IN THE SUPREME COURT OF OHIO

STATE OF OHIO **Plaintiff/Appellee** **v.** **HERBERT TAYLOR** **Defendant/Appellant**	: : : : : : : : : :	**Supreme Court No.** 21-0034 **On Appeal from the Richland County Court of Appeals 5th Appellate District** **Court of Appeals No. 2019CA0117** **Common Pleas No. 2019CR0341**

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT HERBERT TAYLOR

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TABLE OF CONTENTS

Page No.

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.....3

STATEMENT OF THE CASE.....4

STATEMENT OF THE FACTS.....4

ARGUMENT IN SUPPORT OF PROPOSITION OFLAW.....6

Proposition of Law No. 1.

The conviction is against the Manifest Weight of the Evidence, in violation of appellant's 14th Amendment Right to Due Process and Equal Protection.....6

Proposition of Law No. 2.

Plain error was made by the court not dismissing a juror who committed misconduct.....8

CONCLUSION.....9

CERTIFICATE OF SERVICE.....9

APPENDIX:
Decision and Judgment of the Richland County Court of Appeals on October 29, 2020.....10

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

[T]his case is of great public interest because it clearly presents to complete and purposeful departure from the prescribed forms and modes of law. This case involves a felony and raises substantive and procedural questions of Statutory and Constitutional dimension. This case involves a unified willfulness to deprive 'simply justice' where the record, evidence, the Law, and the facts demand otherwise. This case is of great public interest because it exemplifies the notion of a broken criminal justice system when judges are inherently incapable of fairly administering justice and yet rather, encourage in promotion an operational and substantive breakdown in the machinery of justice. The consequence of their actions deprive individuals of established rights, encourage an unchecked legal system which places a substantial burden on individuals and society, and allows local municipalities to make up rules as they go, legislate from the bench, usurp the law and apply it however it sees fit, ignore legislation, and thwart the intent of the General Assembly, thereby to impede Statutory and Constitutional Rights despite the judicial balances in place.

This case is of great public interest because the trier of fact was clearly lost by those responsible for its determination. Evidence indicates that others than the appellant was responsible for the offense which appellant was convicted. Evidence shows that another possessed a tracking number in his phone that tied him to the package in question. Evidence shows that the police tampered with the package prior to delivery and could have easily placed its contents into the package. Evidence shows that the contents after being tampered and delivered contained cocaine; however, the contents that the police testified to removing was not tested nor shown to be cocaine. This case raises the issue of misconduct by police, who transferred contents to others in other jurisdictions and subject to several departments and agencies before delivered to a residence appellant rented to another. Possession or control over the substance was never established, nor was there any evidence to show that appellant was conscious of the presence of the object. This is important to this Court because, though the definition of possession may have been already established by this Court, this Court's judgment is not upheld by the lower courts within its jurisdiction.

The implications of the decision of the court of appeals affect multiple jurisdictions, and will be/is being used as case precedent to ignore a clear and undeniable trier of fact, based on whether appellant fits the appearance of those responsible for its determination-namely, the jury. Apart from this Court's consideration, which makes this case one of great public interest, the decision of the court of appeals has a broad significance. Those where evidence points to being the one responsible is found not guilty and those associated, being the appellant, is found guilty. This case poses a constitutional question of whether appellant's right to due process and equal protection was violated, because every element of the offense was not proven beyond a reasonable doubt.

If allowed to stand, the decision of the court of appeals would allow for many innocent men and women to be convicted of an offense merely because they were in the same vicinity or presence of another or object. To promote the purposes and preserve the integrity of the legislative branch and the courts, this Court must grant jurisdiction to hear this case and review the erroneous and dangerous decision of the court of appeals.

This action does this respectfully follow.

STATEMENT OF THE CASE

On April 18, 2019, the Richland County Grand Jury returned an indictment charging the Appellant ("Herbert Taylor) with a single count of possession of cocaine, in the violation R.C. 2925.11, a felony of the first degree with a forfeiture of currency specification. Appellant was arraigned on April 30, 2019 and bond was set in the amount of fifth thousand dollars. Attorney Rolf Whitney was appointed to represent the appellant in the proceedings. A demand for discovery was filed on May 18, 2019. A motion to suppress was filed on October 24, 2019. This was overruled as untimely filed on October 30, 2019.

