**[Cite as *State v. Zaragoza*, 2017-Ohio-7944.]**

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

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| STATE OF OHIO | : | |
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| *Plaintiff-Appellee* | : | Appellate Case No. 27290 |
| | : | |
| v. | : | Trial Court Case No. 2014-CR-493/1 |
| | : | |
| SAUL ALVERAZ ZARAGOZA | : | (Criminal Appeal from |
| | : | Common Pleas Court) |
| *Defendant-Appellant* | : | |
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O P I N I O N

Rendered on the 29th day of September, 2017.

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TUCKER, J.

**{¶ 1}** Defendant-appellant, Saul Alveraz Zaragoza, appeals from his conviction for one count of possession of more than 40,000 grams of marijuana, a second degree felony under R.C. 2925.11(A) and (C)(3)(g). His appeal includes challenges to the trial court's decision of July 1, 2014, overruling the motion to suppress he filed on March 5, 2014; as well as the court's decision of November 10, 2014, overruling the supplemental motion to suppress he filed on October 17, 2014. Raising three assignments of error, he argues that he did not receive a fair trial as the result of inadequate translation; that the trial court erred by overruling his motions to suppress because racial bias prompted the underlying investigation by law enforcement officers; and that the jury's verdict was not supported by sufficient evidence, or alternatively, that his conviction was against the manifest weight of the evidence. The State argues that the trial record includes no evidence of any significant errors made by the interpreter; that law enforcement officers were not motivated by racial bias; and that the jury had sufficient evidence to support a finding of guilt. We find that Appellant's arguments lack merit, and therefore, we affirm.

## I. Facts and Procedural History

**{¶ 2}** On February 7, 2014, law enforcement officers attached to the Bulk Smuggling Task Force (the "Task Force") conducted surveillance at several locations on Miller Lane in Dayton, an area associated with traffic in illicit drugs. Tr. of Proceedings vol. I, 13-14, May 23 & Oct. 22, 2014 [hereinafter *Tr. vol. I*]; Tr. of Proceedings vol. III 388-389, Sept. 20, 2016 [hereinafter *Tr. vol. III*]. The surveillance included the Americas Best Value Inn at 7130 Miller Lane, where a vehicle with a temporary Indiana license plate attracted officers' interest. Tr. vol. I 125; Tr. vol. III 390. After checking the vehicle's

registration number, Task Force officers found that the vehicle's owner of record was an auto dealership in Indiana;[1] continued observation and an examination of the inn's guest registry revealed that the vehicle was in the possession of Joseph Feliciano Mejias ("Feliciano"), who held a California driver's license. *Id.* at 125-130 and 181; Tr. vol. III 391-392. A search of the National Crime Information Center database indicated that Feliciano had a criminal record, including a narcotics-related arrest in Florida. Tr. vol. I 130; Tr. vol. III 392-393.

**{¶ 3}** When Feliciano left the inn, accompanied by another man, Task Force officers followed in unmarked vehicles. *Id.* at 131; Tr. vol. III 397. They noticed that Feliciano took measures to avoid being followed, such as "pulling quickly in and out of * * * parking lots, driving erratically, [and] making u-turns," which heightened the officers' suspicions. Tr. vol. I 131. Feliciano eventually travelled to a residence on Runyon Avenue in Trotwood, after making a number of stops en route. *Id.* at 132; Tr. vol. III 394-396.

**{¶ 4}** There, Task Force officers saw another vehicle, parked in the driveway, bearing a Washington license plate. Tr. vol. I 135-136; Tr. vol. III 397-398. According to that vehicle's registration information, its owner was "Saul Alvarez," and the National Crime Information Center reported an arrest warrant from Florida for Saul Jimenez Alvarez in connection with a narcotics-related offense. Tr. vol. I 25, 67 and 136-137. Although Appellant owned the vehicle, the officers learned later that the subject identified in the arrest warrant from Florida was another man with a coincidentally similar name and

[1] In his testimony at Appellant's trial, one of the Task Force officers suggested that this would be typical for a recently purchased vehicle. Tr. vol. III 391.

date of birth.[2] *Id.* at 135-143; Tr. vol. III 397-398 and 408.

