**[Cite as *State v. Massey*, 2013-Ohio-1521.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
|---|---|---|
| State of Ohio, | : | |
| Plaintiff-Appellee, | : | |
| | | No. 12AP-649 |
| v. | : | (C.P.C. No. 12CR-02-711) |
| Daniel Massey, Jr., | : | (REGULAR CALENDAR) |
| Defendant-Appellant. | : | |

D E C I S I O N

Rendered on April 16, 2013

*Ron O'Brien*, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

*Howard Legal LLC*, and *Felice Howard*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

**{¶ 1}** Defendant-appellant, Daniel Massey, Jr., appeals from a judgment of the Franklin County Court of Common Pleas convicting him of one count of having a weapon under disability ("WUD"), a third-degree felony, in violation of R.C. 2923.13. For the following reasons, we affirm the judgment of the trial court.

## I. BACKGROUND

**{¶ 2}** Appellant was indicted on February 8, 2012, on one count of carrying a concealed weapon in violation of R.C. 2923.12, one count of improper handling of a firearm in a motor vehicle in violation of R.C. 2923.16, and one count of WUD in violation of R.C. 2923.13. A jury trial commenced on May 22, 2012; however, appellant executed a

jury waiver as to the WUD charge. As adduced at trial, the charges arose from the following events.

**{¶ 3}** On November 2, 2011, at approximately 12:50 a.m., Columbus Police Officer Elizabeth Gibson was driving through an apartment complex located in a "high crime and drug area" looking for anything suspicious. (Tr. 40.) As she was driving through the apartment complex, Officer Gibson noticed three individuals sitting in a parked car. The car's engine was running, but there were no lights illuminated on the car. Officer Gibson drove past the car and then parked her vehicle so that she could observe the car and the entrances to the apartment complex.

**{¶ 4}** Thereafter, the car's headlights came on and the car drove out of Officer Gibson's sight. Officer Gibson waited several minutes, but did not see the car exit the apartment complex; therefore, Officer Gibson began driving around the apartment complex where she noticed the same car again parked with its headlights off. At this time, Officer Gibson turned on her vehicle's spotlight to illuminate the area and observed the back passenger lean toward the floor on the driver's side of the car.

**{¶ 5}** Officer Gibson exited her vehicle and walked toward the car. Officer Gibson testified that, as she walked in the direction of the car, she kept the spotlight illuminated for her safety. (Tr. 44.) As she approached the car, Officer Gibson asked the occupants to place their hands so that she could see them. Officer Gibson also asked the occupants what they were doing and for identification. The car's occupants indicated they were there to meet some girls. The two persons in the front of the car produced identification, but the person in the back of the car was unable to do so. While using her flashlight, Officer Gibson saw several items in the car, including the "butt of a gun, the back sights poking out of the underneath the seat." (Tr. 46.) Upon seeing the gun, Officer Gibson drew her weapon and aired for additional officers. After other officers arrived, the occupants were removed from the car, and the gun, loaded with eight rounds of ammunition, was recovered. Appellant, the occupant in the backseat of the car, was placed under arrest.

**{¶ 6}** Columbus Police Officer Bonnie Lee Lirtzman was the first officer to arrive in response to Officer Gibson's request for additional officers. Officer Lirtzman testified she removed appellant from the vehicle. On his person, appellant had a blunt that Officer

Lirtzman believed to be marijuana, and next to where appellant had been sitting in the car, Officer Lirtzman found a "pretty decent-sized baggy of marijuana as well as some other paraphernalia" and appellant's identification. (Tr. 77.)

**{¶ 7}** Officer Lirtzman conducted an interview of appellant after he was arrested. Initially, appellant told Officer Lirtzman that he was unaware of the loaded firearm and explained that the movement Officer Gibson observed was him attempting to remove the burning portion of the marijuana blunt on the car's floor. (Tr. 89.) When asked if he knew whose fingerprints or DNA may be on the gun, appellant stated he handled the gun earlier in the day but that it was unloaded at that time. The parties stipulated that the gun recovered from the car was tested and determined to be operable.

**{¶ 8}** The jury rendered verdicts of not guilty on the charges for improper handling of a firearm and carrying a concealed weapon, and, subsequently, the court found appellant guilty of the WUD charge. A sentencing hearing was held and appellant was sentenced to a nine-month term of incarceration to be served consecutively with the sentence imposed in case No. 11CR-237.

