[Cite as *State v. Barber*, 2015-Ohio-2653.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 14AP-557
v.	:	(C.P.C. No. 12CR08-4433)
Michael R. Barber,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 30, 2015

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

Todd W. Barstow, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Defendant-appellant, Michael R. Barber, appeals from a judgment of conviction entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm in part and reverse in part and remand the matter for resentencing.

I. Factual and Procedural Background

{¶ 2} On August 30, 2012, a Franklin County Grand Jury indicted appellant and a co-defendant, Kelly Rupe, with counts of possession of heroin and marijuana in violation of R.C. 2925.11.[1] Appellant entered a not guilty plea to the charges and proceeded to trial.

{¶ 3} After complaints were made about possible drug activity at an apartment building located at 500 South Westgate Avenue in Columbus, Ohio, a police investigation

[1] Those counts also contained firearm specifications pursuant to R.C. 2941.141. Appellant was also charged with a count of having a weapon while under disability in violation of R.C. 2923.13. The weapons under disability count and the firearm specifications were dismissed by the trial court during trial pursuant to Crim.R. 29. (Tr. 586.)

discovered evidence of possible drug trafficking at that address. Subsequently, the police obtained and executed a warrant to search 2 upstairs units in the building, labeled apartment A and apartment B. Among other things, police found 12 wrapped bricks of marijuana weighing more than 5,000 grams, a gun, a baggie containing 315 grams of heroin, scales, and miscellaneous pills in apartment A. In apartment B, they found $17,000 in cash, some heroin, a scale, a ledger sheet, and the tape used to wrap the bricks of marijuana.

{¶ 4} Rupe testified[2] that he was living in apartment A at the time of the search. Sometime before the search, appellant moved in with Rupe. Appellant and Rupe had known one another for a long time. Two or three months before the search, however, appellant moved to apartment B after they had a fight. Appellant was living in apartment B on the day of the search.

{¶ 5} According to Rupe, when appellant lived with him in apartment A, appellant began bringing heroin into the apartment. Appellant would cut the heroin, weigh it, and package it in baggies for sale. Rupe became involved in the drug transactions after appellant asked him to sell some heroin to someone. Rupe testified that he sold drugs for appellant between 50 and 100 times. He said that when people contacted appellant to purchase heroin, appellant would let Rupe know they were coming to his apartment and the quantity of drugs they wanted to buy. Rupe then took care of the transaction. (Tr. 319.) Rupe thought that by helping appellant out in this way, he would get appellant out of his apartment faster.

{¶ 6} With respect to the drugs found in his apartment pursuant to the search warrant, Rupe denied knowing how the drugs got there. However, he stated that appellant might have had keys to his apartment. Appellant's fingerprint was found on the baggie of heroin recovered from apartment A. Rupe also explained that appellant liked to keep his money separate from his drugs, which could account for why the drugs were found in Rupe's apartment and the money was found in appellant's apartment. Paperwork found in appellant's apartment appeared to be a ledger sheet which kept track of how much money people owed and the quantity of drugs they wanted. (Tr. 256.)

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[2] Rupe entered into a plea agreement with the state in which he agreed to testify truthfully against appellant. In exchange, Rupe pled guilty to two counts of possession of drugs and the state agreed to make no sentencing recommendation.

{¶ 7} Appellant presented one witness who testified that she bought a lot of heroin from Rupe in apartment A but never saw appellant or purchased heroin from him. In closing arguments, appellant's trial counsel argued that the drugs were Rupe's, not appellant's, and that it was Rupe who kept the money away from his drugs in apartment B. The jury rejected that argument and found appellant guilty of both drug possession counts and the trial court sentenced him accordingly.

II. The Appeal

{¶ 8} Appellant appeals his convictions and assigns the following errors:

> I. The trial court erred and deprived appellant of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article One Section Ten of the Ohio Constitution by finding him guilty of possession of heroin and marijuana as those verdicts were not supported by sufficient evidence and were also against the manifest weight of the evidence.
>
> II. The trial court erred to the prejudice of appellant by improperly sentencing him to consecutive terms of incarceration in contravention of Ohio's sentencing statutes.
>
> III. The trial court committed reversible error in denying appellant's request to represent himself.

{¶ 9} For analytical clarity, we first address appellant's third assignment of error.

A. Appellant's Third Assignment of Error

{¶ 10} In his third assignment of error, appellant contends that the trial court erred by not allowing appellant to represent himself. This argument is based on a false premise.