**{¶ 5}** Feliciano, and the man who had accompanied him from the Americas Best Value Inn, departed from the Runyon Avenue residence approximately 15 minutes after they arrived, with Task Force officers following. Tr. vol. I 134; Tr. vol. III 397. Subsequently, a Montgomery County sheriff's deputy in a marked cruiser stopped Feliciano for a traffic violation. Tr. vol. III 399. The Task Force officers monitored the stop from a distance and heard by radio that the deputy found a "large amount of currency" on Feliciano's person—roughly $5,000.00. Tr. vol. I 134-135 and 191; Tr. vol. III 399. At that point, the officers decided to return to Runyon Avenue for further investigation. Tr. vol. III 399. Three members of the Task Force wearing tactical vests, a representative of the Montgomery County Sheriff's Office, and a uniformed Trotwood Police Department officer initiated a consensual encounter by knocking on the side-door of the residence—a type of encounter referred to as a "knock-and-talk." Tr. vol. I 20-23 and 49; Tr. vol. III 399-400.

**{¶ 6}** Appellant opened the door in response, and when he did so, the officers were greeted with the "pungent odor of raw marijuana." Tr. vol. I 24; *see also* Tr. vol. III 401-402. The side-door opened into the kitchen, and Appellant allowed the officers to enter. Tr. vol. III 401-403, 412-413 and 500-501; Tr. of Proceedings vol. IV 713, Sept. 22-23 & Oct. 5, 2016 [hereinafter *Tr. vol. IV*]; Decision, Order and Entry Overruling Defs.' Mots. to Suppress 8-9, July 1, 2014 [hereinafter *Decision on Mot. to Suppress*].[3] As they stepped

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[2] Appellant's date of birth is May 6, 1982; Saul Jimenez Alvarez's date of birth is May 6, 1985. Tr. vol. I 138-139.

[3] The court also ruled on the motions to suppress filed by Appellant's co-defendants in its decision.

inside, the officers smelled air freshener. Tr. vol. I 24-25; Tr. vol. III 402. A second man in the house, Teodulo Corona Cervantes ("Corona"), joined them in the kitchen shortly afterward. Tr. vol. III 403-404 and 500-501.

**{¶ 7}** One of the officers glanced into the living room and saw blankets on the floor but no furniture. *Id.* at 402. The officer then asked Appellant how many occupants were in the house, and Appellant answered that he and Corona were the only two. *Id.* at 403-404. Nevertheless, at almost the same time, officers heard a noise from the back of the house that they believed might be a third occupant. *Id.* at 404 and 502. Two officers looked out of the kitchen into the adjacent corridor, and as they did so, they saw a man—identified later as Martin Diaz Alvarez ("Diaz")—run out of a bedroom, across the corridor and into the bathroom. *Id.* at 503. After the officers sequestered Diaz in the living room, they performed a protective sweep of the house. *Id.* at 505.

**{¶ 8}** Having quickly obtained a search warrant, Task Force officers undertook a full search of the house. Tr. vol. I 177-178; Tr. vol. III 506-507. Among other things, they discovered 503 pounds of marijuana, Appellant's cellular telephone, and Appellant's wallet, which contained California and Washington-issued identification in Appellant's name. Tr. vol. III 506-530 and 548.

**{¶ 9}** Appellant's instant conviction followed his third trial, the previous two having ended in mistrials.[4] Appellant's Br. 5-6; Appellee's Br. 1. In advance of his first trial, Appellant filed a motion to suppress all evidence obtained as a result of the search and seizure of the house on Runyon Avenue, and shortly after the trial's conclusion, he filed a supplemental motion to suppress directed specifically to evidence obtained from a

[4] Appellant's two co-defendants each pleaded guilty to one count of possession.

forensic search of his cellular telephone. The trial court overruled these motions in decisions dated July 1, 2014 and November 10, 2014. Appellant's third trial began on September 19, 2016, and after the jury found him guilty, he appeared for sentencing on October 5, 2016.

## II. Analysis

**{¶ 10}** Assignment of Error Number One:

> MIR. [sic] ALVAREZ'S CONSTITUTIONAL RIGHTS, INCLUDING HIS RIGHT TO A FAIR TRIAL, WERE VIOLATED BECAUSE HE WAS DEPRIVED OF ADEQUATE AND ACCURATE TRANSLATION DURING HIS TRIAL[.]

