

[Cite as *State v. Flores-Lopez*, 2017-Ohio-690.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO

Plaintiff-Appellee

V.

ELEAZAR FLORES-LOPEZ

Defendant-Appellant

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Appellate Case No. 27108

Trial Court Case No. 2014-CR-3487/1

(Criminal Appeal from
Common Pleas Court)

OPINION

Rendered on the 24th day of February, 2017.

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WELBAUM, J.

{¶ 1} In this case, Defendant-Appellant, Eleazar Flores-Lopez, appeals from his conviction and sentence on one count of Aggravated Possession of Drugs (100 times bulk or more), a first-degree felony.¹ After a jury trial, Eleazar was found guilty and was sentenced to 11 years in prison.

{¶ 2} In support of his appeal, Eleazar contends that the trial court erred in failing to grant his motion to suppress statements made during his police interrogation. Eleazar also contends that his conviction was based on insufficient evidence and, in a supplemental assignment of error, that his conviction was against the manifest weight of the evidence. After considering the record, we conclude that the assignments of error are without merit. Accordingly, the judgment of the trial court will be affirmed.

I. Facts and Course of Proceedings

{¶ 3} On October 8, 2014, Montgomery County Sheriff's Deputy, Joseph Caito, was on duty with his canine partner, Gunner, and was located on Interstate 75 near State Route 35 in Montgomery County, Ohio. Caito was not randomly patrolling; he had been told that Detective Walters, a narcotics investigator for Homeland Security, had received information that a white van from Indiana was going to be bringing illegal drugs into Montgomery County. Both Caito and Gunner were certified in narcotics patrol, including detection of narcotic drugs such as mushrooms, ecstasy, heroin, methamphetamine, and crack-cocaine.

¹ Because Appellant and his brother, Joel, were both involved in this crime and bear the same last names, we will use their first names, to avoid confusion.

{¶ 4} Caito sat on the highway until the van was picked up, and followed it from there. The vehicle was a white Chevrolet van, with an Indiana registration. Caito observed the van violating the space between vehicles, and initiated a traffic stop at around Edwin C. Moses Boulevard, once the vehicles had cleared a construction area.

{¶ 5} Once Caito stopped the vehicle, he contacted the occupants, informed them of the reason for stopping, and asked them for identifying documents or information to identify who they were. He learned that neither the driver (later identified as Joel Flores-Lopez) nor the passenger (Eleazar Flores-Lopez) had an issued driver's license.

{¶ 6} Caito's suspicions were aroused by the fact that the car was a "a third-party car," which means that a car is registered to one person but the owner is not in the vehicle. Another indicator was that the driver said the men were in the area looking for construction-type work. However, based on Caito's experience in highway patrol and seeing this type of activity in the county, he did not believe the men were in the area for that type of work because of the lack of tools in the vehicle. In addition, neither man had any identification.

{¶ 7} Caito called for backup, which arrived within five or six minutes, and then deployed Gunner for a free-air sniff. He began at the front driver's side of the vehicle, put Gunner in a sitting position, and gave Gunner the command to sniff the exterior of the car. Gunner alerted to the passenger's side rear door of the van.

{¶ 8} As soon as Caito opened the sliding rear door, he saw a small black carry-on style suitcase on the floorboard directly behind the front two seats, but in front of the two captains' chairs or middle occupant seats. The suitcase was within arm's reach of the driver and passenger, and would have been accessible from a seated position in

either the driver's or passenger's seat, without the need to get out of the seat.

{¶ 9} When Caito picked up the suitcase, the first thing he noticed was its weight. It seemed to be a little bit heavy for the size of the suitcase. Once Caito opened the suitcase, he saw that the top layer consisted of men's clothing. As Caito began to move the clothes back, he saw two large packages wrapped in duct tape. Based on his experience, Caito knew the content of the packages would be either drugs or illegal currency. Caito then took the suitcase back to the hood of his patrol car, removed the packages, and made sure there were no more packages.

{¶ 10} The clothing in the suitcase was sized similarly to the clothing worn by Eleazar (medium-size), and to the clothing worn by Joel (larger clothing). The items found in the suitcase included three extra-large shirts, a medium-sized shirt, a pair of jeans size 33 by 32, another pair of jeans sized 34, a large pair of underwear, a medium pair of underwear, and a towel. At the time of the stop, Eleazar was wearing a medium shirt and pants that were size 32 by 30. The drugs were contained in taped bundles that were wrapped up in the clothing and a towel.

