[Cite as *State v. Hickle*, 2024-Ohio-4794.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 113617
v.	:	
JOSEPH HICKLE,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: October 3, 2024

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-23-680519-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Stephen Rocco Vernia, Assistant Prosecuting Attorney, *for appellee*.

P. Andrew Baker, *for appellant*.

SEAN C. GALLAGHER, J.:

{¶ 1} Joseph Hickle challenges the sufficiency of the evidence with respect to the one-year firearm specification attendant to his fifth-degree felony drug possession conviction.[1] For the following reasons, we affirm.

{¶ 2} Hickle leased an apartment from which he was evicted during the summer of 2022. He was the only tenant. During the eviction process, the property manager discovered that Hickle had property in the unit, but she was promised that it would be removed that day. The following day, the property manager attempted to enter the apartment, but the door lock was damaged and she was unable to open the door. Maintenance removed the lock, and the property-management employees entered the vacant apartment in preparation for re-leasing the unit. A backpack and two grocery bags were discovered in the kitchen. An employee opened the backpack and found a 9 mm semiautomatic handgun, several loaded magazines, three bags of methamphetamine weighing 2.78 grams, and various other drug paraphernalia. Unbeknownst to Hickle, the Parma Heights Police Department was immediately called to secure the contraband and open an investigation.

{¶ 3} Sometime after the police officers left, Hickle called the property-management company to retrieve the backpack in the apartment. He was told that police officers had taken possession of the bag, so he would have to contact them. Hickle surrendered himself to the Parma Police Department.

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[1] Hickle turned down the State's plea offer of pleading guilty to the underlying possession charge, with a dismissal of the firearm specification, in exchange for applying to the intervention in lieu of conviction or drug court programs.

{¶ 4} During trial, one of the investigating detectives testified that Hickle purchased the firearm through a registered firearms dealer based on a Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") report. Hickle objected to that testimony and the report, but for reasons not specified in the record.

{¶ 5} The transcript of the proceeding indicates that the jury found Hickle guilty of drug possession under R.C. 2925.11(A), along with the attendant firearm specification, and this timely appeal followed. Of note, however, the docket indicates that Hickle pleaded guilty and was sentenced based on that guilty plea. The parties seem unconcerned with this procedural quirk — neither have asked for any relief on this point, so it is simply noted.

{¶ 6} In the first assignment of error, Hickle claims that "the firearm specification must be reversed because it was not supported by sufficient evidence." Importantly, Hickle is not challenging the evidence supporting his possession of the drugs, which were found in the same backpack as the firearm.

{¶ 7} Under R.C. 2929.14(B)(1)(a)(iii), an offender is subject to a mandatory one-year prison sentence on a firearm specification when an offender has a firearm on or about the offender's person or under the offender's control while committing a felony offense. The statute does not differentiate between lawfully or unlawfully owned firearms. Hickle argues that there is no evidence that he possessed or had the firearm under his control while committing the drug possession offense, but he tacitly concedes the drug possession occurred. That argument defies logic.

{¶ 8} "[T]he state may demonstrate a defendant has dominion and control over a firearm for the purposes of R.C. 2941.141 by proving constructive possession of that firearm." *State v. Giguere*, 2023-Ohio-4649, ¶ 20 (8th Dist.), citing *State v. Carson*, 2017-Ohio-7243, ¶ 17 (8th Dist.). Accordingly, "the state need only show that the defendant had possession or constructive possession 'at some point' during the commission of the crime." *Id.*, citing *Carson* at ¶ 20. "[T]he firearm specification statute 'does not require that the firearm be used in the commission of the felony, or that the defendant acquire the firearm before beginning the crime; all that is necessary is that the defendant have the firearm on his person or under his control at some point during the commission of the crime.'" *Id.*, citing *State v. Benton*, 2004-Ohio-3116, ¶ 29 (8th Dist.).

{¶ 9} The State proved that Hickle possessed the drugs beyond a reasonable doubt. That fact conclusively demonstrates that at some point in time, Hickle possessed the backpack within which the drugs were discovered — otherwise, it could not be maintained that Hickle possessed the drugs. The firearm was found with those drugs in the same backpack left in the kitchen of the apartment, however brief that possession lasted. Beyond that, Hickle contacted the management company to ask about retrieving that bag, implicitly claiming the backpack and its contents as his property. Thus, there is evidence that Hickle had control, possession, and use of that backpack, which contained the drugs and the firearm together, at some point in time immediately before he vacated the apartment. He cannot separate his possession, use, or control of the drugs found in the bag from the

firearm itself. There is sufficient evidence that Hickle possessed the firearm at the same time as the drugs, satisfying the elements of the offense and the specification. The first assignment of error is overruled.

{¶ 10} In the second assignment of error, Hickle claims that the ATF trace report, which identified him as the original purchaser of the firearm, was inadmissible hearsay or was introduced in violation of the Confrontation Clause.

{¶ 11} The standard of review for the introduction of evidence at trial depends on whether a specific objection was preserved. It is well settled "'that a defendant may not on appeal urge a new ground for his objection.'" *State v. Hernandez*, 2018-Ohio-5031, ¶ 4 (8th Dist.), quoting *State v. Milo*, 1982 Ohio App. LEXIS 12440, *15 (10th Dist. Sept. 30, 1982), and *Yuin v. Hilton*, 165 Ohio St. 164 (1956); *see also State v. Deadwiley*, 2020-Ohio-1605, ¶ 23 (8th Dist.). In *Hernandez*, the panel recognized that the specificity of the evidentiary objection defines the scope of appellate review. *Id.* at ¶ 5. In that case, the defendant objected to certain evidence on relevancy grounds but in the appeal, the defendant attempted to claim that the evidence also violated Evid.R. 404(B), other acts evidence. *Id.* The panel concluded that the defendant "forfeited the right to argue Evid.R. 404(B) as a ground for appeal" because no specific objection was preserved at the trial based on the record provided by this appeal, and as a result, the appellant forfeited all but plain error under plain application of Evid.R. 103(A)(1). *Hernandez* thus stands for the proposition that in some situations, it is not enough to simply lodge a generic "objection" to the evidence presented at trial. To preserve the right to appeal on

evidentiary issues, the basis of the objection must be included somewhere in the record if the objection is not discernable through context. This is because the nature of the objection is necessary to properly assess whether adequate foundations were laid or to preserve constitutional arguments. *Hernandez's* conclusion is directly derived from Evid.R. 103(A)(1), which provides that when evidence is admitted at trial, a timely objection "stating the specific ground of objection[,]" if not readily apparent from the context, must be stated on the record.

{¶ 12} At the trial in this case, the prosecutor asked the detective, "Do you recall what the result of that firearm trace report was?" Tr. 170:1-2. Defense counsel objected before any answer was given, but the discussion elaborating on the objection was conducted at a sidebar and off the record. No ruling was then made, but upon returning to the record, the State asked a new question: "As part of your investigation, did you investigate the firearm?" Tr. 170:1-9. The basis of the initial objection is not apparent from the context, but it appears the prosecutor satisfied any concerns by reframing the question into a course-of-investigation style inquiry, suggesting some form of hearsay objection, which was evidently overruled on the basis that the statements were not being offered for the truth of the matter asserted.[2]

{¶ 13} No further objection was lodged until after the detective testified that the ATF report indicated that Hickle legally purchased the firearm at a dealer in Middleburg Heights, Ohio. To that, defense counsel stated: "Your honor, I'd just

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[2] A course-of-investigation line of inquiry does not present truth of the matters asserted, and therefore, such evidence is admissible as nonhearsay. *State v. Smith*, 2024-Ohio-2416, ¶ 45 (5th Dist.).

like to note my objection *for the report*." (Emphasis added.) Tr. 171:25-172:2. No clarification as to the grounds of the second objection was placed on the record to identify the basis of the objection, whether it was based on hearsay or constitutional grounds (or both). The ATF trace report was then introduced into the record as a trial exhibit over another unspecified objection. Tr. 205:1-12. Given the lack of specificity as to the objection, Hickle has waived all but plain error, especially as it pertains to the officer's testimony, for which no objection was preserved at trial. Evid.R. 103(D).

{¶ 14} To establish plain error, the offender "must show that an error occurred, that the error was obvious, and that there is 'a reasonable probability that the error resulted in prejudice,' meaning that the error affected the outcome of the trial." (Emphasis deleted.) *State v. McAlpin*, 2022-Ohio-1567, ¶ 66, quoting *State v. Rogers*, 2015-Ohio-2459, ¶ 22. In addition, "[n]otice of plain error 'is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.'" *State v. Neyland*, 2014-Ohio-1914, ¶ 177, quoting *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph two of the syllabus.

{¶ 15} Hickle's entire argument is based on his claim that establishing his status as the purchaser of the firearm was "devastating" to his defense. It is unclear how it would be. Following his conviction, Hickle has not disclaimed possession of the drugs or the backpack at some point in time and ownership of a firearm is not an element of the firearm specification. Hickle further admitted to the property-management employee that he left a bag in the apartment, which presumes he left

the contents of that bag as well. It therefore cannot be concluded that the evidence from the ATF report altered the outcome of trial. *See State v. McKelton*, 2016-Ohio-5735, ¶ 123. The report was merely the final piece of a largely completed puzzle. The sole issue is whether he had a firearm under his control while committing the felony offense of drug possession. In the context of the trial, the firearm was discovered in the same bag as the drugs, and therefore, evidence of the constructive possession of the drugs simultaneously demonstrates constructive possession of the firearm. The ATF report was superfluous.

