[Cite as *State v. Johnson*, 2016-Ohio-867.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 14CA3459
vs.	:	
JOHN JOHNSON,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Timothy Young, Ohio Public Defender, and Peter Galyart, Assistant State Public Defender, Columbus, Ohio, for appellant.

Matthew S. Schmidt, Ross County Prosecuting Attorney, and Pamela C. Wells, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 2-16-16
ABELE, J.

{¶ 1} This is an appeal from a Ross County Common Pleas Court judgment of conviction and sentence. A jury found John Johnson, defendant below and appellant herein, guilty of drug possession in violation of R.C. 2925.11. Appellant assigns the following error for review:

> "THE TRIAL COURT ERRED IN DENYING JOHN JOHNSON'S CRIM.R. 29 MOTION FOR ACQUITTAL, AND VIOLATED HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN, IN THE ABSENCE OF SUFFICIENT EVIDENCE AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, IT CONVICTED HIM OF POSSESSION OF

DRUGS."

{¶ 2} On the afternoon of May 29, 2013, a "special response team" of the Chillicothe Police Department executed a search warrant on room number seventy-seven (77) at "America's Best Value Inn" on East Main Street in Chillicothe. Five people were found inside that room, including appellant. In proximity to appellant was a cell phone and a plastic baggie that contained a substance later determined to be cocaine.

{¶ 3} On July 26, 2013, the Ross County Grand Jury returned an indictment that charged appellant with drug possession. At the two day trial, appellant stipulated that the cell phone found next to the baggie belonged to him and that the baggie contained cocaine. Consequently, the only issue at trial (as the State characterized it during opening and closing arguments) was whether appellant was in "constructive possession" of that controlled substance.

{¶ 4} Several Chillicothe police officers testified about the proximity of the baggie to appellant. Detective Pete Shaw testified that nobody but appellant was even in the "area" where the baggie was found. At the conclusion of the State's case, appellant asked for a "Rule 29," presumably referring to a Crim.R. 29(A) motion for judgment of acquittal. No argument was offered to support that motion and the trial court denied it.

{¶ 5} The jury ultimately returned a guilty verdict and the trial court sentenced him to serve fifteen months in prison. This appeal followed.

{¶ 6} The first clause of the appellant's assignment of error asserts that the trial court erred by denying his Crim.R. 29(A) motion. The remainder of his assignment of error appears to argue that the trial court erred because insufficient evidence supported his conviction and, in

any event, his conviction is "against the manifest weight of the evidence." However, in his issues "presented for review," appellant argues that (1) insufficient evidence supports his conviction, and (2) his conviction is against the manifest weight of the evidence. Whether a trial court erred by denying a Crim.R. 29(A) motion is a separate and distinct argument from arguments concerning the sufficiency of the evidence or the manifest weight of the evidence. Thus, we first pause to disentangle these issues.

{¶ 7} Sufficiency of the evidence and manifest weight of evidence arguments are quantitatively and qualitatively different from one another. See *Eastley v. Volkman*, 132 Ohio St.3d 328, 972 N.E.2d 517, 2012- Ohio-2179, at ¶17; *State v. Wilson*, 113 Ohio St.3d 382, 865 N.E.2d 1264, 2007-Ohio-2202 at ¶25. To the extent appellant is arguing these as "stand alone" issues, the better practice would have been to argue them in different assignments of error. When reviewing sufficiency of the evidence, appellate courts look to the adequacy of the evidence and whether such evidence, if it is believed by the trier of fact, supports a finding of guilt beyond a reasonable doubt. *Thompkins*, supra at 386; *State v. Jenks*, 61 Ohio St.3d 259, 273, 574 N.E.2d 492 (1991). In other words, after viewing the evidence, and each inference reasonably drawn therefrom in a light most favorable to the State, could a rational trier of fact find all of essential elements of the offense beyond a reasonable doubt? See *State v. Were*, 118 Ohio St.3d 448, 890 N.E.2d 263, 2008-Ohio-2762; at ¶132; *State v. Hancock*, 108 Ohio St.3d 57, 840 N.E.2d 1032, 2006-Ohio-160, at ¶34.

