[Cite as *State v. Barber*, 2017-Ohio-8010.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. MARSHALL BARBER Appellant	C.A. No. 28507 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR-2016-08-2176

DECISION AND JOURNAL ENTRY

Dated: September 29, 2017

CALLAHAN, Judge.

{¶1} Defendant-Appellant, Marshall Barber, appeals from his convictions in the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} During the late evening hours of August 12, 2016, Detective Jim Alexander received word that a certain car was seen in a high drug area. Undercover officers notified him that the car's driver had engaged in suspicious activity, so he began following the car. In the course of doing so, he noticed that the car's windshield had several significant cracks and posed a safety concern. He then decided to stop the car and activated his lights and sirens.

{¶3} Mr. Barber was the driver and sole occupant of the car that Detective Alexander stopped. According to the detective, Mr. Barber was slow to stop the car and, before stopping, he made several noticeable movements in the direction of the back seat and center console. The detective became concerned that Mr. Barber had concealed a weapon, so he asked Mr. Barber to

exit the car once he stopped. He then frisked Mr. Barber and searched the areas of the car towards which he had seen Mr. Barber make furtive movements. He discovered a digital scale on the back seat floorboard and two containers of marijuana in the center console. A subsequent search then uncovered a crumpled dollar bill in the visor that contained crack cocaine.

{¶4} A grand jury indicted Mr. Barber on three counts: possession of cocaine, possession of marijuana, and illegal use of drug paraphernalia. Mr. Barber moved to suppress the evidence obtained as a result of Detective Alexander's search and seizure and, following a suppression hearing, the trial court denied his motion. The trial court then conducted a bench trial at Mr. Barber's request and found him guilty of all three charges. The court sentenced him to six months of community control and a fine.

{¶5} Mr. Barber now appeals from his convictions and raises six assignments of error for review. For ease of analysis, this Court consolidates several of his assignments of error.

II.

ASSIGNMENT OF ERROR NO. 1

THE FINDING OF FACT IN THE SUPPRESSION HEARING ORDER THAT THE CRACKS IN THE WINDSHIELD CREATED AN UNSAFE CONDITION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR NO. 2

THE FINDING OF FACT IN THE SUPPRESSION HEARING ORDER THAT THE SMELL OF MARIJUANA JUSTIFIED THE SEARCH OF THE VEHICLE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT APPLIED THE WRONG LAW TO JUSTIFY THE SEARCH OF THE VEHICLE BASED ON OFFICER SAFETY.

{¶6} In each of the foregoing assignments of error, Mr. Barber argues that the trial court erred when it denied his motion to suppress.[1] Specifically, he argues that the court made two incorrect factual findings and applied the wrong legal standard in reaching its ultimate conclusion. Upon review, this Court rejects Mr. Barber's contentions.

{¶7} A motion to suppress evidence presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. "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." *Id.*, citing *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). Thus, a reviewing court gives deference to and "must accept the trial court's findings of fact if they are supported by competent, credible evidence." *Burnside* at ¶ 8, citing *State v. Fanning*, 1 Ohio St.3d 19, 20 (1982). "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." *Burnside* at ¶ 8, citing *State v. McNamara*, 124 Ohio App.3d 706, 710 (4th Dist.1997).

The Initial Traffic Stop

{¶8} The trial court found that the car Mr. Barber was driving first came to Detective Alexander's attention because undercover officers suspected that its driver (Mr. Barber) had engaged in a drug deal. The court found that the detective began following the car and, while

[1] This Court notes that Mr. Barber's written motion to suppress does not appear in the record. Though the trial court repeatedly referred to a written motion having been filed, it was never filed under this criminal case number. The record reflects that Mr. Barber sought to suppress evidence related to two separate traffic stops: the stop giving rise to this case and another stop that occurred eight days later. The trial court held one suppression hearing for both traffic stops, and the record supports the conclusion that Mr. Barber challenged the constitutionality of both stops in a motion to suppress. Thus, while his actual motion was not docketed under this criminal case number, this Court nonetheless concludes that he preserved his arguments for appeal. *See generally State v. Brooks*, 9th Dist. Summit No. 25522, 2012-Ohio-1619, ¶ 6-8.

behind it, saw several large cracks in its windshield. The court determined that the size, location, and number of cracks "obstructed the driver's view and could [have] compromise[d] the windshield glass." Accordingly, the court concluded that Detective Alexander had reasonable suspicion to believe the car was being operated in an unsafe manner and to execute a traffic stop.

