**[Cite as *State v. Edwards*, 2013-Ohio-3597.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| State of Ohio, | : | |
| Plaintiff-Appellee, | : | |
| | | No. 12AP-993 |
| v. | : | (C.P.C. No. 11CR-5247) |
| Tommy Edwards, | : | (REGULAR CALENDAR) |
| Defendant-Appellant. | : | |

D E C I S I O N

Rendered on August 20, 2013

*Ron O'Brien*, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

*Richard Cline & Co., LLC*, and *Richard A. Cline*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

**{¶ 1}** Defendant-appellant, Tommy Edwards ("appellant"), appeals from his convictions in the Franklin County Court of Common Pleas of illegal cultivation of marijuana and possession of marijuana. For the following reasons, we affirm.

**{¶ 2}** On August 14, 2011, acting on a tip, Officers Keith Abel and Marco Merino of the Columbus Police Department went to 220 Chatterly Lane, Columbus, Ohio, to investigate an alleged report of marijuana growing. Upon arrival, the officers saw a large plant growing on the porch at the front entrance. The plant was tied to and growing up a wooden trellis. The officers recognized the plant as marijuana. While the officers were contacting the narcotics division, appellant walked out of the house and asked the officers if he could help them. Officer Abel asked appellant what was growing on the porch, and appellant responded "[t]hat's weed man." (Tr. 125.) Forensic analysis later confirmed the plant was marijuana, weighing 628 grams.

**{¶ 3}** Officer Abel further testified that appellant told him he was watering the plant and taking care of it. However, he did not note this in the police report and, on cross-examination, Officer Abel testified that appellant only said that he was watering the plant and that it, therefore, occurred to the officer that appellant had been caring for the plant. He also testified that appellant identified the house as his mother's house and stated that he had resided there "about ten years." (Tr. 125.) Officer Merino testified only that appellant told them it was a "weed plant, man." (Tr. 141.) The officers did not interview appellant's mother and did not enter the house.

**{¶ 4}** On October 3, 2011, appellant was indicted on one count of illegal cultivation of marijuana, a felony of the fifth degree in violation of R.C. 2925.04, and one count of possession of marijuana, a felony of the fifth degree, in violation of R.C. 2925.11. On October 30, 2012, the case went to trial.

**{¶ 5}** At the close of the state's case at trial, appellant moved for acquittal pursuant to Crim. R. 29, arguing that there was insufficient evidence to convict him of cultivation or possession of marijuana. The trial court overruled the motion. The jury ultimately returned a verdict finding appellant guilty of both counts. By judgment entry filed November 15, 2012, the trial court sentenced appellant to six months in prison on each count, to be served concurrently with each other and concurrent to sentencing in case No. 10CR-2864.

**{¶ 6}** Appellant appealed his convictions and assigned the following two errors:

> [1.] The trial court erred in denying Defendant's Rule 29 motion for acquittal because insufficient evidence existed to show that Mr. Edwards had knowingly cultivated, or constructively possessed, the marijuana.
>
> [2.] The verdicts were against the manifest weight of the evidence.

**{¶ 7}** "Because a Crim.R. 29 motion questions the sufficiency of the evidence, '[w]e apply the same standard of review to Crim.R. 29 motions as we use in reviewing the sufficiency of the evidence.' " *State v. Walburg,* 10th Dist. No. 10AP-1087, 2011-Ohio-4762, ¶ 11, quoting *State v. Hernandez,* 10th Dist. No. 09AP-125, 2009-Ohio-5128, ¶ 6. "Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict." *State v. Cassell,* 10th Dist. No. 08AP–

1093, 2010-Ohio-1881, ¶ 36, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). In reviewing a challenge to the sufficiency of the evidence, an appellate court must determine "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. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus, superseded by constitutional amendment on other grounds as recognized in *State v. Smith*, 80 Ohio St.3d 89, 102 (1997).

**{¶ 8}** "While sufficiency of the evidence is a test of adequacy regarding whether the evidence is legally sufficient to support the verdict as a matter of law, the criminal manifest weight of the evidence standard addresses the evidence's effect of inducing belief." *Cassell* at ¶ 38, citing *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 25, citing *Thompkins* at 386. "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *Thompkins* at 387, citing *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). " 'The court, 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 jury 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*, 20 Ohio App.3d 172, 175 (1st Dist.1983). This discretionary authority " 'should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.' " *Id.*

**{¶ 9}** Regarding both the sufficiency and manifest weight of the evidence, appellant challenges (1) the jury's finding that appellant *knowingly* cultivated marijuana, and (2) the jury's finding that appellant *constructively* possessed marijuana.

**{¶ 10}** R.C. 2925.04(A) states: "No person shall knowingly cultivate marihuana or knowingly manufacture or otherwise engage in any part of the production of a controlled substance." R.C. 2925.01(F) states that *cultivate* includes "planting, watering, fertilizing, or tilling." "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. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B). When determining whether a defendant acted

knowingly, his state of mind must be determined from the totality of the circumstances surrounding the alleged crime. *State v. Ingram*, 10th Dist. No. 11AP-1124, 2012-Ohio-4075, ¶ 22, citing *State v. Hill*, 10th Dist. No. 09AP-398, 2010-Ohio-1687, ¶ 26, citing *State v. Inman*, 9th Dist. No. 03CA0099-M, 2004-Ohio-1420.

**{¶ 11}** Appellant concedes that "the state in this case presented direct evidence that Mr. Edwards had cultivated the marijuana plant, since he admitted having watered it somehow." (Appellant's Corrected Brief, 12.) Appellant challenges, however, the finding that he *knowingly* cultivated the plant. He argues that there was no direct evidence showing appellant's mental state at the time he cultivated the marijuana by watering it. He further argues that the officer's testimony that appellant admitted he was watering the plant was a mere paraphrase and that, because appellant was not actually watering the plant at the time he was conversing with the officers, the jury could not infer beyond a reasonable doubt what appellant actually meant without knowing exactly what he said.

**{¶ 12}** Culpable mental states are frequently demonstrated through circumstantial evidence. *Ingram*, citing *State v. Ramey*, 10th Dist. No. 11AP-485, 2012-Ohio-1015, ¶ 26, and *State v. Collins*, 89 Ohio St.3d 524, 530 (2000). In this case, the state presented both direct and circumstantial evidence which supports both the sufficiency and the weight of the evidence. In addition to Officer Abel's testimony that appellant admitted he watered the plant, the officers testified that he told them it was a "weed plant." Circumstantial evidence also supported the jury's finding, including the fact that appellant had lived at the house for more than ten years, and the plant was growing at the front entrance of the house. Circumstantial evidence possesses the same probative value as direct evidence, and it must be subjected to the same standard of proof. *Jenks*, paragraph one of the syllabus. Considering all of the evidence, we find there was sufficient evidence to deny the Crim.R. 29 motion. Furthermore, we cannot say that the jury lost its way in finding appellant guilty of knowingly cultivating marijuana in violation of R.C. 2925.04, as it was within the jury's province to determine what weight to give the officers' testimonies regarding appellant's admissions at the scene.

**{¶ 13}** R.C. 2925.11(A) states: "No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog." R.C. 2925.01(K) states that "possess" or "possession" 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."

**{¶ 14}** Possession of a controlled substance may be actual or constructive. *State v. Saunders*, 10th Dist. No. 06AP-1234, 2007-Ohio-4450, ¶ 10, citing *State v. Burnett*, 10th Dist. No. 02AP-863, 2003-Ohio-1787, ¶ 19, citing *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. *Saunders; State v. Norman*, 10th Dist. No. 03AP-298, 2003-Ohio-7038, ¶ 29; *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. Because the marijuana herein was not found on appellant's person, the state was required to prove that he constructively possessed it.

**{¶ 15}** Circumstantial evidence alone may be sufficient to support the element of constructive possession. *Jenks* at 272-73. Absent a defendant's admission, the sur-Erounding 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. Stanley*, 10th Dist. No. 06AP-323, 2007-Ohio-2786, ¶ 31; *Norman* at ¶ 31; *State v. Baker*, 10th Dist. No. 02AP-627, 2003-Ohio-633, ¶ 23. The mere presence of an individual in the vicinity of illegal drugs is insufficient to establish the element of possession but, 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. Pilgrim*, 184 Ohio App.3d 675, 691, 2009-Ohio-5357 (10th Dist.), ¶ 27-28, citing *Saunders* at ¶ 11, citing *State v. Wyche*, 10th Dist. No. 05AP-649, 2006-Ohio-1531, ¶ 18, and *State v. Chandler*, 10th Dist. No. 94APA02–172 (Aug. 9, 1994).

**{¶ 16}** Here, in considering whether there was sufficient evidence that appellant constructively possessed the marijuana plant, we consider the officers' testimonies that appellant admitted he was watering the plant and that it was a "weed plant." We consider as well the circumstantial evidence that appellant had lived at the house for more than ten years, and that the plant was growing at the front entrance of the house. Appellant was more than merely present in the vicinity of the plant. Considering all of the evidence, we find there was sufficient evidence to deny the Crim.R. 29 motion. Furthermore, we

cannot say that the jury lost its way in finding appellant guilty of constructively possessing marijuana in violation of R.C. 2925.11(A).

**{¶ 17}** Accordingly, we overrule both of appellant's assignments of error.

**{¶ 18}** For the foregoing reasons, appellant's assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

BROWN and CONNOR, JJ., concur.

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