[Cite as *State v. Peterson*, 2009-Ohio-5088.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 09AP-34 (C.P.C. No. 08CR-05-3291)
v.	:	(REGULAR CALENDAR)
Terrence Peterson,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 17, 2009

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins, IV*, for appellee.

L. Leah Reibel, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendant-appellant, Terrance Peterson ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas convicting him of one count of possession of crack cocaine with firearm specification, a fourth-degree felony in violation of R.C. 2925.11, and one count of having a weapon while under disability, a third-degree felony in violation of R.C. 2923.13.

{¶2} The following description of events underlying the charges herein was adduced at trial. At approximately 4:00 p.m. on December 10, 2007, Columbus Police Officers Raymond Hatfield and Ryan Steele observed a blue Ford Taurus fail to use its

signal light as it turned right at a stop sign. Officer Hatfield, who was driving the cruiser, sped up as he intended to initiate a traffic stop. The officers observed that as they increased their speed, the driver of the car did as well. The car then made another turn without signaling and "cut the curb." (Tr. 46.) The officers, believing the vehicle may flee, activated the cruiser's lights. Officer Hatfield described that he saw the vehicle "dip to the right, pull into the curb, which is what [they] call a curb of [sic] dive" that occurs when someone is trying to avoid the police. (Tr. 101-02.) Officer Hatfield bumped the air horn to let the driver, identified as appellant, know the officers were there. Nonetheless, appellant got out of the vehicle and started walking quickly across the street leaving the vehicle's lights on in the process.

{¶3} Seeing appellant exit the vehicle, Officer Hatfield stopped the cruiser in the middle of the street, and the officers exited the cruiser. Officer Hatfield approached appellant and asked for his driver's license, to which appellant responded that he did not have one. Officer Hatfield described appellant as extremely nervous, which prompted the officer to ask appellant about his demeanor. Appellant then told Officer Hatfield that there was marijuana in the glove compartment of the car. At this time, Officer Hatfield took appellant back to the cruiser to run a records check in the Law Enforcement Database System ("LEADS").

{¶4} During this time, Officer Steele did a "clear sweep" of the vehicle to see if there were any signs of "foul play or anything illegal" in plain view. (Tr. 46.) Officer Steele observed a digital scale on the passenger's seat of the car. According to Officer Steele, this kind of scale is commonly used in narcotics transactions. Officer Steele went to notify Officer Hatfield of the scale, and Officer Hatfield advised Officer Steele that appellant said

there was marijuana in the glove compartment. Officer Steele then went back to the vehicle and did an inventory search as the vehicle was going to be impounded. In the glove compartment, Officer Steele found three bags, one containing what appeared to be crack cocaine and two containing what appeared to be marijuana. Officer Steele also found a black semiautomatic pistol with a magazine containing four live rounds of ammunition. The firearm was found in the backseat between the rear passenger's side and rear driver's side of the car.

{¶5} According to Officer Hatfield, when the gun was recovered, appellant "began to sob and actually started to cry" and made a statement "that he can't do this to his mother again." (Tr. 112-13.) Officer Hatfield also testified that appellant told them the vehicle belonged to his sister and that he had been borrowing it for about two weeks. Appellant also indicated to Officer Hatfield that he put the marijuana in the glove compartment when he turned onto Leona Avenue. In speaking with the officers, appellant denied having any knowledge of the cocaine or the firearm but, according to Officer Hatfield, did state that he had seen the gun before and that his fingerprints could possibly be on it.

{¶6} Additional testimony at trial revealed no fingerprints were obtained from the firearm, but it was found to be operable. Also, from the three bags taken from the glove compartment, one contained 1.5 grams of cocaine base, also known as crack cocaine, one contained 13.5 grams of marijuana, and one contained 0.8 grams of marijuana. Additionally, the scale that was retrieved from the vehicle contained trace amounts of cocaine base.

{¶7} On May 2, 2008, appellant was indicted by a Franklin County Grand Jury on one count of possession of crack cocaine with firearm specification, a fourth-degree felony in violation of R.C. 2925.11; one count of carrying a concealed weapon ("CCW"), a fourth-degree felony in violation of R.C. 2923.12; and one count of having a weapon while under disability ("WUD"), a third-degree felony in violation of R.C. 2923.13. On September 3, 2008, a jury trial commenced on the possession and CCW charges. Appellant waived his right to a jury trial on the WUD charge and agreed to have it tried to the court. The jury found appellant not guilty of the CCW charge, but guilty of the possession with specification charge. After the jury began deliberations, the trial court heard additional evidence as it pertained to the WUD charge, and subsequently, the trial court convicted appellant of the same. Appellant was sentenced on October 28, 2008, and this appeal followed.