**{¶ 11}** In his first assignment of error, Appellant argues that his "trial was inundated with [translation] errors and mis-communication [sic] which affected [his] ability to communicate, testify or defend against the evidence," such that he "was essentially excluded from the proceedings." Appellant's Br. 8. He insists that these "issues with the [interpreter] permeated [his] trial," while acknowledging that "the severity of the [alleged] errors in the translation are not fully developed or recognized" in the trial record. *Id.* at 10; Appellant's Reply Br. 1. Because Appellant offered no objection to the translation at his trial, our review under this assignment of error is only for plain error. *See State v. Jones*, 2015-Ohio-4116, 43 N.E.3d 833, ¶ 112-113 (2d Dist.); *see also* Tr. vol. IV 774-776.

**{¶ 12}** A defendant in "a criminal case * * * is entitled to hear the proceedings in a language that he can understand." (Citation omitted.) *State v. Al-Mosawi*, 2d Dist. Montgomery No. 24633, 2012-Ohio-3385, ¶ 8. To this end, R.C. 2311.14(A)(1) states

that a "court shall appoint a qualified interpreter" to assist a party to a legal proceeding "who cannot readily understand or communicate" because "of a hearing, speech, or other impairment."[5] Although interpreters may not "interject their own conclusions as to [a witness's remarks]," trial courts otherwise "enjoy 'considerable latitude' in determining the manner in which translation[s] will be conducted." *State v. Patel*, 9th Dist. Summit No. 24024, 2008-Ohio-4692, ¶ 47, quoting *State v. Lopez*, 6th Dist. Ottawa No. OT-05-059, 2007-Ohio-202, ¶ 11. A trial court has "the discretion to determine whether a satisfactory translation" has been provided. *See State v. Pina*, 49 Ohio App.2d 394, 398-399, 361 N.E.2d 262 (2d Dist.1975).

**{¶ 13}** The record of Appellant's trial includes little evidence of any significant translation difficulties, which Appellant concedes in his reply brief.[6] Appellant's Reply Br. 1; *see* Tr. vol. IV 718 and 726-727. During Appellant's testimony, the trial court made an isolated statement that it was "very uncomfortable" with the translation provided by the interpreter, but the court appears to have been referring to a specific line of questioning that it deemed leading. *See* Tr. vol. IV 716-718. At the end of the trial, however, the court informed the jury that there had been "one little slip up" concerning the model-year of Appellant's car; it told jurors that "the car in question was a 2003 Nissan Murano," rather than a 2013 Nissan Murano, and added that "everything else was fine." *Id.* at 774-776.

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[5] Among those who have "a hearing, speech, or other impairment," the legislature includes "person[s] who speak[] a language other than English." R.C. 2311.14(A)(2).

[6] The interpreter periodically requested clarification and asked the parties to repeat themselves or to speak slowly. *See e.g.* Tr. vol. III 594-595; Tr. vol. IV 702-703, 722, 740 and 770.

**{¶ 14}** As Appellant acknowledges in his reply brief, the trial court is presently in the best position to review the accuracy of the translation provided throughout Appellant's trial because his pending petition for post-conviction relief will allow him to supplement the record with an expert evaluation. On the record of this case as it stands, Appellant's first assignment of error is overruled.

**{¶ 15}** Assignment of Error Number Two:

> THE TRIAL COURT ERRED IN OVERRULING ALVAREZ'S MOTION TO SUPPRESS BECAUSE THE INITIAL ENCOUNTER WITH LAW ENFORCEMENT WAS RACIALLY MOTIVATED AND COERCIVE, RENDERING IT A NON-CONSENSUAL ENCOUNTER[.]

**{¶ 16}** In this assignment of error, Appellant faults the trial court's decision overruling his motion to suppress for four reasons.[7] First, he contends that he has standing to challenge the search of the house on Runyon Avenue because Task Force officers found evidence that he was an overnight guest there. Appellant's Br. 17-18. Second, he contends that his inability to speak English, and the presence of a group of armed law enforcement officers, rendered the knock-and-talk coercive. *Id.* at 13-14. Third, he argues that Task Force officers improperly relied on racial profiling in conducting the investigation that led to the knock-and-talk, and fourth, he denies that he consented to the officers' entry into the house. *Id.* at 14-16.

