**[Cite as *State v. Bebley*, 2009-Ohio-3201.]**

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

State of Ohio — Court of Appeals No. L-08-1239

Appellee — Trial Court No. CR0200702267

v.

Elijah B. Bebley — **DECISION AND JUDGMENT**

Appellant — Decided: June 30, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Michael D. Bohner, Assistant Prosecuting Attorney, for appellee.

Dan Nathan, for appellant.

* * * * *

HANDWORK, J.

**{¶ 1}** This case is before the court on appeal from the judgment of the Lucas County Court of Common Pleas in which, following a trial to the bench on May 29, 2008, appellant was found guilty of possession of cocaine, in violation of R.C. 2925.11(A) and (C)(4)(a), a felony of the fifth degree, trafficking in cocaine, in violation

of R.C. 2925.03(A)(2) and (C)(4)(a), a felony of the fifth degree, possession of crack cocaine, in violation of R.C. 2925.11(A) and (C)(4)(b), a felony of the fourth degree, and trafficking in cocaine, in violation of R.C. 2925.03(A)(2) and (C)(4)(c), a felony of the fourth degree. Appellant was sentenced on June 27, 2008, to a total of 28 months in prison.[1] Appellant timely appealed his convictions and sentence, and raises the following assignments of error:

**{¶ 2}** "1. The trial court erred in denying the appellant's motion to suppress evidence.

**{¶ 3}** "2. The trial court erred in denying the appellant's motion for judgment of acquittal at the close of the state's case where the state failed to present sufficient evidence to support the charges.

**{¶ 4}** "3. The appellant's conviction was against the manifest weight of the evidence."

**{¶ 5}** On appeal, appellant argues in his first assignment of error that the police lacked probable cause and had no reasonable articulable suspicion of unlawful activity to justify stopping appellant and requesting identification. As such, appellant asserts that the trial court erred in denying his motion to suppress.

**{¶ 6}** The following relevant facts were adduced at the November 21, 2007 hearing on appellant's motion to suppress. Officer Joshua Bell, police officer with the Toledo Police Department, testified that, on December 30, 2006, he responded to a call at

[1]Appellant's sentence was journalized on July 1, 2008.

approximately 3:15 p.m., to 1629 Macomber Street, to back up officers who were there on an anonymous drug complaint regarding a vehicle being stopped in the middle of the roadway, blocking traffic, with at least two occupants. Bell testified that the driver of the vehicle had seven warrants for his arrest, traffic offenses and a failure to appear, and was placed in the back of Bell's cruiser. Bell testified that the vehicle, a 1998 maroon Ford Expedition ("the vehicle"), was towed because the driver was arrested, which is standard procedure for the police department. Once towed, a vehicle inventory was done, but not by Bell. Bell searched appellant, but found no drugs, money or keys on his person.

**{¶ 7}** Sergeant William Shaner, Toledo Police Department, testified that he was working in a marked police cruiser, by himself, on December 30, 2006. He responded to a call at 1629 Macomber Street in response to a drug complaint. Shaner testified that he was informed by his captain that he had received several complaints concerning drug activity in that area, and that he wanted Shaner to come with him to address the people personally. The captain and Shaner approach the vehicle from opposite directions in their cruisers. Shaner testified that the vehicle was blocking traffic in the middle of the street and had a couple of people around it. One person was leaning into the driver's side window. There was no centerline on the street, but, according to Shaner, the vehicle was at least 10 feet from the curb, in the roadway/lane of traffic. Shaner testified that there were parked cars next to the Ford on at least one side of the street. The Ford was running and being driven by appellant.

**{¶ 8}** Having been a police officer for 14 years, Shaner testified that, in his experience and training, the activity occurring at the vehicle was suspicious and indicative of drug activity. Shaner approached the vehicle with the intention of issuing appellant a citation for impeding traffic. Appellant told Shaner that he did not have a driver's license, or any other form of identification, but told Shaner his name, date of birth, social security number, address, and physical description. Shaner radioed the records department which verified that appellant had outstanding warrants for his arrest. Shaner testified that appellant was taken into custody. Although he was not required to impound the vehicle, Shaner testified that, under those circumstances, it is within his discretion to do so. As standard procedure for impounding a vehicle, Shaner conducted an inventory search, where he discovered three plastic baggies of marijuana sticking out of the ashtray. He also discovered several bags of crack cocaine in the headliner, near the windshield, on the driver's side, just left of where a rearview mirror would be located.

**{¶ 9}** On cross-examination, Shaner testified that it is standard procedure to transport a vehicle's keys with it when the vehicle is impounded. Shaner, however, had no recollection of the whereabouts or existence of the keys to the vehicle.

**{¶ 10}** Detective Nora Mugler, with vice narcotics, testified that she was working on December 30, 2006, and was told that a drug-related arrest was made. Mugler, however, did not report to the scene of the arrest. At the station, after reading appellant his *Miranda* rights, appellant told Mugler that the drugs found in the vehicle were not his; however, he did not state whose they were. Appellant stated that he was driving his

sister's vehicle and that the drugs did not belong to her. Mugler testified that the vehicle was eventually returned to the owner, who attested that she did not know how, or for what, the vehicle was being used, and that any contraband found within did not belong to her. Mugler did not know if the keys had been towed with the vehicle, or whether any keys were returned to the owner.

**{¶ 11}** Nichoel Burkes then testified on behalf of the defense. Burkes testified that she lived at 1604 Macomber Street, that she owns the vehicle in question, and that appellant was her "godbrother," but was not a blood relative. Burkes testified that appellant was with Sasha Jackson, Burkes' sister, and that Burkes had parked her vehicle along the curb on Macomber Street, about five or six houses from her home. Burkes testified that the keys were in her possession when the vehicle was towed, as she was having her hair done at a neighbor's house. Burkes testified that the vehicle was not running and that appellant and Jackson were sitting in her car listening to music and charging appellant's cell phone.

**{¶ 12}** On cross-examination, Burkes testified that the key she had did not say "Ford" on it, she did not know if it contained a computer chip, and she did not have keyless entry for her vehicle. She, however, believed that there was no copy of her ignition key.

**{¶ 13}** Sasha Jackson next testified that she and appellant were sitting in the vehicle while appellant charged his cell phone. According to Jackson, the vehicle was unlocked when she got in, it was parked along the curb, was not running, and that

appellant never moved it. Jackson testified that appellant was showing her pictures of his newborn on his cell phone and that Jackson's brother had looked in to see the photos also. When approached by the police, Jackson testified that she and appellant gave the police their identification. She was not charged with anything and left the area before appellant was arrested and before the vehicle was towed.

**{¶ 14}** Appellant testified that he was sitting in Burkes' vehicle with Jackson, charging his cell phone in the lighter. According to appellant, he had asked Burkes if he could charge his phone in her car, that it was unlocked when he entered, and that he never had the keys that day, nor had it been running while he was in it.

**{¶ 15}** On February 19, 2008, the trial court denied appellant's motion to suppress. The trial court considered whether the police encounter was consensual and/or an investigative *Terry* stop. The trial court did not make any determination with respect to whether the officer had probable cause to stop appellant for a traffic violation. The trial court concluded that the stop was not consensual because under the facts and circumstances surrounding the incident, "it is likely that a reasonable person would have believed he was not free to walk away." With respect to whether the encounter was a *Terry* stop, the trial court held that, based on a totality of the circumstances, the officers could have reasonably concluded that appellant was engaged in criminal activity and, therefore, justifiably stopped appellant pursuant to *Terry v. Ohio* (1968), 392 U.S. 1. The factors upon which the trial court relied in determining that the officers could have

reasonably concluded that appellant was engaged in criminal activity, included the following:

**{¶ 16}** "In the case sub judice, the testimony of the officers indicated that there had been several complaints about drug activity in the 1600 block of Macomber. Not only had there been prior reports of drug activity, but there had been an anonymous report of drug activity on the block the day in question. Upon arriving to the 1600 block to investigate the report, Capt. Eggart and Sgt. Shaner observed an occupied vehicle and an individual pedestrian leaning into the open driver's side window. Based on Sgt. Shaner's fourteen years of experience as an officer, and his knowledge and experience with other drug-related situations, he was suspicious about the situation."

**{¶ 17}** The trial court held that "[e]ven though any one of these factors viewed independently does not alone create a reasonable, articulable suspicion, when taken as a whole they do create the requisite suspicion." As such, the trial court held that "the conduct of the police constituted a valid investigatory stop."

