[Cite as *State v. Yakimicki*, 2013-Ohio-2663.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 12AP-894
v.	:	(C.P.C. No. 12CR-03-1250)
Jeffrey L. Yakimicki,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 25, 2013

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Yeura R. Venters, Public Defender, and *John W. Keeling*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Defendant-appellant, Jeffrey L. Yakimicki, appeals from the judgment of the Franklin County Court of Common Pleas, which convicted him of one count of aggravated possession of drugs. For the following reasons, we affirm.

I. BACKGROUND

{¶ 2} Appellant was indicted on one count of aggravated possession of drugs, a second-degree felony, in violation of R.C. 2925.11. The indictment alleged that appellant knowingly obtained, possessed or used methylenedioxymethamphetamine, a Schedule I drug commonly known as Ecstasy, in an amount equal to or greater than five times the

bulk amount but less than 50 times the bulk amount. Appellant pleaded not guilty to the charge and filed a motion to suppress evidence, including the Ecstasy, on grounds that police officers obtained it from an illegal search of appellant and his car. The trial court denied the motion to suppress. Appellant waived jury, and the case was tried to the bench. At trial, the prosecution presented the following evidence.

{¶ 3} Ohio State University Police Officers Jeremy Allen and Steven Cox were patrolling a parking lot before a concert with a band named Further, which consists of members of the Grateful Dead. While walking through the parking lot, Allen noticed appellant sitting in the driver's seat of a parked car holding a bag of marijuana. Appellant saw Allen and immediately shoved the bag underneath his seat.

{¶ 4} Allen approached the driver side of the car, while Cox approached the passenger side, which was occupied by an individual named Gregory Holtkamp. Allen told appellant that he saw him put marijuana under the driver's seat, and appellant "confirmed that." (Trial Tr. 20.) Allen instructed appellant to give him the marijuana and appellant complied. Allen next saw a pack of rolling papers in the center console of the car and ordered appellant out of the car. As appellant exited the car, both Allen and Cox noticed another bag of marijuana underneath the driver's seat.

{¶ 5} Allen was preparing to handcuff appellant when appellant put his hand in his right front pants pocket. Allen grabbed appellant's hand, at which point appellant told Allen that he had pills in his pocket and that the pills were breath mints. At Allen's instruction, appellant removed from his pocket 16 "crude tablets." (Trial Tr. 23.) Allen handcuffed appellant and read him his *Miranda* rights. Appellant told Allen that he was not sure whether the pills contained "Ecstasy, meth, or spice." (Trial Tr. 25.) "Spice" is a form of synthetic marijuana. (Trial Tr. 26.) Appellant told Allen that he met Holtkamp at the concert and that they did not know each other before then. Appellant said that he and Holtkamp were preparing to smoke marijuana when the officers approached the car. Appellant also stated that he bought the pills in his pocket while in the parking lot, but he could not remember from whom.

{¶ 6} As Allen was searching the car, he found in the center console another bag containing 107 pills like the ones in appellant's pocket. In the back of the car was a sealing device used to seal plastic bags. In the front of the car was a duffle bag containing digital scales, although appellant denied that the bag belonged to him.

{¶ 7} Appellant was taken to the police department where Officer Dustin Mowery conducted a field test on one of the pills. The test showed a presumptive positive for Ecstasy. Mowery and Allen informed appellant of the test result, and appellant, after initially reiterating his claim that the pills were "herbal breath mints" (Trial Tr. 107), eventually admitted that the pills were "rolls," which he said was the slang term for Ecstasy. (Trial Tr. 45.) Appellant further admitted that all the pills were his and that he bought them for $800. Appellant said that he was not selling the pills or marijuana found in the car. A subsequent lab test of the pills showed that all 123 were Ecstasy.

