[Cite as *State v. Forney*, 2009-Ohio-2999.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 24361
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
JOHN EVOL FORNEY	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 08 03 0885(A)

DECISION AND JOURNAL ENTRY

Dated: June 24, 2009

BELFANCE, Judge

{¶1} Defendant-Appellant John Forney appeals from his convictions for several drug-related offenses. For the reasons set forth below, we affirm.

FACTS

{¶2} Forney rented a house in a high crime area within the city of Akron, Ohio. On March 13, 2008, members of Akron Police Department's Special Weapons And Tactics ("SWAT") and Street Narcotics Uniform Detail ("SNUD") units executed a search warrant on Forney's premises. Forney and three other individuals were in the house at the time of the search. Officers recovered cocaine, marijuana, drug paraphernalia, and items used in the manufacture of drugs, as well as surveillance equipment, cash, and other items from the residence.

{¶3} Forney was arrested and charged with illegal manufacture of drugs in violation of R.C. 2925.04(A), two counts of possession of cocaine in violation of R.C. 2925.11(A)(C)(4),

possession of marijuana in violation of R.C. 2925.11(A)(C)(3), and possession of criminal tools in violation of R.C. 2923.24. Forfeiture specifications accompanied the possession charges. On June 16, 2008, a jury trial was held. Forney was convicted of the above-listed offenses and sentenced to three years in prison. Forney has timely appealed, raising three assignments of error. Forney argues his convictions for illegal manufacture of drugs, possession of cocaine, possession of marijuana, and possession of criminal tools were against the weight of the evidence. He also alleges that the trial court erred in denying his Crim.R. 29 motion. Finally, Forney argues that his trial counsel was ineffective. We disagree. For ease of review we will address Forney's assignments of error out of order.

SUFFICIENCY OF THE EVDIENCE

{¶4} Forney argues in his second assignment of error that the trial court erred in denying his Crim.R. 29 motion. Specifically he argues that the State did not prove "knowing possession or manufacture, and date of manufacture of the illegal drugs." Initially we note that Forney did not properly preserve this issue for review. At the close of the State's case, Forney's counsel made a Crim.R. 29 motion for acquittal, but only argued that the State had not sufficiently established the date that the alleged manufacturing took place. Forney's counsel specifically stated that "I would concede that with respect to the other counts in the indictment there probably is sufficient evidence to go to a jury, but with respect to [illegal manufacture], that essential element of date was never established by the State's own witnesses, admissions."

{¶5} We have stated that:

> "[i]t is a fundamental principle of appellate review that a court will not consider an error that an appellant was aware of, yet failed to bring to the attention of the trial court. Moreover, appellate courts in Ohio have held that if a defendant sets forth specific grounds in his motion for acquittal, he or she waives review of all grounds not specified." (Internal citations omitted.) *State v. Hilton*, 9th Dist. No. 21624, 2004-Ohio-1418, at ¶8.

Thus, because Forney detailed specific grounds for acquittal in his Crim.R. 29 motion and those grounds addressed only the illegal manufacturing charge, Forney has not properly preserved a sufficiency challenge concerning the remaining charges.

{¶6} "When reviewing the trial court's denial of a Crim.R. 29 motion, this [C]ourt assesses the sufficiency of the evidence 'to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt.'" *State v. Flynn*, 9th Dist No. 06CA0096-M, 2007-Ohio-6210, at ¶8, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. In reviewing challenges to sufficiency, we must view the evidence in a light most favorable to the prosecution. *State v. Cepec*, 9th Dist No. 04CA0075-M, 2005-Ohio-2395, at ¶5, citing *Jenks*, 61 Ohio St.3d at 279.

{¶7} The jury convicted Forney of illegally manufacturing crack cocaine from powder cocaine. R.C. 2925.04(A) states that "[n]o person shall knowingly cultivate marihuana or knowingly manufacture or otherwise engage in any part of the production of a controlled substance." Cocaine and its derivative, crack, are both controlled substances. See R.C. 3719.01(C), (BB); R.C. 3719.41. The Ohio Revised Code provides that manufacturing is "to plant, cultivate, harvest, process, make, prepare, or otherwise engage in any part of the production of a drug, by propagation, extraction, chemical synthesis, or compounding, or any combination of the same, and includes packaging, repackaging, labeling, and other activities incident to production." R.C. 2925.01(J). "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).

