[Cite as *State v. Brown*, 2009-Ohio-5390.]

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

STATE OF OHIO, Plaintiff-Appellee, v. CONDRELL BROWN, Defendant-Appellant.	: : : : : : : : :	Case No. 09CA3 <u>DECISION AND</u> <u>JUDGMENT ENTRY</u> **Released 10/1/09**

APPEARANCES:

Mickey Prisley, YAVITCH AND PALMER CO., LPA, Columbus, Ohio, for appellant.

C. David Warren, ATHENS COUNTY PROSECUTOR, and George Reitmeier, ATHENS COUNTY ASSISTANT PROSECUTOR, Athens, Ohio, for appellee.

Harsha, J.

{¶1} After stopping a vehicle that neither the driver, Condrell Brown, nor his passenger owned, the police arrested Brown for operating a vehicle while under the influence of alcohol, a drug of abuse, or a combination of them ("OVI"). Officers also discovered crack cocaine and oxycodone inside a cigarette pack located on the front, center console of the vehicle. Based upon this incident, a jury found Brown guilty of possession of cocaine and aggravated possession of drugs.

{¶2} In his first assignment of error, Brown contends that the trial court improperly denied his Crim.R. 29(A) motion for acquittal because the State failed to produce sufficient evidence to show that he knowingly possessed any controlled substance. However, the State presented evidence from which the jury could reasonably infer that Brown knew of and had access to the drugs. Brown possessed

keys to the vehicle, the drugs were easily within his access, and Officer Christopher Hock testified to seeing Brown make furtive movements over the center console where police found the drugs. Such evidence, if believed, could convince the average mind beyond a reasonable doubt that Brown knowingly had constructive possession of the drugs. Thus, sufficient evidence supports his convictions.

{¶3} In his second assignment of error, Brown argues that his convictions were against the manifest weight of the evidence because the State failed to establish that he exercised control over the drugs. In particular, he argues that the jury lost its way in crediting the "minimal testimony" of Hock that he observed Brown with his hand in the center console area. However, additional evidence, such as Hock's description of the furtive nature of Brown's behavior, was indicative of his control over the contraband. Moreover, we leave credibility determinations to the finder of fact. Because the jury could reasonably return a guilty verdict based on the State's version of events, we cannot say that the jury clearly lost its way and created such a manifest miscarriage of justice that we must reverse the convictions. Thus, Brown's convictions were not against the manifest weight of the evidence.

{¶4} In his third assignment of error, Brown contends that the prosecution argued facts not in evidence during its rebuttal closing argument. Granted, the prosecutor argued that if defense counsel had thoroughly questioned Scott Debransky, a forensic scientist from the BCI chemistry section, he would have testified as to the impracticality of analyzing a cigarette pack for fingerprints. However, examining the State's closing arguments in their entirety, we do not believe that Brown has been deprived of a fair trial or that the trial court committed plain error in not sua sponte

addressing the State's remarks. Given the evidence of Brown's guilt, we do not believe the prosecutor's remarks violated his substantial rights.

{¶5} In his fourth assignment of error, Brown argues that the trial court improperly defined the term "constructive possession" in its jury instructions. However, the jury instruction accurately stated the law on constructive possession. No evidence indicates that the trial court abused its discretion in wording or formatting the instruction.

{¶6} In his fifth assignment of error, Brown contends that he received ineffective assistance of counsel. He complains about counsel's failure to: file a motion to suppress; object to the admissibility of various evidence; seek admission of certain evidence; object to questions jurors posed to witnesses; challenge the chain of custody for the drugs; request a pre-sentence investigation; or object to the trial court's imposition of maximum, consecutive sentences. However, some of these claims require a review of evidence outside the record and are beyond the scope of a direct appeal. Also, Brown fails to support many of his claims with references to the record and citations to authority under App.R. 16(A)(7). Moreover, he fails to identify any prejudice resulting from the purported deficiencies in counsel's performance. Accordingly, we affirm the trial court's judgment.

I. Facts

{¶7} An Athens County grand jury indicted Brown for one count of possession of cocaine and one count of aggravated possession of drugs, i.e. oxycodone. Brown pled not guilty to the charges, and the matter proceeded to a jury trial. Although several witnesses testified at length during the trial, only an abbreviated summary of the events is necessary at this point.

{¶8} Officer Christopher Hock of the Nelsonville Police Department testified that on October 25, 2009 he observed a vehicle traveling on Route 33 at a high rate of speed. Hock ran the license plate number and learned the vehicle belonged to Thomas Cutts. While following the vehicle, Hock saw the passenger turn around to look at him. He also saw the vehicle cross the double yellow line and fog line several times "while the driver was doing these gestures, along with the passenger, into the center console." Hock testified that he thought they were "trying to stash something, pull something out of their pocket [sic]." Hock also began to suspect the driver of OVI.

{¶9} After stopping the vehicle, Hock immediately exited his police car, approached the driver's window, and saw "the driver [sic] and passenger's attention still down on the center console." Hock testified that the last thing he saw before knocking on the window was the driver's hand in the center console area and the passenger watching the driver. When he knocked on the window, the driver appeared "startled by [his] presence because [he] got up to the vehicle so quickly[,]" and Hock saw the driver's hands "come up" from the console area. However, Hock acknowledged on cross-examination that in his police report and during his testimony at a preliminary hearing, he mentioned seeing the hands of both the driver and the passenger in the center console area and never stated that he last saw the driver's hand there.

{¶10} After the driver rolled his window down, Hock smelled alcohol. Hock learned that Brown was the driver, and Robert Brown was the passenger. Both admitted that they consumed alcohol earlier that evening. After Officer Mark VanCurran arrived, Hock had Brown exit the vehicle for field sobriety tests and arrested him for OVI, which he pled guilty to before trial. Because the passenger was too intoxicated to

drive, the officers prepared to impound the vehicle.

{¶11} While searching the vehicle, Hock saw a cigarette pack on the center console. Hock testified that "in [his] experience, [he finds] a lot of drugs in center consoles," hidden in items like cigarette packs and mint tins. He saw the cigarette pack slightly open, and after he opened it further, he saw "a piece of cellophane, another cigarette clear plastic wrap, with what [he] suspected was a rock of crack cocaine inside." Hock also found three bluish-green pills in the pack, which were oxycodone. On cross-examination, Hock acknowledged that the pack could have belonged to Cutts. However, he testified that based on the location of the pack and the way he observed the vehicle swerving, he felt there was a "strong possibility" that if the pack had been on the console while Brown was driving, it would have fallen off. Hock admitted that he saw the passenger smoking at the scene, outside the vehicle. However, the drugs were found in a Kool cigarette pack, and Hock testified, without objection, that the passenger told Hock he smoked Salem cigarettes.

{¶12} Hock testified that after he told Brown about the drugs found in the vehicle, Brown "immediately put his head down and said, [']that wasn't supposed to be there.[']" Hock testified, without objection, that he interpreted Brown's statement to mean "he knew it was in the vehicle and he'd attempted to hide it, possibly thought, which is common practice, the passenger would take it into his possession to hide it somewhere else when I pulled [Brown] out of the vehicle and attempt to get away with the offense."

{¶13} Hock admitted that he did not send the cigarette pack to BCI for fingerprint analysis. However, he testified that fingerprint analysis was not standard protocol in a

case such as this, and that in his experience, police rarely obtain a useable fingerprint. Furthermore, Hock felt that based on his observations of Brown, the case against him for possession was strong. Officer VanCurran also testified that it would "not be very feasible to take fingerprints off of a cigarette pack" given the number of people who tend to handle such items.

{¶14} The jury found Brown guilty on both possession counts. The trial court sentenced him to 18 months in prison for the possession of cocaine charge and six months in prison for the aggravated possession of drugs charge. The court ordered Brown to serve the sentences consecutively to each other for a total of 24 months in prison. Then, Brown filed this appeal.

II. Assignments of Error

{¶15} Brown assigns the following errors for our review:

> Assignment of Error No. 1: The trial court erred and thereby deprived Appellant of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and comparable provisions of the Ohio Constitution by overruling Appellant's Crim.R. 29 motion for judgment of acquittal, as the prosecution failed to offer sufficient evidence to prove beyond a reasonable doubt each and every element of the offenses of possession of cocaine and aggravated possession of drugs.
>
> Assignment of Error No. 2: The trial court erred and thereby deprived Appellant of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and comparable provisions of the Ohio Constitution by finding Appellant guilty, as the verdict for possession of cocaine and aggravated possession of drugs was against the manifest weight of the evidence.
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> Assignment of Error No. 3: The prosecuting attorney's remarks during closing arguments constituted prosecutorial misconduct and plain error which deprived Appellant of a fair trial in violation of the Fourteenth Amendment to the United States Constitution and comparable provisions of the Ohio Constitution.
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> Assignment of Error No. 4: The trial court erred in improperly instructing

the jury on constructive possession over defendant's objection.

Assignment of Error No. 5: Trial counsel rendered ineffective assistance of counsel in violation of Mr. Brown's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections 10 and 16[,] Article I of the Ohio Constitution.

III. Sufficiency of the Evidence

{¶16} Brown contends that the trial court erred in denying his Crim.R. 29(A) motion for judgment of acquittal. Crim.R. 29(A) motions for acquittal test the sufficiency of the evidence presented at trial. *State v. Umphries*, Ross App. No. 02CA2662, 2003-Ohio-599, at ¶6, citing *State v. Williams,* 74 Ohio St.3d 569, 576, 1996-Ohio-91, 660 N.E.2d 724; and *State v. Miley* (1996), 114 Ohio App.3d 738, 742, 684 N.E.2d 102. The trial court must enter a judgment of acquittal when the state's evidence is insufficient as a matter of law to sustain a conviction. Crim.R. 29(A).

{¶17} When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court's function "is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, at paragraph two of the syllabus (superseded by state constitutional amendment on other grounds), following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560. "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. Our evaluation of the sufficiency of the evidence raises a question of law and does not permit us to weigh the evidence. *State v. Simms*, 165 Ohio App.3d 83, 2005-Ohio-5681, 844 N.E.2d 1212, at ¶9, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175,

485 N.E.2d 717.

{¶18} Brown was convicted of possession of cocaine, in violation of R.C. 2925.11(A) and R.C. 2925.11(C)(4)(b), and aggravated possession of drugs, in violation of R.C. 2925.11(A) and R.C. 2925.11(C)(1)(a). R.C. 2925.11(A) provides: "No person shall knowingly obtain, possess, or use a controlled substance." R.C. 2925.11(C)(4)(b) and R.C. 2925.11(C)(1)(a) indicate the degree of the felony for each conviction based on the amount of each drug police found. Brown contends the State failed to produce sufficient evidence that he knowingly obtained, possessed, or used any controlled substance. According to Brown, the State only proved that police found him in a vehicle that contained crack cocaine and oxycodone, and mere presence in an area where contraband is located does not conclusively establish constructive possession. See *State v. Riggs* (Sept. 13, 1999), Washington App. No. 98CA39, 1999 WL 727952, at *5.

{¶19} The State contends that it produced sufficient evidence that Brown knowingly had constructive possession of crack cocaine and oxycodone. "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* (1982), 70 Ohio St.2d 87, 434 N.E.2d 1362, at syllabus, following *State v. Wolery* (1976), 46 Ohio St.2d 316, 348 N.E.2d 351. For constructive possession to exist, "[i]t must also be shown that the person was conscious of the presence of the object." Id. at 91. "Dominion and control, as well as whether a person was conscious of the presence of an item of contraband, may be established by circumstantial evidence." *State v. Matteson*, Vinton App. No. 06CA642, 2006-Ohio-6827, at ¶23, citing *Jenks*, supra, at 272-273. Moreover, two or more persons may

have joint constructive possession of the same object. *Riggs* at *4.

{¶20} Although a defendant's mere proximity to drugs is in itself insufficient to establish constructive possession, proximity to the drugs may constitute some evidence of constructive possession. *State v. Fry*, Jackson App. No. 03CA26, 2004-Ohio-5747, at ¶40. Therefore, presence in the vicinity of contraband, coupled with another factor or factors probative of dominion or control over the contraband, may establish constructive possession. *Riggs* at *5. For example, in the automobile context a defendant's "possession of the keys to the automobile is a strong indication of control over the automobile and all things found in or upon the automobile." *Fry* at ¶41. "Thus, when one is the driver of a car in which drugs are within easy access of the driver, constructive possession may be established." Id., citing *State v. Morehouse* (Oct. 19, 1989), Cuyahoga App. No. 56031, 1989 WL 125128. In addition, "furtive movements in an automobile may provide sufficient indicia of dominion or control over contraband, allowing an inference of constructive possession." *Riggs* at *5.

{¶21} Here, the State presented evidence that Brown was driving Cutts's vehicle the night he was arrested. As the driver, Brown's possession of the keys provided a strong indication of control over the drugs found in the automobile. Furthermore, the State presented evidence that the drugs were found inside a cigarette pack on the center console, within easy reach of Brown from the driver's seat.

{¶22} In addition, Hock testified to seeing Brown make furtive movements before and after pulling him over. Specifically, Hock testified that while following Cutts's vehicle, he saw Brown and the passenger "doing these gestures * * * into the center console." Hock thought they were "trying to stash something, pull something out of their

pocket [sic]." After stopping the vehicle, Hock observed Brown and the passenger with their attention still on the console. The last thing Hock saw before knocking on Brown's window was Brown's hand in the center console area and the passenger watching Brown. Hock testified that when he knocked on the window, Brown appeared "startled by [his] presence because [he] got up to the vehicle so quickly[,]" and Hock saw Brown's hands "come up" from the console area. In addition, when Hock confronted Brown about the drugs found in the vehicle, Brown "immediately put his head down and said, [']that wasn't supposed to be there.[']" Hock testified, without objection, that he interpreted this statement and behavior to mean Brown knew about the drugs but possibly thought the passenger would hide them.

{¶23} Based on this evidence, any rational trier of fact could have found that Brown knew about the crack cocaine and oxycodone in the cigarette pack on the center console and that he exercised dominion and control over the drugs. Even though Hock did not actually see Brown touch the pack, and regardless of whose hand Hock last saw over the center console, the jury could reasonably infer that Brown knew of and had access to the drugs (1) in the vehicle he possessed the keys to; (2) located on the center console next to his seat; (3) in an area where an officer observed him making furtive movements. Moreover, while Brown complains that a photograph the State introduced into evidence did not accurately reflect the interior of the vehicle, it was admitted without objection, and Brown does not explain how any inaccuracies in the photograph prevent a finding that sufficient evidence supported his convictions. Therefore, we conclude that the State produced sufficient circumstantial evidence that, if believed, would convince the average mind beyond a reasonable doubt that Brown

knowingly had constructive possession of crack cocaine and oxycodone. We overrule Brown's first assignment of error.

IV. Manifest Weight of the Evidence

{¶24} "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. Id., citing *Martin*, supra, at 175. A reviewing court "may not reverse a conviction when there is substantial evidence upon which the trial court could reasonably conclude that all elements of the offense have been proven beyond a reasonable doubt." *State v. Johnson* (1991), 58 Ohio St.3d 40, 42, 567 N.E.2d 266, citing *State v. Eskridge* (1988), 38 Ohio St.3d 56, 526 N.E.2d 304, at paragraph two of the syllabus.

{¶25} Even in acting as a thirteenth juror we must still remember that the weight to be given evidence and the credibility to be afforded testimony are issues to be determined by the trier of fact. *State v. Frazier*, 73 Ohio St.3d 323, 339, 1995-Ohio-235, 652 N.E.2d 1000, citing *State v. Grant*, 67 Ohio St.3d 465, 477, 1993-Ohio-171, 620 N.E.2d 50. The fact finder "is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the

credibility of the proffered testimony." *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273. Thus, we will only interfere if the fact finder clearly lost its way and created a manifest miscarriage of justice.

{¶26} Brown contends that his conviction is against the manifest weight of the evidence because "[t]he only evidence that he exerted control over any contraband was the extremely minimal testimony of Officer Hock that [Brown] had [his hand], at some point, down in the center console area." However, as we discussed above, the State presented additional evidence that Brown had constructive possession of the drugs, such as Hock's testimony regarding the furtive nature of Brown's movements in the vehicle. Although Brown attempted to argue at trial that the drugs may have belonged to Cutts or the passenger, as we explained in *State v. Murphy*, Ross App. No. 07CA2953, 2008-Ohio-1744, at ¶31:

> It is the trier of fact's role to determine what evidence is the most credible and convincing. The fact finder is charged with the duty of choosing between two competing versions of events, both of which are plausible and have some factual support. Our role is simply to insure the decision is based upon reason and fact. We do not second guess a decision that has some basis in these two factors, even if we might see matters differently.

{¶27} For the jury to conclude Brown had constructive possession of the crack cocaine or oxycodone, it had to assess the credibility of the State's witnesses, particularly the credibility of Hock, and accept their testimony. Having heard the testimony and having observed the demeanor of those witnesses, the jury could choose to believe all, part, or none of the testimony presented by any of these witnesses. *State v. Parish*, Washington App. Nos. 05CA14 & 05CA15, 2005-Ohio-7109, at ¶15.

{¶28} The jury chose to believe the State's version of events, and we will not substitute our judgment for that of the finder of fact under these circumstances. The

evidence reasonably supports the conclusion that Brown knew about the drugs in the cigarette pack on the center console and exercised dominion and control over them. Police found the drugs within easy reach of Brown from the driver's seat, and Hock observed Brown making furtive gestures in the area where police found the drugs. Thus, after reviewing the entire record, we cannot say that the jury lost its way or created a manifest miscarriage of justice when it found Brown guilty of possession of cocaine and aggravated possession of drugs. Accordingly, we overrule Brown's second assignment of error.

V. Prosecutorial Misconduct

{¶29} In his third assignment of error, Brown contends that the State deprived him of a fair trial by engaging in prosecutorial misconduct during its closing argument. "A prosecutor's remarks constitute misconduct if the remarks were improper and if the remarks prejudicially affected an accused's substantial rights." *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, 793 N.E.2d 446, at ¶44, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883. Prosecutorial misconduct will not provide a basis for reversal unless the misconduct can be said to have deprived the appellant of a fair trial based on the entire record. See *State v. Lott* (1990), 51 Ohio St.3d 160, 166, 555 N.E.2d 293. "The touchstone of analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, at ¶92, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78. We must "view the state's closing argument in its entirety to determine whether the allegedly improper remarks were prejudicial." *State v. Treesh*, 90 Ohio St.3d 460, 466, 2001-Ohio-4, 739 N.E.2d 749, citing *State v. Mortiz* (1980), 63

Ohio St.2d 150, 157, 407 N.E.2d 1268.

{¶30} The following exchange occurred during the State's rebuttal closing argument:

> BY MR. BLACKBURN: * * * But you know, the Defendant wanted to talk several times about how in his closing all came down to these fingerprints. We had a BCI employee, an expert on the stand, how many questions did he ask him about fingerprints?
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> BY MR. FRANCIS: Objection Your Honor. That expert was for drugs not for fingerprints.
>
> BY MR. BLACKBURN: BCI employee though, Your Honor. He asked him no questions, he didn't know his field of expertise.
>
> BY MR. FRANCIS: He said his specialty was narcotic investigation or narcotic assessment or something of that nature. Clearly –
>
> BY THE JUDGE: He did say that he identified drugs, but he also said he was a forensic scientist. So if he was a forensic scientist I'd presume he'd also be familiar with fingerprints.
>
> BY MR. BLACKBURN: Thank you. Familiar with fingerprints, didn't ask him a single question. Why? He didn't want the answers. He didn't want you to know that you can't get fingerprints off plastic easily. He didn't want you to know how many, how hard a cigarette package is to get fingerprints off of. He didn't want you to know. * * *

{¶31} Initially, Brown objected when the prosecutor implied that he should have asked Debransky questions about fingerprint analysis. However, after the court overruled that objection, Brown did not object when the prosecutor speculated that Debransky would have testified to certain "facts" favorable to the State. Thus, Brown waived all but plain error as to those comments. See Crim.R. 52(B); *State v. Slagle*

(1992), 65 Ohio St.3d 597, 604, 605 N.E.2d 916. "We may invoke the plain error rule only if we find (1) that the prosecutor's comments denied appellant a fair trial, (2) that the circumstances in the instant case are exceptional, and (3) that reversal of the judgment below is necessary to prevent a miscarriage of justice." *State v. McGee*, Washington App. No. 05CA60, 2007-Ohio-426, at ¶15, citing *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, at paragraph three of the syllabus.

{¶32} Brown essentially complains that the prosecutor argued facts not in the record when he stated that Debransky would have testified that it is difficult to obtain fingerprints from plastic in general and cigarette packs specifically. We agree with Brown that these statements were improper as they amount to mere speculation by the prosecutor. Nonetheless, Brown has failed to demonstrate that he has been prejudiced in any way.

{¶33} The trial court instructed the jury that the attorneys' statements were not evidence. And although none of the State's witnesses specifically testified that it is difficult to retrieve fingerprints from plastic, the record contains some evidence regarding the unlikelihood of obtaining a viable fingerprint in this case. VanCurran testified that it would "not be very feasible to take fingerprints off of a cigarette pack" given the number of people who tend to handle such items. Moreover, the feasibility or infeasibility of obtaining fingerprints from the cigarette pack in this case has questionable relevance as Hock, the investigating officer, indicated that he had no intention of requesting a fingerprint analysis. He testified it was not standard protocol for this type of case, and he felt his observations of Brown's behavior provided strong enough evidence of possession. In addition, the evidence showed that Brown had

possession of the keys to Cutts's vehicle and that a police officer observed Brown making furtive movements over the area in the vehicle where the drugs were found. Looking at the entire record and given the evidence demonstrating that Brown had constructive possession of the drugs, we do not believe that the prosecution's comments deprived him of a fair trial.

VI. Jury Instructions

{¶34} In his fourth assignment of error, Brown contends that the trial court failed to properly instruct the jury regarding constructive possession. As we stated in *State v. Pigg*, Scioto App. No. 04CA2947, 2005-Ohio-2227, at ¶17:

> Generally, a trial court should give a requested jury instruction if it is a correct statement of the law as applied to the facts of that particular case. *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591, 575 N.E.2d 828. R.C. 2945.11 requires a trial court to charge the jury with all the law required to return a verdict. *State v. Mitchell* (1989), 60 Ohio App.3d 106, 108, 574 N.E.2d 573. The refusal to give a requested jury instruction is reversible error only if the instruction was a correct statement of the law, was not covered by other instructions, and the failure to give the instruction impaired the theory of the case of the party requesting it. *Alford v. Nelson* (Oct. 12, 1994), Jackson App. No. 93CA720. However, reversible error should not be predicated upon one phrase or one sentence in a jury charge; rather, a reviewing court must consider the jury charge in its entirety. *State v. Porter* (1968), 14 Ohio St.2d 10, 13, 235 N.E.2d 520. While the wording and form of an instruction are within the trial court's sound discretion, the court must charge on all relevant questions of law that the evidence presents.

Thus, we review the issue of whether jury instructions correctly state the law de novo. However, if the instruction correctly states the law, its wording and format are within the trial court's discretion. To constitute an abuse of discretion, the trial court's decision must be unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶35} Here, the trial court instructed the jury that:

> Constructive possession exists when an individual is able to exercise dominion or control over an item[,] even if the individual does not have the item within his immediate physical possession. Dominion and control may be established by circumstantial evidence alone. To find that an individual constructively possessed an item, the evidence must also demonstrate that the individual was conscious of the presence of the object although a Defendant's mere proximity is in itself insufficient to establish constructive possession. Proximity to the object may constitute some evidence of constructive possession, thus presence in the vicinity of contraband coupled with another factor or factors provative [sic] of dominion and control over the contraband may establish constructive possession. Furthermore, since ownership need not be proven to establish constructive possession, multiple persons may constructively possess the same thing.

{¶36} Initially, Brown claims that the court erred by rejecting his proposed amendment to this instruction. However, Brown failed to file a copy of his proposed instructions under Crim.R. 30(A) or otherwise preserve his proposed amendment for the record, and we refuse to speculate as to what language Brown proposed for the instruction. Thus, we reject this argument.

{¶37} Brown also contends that the trial court incorrectly stated the law on constructive possession as outlined in the following passage from the Eighth District's decision in *State v. Mason* (July 5, 2001), Cuyahoga App. No. 78606, 2001 WL 755831, at *5:

> Although the mere presence of a person at the residence in which contraband is discovered is not enough to support the element of possession, if the evidence demonstrates defendant was able to exercise dominion or control over the illegal objects, defendant can be convicted of possession. *State v. Wolery* (1976), 46 Ohio St.2d 316, 348 N.E.2d 351; cf., *State v. Haynes* (1971), 25 Ohio St.2d 264, 267 N.E.2d 787. Moreover, where a sizable amount of readily usable drugs is in close proximity to a defendant, this constitutes circumstantial evidence to support the conclusion that the defendant was in constructive possession of the drugs. *State v. Benson* (Dec. 24, 1992), Cuyahoga App. No. 61545, unreported; *State v. Pruitt* (1984), 18 Ohio App.3d 50, 480 N.E.2d 499. The same reasoning applies to the discovery of other contraband in close proximity to the defendant. *State v. Roundtree* (Dec. 3, 1992), Cuyahoga

> App. No. 61131, unreported. Furthermore, circumstantial evidence alone is sufficient to support the element of constructive possession. *State v. Jenks*, supra; *State v. Lavender* (Mar. 12, 1992), Cuyahoga App. No. 60493, unreported.

{¶38} Brown simply cites this language, and concludes without analysis that the court's instruction fails to "adequately reflect" it. He makes no effort to explain any alleged deficiencies in the trial court's instruction based on the law of constructive possession set forth by the Supreme Court of Ohio and this court and outlined in Section III of this decision. See *Hankerson*; *Matteson*; *Riggs*; and *Fry*, supra. Moreover, a comparison of the caselaw from these authorities to the jury instruction in this case indicates that the trial court made a correct statement of the law on constructive possession. The court properly (1) defined constructive possession, (2) informed the jury that a defendant must be "conscious of the presence" of the contraband for constructive possession to exist; (3) explained the significance of circumstantial evidence; (4) instructed the jury on the importance of a defendant's proximity to contraband; and (5) explained that more than one person could have constructive possession of the same object. See *Hankerson*; *Matteson*; *Riggs*; and *Fry*. While the trial court did not quote these decisions verbatim, it was within its discretion to determine the precise wording and form of its instruction. See *Pigg* at ¶17. No evidence in the record indicates that the court acted unreasonably, arbitrarily, or unconscionably in crafting the instruction. Therefore, we overrule Brown's fourth assignment of error.

VII. Ineffective Assistance of Counsel

{¶39} In his fifth assignment of error, Brown argues that his trial counsel rendered ineffective assistance of counsel. In order to prevail on a claim of ineffective

assistance of counsel, an appellant must show that (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced his defense so as to deprive him of a fair trial. *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, at ¶205, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. To establish deficient performance, an appellant must show that trial counsel's performance fell below an objective level of reasonable representation. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, at ¶95. To establish prejudice, an appellant must show a reasonable probability exists that, but for the alleged errors, the result of the proceeding would have been different. Id. The appellant has the burden of proof on the issue of counsel's ineffectiveness because a properly licensed attorney is presumed competent. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, at ¶62.

{¶40} First, Brown complains that defense counsel failed to file a motion to suppress. However, the failure to file a motion to suppress does not automatically constitute ineffective assistance of counsel. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448, 721 N.E.2d 52, citing *Kimmelman v. Morrison* (1986), 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305. Moreover, under App.R. 16(A)(7), an appellant's brief must contain reasons in support of the appellant's contentions, "with citations to the authorities, statutes, and parts of the record on which appellant relies." Brown makes no effort to explain the basis for a motion to suppress or how such a motion had a reasonable probability of success. Because Brown failed in his burden to prove counsel's ineffectiveness, we reject this argument.

{¶41} Second, Brown argues that defense counsel failed to object on hearsay

grounds when Hock testified to statements the passenger made. Brown specifically cites the location in the transcript where Hock testified that he asked the passenger what brand of cigarette he smoked, and the passenger said, "Salem" – a different brand from the cigarette pack containing the drugs. However, "[t]he failure to make objections is not alone enough to sustain a claim of ineffective assistance of counsel." *State v. Conway*, supra at ¶103. Furthermore, other than a conclusory statement that the admission of this statement was "damaging to the defendant's theory of the case," Brown fails to show that counsel's failure to object affected the outcome of the trial. Therefore, Brown failed to demonstrate any prejudice to his defense.

{¶42} Third, Brown complains that counsel failed to object to the admissibility of a photograph the State introduced into evidence of "a vehicle's interior which differed significantly from the actual vehicle in the case." Again, "[t]he failure to make objections is not alone enough to sustain a claim of ineffective assistance of counsel." Id. "[T]o admit photographs which are illustrative of a witness' testimony, that witness must testify that the photograph 'is a fair and accurate representation of the subject matter, based on that witness' personal observation.'" *State v. Slavens* (Dec. 31, 1998), Vinton App. No. 98CA520, 1999 WL 4895, at *4, quoting *Midland Steel Products Co. v. U.A.W. Local 486* (1991), 61 Ohio St.3d 121, 129, 573 N.E.2d 98. Here, Hock testified that the photograph depicted the interior of a vehicle that was the same make and model as Cutts's vehicle and was "very similar" to the vehicle. Brown fails to demonstrate any prejudice to his defense from the photograph's admission, particularly given the fact that Hock explained to the jury the only difference he could recall between the two vehicles, i.e. the photographed vehicle had cup holders where Cutts's vehicle simply had a "dish

area." Moreover, to illustrate any other differences between the vehicles would require evidence outside of the record in this appeal. That review is beyond the scope of a direct appeal. Therefore, we reject this argument.

{¶43} Fourth, Brown contends that defense counsel should have moved to admit into evidence "the prior inconsistent testimony given by officer Hock at Appellant's preliminary hearing." Again, Brown fails to comply with App.R. 16(A)(7) by providing reasons in support of his contention "with citations to the authorities, statutes, and parts of the record on which [he] relies." Furthermore, each if we assume the transcript from this hearing was admissible, defense counsel questioned Hock about the arguably inconsistent statements he made at the hearing, and Hock admitted to making them. Therefore, whether the hearing transcript itself was admitted into evidence made little difference since the substance of these statements was already before the jury, i.e. an admission of the inconsistency made extrinsic proof unnecessary. See Gianelli & Snyder, Ohio Evidence (2 Ed.) 528-529, Section 613.6.

{¶44} Fifth, Brown complains that defense counsel failed to object any of the questions jurors posed to Hock or VanCurran. However, Brown does not state the specific questions defense counsel should have objected to and why or explain how counsel's failure to object prejudiced his defense. See App.R. 16(A)(7). Therefore, we reject this argument.

{¶45} Sixth, Brown contends that defense counsel failed to object to VanCurran's "opinion testimony about the feasibility of taking fingerprints in this case." Again, Brown does not explain the basis for an objection or explain how counsel's failure to object prejudiced his defense. See App.R. 16(A)(7). We also reject this

argument.

{¶46} Seventh, Brown argues that defense counsel failed to object when Officer Alan Sullivan gave a "legally conclusory answer" to one of the prosecutor's questions. He cites a portion of the transcript where the prosecutor asked, "In order to possess drugs do you have to have ownership of the drugs?" Sullivan responded, "I guess not." Even if we presume that Sullivan improperly gave his opinion on whether ownership was an element of a possession charge, the trial court instructed the jury that it was the court's duty to instruct the jury on the law, and it was the jury's duty to follow those instructions. Furthermore, when the court defined "constructive possession" in the jury instructions, it specifically stated that "ownership need not be proven to establish constructive possession," so Sullivan's testimony did not mislead the jury. Because Brown fails to demonstrate any prejudice to his defense, we reject this argument.

{¶47} Seventh, Brown complains that defense counsel should not have stipulated to the chain of custody for the drugs. "However, the [S]tate was not required to prove a perfect, unbroken chain of custody." *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, at ¶43, quoting *State v. Keene*, 81 Ohio St.3d 646, 662, 1998-Ohio-342, 693 N.E.2d 246. "Even if the chain of custody had indeed been broken, this fact goes to the weight, rather than the admissibility, of the evidence." Id. Because the jury would have considered this evidence in any event, the stipulation did not prejudice Brown. See id.

{¶48} Eighth, Brown argues that counsel failed to request a pre-sentence investigation, "which would have been useful for purposes of sentencing, but would also have been useful to preserve appellant's right to file for Judicial Release." However,

even if defense counsel performed deficiently, Brown merely speculates that a pre-sentence investigation would have been favorable to him and fails to demonstrate actual prejudice from counsel's failure to request it. Moreover, in order to do so he would have to rely on evidence outside of the record in this appeal. That review is beyond the scope of a direct appeal.

{¶49} Finally, Brown complains that defense counsel did not object to the trial court's imposition of maximum, consecutive sentences. However, Brown fails to argue, let alone prove, that he would have received a lesser sentence had counsel objected. Accordingly, we overrule Brown's fifth assignment of error.

VIII. Conclusion

{¶50} Having overruled each of the assignments of error, we affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

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

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Kline, P.J., and Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, 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.