{¶ 11} Caito also found two cell phones, a wallet containing \$639, two money orders in the amount of \$500 each that had not been cashed, and a Wells Fargo receipt indicating a \$2,000 deposit. Caito indicated that this type of evidence was typical for the narcotics world, as Wells-Fargo was a "go-to" bank for illegal drug sales deposits.

{¶ 12} Detective Walters searched the van after it was impounded. Among other things, he found a Walmart bag containing size medium cold-weather gloves, a medium sweatshirt with tags, and size medium-large sweatpants. The bag did not contain any underwear.

{¶ 13} Eleazar and his brother, Joel, were arrested and interviewed. Eleazar was interviewed by Brian Turk, a special agent for Homeland Security. Because Eleazar did not speak English, an employee of the Montgomery County Sheriff's office, Shelly Diaz, was brought in to interpret. Diaz was not a certified interpreter; she worked as a bookkeeper in the foreclosure department. However, she was fluent in Spanish and had been asked to translate in other cases.

{¶ 14} Turk advised Eleazar of his *Miranda* rights prior to the interview, but did not record the reading of the rights because the protocol for Homeland Security at the time was to not record interviews. However, Turk learned that this would likely be a state prosecution, and recorded the rest of the interview.

{¶ 15} During the interview, Eleazar stated that he had lived in Arizona for 14 years, and had arrived in Indianapolis where his brother, Joel, lived, about three days before the traffic stop. He claimed Joel had met a man named Edgar at Home Depot, and Edgar had offered them employment doing construction work in Dayton for a month. Although Eleazar did not know Edgar's last name, they had followed him from Indianapolis to Dayton. Edgar was driving a 2004 or 2005 red Ford Lobo F-150 pickup truck. During the drive, Edgar was guiding them by phone and telling them where to go.

{¶ 16} Eleazar further stated that on the morning of October 8, 2014, he and Joel met Edgar at Walmart, and left from there around 9:00 or 9:30 a.m. At Walmart, Edgar told them to take a backpack or suitcase in the back of their van. Edgar threw it in the back, and Eleazar then pushed it further inside the van. Eleazar told Turk that he did not ask what was in the suitcase and denied knowing it contained drugs until Officer Caito opened it.

{¶ 17} Matthew Fox, a forensic chemist from the Miami Valley Regional Crime Lab, tested the packages from the van for the presence of controlled substances. Fox, who was qualified as an expert, stated that he weighed the packages before testing. The gross weight of the sample, plus packaging, was 3,660 grams, plus or minus ten grams. Of this total amount, Fox tested one sample that was 444 grams plus or minus four grams. The bulk amount of methamphetamine in Ohio is 3 grams. Fox tested only the sample weighing 444 grams because that amount was over 100 times the bulk amount.

{¶ 18} Fox used three tests that are the generally accepted methods of testing drugs in the scientific community. These tests included a sodium nitroprusside color test, a marquis color test, and gas chromatography-mass spectrometry (“GCMS”) testing. The nitroprusside test checks for the presence of a compound called secondary aliphatic amines. If that compound is present, the test will obtain a blue reaction, which it did in this case.

{¶ 19} The second test was a marquis color test, which produces a variety of colors depending on various compounds that may be present. An orange reaction was produced, which is consistent with methamphetamine. Finally, Fox performed the GCMS test. In this test, a gas chromatograph separates out different compounds of a mixture. Mass spectrometry is then used to identify the compounds that are present. The GCMS test identified methamphetamine, which is a Schedule II drug.

{¶ 20} Fox did not test the remaining drugs, but checked each bundle and determined that the substances in the bags were consistent in nature with the bag that he tested. These substances did not differ in color, texture, or consistency from the tested drugs.

{¶ 21} On October 17, 2014, Eleazar and his brother, Joel, were indicted for one count of Possession of Drugs (Methamphetamine) in an amount equaling or exceeding 100 times the bulk amount, in violation of R.C. 2925.11(A). This count contained a specification that they were major drug offenders in that the offense involved a drug included in Schedule I or II, other than marijuana, that consisted of at least 100 times the bulk amount.

