

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

ROBERT J. HALE

Defendant-Appellant

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JUDGES:

Hon. John W. Wise, P.J.

Hon. Patricia A. Delaney, J.

Hon. Earle E. Wise, Jr., J.

Case No. 17CA88

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Court of Common
Pleas, Case No. 2017CR0373

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

May 9, 2018

APPEARANCES:

For Plaintiff-Appellee

JOSEPH C. SNYDER
38 South Park Street
Mansfield, OH 44902

For Defendant-Appellant

DANIEL Z. INSCORE
3 North Main Street
Mansfield, OH 44902

Wise, Earle, J.

{¶ 1} Defendant-Appellant, Robert J. Hale, appeals his September 12, 2017 conviction and sentence by the Court of Common Pleas of Richland County, Ohio. Plaintiff-Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶ 2} On March 26, 2017, police pulled over a vehicle being driven by Garrett Black. Appellant was riding in the front passenger seat. Mr. Black gave police consent to search the vehicle. A bag of cocaine was discovered underneath the front passenger seat.

{¶ 3} On June 12, 2017, the Richland County Grand Jury indicted appellant on one count of possession of cocaine in violation of R.C. 2925.11.

{¶ 4} A jury trial commenced on September 7, 2017. At the conclusion of the state's case, appellant moved for a Crim.R. 29 acquittal which was denied. The jury found appellant guilty as charged. By sentencing entry filed September 12, 2017, the trial court sentenced appellant to twelve months in prison.

{¶ 5} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶ 6} "THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S CRIM.R. 29 MOTION FOR ACQUITTAL BECAUSE THE STATE FAILED TO PROVIDE SUFFICIENT AND (SIC) EVIDENCE OF THE ELEMENT OF POSSESSION BEYOND A REASONABLE DOUBT. FURTHER, THE GREATER WEIGHT OF THE EVIDENCE DOES NOT SUPPORT THE JURY'S VERDICT."

II

{¶ 7} "THE TRIAL COURT ERRED IN SENTENCING DEFENDANT TO THE MAXIMUM TWELVE MONTHS BECAUSE THE MAXIMUM SENTENCE IS NOT SUPPORTED BY THE RECORD."

I

{¶ 8} In his first assignment of error, appellant claims the trial court erred in denying his Crim.R. 29 motion for acquittal because the state failed to sufficiently prove the element of "possession," and the jury's verdict was against the sufficiency and manifest weight of the evidence. We disagree.

{¶ 9} Crim.R. 29 governs motion for acquittal. Subsection (A) states the following:

The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

{¶ 10} The standard to be employed by a trial court in determining a Crim.R. 29 motion is set out in *State v. Bridgeman*, 55 Ohio St.2d 261, 381 N.E.2d 184 (1978), syllabus: "Pursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as

to whether each material element of a crime has been proved beyond a reasonable doubt."

{¶ 11} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991). "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

{¶ 12} On review for manifest weight, a reviewing court is to examine 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 jury 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. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). See also, *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶ 13} We note circumstantial evidence is that which can be "inferred from reasonably and justifiably connected facts." *State v. Fairbanks*, 32 Ohio St.2d 34, 289 N.E.2d 352 (1972), paragraph five of the syllabus. "[C]ircumstantial evidence may be more certain, satisfying and persuasive than direct evidence." *State v. Richey*, 64 Ohio St.3d 353, 595 N.E.2d 915 (1992). It is to be given the same weight and deference as direct evidence. *Jenks, supra*.

{¶ 14} Appellant was found guilty of possession of cocaine in violation of R.C. 2925.11 which states: "No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog." Appellant complains that the state did not prove "possession."

{¶ 15} R.C. 2925.01(K) defines "possess" or "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."

{¶ 16} Possession may be actual or constructive. "Constructive possession exists when an individual knowingly exercises dominion and control over an object, even though that object may not be within his immediate physical possession." *State v. Hankerson*, 70 Ohio St.2d 87, 434 N.E.2d 1362 (1982), syllabus. The evidence must prove that the defendant was able to exercise dominion and control over the contraband. *State v. Wolery*, 46 Ohio St.2d 316, 332, 348 N.E.2d 351 (1976). Dominion and control may be proven by circumstantial evidence alone. *State v. Holman*, 5th Dist. Stark No. 2017CA00114, 2018-Ohio-1373, ¶ 25, citing *State v. Trembly*, 137 Ohio App.3d 134, 738 N.E.2d 93 (8th Dist.2000). "Circumstantial evidence that the defendant was located in very close proximity to the contraband may show constructive possession." *Id.* "Multiple individuals may constructively possess a particular item of contraband simultaneously." *Id.*, citing *State v. Pitts*, 4th Dist. Scioto No. 99 CA 2675, 2000-Ohio-1986.

{¶ 17} Mansfield Police Officer Mark Boggs testified he was patrolling in a high crime area with his field training officer, Ryan Grimshaw, when a vehicle attracted his attention because "to me it looked like it was trying to get away from me, it was trying to

get away from my eyes so I couldn't see the plate or, or that vehicle." T. at 120, 122-124. Officer Boggs ran the license plate and discovered it was expired. T. at 123, 125. The officers stopped the vehicle and approached the vehicle, Officer Boggs on the driver's side and Officer Grimshaw on the passenger's side where appellant was seated. T. at 125. Officer Boggs observed the driver looking straight ahead with his hands on the steering, and he observed appellant turn "toward me and his shoulder went down and his eyes were on me, I was looking at him and he was looking at me and he had his hand under his seat." T. at 125-126. Officer Boggs was concerned appellant was reaching for a weapon. *Id.* As Officer Boggs approached closer, he observed appellant with his hands up and "there was nothing in his hands." T. at 126. Officer Boggs believed because appellant did not pull out a weapon, "he was reaching under his seat to hide something." T. at 127. Because appellant reached under his seat while looking intently at Officer Boggs, Officer Boggs believed "there was something under his seat that was contraband." *Id.* Officer Boggs spoke with the driver who gave his consent to search the vehicle. T. at 127-128. Upon searching the vehicle, "a clear plastic bag with a white, white substance in it" was discovered under the front passenger seat where appellant had been sitting. T. at 132. Appellant told Officer Boggs "he had no idea what it was or what it was doing in the vehicle." T. at 133. The white substance tested positive for cocaine. T. at 137, 179-181; State's Exhibits 2 and 3.

{¶ 18} Officer Grimshaw testified as he approached the vehicle on the passenger's side, he observed appellant "make a lean forward motion, it looked like he was reaching under his seat with his right arm, looked back over his left shoulder, looking back at Officer Boggs who was approaching on the driver's side." T. at 147-148. Officer Grimshaw also

believed appellant was reaching for a weapon. T. at 148. As he approached closer, he saw appellant sit up and his hands were empty. T. at 150. Officer Grimshaw believed appellant "hid something under the seat, whatever he was reaching for is still under the seat." *Id.*

{¶ 19} Upon review, we find sufficient evidence was presented to overcome the Crim.R. 29 challenge.

{¶ 20} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact, in this case, the jury. *State v. Jamison*, 49 Ohio St.3d 182, 552 N.E.2d 180 (1990). The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997).

{¶ 21} Upon review, we find sufficient evidence to support the conclusion that appellant was able to exercise dominion and control over the bag of cocaine and therefore was in possession of drugs, and we do not find any manifest miscarriage of justice.

{¶ 22} Assignment of Error I is denied.

II

{¶ 23} On April 30, 2018, appellant filed a motion to dismiss his second assignment of error only. The motion is granted.

{¶ 24} Assignment of Error II is dismissed.

{¶ 25} The judgment of the Court of Common Pleas of Richland County, Ohio is hereby affirmed.

By Wise, Earle, J.

Wise, John, P.J. and

Delaney, J. concur.

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