{¶8} On appeal, appellant brings two assignments of error for our review:

> ASSIGNMENT OF ERROR NO. 1
>
> IT WAS ERROR FOR THE COURT TO CONVICT TERRENCE PETERSON AT A BENCH TRIAL OF HAVING WEAPONS UNDER DISABILITY WHEN THE JURY FOUND HIM NOT GUILTY OF CARRYING A CONCEALED WEAPON, AND THE FACT THAT THE JURY CONVICTED APPELLANT OF A GUN SPECIFICATION BUT FOUND HIM NOT GUILTY OF CARRYING A CONCEALED WEAPON PRODUCED AN INCONSISTENT VERDICT.
>
> ASSIGNMENT OF ERROR NO. 2
>
> APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, WHEN TRIAL COUNSEL FAILED TO FILE A MOTION TO SUPPRESS THE WARRANTLESS SEARCH CONDUCTED DURING A MINOR MISDEMEANOR TRAFFIC STOP, FAILED TO REQUEST 16(b)(1)(g) MATERIAL, AND FAILED TO MAKE A RULE 29 MOTION.

{¶9} In his first assignment of error, appellant contends the jury's verdict of not guilty of CCW is inconsistent with the jury's verdict of guilty of the firearm specification and the trial court's finding of guilty of WUD.

{¶10} Initially, we observe that a conviction on one count of an indictment may not be reversed upon the ground that it is inconsistent with an acquittal on another count. *State v. Hayes*, 166 Ohio App.3d 791, 2006-Ohio-2359, ¶35, citing *State v. Brown* (1984), 12 Ohio St.3d 147; *State v. Washington* (1998), 126 Ohio App.3d 264.

{¶11} Furthermore, the offense of CCW, as codified in R.C. 2923.12, states in relevant part:

> (A) No person shall knowingly carry or have, concealed on the person's person or concealed ready at hand, any of the following:
>
> * * *
>
> (2) A handgun other than a dangerous ordnance[.]

{¶12} In contrast, the offense of WUD, as codified in R.C. 2923.13, provides in part:

> (A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:
>
> * * *
>
> (2) The person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.
>
> (3) The person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale,

> administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been an offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.

{¶13} R.C. 2941.141, as it relates to the firearm specification, imposes a mandatory prison term upon an offender that "had a firearm on or about the offender's person or under the offender's control while committing the offense."

{¶14} A review of the elements for the two offenses and specification at issue reveals that while "concealment" is a required element for conviction of CCW it is *not* a required element for either the firearm specification or WUD charge. Thus, it is apparent from the statutes themselves that one could conceivably be acquitted of CCW, but convicted of WUD and/or a firearm specification and the verdicts not be inconsistent. See *Hayes*, supra. Moreover, to the extent the verdicts could be viewed as inconsistent, "an appellate court is not permitted to speculate about the reason for the inconsistency when it determines the validity of a verdict." *State v. Trewartha*, 165 Ohio App.3d 91, 2005-Ohio-5697, ¶16, discretionary appeal not allowed by 108 Ohio St.3d 1475, 2006-Ohio-665.

{¶15} Next under this assigned error, appellant contends the trial court erred in denying his request for two jury instructions relating to the definition of possession. "The court must give all instructions that are relevant and necessary for the jury to weigh the evidence and discharge its duty as the factfinder." *State v. Joy*, 74 Ohio St.3d 178, 181, 1995-Ohio-259, citing *State v. Comen* (1990), 50 Ohio St.3d 206, paragraph two of the syllabus. When reviewing a trial court's jury instruction, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested instruction was

an abuse of discretion under the facts and circumstances of the case. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68; *State v. Dovangpraseuth*, 10th Dist. No. 05AP-88, 2006-Ohio-1533; *State v. Phipps*, 7th Dist. No. 04 MA 52, 2006-Ohio-3578. An abuse of discretion implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶16} Appellant does not take issue with the instructions that were given to the jury but, rather, argues the trial court should have given the following two instructions that were requested by his trial counsel:

> [1.] Constructive possession exists when an individual exercises dominion and control over an object even though that object may not be within his immediate physical control[.]
>
> [2.] The mere presence of an accused in the vicinity of contraband is insufficient to support the element of possession.