{¶ 8} With regard to a manifest weight of the evidence challenge, an appellate court will not reverse a conviction on that basis unless it is obvious that the trier of fact lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new

trial ordered. See *State v. Moore*, 190 Ohio App.3d 102, 940 N.E.2d 1003, 2010-Ohio-4575, at ¶15; *State v. Garrow*, 103 Ohio App.3d 368, 371, 659 N.E.2d 814 (4th Dist.1995). The theoretical underpinnings of a manifest weight of evidence argument assumes that the sufficiency of the evidence has been established. See generally *Cuyahoga Falls v. Foster*, 9th Dist. Summit No. 21820, 2004-Ohio-2662 at ¶9 ("While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion.") This is why, once again, the two concepts should be argued separately.

{¶ 9} The assignment of error is couched in terms of the trial court erring when it denied appellant's Crim.R. 29(A) motion for judgment of acquittal. That rule states such a motion can be sustained "if the evidence is insufficient to sustain a conviction of such offense[.]" By its terms, the rule employs the same standard of review as used in a sufficiency of the evidence argument. See *State v. Miley*, 114 Ohio App.3d 738, 742, 684 N.E.2d 102 (4th Dist.1996); *State v. Fox*, 4th Dist. Washington No. 14CA36, 2015-Ohio-3892, at ¶29. A manifest weight of the evidence standard is inapplicable in the context of Crim.R. 29(A) consideration. See *State v. Rooker*, 4th Dist. Pike No. 463, 1991 WL 136186 (Jul. 16, 1991) (Harsha & Abele, JJ. Concurring). Again, these two issues should not have been argued in the same assignment of error.

{¶ 10} The issue of whether sufficient evidence was adduced at trial to sustain a conviction is a question of law. In reviewing the trial court's decision on a Crim.R. 29(A) motion, we conduct a de novo review and will not reverse unless clearly contrary to law. See *State v. Umphries*, 4th Dist. Ross No. 02CA2662, 2003-Ohio-599, at ¶6; *State v. Allen*, 4th Dist.

Jackson No. 00CA24, 2002 WL 853461 (Feb. 27, 2002). We afford no deference to the trial court under this standard and instead conduct our own, independent review of the evidence. With these principles in mind, we turn our attention to the arguments in appellant's assignment of error.

{¶ 11} The question underlying all of appellant's arguments is whether the State carried its burden to prove constructive possession. For the following reasons, we answer that question in the affirmative.

{¶ 12} R.C. 2925.11(A) prohibits someone from knowingly possessing a controlled substance. A person has possession of the drug if he has "control" over it. Id. at (K). Possession may be actual or constructive. *State v. Wilson*, 8th Dist. Cuyahoga No. 102231, 2015-Ohio-4979, at ¶10; *State v. Brown*, 12 Dist. Butler No. CA2014–12–257, 2015-Ohio-3407, at ¶13; State v. Markin, 4th Dist. Pickaway No. 13CA22, 2014-Ohio-3630, at ¶28. While it is true that constructive possession cannot be inferred from mere access to the drug, R.C. 2925.11(K), such access is one of several factors that can be considered under the totality of the circumstances. *State v. Johnson*, 4th Dist. Gallia No. 13CA16, 2014-Ohio-4032 at ¶16; *State v. Williams*, 4th Dist. Ross No. 03CA2736, 2004–Ohio–1130, ¶25. Also, constructive possession may be proven solely by circumstantial evidence. *State v. Hurst*, 10 Dist. Franklin No. 14AP–687, 2015-Ohio-2656, at ¶21; *State v. Sunday*, 4th Dist. Pickaway No. 13CA19, 2014-Ohio-900, at ¶20.