{¶ 16} Even if we found error in the introduction of the public record kept by the agency in the regular course of its business solely for the sake of discussion, which we do not in consideration of the potential implications of Evid.R. 803(8) and the nonhearsay grounds laid during the officer's testimony, any error would be harmless as a matter of law.

{¶ 17} In addition, introduction of the information contained within the ATF trace report did not violate the Confrontation Clause. *See, e.g., State v. Jackson*, 764 N.W.2d 612, 617 (Minn. 2009) (ATF trace report is not testimonial in nature because the report "is a record that is maintained in the normal course of business" of the ATF for the express purpose of tracking gun ownership). In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the Court differentiated between regularly kept records, which are admissible without testimony from a custodian, and analysis by that custodian within a given report, which is only admissible under the Confrontation Clause if the creator of the document testifies. *Id.* at 321-322; *Smith*

v. Arizona, 144 S.Ct. 1785, 1791 (2024), citing *Crawford v. Washington*, 541 U.S. 36, 60 (2004) ("[T]he Confrontation Clause's requirements apply only when the prosecution uses out-of-court statements for 'the truth of the matter asserted.'"). Generally, if the report is limited to certifying an official record, the report is not testimonial. *See Melendez-Diaz* at 321-322. It becomes testimonial hearsay when the report requires the drafter's interpretation beyond simply authenticating the document. *Id.*

{¶ 18} The information in the ATF trace report was limited to certifying that Hickle was the individual who originally purchased the firearm, a record kept in the regular course of the ATF's business for the purpose of tracking gun ownership. *Jackson* at 617. That record is not testimonial hearsay by nature because it requires no interpretation and does not go beyond the information within the report itself, and importantly, is not introduced to prove that Hickle actually purchased the firearm — a fact not necessary to a successful prosecution. *See, e.g., United States v. Barber*, 937 F.3d 965, 968 (7th Cir. 2019) (the information from the ATF licensing report also discusses the continued applicability of the licensing, and thus, the offender was entitled to question the ATF as to those conclusions under the Confrontation Clause analysis). There is nothing Hickle could have questioned an ATF official on with respect to his purchase of the firearm any more than he could have questioned the testifying officer. The sole information in the report recorded the store's reporting that Hickle purchased the firearm, and the ATF merely recorded that transaction in a federal registry. Further, the fact that Hickle

purchased the firearm was not offered for the truth of that assertion. The State was not required to prove that Hickle purchased or owned the firearm, only that he possessed it when he possessed the drugs. The admission of the report did not implicate the Confrontation Clause.

{¶ 19} And finally, Hickle's reliance on *State v. Iverson*, 2005-Ohio-6098 (8th Dist.), and *State v. Ray*, 2010-Ohio-513 (8th Dist.), in support of his constitutional argument is misplaced. In *Iverson*, the panel concluded that the testifying police officer could not relate events and circumstances witnessed by his partner and recorded in the police report that were outside of the testifying officer's knowledge and occurred outside of his presence. *Id.* at ¶ 17. That conclusion is unremarkable considering the hearsay implications raised in *Iverson*, but importantly has no bearing on the ATF report in light of several factors, including the nonhearsay basis for introducing the report, the exception to hearsay for public records, and our conclusion that the report did not alter the outcome of trial in light of the overwhelming evidence of Hickle's guilt.

{¶ 20} *Ray* is likewise unpersuasive. In *Ray*, the offender was convicted of receiving stolen property, and the State attempted to prove that fact of consequence with the ATF report indicating the weapon was stolen. In that context, the panel concluded that the information in the report, being offered for the truth of the matter asserted, was improper hearsay and bore directly on the elements of the offense. *Id.* at ¶ 31. Importantly, there is no indication that the State sought to introduce the ATF report for the truth of the matter asserted in this case, in other

words, for proof that Hickle purchased the firearm; and as already concluded, the admission of ATF report would constitute harmless error even if we concluded that its admission was in error. But nevertheless, the ATF report in this case formed a piece of the investigation leading the investigators to Hickle, as demonstrated by the State's revised question following the generic objection and off-the-record sidebar. And, it must be recognized that the *Ray* panel did not address Evid.R. 803(8) as an exception to hearsay or *Melendez-Diaz*, ostensibly a limitation based on the arguments presented in that particular case. *See generally id.*

{¶ 21} In short, neither case is applicable to the current circumstances and can be readily distinguished. The second assignment of error is overruled.

{¶ 22} Hickle's conviction is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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SEAN C. GALLAGHER, JUDGE

MARY J. BOYLE, J., CONCURS;
LISA B. FORBES, P.J., CONCURS IN JUDGMENT ONLY