**{¶ 17}** Appellate "review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. As the trier of fact, a trial court "is in the best position to weigh * * * evidence * * * and

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[7] *See supra* note 3.

evaluate [the credibility of] witness[es]," so an "appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence." *Id.*, citing *State v. Fanning*, 1 Ohio St.3d 19, 437 N.E.2d 583 (1982); *State v. Graves*, 12th Dist. Clermont No. CA2015-03-022, 2015-Ohio-3936, ¶ 9, citing *State v. Cruz*, 12th Dist. Preble No. CA2013-10-008, 2014-Ohio-4280, ¶ 12. Accepting the trial court's findings of fact as true, "the appellate court must then independently determine, without deference to the [trial court's legal] conclusion[s]," whether the "facts satisfy the applicable * * * standard." *Burnside*, 2003-Ohio-5372, ¶ 8, citing *Fanning*, 1 Ohio St.3d 19, and *State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539 (3d Dist.1997).

**{¶ 18}** The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. *See e.g. Terry v. Ohio*, 392 U.S. 1, 8, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Warrantless searches and seizures violate this prohibition unless conducted pursuant to one of the "few specifically established and well-delineated exceptions." (Citations omitted.) *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Here, the relevant exception is "a search [of a home] conducted with [a] resident's voluntary consent."[8] (Citations omitted.) *State v. Thomas*, 2d Dist. Montgomery No. 26907, 2017-Ohio-5501, ¶ 20.

**{¶ 19}** Overruling Appellant's motion to suppress, the trial court found that Appellant lacks standing to challenge the search of the Runyon Avenue residence because he did not demonstrate either that the owner of the residence had given him permission to be there, or that he had any property interest in the premises. Decision on

[8] Task Force officers obtained a search warrant before conducting a full search, but by that time, they had already entered the residence and performed a protective sweep of the interior. *See supra* § I.

Mot. to Suppress 6-7. Appellant argues "the evidence belie[s] that conclusion" because he told a Task Force officer that he was an overnight guest, and because there "w[as] circumstantial evidence [to] support" his statement to the officer, "including pillows and blankets in the living room," his luggage, and signs that "the kitchen was used." Appellant's Br. 18.

**{¶ 20}** Fourth Amendment privacy rights "are 'personal rights [that] may not be vicariously asserted.' " *Graves*, 2015-Ohio-3936, ¶ 9, quoting *Rakas v. Illinois*, 439 U.S. 128, 133, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). Hence, a "person who alleges error [in] the use of evidence taken from [another's home] cannot claim that his own [Fourth Amendment] rights have been violated." *State v. Coleman*, 45 Ohio St.3d 298, 306, 544 N.E.2d 622 (1989). A person contesting the "legality of a [search and seizure of this kind] bears the burden of proving that he ha[d] a legitimate expectation of privacy in the place searched * * *." *Thomas*, 2017-Ohio-5501, ¶ 21, citing *Minnesota v. Carter*, 525 U.S. 83, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998). Although an "overnight guest in a home" has a legitimate expectation of privacy while on the premises, a guest "who is merely present [for a relatively short interval] with the consent of the householder" lacks such an expectation. *See Carter*, 525 U.S. at 90. Likewise, "those who inhabit a residence wrongfully [have no] legitimate expectation of privacy in the property." *United States v. Whitehead*, 415 F.3d 583, 587 (6th Cir.2005), citing *United States v. McRae*, 156 F.3d 708, 711 (6th Cir.1998).

**{¶ 21}** We concur with the trial court's holding that Appellant lacks standing to challenge the search. The evidence to which Appellant refers certainly suggests that he was physically present on the premises, but it fails to establish that he had been invited

or granted permission to be there as an overnight guest—or to be there at all—by the owner or lessee. By contrast, at the hearing on Appellant's motion to suppress, the State introduced evidence indicating that the owner did not know or recognize Appellant and had not rented the house to him or to any of his co-defendants. Tr. vol. I 37-38 and 63-65; Decision on Mot. to Suppress 6-7; *see also* Tr. vol. III 548. Appellant has therefore failed to meet his burden to prove that he had a legitimate expectation of privacy while at the Runyon Avenue residence, meaning that he lacks standing to claim that his Fourth Amendment rights were violated by the search of the house and the resulting seizure of evidence. *Coleman*, 45 Ohio St.3d at 306.

**{¶ 22}** Assuming for sake of analysis that Appellant did have standing, we would also concur with the trial court's holding that the search and seizure were valid under the Fourth Amendment. Decision on Mot. to Suppress 7-10. Because Appellant is primarily a Spanish-speaker, a Task Force officer used gestures as well as words to request permission to enter the house, and Appellant later proved able to respond to questions by answering "yes" or "no" in English. Tr. vol. I 26, 42-44, 76 and 159; Tr. vol. IV 705; Appellant's Br. 4. Appellant testified that he knew that law enforcement officers were knocking before he opened the door and that, instead of attempting to flee or hide, he voluntarily opened the door and allowed them to enter. *See* Tr. vol. IV 712-713. And despite his relative inability to speak English, Appellant's characterization of his interaction with the officers does not suggest that he felt coerced to open the door or to talk with them. *See id.* at 712-713 and 742-743.

**{¶ 23}** Similarly, the presence of a group of officers during the knock-and-talk, as opposed to a single officer, did not of itself render the encounter coercive. *See e.g.*

*Hardesty v. Hamburg Twp.*, 461 F.3d 646, 653-654 (6th Cir.2006); *United States v. Thomas*, 430 F.3d 274, 277-278 (6th Cir.2005); *United States v. Holmes*, 143 F.Supp.3d 1252, 1259-1261 (M.D.Fla.2015); *see generally State v. Barber*, 2d Dist. Montgomery No. 19017, 2002-Ohio-3278; *but see State v. Clark*, 8th Dist. Cuyahoga No. 96768, 2012-Ohio-2058, ¶ 6 and 20-22 (finding that the "presence of six officers immediately outside" the door to a suspect's apartment was "an overwhelming show of force that was inherently coercive"). Furthermore, the officers' behavior does not appear "otherwise [to have made] the people inside [the house] feel [that] they [could not] refuse to open up." *United States v. Spotted Elk*, 548 F.3d 641, 655 (8th Cir.2008). For example, the officers did not arrive at an inappropriately late (or early) hour and rouse the occupants from sleep, nor did they brandish their weapons; demand that the occupants open the door; knock or shout unduly loudly; lie about who they were or why they were there; or refuse to leave after the occupants rebuffed their attempts to make contact. *Id.*; *see also e.g. United States v. Quintero*, 648 F.3d 660, 668-671 (8th Cir.2011); *United States v. Velazco-Durazo*, 372 F.Supp.2d 520, 525 (D.Ariz.2005); *State v. Miller*, 2012-Ohio-5206, 982 N.E.2d 739, ¶ 19-20 (2d Dist.).

**{¶ 24}** Moreover, we concur with the trial court's finding that the Task Force made its decision to initiate the knock-and-talk at the house on Runyon Avenue based upon a number of racially neutral facts. *See* Decision on Mot. to Suppress 7-8. The sequence of events that led to the knock-and-talk began with the observation of a vehicle with a temporary Indiana license plate at the Americas Best Value Inn on Miller Lane, an area associated with drug trafficking. Tr. vol. I 13-14 and 125; Tr. vol. III 388-390. At that point, Task Force officers discovered that the vehicle was in the possession of a man

(Feliciano) with a California driver's license and a criminal record, including a narcotics-related arrest in Florida. Tr. vol. I 125-130 and 181; Tr. vol. III 391-393. When Feliciano left the inn, officers noted that he drove evasively to avoid being followed, and shortly after his very brief visit to Runyon Avenue, a Montgomery County sheriff's deputy discovered $5,000.00 on his person during a traffic stop. Tr. vol. I 134-135 and 191; Tr. vol. III 397 and 399. Further, by the time the officers first encountered Appellant, they believed, albeit mistakenly, that they had discovered a warrant for his arrest. Tr. vol. I 135-143; Tr. vol. III 397-398 and 408.

**{¶ 25}** To the extent that Talk Force officers considered race or ethnicity in conducting their investigation, the trial court remarked that the fact that Feliciano and Appellant are Latinos "was probably considered by [the officers] because the purpose" of the Task Force "is to stop the smuggling of currency related to drug transactions to and from foreign countries," and "Mexico [is] one of the countries involved in such smuggling." *See* Decision on Mot. to Suppress 7-8; *see also* Tr. vol. I 13, 80-81 and 180-184. Appellant rejects this assertion, arguing, by implication, that the officers were largely motivated by racial animus. *See* Appellant's Br. 14-15.