**{¶ 18}** As stated by the Ohio Supreme Court, "Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial

court, whether the facts satisfy the applicable legal standard. [Citations omitted.]" *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8.

**{¶ 19}** Because the trial court did not render any findings with respect to whether the officer had probable cause to stop the vehicle for a traffic violation, we will instead consider whether the officer was justified in engaging appellant in an investigatory stop. "The propriety of an investigative stop by a police officer must be viewed in light of the totality of the surrounding circumstances." *State v. Bobo* (1988), 37 Ohio St.3d 177, paragraph one of the syllabus. To justify an investigatory stop, law enforcement officials must demonstrate reasonable articulable suspicion of unlawful activity. *Terry v. Ohio* (1968), 392 U.S. 1, 21. Reasonable articulable suspicion means that the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion [or stop]." Id. at 21-22. This is a lesser evidentiary burden to satisfy in comparison with a probable cause determination. *State v. Cowan*, 6th Dist. No. WD-05-090, 2006-Ohio-6177, ¶ 9.

**{¶ 20}** In making an assessment regarding the existence of "reasonable articulable suspicion," the facts must be judged pursuant to an objective standard, i.e., whether those facts available to the officer, at the time of the search, would warrant a reasonable man in the belief that the action taken was appropriate. *Terry* at 21-22. Although no single factor is dispositive, as the decision must be based on the totality of the circumstances, the Ohio Supreme Court has identified several factors that may be considered in determining the reasonableness of an investigative stop: (1) whether the location where

the actions occurred had a reputation of being an area for criminal activity; (2) surrounding circumstances, such as the time of day or night that the stop was made, which may increase the danger to the officer, or whether the officer had backup available; (3) the officer's experience, training or knowledge, including particular knowledge of crimes in the area; and (4) whether the suspect's conduct or appearance was suspicious, such as, he was making furtive gestures or movements and/or was ducking down or hiding. *Bobo*, 37 Ohio St.3d at 179-180.

**{¶ 21}** Additionally, citing *Adams v. Williams* (1972), 407 U.S. 143, 145-146, the Ohio Supreme Court in *Bobo* recognized that "'* * * The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. * * * A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. * * *'" *Bobo*, 37 Ohio St.3d at 180.

**{¶ 22}** Initially, we find that the trial court's findings of fact were supported by competent, credible evidence in the record and, therefore, accept the trial court's findings to be true. Upon making an independent determination, we find that the facts in this case establish that the officers had a reasonable articulable suspicion to inquire of appellant while he was sitting in Burkes' vehicle. There had been numerous reports of drug activity

in the 1600 block of Macomber Street, including one on the winter day in question. Sergeant Shaner saw pedestrians grouped near an occupied vehicle and one individual was leaning into the open driver's side window. Based on Shaner's fourteen years of experience as a police officer, he found that this behavior was consistent with drug-related activity. We note that appellant did not have to actually be engaged in drug-related activity at the time Shaner observed appellant in the vehicle; rather, Shaner was only required to have a reasonable articulable suspicion of criminal activity in order to lawfully stop appellant. We find that, based upon the totality of the circumstances in this case, the applicable legal standard was satisfied.

**{¶ 23}** Accordingly, we find that appellant's Fourth Amendment rights were not unlawfully infringed upon and that the trial court did not err in denying appellant's motion to suppress. Appellant's first assignment of error is therefore found not well-taken.

**{¶ 24}** Appellant argues in his second and third assignments of error that his conviction was against the sufficiency and manifest weight of the evidence. In particular, appellant argues that a reasonable trier of fact could not conclude that appellant knowingly exercised control over the contraband found in Burkes' vehicle. Asserting that possession cannot be inferred solely from a person's access to the object in question, appellant argues that the state needed to produce some evidence, other than mere proximity to the drugs, to establish that he possessed the contraband. Appellant asserts that Sergeant Shaner did not know when the drugs were placed in the vehicle, or who

placed them there, the baggies were not analyzed for fingerprints, there was no circumstantial evidence supporting the state's assumption that the drugs belonged to appellant, no drugs, drug paraphernalia or money was found on appellant's person, or the man whom police observed leaning in the driver's side window of the vehicle, Shaner "saw no furtive movements as he approached the vehicle and was not suspicious that a drug transaction was occurring," and appellant cooperated fully.