## II. ASSIGNMENTS OF ERROR

**{¶ 9}** This appeal followed, and appellant brings the following two assignments of error for our review:

> [I.] Daniel Massey was denied the effective assistance of counsel as guaranteed by the United States and Ohio Constitutions.
>
> [II.] Daniel Massey's conviction is against the manifest weight of the evidence.

## III. DISCUSSION

### A. First Assignment of Error

**{¶ 10}** In his first assignment of error, appellant contends his counsel was ineffective for failing to file a motion to suppress the gun and his statements made to Officer Lirtzman.

**{¶ 11}** In Ohio, a properly licensed attorney is presumed competent. *Vaughn v. Maxwell*, 2 Ohio St.2d 299, 301 (1965). Therefore, the burden of showing ineffective assistance of counsel is on the party asserting it. *State v. Smith*, 17 Ohio St.3d 98, 100

(1985). Additionally, in fairly assessing counsel's performance, there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶ 101.

**{¶ 12}** "[T]he 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 [court] cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In order to succeed on a claim of ineffective assistance of counsel, appellant must satisfy a two-prong test. First, he must demonstrate that his trial counsel's performance was deficient. *Id*. at 687. This requires a showing that his counsel committed errors which were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. If he can show deficient performance, he must next demonstrate that he was prejudiced by the deficient performance. *Id*. To show prejudice, he must establish there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the trial would have been different. A reasonable probability is one sufficient to erode confidence in the outcome. *Id*. at 694.

**{¶ 13}** The failure to file a motion to suppress is not ineffective assistance of counsel per se. *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, ¶ 65, citing *State v. Madrigal*, 87 Ohio St.3d 378, 389 (2000). In order to establish ineffective assistance of counsel for failure to file a motion to suppress, the defendant must prove there was a basis for suppressing the evidence at issue. *Id.*, citing *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, ¶ 35. Counsel is not deficient for failing to raise a meritless issue. *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, ¶ 117, citing *State v. Taylor*, 78 Ohio St.3d 15, 31 (1997).

**{¶ 14}** " '[T]he ineffective assistance of counsel test set forth in *Strickland* can be summarized, in cases involving a failure to make a motion on behalf of the defendant * * * as requiring the defendant to: (1) show that the motion * * * was meritorious, and (2) show that there was a reasonable probability that the verdict would have been different had the motion been made.' " *State v. Simms*, 10th Dist. No. 10AP-1063, 2012-Ohio-2321, ¶ 50, quoting *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶ 63, citing *State v. Santana*, 90 Ohio St.3d 513 (2001), and *State v. Lott*, 51 Ohio St.3d 160

(1990). "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. Gibson*, 69 Ohio App.2d 91, 95 (8th Dist.1980).

**{¶ 15}** As this court has recognized, the failure to file a motion to suppress may constitute ineffective assistance of counsel where there is a solid possibility that the court would have suppressed the evidence. *State v. Jones*, 10th Dist. No. 99AP-704 (June 13, 2000), citing *State v. Garrett*, 76 Ohio App.3d 57 (11th Dist.1991). Nevertheless, even when some evidence in the record supports a motion to suppress, we must presume that defense counsel was effective if counsel could have reasonably decided that filing a motion to suppress would have been a futile act. *Id.*, citing *State v. Edwards*, 8th Dist. No. 69077 (July 11, 1996), citing *State v. Martin*, 20 Ohio App.3d 172 (1st Dist.1983).

**{¶ 16}** Appellant contends the circumstances of this case indicate a motion to suppress was required because Officer Gibson lacked a "reasonable suspicion that criminal activity [was] afoot," as is required for an investigative stop to be in compliance with Fourth Amendment principles. (Appellant's brief, 6.) Because, according to appellant, the stop was unlawful, the evidence obtained from the same must be suppressed.

**{¶ 17}** In response, appellee contends Officer Gibson's initial approach of the car constituted a consensual encounter, and as the encounter ripened into an investigative stop, Officer Gibson possessed a reasonable suspicion to justify the stop. Therefore, it is appellee's position that the record does not demonstrate a solid possibility that the court would have granted a motion to suppress, and, therefore, appellant has failed to demonstrate that he received ineffective assistance of counsel. *Simms* at ¶ 51.

**{¶ 18}** The Fourth Amendment to the United States Constitution, as well as the Ohio Constitution, Article I, Section 14, prohibits unreasonable searches and seizures. *State v. Kinney*, 83 Ohio St.3d 85, 87 (1998); *Katz v. United States*, 389 U.S. 347, 351 (1967). However, "not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a

'seizure' has occurred" within the meaning of the Fourth Amendment. *Terry v. Ohio*, 392 U.S. 1, 19 (1968), fn. 16.

