[Cite as *State v. White*, 2010-Ohio-3033.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 09AP-1168
v.	:	(C.P.C. No. 08CR11-7912)
Kevin C. White,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 30, 2010

Ron O'Brien, Prosecuting Attorney, and *Kimberly Bond*, for appellee.

W. Joseph Edwards, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Kevin C. White, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. Because appellant's convictions are supported by sufficient evidence and are not against the manifest weight of the evidence, we affirm that judgment.

{¶2} On August 10, 2008, officers from the Columbus Police Department responded to a complaint of drug use at a house located at 1039 Republic Avenue in north Columbus. The owner of the house allowed the officers to enter. Officer Patrick

Daugherty entered the home first and observed a number of people in the living room. One of them, later identified as appellant, was seated in a reclining chair. Daugherty observed appellant behave in a manner that suggested appellant was trying to hide something in the chair. After the officers removed the people from the living room, they searched the reclining chair appellant was seated in and found two plastic baggies inside a side cushion. Field tests of the substances found in the baggies indicated the substances were crack cocaine and heroin. Appellant denied the drugs were his.

{¶3} A Franklin County Grand Jury indicted appellant with one count of possession of heroin and one count of possession of cocaine, both in violation of R.C. 2925.11. Appellant entered a not guilty plea to the charges and proceeded to a jury trial. At trial, Officer Daugherty testified to the above events. The parties stipulated that the baggies found inside the chair cushion contained crack cocaine and heroin. The jury found appellant guilty as charged and the trial court sentenced him accordingly.

{¶4} Appellant appeals and assigns the following error:

> THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE APPELLANT WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION AND WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶5} Appellant contends in his assignment of error that his convictions are not supported by sufficient evidence and are against the manifest weight of the evidence. The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins* (1997), 78 Ohio St.3d 380, paragraph two of the syllabus. Therefore, we will separately discuss each concept.

{¶6} The Supreme Court of Ohio delineated the role of an appellate court presented with a sufficiency of the evidence argument in *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus:

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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. * * *

{¶7} Whether the evidence is legally sufficient is a question of law, not fact. *Thompkins* at 386. Indeed, in determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789. Consequently, the weight of the evidence and the credibility of the witnesses are issues primarily determined by the trier of fact. *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79; *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. A verdict will not be disturbed unless, after viewing the evidence in the light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh* (2001), 90 Ohio St.3d 460, 484; *Jenks* at 273.

{¶8} In order to convict appellant in the present case, the state had to prove beyond a reasonable doubt that appellant knowingly possessed crack cocaine and heroin. R.C. 2925.11. Appellant argues that the state did not prove that he possessed the drugs found in the seat cushion. We disagree.

{¶9} Possess, or possession, is defined as "having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found." R.C. 2925.01(K). Possession of a controlled substance may be actual or constructive. *State v. Burnett,* 10th Dist. No. 02AP-863, 2003-Ohio-1787, ¶19 (citing *State v. Mann* (1993), 93 Ohio App.3d 301, 308). A person has actual possession of an item when it is within his immediate physical control. Id. (citing *State v. Messer* (1995), 107 Ohio App.3d 51, 56). In the instant case, because the drugs were not found on appellant's person, the state was required to establish that appellant constructively possessed them. *Burnett* at ¶19.

{¶10} 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. Pilgrim,* 184 Ohio App.3d 675, 2009-Ohio-5357, ¶27 (citing *State v. Hankerson* (1982), 70 Ohio St.2d 87, syllabus). Although the mere presence of an individual in the vicinity of illegal drugs is insufficient to establish constructive possession, if the evidence demonstrates that the individual was able to exercise dominion or control over the drugs, he or she can be convicted of possession. *State v. Wyche,* 10th Dist. No. 05AP-649, 2006-Ohio-1531, ¶18; *Burnett* at ¶20. "All that is required for constructive possession is some measure of dominion or control over the drugs in question, beyond mere access to them." *Burnett* (quoting *In re Farr* (Nov. 9, 1993), 10th Dist. No. 93AP-201).

{¶11} Circumstantial evidence alone may be sufficient to support the element of constructive possession. *Jenks* at 272-73; *State v. Alexander,* 8th Dist. No. 90509, 2009-

Ohio-597, ¶25. Absent a defendant's admission, the surrounding facts and circumstances, including the defendant's actions, constitute evidence from which the trier of fact can infer whether the defendant had constructive possession over the subject drugs. *State v. Norman,* 10th Dist. No. 03AP298, 2003-Ohio-7038, ¶31; *State v. Baker,* 10th Dist. No. 02AP-627, 2003-Ohio-633, ¶23.

{¶12} Appellant contends the state failed to prove that he possessed the drugs because it only presented evidence that appellant was found in a location where drugs were found. However, the state presented evidence indicating more than just appellant's presence in a location where drugs were found.

{¶13} Officer Daugherty testified that he walked into a house and observed appellant sitting in a chair by himself. Appellant appeared to dip down into the chair as if he was trying to hide something. A subsequent search of the chair discovered two baggies of drugs in the seat's cushion. This evidence, when viewed in a light most favorable to the state, is sufficient to prove that appellant exercised dominion or control over the drugs found in the chair's cushion and, therefore, constructively possessed the drugs. *State v. Gray*, 2d Dist. No. 19493, 2003-Ohio-2822, ¶20-22; *State v. Perkins* (June 29, 2000), 10th Dist. No. 99AP-820 (noting that movements consistent with attempt to hide drugs in vicinity of where drugs are found is probative of dominion and control of drugs). Appellant's convictions are supported by sufficient evidence.

{¶14} Appellant's manifest weight of the evidence claim requires a different review. The weight of the evidence concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other. *State v. Brindley,* 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶16. When presented with a

challenge to the manifest weight of the evidence, an appellate court, after " 'reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [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.' " *Thompkins* at 387 (quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175). An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Id.*

{¶15} A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver,* 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21. Neither is a conviction against the manifest weight of the evidence because the trier of fact believed the state's version of events over the appellant's version. *State v. Gale,* 10th Dist. No. 05AP-708, 2006-Ohio-1523, ¶19; *State v. Williams,* 10th Dist. No. 08AP-719, 2009-Ohio-3237, ¶17. The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson* (Mar. 19, 2002), 10th Dist. No. 01AP-973; *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553. The trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. *State v. Williams,* 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶58; *State v. Clarke* (Sept. 25, 2001), 10th Dist. No. 01AP-194. Consequently, an appellate court must ordinarily give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington,* 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶28; *State v. Hairston,* 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶74.

{¶16} Appellant does not present additional arguments in support of his manifest weight claim. As noted, there was credible evidence that appellant constructively possessed the drugs found in the seat cushion. Although appellant denied possessing the drugs, in light of Officer Daugherty's testimony, we cannot conclude that the jury clearly lost its way when it rejected appellant's denial and convicted him of drug possession. *State v. Stewart*, 10th Dist. No. 08AP-33, 2009-Ohio-1547, ¶22 (noting that a conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution's witnesses). This is not the exceptional case in which the evidence weighs heavily against the convictions.

{¶17} In conclusion, appellant's convictions are supported by sufficient evidence and are not against the manifest weight of the evidence. Accordingly, appellant's assignment of error is overruled and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and McGRATH, JJ., concur.