**{¶ 25}** Crim.R. 29(A) states that a court shall order an entry of judgment of acquittal if the evidence is insufficient to sustain a conviction of the offenses. As such, the issue to be determined with respect to a motion for acquittal is whether there was sufficient evidence to support the conviction. Sufficiency of the evidence and manifest weight of the evidence are quantitatively and qualitatively different legal concepts. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

**{¶ 26}** "Sufficiency" applies to a question of law as to whether the evidence is legally adequate to support a jury verdict as to all elements of a crime. Id. In making this determination, an appellate court must determine 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." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

**{¶ 27}** When considering whether a judgment is against the manifest weight of the evidence in a bench trial, an appellate court will not reverse a conviction where the trial court could reasonably conclude from substantial evidence that the state has proved the

offense beyond a reasonable doubt. *State v. Eskridge* (1988), 38 Ohio St.3d 56, 59. The 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 court "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins* at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. The discretionary power to grant a new trial should be exercised only in exceptional cases where the evidence weighs heavily against the conviction. Id.

**{¶ 28}** Appellant was convicted of one count of possession of cocaine, one count of possession of crack cocaine, and two counts of trafficking in cocaine. R.C. 2925.11(A) states that "[n]o person shall knowingly obtain, possess, or use a controlled substance." R.C. 2925.03(A)(2) states that no person shall knowingly "[p]repare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person."

**{¶ 29}** The relevant evidence adduced at trial was as follows. Officer Joshua Bell, Toledo Police Department, testified on behalf of the state that he was called to the scene to transport some suspects or prisoners. When he arrived, he saw the Ford Expedition "pretty much stopped in the middle of the roadway." Bell prepared the tow report for the vehicle and did not recall what was done with the keys, although it was the policy of the department to keep any keys with the vehicle. There was no indication on the tow report

that keys were transported with the vehicle. Bell prepared the crime report for appellant's arrest, for both the outstanding warrants and the drugs found in the vehicle. Bell additionally prepared the arrest report for Orrin Hitt, the pedestrian who was seen leaning into the vehicle, who also had outstanding warrants.

**{¶ 30}** Nichoel Burkes testified that she lived at 1604 Macomber Street. She stated that, on December 30, 2006, she had been hanging out on the block with friends. She was down the street from her house, on the sidewalk, when appellant showed up and asked her if he could charge his phone. She did not recall how appellant got there. She testified that her car was parked about eight houses from her house because, when she pulled up, everybody was hanging out, so she just parked the car and started hanging out with them. Burkes testified that it was not unusual for her to leave her vehicle unlocked. Regarding who had access to her vehicle, Burkes testified that only she and appellant used her vehicle.[2] Regarding the drugs found in the vehicle, Burkes testified that they were not hers and that she did not know there were any drugs in her vehicle until after it was towed. Burkes also testified she was alone in her vehicle on December 30, 2006, and that there was no marijuana in the ashtray and that she had never seen anything wrong with the headliner of her vehicle. Further, Burkes testified that only she and appellant had used her vehicle on the day in question.

[2]Burkes testified that maybe a couple of people use her vehicle, but she did not identify anyone except appellant and did not state when her vehicle would have been used by any other person.

**{¶ 31}** On cross-examination, Burkes stated that appellant never had the keys to her vehicle, as they were with her the entire time, and that appellant only sat in it to charge his cell phone. Burkes had purchased the car six months prior to the incident from a car lot. At the time appellant was approached by the police, Burkes stated that her sister, Sasha Jackson, was with appellant and that Burkes was in her neighbor's house getting her hair done.

**{¶ 32}** Chadwyck Douglass, criminalist with the Toledo Police Department crime lab, testified that he received for testing six small bags containing cocaine hydrochloride (powdered cocaine), weighing a total of 2.39 grams, seven small bags containing crack cocaine, weighing a total of 4.20 grams, and two baggies containing marijuana, weighing a total of 8.61 grams.