(Tr. 160, 164.)

{¶17} Though declining to give the requested instructions, the trial court instead gave the following instruction pertaining to the definition of possession from Ohio Jury Instructions ("OJI"):

> Possess or possession means having control over a thing or substance but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found.

(Tr. 211.)

{¶18} Notwithstanding the instruction given by the trial court, appellant contends his requested instructions were necessary to show that " 'just because they [the contraband] were in the vicinity doesn’t mean that he actually possessed them.' "

(Appellant's brief at 6, quoting Tr. 162.) We disagree since, based on the evidence adduced at trial, appellant was not entitled to his requested instructions.

{¶19} First we point out the trial court provided adequate jury instructions from OJI regarding the definition of possession. Secondly, appellant does not make clear how either of his proposed instructions would have assisted him further, as the given instructions accurately reflected the evidence adduced at trial. As argued by appellee, the constructive possession instruction actually renders support for appellee rather than appellant, as the instruction establishes that constructive possession exists even though the object is not in the person's immediate physical possession. *State v. Smith*, 10th Dist. No. 08AP-736, 2009-Ohio-2166, ¶41, citing *State v. Wolery* (1976), 46 Ohio St.2d 316. Thus, the constructive possession instruction actually expands the items that can be possessed by a person and does not render support for appellant under the facts of this case. Therefore, we cannot find the trial court abused its discretion in refusing to give the requested instruction on constructive possession.

{¶20} Similarly, appellant does not set forth how the second instruction he requested was applicable here. The evidence at trial established more than appellant's "mere presence" in the vicinity of contraband. Rather, the evidence demonstrated that when stopped, appellant was the sole occupant of a car containing contraband. Further, though the car did not belong to him, there was evidence appellant had been the sole user of the car for at least two weeks prior to being stopped by the police. Most notable perhaps is the evidence that appellant admitted he put marijuana in the glove compartment. Moreover, as mentioned by appellee, the trial court did instruct the jury that appellant must have acted "knowingly" with respect to the possession, CCW, and

WUD counts. Thus, we cannot say the trial court abused its discretion in failing to give the requested jury instruction on "mere presence." *State v. Perkins*, 8th Dist. No. 83659, 2004-Ohio-4915 (jury instruction on mere presence not appropriate when evidence does not support the same).

{¶21} Lastly under his first assignment of error, appellant contends the trial court should have sustained his objections to his identification for purposes of the WUD charge.

{¶22} As is relevant here, to establish appellant was guilty of WUD, appellee had to prove beyond a reasonable doubt that appellant "is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse." R.C. 2923.13(A)(3). Appellant did not waive identification for the WUD charge; therefore, to establish identity, appellee called two Columbus Police officers who previously arrested appellant for possession of cocaine. Appellant's trial counsel objected to their testimony, arguing these officers would not be able to identify appellant as the person who entered a guilty plea in a prior possession case. The trial court, having heard appellant's objection, overruled the same, explaining the officers could testify in regards to who they arrested, and that the court would determine weight and credibility issues as was appropriate.

{¶23} It is not entirely clear from appellant's brief, however, whether appellant is making an evidentiary challenge, arguing the officers' testimony is insufficient to establish identification, or both. Regardless, we will address both issues.

{¶24} To the extent appellant suggests the trial court erred in overruling his objections to the officers' testimony, we note that the trial court has broad discretion in the admission or exclusion of evidence. *State v. Gray*, 10th Dist. No. 06AP-15, 2007-Ohio-

1504, ¶7. In the absence of an abuse of discretion which results in material prejudice to a defendant, an appellate court should be slow to reverse evidentiary rulings. Id., citing *Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 66.

{¶25} In addition, the WUD charge here was tried to the bench, rather than to a jury. " 'We indulge in the usual presumption that in a bench trial in a criminal case the court considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary.' " *State v. Chatman*, 10th Dist. No. 08AP-803, 2009-Ohio-2504, ¶17, quoting *State v. White* (1968), 15 Ohio St.2d 146, 151; *State v. Nasser*, 10th Dist. No. 02AP-1112, 2003-Ohio-5947, ¶57, appeal not allowed by 101 Ohio St.3d 1490, 2004-Ohio-1293. Appellant has not shown, or even alleged, such circumstance here. Accordingly, we are not able to find the trial court abused its discretion in allowing the officers to testify. However, rather than argue the trial court abused its discretion in permitting the officers to testify as set forth in his brief's subheading, appellant states in the body of his brief that the testimony admitted over objection is "simply insufficient identification for purposes of the [WUD] statute." (Appellant's brief at 9.)

{¶26} The Supreme Court of Ohio described the role of an appellate court presented with a sufficiency of the evidence argument in *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus:

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction 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. 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. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, followed.)

{¶27} Whether the evidence is legally sufficient is a question of law, not fact. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. In determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789. Consequently, the weight of the evidence and the credibility of the witnesses are issues primarily determined by the trier of fact. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79; *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. Thus, a verdict will not be disturbed unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484, 2001-Ohio-4; *Jenks* at 273.

{¶28} Officers Adam Hicks and James Howe testified appellant was stopped for a traffic violation on May 1, 2005, that resulted in appellant being arrested for cocaine possession. Officer Hicks testified appellant was subsequently indicted and convicted on a possession charge. Diane Smalley, employee of the Franklin County Clerk of Courts, confirmed the authenticity of the judgment entry indicating a Terrance E. Peterson entered a guilty plea to possession of cocaine as a fourth-degree felony on November 3, 2006, in the Franklin County Court of Common Pleas.

{¶29} In this case, if believed, the evidence presented supports each element of the WUD offense for which appellant was found guilty beyond a reasonable doubt.

Based on the evidence viewed in the light most favorable to the prosecution, as is required when reviewing the sufficiency of the evidence, a reasonable trier of fact could have found the essential elements of the offense of WUD proven beyond a reasonable doubt. Therefore, we cannot conclude there is insufficient evidence to sustain appellant's WUD conviction.

{¶30} For the foregoing reasons, we overrule appellant's first assignment of error.

{¶31} In his second assignment of error, appellant contends he was denied effective assistance of counsel. Specifically, appellant argues his trial counsel failed to file a motion to suppress, failed to request Crim.R. 16(B)(1)(g) material, and failed to file a motion for acquittal pursuant to Crim.R. 29.

{¶32} "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington* (1984), 466 U.S. 668, 686, 104 S.Ct. 2052, 2064. In order to establish a claim of ineffective assistance of counsel, a defendant must first demonstrate that his trial counsel's performance was so deficient that it was unreasonable under prevailing professional norms. Id. 466 U.S. at 687, 104 S.Ct. at 2064. The defendant must then establish "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. 466 U.S. at 694, 104 S.Ct. at 2068.

{¶33} According to *Strickland*:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. 466 U.S. at 687, 104 S.Ct. at 2064.

{¶34} "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " Id. 466 U.S. at 689, 104 S.Ct. at 2065, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158, 164. A verdict adverse to a criminal defendant is not of itself indicative that he received ineffective assistance of trial counsel. *State v. Hester* (1976), 45 Ohio St.2d 71, 75.

{¶35} Appellant first contends his counsel was ineffective for failing to file a motion to suppress the evidence. "Failing to file a motion to suppress does not constitute ineffective assistance of counsel per se." *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-

4837, ¶65, citing *State v. Madrigal* (2000), 87 Ohio St.3d 378, 389, quoting *Kimmelman v. Morrison* (1986), 477 U.S. 365, 384, 106 S.Ct. 2574, 2587. To establish ineffective assistance of counsel for failure to file a motion to suppress, a defendant must prove that there was a basis to suppress the evidence in question. Id., citing *State v. Adams,* 103 Ohio St.3d 508, 2004-Ohio-5845, ¶35. " 'Where the record contains no evidence which would justify the filing of a motion to suppress, the appellant has not met his burden of proving that his attorney violated an essential duty by failing to file the motion.' " *State v. Tibbetts* (2001), 92 Ohio St.3d 146, 166, cert. denied (2002), 534 U.S. 1144, 122 S.Ct. 1100, quoting *State v. Gibson* (1980), 69 Ohio App.2d 91, 95.

{¶36} Because appellant was initially stopped for a traffic violation that constituted only a non-arrestable, minor misdemeanor, appellant contends there was no basis for the police to have searched the vehicle. In support of his position, appellant relies on the recent United States Supreme Court decision in *Arizona v. Gant* (2009), 556 U.S. ____, 129 S.Ct. 1710, decided after the trial in this case. However, not only does appellant not accurately depict the evidence of the events surrounding appellant's arrest, *Gant* is not applicable here. In *Gant*, the Supreme Court held:

> Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

Id. at 1723-24.

{¶37} *Gant*, however, has no bearing in the case sub judice as the warrantless search of the vehicle was, irrespective of appellant's arrest, justified by probable cause. Though initially pulled over for a traffic violation, upon being stopped by police, appellant quickly got out of the vehicle and began walking away from it. A digital scale, that in the testifying officer's experience is commonly used in drug transactions, was in plain view on the front passenger's seat, and appellant admitted to the officers that he put marijuana in the glove compartment of the car. In the present case, because there is evidence the officers had probable cause to search appellant's vehicle, appellant cannot show that he was prejudiced by his trial counsel's failure to file a motion to suppress. In light of the evidence, appellant's trial counsel could have reasonably concluded that a motion to suppress lacked merit.

{¶38} Appellant next contends his trial counsel failed to request materials in chambers pursuant to Crim.R. 16(B)(1)(g), which provides in part:

> Upon completion of a witness' direct examination at trial, the court on motion of the defendant shall conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

{¶39} According to appellant, there are inconsistencies between the testimony of Officers Steele and Hatfield and that requesting "an in camera inspection of the officers' statements would have preserved these issues for appeal." (Appellant's brief at 14.) However, appellant's complaint to us concerns inconsistencies in the officers' testimony, not inconsistencies in the officers' testimony and their prior respective statements to which Crim.R. 16(B)(1)(g) would apply. In fact, there is no evidence whatsoever in the

record of any prior inconsistent statements of these officers. Therefore, we cannot find appellant's trial counsel was ineffective for failing to request said materials in chambers.

{¶40} Lastly under this assigned error, appellant states, "[a]dditionally, no Rule 29 motion for judgment of acquittal was made at the close of the state's evidence." (Appellant's brief at 14.) This, however, is the extent of appellant's argument.

{¶41} App.R. 16(A)(7) states, in relevant part, that an appellant's brief shall include "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions[.]" App.R. 12(A)(2) states that "the court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A)." *State v. Sutton,* Franklin App. No. 06AP-708, 2007-Ohio-3792, ¶68. As stated by the Ninth District Court of Appeals: " '[I]t is the duty of the appellant, not this court, to demonstrate his assigned error through an argument that is supported by citations to legal authority and facts in the record.' " *State v. Vinson,* 9th Dist. No. 23739, 2007-Ohio-6045, ¶25, quoting *State v. Taylor* (Feb. 9, 1999), 9th Dist. No. 2783-M.

{¶42} " '[F]ailure to comply with the rules governing practice in the appellate courts is a tactic which is ordinarily fatal.' " *Lias v. Beekman,* 10th Dist. No. 06AP-1134, 2007-Ohio-5737, ¶6, quoting *State ex rel. Petro v. Gold,* 166 Ohio App.3d 371, 2006-Ohio-943, ¶51, appeal not allowed, 110 Ohio St.3d 1439, 2006-Ohio-3862, reconsideration denied, 111 Ohio St.3d 1418, 2006-Ohio-5083. "It is not the duty of [an appellate] court to search the record for evidence to support an appellant's argument as to alleged error." Id. at ¶94, citing *Slyder v. Slyder* (Dec. 29, 1993), 9th Dist. No. 16224;

Sykes Constr. Co. v. Martell (Jan. 8, 1992), 9th Dist. No. 15034, cause dismissed, 64 Ohio St.3d 1402. See also *State ex rel. Physicians Cmmt. For Responsible Medicine v. Bd. of Trustees of The Ohio State Univ.,* 108 Ohio St.3d 288, 2006-Ohio-903, ¶13. "It is also not appropriate for [an appellate court] to construct the legal arguments in support of an appellant's appeal." *Petro* at ¶94. " 'If an argument exists that can support [an] assignment of error, it is not [an appellate] court's duty to root it out.' " Id. quoting *Cardone v. Cardone* (May 6, 1998), 9th Dist. No. 18349, dismissed, appeal not allowed by, 83 Ohio St.3d 1429. Accordingly, we do not address appellant's allegation that his trial counsel was ineffective for failing to make a motion for acquittal pursuant to Crim.R. 29.

{¶43} For the foregoing reasons, we overrule appellant's second assignment of error.

{¶44} In conclusion, appellant's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

TYACK and CONNOR, JJ., concur.