{¶ 11} At the beginning of trial, after plea negotiations between appellant and the state broke down, appellant decided that he wanted to represent himself because he had lost confidence in his trial counsel. The trial court informed appellant that he could do so, but warned him of the dangers of proceeding pro se. (Tr. 10.) The trial court also told appellant that he would not continue the trial date further because of the numerous prior continuances. Subsequently, the trial court asked appellant how he wanted to proceed. Appellant replied that he could not represent himself and he indicated that he wanted to proceed with trial counsel.

{¶ 12} Appellant now argues that the trial court erred by not allowing him to represent himself. We disagree. The trial court did not prevent appellant from representing himself. When his trial counsel brought appellant's request to the attention of the trial court, the trial court told appellant that "if you would like to represent yourself and move forward as a pro se litigant, you can do so. That's your own decision. All right?" (Tr. 10.) The trial court then repeatedly asked appellant to decide if he really wanted to represent himself and warned him that regardless of his decision, his trial was going to start today. When asked to make a final decision, appellant told the trial court "you know I can't represent myself. You know I don't know the law." (Tr. 18.) He then stated that he would keep his trial counsel.

{¶ 13} Because the trial court did not prevent appellant from representing himself, we overrule appellant's third assignment of error.

B. Appellant's First Assignment of Error

{¶ 14} Appellant contends in his first assignment of error that his convictions are not supported by sufficient evidence and are also against the manifest weight of the evidence. 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 convictions are supported by the manifest weight of the evidence. *State v. Gravely*, 188 Ohio App.3d 825, 2010-Ohio-3379, ¶ 46 (10th Dist.).

{¶ 15} 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. Thompkins*, 78 Ohio St.3d 380, 387 (1997). 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.* at 387. 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 *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983); *State v. Strider-Williams*, 10th Dist. No. 10AP-334, 2010-Ohio-6179, ¶ 12.

{¶ 16} In addressing a manifest weight of the evidence argument, we are able to consider the credibility of the witnesses. *State v. Cattledge*, 10th Dist. No. 10AP-105, 2010-Ohio-4953, ¶ 6. However, in conducting our review, we are guided by the presumption that the jury, or the trial court in a bench trial, " 'is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' " *Id.*, quoting *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984). Accordingly, we afford great deference to the jury's determination of witness credibility. *State v. Redman*, 10th Dist. No. 10AP-654, 2011-Ohio-1894, ¶ 26, citing *State v. Jennings*, 10th Dist. No. 09AP-70, 2009-Ohio-6840, ¶ 55. *See also State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus (credibility determinations are primarily for the trier of fact).

{¶ 17} Appellant was found guilty of two counts of possession of drugs. In order to convict appellant, the state was required to prove beyond a reasonable doubt that defendant knowingly possessed those drugs. R.C. 2925.11(A); *State v. Reed*, 10th Dist. No. 09AP-84, 2009-Ohio-6900, ¶ 17. In essence, appellant argues that the state failed to prove that the drugs were his. We disagree.

{¶ 18} 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. 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. The mere presence of an individual in the vicinity of illegal drugs is insufficient to establish constructive possession. *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).

{¶ 19} Because the drugs were not found on appellant's person, the state was required to prove that he constructively possessed them. Circumstantial evidence alone may be sufficient to support constructive possession. *Saunders* at ¶ 11, citing *Wyche* at ¶ 18. The surrounding facts and circumstances, including the defendant's actions, constitute evidence from which the trier of fact can infer that the defendant had constructive possession of 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.

{¶ 20} The jury heard two different versions of who had control of the drugs. The state presented evidence, both direct and circumstantial, indicating that the drugs were appellant's and that Rupe only helped appellant with the drug transactions. Specifically, Rupe testified that appellant arranged the drug sales and that Rupe only conducted the transactions for appellant. Rupe also denied knowing how the drugs came to be in his apartment but testified that appellant might have had a key to the apartment. Additionally, appellant's fingerprint was found on the baggie in apartment A that contained a large amount of heroin. Last, a large amount of cash and a ledger sheet were found in appellant's apartment, which supports the state's theory that appellant initiated the drug transactions. On the other hand, appellant argues that Rupe is not credible and that the drugs belonged to Rupe. In support, appellant notes that (1) most of the drugs were found in Rupe's apartment, not his; (2) his witness testified that she bought heroin from Rupe, not appellant; and (3) Rupe entered into a plea agreement wherein he pled guilty to one count of drug possession.