{¶ 8} Testifying in his own defense, appellant said that his wife, Tina, with whom he was separated by the time of trial, partied more than he did, and that although he was "relatively clean, except for the minor use of marijuana," he "started [experimenting] with drugs again" in order to "keep [his] marriage together." (Trial Tr. 128.) Smoking marijuana helped with neck pain from a work injury, and he preferred to use marijuana because prescription drugs left him "unable to take care of [his] child" when his wife was busy. (Trial Tr. 131.)

{¶ 9} Appellant additionally testified that he went to the Further concert with his wife and another couple, Damian and Dawn Surilla. Appellant noted that he owned the car they drove to the concert and that he brought $750 or $800 to the concert. Shortly after arriving at the concert, they smoked marijuana that they had bought in the parking lot. People at the concert were selling Ecstasy, but appellant did not want to buy the drug because he "didn't like the high [he] had gotten from" it and because of the "potential legal trouble it could cause." (Trial Tr. 131.)

{¶ 10} Appellant found someone selling "herbal legal substances." (Trial Tr. 132.) Appellant said that the vendor indicated that he had "herbal rolls" and "[a]ssured

[them] that they were not illegal." (Trial Tr. 132-33.) Appellant said that he and Damian followed the man behind his tent and bought $800 worth of pills, with appellant contributing $125 of that amount. Appellant and Damian returned to appellant's car where they split up the pills. Appellant put his portion of the pills in his pocket, and he thought Damian put his portion of the pills in his pocket or backpack.

{¶ 11} Appellant testified that, after Allen approached the car and confiscated the two bags of marijuana, he told the officer that the pills in his pocket were "herbal mints." (Trial Tr. 139.) Allen ordered appellant to sit on a nearby curb while he searched appellant's car. Appellant's wife and Damian and Dawn Surilla were in the concert, or were heading toward the concert, at the time. During the search, Allen found the remaining pills in the center console, and appellant told Allen that the pills were the same as those in his pocket.

{¶ 12} At the police station, the officers confronted appellant with the field test results showing that the pills were Ecstasy. Appellant told the officers that he had indeed bought all the pills, but testified that he made the admission only because the officers threatened to impound his car. Appellant admitted at trial that, 22 days before Allen arrested him, he was arrested in Indiana for possession of Ecstasy. Appellant told the officers in Indiana that he "went to a concert [the night before] and someone had left it in [his] car." (Trial Tr. 158.)

{¶ 13} The trial court found appellant guilty. In announcing its verdict, the trial court noted that the officers were more credible than appellant and found that appellant's claim that he did not know that the pills he purchased contained illegal substances was "implausible." (Trial Tr. 189.) Moreover, the trial court found that, in addition to actually possessing the pills found in appellant's pocket, appellant constructively possessed the pills found in the center console. The trial court sentenced appellant to two years imprisonment.

II. ASSIGNMENT OF ERROR

{¶ 14} Appellant filed a timely notice of appeal and assigns the following as error:

> [I.] The trial court erred when it entered judgment against the defendant for possessing more than five times the bulk

> amount, 123 pills, when the evidence was insufficient to sustain the conviction for this amount since it only established, beyond a reasonable doubt, that he possessed 16 pills.
>
> [II.] The conviction for aggravated possession of drugs was against the manifest weight of the evidence when the state failed to prove beyond a reasonable doubt that the defendant possessed more than five times the bulk amount of the contraband.

III. DISCUSSION

A. First Assignment of Error

{¶ 15} In his first assignment of error, appellant argues that his conviction for second-degree felony aggravated possession of drugs is based on insufficient evidence. We disagree.

{¶ 16} Sufficiency of the evidence is a legal standard that tests whether the evidence is legally adequate to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). Whether the evidence is legally sufficient to support a verdict is a question of law, not fact. *Id.* In determining whether the evidence is legally sufficient to support a verdict, " '[t]he 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.' " *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, ¶ 34, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. A verdict will not be disturbed unless, after viewing the evidence in a 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*, 90 Ohio St.3d 460, 484 (2001).