**{¶ 19}** In *State v. Jones*, 188 Ohio App.3d 628, 2010-Ohio-2854 (10th Dist.), this court explained the United States Supreme Court recognizes three categories of police-citizen interactions: (1) a consensual encounter, which requires no objective justification, *see Florida v. Bostick*, 501 U.S. 429, 434 (1991), (2) a brief investigatory stop or detention, which must be supported by reasonable suspicion of criminal activity, *see Terry*, and (3) a full-scale arrest, which must be supported by probable cause, *see Brown v. Illinois*, 422 U.S. 590 (1975).

**{¶ 20}** A consensual encounter occurs when the police approach a person in a public place, the police engage the person in conversation, and the person remains free not to answer or to walk away. *Florida v. Royer*, 460 U.S. 491, 497 (1983) (plurality opinion); *United States v. Mendenhall*, 446 U.S. 544, 553-54 (1980). A consensual encounter does not implicate the Fourth Amendment or trigger its protections. *Bostick* at 434; *State v. Moyer*, 10th Dist. No. 09AP-434, 2009-Ohio-6777, ¶ 13, citing *In re Parks*, 10th Dist. No. 04AP-355, 2004-Ohio-6449, ¶ 7, citing *Royer*. A consensual encounter remains consensual even if police officers ask questions, ask to see the person's identification or ask to search the person's belongings, provided "the police do not convey a message that compliance with their requests is required." *Bostick* at 435; *Florida v. Rodriguez*, 469 U.S. 1, 4-6 (1984); *Immigration & Naturalization Serv. v. Delgado*, 466 U.S. 210, 216 (1984).

**{¶ 21}** The next category of police-citizen interaction is an investigatory detention, commonly referred to as a *Terry* stop. *See Terry*. An investigatory stop constitutes a "seizure" for purposes of the Fourth Amendment. *State v. Guinn*, 10th Dist. No. 99AP-630 (June 1, 2000), citing *Terry* at 16. Under *Terry*, a police officer may stop or detain an individual without probable cause when the officer has reasonable suspicion, based on specific, articulable facts, that criminal activity is afoot. *Id*. at 21-22. Accordingly, "[a]n investigative stop does not violate the Fourth Amendment to the United States Constitution if the police have reasonable suspicion that 'the person stopped is, or is about to be, engaged in criminal activity.' " *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, ¶ 35, quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981).

**{¶ 22}** Reasonable suspicion entails some minimal level of objective justification, "that is, something more than an inchoate and unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause." *State v. Jones*, 70 Ohio App.3d 554, 556-57 (2d Dist.1990), citing *Terry* at 27; *State v. Carter*, 69 Ohio St.3d 57, 66 (1994) (concluding a police "officer's inarticulate hunch will not provide a sufficient basis for an investigative stop"). "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Royer* at 500; *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *State v. Chatton*, 11 Ohio St.3d 59, 63 (1984). A person's mere presence in a high crime area does not suspend the protections of the Fourth Amendment, nor is it a sufficient basis to justify an investigative stop. *Brown v. Texas*, 443 U.S. 47, 51-52 (1979); *Carter* at 65; *State v. Chandler*, 54 Ohio App.3d 92, 97 (8th Dist.1989). An appellate court views the propriety of a police officer's investigative stop or detention in light of the totality of the surrounding circumstances. *State v. Bobo*, 37 Ohio St.3d 177 (1988), paragraph one of the syllabus, approving and following *State v. Freeman*, 64 Ohio St.2d 291 (1980), paragraph one of the syllabus.

**{¶ 23}** The third and final category of police-citizen interaction is a seizure that is the equivalent of an arrest. "A seizure is equivalent to an arrest when: (1) there is an intent to arrest; (2) under real or pretended authority; (3) accompanied by an actual or constructive seizure or detention; and (4) which is so understood by the person arrested." *State v. Taylor*, 106 Ohio App.3d 741, 749 (2d Dist.1995), citing *State v. Barker*, 53 Ohio St.2d 135 (1978), syllabus. "A warrantless arrest that is based upon probable cause and occurs in a public place does not violate the Fourth Amendment." *State v. Brown* at ¶ 66, citing *United States v. Watson*, 423 U.S. 411 (1976).

**{¶ 24}** Generally, when a police officer merely approaches and questions persons seated within parked vehicles, a consensual encounter occurs that does not constitute a seizure so as to require reasonable suspicion supported by specific and articulable facts. *State v. Barnhart*, 10th Dist. No. 98AP-1474 (Aug. 17, 1999), citing *State v. Robinson*, 12th Dist. No. CA97-04-093 (Sept. 8, 1997) (no seizure at the time officer approached defendant's vehicle and made inquiries of driver whose vehicle was parked at night in parking lot of establishment no longer open for business; officer's initial contact with defendant was a consensual encounter, not a stop or seizure implicating Fourth

Amendment scrutiny and requiring reasonable suspicion); *State v. Boys*, 128 Ohio App.3d 640 (1st Dist.1998) (trial court erred in granting motion to suppress evidence on ground that police officers did not have reasonable and articulable suspicion that defendant was involved in criminal activity when they first approached his vehicle because no seizure occurred when the officers went to check on defendant's condition); *State v. Brock*, 12th Dist. No. CA97-09-077 (June 1, 1998) (police officer's mere approach of appellant was not a stop or seizure which would trigger Fourth Amendment scrutiny and require reasonable suspicion; officer did not pull appellant's vehicle over or order appellant from his vehicle, nor did he activate his overhead lights when he arrived at scene of parked car); *Cuyahoga Falls v. Sandstrom*, 9th Dist. No. 17000 (June 21, 1995) (defendant not seized, within meaning of Fourth Amendment, at time officer approached defendant's parked vehicle and asked defendant questions; thus, officer was not required to state a reasonable and articulable suspicion for his approach and initial interrogation); *see also State v. McClendon*, 10th Dist. No. 09AP-554, 2009-Ohio-6421, ¶ 8; *State v. Chapa*, 10th Dist. No. 04AP-66, 2004-Ohio-5070, ¶ 8.

**{¶ 25}** In *Barnhart*, the defendant was sitting in the driver's seat of a legally parked car with the motor running at approximately 1:30 a.m. A patrol officer noticed the car and pulled in behind the defendant's car. The officer turned on a spotlight and approached the car. Upon asking for identification, the officer noticed a strong odor of alcohol. After concluding the driver was intoxicated, the officer placed her under arrest. The defendant filed a motion to suppress arguing that, as he approached the car, the officer lacked a reasonable suspicion that criminal activity was occurring. The trial court denied the defendant's motion.

**{¶ 26}** In affirming the trial court's denial of the defendant's motion to suppress, this court noted the officer did not stop the defendant's vehicle nor did he block the driver's path. Additionally, this court noted that, though turning on the spotlight, the officer did not activate his vehicle's overhead flashing lights or siren. Based on the totality of the circumstances, this court held a seizure did not occur at the time the officer initially approached the car and questioned the defendant, and, therefore, the trial court did not err in denying the defendant's motion to suppress. *See also State v. McClain*, 2d Dist. No. 19710, 2003-Ohio-5329, ¶ 14 (officer's act of illuminating his cruiser's spotlight on the

defendant's car and stating "How're you doing? Police," as he approached the car not a *Terry* stop but "purely [a] consensual encounter").

**{¶ 27}** In the case sub judice, the record establishes appellant was sitting in the backseat of a parked vehicle in the parking lot of an apartment complex at 12:50 a.m. The car was "not near an apartment building" but "back out of the way." (Tr. 41.) Though the car's engine was running, the car's headlights were not on. After Officer Gibson parked her cruiser, the car drove away and moved to another area of the parking lot out of Officer Gibson's sight. When Officer Gibson came upon the car the second time, it again had its lights off and engine running. Officer Gibson turned on her cruiser's spotlight and noticed the back passenger move toward the floor of the driver's side of the car. As she approached the car, Officer Gibson asked the car's occupants to keep their hands in view.

**{¶ 28}** According to the record, Officer Gibson did not initiate a stop of the car as it was already parked nor she did not block the car's path. Though using her vehicle's spotlight to illuminate the area, Officer Gibson did not activate her vehicle's overhead lights or siren. In accordance with *Barnhart* and *McClain*, these facts indicate Officer Gibson's initial approach of the car constituted a consensual encounter that does not trigger Fourth Amendment scrutiny.

**{¶ 29}** We recognize this case contains an additional fact not present in *Barnhart* in that as she approached the car, Officer Gibson "asked [the car's occupants] to put their hands up, you know, so I could see them in sight. They all – they complied. I asked them what they were doing." (Tr. 44.) However, we do not find this fact sufficient to establish a strong possibility that a motion to suppress would have been granted. *Conway* at ¶ 101; *Jones*, 10th Dist. No. 99AP-704, quoting *Edwards* ("even when some evidence in the record supports a motion to suppress, we presume that defense counsel was effective if 'the defense counsel could reasonably have decided that the filing of a motion to suppress would have been a futile act' ").

**{¶ 30}** Though asking the car's occupants to keep their hands where she could see them, the record does not indicate Officer Gibson ordered them to do so or otherwise demonstrated a display of force such that there is a solid probability that a motion to suppress could have been granted. *State v. Body*, 10th Dist. No. 11AP-609, 2012-Ohio-379, ¶ 12 (circumstances indicative of a seizure include the threatening presence of several

officers, display of a weapon by an officer, some physical touching of the person, use of language or tone of voice indicating compliance with officer's request might be compelled, approaching the person in a non-public place, and blocking the person's path); *Barnhart* (no seizure if officer did not demand or order compliance but rather asked for compliance).

**{¶ 31}** Even if we were to assume an investigatory stop occurred at the time Officer Gibson requested the car's occupants to show their hands, the record does not indicate there is a strong possibility that a motion to suppress would have been granted, and that, therefore, appellant's counsel was ineffective for failing to file a motion to suppress the evidence. A police officer may stop or detain an individual without probable cause when the officer has reasonable suspicion, based on specific, articulable facts, that criminal activity is afoot. *Terry* at 21-22. The propriety of an investigative stop must be viewed in light of the totality of the surrounding circumstances. *Bobo*. Since the purpose of a *Terry* stop is not to accuse, but to investigate whether a crime has been or may be committed, "[e]ven facts that might be given an innocent construction will support the decision to detain an individual momentarily for questioning" as long as it is reasonable to infer from the totality of the circumstances that the individual may be involved in criminal activity. *Pepper Pike v. Parker*, 145 Ohio App.3d 17, 20 (8th Dist.2001), citing *Cortez* at 417. Factors that may justify an investigative stop include (1) the location of the stop, (2) the officer's experience, training or knowledge, (3) the suspect's conduct or appearance, and (4) the surrounding circumstances. *State v. Nelms*, 10th Dist. No. 06AP-1193, 2007-Ohio-4664, ¶ 16, citing *Bobo*.

**{¶ 32}** As we previously discussed, the car in which appellant occupied was located in an area known to Officer Gibson as "a high crime and drug area" at 12:50 a.m. (Tr. 40.) The car was parked in the back area of the parking lot with its engine running, but after Officer Gibson parked her cruiser, the car moved to another area of the parking lot out of Officer Gibson's view. After illuminating the area with her spotlight, Officer Gibson saw appellant, who was seated in the backseat on the passenger's side, lean down toward the floor of the vehicle on the driver's side of the car. Under these circumstances, Officer Gibson had a reasonable basis for conducting an investigative stop, and the record does not suggest that a motion to suppress the evidence ultimately found as a result of the stop

would have been successful. *Id.* (occupants of vehicle behaved in a suspicious manner, each reaching down toward the floor of the vehicle out of the officer's line of sight provided reasonable suspicion to initiate an investigative stop); *State v. Atchley*, 10th Dist. No. 07AP-412, 2007-Ohio-7009 (high crime area, furtive movements, and nervous appearance gave officer reasonable suspicion sufficient to justify an investigative stop); *State v. McGary*, 11th Dist. No. 2006-T-0127, 2007-Ohio-4766 (high crime area coupled with furtive gesture of reaching toward floor of the vehicle supports reasonable and articulable suspicion); *Bobo* (furtive movements combined with other factors gave rise to reasonable suspicion).

**{¶ 33}** In light of all of the above-cited authority, we conclude the record demonstrates appellant's counsel could have reasonably decided that filing a motion to suppress would have been a futile act, and, thus, we presume that defense counsel was effective. *Jones*, 10th Dist. No. 99AP-704. As previously discussed, the record indicates Officer Gibson's initial approach of the car and questioning of the occupants constituted a consensual encounter. Once she approached the vehicle and asked the occupants for identification, with the aid of her flashlight, Officer Gibson observed the butt of a gun sticking out from underneath of the driver's seat. Under the plain-view doctrine, an officer may seize an item without a warrant if the initial intrusion leading to the discovery of the item was lawful, and it was immediately apparent that the item was incriminating. *State v. Suber*, 118 Ohio App.3d 771, 780 (10th Dist.1997) (observing a gun partially concealed under the seat of car with the aid of a flashlight constitutes plain view); *McClain* (officer's conduct of shining his flashlight into the vehicle does not constitute a search for Fourth Amendment purposes); *State v. Willette*, 4th Dist. No. 11CA18, 2012-Ohio-3836 (marijuana in plain view and observed on defendant's shirt after the officer shined flashlight inside the car); *State v. Reeder*, 12th Dist. No. CA2002-04-017, 2002-Ohio-6680, ¶ 13 (observation of open container of alcohol through the window of a parked vehicle, even with aid of a flashlight, is in open view and does not constitute a search under the Fourth Amendment).

**{¶ 34}** Based on this record, we cannot conclude the decision of appellant's trial counsel to not file a motion to suppress fell outside the range of reasonable professional assistance or that a motion to suppress the evidence would have been successful. Hence,

appellant has failed to demonstrate that he received ineffective assistance of counsel. Accordingly, we overrule appellant's first assignment of error.

**B. Second Assignment of Error**

**{¶ 35}** In his second assignment of error, appellant challenges the weight of the evidence supporting his conviction.

**{¶ 36}** When presented with a manifest weight challenge, an appellate court may not merely substitute its view for that of the trier of fact, but 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. Thompkins*, 78 Ohio St.3d 380, 387 (1997), citing *Martin* at 175. An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Id.*, citing *Martin*.

**{¶ 37}** As noted above, in conducting a manifest weight of the evidence review, we may consider the credibility of the witnesses. *State v. Cattledge*, 10th Dist. No. 10AP-105, 2010-Ohio-4953, ¶ 6. However, in conducting such review, "we are guided by the presumption that the jury, or the trial court in a bench trial, 'is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' " *Id.*, quoting *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984).

**{¶ 38}** The trial judge, as trier of fact, found appellant guilty of WUD in violation of R.C. 2923.13. As is relevant here, R.C. 2923.13 prohibits a person from knowingly acquiring, having, carrying or using any firearm if the person has been convicted of any felony offense of violence and has not been relieved of the disability. R.C. 2923.13(A)(2). The parties stipulated that appellant was convicted on August 18, 2011 of one count of robbery, a third-degree felony, in violation of R.C. 2911.02. Appellant contends that, while the record contains evidence that he touched a firearm, the record contains no evidence that he knowingly acquired, had or carried the firearm recovered from the vehicle. Therefore, it is appellant's position that his WUD conviction is against the manifest weight of the evidence.

**{¶ 39}** Officer Gibson testified she saw appellant in the backseat on the passenger's side of the car lean "all the way across towards the driver's side floorboard." (Tr. 43.) After approaching the car, Officer Gibson saw the butt of the gun protruding from underneath the driver's seat with the handle of the gun pointing toward the interior of the car. Officer Lirtzman testified appellant initially told her that he was not aware there was a loaded firearm in the car. However, after being asked whose fingerprints and DNA may be on the firearm, appellant told Officer Lirtzman he handled the firearm earlier in the day. According to Officer Lirtzman, appellant also told her someone had shown him the firearm in order for him "to inspect it and for him to look at it." (Tr. 90.) However, when appellant was asked to elaborate, Officer Lirtzman testified that appellant would not divulge who showed him the firearm and any other circumstances surrounding the firearm.

**{¶ 40}** From appellant's movements described by Officer Gibson and the location of the firearm inside of the car, the trier of fact could conclude, despite appellant's statements to Officer Lirtzman, that appellant placed the firearm underneath the driver's seat. Further, according to Officer Lirtzman's testimony, appellant admitted handling the firearm earlier in the day. From this evidence, the trier of fact could reasonably conclude appellant knowingly acquired, had or carried the firearm in violation of R.C. 2923.13.

**{¶ 41}** As an appellate court reviewing a manifest weight challenge, we do not merely substitute our view for the trier of fact, but, rather, 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. *Thompkins* at 387. After carefully reviewing the record in its entirety, we conclude there is nothing to indicate the trier of fact lost its way or that any miscarriage of justice resulted. Consequently, we conclude appellant's conviction is not against the manifest weight of the evidence.

**{¶ 42}** Accordingly, we overrule appellant's second assignment of error.

## IV. CONCLUSION

**{¶ 43}** For the foregoing reasons, appellant's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

*Judgment affirmed.*

KLATT, P.J., and DORRIAN, J., concur.

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