A jury was selected and sworn on October 31, 2019. Following the presentation of evidence by both sides, appellant was found guilty on the single count in the indictment. The same day he was sentenced to eleven years in prison on the single count in the indictment.

On December 6, 2019, a notice of appeal and docketing statement were filed. On December 31, 2019, a motion to extend time to file the record was sought and granted. ON February 10, 2020, the record was filed. Appellant sought and was granted extensions to file a merit brief, which was filed on or about June 29, 2020.

On October 29, 2020, the Court of Appeals affirmed the judgement of the Richland County Court of Common Pleas.

STATEMENT OF THE FACTS

Michael Towly with the Cuyahoga County Sheriff's Department, assigned to the drug interdiction unit was working on February 7, 2019. He and his canine Ciga, were on the second floor of the postal service. T.P. 211. He let the dog off the leash and it alerted t a package that the deputy determined beforehand was suspicious. T.P. 213. After a search warrant was obtained, the package was opened. T.P. 217.

The deputy conducted a controlled delivery, where they had earlier placed a monitoring device in the package, and then sent it to its destination. T.P. 222. The package was sent for delivery and made it to Richland County on February 7, 2019. T.P. 225. The package would not be delivered until February 8, 2019.

Steven Blust of the METRICH unit in Richland County received a phone call from postal inspectors stating a package they were tracking was to be delivered to 222 Penn Avenue, Mansfield, Ohio. T.P. 253. He indicated that he would deliver the package. T.P. 253-254.

On February 8, 2019, appellant was outside 222 Penn Avenue with another male. T.P. 258. The package was delivered to 222 Penn. T.P. 259. Detective Wheeler and agent Adams observed the appellant get out of the car and grab the package. T.P. 260. Appellant walked straight through the back yards where he got back in the car's passenger side and the car drove off. T.P. 260. Police initiated a stop, where detective Wheeler saw the package held by appellant. T.P. 286.

Anthony Tamasco testified that he tested the substances in the box. It contained cocaine. T.P. 335. The weight was 369.4 grams. The amount that was removed by the police prior to delivery was 119.7 grams. T.P. 335.

The state rested after all of the exhibits were put into evidence. Appellant testified on his own behalf. T.P. 391. He testified that he owned the property, but leased it to Brandy Miller. T.P. 397. On February 8, 2019 Brandy was incarcerated. T.P. 397. Appellant testified that he picked up the box because he was in jail. T.P. 402.

In its opinion, the Court of Appeals summarizes that after the appellant and the driver's ("Roberts") cell phones were analyzed, a photograph revealed a screen shot of the tracking number for the package that was recovered. October 29, 2020 Opinion. Pg. 4-5. The court, in page 5, paragraph 13, describes appellant's testimony leading up to the events before arrest. Appellant's truck broke down because of transmission issues. Appellant was planning to meet his cousin at the house on February 8, 2019 to have his truck repaired. A friend dropped him off. While appellant was waiting for him to arrive, the package was delivered. Because Miller was in county jail, appellant retrieved the package. Appellant stated Roberts drove away with his phone. When appellant realized Roberts had his phone, he walked through the neighbor's backyard to catch up with Roberts, because he knew he would drive around the block. Appellant opened the package because the contents were jiggling around and he was curious. On page 6, paragraph 14 of its opinion, the Court of Appeals states, "Appellant acknowledged he was at the Penn Ave. residence on February 7, 2019, but denied he was waiting for a package. Appellant could not explain why Roberts had an image of the tracking number for the package on his phone." At page 6, paragraph 15, "Following the presentation of the evidence and closing arguments, the trial court instructed the jury on applicable law. After deliberating, the jury found Appellant guilty as charged. The trial court sentenced Appellant to the mandatory period of incarceration of eleven years.

Appellant appealed the judgment of the Richland County Court of Common Pleas, raising the following assignments of error:

1. THE CONVICTIONS IN THIS MATTER ARE NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE VIOLATIVE OF THE APPELLANT'S RIGHT TO DUE PROCESS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUION.
2. THE TRIAL COURT COMMITTED PLAIN ERROR BY NOT DISMISSING A JUROR WHO COMMITTED MISCONDUCT.

The Fifth Appellate District Court affirmed the judgement of the Richland County Court of Common Pleas.

LAW AND ARGUMENT

Proposition of Law No. 1.

The conviction is against the Manifest Weight of the Evidence, in violation of appellant's 14th Amendment Right to Due Process and Equal Protection

In determining whether a verdict is against the manifest weight of the evidence, the court must examine the entire record, weight all of 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 such a manifest miscarriage of justice that the conviction must be reversed and a new trial is ordered." *State v. Martin*, 20 Ohio App.3d 172,175, 20 Ohio B. 215, 485 N.E. 2d 717 (1st Dist. 1983). See also *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. "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, 227 N.E.2d 212 (1967), at paragraph one of the syllabus.

The Due Process clauses of the Fifth and Fourteenth Amendments requires that every element of the offense must be proven beyond a reasonable doubt. The 14th amendment also guarantees equal protection of the laws to all United States citizens. The requirement is met when, after viewing the evidence in 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. *State v. Cureton*, 1994 Ohio App. LEXIS 243; *Florida v. Tibbs*, 547 U.S. 31; Fifth Amendment; Fourteenth Amendment.

R.C. 2925.01 (K), former R.C. 2925.01 (L) provides:

(K) "Possess" or "possession" means 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.

ORC Ann. 2925.01

Possession may be actual or constructive. *State v. Hankerson,* 70 Ohio St. 2d 87; *State v. Butler*, 42 Ohio St.3d 174; State v. Haynes (1971), 25 Ohio St.2d 264, 267 N.E.2d 787. In order to establish constructive possession, the state must prove the defendant was able to exercise dominion or control over the object, even though that object may not be within his immediate physical possession. *State v. Boyd*, 1995 Ohio App. LEXIS 75. Furthermore, it must be shown that the person was conscious of the presence of the object. Hankerson, supra at 91. In State v. Haynes (1971), the supreme court stated that, "the mere fact that one is the owner or lessee of premises upon which narcotics are found where such premises are also regularly occupied by others as co-tenants and the narcotics are found in an area ordinarily accessible to all tenants-s not, without further evidence, sufficient to establish possession in the owner of lessee." Id. At 270. The Haynes court went on to hold that person who lived in a house with three other persons and who had not been present on the premises a week before a search was conducted, could not be convicted of possession of narcotics found in the house. Haynes (1971.

HN4 To convict one of *possession* for sale, the state must prove that the accused had (1) actual *possession* or *control* [***11] [*270] of the substance, (2) that the accused knew that the narcotic substances were in his *possession*, (3) that he knew the substances were narcotics, *State* v. *Dempsey* (1970), 22 Ohio St. 2d 219, and (4) that at the time he possessed said narcotic substance, he did so for the purpose and with the intent to sell that narcotic substance. For the definition of "sale" see R. C. 3719.01 (H). There is no evidence in the record of a sale.
HN5 The mere fact that one is the owner or lessee of premises upon which narcotics are found -- where such premises are also regularly occupied by others as co-tenants and the narcotics are found in an area ordinarily accessable to all tenants -- is not, without further evidence, sufficient to establish *possession* in the owner or lessee.
When narcotics [***12] 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.
HN6 Criminal convictions cannot rest upon mere speculation; the state must establish the guilt of the accused by proof beyond a reasonable doubt.
State v. Haynes, 25 Ohio St. 2d 264, 269-270, 267 N.E.2d 787, 791, 1971 Ohio LEXIS 542, *10-12, 54 Ohio Op. 2d 379 (Ohio March 17, 1971)

In appellant's case, the drugs (assuming that the original contents were in fact drugs), were intercepted in Cuyahoga County. The court of appeals, in its 10.29.2020 opinion, summarized on page 2 paragraph 4-6, that a detective for the Cuyahoga County Sheriff's Office seized the package and opened the package to find what appeared to be a wrapped gift. This was on February 7, 2019. He removed he wrapping paper and discovered a freezer bag of what was ultimately determined to be cocaine. Det. Tomley explained that over 100 grams of cocaine would be repackaged with a box beacon and a controlled delivery would be conducted. They sent the package to Mansfield Police Department where a tracking device was placed in the package. Postal inspectors ultimately delivered the package on February 8, 2019.

Appellant merely picked up the package from the residence that he owned, because the tenant was in the county jail. He admits that he opened the package, but did not knowingly possess the contents of the package. Reasonable minds would conclude that because the driver had a screen shot of the tracking number, the package belonged to him and was coordinated by he and the tenant of the residence, rather than the appellant. The trier of fact was clearly lost and appellant's conviction was against the manifest weight of the evidence.

R.C. 2925.11(A) provides:

(A) No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog.
ORC Ann. 2925.11

Appellant was not conscious of the presence of the substance, and did not meet the elements of the statute to constitute violation of the offense. Consequently, the state did not prove every element of the offense beyond a reasonable doubt, in violation of the 14th amendment. The trier of fact clearly points to others being responsible for the offense.

The appellate court failed to review all parts of the record and its ruling is both erroneous and contrary to law. The entire record of the evidence presented unmistakably shows that the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Martin*, 20 Ohio App.3d 172,175, 20 Ohio B. 215, 485 N.E. 2d 717 (1st Dist. 1983). See also *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541.

Proposition of Law No. 2.

Plain error was made by not dismissing a juror who committed misconduct

In order to prevail under Crim. R. 52(B), appellant bears the burden of demonstrating that the outcome of the trial clearly would have been different but for the error. State v. Long (1978), 53 Ohio St.2d 91, 97, 372 N.E.2d 804. Notice of plain error is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. Id. at paragraph three of the syllabus.

Appellant has a constitutional right to a fair jury. One touchtone of a fair trial is an impartial trier of fact-"a jury capable and willing to decide the case solely on the evidence before it." McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984). Similarly, Smith v. Phillips, 455 U.S. 209, the court held:

HN5 Due process means **a jury capable and willing to decide the case solely on the evidence before it**, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Smith v. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940, 946, 71 L. Ed. 2d 78, 86, 1982 U.S. LEXIS 69, *18, 50 U.S.L.W. 4169 (U.S. January 25, 1982)

In appellant's case, juror number five stated that he did say to another juror prior to instructions and deliberations that, "boy this is a tough case" T.P. 483. The juror's statement was made in the presence of a witness for appellant's trial, in the bathroom.

The Supreme Court clearly teaches that hearings on the issue of a juror's impartiality "will frequently turn upon testimony of the juror in question" and that it is error to contend that such evidence "is inherently suspect." Smith v. Phillips, 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982), fn.7. "One may not know or altogether understand the imponderables which cause one to think what he thinks, but surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in certain matter." Dennis v. United States, 339 U.S. 162, 171, 70 S.Ct. 519, 94 L.Ed. 734 (1950). The juror stated that he hasn't made up his mind; however, the words make it clear that he has.

The State would argue that his assertions are merely speculative and that the appellant was not prejudiced by the juror. However, the juror's admission of statements made to other members of the jury and in the presence of witnesses, a detective, who testified against appellant, undoubtedly prejudiced him. The court of appeals' decision that appellant was not prejudiced is erroneous. In the same instance that it claims that appellant's assertion is speculative, its opinion that appellant was not prejudiced is too speculative. Appellant was prejudiced by the mere fact that he was found guilty. The possibility of jury bias and/or colluding with State's witnesses with a finding of guilty constitutes prejudice. In any event, at least that one juror should have been dismissed, if for no other reason, to send a message of the court's insistence of fundamental fairness.

CONCLUSION

For all of the reasons discussed herein, this case involves matters of public and great general interest and substantial constitutional question. The appellant respectfully requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

Herbert Taylor

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CERTIFICATE OF SERVICE:

This is to certify that the foregoing Memorandum in Support of Jurisdiction was served upon the Richland County Prosecutor at 38 Park Street, 2nd Fl., Mansfield, Ohio 44902, by United States Mail, this 1 day of Dec., 2020.

Herbert Taylor

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Herbert Taylor
Mar. 11, 2021

IN THE SUPREME COURT OF OHIO

STATE OF OHIO **Plaintiff/Appellee**	:	**Supreme Court No.** 21-0034
v.	:	**On Appeal from the Richland County Court of Appeals 5th Appellate District**
HERBERT TAYLOR **Defendant/Appellant**	:	**Court of Appeals No. 2019CA0117**
	:	**Common Pleas No. 2019CR0341**

APPENDIX

(JUDGMENT FROM THE COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT)

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

HERBERT TAYLOR

Defendant-Appellant

JUDGES:
Hon. William B. Hoffman, P.J.
Hon. W. Scott Gwin, J.
Hon. Craig R. Baldwin, J.

Case No. 2019 CA 0117

OPINION

CHARACTER OF PROCEEDINGS: Appeal from the Richland County Court of Common Pleas, Case No. 2019 CR 0341

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY:

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Hoffman, P.J.

{¶1} Defendant-appellant Herbert Taylor appeals his conviction and sentence entered by Richland County Court of Common Pleas, on one count of possession of cocaine with a forfeiture specification, following a jury trial. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On April 18, 2019, the Richland County Grand Jury indicted Appellant on one count of possession of cocaine, in violation of R.C. 2925.11(A) and (C)(4)(f), a felony of the first degree, with an attendant forfeiture specification. Appellant appeared for arraignment on April 30, 2019, and entered a plea of not guilty to the Indictment.

{¶3} The trial court originally scheduled the matter for trial on July 8, 2019, but continued the trial until October 28, 2019, upon Appellant's request. Appellant filed a motion to suppress on October 24, 2019. The trial court overruled the motion as untimely pursuant to Crim. R. 12(D).

{¶4} At trial, Cuyahoga County Sheriff's Deputy Michael Twombly, who serves as a detective in the K9 narcotics unit, testified he works on an FBI task force assigned to the postal service. Det. Twombly's duties include parcel interdiction, detecting packages which might contain narcotics. Det. Twombly and his K9 partner, Ciga, were on duty at the Cleveland postal facility on February 7, 2019, when he seized a suspicious package. The detective brought the package to a different area of the facility where it was hidden among parcels, luggage, and other items. When Ciga was unleashed, he alerted to the suspicious package.

{¶5} Det. Twombly sought and obtained a federal search warrant to open the package. Upon opening the package, the detective found what appeared to be a wrapped

gift. He removed the wrapping paper and discovered a freezer bag of what was ultimately determined to be cocaine. Det. Twombly explained over 100 grams of the cocaine would be repackaged with a box beacon, a GPS monitoring device which also notifies police when the package is opened,[1] and a controlled delivery would be conducted.

{¶6} Mansfield Police Sergeant Steve Blust, who is assigned to the METRICH Enforcement Unit, testified he received a phone call on February 7, 2019, from U.S. postal inspectors advising him they had intercepted a package containing cocaine with an intended delivery address of 222 Penn Ave., Mansfield, Ohio. Postal inspectors delivered the package to Sgt. Blust to conduct the controlled delivery. The inspectors and Sgt. Blust developed a raid plan, which included surveillance and the use of a postal inspector dressed as a mail carrier who would deliver the package.

{¶7} Later that day, Sgt. Blust and Detective Wayne Liggett drove by the area and the delivery location to check vehicles and license plates at the address as well as ascertain a description of the house. During the drive-by, Sgt. Blust and Det. Liggett observed Appellant speaking with two females inside a vehicle parked in the driveway of 222 Penn Ave. The controlled delivery was scheduled for February 8, 2019.

{¶8} On February 8, 2019, the postal inspectors and members of their unit arrived at METRICH. The cocaine was repackaged with the box beacon. Sgt. Blunt, federal officers, and members of METRICH proceeded to their assigned positions in the vicinity of 222 Penn Ave. Sgt. Blunt and the agent with him observed a Pontiac Grand Prix with the engine running parked in front of 222 Penn Ave. When the postal inspector, dressed as mail carrier, delivered the package, he also observed two individuals sitting in

[1]An amount enough to meet the major trafficker threshold.

a Grand Prix parked at the address. The postal inspector returned to his vehicle and left the area.

{¶9} Appellant exited the vehicle from the passenger side and grabbed the package. The Grand Prix drove off. Appellant walked through several backyards to another street where the Grand Prix was waiting to pick him up. Shortly after Appellant reentered the vehicle, the box beacon alarm went off, indicating the package had been opened. Officers blocked the street and initiated a stop of the vehicle. When Appellant was arrested, the package was sitting on his lap. Akili Roberts was identified as the driver of the vehicle. Officers learned Roberts was the registered owner of the Grand Prix.

{¶10} Anthony Tambasco, Director of the Mansfield Police Department Forensic Science Laboratory, analyzed the substance found in the package and confirmed it was, in fact, cocaine. The amount of cocaine in Appellant's possession totaled 119.7 grams. The weight of the cocaine which had been removed from the package prior to the controlled delivery was 369.4 grams for a total weight of 489.1 grams.

{¶11} Officers found $461 on Appellant's person and $842 on Roberts' person. Appellant was unemployed at the time of his arrest. Officers seized four cell phones, which were submitted to the Mansfield Crime Laboratory for analysis. Richland County Sherriff's Detective Wayne Liggett, who is assigned to the METRICH Enforcement Task Force, testified he downloaded the contents of three of the phones seized on February 8, 2019. Det. Liggett explained he was unable to break the security encryption on the fourth phone. Photographs were downloaded from one of the phones, which Det. Liggett ascertained belonged to Appellant. A photograph taken on February 5, 2019, depicted Appellant with a large amount of cocaine. On a phone belonging to Roberts, Det. Liggett

found a screen shot of the tracking number for the package Appellant had on his person at the time of his arrest.

{¶12} Appellant testified on his own behalf. Appellant stated he purchased the property at 222 Penn Ave. in January, 2018. He explained he never moved into the house, and instead rented the property. Appellant leased the property to Brandy Miller for a period of one year between February, 2018, and February, 2019.

{¶13} Appellant described the events leading up to his arrest. He had left his truck at 222 Penn Ave. as he was having issues with the transmission. Appellant planned to meet his cousin, Akili Roberts, at the house on February 8, 2019, to have his truck repaired. A friend dropped him off at the Penn Ave. residence. When Roberts arrived, Appellant entered the car and the two men sat and talked while they waited for a man named "Luke", who was going to repair Appellant's truck, to arrive. Appellant observed the mailman deliver the package. Because Miller was in county jail, Appellant retrieved the package. Appellant stated Roberts drove away with Appellant's phone. When Roberts realized he had Appellant's phone, Roberts was unable to stop because another car was behind his Grand Prix. Appellant knew Roberts would drive around the block. Appellant decided to walk through his neighbor's backyard to catch up with Roberts. Roberts stopped suddenly when he saw Appellant walking towards the car. Appellant explained he opened the package because the contents were jiggling around and he was curious. Appellant indicated he had the large amount of cash on his person as he had gone to the credit union to get money to pay for the repairs to his truck.

{¶14} On cross-examination, Appellant admitted he was not employed on the date of his arrest. He did not have any documentation to verify the money he received from

the credit union. Appellant acknowledged he was at the Penn Ave. residence on February 7, 2019, but denied he was waiting for a package. Appellant could not explain why Roberts had an image of the tracking number for the package on his phone.

{¶15} Following the presentation of the evidence and closing arguments, the trial court instructed the jury on the applicable law. After deliberating, the jury found Appellant guilty as charged. The trial court sentenced Appellant to the mandatory period of incarceration of eleven years.

{¶16} It is from his conviction and sentence Appellant appeals, raising the following assignments of error:

I. THE CONVICTIONS IN THIS MATTER ARE NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE VIOLATIVE OF APPELLANT'S RIGHT TO DUE PROCESS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION

II. THE TRIAL COURT COMMITTED PLAIN ERROR BY NOT DISMISSING A JUROR WHO COMMITTED MISCONDUCT.

I.

{¶17} In his first assignment of error, Appellant challenges his conviction as against the manifest weight of the evidence.

{¶18} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror and "in reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses,

and determines whether in resolving conflicts in 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'." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1983).

{¶19} "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, 227 N.E.2d 212 (1967), at paragraph one of the syllabus. The trier of fact is in the best position to judge the credibility of the witnesses.

{¶20} Appellant was convicted of R.C. 2925.11 (A) and (C)(4)(f), which provides:

> No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog.
>
> * *
>
> Whoever violates division (A) of this section is guilty of one of the following:
>
> * *
>
> (4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of possession of cocaine. The penalty for the offense shall be determined as follows:
>
> * *
>
> (f) If the amount of the drug involved equals or exceeds one hundred grams of cocaine, possession of cocaine is a felony of the first degree, the

offender is a major drug offender, and the court shall impose as a mandatory prison term a maximum first degree felony mandatory prison term. R.C. 2925.11.

{¶21} Appellant argues the state failed to prove he knowingly possessed the cocaine found in the package. He points to his testimony at trial in which he acknowledged he was outside the Penn Ave. residence, but noted he was merely waiting for an individual by the name of "Luke" to arrive to repair his truck. Roberts arrived and Appellant sat in his vehicle as he continued to wait. Appellant observed the carrier deliver the package. Appellant explained, because he knew Brandy Miller, who rented the home from him, was in jail, he picked up the package.

{¶22} " 'Possess' or 'possession' means 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." Former R.C. 2925.01(L), current R.C. 2925.01(K). However, possession may be actual or constructive. *State v. Garza*, 5th Dist. Stark No. 2020CA00018, 2020-Ohio-4001, ¶16, citing *State v. Butler*, 42 Ohio St.3d 174, 176, 538 N.E.2d 98 (1989).

{¶23} To establish constructive possession, the evidence must prove the defendant was able to exercise dominion and control over the contraband. *State v. Wolery*, 46 Ohio St.2d 316, 332, 348 N.E.2d 351(1976). Dominion and control may be proven by circumstantial evidence alone. *Garza*, supra, at ¶16, citing *State v. Trembly*, 137 Ohio App.3d 134, 738 N.E.2d 93 (2000). Circumstantial evidence establishing the defendant was located in very close proximity to the contraband may show constructive

possession. *State v. Butler*, supra; *State v. Morales*, 5th Dist. Licking No. 2004 CA 68, 2005-Ohio-4714, ¶ 50. "Establishment of ownership is not required." *State v. Rastbichler*, 2d Dist. Montgomery No. 25753, 2014-Ohio-628, ¶ 33. The issue of whether a person charged with drug possession 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).

{¶24} Upon review of the evidence as set forth in our Statement of the Case and Facts, set forth supra, as well as the testimony presented at trial, we find Appellant's conviction was not against the manifest weight of the evidence. On February 7, 2019, Sgt. Blust received a phone call from U.S. postal inspectors advising him they had intercepted a package containing cocaine with an intended delivery address of 222 Penn Ave., Mansfield, Ohio. Postal inspectors and Sgt. Blust developed a raid plan for a controlled delivery.

{¶25} Later that day, Sgt. Blust and Det. Liggett drove by the area to check vehicles and license plates at the address as well as to ascertain a description of the house. During the drive-by, Sgt. Blust and Det. Liggett observed Appellant speaking with two females inside a vehicle parked in the driveway of 222 Penn Ave. The controlled delivery was scheduled for the following day.

{¶26} On February 8, 2019, Sgt. Blunt, federal officers, and members of METRICH proceeded to their assigned positions in the vicinity of 222 Penn Ave. Officer Blunt and the agent with him observed a Pontiac Grand Prix parked with the engine running in front of 222 Penn Ave. The postal inspector, dressed as a mail carrier, also

observed two individuals sitting in a Pontiac Grand Prix parked at the address as he delivered the package.

{¶27} After the postal inspector returned to his truck and left, Appellant exited the vehicle and grabbed the package. The Grand Prix drove off. Appellant walked through several backyards to another street where the Grand Prix was stopped on the street, waiting to pick him up. Appellant reentered the vehicle and immediately opened the package. Officers blocked the street and initiated a stop of the vehicle. When Appellant was arrested, the package was sitting on his lap. Pictures of drugs were found on Appellant's cell phone. A picture taken on February 5, 2019, depicted Appellant with a large amount of cocaine. A screen shot of the package tracking number was found on Roberts' phone.