{¶9} Mr. Barber argues that Detective Alexander's testimony about the windshield was not credible, as he did not describe the windshield cracks in his report or take pictures of the cracks. Accordingly, he asserts that the court clearly lost its way when it chose to believe the detective.

{¶10} Detective Alexander specifically wrote on his field arrest form that the car Mr. Barber was driving had a "severely cracked" windshield. During his testimony, he also described the cracks in detail, estimating that there were in excess of five or six and that they "ran all the way across the windshield." The detective agreed that the cracks posed a safety hazard because they traversed the driver's line of sight.

{¶11} Mr. Barber testified at the suppression hearing and denied that the car's windshield was cracked. In support of his testimony, he introduced several pictures of the windshield, none of which clearly depicted multiple cracks. He acknowledged, however, that the pictures had been taken the day before the suppression hearing. It is undisputed that the hearing took place four months after the traffic stop.

{¶12} Upon review, this Court must conclude that the record contains competent, credible evidence in support of the trial court's finding that Mr. Barber was driving a car with large cracks in the windshield. Detective Alexander specifically described the cracks in his testimony and noted their presence in his initial field arrest form. While Mr. Barber testified that no cracks were present, the trial court was "in the best position to resolve factual questions and

evaluate the credibility of witnesses." *Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶ 8. Accordingly, this Court rejects Mr. Barber's first assignment of error.

The Search of the Car

{¶13} The trial court found that, when Detective Alexander activated his lights and sirens, Mr. Barber was slow to stop the car he was driving. The court also found that the detective saw Mr. Barber making "'large' furtive movements towards the rear of the car and center console as if he were trying to tuck something away * * *." The court determined that those areas "are known locations for gun concealment in motor vehicles * * *." It found that the detective asked Mr. Barber to exit the car for officer safety and, when he did so, he smelled the odor of marijuana coming from the car. The detective then frisked Mr. Barber for weapons and conducted a brief search of his car for weapons. During the search, the detective found a digital scale on the back seat floorboard and two mason jars full of marijuana in the center console. The trial court concluded that, "[g]iven all of the information available to Detective Alexander, coupled with his training and experience that drug activity correlates with violence, the Court finds he had a reasonable suspicion that [Mr. Barber] was armed and dangerous, warranting the pat down of [his] person and search of [his] vehicle in the vicinity of [his] reach and furtive movements."

{¶14} Mr. Barber challenges the court's decision on two fronts. First, he argues that the court lost its way when it found that the car he was driving had an odor of marijuana. Second, he argues that the court erred as a matter of law when it concluded that Detective Alexander engaged in a constitutionally valid protective search. This Court first addresses the latter argument.

{¶15} "Where a police officer, during an investigative stop, has a reasonable suspicion that an individual is armed based on the totality of the circumstances, the officer may initiate a protective search for the safety of himself and others." *State v. Bobo*, 37 Ohio St.3d 177 (1988), paragraph two of the syllabus. Additionally, "the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer [has a reasonable suspicion] * * * that the suspect is dangerous and * * * may gain immediate control of weapons." *Michigan v. Long*, 463 U.S. 1032, 1049 (1983).

> In cases involving a subject who has exited his vehicle but has not been placed under arrest, this Court has underscored that the central inquiry regarding whether a protective search of the vehicle is reasonable focuses on whether the subject will be permitted to return to his vehicle where he could regain immediate control of the weapon.

State v. Borum, 9th Dist. Summit No. 27167, 2014-Ohio-5639, ¶ 12. "Such searches are justified based on the officers' particularly vulnerable position existing because a full custodial arrest has not been effected and the individual may be permitted to reenter his vehicle before the investigation is over." *State v. Oliver*, 91 Ohio App.3d 607, 610 (9th Dist.1993).

{¶16} Detective Alexander testified that, on the night he stopped Mr. Barber, he was aiding undercover officers in an area of high drug activity. He stated that, around 11:30 p.m., he received word from one of the officers that a certain car had engaged in "some short-term activity," meaning that its driver had stopped, an individual had approached the car, and the two briefly interacted before the individual walked away. The detective explained that short-term activity can be indicative of a drug sale, so he proceeded to the area and began to follow the car. He later identified Mr. Barber as the driver of the car and its sole occupant.

{¶17} Detective Alexander testified that, once he activated his lights and sirens, Mr. Barber was slow to stop. He estimated that it took Mr. Barber 15 to 20 seconds to stop the car

and, during that time, he made "very exaggerated" movements with his "whole torso" in the direction of the back seat and center console. Detective Alexander testified that, at that point, he became concerned Mr. Barber had a weapon because weapons are commonplace in drug transactions and suspects often attempt to hide them in backseats, between or underneath seats, or in center consoles.

{¶18} Once Mr. Barber brought the car to a complete stop, Detective Alexander approached and asked him to exit. Mr. Barber complied, and Detective Alexander noticed "a faint smell of marijuana" coming from the car. He testified that he was familiar with the odor of marijuana because he had made numerous marijuana arrests. The detective then frisked Mr. Barber and had him stand behind the car where at least one other officer was present. While Mr. Barber stood there, Detective Alexander proceeded to look for weapons in the car, focusing strictly on the areas towards which he had seen Mr. Barber making furtive movements. On the back seat floorboard, he immediately spotted a digital scale, which he stated is a tool commonly used to weigh drugs in drug transactions. He then opened the center console and found two mason jars containing marijuana. A subsequent search of the car also uncovered a crumpled dollar bill in the visor that contained crack cocaine.

{¶19} Detective Alexander could not recall how many officers were present when he searched the car. He recalled that at least one other officer was present, but acknowledged that it was possible several others had arrived during the traffic stop. Meanwhile, Mr. Barber stated that six police officers were present when the detective searched his car. He also denied having made any furtive movements towards the back seat or center console when stopping the car.

{¶20} Mr. Barber argues that the court erred as a matter of law when it concluded that Detective Alexander engaged in a constitutionally valid protective search. According to Mr.

Barber, he was standing behind the car surrounded by multiple officers when Detective Alexander searched it, so the detective could not have possessed a reasonable belief that he was dangerous or capable of gaining immediate control of a weapon.

{¶21} Having reviewed the record, this Court cannot conclude that the trial court erred when it determined that Detective Alexander engaged in a constitutionally valid protective search of the car Mr. Barber was driving. There was testimony that the detective stopped Mr. Barber very late at night and, directly before the stop, Mr. Barber had frequented an area known for high drug activity. *See State v. Biehl*, 9th Dist. Summit No. 22054, 2004-Ohio-6532, ¶ 15, 18, citing *Bobo*, 37 Ohio St.3d at 178-179. The detective specifically testified to a correlation between drug transactions and weapons and indicated that he began following Mr. Barber because undercover officers suspected he had just taken part in a drug transaction. Moreover, when he began to execute his traffic stop, the detective then saw Mr. Barber making multiple furtive movements in the direction of the back seat and center console. Given that Mr. Barber had just come from an area of high drug activity and had engaged in behavior consistent with a drug deal, his "movement[s] may [have] indicate[d] an attempt to conceal a gun or drugs." *Bobo*, 37 Ohio St.3d at 179.

{¶22} While Mr. Barber claims that he could not reasonably have been considered dangerous because he was surrounded by multiple officers, this Court notes that the trial court did not make a finding to that effect. Mr. Barber did testify that six police officers were present when Detective Alexander searched his car, but the trial court gave no indication whether it believed his testimony. Accordingly, this Court will not make a finding to that effect for the first time on appeal. *See State v. Purefoy*, 9th Dist. Summit No. 27992, 2017-Ohio-79, ¶ 18.

{¶23} Under the totality of the circumstances, this Court must conclude that Detective Alexander was warranted in his belief that Mr. Barber posed a safety risk if permitted to return to his car in the absence of a protective sweep. *See Borum*, 2014-Ohio-5639, at ¶ 12; *State v. Criss*, 9th Dist. Wayne No. 2406, 1989 WL 35110, *2 (Apr. 12, 1989). The record reflects that the detective properly conducted a limited search, confined to the areas towards which he saw Mr. Barber make furtive movements while executing his traffic stop. *See State v. Smiley*, 9th Dist. Summit No. 23815, 2008-Ohio-1915, ¶ 24. Thus, the trial court did not err when it denied Mr. Barber's motion to suppress on that basis, and Mr. Barber's third assignment of error is overruled.

{¶24} Mr. Barber also argues that the court lost its way when it found that the car he was driving had an odor of marijuana. The trial court, however, did not premise its holding upon that finding. The odor of marijuana was only a factor that the court considered in its assessment of the totality of the circumstances.[2] Further, this Court has already determined that Detective Alexander conducted a constitutionally valid protective search, irrespective of any marijuana odor that may have been present. Even if the court's finding as to the marijuana odor was incorrect, its error would have no bearing on the outcome in this matter. Thus, this Court rejects Mr. Barber's second assignment of error. *See Princess Kim, L.L.C. v. U.S. Bank, N.A.*, 9th Dist.

[2] The smell of marijuana alone affords probable cause to search pursuant to the automobile exception to the warrant requirement. *State v. Burgin*, 9th Dist. Lorain No. 12CA010277, 2013-Ohio-4261, ¶ 16. Although Detective Alexander later testified at trial that he did not know whether the marijuana odor he detected was coming from the car Mr. Barber was driving, "[t]rial testimony * * * has no bearing upon a court's suppression ruling." *State v. Jackson*, 9th Dist. Summit No. 26234, 2012-Ohio-3785, ¶ 14. *Accord State v. Jackson*, 9th Dist. Summit Nos. 27132, 27133, 27158, 27200, 2015-Ohio-5246, ¶ 46-47 (review of suppression ruling limited to suppression testimony unless defendant renews motion to suppress following inconsistent trial testimony). The trial court, therefore, could have relied upon the automobile exception in denying Mr. Barber's motion to suppress.

Summit No. 27401, 2015-Ohio-4472, ¶ 18 ("To demonstrate reversible error, an aggrieved party must demonstrate both error and resulting prejudice.").

ASSIGNMENT OF ERROR NO. 4

> THE TRAIL (sic) COURT ABUSED ITS DISCRETION AND DENIED DUE PROCESS BY ALLOWING PREJUDICIAL CHARACTER AND OTHER ACTS TESTIMONY INTO EVIDENCE.

{¶25} In his fourth assignment of error, Mr. Barber argues that the trial court abused its discretion when it admitted certain other acts evidence. The evidence was that, eight days after this incident, the police stopped Mr. Barber while he was driving the car at issue in this case. For the reasons that follow, this Court rejects his argument.

{¶26} Under Evid.R. 404(B), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." The rule governs against the admission of other acts evidence offered for the purpose of "proving the defendant's propensity to act in conformity with a particular trait of his character." *State v. Myers*, 9th Dist. Summit No. 25737, 2012-Ohio-1820, ¶ 10. Yet, "[n]ot every act implies something about a person's character." *State v. Hash*, 9th Dist. Medina No. 10CA0008-M, 2011-Ohio-859, ¶ 74. "[T]estimony does not run afoul of [Evid.R.] 404 [when] it is not 'evidence of a person's character or a trait of character.'" *State v. Morris*, 9th Dist. Medina No. 09CA0022-M, 2012-Ohio-6151, ¶ 47, quoting Evid.R. 404(A).

{¶27} At trial, the State introduced the testimony of Officer Andrew Moss. Officer Moss testified that he initiated a traffic stop on August 20, 2016, and Mr. Barber was the driver and sole occupant of the car he stopped. He testified that Mr. Barber had his laundry in the car, as well as a few hundred dollars that he had stored in a cubby pocket on the driver's side door. The evidence was that the car Mr. Barber was driving was the same car that he was driving on

August 12, 2016, when Detective Alexander stopped him. Because Mr. Barber was not the owner of the car and had claimed that the contraband inside it on August 12th did not belong to him, the State introduced the foregoing testimony to refute his claim and support its theory of constructive possession.

{¶28} Mr. Barber argues that the trial court abused its discretion when it admitted Officer Moss' testimony because his testimony violated Evid.R. 404(B). Yet, the officer's testimony had no bearing on Mr. Barber's character. Officer Moss did not say why he stopped Mr. Barber or divulge any details about the result of the stop. He only testified that Mr. Barber was driving the car and had certain personal effects in the car. Because that testimony did not concern Mr. Barber's character, its admission did not violate Evid.R. 404(B). *See Morris* at ¶ 47; *Hash* at ¶ 74. Moreover, because this was a bench trial, this Court presumes that the trial court only considered the officer's testimony for the purpose for which it was offered. *See State v. Diaz*, 9th Dist. Lorain No. 02CA008069, 2003-Ohio-1132, ¶ 39 ("A trial judge in a bench trial is presumed to know the law and to consider only the relevant, material, and competent evidence in arriving at a decision."). Mr. Barber's fourth assignment of error is overruled.

ASSIGNMENT OF ERROR NO. 5

> THE EVIDENCE AT TRIAL WAS INSUFFICIENT TO CONVINCE THE AVERAGE TRIER OF FACT BEYOND A REASONABLE DOUBT THAT MR. BARBER KNOWINGLY WAS IN ACTUAL AND CONSTRUCTIVE POSSESSION OF THE CONTRABAND FOUND DURING THE SEARCH OF THE VEHICLE.

{¶29} In his fifth assignment of error, Mr. Barber argues that his convictions are based on insufficient evidence. Specifically, he argues that there was no evidence he knew about the contraband found in the car he was driving as the car was "owned by someone else [and] no personal items of [his] were found in [it]." This Court disagrees.

{¶30} Whether the evidence in a case is legally sufficient to sustain a conviction is a question of law that this Court reviews de novo. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997).

> 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.

State v. Jenks, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. "In essence, sufficiency is a test of adequacy." *Thompkins* at 386.

{¶31} "No person shall knowingly obtain, possess, or use a controlled substance * * *." R.C. 2925.11(A). "A person acts knowingly, regardless of purpose, when [he] is aware that [his] conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when [he] is aware that such circumstances probably exist." R.C. 2901.22(B). "'[P]ossession' 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. 2925.01(K).

{¶32} "'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. Reis*, 9th Dist. Summit No. 26237, 2012-Ohio-2482, ¶ 7, quoting *State v. Kendall*, 9th Dist. Summit No. 25721, 2012-Ohio-1172, ¶ 14, quoting *State v. Hankerson*, 70 Ohio St.2d 87 (1982), syllabus. "'[T]he crucial issue is not whether the accused had actual physical contact with the article concerned, but whether the accused was capable of exercising dominion [and] control over it.'" *State v. Graves*, 9th Dist. Lorain No. 08CA009397,

2011-Ohio-5997, ¶ 15, quoting *State v. Ruby*, 149 Ohio App.3d 541, 2002-Ohio-5381, ¶ 30 (2d Dist.). "[R]eady availability of the item and close proximity to it support a finding of constructive possession." *State v. Lamb*, 9th Dist. Summit No. 23418, 2007-Ohio-5107, ¶ 12. "The State may prove dominion and control through circumstantial evidence." *State v. Rucker*, 9th Dist. Summit No. 25081, 2010-Ohio-3005, ¶ 30.

{¶33} Sergeant Dale Dorn testified that, on the night of August 12, 2016, the Akron Police Department's gun violence unit was conducting an operation in west Akron. Specifically, it was focusing on a housing complex on Everton Drive because the police had received numerous complaints about gun and drug activity occurring there. While watching the parking lot, Sergeant Dorn observed a black Pontiac Grand Prix. He watched as an individual stood outside the driver's side door and had a brief encounter with the driver before entering the building. The driver of the Grand Prix then began driving the car out of the parking lot, so Sergeant Dorn radioed for another officer to follow it. He testified that he did so because it was commonplace for drug transactions to occur during late evening hours in a manner consistent with the brief encounter that he had witnessed.

{¶34} Detective Alexander testified that he was aiding the gun violence unit that evening and began following the Grand Prix within two to three minutes of Sergeant Dorn's radio transmission. As he followed the car, he saw that its windshield was "severely cracked" and decided to execute a traffic stop. He testified that he activated his lights and sirens, but the driver was slow to stop and "kept rolling, rolling, rolling." As the car kept moving, he saw the driver moving around a lot and making "an exaggerated movement to his right which looked like he was going to the passenger seat or behind the passenger seat." The detective then became concerned the driver had attempted to conceal a weapon.

{¶35} Detective Alexander identified Mr. Barber as the driver of the Grand Prix. He testified that he searched the car after asking Mr. Barber to exit and, during the course of his search, found contraband. Specifically, he found a digital scale on the back seat floorboard, two mason jars containing marijuana in the center console, and a crumpled dollar bill containing crack cocaine in the visor on the driver's side. Detective Alexander confirmed that both the scale and the marijuana jars were located in areas where he had seen Mr. Barber reaching during the stop. As to the crumpled dollar bill, he testified that it was stuck between the visor and the roof of the car, but was visible without lowering the visor. He specified that the bill would have been visible to an individual seated in the driver's seat.

{¶36} The State also presented the testimony of Officer Moss. Officer Moss testified that he stopped Mr. Barber on August 20, 2016, and, at that time, Mr. Barber was again driving the Grand Prix. He stated that Mr. Barber was the car's only occupant. Additionally, he noted that Mr. Barber had his laundry in the car, as well as $300 or $400 that he had stored in a cubby pocket on the driver's side door.

{¶37} Viewing all the evidence in a light most favorable to the State, a rational trier of fact could have concluded that the State proved beyond a reasonable doubt that Mr. Barber constructively possessed the scale, marijuana, and crack cocaine. All of the items were located in close proximity to Mr. Barber, such that they were readily available to him. *See Lamb*, 2007-Ohio-5107, at ¶ 12. There also was testimony that he was slow to stop the car and, during that time, he noticeably moved towards the direction of the back seat and center console where several items of contraband were found. *See State v. Fletcher*, 9th Dist. Summit No. 23171, 2007-Ohio-146, ¶ 21-23. Additionally, there was testimony that, directly before Detective Alexander stopped Mr. Barber, he was seen in a parking lot, engaging in activity that was

consistent with a possible drug sale. Based on all the foregoing, this Court cannot conclude that Mr. Barber's convictions are based on insufficient evidence. Consequently, his fifth assignment of error is overruled.

ASSIGNMENT OF ERROR NO. 6

> THE TRAIL (sic) COURT'S FINDING OF GUILT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AS MR. BARBER WAS NOT IN CONSTRUCTIVE POSSESSION OF THE CONTRABAND FOUND IN THE VEHICLE.

{¶38} In his sixth assignment of error, Mr. Barber argues that his convictions are against the manifest weight of the evidence. Upon review, this Court rejects his argument.

{¶39} When a defendant argues that his conviction is against the weight of the evidence, this court must review all of the evidence before the trial court.

> In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.

State v. Otten, 33 Ohio App.3d 339, 340 (9th Dist.1986). "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the fact[-]finder's resolution of the conflicting testimony." *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997), quoting *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). An appellate court should exercise the power to reverse a judgment as against the manifest weight of the evidence only in exceptional cases. *Otten* at 340.

{¶40} Mr. Barber argues that his convictions are against the manifest weight of the evidence because: (1) the trial court erred by considering testimony related to the traffic stop that occurred on August 20th; (2) two of the State's witnesses were unable to identify him as the

driver of the Grand Prix on August 12th; and (3) there was no evidence that he was aware of the contraband inside the car. He has not argued, however, that any of the State's evidence was "unreliable or lacking credibility." *State v. Smith*, 9th Dist. Summit No. 27877, 2016-Ohio-7278, ¶ 16. His first argument essentially pertains to the admissibility of certain evidence, and his third argument pertains to sufficiency. *See State v. Vicente-Colon*, 9th Dist. Lorain No. 09CA009705, 2010-Ohio-6242, ¶ 20 ("[S]ufficiency and manifest weight are two separate, legally distinct arguments."). Meanwhile, his second argument fails to account for Detective Alexander's testimony, identifying Mr. Barber as the driver of the car that he stopped on August 12th.

{¶41} As this Court has repeatedly held, "[i]f an argument exists that can support [an] assignment of error, it is not this [C]ourt's duty to root it out." *Cardone v. Cardone*, 9th Dist. Summit No. 18349, 1998 WL 224934, *8 (May 6, 1998). This Court will not develop a manifest weight argument for Mr. Barber when he has not done so. *See State v. Sadeghi*, 9th Dist. Wayne No. 14AP0051, 2016-Ohio-744, ¶ 32. Mr. Barber has not shown that this is the exceptional case where the trier of fact lost its way in convicting him. *See id.* at ¶ 33. As such, his sixth assignment of error is overruled.

III.

{¶42} Mr. Barber's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

LYNNE S. CALLAHAN
FOR THE COURT

SCHAFER, P. J.
CARR, J.
CONCUR.

APPEARANCES:

NICHOLAS KLYMENKO, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.