{¶ 13} In the case sub judice, the evidence adduced at trial shows more than appellant's mere proximity to the cocaine. Both Detective Shaw and Detective Campbell testified the baggie was positioned next to appellant's cell phone. Further, State's Exhibit G (a crime scene

photograph) appears to show a part of the baggie actually positioned on the phone. The photograph also reveals that these two items are not in a general area of the room, but are wedged into a small space between what appears to be a bedbox spring and a night stand. Detective Shaw also testified that no other person was in the area near the baggie and the cell phone.

{¶ 14} These factors provided the trier of fact with sufficient evidence to conclude that appellant had constructive possession of the cocaine. In addition to the crime scene photographs, the detectives described a layout of the room and where various objects and people were located. The jury had the opportunity to observe and evaluate the evidence.

{¶ 15} Appellant cites decisions that "overturned possession convictions, for lack of sufficient evidence, under similar facts." He did not fully explain the facts in those cases. In one case he cites from this District, we reversed a conviction for drug possession on grounds that insufficient evidence supported the finding of constructive possession. *State v. Criswell*, 4th Dist. Scioto No. 13CA3588, 2014-Ohio-3941, at ¶28. Contrary to appellant's argument, however, the facts in *Criswell* are not similar to the facts in the present case.

{¶ 16} Criswell was one of several passengers in a van. He was neither the vehicle's driver nor the owner. Id. at ¶25. Also, no evidence was adduced to show that he had access to the drugs found in the van. Id. By contrast, in the case sub judice Detective Shaw testified that the cocaine "was just right above his head." When asked whether appellant could have reached the cocaine if had he not been handcuffed, the witness responded in the affirmative. Furthermore, in *Criswell* no evidence indicated that the drugs were found next to (and even touching) the accused's personal property as there is in this case (i.e. appellant's cell phone). *Criswell* and the instant case are distinguishable on their facts.

{¶ 17} Appellant also asserts that other plausible scenarios exist for how the phone and cocaine were placed in their particular location. He points out that four other people were in the room and a "distraction device" was thrown into the room before the police entered and caused confusion. However, when sufficient evidence exists on the whole to support a conviction, a jury is entitled to reject even plausible theories of innocence. *United States v. Tierney*, 266 F.3d 37, 40 (1st Cir. 2001); *United States v. Pelletier*, 517 F.Supp.2d 498, 499 (D. Maine 2007); also see generally *Holland v. State*, 554 S.E.2d 303, 305 (GA.App. 2001); *Earle v. United States*, 612 A.2d 1258, 1269, at fn. 13 (D.C.App. 1992). We are not going to second-guess the jury's rejection of other "plausible" scenarios.

{¶ 18} Furthermore, we are not persuaded that appellant's alternative scenarios are plausible. State's Exhibit G shows a very small space between the box spring and the bed-side table where the phone and cocaine were found. Their proximity to each other, in such a confined area, suggests that they may have been placed there. Even if we accept the view of the chaos and confusion in the room at that time, it seems unlikely that appellant's phone would happen to fall in that area, and then someone else's baggie of cocaine would happen to land on the phone. Therefore, to the extent that appellant argues that his conviction is against the manifest weight of the evidence (as a stand alone issue), we will not second guess the jury's rejection of appellant's other "plausible" scenarios. His assignment of error is thus overruled for these reasons.

{¶ 19} Having reviewed appellant's assignments of error, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

Harsha, J., concurring:

{¶ 20} I concur in judgment and opinion rejecting Johnson's arguments that the jury's verdict is not supported by sufficient evidence and is against the manifest weight of the evidence. However, I would go one step further and expressly reject the second conclusion of his compound assignment of error. The conclusions of his sufficiency and manifest weight arguments act as a follow-up premise for the conclusion of his secondary argument that his constitutional rights were violated. Because his premise about purported sufficiency and manifest weight errors is faulty, i.e. there was no error in those regards, his conclusion that he suffered a violation of constitutional dimension also must fail.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Hoover, J.: Concurs in Judgment & Opinion
Harsha, J.: Concurs with Concurring Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.