[Cite as *State v. Owens*, 2018-Ohio-4225.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 2018CA00015
	:	
TREMAINE J. OWENS	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2017CR1726
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	October 15, 2018

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
JOHN D. FERRERO STARK COUNTY PROSECUTOR	BERNARD L. HUNT 2395 McGinty Rd NW North Canton, OH 44720
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Delaney, J.

{¶1} Defendant-Appellant Tremaine J. Owens appeals his January 22, 2018 conviction and sentence by the Stark County Court of Common Pleas. Plaintiff-Appellee is the State of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} Officer Scott Jones of the Canton Police Department was working the midnight shift at 2:00 a.m. on September 12, 2017. While on patrol, he was flagged down by a tenant who resided at an apartment building on 12th Street Northwest, Canton, Ohio. The tenant told Officer Jones he was having trouble with a male and female guest at his apartment. The tenant stated the male and female were threatening him with physical harm and he wanted the police to help him get them out of his apartment.

{¶3} Officer Jones and his partner followed the tenant to his apartment. At the apartment, the officers spoke with Defendant-Appellant Tremaine J. Owens and his female friend. As a result of their discussion, the tenant changed his mind and allowed Owen and his female friend to stay at the apartment.

{¶4} A short time after Officer Jones and his partner left the apartment, they received a 911 call from the tenant. The tenant advised dispatch he locked himself in the bathroom because Owens was threatening to assault him.

{¶5} Officer Jones and his partner returned to the apartment. They walked up the stairs to the tenant's apartment and they could hear people talking in the apartment. The officers stood at the door and listened to determine what threats were being made by Owens. The officers stood at the door and listened because they wanted to be aware of the situation they were entering.

{¶6} The officers heard footsteps coming towards the door. The door opened a crack and the officers saw Owens peek out the door. When he saw the officers at the door, Owens slammed the door and held it closed.

{¶7} Officer Jones pushed the door open and Owens ran towards the living room. Officer Jones saw Owens throw a bag on the floor. The bag was recovered and determined to contain 0.03 grams of cocaine or cocaine base. Owens moved towards a recliner in the living room. Officer Jones struggled with Owens to restrain and arrest him.

{¶8} The other police officer knocked on the door of the bathroom and told the tenant it was safe to come out. The tenant was uninjured.

{¶9} On September 20, 2017, the Stark County Grand Jury indicted Owens on one count of possession of cocaine, a fifth-degree felony in violation of R.C. 2925.11(A)(C)(4)(a); one count of resisting arrest, a second-degree misdemeanor in violation of R.C. 2921.33(A); and one count of obstructing official business, a second-degree misdemeanor in violation of R.C. 2921.31(A). Owens entered a plea of not guilty to the charges.

{¶10} Owens filed a motion to suppress on November 27, 2017 and a suppression hearing was held on December 18, 2017. Owens alleged his constitutional rights were violated when Canton police officers opened the door to an apartment he was visiting without a warrant. The trial court denied the motion to suppress.

{¶11} A jury trial was held on January 18, 2018. The State called Officer Jones and a criminalist with the Stark County Crime Laboratory. The State played a video recording from the body cam Officer Jones wore the night of September 12, 2017.

{¶12} The jury deliberated and found Owens guilty of possession of cocaine and obstructing official business. Owens was sentenced to a prison term of 12 months for possession of cocaine and 30 days for obstructing official business, to be served concurrently.

{¶13} It is from these judgments Owens now appeals.

ASSIGNMENTS OF ERROR

{¶14} Owens raises two Assignments of Error:

{¶15} "I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS.

{¶16} "II. THE TRIAL COURT'S FINDING OF GUILT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, THUS WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE OF GUILT."

ANALYSIS

I. Motion to Suppress

{¶17} Owens argues in his first Assignment of Error that the trial court erred in denying his motion to suppress. We disagree.

{¶18} Appellate review of a trial court's decision to deny a motion to suppress involves a mixed question of law and fact. *State v. Long*, 127 Ohio App.3d 328, 332, 713 N.E.2d 1 (4th Dist.1998). During a suppression hearing, the trial court assumes the role of trier of fact and, as such, is in the best position to resolve questions of fact and to evaluate witness credibility. *State v. Brooks*, 75 Ohio St.3d 148, 154, 661 N.E.2d 1030 (1996). A reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Medcalf*, 111 Ohio App.3d 142, 145,

675 N.E.2d 1268 (4th Dist.1996). Accepting these facts as true, the appellate court must independently determine as a matter of law, without deference to the trial court's conclusion, whether the trial court's decision meets the applicable legal standard. *State v. Williams*, 86 Ohio App.3d 37, 42, 619 N.E.2d 1141 (4th Dist.1993), overruled on other grounds.

{¶19} There are three methods of challenging a trial court's ruling on a motion to suppress on appeal. First, an appellant may challenge the trial court's finding of fact. In reviewing a challenge of this nature, an appellate court must determine whether the trial court's findings of fact are against the manifest weight of the evidence. *See State v. Fanning*, 1 Ohio St.3d 19, 437 N.E.2d 583 (1982); *State v. Klein*, 73 Ohio App.3d 486, 597 N.E.2d 1141 (4th Dist.1991). Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. *See Williams, supra*. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issues raised in a motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry*, 95 Ohio App.3d 93, 96,620 N.E.2d 906 (8th Dist.1994).

{¶20} Owens contends the trial court erred when it denied his motion to suppress because the police officers entered and searched the apartment without a warrant. Owens claims the warrantless entry into the apartment by the police officers was not based on exigent circumstances. There is no dispute the police officers entered the apartment without a warrant. The Fourth Amendment to the United States Constitution

and Section 14, Article I, Ohio Constitution, prohibits warrantless searches and seizures, rendering them per se unreasonable unless an exception to the warrant requirement applies. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

{¶21} The Ohio Supreme Court has recognized seven exceptions to the search warrant requirement: (a) [a] search incident to a lawful arrest; (b) consent signifying waiver of constitutional rights; (c) the stop-and-frisk doctrine; (d) hot pursuit; (e) probable cause to search and the presence of exigent circumstances; (f) the plain-view doctrine; or (g) an administrative search. *State v. Smith*, 5th Dist. Licking No. 18 CA 00011, 2018-Ohio-3436, ¶ 18 citing *State v. Akron Airport Post No. 8975,* 19 Ohio St.3d 49, 51, 482 N.E.2d 606 (1985), certiorari denied, 474 U.S. 1058, 106 S.Ct. 800, 88 L.Ed.2d 777 (1986); *Stone v. Stow,* 64 Ohio St.3d 156, 164, 593 N.E.2d 294, fn. 4 (1992).

{¶22} The exigent circumstances exception "is founded on the premise that the existence of an emergency situation, demanding urgent police action, may excuse the failure to procure a search warrant." *State v. Cheadle,* 2nd Dist. Miami No. 00CA03, 2000 WL 966167, (July 14, 2000). "Whether exigent circumstances are present is determined through an objective test that looks at the totality of the circumstances confronting the police officers at the time of the entry." *State v. Enyart,* 10th Dist. Franklin Nos. 08AP–184, 08AP–318, 2010-Ohio-5623, 2010 WL 4681889, ¶ 21.

{¶23} Looking at the totality of the circumstances of this case, we find exigent circumstances were present to support a warrantless entry into the apartment. Officer Jones first came in contact with the tenant when the tenant asked for the Officer's assistance in removing Owens and his female friend from his apartment. He stated Owens and his female friend were threatening the tenant with physical harm. Officer

Jones came in contact with the tenant three hours later when the tenant called 911. He told dispatch he was locked in his bathroom because Owens was threatening him with physical harm. No active violence was reported during the 911 call, but Officer Jones proceeded with caution:

> And since there was no active violence being dictated over the phone, however the male was saying that he was being threatened and that he was in fear for his safety so much that he locked himself in his bathroom, we're going to go up and listen to see if Tremaine is actually making these threats to this guy.
>
> But as we're listening, he sees us, opens the door, slams the door on the officers clearly dressed in uniform, that makes me feel like something either happened to the victim in the time that it took from the 911 call for us to respond and get there or that something's about to happen to the victim, at which point I have to make my way in there to ensure the sa – victim's safety.

(Dec. 18, 2017 Hearing, T. 15-16). Officer Jones tried to push the door open as Owens tried to push the door closed. (T. 17). When Officer Jones opened the door and entered the apartment, he saw Owens throw a bag on the floor.

{¶24} Under the facts of this case, we find exigent circumstances existed in the form of an emergency excusing the failure to procure a search warrant. Officer Jones entered the apartment based on a 911 call where the tenant claimed he was in fear of physical harm by Owens.

{¶25} Owens's first Assignment of Error is overruled.

II. Sufficiency and Manifest Weight of the Evidence

{¶26} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, paragraph two of the syllabus. The standard of review for a challenge to the sufficiency of the evidence is set forth in *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991) at paragraph two of the syllabus, in which the Ohio Supreme Court held, "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."

{¶27} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as the "thirteenth juror," and after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered." *State v. Thompkins*, supra, 78 Ohio St.3d at 387. Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶28} Owens contends in his second Assignment of Error that his convictions for possession of cocaine and obstructing official business were against the sufficiency and

manifest weight of the evidence because the officers did not interview his female friend nor was the apartment or evidence checked for fingerprints. Owens concludes the evidence presented by the State did not prove Owens possessed of the bag of cocaine found by Officer Jones.

{¶29} Owens was convicted of possession of cocaine, in violation of R.C. 2925.11(A), which states, "[n]o person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog." Possession may be actual or constructive. *State v. Smith*, 5th Dist. Muskingum No. CT2017-0044, 2018-Ohio-2366, 2018 WL 3046480, ¶ 47. "Constructive possession exists when an individual knowingly exercises dominion and control over an object, even though that object may not be within his immediate physical possession." *State v. Hankerson*, 70 Ohio St.2d 87, 434 N.E.2d 1362 (1982), syllabus. The evidence must prove that the defendant was able to exercise dominion and control over the contraband. *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. *State v. Holman,* 5th Dist. Stark No. 2017CA00114, 2018–Ohio–1373, ¶ 25, 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. Barr,* 86 Ohio App.3d 227, 235, 620 N.E.2d 242, 247–248 (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).

{¶30} A review of the record in this case demonstrates sufficient evidence to support Owens's conviction of possession of cocaine. Officer Jones testified he witnessed Owens throw a bag on the floor when he and his partner entered the apartment. The bag was recovered and determined to contain 0.03 grams of cocaine or cocaine base. The video recording of Officer Jones's body cam was presented as an exhibit at trial. The video recording of the body cam showed the cocaine being thrown on the floor of the apartment.

{¶31} Reviewing the evidence in a light most favorable to the prosecution, the jury could have determined the State proved the elements of possession of cocaine and obstructing official business beyond a reasonable doubt. Further, Owens's convictions based on the evidence presented did not create a manifest miscarriage of justice.

{¶32} The second Assignment of Error is overruled.

CONCLUSION

{¶33} The judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, J.,

Wise, John, P.J. and

Baldwin, J., concur.