**{¶ 33}** Sergeant William Shaner, Toledo Police Department, testified as he had in the motion to suppress hearing. Shaner stated that Captain Eggart told him that he had been receiving several calls of drug complaints and gang activity within the 1600 block of Macomber Street and that he wanted Shaner to go along with him to investigate the problem. As Shaner was traveling westbound on Macomber, he observed two males in the street, one on the sidewalk, a maroon/red suburban in the street, approximately 10 feet from the curb, blocking traffic, and a male approach the driver's side and make some type of contact with the driver of that vehicle. As Shaner approached the vehicle, he could hear it running. According to Shaner, appellant was alone in the vehicle. Appellant had no driver's license, but provided his identifying information. Appellant

was placed under arrest and the vehicle was searched in preparation of impound. Shaner saw a small amount of a plastic baggie sticking out of the closed ashtray in the center console of the vehicle, just below the radio, within an easy reach of the driver. The ashtray had three baggies in total, each of which contained marijuana. At the point where the interior lining meets the windshield, Shaner observed a lump. From past experience, Shaner recognized that area as a location where narcotics are concealed. He reached in and discovered the cocaine. The cocaine was located in the vehicle's ceiling liner, approximately six inches to the left of the rearview mirror, "exactly" where the driver would be seated. Shaner testified that he only ran records for appellant and Orrin Hitt to see if either had warrants.

**{¶ 34}** On cross-examination, Shaner was asked if he was suspicious that there might be a transaction going on when he first saw the vehicle, to which Shaner responded that he "was unaware what was going on." However, Shaner did not see any furtive movements and appellant cooperated with Shaner. No drugs, drug paraphernalia, or money was found on either appellant or Hitt, but both were arrested for outstanding warrants.

**{¶ 35}** Detective Norma Mugler testified that she was with the vice narcotics unit, with the Toledo Police Department, on December 30, 2006. Mugler testified that based upon her experience, she was familiar with how drugs are packaged for distribution, and that the cocaine found in this case was packaged for resale. Mugler also testified that she interviewed appellant regarding the drugs after reading him his *Miranda* rights.

Appellant told Mugler that the drugs were not his, that the car belonged to Nichoel Burkes, and that the drugs were not hers either, but appellant refused to comment on whose drugs they were.

**{¶ 36}** Upon conclusion of the state's case, appellant moved for a judgment of acquittal, arguing that the state had failed to establish that appellant had possession of the drugs. The trial court denied appellant's motion and held that, after construing the evidence in a light most favorable to the prosecution, and granting them all reasonable inferences, the evidence set forth established that Nichoel Burkes was the owner of the vehicle and, on December 30, 2006, when she parked her vehicle, there was no marijuana in the ashtray and there were no defects in the headliner, and she and appellant were the only people who used the vehicle that day.

**{¶ 37}** The defense then called Sasha Jackson to the stand, who testified as she had during the suppression hearing. Jackson stated she was sitting in the parked vehicle with appellant, it was not running, and it was parked along the curb. Jackson testified that appellant told the police that he did not have the keys to the vehicle and that they were just sitting in the vehicle looking at photographs. The police took their identification information. Jackson left the scene before appellant was arrested. On cross-examination, Jackson testified that she and appellant did not enter the vehicle at the same time and that she had no idea how long appellant had been in the vehicle before she joined him. She was in the vehicle approximately five minutes before the police arrived. She also testified that she had not been in Burkes' vehicle for at least three days prior to

December 30, 2006. Jackson stated that she did not know that the drugs were in the vehicle, that she did not put them there, and that she had no idea how they got there. Jackson was never questioned or patted down by the police.

**{¶ 38}** In entering its verdict, the trial court noted that "to possess" or "possession" means "having control over a thing or substance, but may not be inferred solely by mere access to the thing or substance through ownership or occupation of the premises." The trial court also stated that in order to find possession, beyond a reasonable doubt, it would have "to draw reasonable inferences, and of course the evidence would be circumstantial." The trial court held that "circumstantial evidence must do more than raise a strong presumption of guilt in order to support a conviction. In order to prove an essential element of the crime the circumstantial evidence must be irreconcilable with any reasonable theory of the accused's innocence."

**{¶ 39}** Based on the testimony presented, the trial court found the following with respect to whether appellant had knowledge of the drugs and their presence:

**{¶ 40}** "Well, here is what we're left with. The person who owned the vehicle who drove it that day said there was nothing wrong with the headliner. There was no marijuana in the ashtray, and so Mr. Bebley was the only other one in the driver's side where the headliner was loose and where the drugs were found.