{¶8} The prosecution presented evidence that police found a measuring cup with cocaine residue, baking soda, a digital scale and small plastic bags in Forney's kitchen in a cabinet directly above a drawer containing powder cocaine. Forney's mail was also found in the kitchen cabinet. Detectives testified that the presence of all the items together in an area with water and a heat source indicates to them that drugs are being manufactured on the premises. Thus, the State presented evidence that the items necessary to make crack cocaine, as well as the finished product, crack cocaine, and cocaine itself were all found in Forney's house on the day of the search. The evidence presented specifically supports the definition of manufacturing provided in the Ohio Revised Code; pursuant to R.C. 2925.01(J), manufacture includes engaging in any part of the production of the illegal substance and includes packaging and other activities incident to production. The State supplied the testimony of police officers indicating that packaging supplies, i.e. the plastic bags, were found adjacent to the beaker containing cocaine residue, the baking soda, and the scale, all of which are items used in the production of crack cocaine.

{¶9} As to the *mens rea* element of knowingly, the State presented the testimony of Detective Harvey. Detective Harvey told Forney that police were at his home because "he was selling crack cocaine out of the house." To which Forney replied, "Okay." Forney then indicated that a lot of people came to his house to get high. While this testimony is ambiguous, and could arguably be used to support Forney's position, it also could support the State's position. When this Court reviews challenges to sufficiency, we view the evidence in a light most favorable to the prosecution. *Cepec* at ¶5. Moreover, given that there was evidence indicating that Forney was present in the home at the time of the search, was the only individual who listed the house as his residence, and was found by officers within several feet of a piece of

crack cocaine, we cannot conclude that the State presented insufficient evidence to support the *mens rea* element of this offense.

{¶10} However, Forney argues that the State failed to prove when the alleged manufacturing took place. "Ordinarily the precise dates and times are not essential elements of the offense, and a certain degree of inexactitude of averments, where it relates to matters other than elements of the offense, is not fatal to the prosecution." *State v. Adams*, 5th Dist. No. 02-CA-00043, 2002-Ohio-5953, at ¶8, citing *State v. Sellards* (1985), 17 Ohio St.3d 169, 171. The State is only required to prove that the offense occurred reasonably near the date specified in the indictment. Id. Here, the indictment states that Forney engaged in the illegal manufacture of drugs on or about March 13, 2008, the date of the search. We note that Forney failed to provide any authority to support his position that the State failed to sufficiently establish the date of manufacture because the State could not identify the precise date of manufacture.

{¶11} The State can rely on circumstantial evidence to prove even essential elements of an offense. See *State v. Brooks*, 9th Dist. No. 23236, 2007-Ohio-506, at ¶24. In light of all of the foregoing, including the fact that the State presented evidence that the police found the items necessary to make crack in the same location where both crack and powder cocaine were found, and the fact that Forney was present in the house at the time of the search and was discovered near a piece of crack cocaine, we determine that the State presented sufficient evidence to take the illegal manufacturing charge to the jury.

MANIFEST WEIGHT

{¶12} Forney argues in his first assignment of error that his convictions are against the manifest weight of the evidence. When determining whether a conviction is supported by the manifest weight of the evidence,

> "an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses 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." *Cepec* at ¶6, quoting *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

We must only invoke this discretionary power in "extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant." *Flynn* at ¶9, citing *Otten*, 33 Ohio App.3d at 340.

{¶13} Forney essentially argues that the State did not prove beyond a reasonable doubt that Forney possessed the drugs or criminal tools and that the State could not prove when the alleged manufacture of drugs took place. Forney claims that he did not live at the house, that he rented it out to drug users, and that all of the drugs belonged to other people.

{¶14} However, after reviewing the entire record we cannot determine that Forney's convictions are against the manifest weight of the evidence.

