[Cite as *State v. Bass*, 2015-Ohio-1868.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-14-1270

Appellee — Trial Court No. CR0201402495

v.

Thomas C. Bass, Jr. — **DECISION AND JUDGMENT**

Appellant — Decided: May 15, 2015

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Jerome Phillips, for appellant.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} In this accelerated appeal, appellant, Thomas Bass, appeals from his conviction, following a bench trial, of one count of possession of cocaine in violation of R.C. 2925.11(A) and (C)(4)(b), a felony of the fourth degree. We affirm.

A. Facts and Procedural Background

{¶ 2} On September 19, 2014, the Lucas County Grand Jury entered a three-count indictment against appellant. The first count was for trafficking in cocaine in violation of R.C. 2925.03(A)(2) and (C)(4)(c), a felony of the fourth degree. The second count was for possession of cocaine in violation of R.C. 2925.11(A) and (C)(4)(b), a felony of the fourth degree. The third count was for trafficking in marijuana in violation of R.C. 2925.03(A)(2) and (C)(3)(a), a felony of the fifth degree. The charges were brought following a nighttime police raid of the residence at 1130 Harding Street in Toledo, where appellant and one other person, Kelly Kennedy, were sleeping.

{¶ 3} Appellant entered a plea of not guilty to the charges, and the matter proceeded to a bench trial on November 18, 2014. The trial began by the parties agreeing to a number of stipulations. They first stipulated that the search warrant executed by the police leading to the discovery of drugs and drug paraphernalia was a valid search warrant. In addition, the parties stipulated that a bag containing 7.00 grams of crack cocaine was found in the kitchen cupboard, and that two bags containing 9.04 grams of marijuana were found in the bedroom closet. The parties also stipulated that appellant is the same person who was arrested as a result of the search. Finally, the parties stipulated as to the authenticity and admissibility of a Columbia Gas of Ohio utility bill that was in appellant's name for the same address that was searched pursuant to the warrant.

{¶ 4} At trial, the state presented the testimony of three Toledo police officers who were present during the search. First, Sergeant William Bragg testified that he found a

marijuana pipe in the bedroom where appellant was sleeping, and two bags of marijuana in that bedroom's closet. He also indicated that the closet was full of men's shoes and clothes. No women's clothes were found, other than those worn by Kennedy that night.[1] Bragg further testified that a significant amount of medical supplies similar to dietary supplements were found in a separate bedroom, possibly indicating that someone might have a serious health issue. Bragg offered that appellant was known to have medical issues, but appellant's objection to that testimony was sustained.

{¶ 5} The state next called Sergeant Karrie Williams. Williams testified that she searched the kitchen, and found cocaine in a kitchen cupboard under a dust mask. She further testified that the kitchen contained other drug paraphernalia such as a razor blade, digital scales, baggies, Chore Boy,[2] and a crack pipe.

{¶ 6} Finally, the state called Sergeant Alanna Whatmore, who was the lead detective at the time of the search. Whatmore testified that, in addition to the drugs and drug paraphernalia, the officers found several pieces of mail belonging to appellant. The mail was addressed to appellant either at 621 Tecumseh or at P.O. Box 9445. Whatmore also identified and testified to a current Columbia Gas of Ohio bill that was in appellant's name for the residence at 1130 Harding. The bill showed a connection date of March 13, 2007. On cross-examination, it was revealed that the bill was not present in the home at

[1] It was suggested at trial that Kennedy was a prostitute.

[2] Williams described "Chore Boy" as a type of scrubber that is used to assist in the ingestion of crack cocaine.

the time of the search, but that Whatmore had separately subpoenaed that information. Further, the bill had a mailing address of P.O. Box 9445. Whatmore conceded that she did not check whose name was on any other utility bills. Whatmore also testified on cross-examination that appellant was not the owner of the house at 1130 Harding, but that the owner was Henry Lino. Lino was not contacted during the investigation, and Whatmore did not know if there was a lease or rental agreement between Lino and appellant.

{¶ 7} Notably, Whatmore also testified on direct-examination that she conducted surveillance on the residence at 1130 Harding for approximately two weeks before the execution of the search warrant, during which time she observed appellant coming and going from the house. On cross-examination, she was asked whether she saw anyone else go into or out of the residence during that time period, to which she replied "No, I did not." Upon further questioning from the court during re-direct, Whatmore testified that she observed appellant go into or out of the house three times, each time after 8:00 p.m.