{¶ 17} In a sufficiency of the evidence inquiry, appellate courts do not assess whether the prosecution's evidence is to be believed, but, whether, if believed, does the evidence support the verdict. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 79-80 (concluding that the evaluation of witness credibility is not proper on a review for the sufficiency of evidence); *State v. Bankston*, 10th Dist. No. 08AP-668, 2009-

Ohio-754, ¶ 4, citing *State v. Woodward,* 10th Dist. No. 03AP-398, 2004-Ohio-4418, ¶ 16 (noting that "in a sufficiency of the evidence review, an appellate court does not engage in a determination of witness credibility; rather, it essentially assumes the state's witnesses testified truthfully and determines if that testimony satisfies each element of the crime").

{¶ 18} Appellant was convicted of one count of aggravated possession of drugs, in violation of R.C. 2925.11(A), which states that "[n]o person shall knowingly obtain, possess, or use a controlled substance." Pursuant to R.C. 2925.11(C)(1)(c), the conviction is a second-degree felony because he was determined to have possessed an amount of Ecstasy that "equals or exceeds five times the bulk amount but is less than fifty times the bulk amount." Pursuant to R.C. 2925.01(D)(1)(c), the bulk amount for Ecstasy is ten unit doses, and appellant was convicted of possessing 123 pills.

{¶ 19} On appeal, appellant does not dispute that he possessed the 16 pills found in his pocket. He instead contends that sufficient evidence does not establish that he constructively possessed the 107 pills found in the center console of his car. Consequently, he argues that this court should reduce his conviction to a third-degree felony, pursuant to R.C. 2925.11(C)(1)(b), which pertains to possession of more than the bulk amount of Ecstasy but less than five times the bulk amount.

{¶ 20} "Possess" 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 of a controlled substance may be actual or constructive. *State v. Williams*, 190 Ohio App.3d 645, 2010-Ohio-5259, ¶ 12 (10th Dist.). "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." *Id.*, citing *State v. Hankerson*, 70 Ohio St.2d 87 (1982), 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 can be convicted of possession.

State v. Miller, 10th Dist. No. 10AP-1017, 2011-Ohio-3600, ¶ 14. All that is required for constructive possession is some measure of dominion or control over the drugs in question, beyond mere access to them. *Id.* In other words, constructive possession can be inferred from a totality of the circumstances where sufficient evidence, in addition to proximity, supports dominion or control over the contraband. *State v. Barron*, 10th Dist. No. 09AP-458, 2009-Ohio-5785, ¶ 14.

{¶ 21} Appellant argues that this case is like *State v. Chandler*, 10th Dist. No. 94APA02-172 (Aug. 9, 1994), in which this court reversed a conviction for attempted drug abuse because we determined the state had presented insufficient evidence that the defendant possessed the drugs in question. We disagree. In *Chandler*, "[t]here was no evidence presented to establish that defendant was anything more than an observer of the [drug] activity." The police in that case observed four men, including Chandler, huddled around a trash can lid that had crack cocaine resting on it. Police also found a homemade crack pipe on the ground about two feet from the trash can lid. One of the four men (not Chandler) had put his left hand on the ground as soon as he saw police. All that Chandler did was look at the drugs in question, and, therefore, the record was devoid of any evidence establishing the defendant's exercise of dominion and control over the drugs.

{¶ 22} Here, sufficient evidence established that appellant was more than an observer and did have dominion and control over the Ecstasy found in the center console of his car such that he had constructive possession over them. Appellant not only admitted at trial that he brought a significant amount of money to the concert, but, also, according to the officers' testimony, appellant admitted to them that he bought the Ecstasy pills found in his pocket and in his car.