Possession Offenses

{¶15} Forney was convicted of violating R.C. 2925.11(A)(C)(3), R.C. 2925.11(A)(C)(4) and R.C. 2923.24. R.C. 2925.11(A)(C)(3) provides that no one shall "knowingly obtain, possess, or use" marijuana and (A)(C)(4) provides that no one shall "knowingly obtain, possess, or use" cocaine.

{¶16} The term possession, under the Ohio Revised Code, "means having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found." R.C. 2925.01(K). Possession can be actual or constructive. See *State v.Mack*, 9th Dist. No. 22580, 2005-Ohio-5808, at ¶13. Actual possession requires ownership or physical control. Id. However, constructive possession exists "when a person knowingly exercises dominion or

control over an item, even without physically possessing it. While mere presence in the vicinity of the item is insufficient to justify possession, ready availability of the item and close proximity to it support a finding of constructive possession." *State v. Graves*, 9th Dist. No. 08CA009397, 2009-Ohio-1133, at ¶18, quoting *State v. Lamb*, 9th Dist. No. 23418, 2007-Ohio-5107, at ¶12. "[C]onstructive possession may be inferred from the drugs' presence in a usable form and in close proximity to the defendant." *State v. Fletcher*, 9th Dist. No. 23171, 2007-Ohio-146, at ¶20, quoting *State v. Figueroa*, 9th Dist. No. 22208, 2005-Ohio-1132, at ¶8.

{¶17} In this case, there was testimony from several police officers who participated in the search. Detective Carney, part of the SNUD unit, testified that before entering the house, he observed Forney through a window, holding a bag containing a white substance which appeared to Detective Carney to be crack cocaine. Detective Carney saw Forney put the bag into his mouth. At that point Detective Carney yelled, "He's eating the drugs." While nothing was found in Forney's mouth upon his arrest, and Forney was not charged in relation to this incident, Detective Carney testified he was confident about what he saw. Detective Carney further testified that approximately three feet from where he found Forney in his living room, a glass dish containing crack cocaine and a razor were found. While police found another individual, Mr. Heflin, near the doorway in the living room, no one else was in the room with Forney. Forney was charged with possession of the piece of crack found in the living room.

{¶18} Police found drugs on Mr. Heflin for which Forney was not charged. There was testimony that in the kitchen in a drawer, officers recovered a bag of marijuana and a bag of cocaine. Forney was charged with possession of both. Officers also found mail addressed to Forney in a kitchen cabinet near where the drugs were found.

{¶19} Detective Carney also explained the layout of the house. Forney's bedroom was actually the dining room, which was located on the first floor adjacent to the living room and kitchen. Detective Timothy Harvey of the SNUD unit testified that there were three bedrooms upstairs which contained various personal items that were strewn about the rooms. Only one of the bedrooms contained a mattress; however, the mattress did not have sheets or any pillows on it. The three other individuals in the house all gave addresses other than Forney's house as their residence. Forney was the only person who listed the residence as his home. Forney did not tell officers that any of the other three people lived there. Moreover, Detective Harvey testified that the investigation he conducted, which involved confidential informants, did not provide him with any evidence that anyone else was living in the house.

{¶20} Once the residence was secured, Detective Harvey interviewed Forney. Forney stated that he was renting the house. Detective Harvey then told Forney that police were at his home because "he was selling crack cocaine out of the house." To which Forney replied, "Okay." Forney then indicated that a lot of people came to his house to get high.

{¶21} Forney argues that the record does not support that Forney possessed the cocaine and marijuana, as police did not find drugs on Forney and there were other people in the house who did actually possess drugs. Also, no fingerprint or DNA analysis was performed. Police testified that fingerprints and DNA are not necessary to show control of a substance and they felt that neither fingerprints nor DNA would have been helpful to the investigation. We also note that Forney was never charged with the possession of drugs found on other individuals in the house. We cannot determine that the jury lost its way in finding Forney guilty of possession of those drugs for which he was convicted. The weight of the evidence indicates that Forney was the only individual living on the premises. While this alone is not adequate to support a

conviction for possession, R.C. 2925.01(K), the weight of the evidence supports a finding of constructive possession of both marijuana and cocaine.