**{¶ 41}** "Sasha Jackson was in the car, but she testified that Mr. Bebley called her to say that his baby daughter had been born. He had photos on the – his camera and he would be happy to show her that, and therefore he knew that she was coming to the car,

because he told her where he was, according to Miss Jackson, and was going to look at the pictures of his baby.

**{¶ 42}** "That would explain why the drugs were in a concealed area, both in the ashtray and in the headliner, and that this court finds plausible to draw a reasonable inference. The reasonable inference is that Mr. Bebley hid those because of Miss Jackson coming to the car, and particularly in view of the fact that Miss Jackson says she was in the car for only a couple of minutes before the police showed up, and Sergeant Shaner did not see any furtive movements, which would explain that the drugs were already hidden.

**{¶ 43}** "The only way that the court can't draw this inference is to otherwise find that Miss Burkes and Miss Jackson are not credible witnesses, and the court cannot find that they were lacking in credibility.

**{¶ 44}** "But the court also finds that with respect to the argument that the drugs could have been placed there at any point in time by anybody because the car was unlocked, that that is not reasonable under the circumstances because of the amount of drugs and the value of the drugs, and it would be highly unlikely and highly unreasonable that a drug dealer would leave approximately a thousand dollars worth of drugs in an automobile that the person had no access to[,] according to the owner of the car."

**{¶ 45}** Upon our own review, with respect to appellant's motion for acquittal, we find that, 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. Contrary to appellant's arguments, we find that there was more evidence presented regarding appellant's knowledge and possession than the mere fact that appellant was in close proximity to the cocaine. Specifically, there was limited access to the vehicle in general and, on the day in question, only Burkes and appellant used the vehicle. Burkes testified that she drove the vehicle and parked it along the curb. While she was still outside talking to people, appellant approached her and asked if he could charge his phone, which she allowed him to do. Burkes testified that the drugs in the vehicle did not belong to her and were not in the vehicle when she last exited it. Because the evidence established that there were no drugs in the vehicle before appellant got in, but there were drugs found while he was sitting in the driver's seat, a reasonable inference could be drawn that appellant was the individual who hid the drugs in Burkes' vehicle.

**{¶ 46}** With respect to our determination of the manifest weight of the evidence, keeping in mind that the trial court is in the best position to view the witnesses and determine their credibility, we find that there was sufficient evidence presented upon which the trial court could have relied in concluding that the state proved the offenses beyond a reasonable doubt, and that the trial court did not clearly lose its way or create a manifest miscarriage of justice. As the trial court correctly held, circumstantial evidence must do more than raise a strong presumption of guilt in order to support a conviction, "it must be irreconcilable with any reasonable theory of the accused's innocence." *State v. Hankerson* (1982), 70 Ohio St.2d 87, 92.

**{¶ 47}** The trial court found Burkes and Jackson to be credible witnesses. We are not inclined to disagree with the trial court's finding in this regard. Burkes testified that there were no drugs in her vehicle when she parked it and both women testified that the drugs did not belong to them. Thus, for appellant not to have placed the cocaine in the vehicle, an unknown third party would have had to hide almost $1,000 worth of drugs in Burkes' vehicle, while she was standing on the sidewalk talking to people, between the time she parked her vehicle and the time appellant approached her to use it. We find that this is not a reasonable theory of appellant's innocence.

**{¶ 48}** Additionally, because the timing of the appearance of the drugs was established to be some point after Burkes parked her vehicle and before the police arrived, and because Jackson testified that the drugs did not belong to her, we find that there was no one with appellant who could have possessed the drugs found in the vehicle. When readily usable drugs are in close proximity to a defendant, and he was the only person who could have placed them in their location, such facts constitute circumstantial evidence that supports a conclusion that the defendant was in constructive possession of the drugs. See *State v. Dunn*, 8th Dist. No. 83754, 2004-Ohio-4350, ¶ 18. Accordingly, having found that appellant was not merely in close proximity to the drugs but, in fact, was the only person who could have controlled them, we find that the cases relied upon by appellant, which hold that mere proximity alone is insufficient to establish possession, are not dispositive of this case as the facts are distinguishable. Appellant's second and third assignments of error are therefore found not well-taken.

**{¶ 49}** On consideration whereof, this court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

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

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE