[Cite as *State v. Martin*, 2018-Ohio-3903.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Earle E. Wise, Jr., J.
-vs-	:	
	:	Case No. 17CA90
	:	
MYCHAEL MARTIN	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas, Case No. 2016 CR 0689 R
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	September 21, 2018

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
GARY BISHOP RICHLAND CO. PROSECUTOR JOSEPH C. SNYDER 38 South Park St. Mansfield, OH 44902	RANDALL E. FRY 10 West Newlon Place Mansfield, OH 44902

Delaney, J.

{¶1} Appellant Mychael Martin appeals from the September 28, 2017 Sentencing Entry of the Richland County Court of Common Pleas. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} This case arose on October 20, 2016 when a Mansfield Police Department SWAT unit served a no-knock nighttime search warrant at the residence located at 512 West Third Street, Mansfield. Investigators with the METRICH narcotics unit targeted a subject named Terrell Harris whom they believed to be selling narcotics at this address. METRICH had in fact made a number of controlled buys of heroin from Harris at this residence, including on October 20, 2016. The affidavit for the search warrant cited evidence including mail addressed to Harris at 512 West Third Street.

Officer spots man with a gun

{¶3} Around 9:30 p.m. the SWAT unit descended upon the residence in an armored vehicle. Officer Korey Kaufman was in the position of "point man," providing cover for the "breachers" who broke through the front door. It was Kaufman's job to ensure that the breachers were able to reach the door safely. As Kaufman stepped off the armored vehicle, he observed a "backlit silhouette" in a southeast window which appeared to be a slender individual with a large gun in his or her hand. Kaufman observed the individual peering out a window through a space in the blinds and going back and forth inside the residence.

{¶4} Kaufman yelled "Gun, gun, gun" to alert the rest of the unit. The commander of the team ordered "abort" but the breachers didn't hear the abort command and went

through the front door. It became imperative to the SWAT unit to clear the house as quickly as possible and the entire team entered the residence.

{¶5} Kaufman was not involved in the apprehension of appellant, but he did note that four people were found inside the residence: appellant, his sister, and his two children under the age of 10. Kaufman testified that appellant's sister and his children were not tall enough to be the person he observed at the window and he testified appellant was the person he saw with the gun. T.I, 54.

Appellant runs from southwest bedroom

{¶6} Officer Shane Gess was one of the breachers covered by Kaufman. He entered the residence behind a shield and observed activity in the house through a window on the shield. He saw a man turn away from him, running from the southwest corner of the house. Gess ordered the man—appellant--to the ground. When appellant was secured, Gess went into the bedroom appellant had come out of. He observed a firearm which he described as a handheld pistol rifle; plastic baggies containing some type of substance; and cash.

{¶7} Officer Chris Rahall was the affiant for the search warrant and was on the SWAT unit that entered the residence. Once appellant was secured and his sister and children were out of the house, Rahall was part of the METRICH team that went through the house. He testified they were looking for drugs, money, and firearms, along with any contraband that goes along with drug trafficking such as digital scales and plastic baggies. The evidence-collection process consisted of photographing items where they were found, then collecting them and placing them in plastic bags. Back at the METRICH

office, the plastic bags were opened and substances were weighed, sealed, and sent to the crime lab.

Contraband found throughout the house, including southwest bedroom

{¶8} Appellee admitted the search warrant return as Exhibit 54. This exhibit listed the contraband found in the residence, where it was found, and who found it. Rahall testified to the items found, including: in the southwest bedroom, $1395 in U.S. currency, white powder in two separate baggies found with a black Nike shoebox, two baggies of suspected marijuana in a green plastic tote, and an AK-47 pistol with a magazine containing nine rounds;[1] in the living room, $440 in U.S. currency in an empty trash box behind the couch and U.S. mail addressed to Terrell Harris on a T.V. stand; in the kitchen, "tiny" Ziploc bags in a drawer (some bearing emblems of dollar signs, naked women, or Nike symbols), a large orange bag of marijuana on the counter, another bag of marijuana in a drawer, two digital scales including one covered in residue, and a box of plastic sandwich baggies in a cupboard.

{¶9} The two plastic baggies of suspected cocaine were found on top of the black Nike shoebox and Rahall acknowledged the bags were moved in order to open the box and to photograph personal photos found inside the box. Appellant was identified in several of the photos (and admitted they were his).

{¶10} Detective Perry Wheeler was also part of the METRICH team collecting evidence. He testified that in addition to the items listed supra, several things were found that weren't seized, including children's clothing, tennis shoes, and a child's backpack, all found in the southwest bedroom. The backpack contained a child's school items.

[1] The parties stipulated this was an operable firearm.

{¶11} The suspected cocaine was found about four feet away from appellant's two young children. Wheeler testified the house was so small that the children could not have gone anywhere inside the house and been more than 100 feet away from illegal drugs.

Evidence found typical of drug trafficking, per detective

{¶12} Wheeler testified baggies such as the ones found in the kitchen with the various symbols are used to package drugs for sale. Typically firearms are found at drug trafficking scenes because firearms are necessary to protect dealers' investment.

{¶13} Wheeler further testified the residence at 512 West Third Street is a "trap house," a place where various people "post up" and sell drugs for a limited period of time. The house exists merely as a place to sell drugs; the person selling there in the morning may be different than the person selling there at night. Dealers use "trap houses" to avoid seizure of their own personal property. It is common for multiple dealers to use a single "trap house." This house, Wheeler noted, contained very little furniture, and no food at all.

{¶14} The fact that Terrell Harris sold drugs out of the "trap house" does not mean Harris was the only person doing so. As Kaufman testified, the target of the search warrant was the house itself.

Appellant's DNA found on bag of marijuana

{¶15} Personnel of the Mansfield crime lab testified that the substances found in the house included 24.75 grams of cocaine and, separately packaged, the following amounts of marijuana: 1.91 grams, 27.6 grams, 20.7 grams, 182.3 grams, and 15.4 grams. One item was tested for DNA: one of two bags of marijuana found in the green

plastic tote in the southwest bedroom.[2] A DNA profile was developed from the bag of marijuana and it was found to contain a mixture of DNA. Appellant's DNA profile matched the major profile from the plastic bag of marijuana. Specifically, "[t]he probability that a random individual would be included as a possible contributor to the DNA profile using the loci available for statistical calculation is one in 63 billion."

Defense case: appellant and his sister

{¶16} Appellant's sister Mykeia Martin testified on his behalf. She lives on Penn Avenue with appellant and their mother. On October 20, 2016, appellant asked her to give him and his young sons a ride. On the ride, appellant asked to stop at the house at 512 West Third Street. Mykeia had never been to the house before and had no idea who owned it. She testified that her brother wanted to stop there and one of her nephews needed to use the bathroom so she took the children into the house.

{¶17} Mykeia further testified that appellant and his two sons were trying on White Sox jerseys that appellant had just purchased. At 9:26 p.m., Mykeia snapped a picture of appellant and his sons in the jerseys with their backs to the camera. As they started to take the jerseys off, a light flashed outside and police broke the door down. Mykeia said the four had been at the house for a total of about ten minutes before the SWAT unit's arrival.

{¶18} Police asked Mykeia whether she knew Terrell Harris and she said no. She said "they wanted her to say" appellant was Terrell Harris, but she identified appellant as

[2] Other items were not tested because the request for DNA testing came after the other bags had already been handled and analyzed by crime lab personnel. The firearm was not tested for DNA because it was not submitted in a sealed fashion and it was handled by crime lab personnel when it was removed from the evidence locker.

her brother Mychael Martin. No one else was present in the house. Appellant's children had a book bag and a shoebox with them. Mykeia never saw her brother with the firearm. Upon cross-examination, she said she didn't recall appellant entering the bedroom and she had no idea whose house this was or what went on there. Jurors were permitted to ask questions and asked how one child's jersey ended up on the couch in the living room and one ended up in the southwest bedroom; she had no explanation.

{¶19} Appellant testified on his own behalf. He acknowledged he is a convicted felon with a prior conviction for cocaine possession and is prohibited from owning or possessing a firearm. At the time of these events, he was living on Penn Avenue with his mother and siblings.

{¶20} Earlier in the day on October 20, 2016, appellant had been "shooting dice" and won $1000. He purportedly won most of the money from a single individual, who told appellant he wanted some of his money back. The individual demanded "$700 or $1000." Appellant was willing to give some of the money back, but not all of it, because he needed the money to take his kids to a hotel. Appellant agreed to give back $500 and the individual agreed to let appellant and his kids stay at his place for two nights. Appellant said he knows this person as "Shiz," the house "Shiz" let him borrow was 512 West Third Street, and appellant had never been there before.

{¶21} Appellant said "Shiz" Facetimed him earlier that day to show him the location of a house key under a rock near the front door. Appellant said he picked up the house key, went to his mother's house, and asked his sister for a ride back to "Shiz's" house with his kids. Once inside the house, he gave his kids the new jerseys and his

sister took the photo. He told the kids to take the jerseys off and started to hook up a video game.

{¶22} Appellant testified that as he was hooking up the video game, within ten minutes of their arrival at the house, he had to use the bathroom and walked toward it. He heard his sister say she saw a light outside and the cops broke down the front door. Appellant knew it was police because he saw the SWAT shield. Appellant said he did not run and immediately laid down in the hallway and officers cuffed him.

{¶23} Appellant said he never had a gun in his hand and he didn't put the gun in the southwest bedroom. He said he didn't put the cocaine or the Superman backpack in the bedroom, although the backpack belonged to one of his sons. He acknowledged that he was pictured in the photos in the Nike box and admitted these were his personal photos that he kept in the box.

{¶24} Defense trial counsel showed appellant photos of the inside of 512 West Third and asked if any of the items belonged to him. Appellant said the television and clothes in baskets weren't his, but clothes on the couch, including White Sox jerseys, were his. Appellant said a pair of Timberland boots on the floor was not his. Defense trial counsel pointed out that in the photo of appellant and his sons taken at 9:26 p.m., appellant is wearing Timberland boots. Appellant said the pair on the floor was a different pair, however. He said he put his own boots in a Nike box and changed into tennis shoes because it was raining outside.

{¶25} Appellant claimed he originally planned to take his kids to a hotel to "hang out" but when the house became available, he decided to take them there instead. When asked why there was no food in the house, he said they ordered pizza.

{¶26} Appellant testified that he told police he doesn't know Terrell Harris; he told them the story about the dice game and the key under the rock. He claimed to know nothing about the cocaine, gun, marijuana, scales, and baggies.

{¶27} When reminded by his counsel that his DNA was found on a bag of marijuana, he said "yes, on the misdemeanor bag…." T. II, 285.

{¶28} On cross-examination, appellant acknowledged he told the police nothing in the house would have his DNA on it. He said the currency found in the house was not his. He acknowledged he told police he never entered the southwest bedroom; he claimed one White Sox jersey and the child's backpack were found there because police moved the items. Appellant insisted he didn't know anyone named Terrell Harris, but acknowledged there are two people by the name of "Rell" in his phone. He acknowledged his sister drove a blue Taurus that night, but claimed the Taurus was parked at the house for only about ten minutes prior to the raid. Further, although he put his photos in the Nike box, he did not put the box in the southwest bedroom. He acknowledged he handled the box, and that the box was found under bags of cocaine, but insisted he didn't handle the cocaine and was unaware of it.

Appellee's rebuttal

{¶29} Appellee recalled two officers on rebuttal. The first testified that appellant also told them the story about the dice game and staying at "Shiz's" house. When appellant showed them his phone to recreate his Facetime conversation with "Shiz," however, the number came up under the name "Rell." Appellant attempted to prevent officers from seeing the name "Rell" on his phone. The second officer testified that the house was surveilled prior to the execution of the search warrant; officers drove by several

times and saw the blue Taurus parked outside the house at least 45 minutes before the raid took place. Officer specifically discussed the Taurus' presence in their meeting prior to the raid.

Indictment, trial, and conviction

{¶30} Appellant was charged by indictment as follows: Count I, trafficking in cocaine in the vicinity of a school or juvenile pursuant to R.C. 2925.03(A)(2) and (C)(4)(e), a felony of the first degree; Count II, possession of cocaine pursuant to R.C. 2925.11(A) and (C)(4)(d), a felony of the second degree; Count III, trafficking in marijuana in the vicinity of a school or juvenile pursuant to R.C. 2925.03(A)(2) and (C)(3)(c), a felony of the third degree;[3] Count V, having weapons while under disability pursuant to R.C. 2923.13(A)(3), a felony of the third degree; and Count VI, possession of marijuana pursuant to R.C. 2925.11(A) and (C)(3)(c), a felony of the fifth degree. Counts I, III, and V were accompanied by forfeiture specifications pursuant to R.C. 2941.1417.

{¶31} Appellant entered pleas of not guilty and the matter proceeded to trial by jury. Appellant was found guilty as charged and sentenced to an aggregate prison term of 17 years.

{¶32} Appellant now appeals from the judgment entry of his convictions and sentence.

{¶33} Appellant raises five assignments of error:

ASSIGNMENTS OF ERROR

{¶34} "I. THE EVIDENCE IN THIS CASE WAS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT A CONVICTION OF TRAFFICKING COCAINE AND AS A

[3] Count IV, a second count of having weapons while under disability, was dismissed.

RESULT, THE APPELLANT'S RIGHTS AS PROTECTED BY ARTICLE I SECTION 16 OF THE OHIO CONSTITUTION AND FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION WERE VIOLATED."

{¶35} "II. THE EVIDENCE IN THIS CASE WAS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT A CONVICTION OF POSSESSION OF COCAINE AND AS A RESULT, THE APPELLANT'S RIGHTS AS PROTECTED BY ARTICLE I SECTION 16 OF THE OHIO CONSTITUTION AND FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION WERE VIOLATED."

{¶36} "III. THE EVIDENCE IN THIS CASE WAS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT A CONVICTION OF TRAFFICKING MARIJUANA AND AS A RESULT, THE APPELLANT'S RIGHTS AS PROTECTED BY ARTICLE I SECTION 16 OF THE OHIO CONSTITUTION AND FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION WERE VIOLATED."

{¶37} "IV. THE EVIDENCE IN THIS CASE WAS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT A CONVICTION OF HAVING WEAPONS UNDER DISABILITY AND AS A RESULT, THE APPELLANT'S RIGHTS AS PROTECTED BY ARTICLE I SECTION 16 OF THE OHIO CONSTITUTION AND FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION WERE VIOLATED."

{¶38} "V. THE EVIDENCE IN THIS CASE WAS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT A CONVICTION OF POSSESSION OF MARIJUANA AND AS A RESULT, THE APPELLANT'S RIGHTS AS PROTECTED BY ARTICLE I SECTION 16 OF THE OHIO CONSTITUTION AND FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION WERE VIOLATED."

ANALYSIS

I-V.

{¶39} Appellant's five assignments of error are related and will be considered together. Appellant argues his convictions are not supported by sufficient evidence.[4] We disagree.

{¶40} Sufficiency of the evidence is a legal question dealing with whether the state met its burden of production at trial. *State v. Murphy*, 5th Dist. Stark No. 2015CA00024, 2015–Ohio–5108, ¶ 13, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "Specifically, 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." *Murphy* at ¶ 15. The test for sufficiency of the evidence raises a question of law and does not permit the court to weigh the evidence. *State v. Martin,* 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶41} 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. *Murphy* at ¶ 15, citing *Thompkins* at 386.

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[4] Appellee points out that appellant did not make a motion for acquittal pursuant to Crim.R. 29(A) at the close of appellee's evidence or at the close of all of the evidence. In *State v. Brown,* 5th Dist. Licking No.2006–CA–53, 2007–Ohio–2005 at ¶ 36, we noted failure to timely file a Crim.R. 29(A) motion during a jury trial does not waive an argument on appeal concerning the sufficiency of the evidence. *State v. Nian*, 5th Dist. Delaware No. 15CAA070052, 2016-Ohio-5146, ¶ 26, *appeal not allowed,* 148 Ohio St.3d 1411, 2017-Ohio-573, 69 N.E.3d 751. Thus, for purposes of this review, we do not consider appellant to have waived his right to argue sufficiency of the evidence on appeal. *Id*., citing *State v. Lee,* 5th Dist. Richland No. 15–CA–52, 2016–Ohio–1045, ¶ 30.

{¶42} The weight to be given the evidence introduced at trial and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. Thomas*, 70 Ohio St.2d 79, 434 N.E.2d 1356 (1982), syllabus. It is not the function of an appellate court to substitute its judgment for that of the factfinder. State v. *Jenks,* 61 Ohio St.3d 259, 279, 574 N.E.2d 492 (1991).

{¶43} Appellant argues appellee's evidence in insufficient because he didn't own the house at 512 West Third Street; the investigation focused upon Terrell Harris; and there is no direct evidence that appellant personally trafficked or possessed marijuana or cocaine, or possessed the firearm.[5] Appellee responds that reasonable inferences from the evidence presented readily establish appellant's guilt.

Trafficking

{¶44} We first address the trafficking offenses, Counts I and III. Appellant was charged with trafficking cocaine and marijuana, pursuant in pertinent part to R.C. 2925.03(A)(2) which states, "No person shall knowingly * * * [p]repare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance or a controlled substance analog, when the offender knows or has reasonable cause to believe that the controlled substance or a controlled substance analog is intended for sale or resale by the offender or another person."

{¶45} Our review of the record indicates appellee presented ample circumstantial evidence that appellant was guilty of the trafficking offenses. Ohio law recognizes that circumstantial evidence is sufficient to prove the essential elements in a criminal

[5] Appellant does not challenge the jury's findings on the presence-of-a-juvenile or forfeiture specifications.

case. *State v. Scott*, 5th Dist. Morgan No. 06 CA 1, 2007-Ohio-303, ¶ 35, citing *State v. Willey*, 5th Dist. Guernsey No. 98 CA 6, unreported, 1999 WL 3962 (Nov. 24, 1998), internal citation omitted. "The only notable exception to this principle is where the inference between the facts proven and the facts sought to be proven is so attenuated that no reasonable mind could find proof beyond a reasonable doubt." *Id.,* citing *State v. Griffin*, 13 Ohio App.3d 376, 377-378, 469 N.E.2d 1329 (1st Dist.1979).

{¶46} If the state relies on circumstantial evidence to prove an essential element of an offense, it is not necessary for "such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction." *Granados*, supra, at ¶ 27, citing *Jenks,* supra, 61 Ohio St.3d at 272, paragraph one of the syllabus. "Circumstantial evidence and direct evidence inherently possess the same probative value [.]" *Jenks,* 61 Ohio St.3d at paragraph one of the syllabus. Furthermore, "[s]ince circumstantial evidence and direct evidence are indistinguishable so far as the jury's fact-finding function is concerned, all that is required of the jury is that i[t] weigh all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt." *Jenks,* 61 Ohio St.3d at 272, 574 N.E.2d 492. While inferences cannot be based on inferences, a number of conclusions can result from the same set of facts. *State v. Lott,* 51 Ohio St.3d 160, 168, 555 N.E.2d 293 (1990), citing *Hurt v. Charles J. Rogers Transp. Co,* 164 Ohio St. 329, 331, 130 N.E.2d 820 (1955). Moreover, a series of facts and circumstances can be employed by a jury as the basis for its ultimate conclusions in a case. *Lott,* 51 Ohio St.3d at 168, citing *Hurt,* 164 Ohio St. at 331.

{¶47} Appellee's evidence is circumstantial but compelling. Kaufman observed appellant with a firearm peering out the window of the house as the SWAT unit arrived,

supporting appellee's characterization of 512 West Third Street as a "trap house" from which appellant was actively trafficking cocaine and marijuana. Those drugs were found in significant quantities throughout the house, along with evidence of drug distribution but not of drug use. Officers testified that items such as firearms, scales, baggies, and large amounts of currency are indicators of trafficking activity. Appellant's story that "Shiz" let him stay at the house temporarily, and that he didn't know what went on there, is belied by the fact that appellant was in the southwest bedroom where compelling evidence of trafficking was found.

{¶48} Appellant cites *State v. Collins* in support of his contention that appellee failed to establish he (1) prepared the drugs for shipment; (2) shipped, transported, or delivered the drugs; (3) prepared the drugs for distribution; or (4) distributed the drugs. *State v. Collins*, 8th Dist. Cuyahoga No. 95422, 2011-Ohio-4808, ¶ 20, cause dismissed, 130 Ohio St.3d 1414, 2011-Ohio-5604, 956 N.E.2d 306, citing *State v. Hatcher*, 8th Dist. Cuyahoga No. 70857, unreported, 1997 WL 428656 (July 31, 1997). The facts of *Collins* are distinguishable from the instant case. The state's evidence against Collins consisted of several controlled deliveries of packages of large amounts of marijuana, without more, and the Court was unwilling to conclude that because Collins possessed a large amount of marijuana, he was necessarily selling it. *Id*., ¶ 25. The Court reasoned:

> The statute as written, however, indicates prospective conduct that is particularized and not based on common assumptions. A plain reading indicates that it requires an offender to take some action in furtherance of the goal of accomplishing trafficking by doing one or more of

> the proscribed acts under the statute. Receipt of drugs alone is not one of the enumerated methods of violating the "preparation for shipment" statute.
>
> Unless police can lay out the conspiracy to distribute drugs, including details on the origin of the shipment, method of shipment, and parties involved in the shipment (real or otherwise), in a manner designed to prove the act of receipt is part of an overall drug conspiracy, the elements that an offender prepares a drug for shipment, or ships a drug, or transports a drug, or delivers a drug, or prepares for distribution a drug, or actually distributes 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, are not met by evidence of receipt alone.
>
> *State v. Collins*, 8th Dist. Cuyahoga No. 95422, 2011-Ohio-4808, ¶ 29-30, cause dismissed, 130 Ohio St.3d 1414, 2011-Ohio-5604, 956 N.E.2d 306.

{¶49} The instant case is distinguishable from *Collins* because there is evidence of drug trafficking above and beyond receipt of a large quantity of drugs. METRICH was actively investigating the house as a "trap house" from which drugs were sold, and the contents of the house were consistent with a "trap house." Typical house contents were minimal, but evidence of a drug trafficking operation were unmistakable: in addition to large quantities of cocaine and marijuana, police found currency, a firearm, baggies, and scales, all of which are evidence of drug trafficking per officers' testimony. The evidence circumstantially established that Terrell Harris was known to appellant: although he

claimed he borrowed the house from "Shiz," "Rell" was the name that appeared in appellant's phone, a fact he tried to conceal.

{¶50} The appellant in *State v. Franklin* made a similar argument, contending that her mere presence in a residence where illegal drugs were located was insufficient as a matter of law to support an inference of knowledge of the drugs and activities involving drugs. *State v. Franklin*, 5th Dist. Stark No. 2007-CA-00022, 2007-Ohio-4649, ¶ 15, citing *State v. Cortez,* 6th Dist. Lucas No. 05-1112, 2007-Ohio-96. The evidence in *Franklin* consisted of testimony that the appellant sold crack to an informant, and appellant was found in the kitchen of an apartment containing crack cocaine, marijuana, baggies, digital scales, Chore Boys, and a glass crack pipe. Also in the apartment was "a large amount of consumer goods still in unopened boxes, and plastic store bags containing clothing, toiletries, and electronics," which officers testified are often found in crack houses because users and buyers of crack often lack cash and barter goods for drugs. We found this to be sufficient evidence from which a reasonable trier of fact could conclude the state presented evidence on each essential element of the offense of trafficking in cocaine. *Id.* In the instant case, the trappings of drug trafficking were throughout the house, to the extent that appellant's children were within four feet of it. While there is no direct evidence of appellant undertaking a sale, the extent of his personal property in the house, and his apparent protective instinct over it, are strong circumstantial evidence.

{¶51} Appellee cites our decision in *State v. Batin*, 5th Dist. Stark No. 2004-CA-00128, 2005-Ohio-36, at ¶ 24, in which we found the jury could properly draw inferences from the evidence:

> In this case, the jury correctly inferred from the evidence that appellant not only possessed the drugs but that he was also involved in the preparation for shipment or distribution of drugs to facilitate drug trafficking activity. The appellant's possession of a large amount of crack cocaine, both cut and uncut, as well as his possession of a large sum of money permitted the jury to draw the logical inference that he was involved in the distribution of drugs. Likewise, the lack of any cocaine smoking paraphernalia on his person at the time of his arrest suggested that the drugs he possessed were not for personal use. *See, State v. Jolly*, 8th Dist. No. 70482, unreported, 1997 WL 391317 (July 10, 1997); *State v. Gill*, 1st Dist. Nos. C-950762, C-950806, unreported, 1997 WL 5181 (Jan. 8, 1997).

{¶52} Similarly, the jury in the instant case could draw the logical inference that appellant was involved in the distribution of drugs. The record contains more evidence than appellant's mere proximity to patent evidence of drug trafficking—he was observed by Kaufman with the firearm, and the logical inference is he was prepared to protect his investment.

Possession of marijuana and cocaine, and having weapon while under disability

{¶53} Appellant argues his convictions for possession of marijuana and cocaine, and the conviction of having weapons under disability, are not supported by sufficient evidence because appellee failed to establish he knowingly "possessed" the drugs and the firearm. Appellee responds that the evidence directly connected appellant to the marijuana, cocaine, and firearm.

{¶54} Appellant was convicted of one count of possession of cocaine and one count of possession of marijuana [Counts II and V]. R.C. 2925.11(A) states, “No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog.” He was also convicted of one count of having a weapon while under disability pursuant to R.C. 2923.13(A)(3), which states, “Unless relieved from disability under operation of law or legal process, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if * * * [t]he person * * * has been convicted of any felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse * * *.” Appellant’s premise is the same for all three convictions: appellee failed to establish he knowingly possessed the drugs and the firearm.

{¶55} R.C. 2925.01(K) defines possession as follows: “‘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.” R.C. 2901.21 provides the requirements for criminal liability and provides that possession is a “voluntary act if the possessor knowingly procured or received the thing possessed, or was aware of the possessor's control of the thing possessed for sufficient time to have ended possession.” R.C. 2901.21(D)(1). Possession may be actual or constructive. *State v. Granados*, 5th Dist. Fairfield No. 13-CA-50, 2014-Ohio-1758, ¶ 25, citing *State v. Butler,* 42 Ohio St.3d 174, 176, 538 N.E.2d 98 (1989); *State v. Haynes,* 25 Ohio St.2d 264, 267 N.E.2d 787 (1971); *State v. Hankerson,* 70 Ohio St.2d 87, 434 N.E.2d 1362 (1982), syllabus.

{¶56} To establish constructive possession, the evidence must prove that the defendant was able to exercise dominion and control over the contraband. *Granados,* supra at ¶ 26, citing *State v. Wolery,* 46 Ohio St.2d 316, 332, 348 N.E.2d 351 (1976). Dominion and control may be proven by circumstantial evidence alone. *Id*., citing *State v. Trembly,* 137 Ohio App.3d 134, 738 N.E.2d 93 (8th Dist.2000). Circumstantial evidence that the defendant was located in very close proximity to the contraband may show constructive possession. *State v. Butler,* supra; *State v. Barr,* 86 Ohio App.3d 227, 235, 620 N.E.2d 242 (8th Dist.1993); *State v. Morales,* 5th Dist. Licking No. 2004 CA 68, 2005–Ohio–4714, ¶ 50; *State v. Moses,* 5th Dist. Stark No. 2003CA00384, 2004–Ohio–4943, ¶ 9. Ownership of the contraband need not be established in order to find constructive possession. *State v. Smith,* 9th Dist. Summit No. 20885, 2002–Ohio–3034, ¶ 13, citing *State v. Mann,* 93 Ohio App.3d 301, 308, 638 N.E.2d 585 (8th Dist.1993). Furthermore, possession may be individual or joint. *Wolery,* 46 Ohio St.2d at 332. Multiple individuals may constructively possess a particular item of contraband simultaneously. *State v. Pitts,* 4th Dist. Scioto No. 99 CA 2675, 2000–Ohio–1986. The Supreme Court has held that knowledge of illegal goods on one's property is sufficient to show constructive possession. *State v. Hankerson,* 70 Ohio St.2d 87, 91, 434 N.E.2d 1362, (1982), cert. denied, 459 U.S. 870, 103 S.Ct. 155, 74 L.Ed.2d 130(1982). Possession of the object must be "conscious," *i.e.,* a defendant must have knowledge of the thing or substance which he is alleged to have possessed. *Hankerson,* 70 Ohio St.2d at 91.

{¶57} "Whether a person acts knowingly can only be determined, absent a defendant's admission, from all the surrounding facts and circumstances, including the

doing of the act itself." *State v. Zachery*, 5th Dist. Stark No. 2008-CA-00187, 2009-Ohio-715, ¶ 20, citing *State v. Huff*, 145 Ohio App.3d 555, 563, 763 N.E.2d 695 (1st Dist.2001). (Footnote omitted.) Thus, "[t]he test for whether a defendant acted knowingly is a subjective one, but it is decided on objective criteria." *Zachery, id.,* citing *State v. Elliott*, 104 Ohio App.3d 812, 663 N.E.2d 412 (10th Dist.1995).

{¶58} In *State v. Thomas*, 107 Ohio App.3d 239, 244, 668 N.E.2d 542 (5th Dist.1995), we found sufficient evidence to support the jury's finding that appellant constructively possessed illegal drugs found in a briefcase, noting "[c]onstructive possession requires the *ability* to exercise dominion or control over the object at issue." *Id*., citing *State v. Boyd,* 63 Ohio App.3d 790, 796, 580 N.E.2d 443 (8th Dist.1989). We found Thomas had the ability to exercise dominion or control over the drugs because he owned the briefcase in which the drugs were found.

{¶59} The instant case is similar to *Thomas* in several respects. In the briefcase, officers found evidence linked to Thomas by its personal nature, akin to the personal photos in the Nike box in the instant case, under the bags of cocaine. Appellant's DNA was admittedly found on "the misdemeanor bag" of marijuana, and that bag was adjacent to other bags of marijuana. The evidence demonstrates the appellant's ability to exercise dominion or control over the Nike box, as well as the items located on the box, including the illegal drugs. *Id.* Furthermore, testimony at trial established appellant handled the firearm as he looked out the window, then ran from the southwest bedroom when police broke down the door. This evidence is sufficient to support an inference that appellant had knowledge of the illegal drugs and the firearm and, therefore, knowingly possessed them.

{¶60} The evidence of having a weapon while under a disability was direct. Appellee entered a certified copy of appellant's 2010 conviction for cocaine possession. The offense of having a weapon under disability can be established by proving a defendant "possessed" a firearm. *Zachery*, supra, 2009-Ohio-715 at ¶ 30. Constructive possession of a firearm exists when a defendant knowingly has the power and intention at any given time to exercise dominion and control over a firearm, either directly or through others. *Zachery*, supra, 2009-Ohio-715 at ¶ 31, citing *U.S. v. Clemis*, 11 F.3d 597 (6th Cir.1993), cert. denied, 511 U.S. 1094, 114 S.Ct. 1858, 128 L.Ed.2d 481.In this case, officers testified there were four people in the house upon entry: appellant, his sister, and his two young children. Kaufman observed the silhouette of a person holding the firearm and testified it could only have been appellant. Like a portion of the drugs, the firearm was found in the southwest bedroom appellant came out of.

{¶61} Viewing the evidence in the light most favorable to appellee, we conclude that a reasonable person could have found beyond a reasonable doubt that appellant was guilty of the trafficking and possession offenses, and of having a weapon while under disability. We hold, therefore, that appellee met its burden of production regarding every element of the crimes and, accordingly, there was sufficient evidence to support appellant's convictions.

{¶62} The jury was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. *Zachery*, supra, 2009-Ohio-715 at ¶ 36. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence". *Id.,* citing *State v. Craig*, 10th Dist.

Franklin No. 99AP-739, unreported, 2000 WL 297252 (Mar. 23, 2000), internal citation omitted.

{¶63} Appellant's five assignments of error are overruled.

CONCLUSION

{¶1} Appellant's five assignments of error are overruled and the judgment of the Richland County Court of Common Pleas is affirmed.

By: Delaney, J.,

Wise, John, P.J. and

Wise, Earle, J., concur.