{¶22} There was testimony that Forney was attempting to dispose of evidence at the time police arrived, and crack cocaine, in a usable form, was recovered in Forney's immediate vicinity. We have held that such constitutes constructive possession. See *Fletcher* at ¶20. Moreover, police found cocaine and marijuana in a drawer in Forney's kitchen near where police discovered mail addressed to Forney. Also, the trial court instructed the jury on joint possession. "Possession of a drug includes possessing individually, or jointly with another person. Joint possession exists when two or more persons together have the ability to control an object, exclusive of others." (Citations and internal quotations omitted.) Id. The weight of the evidence indicates that even if Forney did not possess the cocaine and marijuana individually, given that he lived in the residence, occupied a bedroom on the first floor, was found on the first floor, and kept mail in the kitchen cabinet, he clearly could exercise control over the drugs either alone or with others in the house. It is also clear from the record that the jury could have reasonably concluded that Forney's possession was knowing. While Forney's statements to police were ambiguous, in weighing the evidence, the jury could have decided that Forney's statements constituted admissions. Further, the jury could have found credible Detective Carney's testimony that he saw Forney ingest what he believed to be crack. Forney's convictions for possession of cocaine and marijuana were not against the manifest weight of the evidence.

{¶23} We turn now to Forney's conviction for possession of criminal tools, to wit, scales, beakers, surveillance cameras, and other manufacturing equipment. R.C. 2923.24 states that:

> "(A) No person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally.

> "(B) Each of the following constitutes prima-facie evidence of criminal purpose:
>
> "(1) Possession or control of any dangerous ordnance, or the materials or parts for making dangerous ordnance, in the absence of circumstances indicating the dangerous ordnance, materials, or parts are intended for legitimate use;
>
> "(2) Possession or control of any substance, device, instrument, or article designed or specially adapted for criminal use;
>
> "(3) Possession or control of any substance, device, instrument, or article commonly used for criminal purposes, under circumstances indicating the item is intended for criminal use."

R.C. 2901.22(A) provides that:

> "A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature."

{¶24} During the search of Forney's house, police found operational surveillance cameras set up on both the front and side of the house, along with a computer monitor in the house. Detective Harvey testified that in his experience, such equipment is used in counter surveillance so that people in the house can know ahead of time if police are coming. Given this testimony, along with the presence of drugs in the house, the jury could reasonably infer that Forney used the cameras and equipment in an effort to avoid police detection of illegal activities occurring in the house. There was no testimony evidencing that Forney used the cameras for anything other than this purpose.

{¶25} In Forney's kitchen, on a shelf in a cabinet, directly above the drawer containing marijuana and cocaine, officers found a Pyrex measuring cup/beaker, baking soda, and plastic bags. Officers testified that the presence of the items together and near a water source (the sink) and a heat source (the microwave), indicated to them that those items were being used in the manufacture of drugs; specifically those items are used to produce crack from powder cocaine. Moreover, an officer tested the measuring cup on site and determined that it tested positive for

cocaine. We have stated that "[a]ctual physical possession is not a prerequisite for a conviction of possession of criminal tools if a defendant was in constructive possession." (Citation and internal quotations omitted.) *Fletcher* at ¶20.

{¶26} Based on all the evidence, the jury could have reasonably concluded that Forney possessed criminal tools and his conviction for such was not against the manifest weight of the evidence.

Illegal Manufacture

{¶27} Next we address Forney's claim that his conviction for illegal manufacture of drugs is against the manifest weight of the evidence. We noted the elements of such a charge in our sufficiency analysis detailed above.

{¶28} As noted above, police found a measuring cup with cocaine residue, baking soda, a digital scale and small plastic bags in Forney's kitchen in a cabinet directly above a drawer containing powder cocaine. Forney's mail was also found in the kitchen cabinet. Detectives testified that the presence of all the items together in an area with water and a heat source indicates to them that drugs were being manufactured on the premises. We have already established that the weight of the evidence supports Forney's convictions for both possession of cocaine and the possession of criminal tools, so we need not again engage in analysis of Forney's possession of these items. Moreover, not only did officers find cocaine in Forney's house, they also found the product that Forney was convicted of manufacturing, i.e. crack cocaine.