{¶ 22} Prior to trial, Eleazar filed motions to suppress, including a motion to suppress statements that he made during his interview. After hearing testimony from several witnesses, including Diaz, Caito, Turk, and Bill Hargis, an interpreter who had been certified by the Supreme Court of Ohio, the trial court overruled the motion to suppress.

{¶ 23} At the jury trial, Joel testified on behalf of his brother. Joel had already been convicted as charged, following a jury trial. *State v. Flores-Lopez*, 2d Dist. Montgomery No. 26964, 2016-Ohio-7687. Joel testified that he had met Edgar before Eleazar arrived in town, and Edgar told him then that he had possible construction work available in Dayton. Three days later, after Eleazar arrived, Joel again met with Edgar. Edgar said there would be enough work for a month, and they would make about \$200 per day each. Joel stressed that he was the one who made the deal with Edgar, not Eleazar.

{¶ 24} Joel also indicated that the suitcase belonged to Edgar, and that Edgar asked them to put it in their truck because his own truck was full. Because Joel was busy at the moment, Eleazar put the suitcase in the van. In addition, Joel denied knowing there were drugs in the suitcase.

{¶ 25} Joel stated that he had never been to Dayton before, and that Edgar told him that when they arrived, they were to find a store like Home Depot and Edgar would call them. Finally, Joel said he did not bring clothing with him, but had bought clothing, including underwear, gloves, and hats at Walmart.

{¶ 26} The jury found Eleazar guilty as charged, and the trial court sentenced him as noted above. Eleazar now appeals from his conviction and sentence.

II. Alleged Error in Denying the Motion to Suppress

{¶ 27} Eleazar's First Assignment of Error states that:

The Trial Court Erred by Failing to Grant Defendant Eleazar Flores-Lopez's ("Flores-Lopez") Motion to Suppress Statements Made in the Course of an Interrogation Using an Unqualified Interpreter.

{¶ 28} Under this assignment of error, Eleazar argues that the trial court should have granted his motion to suppress because he was not provided with a certified or qualified interpreter. After hearing the testimony at the hearing, the trial court overruled the motion to suppress. In particular, the court found the interpreter, Diaz, credible when she said she had advised Eleazar of his *Miranda* rights. As a result, the court concluded there was no violation of Eleazar's rights. The court further observed that a certified language interpreter need not be used in out-of-court-proceedings, and that while the expert witness criticized Diaz in some respects, the criticism did not rise to such a level that would cause Diaz's translation to be inadequate. The court did note that some of the statements might be inadmissible on a case-specific basis, and that the court would entertain a motion in limine in that regard. No such motion was filed, and no objections

were raised at trial to any specific statements.

{¶ 29} “Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses.” (Citation omitted.) *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. “Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. * * * Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.” (Citations omitted.) *Id.*

{¶ 30} After applying these standards, we conclude that the trial court did not err in denying the motion to suppress. Under the Fifth Amendment of the Constitution, no person can be compelled to testify against himself, and those who are accused have a right to the assistance of counsel. “In light of the inherent coercion involved in custodial interrogation, *Miranda* established ‘a set of prophylactic measures’ to safeguard the constitutional privilege against self-incrimination.” *State v. Barker*, Ohio Sup. Ct. Slip Opinion No. 2016-Ohio-2708, ¶ 22, quoting *J.D.B. v. North Carolina*, 564 U.S. 261, 269, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011), which in turn cites *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

{¶ 31} “In broad terms, *Miranda* held that the state may not use a defendant's statements from custodial interrogation ‘unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.’ ” *Barker* at ¶ 22, quoting *Miranda* at 444. “Prior to questioning, the police must warn the suspect ‘that he

has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.’ *Id.* The Supreme Court recognized the importance of a suspect’s ‘real understanding’ of his rights and his intelligent decision whether to exercise them.” *Barker* at ¶ 22, quoting *Miranda* at 469.

{¶ 32} In *Barker*, the court further observed that:

If custodial interrogation continues in the absence of an attorney after a police officer advises a suspect of his rights, the government bears “a heavy burden” to demonstrate by a preponderance of the evidence that the suspect “knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel” before speaking to the police. *Miranda* at 475, 86 S.Ct. 1602, citing *Escobedo v. Illinois*, 378 U.S. 478, 490, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), fn. 14 * * * . * * *

A court may not presume a valid waiver either from the suspect’s silence after warnings are given or from the fact that the suspect eventually confessed. *Miranda* at 475, 86 S.Ct. 1602. Rather, the record must show “ ‘that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.’ ” *Id.*, quoting *Carnley v. Cochran*, 369 U.S. 506, 516, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962). If the state does not satisfy its burden, “no evidence obtained as a result of interrogation can be used.” *Id.* at 479, 86 S.Ct. 1602.

(Citations omitted.) *Barker* at ¶ 23. Courts consider the totality of the circumstances in deciding if suspects have “knowingly, intelligently, and voluntarily waived” their *Miranda*

rights. (Citation omitted.) *Id.* at ¶ 24.

{¶ 33} In support of his argument that the motion to suppress should have been granted, Eleazar cites *State v. Ramirez*, 135 Ohio App.3d 89, 732 N.E.2d 1065 (11th Dist.1999). In *Ramirez*, the defendant's murder conviction was reversed, based on flaws in an interpreter's translation of the defendant's *Miranda* rights. Like Diaz, the interpreter in *Ramirez* was not certified, but had taken Spanish in college and had lived in Mexico for six months. *Id.* at 91. However, in contrast to the procedure used in the case before us, the police in *Ramirez* instructed the interpreter to read the defendant his *Miranda* rights using a *Miranda* card that was written in English. *Id.* While doing so, the interpreter made a number of significant errors and also failed to tell the defendant of certain rights that he had, including having an attorney present during questioning, and that if the defendant spoke to police, his statements could be used against him in court. *Id.* at 94.

{¶ 34} In contrast, the Montgomery County Sheriff's Office has a pre-interview form setting forth the waiver of rights in Spanish and containing a waiver of rights paragraph in Spanish. As the trial court noted, Diaz used this form when advising Eleazar of his rights. Decision and Entry Overruling Defendant's Motion to Suppress, Doc. #38, p. 4.

{¶ 35} Courts have also stressed that "[a] translation of a suspect's *Miranda* rights need not be perfect or verbatim if the suspect understands that he need not speak to the police, that any statement made may be used against him, that he has a right to an attorney, and that an attorney will be appointed if he cannot afford one." *State v. Ramirez-Garcia*, 141 Ohio App.3d 185, 188, 750 N.E.2d 634 (12th Dist. 2001), citing *Duckworth v. Eagan*, 492 U.S. 195, 210-215, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989).

(Other citations omitted.)

{¶ 36} The transcript of the suppression hearing indicates that Eleazar had twelve years of schooling, that he read each of the five *Miranda* rights from the pre-interview form, and that he read the waiver of rights paragraph. Eleazar had no difficulty reading the waiver of rights paragraph. In addition, Diaz used the pre-interview form written in Spanish when advising Eleazar of his rights. Eleazar agreed to speak with the police and signed the form waiving his rights. There was also no evidence of coercion or physical threats, nor was there any evidence that Eleazar was under the influence of drugs or alcohol. The totality of the circumstances indicate that Eleazar knowingly, voluntarily, and intelligently waived his *Miranda* rights.

{¶ 37} Regarding the content of the interview itself, Eleazar's expert criticized Diaz during the suppression hearing for having asked questions on her own that were not asked by the law enforcement official. The expert described this as demonstrating a lack of impartiality. In addition, the expert criticized Diaz for expressing opinions in some instances, for occasionally failing to interpret things that Eleazar said back into English, and for speaking at times about Eleazar in the third person. The trial court did not find a pattern or that this was done on a broad scale. However, the trial court did indicate that Eleazar could file a motion in limine to exclude particular statements, which Eleazar failed to do. Eleazar also failed to object at trial to any portion of Special Agent Turk's testimony about the interrogation. In particular, at trial, Turk recounted statements that Eleazar had made during the interrogation.

{¶ 38} To the extent that Eleazar's objection is based on the prejudicial or irrelevant nature of his statement to the police, the failure to object at trial waived all but

plain error. *State v. Jones*, 91 Ohio St.3d 335, 343, 744 N.E.2d 1163 (2001), citing *State v. Joseph*, 73 Ohio St.3d 450, 455, 653 N.E.2d 285 (1995). “ ‘Plain error does not exist unless, but for the error, the outcome at trial would have been different.’ ” *Id.* In this regard, our review of the record indicates no error, let alone plain error. Eleazar basically indicated that he and his brother were coming to Dayton at the request of Edgar, to do construction work, that the deal for the work was between Joel and Edgar, and that Eleazar did not know what was in the suitcase until Officer Caito opened the suitcase.

{¶ 39} Furthermore, even if the objection is to the alleged errors during the interrogation, the law does not require certified interpreters to be furnished during out-of-court proceedings. For example, R.C. 2311.14(A) requires only that courts appoint “qualified interpreters” for witnesses or parties *during legal proceedings*, where the party or witness “cannot readily understand or communicate * * *.” (Emphasis added.)

{¶ 40} Sup.R. 88(A) also requires appointment of foreign language interpreters in “*a case or court function* * * *.” (Emphasis added.) In this situation, Ohio Supreme Court certified foreign language interpreters are required, except where exceptions in Sup.R. 88(D)(2)-(4) apply. For example, certified foreign language interpreters are not required in certain court proceedings, including where such interpreters do not exist or are not reasonably available. Sup.R. 88(D)(1)-(2).

{¶ 41} Courts instead, may use provisionally qualified foreign language interpreters, or language-skilled foreign language interpreters to participate in-person in cases or court functions, or courts may, in some situations, use interpreters who participate through “through telephonic interpretation.” Sup.R. 88(D)(3)-(4).

{¶ 42} Notably, neither the statute nor the Superintendence Rule requires that

certified foreign language interpreters be used in out-of-court proceedings. Eleazar has provided no case law indicating otherwise, and we agree with the trial court that even though the translator was not perfect, there was no pattern of poor performance or any significant issue.

{¶ 43} Based on the preceding discussion, the First Assignment of Error is overruled.

III. Sufficiency of the Evidence and Manifest Weight Challenge

{¶ 44} Eleazar's Second and Third Assignments of Error are interrelated and will be considered together. Eleazar's Second Assignment of Error states that:

The Trial Court Erred in Overruling Flores-Lopez's Motion for Acquittal (Crim.R. 29) Where the State Failed to Prove Each Element of R.C. 2925.11.

{¶ 45} Eleazar's Third Assignment of Error states that:

Flores-Lopez's Conviction is Against the Manifest Weight of the Evidence.

{¶ 46} Under these assignments of error, Eleazar contends that his conviction was not supported by sufficient evidence and was also against the manifest weight of the evidence because the State failed to provide concrete evidence that he had knowledge of the contents of the suitcase. Eleazar also bases a manifest weight argument on discrepancies between the testimony of Detectives Walter and Caito concerning how many seats were in the van.

{¶ 47} "A sufficiency of the evidence argument disputes whether the State has

presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law.” *State v. Wilson*, 2d Dist. Montgomery No. 22581, 2009-Ohio-525, ¶ 10, citing *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). In this situation, we apply the test from *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), which states that:

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.

(Citation omitted). *Id.* at paragraph two of the syllabus.

{¶ 48} Contrastingly, “[a] weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive.” (Citation omitted.) *Wilson* at ¶ 12. In this situation, a court reviews “ ‘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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.’ ” *Thompkins*, 78 Ohio St.3d at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

Accord State v. Drummond, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶ 193. “The fact that the evidence is subject to different interpretations does not render the conviction against the manifest weight of the evidence.” *State v. Adams*, 2d Dist. Greene Nos. 2013-CA-61, 2013-CA-62, 2014-Ohio-3432, ¶ 24, citing *Wilson* at ¶ 14.

{¶ 49} “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.” (Citations omitted.) *State v. McCrary*, 10th Dist. Franklin No. 10AP-881, 2011-Ohio-3161, ¶ 11. *Accord State v. Robinson*, 2d Dist. Montgomery No. 26441, 2015-Ohio-1167, ¶ 17. As a result, “a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency.” (Citations omitted.) *State v. Braxton*, 10th Dist. Franklin No. 04AP-725, 2005-Ohio-2198, ¶ 15.