{¶ 23} Furthermore, a factfinder can "conclude that a defendant who exercises dominion and control over an automobile also exercises dominion and control over illegal drugs found in the automobile." *State v. Rampey*, 5th Dist. No. 2004 CA 00102, 2006-Ohio-1383, ¶ 37, citing *State v. Smith*, 162 Ohio App.3d 208, 2005-Ohio-3579, ¶ 23-28 (8th Dist.). Here, the evidence establishes that appellant exercised dominion

and control over the car containing the Ecstasy given that appellant admitted that the car belonged to him and police officers found him in the driver's seat. In addition, this court has held that the discovery of readily accessible drugs in close proximity to a person constitutes circumstantial evidence that the person was in constructive possession of the drugs. *State v. Banks*, 182 Ohio App.3d 276, 2009-Ohio-1892, ¶ 12 (10th Dist.). Here, appellant, and not Damian, was in close proximity of the drugs in the center console of his car. Therefore, reviewing the totality of the circumstances pursuant to *Barron*, we find the trial court properly concluded that appellant had dominion and control over the illegal drugs in the center console of the car.

{¶ 24} For all these reasons, we hold, construing the evidence in a light most favorable to the state, that appellant was in constructive possession of the 107 Ecstasy pills found in the center console of his car and, as appellant concedes, the 16 Ecstasy pills found in his pocket. Therefore, sufficient evidence supports appellant's conviction for second-degree felony aggravated possession of drugs. We overrule appellant's first assignment of error.

B. Second Assignment of Error

{¶ 25} In his second assignment of error, appellant argues that his conviction is against the manifest weight of the evidence. We disagree.

{¶ 26} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a "thirteenth juror." *In re C.S.*, 10th Dist. No. 11AP-667, 2012-Ohio-2988, ¶ 26. Under this standard of review, the appellate court weighs the evidence in order to determine whether 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. The appellate court must bear in mind the factfinder's superior, first-hand perspective in judging the demeanor and credibility of witnesses. *In re C.S.* at ¶ 26. The power to reverse on manifest-weight grounds should only be used in exceptional circumstances when " 'the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

{¶ 27} A defendant is not entitled to a reversal on manifest-weight grounds merely because inconsistent evidence was offered at trial. *In re C.S.* at ¶ 27. The trier of fact is free to believe or disbelieve any or all of the testimony presented. *Id.* The trier of fact is in the best position to take into account the inconsistencies in the evidence, as well as the demeanor and manner of the witnesses, and to determine which witnesses are more credible. *Id.* Consequently, although an appellate court must sit as a "thirteenth juror" when considering a manifest weight argument, it must also give great deference to the trier of fact's determination on the credibility of the witnesses. *Id.*

{¶ 28} To support his claim that his conviction is against the manifest weight of the evidence, appellant relies on the same arguments he raised to assert that his conviction is based on insufficient evidence. We reject those arguments here, for the same reasons we have already stated.

{¶ 29} Nor do we find that appellant's conviction is against the manifest weight of the evidence because his testimony differed from the prosecution's witnesses. " '[W]here a factual issue depends solely upon a determination of which witnesses to believe, that is the credibility of witnesses, a reviewing court will not, except upon extremely extraordinary circumstances, reverse a factual finding either as being against the manifest weight of the evidence or contrary to law.' " *In re L.J.*, 10th Dist. No. 11AP-495, 2012-Ohio-1414, ¶ 21, quoting *In re Johnson*, 10th Dist. No. 04AP-1136, 2005-Ohio-4389, ¶ 26.

{¶ 30} The trial court, as trier of fact, was in the best position to consider the evidence from both parties, as well as the demeanor and manner of the witnesses, and to determine which of those witnesses were more credible. The trial court accepted evidence proving that appellant committed second-degree felony aggravated drug possession, and we cannot say that this was one of the rare cases in which the trier of fact clearly lost its way such that a miscarriage of justice requiring reversal of appellant's conviction has occurred. Consequently, appellant's conviction is not against the manifest weight of the evidence, and we overrule appellant's second assignment of error.

IV. CONCLUSION

{¶ 31} Having overruled appellant's two assignments of error, the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

KLATT, P.J., and BROWN, J., concur.
