[Cite as *State v. Washington*, 2023-Ohio-4735.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JAREL A. WASHINGTON,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case Nos. 22 MA 0128; 22 MA 0129

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 21 CR 814

BEFORE:
Cheryl L. Waite, Carol Ann Robb, Mark A. Hanni, Judges.

JUDGMENT:
Affirmed.

Atty. Gina DeGenova, Mahoning County Prosecutor and *Atty. Edward A. Czopur*, Assistant Prosecutor, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee

Atty. Edward F. Borkowski, Jr., P.O. Box 609151, Cleveland, Ohio 44109, for Defendant-Appellant

Dated: December 20, 2023

WAITE, J.

{¶1} Appellant Jarrell A. Washington appeals his conviction and sentence, following a jury trial, for possession of cocaine. Appellant argues that the conviction is against the sufficiency and manifest weight of the evidence. The record reflects that Appellant was the driver and sole occupant of a vehicle in which 29 grams of cocaine were found in a box hidden in the undercarriage of the vehicle. Based on the circumstances of the stop, including a phone call Appellant made to his brother prior to the stop, there is sufficient evidence to support the conviction and the conviction is not against the manifest weight of the evidence. Appellant's two assignments of error are overruled and the judgment of the trial court is affirmed.

History of the Case

{¶2} At approximately 8:40 p.m. on November 1, 2021, Beaver Township Officer Christopher Albert observed a 2007 Dodge Charger on Market Street in North Lima, Ohio, that had overly dark tinted windows. Officer Albert checked the license plate of the vehicle and found that the owner, Devonte Clay, had a suspended license. Another vehicle, a maroon Ford sedan, was following very closely behind the Dodge Charger, blocking Officer Albert from pulling behind it. The officer assumed the two cars were together. He turned on his cruiser lights and siren, and forced his way behind the Dodge Charger and in front of the Ford sedan. The Dodge Charger eventually pulled over and stopped. The other car continued on, then circled back and parked about 25 yards away, watching what was occurring with the traffic stop.

{¶3} Appellant was the driver and sole occupant of the Dodge Charger. Officer Albert told Appellant the reason for the stop. The officer asked Appellant if he was the

registered owner, and Appellant stated that "he was not the registered owner and he did not have a driver's license, that he was suspended." (8/29/22 Tr., p. 211.) Appellant also said that he had picked up the car for his brother Devonte Clay at the impound lot in Tiffin, Ohio (a three-hour drive away). Officer Albert asked if he could search the vehicle, and Appellant said yes. The officer found a puppy, dog food in the passenger compartment, and a box of plastic sandwich bags in the trunk.

{¶4} Officer Albert told Appellant that the vehicle had to be towed to a tow company lot since Appellant did not own the vehicle and had a suspended license. The officer told Appellant to leave the keys in the vehicle; that Appellant would not have access to the vehicle after it was towed; and that only the registered owner could retrieve the vehicle. Officer Albert gave Appellant a traffic citation, and Appellant walked over to the Ford sedan and got in. The Ford sedan stayed at the scene for five or ten minutes more, and left with Appellant prior to the Dodge Charger being towed.

{¶5} Gobel's Towing arrived to tow the vehicle. While it was being lifted onto the tow trunk, Nick Gobel spotted a box magnetically attached to the underside of the vehicle in the passenger side front wheel well. Officer Albert opened the box and found 29 grams of cocaine inside.

{¶6} The next day, Detective Datillo of the Beaver Township Police drug task force began investigating the circumstances of Appellant's traffic stop to determine whether charges should be filed. On November 2, 2021, a criminal complaint with one count of possession of cocaine was filed against Appellant in Mahoning County Court, Area 5. Appellant was arrested on November 3, 2021. His initial hearing was on November 5, 2021. Bond was set at $25,000. The case was bound over to the Mahoning County Grand Jury.

{¶7} Appellant was indicted on December 30, 2021, on one count of possession of cocaine, R.C. 2925.11(A), (C)(4)(e), a first degree felony. Jury trial was held on August 29, 2022. The state presented four witnesses: Officer Christopher Albert; tow truck operator Nicholas Gobel; Anna Petro of the Ohio Bureau of Criminal Investigation ("BCI"); and Detective Anthony Datillo.

{¶8} Officer Albert testified that he found a box of plastic sandwich bags in the trunk of the vehicle, and that sandwich bags were commonly used for possession of controlled substances. He testified that the magnetic box found under the vehicle was a "narcotics hide box" commonly used to transport illegal narcotics. (8/29/22 Tr., p. 218-219.) He also testified that Appellant took the car keys with him even though he was told to leave them in vehicle. His testimony also included the circumstances of the second car following Appellant's vehicle.

{¶9} Nicholas Gobel, the tow truck driver, testified that he found the black magnetic box under the vehicle while loading the vehicle onto the tow truck. He also testified that after he had returned to his tow lot after towing the Dodge Charger, Appellant called him and asked if he could "come remove something he forgot to remove" from the vehicle. (8/29/22 Tr., p. 274.)

{¶10} Detective Datillo of the Beaver Township Police drug task force testified that he was aware that the owner of Dodge Charger, Devonte Clay, was incarcerated in the Mahoning County Jail. He looked into jail phone calls and found that Appellant had called Clay on November 1, 2021 at 5:19 p.m., approximately three hours before Appellant was stopped by Officer Albert. Det. Datillo obtained a recording of that call. On the recording Appellant can be heard to say that he just picked up the vehicle from the impound lot and

that he was worried about what would happen if the car was stopped by the police and was towed.

{¶11} Det. Datillo also testified about a call Appellant received in jail on November 4, 2021, made by an unknown woman. On that call, Appellant and the woman were discussing his case and Appellant made remarks about talking to "the cops" and getting "that shit" flushed down the toilet. The recording is of poor quality and it is difficult to hear most of the dialog, much less the context in which Appellant's statements were made.

{¶12} Appellant called Vicki Bartholomew from BCI to testify that no identifiable prints were found on the narcotics lock box. She testified that only about 40% of the 2,700 fingerprint submissions to BCI involve prints that are sufficient for analysis. She further testified that fingerprints on an object may degrade or be destroyed by many factors, including being exposed to heat, cold, rain, dirt and dust, airflow, or anything else that occurs outside in the elements.

{¶13} Following trial, the jury returned a guilty verdict. Appellant was sentenced on November 2, 2022. The court determined that Appellant had previously been found guilty of first degree felony possession of cocaine. The court sentenced Appellant to seven to ten-and-one-half years in prison. The court filed its judgment entry on November 4, 2022. Appellant's counsel filed a timely appeal on December 5, 2022, Appeal No. 22 MA 0128. The appeal was filed on the 31st day after judgment because December 4, 2022, was a Sunday. Appellant filed his own *pro se* notice of appeal on the same day. The two appeals were consolidated on January 10, 2023.

{¶14} Appellant asserts two related assignments of error on appeal that will be treated together.

ASSIGNMENT OF ERROR NO. 1

APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR NO. 2

APPELLANT'S CONVICTION WAS UNSUPPORTED BY SUFFICIENT EVIDENCE.

{¶15} Appellant's argument involves both the sufficiency and manifest weight of the evidence against him at trial. These are distinct but related legal concepts. "Sufficiency of the evidence is a legal question dealing with adequacy." *State v. Pepin-McCaffrey*, 186 Ohio App.3d 548, 2010-Ohio-617, 929 N.E.2d 476, ¶ 49 (7th Dist.), citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "Sufficiency is a term of art meaning that legal standard which is applied to determine whether a case may go to the jury or whether evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Draper*, 7th Dist. Jefferson No. 07 JE 45, 2009-Ohio-1023, ¶ 14, citing *State v. Robinson*, 162 Ohio St. 486, 124 N.E.2d 148 (1955). When reviewing a conviction for sufficiency of the evidence, a reviewing court does not determine "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Rucci*, 7th Dist. Mahoning No. 13 MA 34, 2015-Ohio-1882, ¶ 14, citing *State v. Merritt*, 7th Dist. Mahoning No. 09-JE-26, 2011-Ohio-1468, ¶ 34.