{¶ 8} Aside from appellant's presence in the house at the time of the search, Whatmore had no personal knowledge of appellant having possession of the cocaine on the day of the raid. Moreover, no scientific evidence such as DNA or fingerprints was collected linking appellant to the drugs.

{¶ 9} Following its presentation of evidence, the state rested. Appellant then moved for an acquittal pursuant to Crim.R. 29(A), on the grounds that the state had failed

to prove that he was in possession of the drugs or that he trafficked the drugs. The trial court denied appellant's Crim.R. 29(A) motion. Appellant then rested without calling any witnesses. Thereafter, he renewed his Crim.R. 29(A) motion, which the trial court again denied.

{¶ 10} The trial court took the matter under advisement, and returned that afternoon with a finding of guilty as to the second count of possession of cocaine, and not guilty as to the first and third counts of trafficking. The court proceeded immediately to sentencing, and ordered appellant to serve 14 months in prison. In its subsequent judgment entry containing findings of fact and conclusions of law, the trial court stated,

> A thorough evaluation of this record indicates that the possession of the cocaine by the defendant, Thomas C. Bass Jr., could be inferred by circumstantial evidence. The defendant was the sole occupant of the premises with only mens (sic) clothing and shoes in the closet. The female only happened to be there. The defendant was present at the time of the search and the only person seen exiting or entering the premises during the two week surveillance. The bills were found with the defendant's name and address for that location. More importantly, a P.O. Box was used for the defendant and that bill was brought to the 1130 Harding address. It is also interesting to note that a communication from the Cleveland Clinic regarding Mr. Bass was sent to the Harding address. It is further evident that the various paraphernalia used in the administering of drugs were

found in plain view while the drugs themselves were slightly hidden so that only the one occupant would know or have access to them. All of this evidence indicates that the defendant, Thomas C. Bass, Jr., was in possession of the cocaine.

{¶ 11} Following the entry of judgment, appellant moved for a new trial under Crim.R. 33 on the basis that there was misconduct by a witness for the state. Specifically, appellant argued that Whatmore testified at trial that during her period of surveillance she did not see anyone other than appellant go into or out of the residence at 1130 Harding. However, in her affidavit submitted for the purpose of obtaining the search warrant, Whatmore averred:

> This Affiant conducted surveillance at 1130 Harding between the days of July 22-28, 2014, between the hours of 8:00 p.m. and 4:00 a.m., and did witness foot traffic in and out of the rear of the residence at 1130 Harding. This Affiant observed subjects walking through the rear fence and up to the rear door of the residence at 1130 Harding, and go in the back door. Subjects would then exit 3 - 4 minutes later and leave.

{¶ 12} In its decision on appellant's motion for a new trial, the trial court construed appellant's motion as being based on newly discovered evidence under Crim.R. 33(A)(6). The court then determined that although Whatmore's affidavit may have been material to the defense, it did not comply with the requirement that it could not have been discovered with reasonable diligence before trial. In fact, the court noted that

Whatmore's affidavit was provided to counsel during discovery before the trial, and was available as a basis for appellant to cross-examine Whatmore. The court surmised that counsel simply chose not to cross-examine Whatmore on the issue. Therefore, the trial court denied appellant's motion.

B. Assignments of Error

{¶ 13} Appellant has timely appealed the trial court's judgment of conviction and judgment denying the motion for a new trial. He now asserts two assignments of error for our review:

1. The Trial Court erred by denying Appellant's Motion for a New Trial.

2. Appellant's conviction was based upon insufficient evidence as a matter of law and was against the manifest weight of the evidence.

II. Analysis

A. Motion for a New Trial

{¶ 14} We review decisions denying a motion for a new trial under an abuse of discretion standard. *Toledo v. Stuart*, 11 Ohio App.3d 292, 293, 465 N.E.2d 474 (6th Dist.1983). An abuse of discretion connotes that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 15} In support of his assignment of error, appellant notes that the trial court construed his motion for a new trial as being based on newly discovered evidence under

Crim.R. 33(A)(6). However, appellant argues that his motion was based on witness misconduct under Crim.R. 33(A)(2). He contends that Whatmore falsely testified in contradiction to a previously filed affidavit, and thus committed misconduct.

{¶ 16} Crim.R. 33(A) provides,

> **(A) Grounds.** A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:
>
> * * *
>
> (2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state.
>
> * * *
>
> (6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial.

{¶ 17} We agree with appellant that his motion was based on witness misconduct under Crim.R. 33(A)(2), not newly discovered evidence under Crim.R. 33(A)(6). Nevertheless, we hold that the trial court's decision denying appellant's motion for a new trial does not constitute an abuse of discretion because appellant has failed to demonstrate that his substantial rights were materially affected.

