 100} "JUROR #9: I hope I can be a good one.

{¶ 101} "MR. DRISCOLL: Even though you told me that you couldn't find that person guilty?

{¶ 102} "JUROR #9: Maybe I spoke too quickly."

{¶ 103} The court, counsel, and the prospective juror continued the voir dire in chambers. The prospective juror explained that she was not raised by her mother and stepfather, but her former stepfather had known Bowshier's father, Teddy Bowshier. She also stated that her former stepfather had been to prison many times when she was a child, and that was the time when Teddy Bowshier was around. The prospective juror stated that she does not socialize with Bowshier's family, but she has said "hi" to Teddy Bowshier whenever she saw him.

{¶ 104} When asked whether she could convict Bowshier if the evidence showed that he was guilty, the prospective juror responded:

{¶ 105} "I don't know. I don't know. If the evidence says this is a guilty man, then yes, I would. But I can't do hypotheticals not knowing what the evidence is. I can't sit back and say, well, yes, he's guilty. I don't know that."

{¶ 106} The court then had the following discussion with the prospective juror about whether she would associate Bowshier with her childhood.

{¶ 107} "THE COURT: My concern is that you're going to associate this defendant with that lifestyle and have that impression going –

{¶ 108} "JUROR #9: No, no. Because you know what, my stepdad – I know the man that he used to be to who he's become today is totally different.

{¶ 109} "THE COURT: What I'm concerned about is your concern that this particular defendant's father reminded you of a culture, an environment of drug use.

{¶ 110} "JUROR #9: But how can I judge his son with his father? That would be like everyone else judging me.

{¶ 111} "THE COURT: Well, you're the one that said it reminded you.

{¶ 112} "JUROR #9: Right. But I wouldn't judge somebody else by who their parents are. People need to make their own impression of who they are.

{¶ 113} "THE COURT: You said something about you didn't think you can serve as a juror on this case. You said that earlier.

{¶ 114} "JUROR #9: Yes, I did. That's just because I knew him from my past. I knew the father from my past.

{¶ 115} "THE COURT: But you just told me that you wouldn't associate that.

{¶ 116} "JUROR #9: I felt put on the spot. I want to be honest, but I was afraid to speak in front of the other jury members. I didn't want to taint your jury and say, 'Hey, this makes me think of my young childhood.' That would be wrong for me to speak of my life and have them – I mean, that's wrong. I mean, you're asking me to be a juror based on the facts in this case, which would be whatever he presents. You know, that's something that I can do, but I didn't want to taint your jury by saying how I knew him. I think that would be unfair to the

defendant."

{¶ 117} Upon returning to open court, the State renewed its challenge for cause, and the court granted it.

{¶ 118} Bowshier claims that the trial court abused its discretion by dismissing the prospective juror based solely on her past association with Bowshier's father. We disagree. The prospective juror initially stated that she "just really [didn't] think that I would be a good juror" and that she "couldn't vote guilty for people that I know." Although she later indicated that she "hoped" she would be a good juror and would follow the instructions given by the court, she still expressed that she did not know if she could find him guilty. And, while the prospective juror stated that she would not judge Bowshier based on her former stepfather's and Teddy Bowshier's lifestyle of drugs use, the prospective juror had indicated that this case reminded her of that lifestyle. Although it is clear that Juror #9 wanted to be honest and impartial, her responses to counsel's and the court's questions were somewhat ambiguous as to whether she could, in fact, judge the case impartially and without bias. Having seen and heard her responses, the trial court could have reasonably been unpersuaded that she was able to judge the case impartially. We find no abuse of discretion in the trial court's decision to dismiss the prospective juror for cause.

{¶ 119} The fifth assignment of error is overruled.

VII

{¶ 120} Having sustained the second assignment of error, the judgment will be reversed and the matter will be remanded for further proceedings as to the

forfeiture specifications. In all other respects, the judgment will be affirmed.

. . . . . .

FAIN, J. and GRADY, J., concur.

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