{¶16} In reviewing a sufficiency of the evidence argument, the evidence and all rational inferences are evaluated in the light most favorable to the prosecution. *State v.*

Goff, 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). A conviction cannot be reversed on the grounds of sufficiency unless the reviewing court determines that no rational juror could have found the elements of the offense proven beyond a reasonable doubt. *Id.*

{¶17} Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." (Emphasis deleted.) *Thompkins* at 387. It is not a question of mathematics, but depends on the effect of the evidence in inducing belief. *Id.* Weight of the evidence involves the state's burden of persuasion. *Id.* at 390. (Cook, J. concurring). The appellate court reviews 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. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, citing *Thompkins*, at 387. This discretionary power of the appellate court to reverse a conviction is to be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Id.*

{¶18} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 118, quoting *State v. DeHass*, 10 Ohio St.2d 230, 39 O.O.2d 366, 227 N.E.2d, 212 (1967), paragraph one of the syllabus. "The trier of fact is in the best position to weigh the evidence and judge the witnesses' credibility by observing their gestures, voice inflections, and demeanor." *State v. Vaughn*, 7th Dist. No. 20 MA 0106, 2022-Ohio-3615, 197 N.E.3d 644, ¶ 16, citing *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

{¶19} To reverse a jury verdict as against the manifest weight of the evidence, a unanimous concurrence of all three appellate judges is required. *Thompkins* at 389; Section 3(B)(3), Article IV of the Ohio Constitution.

{¶20} R.C. 2925.11(A) states: "No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog." Appellant argues that he did not directly possess the cocaine because it was not found on his person. Appellant contends that the state needed to prove that he constructively possessed the cocaine. "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. Appellee does not dispute that this is a case of constructive possession.

{¶21} "When looking at constructive possession, a person's mere presence or access to contraband or the area where contraband is found is insufficient to demonstrate dominion and control." *Vaughn*, supra, at ¶ 21, citing *State v. Gardner*, 2017-Ohio-7241, 96 N.E.3d 925, ¶ 35 (8th Dist.). Instead, there must be some evidence that the person exercised or had the ability to exercise dominion and control over the contraband. *Id*., citing *State v. Long*, 8th Dist. Cuyahoga No. 85754, 2005-Ohio-5344. "It must also be shown that the person was conscious of the presence of the object." *Hankerson*, supra, at 91. "Inherent in a finding of constructive possession is that the defendant was conscious of the item and therefore had knowledge of it." *State v. Alexander*, 8th Dist. Cuyahoga No. 90509, 2009-Ohio-597, ¶ 24, citing *Hankerson* at 91.

{¶22} "[C]onstructive possession may be established by circumstantial evidence." *State v. Tucker*, 2016-Ohio-1353, 62 N.E.3d 903, ¶ 21 (9th Dist.).

{¶23} The issue here is whether Appellant had constructive possession of the cocaine, including whether the state proved the mens rea of "knowingly," i.e., that Appellant knew that he was transporting illegal narcotics when he was driving the vehicle. There is no question that Appellant exercised dominion and control over the vehicle where the cocaine was found. He was the driver and sole occupant of the vehicle. Appellant also had easy access to the narcotics hide box, since it was magnetically attached inside the wheel well and was easily found by the tow truck operator. Appellant contends, though, that there is no reliable evidence that he knew or was aware of the existence of narcotics hide box or that cocaine was in the box.

{¶24} The evidence of record to prove the element of "knowingly" consists of: Appellant's sole control over the vehicle; State's Exhibit 7, the phone call Appellant made to his brother three hours prior to the traffic stop in which he was worried about the vehicle being towed if he was stopped by police; the fact that he was driving in tandem with another vehicle when he was stopped; that Appellant took the car keys with him even though he was told by the police to leave them in the vehicle; Appellant's immediate call to the towing company asking to retrieve something from the vehicle that he had "forgotten" to remove during the traffic stop; and State's Exhibit 8, the recorded call from jail ON November 4, 2021, in which Appellant says that he should have flushed "that shit" down the toilet.

{¶25} Regarding the November 4, 2021 call, the record is not very clear. The supposedly incriminating phrase that Appellee cites is not entirely audible on the recording. Further, the call was made after Appellant was charged with possession of cocaine. Even if the phrase could be understood as referring to the cocaine, it is not entirely persuasive as to his prior knowledge, since he could have learned about the

cocaine from the criminal charge against him on November 2, 2021, and his arrest on November 3, 2021.

{¶26} The other evidence does fully support the jury verdict. Since Appellant was the sole occupant and driver of the vehicle, the state maintains there is a presumption Appellant was aware of the contents of the vehicle. "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 probative of dominion or control over the contraband, may establish constructive possession." (Internal citations removed.) *State v. Kingsland*, 177 Ohio App.3d 655, 2008-Ohio-4148, 895 N.E.2d 633, ¶ 13 (4th Dist.).

{¶27} Something as simple as a defendant making furtive movements near the hidden drugs, along with the fact that the defendant was the driver and sole occupant of the vehicle, may be sufficient to prove constructive possession. *State v. Brown*, 4th Dist. Athens No. 09CA3, 2009-Ohio-5390, ¶ 20.

{¶28} Appellant's phone call to his brother at the start of the trip to the Youngstown area, in which Appellant was worried that the car might be towed if he was stopped by the police, raises the inference he knew there was contraband in the car that he did not want the police to find. The prosecutor mentioned this inference in its closing argument: "Is he worried that somebody might find something? Like they did when they actually towed it on November 1st. It should tell you a lot." (8/29/22 Tr., p. 408.)

{¶29} That Appellant was driving in tandem also raises an inference that he was engaged in illegal drug activity. Driving in tandem is a common practice in drug smuggling cases and may alone support the reasonable suspicion to stop a vehicle for drug

possession. *United States v. Belakhdhar*, 924 F.3d 925, 926 (6th Cir.2019); *State v. Lopez*, 166 Ohio App.3d 337, 2006-Ohio-2091, 850 N.E.2d 781, ¶ 5 (1st Dist.). "[D]rug couriers often take two cars on a trip so the decoy car could either be a lookout in the front or a diversion in the back of the convoy." *State v. Rose*, 2022-Ohio-3529, 202 N.E.3d 1, ¶ 16 (7th Dist.).

{¶30} Appellant took the car keys, even though he was told by the police to leave them in the vehicle. This supports an inference either that he was trying to prevent the police from towing the vehicle and further searching it after it was towed, or that he was hoping to gain access to the vehicle subsequent to it being towed, possibly to retrieve the illegal narcotics.

{¶31} Appellant's immediate call to the towing company to retrieve something, even though he was told he could not get back into the vehicle after it was towed, supports the contention that he was trying to retrieve something that he could not simply obtain at the traffic stop when the police were present. Appellant's actions give rise to multiple inferences of a guilty conscience regarding something that might be found in or on the vehicle.

{¶32} Thus, the combined evidence satisfies the essential elements of R.C. 2925.11(A) and supports the decision of the jury. Appellant contends that since his fingerprints were not on the narcotics hide box, this proves he did not touch or actually control the box. The testimony, though, of Vicki Bartholomew from BCI undercuts Appellant's contention. She testified that only a minority of objects sent to BCI contain fingerprint evidence, and that fingerprints can be destroyed by many factors when they are exposed to the elements. The box in this case was attached to the underside of the vehicle. It was exposed to the weather as well as road dirt or water kicked up by the

wheels of the vehicle while it is moving. Based on Bartholomew's testimony, it is hardly surprising there were no fingerprints found on the box.

{¶33} Based on the above, Appellant's assignments of error are not supported by the record and are overruled.

Conclusion

{¶34} Appellant appeals his conviction and sentence for possession of cocaine. Appellant argues that the jury verdict is against the sufficiency and manifest weight of the evidence. The record reflects that Appellant was the driver and sole occupant of a vehicle in which 29 grams of cocaine were found in a box hidden on the undercarriage of the vehicle. Based on the circumstances of the stop and the statements and actions of Appellant prior to, during, and after the stop, there is sufficient evidence supporting the conviction, and the conviction is not against the manifest weight of the evidence. Appellant's two assignments of error are overruled and the judgment of the trial court is affirmed.

Robb, J. concurs.

Hanni, J., concurs.

For the reasons stated in the Opinion rendered herein, Appellant's assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.