{¶ 21} Appellant's challenge to Rupe's credibility does not require us to reject Rupe's testimony as a matter of law. *State v. Peterson*, 10th Dist. No. 12AP-646, 2013-Ohio-1807, ¶ 15, citing *State v. Timmons*, 10th Dist. No. 04AP-840, 2005-Ohio-3991, ¶ 12. The jury was aware of the plea agreement that Rupe entered into and was in the best position to weigh that fact in determining his credibility. *State v. Hudson*, 10th Dist. No. 06AP-335, 2007-Ohio-3227, ¶ 17. Moreover, Rupe's guilty plea to one count of drug possession does not detract from appellant's constructive possession of the same drugs. *State v. Williams*, 4th Dist. No. 11CA3408, 2012-Ohio-4693, ¶ 38, citing *State v. Cooper*,

3d Dist. No. 9-06-49, 2007-Ohio-4937, ¶ 25 (both cases noting that two or more people may have joint constructive possession of a particular item).

{¶ 22} Given the conflicting testimony presented, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice. The jury simply believed the version of events presented by the state's witnesses and disbelieved appellant's version of events. This was within the province of the jury. *State v. Williams*, 10th Dist. No. 08AP-719, 2009-Ohio-3237, ¶ 19; *State v. Norman*, 10th Dist. No. 10AP-680, 2011-Ohio-2870, ¶ 12.

{¶ 23} Appellant's convictions are not against the manifest weight of the evidence. That conclusion also resolves his claim that his convictions were not supported by sufficient evidence. *Gravely*. Accordingly, we overrule his first assignment of error.

C. Appellant's Second Assignment of Error

{¶ 24} In his second assignment of error, appellant contends that the trial court erred when it imposed consecutive sentences without making the findings required by R.C. 2929.14(C)(4). We agree.

{¶ 25} The trial court ordered appellant's two prison sentences to be served consecutively. In order to impose consecutive sentences, a trial court must make findings required by R.C. 2929.14(C)(4). *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, ¶ 26. That statute requires:

> If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused

> by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶ 26} A word-for-word recitation of the language of the statute is not required. As long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld. *Id.* at ¶ 29.

{¶ 27} At appellant's sentencing hearing, the trial court made the following findings to support its imposition of consecutive sentences:

> As I indicated, based on the record here and based on [appellant]'s – it really is a hideous criminal record, and his conduct is – it's just criminal in nature. This is – this consecutive sentence will also serve to also keep the public safe, and it meets all the requirements as set forth in the Revised Code. Okay?
>
> So whatever – adopting all the other arguments made by the state, the court will find that the consecutive sentences here is necessary and warranted in this case.

(Tr. 687.)

{¶ 28} Because these comments relate to the findings required by R.C. 2929.14(C)(4), they can be read to address the appellant's history of criminal conduct as well as the need to protect the public from his conduct. The trial court completely omitted, however, any mention of the proportionality finding that is also required by the statute. *Bonnell* at ¶ 33-34 (reversing for resentencing where trial court made findings that could be interpreted to address the protection of the public as well as the history of criminal conduct findings but did not address proportionality finding). Nevertheless, the state argues that the trial court satisfied its obligation when it noted that a consecutive sentence "meets all the requirements as set forth in the Revised Code" and by adopting the arguments made by the state at the sentencing hearing. We disagree.

{¶ 29} The lone comment that consecutive sentences meet all the requirements of the revised code is insufficient for this court to discern whether the trial court engaged in

the required analysis–i.e. determining whether consecutive sentences were disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. *Bonnell* at ¶ 29. Additionally, a trial court must make its own findings. A trial court does not satisfy that obligation simply by incorporating or referencing other arguments or statements. *State v. Torres*, 11th Dist. No. 2001-Ohio-L-122, 2003-Ohio-1878, ¶ 19; *State v. Voisard*, 2d Dist. No. 20265, 2004-Ohio-4675, ¶ 15.

{¶ 30} The trial court failed to make the findings required to impose consecutive sentences pursuant to R.C. 2929.14(C). Accordingly, we sustain appellant's second assignment of error.

III. Conclusion

{¶ 31} We overrule appellant's first and third assignments of error but sustain his second assignment of error. Accordingly, we affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas and remand the matter for resentencing.

Judgment affirmed in part; reversed in part;
cause remanded for resentencing.

BROWN, P.J., and BRUNNER, J., concur.