{¶28} The jury was free to accept or reject any or all of the evidence offered by the parties and assess the witnesses' credibility. Indeed, the jurors need not believe all of a witness' testimony, but may accept only portions of it as true. *State* v. *McGregor*, 5th Dist. Ashland No. 15-COA-023, 2016-Ohio-3082, 2016 WL 294299. The jury clearly believed the testimony of the state's witnesses, over Appellant's explanation of the events, and concluded Appellant was aware of the contents of the package; therefore, possessed the cocaine in question.

{¶29} Upon review of the entire record, including reading the entire transcript, we find Appellant's conviction was not against the manifest weight of the evidence.

{¶30} Appellant's first assignment of error is overruled.

II

{¶31} In his second assignment of error, Appellant maintains the trial court committed plain error by failing to dismiss a juror who committed misconduct. We disagree.

{¶32} Before closing arguments, the trial court learned Det. Wheeler, one of the state's witnesses, had overheard a comment made by Juror No. 5 to Juror No. 9, while the three men were in the restroom. Juror No. 9 remarked, "This is a hard case, isn't it?", or something to that effect. Juror No. 5 did not respond. In the presence of counsel, the trial court brought Juror No. 9 into chambers to inquire of him. Juror No. 9 indicated he had not formed or expressed any opinions, was able to keep an open mind, and had not decided the case. Likewise, the trial court brought Juror No. 5 into chambers to inquire of him. Juror No. 5 acknowledged making the comment, but stated he had not formed an opinion or made a decision about the case. The trial court suggested Juror No. 5 be made the alternate. The prosecutor and counsel for Appellant agreed.

{¶33} Where the defense did not request a remedy at trial and expressed no dissatisfaction with the trial court's handling of alleged juror misconduct, we review for plain error. *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 185.

{¶34} Pursuant to Crim.R. 52(B), notice of plain error is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Long*, 53 Ohio St.2d 91, 91, 372 N.E.2d 804 (1978). Generally, a court will not reverse a judgment based upon juror misconduct unless the complaining party shows they were prejudiced by the misconduct. *State v. Mack*, 8th Dist.

Cuyahoga No. 93091, 2010-Ohio-1420, ¶ 16, citing *State v. Keith*, 79 Ohio St.3d 514, 526, 684 N.E.2d 47 (1997).

{¶35} Appellant submits the trial court should have dismissed Juror No. 5, asking, "What happens if a juror were to get ill?" Brief of Appellant at 7. Appellant's question is merely speculative. Juror No. 5 was made the alternate and did not participate in deliberations. None of the jurors became ill or were, in any other way, unable to complete deliberations. Speculation is outside the scope of this Court's review. We find Appellant is unable to establish he was prejudiced by the misconduct. Thus, we find that no plain error exists which has caused a manifest miscarriage of justice in the case *sub judice*.

{¶36} Appellant's second assignment of error is overruled.

{¶37} The judgment of the Richland County Court of Common Pleas is affirmed.

By: Hoffman, P.J.
Gwin, J. and
Baldwin, J. concur

HON. WILLIAM B. HOFFMAN

HON. W. SCOTT GWIN

HON. CRAIG R. BALDWIN

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

HERBERT TAYLOR

Defendant-Appellant

JUDGMENT ENTRY

Case No. 2019 CA 0117

For the reasons stated in our accompanying Opinion, the judgment of the Richland County Court of Common Pleas, is affirmed. Costs assessed to Appellant.

HON. WILLIAM B. HOFFMAN

HON. W. SCOTT GWIN

HON. CRAIG R. BALDWIN

CERTIFICATE OF SERVICE
I hereby certify that a true and correct copy of the foregoing was served according to appellate rules and by
☒ **Regular Mail.**
☐ **Placed in Counsel's box in Clerk of Courts**
this 29 **day of** Oct 2020

Clerk of Courts

cc: Pros
Eric Allen

The Supreme Court of Ohio

State of Ohio

v.

Herbert Taylor

Case No. 2021-0034

ENTRY

Upon consideration of appellant's motion for a delayed appeal, it is ordered by the court that the motion is granted.

It is further ordered by the court that appellant shall file a memorandum in support of jurisdiction within 30 days from the date of this entry.

(Richland County Court of Appeals; No. 2019 CA 0117)

Maureen O'Connor
Chief Justice