{¶ 50} As an additional matter, “[b]ecause the factfinder * * * has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness.” *State v. Lawson*, 2d Dist. Montgomery No. 16288, 1997 WL 476684, *4 (Aug. 22, 1997).

{¶ 51} “Contrastingly, the decision as to which of several competing inferences, suggested by the evidence in the record, should be preferred, is a matter in which an appellate judge is at least equally qualified, by reason and experience, to venture an

opinion.” *Id.* For this reason, “we defer more to decisions on what testimony should be credited, than we do to decisions on the logical force to be assigned to inferences suggested by evidence, no matter how persuasive the evidence may be.” *State v. Brooks*, 2d Dist. Montgomery No. 21531, 2007-Ohio-1029, ¶ 28, citing *Lawson* at *4.

{¶ 52} In the case before us, Eleazar was charged with Possession of Drugs (Methamphetamine), in violation of R.C. 2925.11(A). This subsection of the statute provides that “No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog.” At the time Eleazar was arrested, R.C. 2901.22(B) defined the culpable state of “knowingly” as follows:

A person acts knowingly, regardless of 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.²

{¶ 53} “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).³ “ ‘Possession of a drug may be either actual physical possession or constructive possession. A person has constructive possession of an item when he is conscious of the presence of the object and able to exercise dominion and

² R.C. 2901.22 was amended, effective March 23, 2015. See Am. S.B. 361, 2014 Ohio Laws File 194. This case was tried after the amendment. However, the trial court did not use the amended definition, which added a sentence to R.C. 2901.22(B). Instead, the court used the definition in effect at the time the alleged crime was committed. Transcript of Proceedings, Vol. III, p. 531.

³ R.C. 2925.01 was also amended after the alleged crime, but no change was made in the wording of R.C. 2925.01(K). See Am. Sub. S.B. No. 213, 2016 Ohio Laws File 92.

control over that item, even if it is not within his immediate physical possession.’ ” *State v. Dillard*, 173 Ohio App.3d 373, 2007-Ohio-5651, 878 N.E.2d 694, ¶ 53 (2d Dist.), quoting *State v. Mabry*, 2d Dist. Montgomery No. 21569, 2007-Ohio-1895, ¶ 18.

{¶ 54} Whether a person “knowingly possessed * * * a controlled substance is to be determined from all the attendant facts and circumstances available.” *State v. Teamer*, 82 Ohio St.3d 490, 492, 696 N.E.2d 1049 (1998). Moreover, “[c]ircumstantial evidence and direct evidence inherently possess the same probative value * * *.” *Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492, at paragraph one of the syllabus.

{¶ 55} In view of the preceding discussion, the State did not have to provide direct (or “concrete”) evidence of Eleazar’s knowledge or possession; the conviction could rest on circumstantial evidence. In *State v. Ruby*, 149 Ohio App.3d 541, 2002-Ohio-5381, 778 N.E.2d 101 (2d Dist.), we held that a reasonable trier of fact could conclude that the defendant constructively possessed drugs, where the defendant had loaned his wife’s vehicle to others in the past, including known drug dealers, and his wife had previously removed drug paraphernalia from the vehicle. When the defendant was stopped by the police, the facts indicated that the defendant had loaned his vehicle to a known drug dealer earlier that day. The dealer was also in the car with the defendant. A crack pipe and piece of crack cocaine were recovered from the floor of the rear passenger compartment, behind the driver’s seat. *Id.* at ¶ 42-43.

{¶ 56} In addition, we concluded in *Ruby* that the conviction was not against the manifest weight of the evidence. In this regard, we rejected the defendant’s argument that he did not know contraband was in the vehicle and that it had been placed there by the drug dealer. *Id.* at ¶ 44. Again, we relied on circumstantial evidence. *Id.* at ¶ 36.

{¶ 57} In the case before us, the suitcase containing the drugs was located in close proximity to Eleazar's seat. The suitcase also contained clothing that was consistent with the two different clothing sizes worn by Eleazar and his brother. In addition, we note that Eleazar moved the suitcase closer to the front of the vehicle after it was placed in the van by Edgar. Officer Caito observed that the suitcase was heavier than one would expect if it only contained clothing. Again, while this evidence is circumstantial, direct evidence of Eleazar's knowledge need not be provided.

{¶ 58} As a further matter, Joel's testimony failed to aid Eleazar. Although Joel testified that he was the one who made the deal for work with Edgar, Joel also testified that he did not bring any clothing with him and had purchased underwear at Walmart. However, no underwear was found in the Walmart bag; instead, the bag contained only gloves, a sweatshirt, and sweatpants. The fact that no underwear was found in the bag casts doubt on Joel's credibility. We also stress that a pair of men's medium underwear (a size that would fit Eleazar) was found in the suitcase, along with a pair that would have fit Joel. It is difficult to believe that people would travel to a city where they intended to work for a month, without bringing a change of underwear.

{¶ 59} Eleazar also said in his statement that Edgar was traveling alone. While it is possible that Edgar packed two different sizes of men's underwear and clothing for himself, it is an unlikely coincidence that the clothing in the suitcase was also consistent with the sizes worn by Eleazar and Joel.

{¶ 60} Eleazar's final argument is that the judgment was against the manifest weight due to discrepancies between the testimony of Officer Caito and Detective Walters about the presence of a middle row of captains' chairs in the vehicle. According to Caito,

the suitcase with the drugs was on the floorboard directly behind the two front seats and in front of two captains' chairs, or middle occupant seats. Transcript of Proceedings, Vol. II, p. 286.

{¶ 61} In contrast, Detective Walters testified that when he searched the van on September 15, 2015, there were only two seats inside the vehicle. Transcript of Proceedings, Vol. I, p. 219, referencing State's Ex. 5. Officer Caito looked at the same photograph and stated that the only difference between the way the van looked on the day of the stop and in Ex. 5 was that the suitcase in Ex. 5 was not located where he initially found it. Transcript of Proceedings, Vol. II, p. 295. At that latter point, the suitcase was in the back of the van, in front of a spare tire. *Id.* at 296. The following exchange then occurred:

Q. Okay. And then could you describe where you located the suitcase when you conducted the search of the vehicle?

A. Yes, the two chairs that you're seeing in the middle of the car there are what's called "captains' chairs." Those are rear occupant seats. Directly in front of those, on the floorboard, is where the suitcase was initially located, which would basically be between the middle occupant seats and the backs of the front driver and passenger seats.

Id. at p. 296, referring to State's Ex. 5.

{¶ 62} Officer Caito was emphatic about what he originally saw and where the suitcase was located on the day of the traffic stop. He also stated that there were four seats in the van as shown on Exhibit 5, and that if anyone said there were two seats, that person would be wrong. *Id.* at p. 313. In contrast, Detective Walters was not present

at the time of the stop and only viewed the suitcase and van nearly a year later, when he conducted a search. His testimony was also not detailed and was somewhat ambiguous.

{¶ 63} “In either a criminal or civil case the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.” *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967). “A jury, as finder of fact, may believe all, part, or none of a witness's testimony.” (Citations omitted.) *State v. Jackson*, 8th Dist. Cuyahoga No. 93235, 2010-Ohio-3716, ¶ 16. See also *State v. Howard*, 11th Dist. Lake No. 2009-L-158, 2010-Ohio-2817, ¶ 33 (noting that even if testimony of two officers is inconsistent, a trier of fact is entitled to decide credibility and believe all, part, or none of a witness's testimony).

{¶ 64} As a final matter, whether there were captains' chairs or not is irrelevant. Specifically, Joel testified that the suitcase was located where both he and Eleazar could reach back and touch it. Transcript of Proceedings, Vol. II, pp. 458-459.

{¶ 65} Based on the preceding discussion, the trial court did not err in denying Eleazar's Crim.R. 29 motion for acquittal, as the State presented sufficient evidence to sustain a conviction for the offense charged. In addition, the conviction was also not against the manifest weight of the evidence. Accordingly, the Second and Third Assignments of Error are overruled.

IV. Conclusion

{¶ 66} All of Appellant's assignments of error having been overruled, the judgment of the trial court is affirmed.

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DONOVAN, J. and FROELICH, J., concur.

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