{¶29} Forney again argues that the State failed to prove when the alleged manufacturing took place. However, as we stated in our analysis above, the State is only required to prove that the offense occurred reasonably near the date specified in the indictment. *Adams* at ¶8. The indictment stated that the illegal manufacturing took place on or about March 13, 2008, which

was the date of the search. As noted above, circumstantial evidence can be used to prove even essential elements of an offense. See *Brooks* at ¶24. Furthermore, circumstantial and direct evidence have the same probative value. Id. Given all of the above and the fact that the police found the items necessary to make crack in the same location where both crack and powder cocaine were found, the jury could have reasonably inferred that Forney manufactured the crack on or about March 13, 2008. Further, Forney has not provided us with any case law suggesting the opposite conclusion is correct.

{¶30} This Court concludes this is not the rare case in which 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." (Citation omitted.) *Cepec* at ¶6. Forney's first assignment of error is overruled.

INEFFECTIVE ASSISTANCE OF COUNSEL

{¶31} In Forney's third assignment of error he argues that his trial counsel was ineffective in that he did not offer any evidence on behalf of Forney and trial counsel did not call Forney as a witness and that his trial counsel's ineffectiveness prejudiced Forney. We are not convinced.

{¶32} The Sixth Amendment of the United States Constitution guarantees the right of criminal defendants to receive the effective assistance of counsel for their defense. *State v. Toney*, 9th Dist. No. 04CA0013, 2004-Ohio-4877, at ¶7, citing *McMann v. Richardson* (1970), 397 U.S. 759, 771.

{¶33} To prove that Forney's trial counsel was ineffective, Forney must prove the following:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not

> functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland v. Washington* (1984), 466 U.S. 668, 687; see, also, *State v. Treesh* (2001), 90 Ohio St.3d 460, 489, 2001-Ohio-4.

{¶34} There is a strong presumption that Forney's counsel was effective and it is his burden to prove otherwise. *Toney* at ¶8, citing *State v. Smith* (1985), 17 Ohio St.3d 98, 100.

{¶35} Forney's trial counsel's decision to not call witnesses on Forney's behalf does not amount to ineffective assistance. "Generally, counsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court." *Treesh*, 90 Ohio St.3d at 490. Moreover, trial counsel's failure to call witnesses cannot constitute ineffective assistance without a showing of prejudice. *Toney* at ¶12; *Strickland*, 466 U.S. at 687.

{¶36} Forney has not pointed to any evidence in the record demonstrating that he was prejudiced by his trial counsel's failure to call witnesses on Forney's behalf. Thus, Forney fails to meet his burden. See *Toney* at ¶12. Furthermore, the record indicates that Forney's trial counsel discussed whether Forney would testify and they decided that he would not do so. Also it is clear that Forney's trial counsel thoroughly cross-examined each of the State's witnesses. Therefore, we cannot determine that Forney's counsel was deficient, or that trial counsel's handling of the case prejudiced Forney. We conclude Forney's third assignment of error is without merit.

CONCLUSION

{¶37} In light of the foregoing, we affirm the judgment of the Summit County Court of Common Pleas.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

EVE V. BELFANCE
FOR THE COURT

MOORE, P. J.
CONCURS

CARR, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶38} While I concur in this Court's resolution of the appeal, I concur in judgment only in regard to the disposition of Forney's second assignment of error because I would not address the sufficiency of the evidence in regard to any element other than the timing of the illegal manufacture of drugs. Forney moved for judgment of acquittal on that charge on only "one essential element, that is the essential element of date." Furthermore, he conceded that the State

had presented sufficient evidence on all other counts but concluded "with respect to that, that essential element of date was never established by the State's own witnesses, admissions." Because of the limited specificity of his Crim.R. 29 motion, I believe that Forney forfeited any argument regarding the sufficiency of any element besides the timing of the manufacture.

APPEARANCES:

LEONARD J. BREIDING, II, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.