**{¶ 26}** By way of illustration, Appellant points to a statement made by one of the Task Force officers; the officer said that "Hispanic nationals living on the west coast will oftentimes be utilized by Mexican cartel members to conduct illicit business throughout the United States," adding that "Hispanic males utilize hotel rooms near interstates to conduct[,] or [to] meet with people to conduct[,] illicit business including but not limited to drug trafficking."[9] Appellant's Br. 15; Tr. vol. I 181-183. The literal wording of this

[9] The officer made these statements in an affidavit attached to the Task Force's

statement aside, we believe that the trial court correctly interpreted the import of the officer's remarks—i.e. that officers considered ethnicity to be a factor in their investigation only in light of what they perceived as a nexus between Mexican drug cartels and the common practices of persons acting at their behest within the United States. In any event, it does not affect our determinations regarding standing or consent.

**{¶ 27}** Finally, the Task Force officer who initiated the knock-and-talk testified that Appellant "stepped to the side" when he asked for permission to enter, an action seemingly calculated to be a non-verbal expression of consent. Tr. vol. I 26 and 43-44; *see United States v. Zapata*, 180 F.3d 1237, 1242 (11th Cir.1999) (holding that to determine "whether a[] [person] has sufficient comprehension of English to provide voluntary consent, courts examine [the person's] ability to interact intelligently with police"). Even if Appellant did not consciously intend this action to be an invitation, however, we would agree with the trial court's determination that it supported "a good faith belief" on the part of the Task Force officers "that they had [Appellant's] permission to enter the house." Decision on Mot. to Suppress 8. For all of the foregoing reasons, Appellant's second assignment of error is overruled.

**{¶ 28}** Assignment of Error Number Three:

> THE EVIDENCE DID NOT SUPPORT A CONVICTION FOR POSSESSION OF DRUGS[.]

**{¶ 29}** At trial, the jury found Appellant guilty of one count of possession of more than 40,000 grams of marijuana, a second degree felony pursuant to R.C. 2925.11(A) and (C)(3)(g). Appellant argues in his last assignment of error that there was insufficient

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application for a warrant to search the house on Runyon Avenue. Tr. vol. I 178-180.

evidence to support his conviction, and in the alternative, that his conviction was against the manifest weight of the evidence. Appellant's Br. 18-19.

**{¶ 30}** Sufficiency of the evidence "is the legal standard applied to determine whether * * * the evidence [in a given case] is legally sufficient as a matter of law to support the jury['s] verdict." *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997), citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). On review of a challenge to a conviction based upon the sufficiency of the evidence, 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.' " *Id.*, quoting *State v. Jenks,* 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

**{¶ 31}** In a challenge based on the weight of the evidence, an appellate court must review the record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether in resolving conflicts in the evidence, the jury clearly lost its way and created a manifest miscarriage of justice warranting reversal and a new trial. *Thompkins*, 78 Ohio St.3d at 387, citing *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983); *State v. Hill*, 2d Dist. Montgomery No. 25172, 2013-Ohio-717, ¶ 8. A trial court's "judgment should be reversed as being against the manifest weight of the evidence 'only in the exceptional case in which the evidence weighs heavily against the conviction.' " *Hill*, 2013-Ohio-717, ¶ 8, quoting *Martin*, 20 Ohio App.3d at 175. Because "a finding that a conviction is supported by the manifest weight of the evidence necessarily includes a finding of sufficiency," a determination that a conviction is supported by the manifest weight of the evidence is also dispositive of the

issue of sufficiency. (Citation omitted.) *State v. McCrary*, 10th Dist. Franklin No. 10AP-881, 2011-Ohio-3161, ¶ 11; *State v. Miller*, 2d Dist. Montgomery No. 25504, 2013-Ohio-5621, ¶ 48, citing *McCrary*, 2011-Ohio-3161, ¶ 11.