{¶ 18} Crim.R. 33(E)(5) states, "No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because

of: * * * (5) Any other cause, unless it affirmatively appears from the record that the defendant was prejudiced thereby or was prevented from having a fair trial." Here, appellant acknowledges that his trial counsel was in possession of Whatmore's affidavit prior to trial.[3] Furthermore, trial counsel, not the state, elicited the inconsistent testimony that appellant was the only person to enter or exit the property. At that moment on cross-examination, counsel could have questioned Whatmore on the inconsistency, but he did not. Therefore, we cannot say that appellant was prevented from having a fair trial.

{¶ 19} Accordingly, we hold that the trial court did not abuse its discretion in denying appellant's motion for a new trial. Appellant's first assignment of error is not well-taken.

B. Sufficiency and Manifest Weight of the Evidence

{¶ 20} In his second assignment of error, appellant contends that the trial court's determination that he was in possession of the cocaine was based on insufficient evidence and was against the manifest weight of the evidence.

{¶ 21} Insufficiency and manifest weight are distinct legal theories. "In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "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

[3] Appellate counsel also represented appellant in the trial court.

elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 22} In contrast, when reviewing a manifest weight claim,

> The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. 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. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, quoting *Thompkins* at 387.

{¶ 23} Here, appellant argues that the state failed to prove that he had constructive possession of the cocaine. R.C. 2925.01(K) defines "possess" or "possession" as "having control over a thing or substance, but [possession] 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." "Constructive possession exists when an individual knowingly exercises dominion and control over an object, even though that object may not be within his immediate physical possession." *State v. Hankerson*, 70 Ohio St.2d 87, 434 N.E.2d 1362 (1982), syllabus.

{¶ 24} Specifically, appellant contends that the only facts linking him to the drugs are his presence inside the house at the time of the search, the gas bill being in his name, and some of his mail being in the house. Moreover, the mail and the gas bill had a mailing address that was different from 1130 Harding. Appellant argues that the most the state can prove is that he may have been an occupant of a house in which drugs were found in the common area. He concludes that this evidence is insufficient to support a conviction for possession of drugs, citing *State v. Haynes*, 25 Ohio St.2d 264, 270, 267 N.E.2d 787 (1971), wherein the Supreme Court of Ohio held, "When narcotics are discovered in the general living area of jointly occupied premises, one can only speculate as to which of the joint occupiers have possession of the narcotics. In other words, no inference of guilt in relation to any specific tenant may be drawn from the mere fact of the presence of narcotics on the premises."

{¶ 25} The state, on the other hand, argues that appellant's conviction was amply supported by the evidence. The state relies on the gas bill in appellant's name, the other mail addressed to appellant that was found at 1130 Harding, appellant's presence in the bedroom at the time of the search, and the men's clothing and shoes inside the closet to establish that appellant lived at 1130 Harding and had constructive possession of the drugs.[4]

[4] The state also lists the medical supplies as being relevant given appellant's known medical condition. However, testimony regarding appellant's medical condition was objected to, and the objection was sustained by the trial court. Thus, we conclude that the presence of medical supplies in the house has no persuasive value.

{¶ 26} Here, upon our review of the record, we conclude that appellant's conviction was based on sufficient evidence. We find that appellant's occupancy of the house is supported by his presence in the bedroom at the time of the night raid, the gas bill being listed in his name, and the presence of his mail at the house. While occupancy alone may not demonstrate constructive possession where the premises are jointly occupied and the drugs are found in a common area, here, the unrebutted and uncontradicted testimony at trial was that appellant was the only person seen entering and exiting the house for approximately two weeks before the raid. Therefore, we hold that a rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found beyond a reasonable doubt that appellant constructively possessed the cocaine based on his sole occupancy of the house for the two weeks prior to the raid.

{¶ 27} Furthermore, we hold that appellant's conviction is not against the manifest weight of the evidence. Although Kennedy was also present in the house when the drugs were found, there was no indication that hers was an extended stay, or that she had any involvement with the drugs and drug paraphernalia located in the kitchen, especially when considering that the cocaine was hidden in a cupboard under a mask. Thus, we do not find the trial court's conclusion that appellant possessed the cocaine to be a manifest miscarriage of justice, and this is not the exceptional case where the evidence weighs heavily against the conviction.

{¶ 28} Accordingly, appellant's second assignment of error is not well-taken.

III. Conclusion

{¶ 29} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE