**[Cite as *State v. Rucker*, 2013-Ohio-2215.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
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| State of Ohio, | : | |
| Plaintiff-Appellee, | : | No. 12AP-791<br>(C.P.C. No. 11CR-04-1843) |
| v. | : | (REGULAR CALENDAR) |
| Howard Rucker, III, | : | |
| Defendant-Appellant. | : | |

D E C I S I O N

Rendered on May 30, 2013

*Ron O'Brien*, Prosecuting Attorney, and *Sheryl L. Pritchard*, for appellee.

*The Law Office of Jennifer L. Coriell, LLC, Jennifer L. Coriell; Armengau & Associates, Javier H. Armengau*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

**{¶ 1}** Howard Rucker, III, defendant-appellant, appeals from the judgment of the Franklin County Court of Common Pleas, in which the court found him guilty, pursuant to a bench trial, of attempted possession of drugs, a violation of R.C. 2923.02 as it relates to 2925.11 and a first-degree felony; and trafficking in drugs, a violation of R.C. 2925.03 and a first-degree felony, with a major drug offender specification because the amount of drugs was over 1,000 grams.

**{¶ 2}** On February 18, 2011, Columbus Police Officer Daniel Grant observed a drug deal in a department store parking lot in Columbus, Ohio. Officer Grant pursued the vehicle onto Interstate 71. During the chase, several bags of a white, powdery substance

were thrown from the passenger-side window. Officer Steven Roberts retrieved the discarded bags, which field tests determined to contain cocaine. Officer Grant eventually stopped the vehicle, which was occupied by Hugo Medrano and Cesar Hernandez. Later that afternoon, Medrano agreed to call "Gucci," who ended up being appellant, to set up a sale of the cocaine. Although drugs were never specifically mentioned in any of the multiple telephone conversations, appellant agreed to come to Medrano's apartment to pick up "two" of something.

**{¶ 3}** When appellant arrived at Medrano's apartment, six police officers were hiding inside. On the kitchen counter, the police had placed two objects, which were actually radio batteries wrapped to look like cocaine "bricks." Appellant entered the apartment with a s0ft-sided lunch bag/cooler, closed the front door, and moved deeper into the apartment. Before appellant spoke, police apprehended him. Appellant had approximately $3,000 on his person and $64,000 in the bag.

**{¶ 4}** Appellant was charged with attempted aggravated possession of drugs and trafficking in drugs, with a major drug offender specification because the amount of drugs was over 1,000 grams. On August 2, 2012, a bench trial commenced. At the close of the state's evidence, appellant did not call any witnesses and moved for dismissal pursuant to Crim.R. 29, which the trial court overruled. Subsequently, the trial court found appellant guilty of all counts. The trial court held a sentencing hearing on August 14, 2012, at which the court sentenced appellant to ten years of incarceration on both counts, to be served concurrently to each other, and two years of incarceration on the major drug offender specification, to be served consecutively to the ten-year sentence. Appellant appeals the judgment of the trial court, asserting the following assignments of error:

> [I.] INSUFFICIENT EVIDENCE EXISTED TO CONVICT APPELLANT AND APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
>
> [II.] THE TRIAL COURT ERRED IN SENTENCING APPELLANT.

**{¶ 5}** Appellant argues in his first assignment of error that the trial court's judgment was based upon insufficient evidence and against the manifest weight of the evidence. This court's function when reviewing the weight of the evidence is to determine

whether the greater amount of credible evidence supports the verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). In order to undertake this review, we must sit as a "thirteenth juror" and review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice. *Id*., citing *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). If we find that the fact finder clearly lost its way, we must reverse the conviction and order a new trial. *Id*. On the other hand, we will not reverse a conviction so long as the state presented substantial evidence for a reasonable trier of fact to conclude that all of the essential elements of the offense were established beyond a reasonable doubt. *State v. Getsy*, 84 Ohio St.3d 180, 193-94 (1998).

**{¶ 6}** 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. *Thompkins* at 387. When presented with a challenge to the manifest weight of the evidence, an appellate court may not merely substitute its view for that of the trier of fact, but 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. *Id*. 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*., quoting *Martin* at 175; *State v. Strider-Williams*, 10th Dist. No. 10AP-334, 2010-Ohio-6179, ¶ 12.

**{¶ 7}** Although sufficiency and manifest weight are different legal concepts, manifest weight may subsume sufficiency in conducting the analysis; that is, a finding that a conviction is supported by the manifest weight of the evidence necessarily includes a finding of sufficiency. *State v. McCrary*, 10th Dist. No. 10AP-881, 2011-Ohio-3161, ¶ 11, citing *State v. Braxton*, 10th Dist. No. 04AP-725, 2005-Ohio-2198, ¶ 15. " '[T]hus, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency.' " *Id*. In that regard, we first examine whether appellant's conviction is supported by the manifest weight of the evidence. *State v. Gravely*, 188 Ohio App.3d 825, 2010-Ohio-3379, ¶ 46 (10th Dist.).

**{¶ 8}** R.C. 2925.11(A) provides, in pertinent part:

> No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog.

**{¶ 9}** R.C. 2923.02 provides, in pertinent part:

> (A) No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense.
>
> (B) It is no defense to a charge under this section that, in retrospect, commission of the offense that was the object of the attempt was either factually or legally impossible under the attendant circumstances, if that offense could have been committed had the attendant circumstances been as the actor believed them to be.

**{¶ 10}** R.C. 2925.03 provides, in pertinent part:

> (A) No person shall knowingly do any of the following:
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> * * *
>
> (2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance or a controlled substance analog, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person.

**{¶ 11}** R.C. 2923.03 provides, in pertinent part:

> (A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:
>
> (1) Solicit or procure another to commit the offense;
>
> (2) Aid or abet another in committing the offense;
>
> (3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;
>
> (4) Cause an innocent or irresponsible person to commit the offense.

**{¶ 12}** In the present case, appellant argues that the trial court erred when it found him guilty of trafficking in drugs under a complicity theory. Appellant contends the state did not prove that he took any affirmative steps to participate in Medrano and Hernandez's commission of trafficking in cocaine. Appellant points out that Medrano and Hernandez were arrested for having possession of two kilograms of cocaine, and there was never any specific mention of the sale of drugs in any of the phone calls to him. Appellant asserts there is no evidence that he ever asked for Medrano and Hernandez to procure drugs for him.

**{¶ 13}** The Supreme Court of Ohio has held that, "[to] support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal." *State v. Johnson*, 93 Ohio St.3d 240 (2001), syllabus. Such criminal intent can be inferred from the presence, companionship, and conduct of the defendant before and after the offense is committed. *Id*. at 245.

**{¶ 14}** Appellant admits that he had a lot of money in his bag but claims that the only evidence that it was to be used to buy drugs came from Medrano's testimony, and Medrano is not reliable because he entered into a deal with the state to reduce his own prison sentence. Although the money might have been intended to buy drugs at some time, argues appellant, there was no evidence that the money was to buy drugs from Medrano.

**{¶ 15}** Initially, appellant's argument raises an issue of witness credibility. "The choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan*, 22 Ohio St.3d 120, 123 (1986). The fact finder is free to believe all, part or none of the testimony of each witness appearing before it. *Hill v. Briggs*, 111 Ohio App.3d 405, 412 (10th Dist.1996). Here, we must give great deference to the finder of fact's decision on credibility. The trial court, as the finder of fact, was in the best position to determine whether Medrano's testimony was credible. The trial court found Medrano's testimony both persuasive and credible. We cannot find that the trial

court lost its way in determining that Medrano's testimony was credible despite the fact he was offered a deal from the state for his testimony.

**{¶ 16}** After reviewing the record, we find appellant's conduct was evidence that could have led the trier of fact to convict him of these offenses under a theory of complicity. Medrano testified that, on the day of appellant's arrest, he called appellant to inform him that he had the cocaine. Appellant knew the price and location of the drugs from prior deals. Appellant had $3,000 on his person and $64,000 in a lunch bag. Hernandez testified that the standard cost of one kilogram of cocaine was $32,000. The state also introduced the monitored phone calls between Medrano and appellant into evidence. Appellant asked during one phone call, "How many are you bringing me?" When Medrano informed appellant that he only had two, appellant stated he wanted more later. Appellant then drove to Medrano's apartment with the money. This is conduct that supported, assisted or encouraged Medrano in the commission of the crime.

**{¶ 17}** Appellant also argues that it was impossible for him to buy drugs from Medrano because there were no actual drugs in the apartment, and he could not have possessed drugs because he was arrested as soon as he walked through the apartment door. R.C. 2923.02(B) speaks to impossibility, providing that it is no defense that the commission of the offense that was the object of the attempt was either factually or legally impossible under the attendant circumstances, if the offense could have been committed had the attendant circumstances been as the actor believed them to be.

**{¶ 18}** The trial court could have reasonably found that there was sufficient evidence that appellant attempted to possess actual drugs. There was a history of appellant purchasing drugs from "the Mexicans." Hernandez also testified that he had delivered drugs to appellant three times before and there was never an occasion where Hernandez would have drugs for appellant and appellant would refuse to purchase them. Similarly, Medrano stated that, in his dealings with appellant, appellant never refused to purchase any of the cocaine he had to sell him. There was also evidence of the phone conversation between appellant and Medrano in which appellant said he was coming to pick up "two" of something on the day of his arrest. Medrano testified that this conversation was about appellant picking up two kilograms of cocaine.

**{¶ 19}** Based on R.C. 2923.02(B), appellant did not need to acquire real drugs to be found guilty of the offense. It is enough that appellant had cause to believe there were actual drugs in the apartment. Therefore, the fact that there were no drugs in the apartment, and police had wrapped radio batteries in tape to look like cocaine, is immaterial. While on this particular occasion law enforcement intervened in appellant's drug purchase, the testimony of Hernandez and Medrano regarding the history of appellant's purchases could be found credible. Therefore, appellant's argument is not persuasive. It was reasonable for the trial court to find that the $64,000 found in appellant's lunch bag was to buy two kilograms of cocaine costing $32,000 each.

**{¶ 20}** Appellant also argues that there was insufficient evidence to prove that he "knowingly" attempted to possess cocaine because there was no evidence that he ever had actual or constructive possession of the cocaine. The state was required to prove beyond a reasonable doubt that defendant knowingly attempted to possess drugs. "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." R.C. 2901.22(B). "A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B).

**{¶ 21}** Possession of a controlled substance may be actual or constructive. *State v. Mann*, 93 Ohio App.3d 301, 308 (8th Dist.1993). A person has actual possession of an item when it is within his immediate physical control. *State v. Messer*, 107 Ohio App.3d 51, 56 (9th Dist.1995). Constructive possession exists when a person knowingly exercises dominion and control over an object, even though the object may not be within the person's immediate physical possession. *State v. Hankerson*, 70 Ohio St.2d 87 (1982), syllabus. Circumstantial evidence alone is sufficient to support the element of constructive possession. *State v. Jenks*, 61 Ohio St.3d 259, 272 (1991). "Constructive possession can be inferred from a totality of the evidence where sufficient evidence, in addition to proximity, supports dominion or control over the contraband." *State v. Norman*, 10th Dist. No. 03AP-298, 2003-Ohio-7038, ¶ 31, citing *State v. Johnson*, 9th Dist. No. 14371 (July 11, 1990).

**{¶ 22}** In the present case, the evidence in the record is sufficient to prove that appellant attempted to exercise dominion and control over the drugs. The testimony of

the state's witnesses coupled with appellant's arrival at the apartment with $64,000 in a bag is legally sufficient to convict appellant. When appellant entered the apartment there were two packages in the shape and size of two kilograms of cocaine. These packages were clearly visible from the doorway. Medrano testified that appellant saw the packages on the table when he entered the apartment. Appellant walked in, closed the door behind him, and walked deeper into the apartment before police ordered him to the ground. Had appellant's attempts to buy the cocaine not been thwarted by law enforcement, appellant would have had actual possession. For these reasons, we do not find that the trial court's judgment was against the manifest weight of the evidence or based upon insufficient evidence. Therefore, appellant's first assignment of error is overruled.

**{¶ 23}** Appellant argues in his second assignment of error that the trial court erred in its sentencing of appellant. Appellant contends that the prosecutor committed misconduct by bringing up, during the sentencing hearing, that appellant, during his proffer, made certain statements to the prosecution. Appellant maintains that, in each proffer letter submitted by the prosecutor's office for signature by a defendant who is proffering, the standard language states that any information disclosed by a defendant will not be used against him in any criminal proceeding. Thus, the prosecutor's use of appellant's statements made in the proffer were in violation of the agreement.

**{¶ 24}** When portions of the transcript necessary for resolution of assigned errors are omitted from the record we have no choice but to presume the validity of the lower court's proceedings and affirm. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197 (1980); *see also Tyrrell v. Investment Assoc., Inc.*, 16 Ohio App.3d 47 (8th Dist.1984). In the absence of all the relevant evidence, a reviewing court must indulge the presumption of regularity of the proceedings and the validity of the judgment in the trial court. It is the appellant's responsibility to include all the evidence in the appellate record so that the claimed error is demonstrated to the reviewing court. *Bates & Springer, Inc. v. Stallworth*, 56 Ohio App.2d 223 (8th Dist.1978); *see also* App.R. 9(B).

**{¶ 25}** The only reference in the record regarding the proffer was from the prosecutor who said the state was prohibited from using the proffer at trial but not at sentencing. However, without the proffer we have no way of making a determination about whether the prosecutor improperly introduced the evidence at sentencing.

Therefore, we must presume the validity of the trial court's judgment. For these reasons, appellant's second assignment of error is overruled.

**{¶ 26}** Accordingly, appellant's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

BRYANT and TYACK, JJ., concur.

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