**{¶ 32}** Here, to find Appellant guilty of possession under R.C. 2925.11(A), the jury had to determine beyond a reasonable doubt that Appellant knowingly possessed a controlled substance.[10] For purposes of R.C. 2925.11(A), a person may "possess" a controlled substance either physically or constructively. *State v. Charlton*, 2d Dist. Montgomery No. 23227, 2010-Ohio-1683, ¶ 22, citing *State v. Butler*, 42 Ohio St.3d 174, 175, 538 N.E.2d 98 (1989). A person has constructive possession of something if he is aware of its presence and is able to exercise dominion and control over it, "even though [it] may not be within his immediate physical possession." *State v. Hankerson*, 70 Ohio St.2d 87, 434 N.E.2d 1362 (1982), syllabus; *Charlton*, 2010-Ohio-1683, ¶ 22, citing *Hankerson*, 70 Ohio St.2d 87, and *State v. Wolery*, 46 Ohio St.2d 316, 348 N.E.2d 351 (1976). Possession, however, "may not be inferred solely from mere access to [a] thing * * * through ownership or occupation of the premises upon which [it] is found." R.C. 2925.01(K).

**{¶ 33}** Task Force officers recovered 503 pounds of marijuana from the Runyon Avenue residence where they encountered Appellant, along with packaging equipment and a calendar seemingly being used as a ledger. Tr. vol. III 424-431, 506-530 and 548.

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[10] R.C. 2901.22(B) states that 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," and that a person "has knowledge of circumstances when [he] is aware that such circumstances probably exist." Further, when "knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious person to avoid learning the fact."

Two of the officers testified that the rooms where they discovered these items were not padlocked or otherwise secured, and in his own testimony, Appellant acknowledged that he knew the marijuana was in the house. Tr. vol. III 432 and 521-522; Tr. vol. IV 731-736. Labels on one box and several bags containing marijuana were apparently marked with Appellant's first initial, "S." Tr. vol. III 532-535, 541-542. The contacts stored on Appellant's cellular telephone, which officers recovered during their search, included names listed in the ledger. *Id.* at 523-527. In addition, although he had money with which he could have rented a hotel room, Appellant chose to stay in the house for at least two days, despite the absence of any furniture, including beds. Tr. vol. IV 713-716, 720-721 and 731-736.

**{¶ 34}** Appellant testified that from 2012 until 2014, he lived in Juarez City, Chihuahua, Mexico and traveled periodically to the states of California and Washington to work as a laborer on ranches and also in dairies. *See id.* at 704-707. By his account, Diaz (the third of the three men Task Force officers met in the house on Runyon Avenue) asked in December, 2013 to borrow his car for roughly a month, apparently for a trip to Ohio, and Appellant agreed on condition that Diaz replace the car's tires and return it to Washington.[11] *See id.* at 707-709. Diaz agreed and told Appellant that he would return the car in roughly one month. *See id.* at 709.

**{¶ 35}** Between December, 2013 and February, 2014, Diaz asked Appellant to come to Ohio and drive the car back to Washington himself. *See id.* They agreed that Appellant would be paid $1,000.00 for the gas and expenses associated with driving the

[11] When Diaz asked to borrow the car, Appellant was in Mexico, though he had left the car in Washington. Tr. vol. IV 707-708.

car to Washington, which included Appellant's air fare for a trip from Mexico to Ohio. *Id.* Appellant arrived in Ohio on or about February 5, 2014, and thus found himself in the house on Runyon Avenue on February 7, 2014, when Task Force officers initiated the knock-and-talk. *Id.* at 710-711. Essentially, Appellant's defense was that he was in the wrong place at the wrong time.

**{¶ 36}** On these facts, we cannot conclude that the jury clearly lost its way in finding Appellant guilty of possession. However plausible Appellant's account of events might be, his presence in the Runyon Avenue residence with more than 40,000 grams of marijuana; his access to it and conscious awareness of its presence;[12] and particularly, the links between the ledger and the contacts list on his cellular telephone, suffice to establish constructive possession. This is not a case in which the evidence weighs heavily against the conviction. Accordingly, we hold that Appellant's conviction was not against the manifest weight of the evidence, and by extension, that the jury received sufficient evidence to support its verdict of guilty. Appellant's third assignment of error is overruled.

## III. Conclusion

**{¶ 37}** We find that Appellant's assignments of error lack merit. Therefore, we affirm the trial court's decisions of July 1, 2014 and November 10, 2014 overruling Appellant's motions to suppress, and we affirm Appellant's conviction for one count of possession of a controlled substance under R.C. 2925.11(A).

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[12] Appellant testified that he was not allowed to enter the rooms containing marijuana. Tr. vol. IV 713-714.

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

Copies mailed to:

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