

[Cite as *State v. St. John*, 2009-Ohio-6248.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 09 BE 13
PLAINTIFF-APPELLEE,)	
)	
- VS -)	OPINION
)	
DAVID ST. JOHN,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Western Division Court, Case No. 09CRB00085-02.
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JUDGMENT:	Affirmed.
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APPEARANCES:	
For Plaintiff-Appellee:	Attorney Chris Berhalter Prosecuting Attorney Attorney Helen Yonak Asst. Prosecuting Attorney 147 West Main Street St. Clairsville, OH 43950

For Defendant-Appellant:	Attorney Daniel Balgo 156 Woodrow Avenue, 2nd Floor St. Clairsville, OH 43950
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JUDGES:
Hon. Mary DeGenaro
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: November 19, 2009

[Cite as *State v. St. John*, 2009-Ohio-6248.]
DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, the parties' briefs, and their oral arguments before this Court. Appellant, David St. John, appeals the decision of the Western Division Court, Belmont County, Ohio that convicted him of one count of possession of drug paraphernalia, and one count of possession of marijuana, and sentenced him accordingly. On appeal, St. John argues that his convictions were against the manifest weight of the evidence. Upon review, St. John's arguments are meritless. Resolution of this case hinged on credibility determinations that were best made by the trial court as fact-finder. The trial court did not clearly lose its way so as to create a manifest miscarriage of justice. Accordingly, the judgment of the trial court is affirmed.

Facts

{¶2} On February 21, 2009, Sergeant Richard Chesar of the Ohio Highway Patrol stopped on State Route 9 in Belmont County to investigate a truck stopped alongside the highway. St. John was one of three people standing outside the truck. Upon further investigation Sgt. Chesar discovered St. John had an outstanding warrant. A pat-down search of St. John prior to him being placed in the cruiser revealed rolling papers, a scale and marijuana in St. John's coat pocket.

{¶3} As a result, St. John was charged by complaint with one count of possession of drug paraphernalia, a fourth degree misdemeanor pursuant to R.C. 2925.14(C)(1), and one count of possession of marijuana, a minor misdemeanor pursuant to R.C. 2925.11(A)(C)(3)(a). St. John was arraigned, pled not guilty and counsel was appointed.

{¶4} The case proceeded to a bench trial on April 14, 2009. The State called Sgt. Chesar as its sole witness. He testified that on February 21, 2009 he investigated the truck, at first thinking perhaps it had been involved in an accident. He discovered no evidence of a crash, but saw three people standing outside of the truck: two males and a female. One of the males was St. John. The female was St. John's girlfriend, and the other male was St. John's brother.

{¶5} Sgt. Chesar said he was informed that the truck had run off the side of the

road, but that he was unable to determine the driver because all three people at the scene were intoxicated. During his investigation, he discovered St. John had an outstanding warrant, and therefore placed St. John under arrest. While performing a search incident to arrest, Sgt. Chesar found a Crown Royal bag containing a pack of rolling papers and a scale in the lower right hand pocket of the jacket St. John was wearing. He said that St. John then remarked that "it doesn't appear what it seems." Sgt. Chesar continued his search and found, in the upper left-hand pocket of St. John's jacket, a baggie containing a green leafy substance which appeared to be marijuana. Sgt. Chesar said he sent the substance away to be analyzed and a report came back indicating the substance was 7.08 grams of marijuana. This report was later admitted into evidence.

{¶6} Sgt. Chesar explained that as a police officer he is trained in drug detection and instrumentalities of drug abuse and that rolling papers are typically used to make a marijuana cigarette. He said that St. John had no loose tobacco on his person. Sgt. Chesar testified that a scale is typically used for measuring controlled substances to ensure the correct amount is purchased or sold. He stated that based on his experience and training, the rolling papers and scale he seized from St. John were instrumentalities of drug abuse. He testified that when St. John stated: "it doesn't appear what it seems," he thought the man was lying.

{¶7} After arresting St. John, Sgt. Chesar waited "a lengthy time" for a tow truck to come for St. John's truck. He said it was a cool night but that he could not recall whether St. John's brother or St. John's girlfriend wore jackets. He testified that neither the girlfriend nor the brother came forward and claimed ownership of the drugs and paraphernalia. He testified that no drug screens were administered to St. John as a result of the incident that evening.

{¶8} St. John then testified in his own defense. He stated that when the patrol car arrived that evening he was standing outside of his truck on the passenger side. He said he had been standing there for at least an hour and that the three of them were waiting for a tow truck to arrive. He said that as Sgt. Chesar was arriving he took a jacket

out of the bed of his truck and put it on. He claimed this jacket belonged to his brother, and that his brother had placed it in the truck bed earlier in the evening when it was still nice outside. He said he put on the jacket because he was cold, and that when he saw the officer pull up he knew they were going to be there for a while. He testified that his girlfriend was also wearing a jacket at that time but that his brother was not. He said he did not know what was in the pockets of the jacket and claimed that the items found in the pockets did not belong to him. He claimed the reason he did not tell Sgt. Chesar that the marijuana and paraphernalia did not belong to him was because he knew he was already going to jail on the outstanding warrant.

{¶9} St. John initially claimed that his brother did not see him getting arrested for possessing the drugs because by the time that occurred his brother's girlfriend had already arrived to pick him up. He later conceded that he could not remember the exact timing of events, and that therefore his brother might have seen him getting searched and the officer discovering the drugs. He claimed the reason his brother would not have volunteered that the jacket belonged to him was because his brother would not have wanted to get in trouble and go to jail. St. John reiterated that the jacket was not his, the contraband was not his, and that he did not know the items were in the pockets when he put on the jacket. However, he conceded he did not tell Sgt. Chesar that the jacket did not belong to him, or that it was his brother's jacket.

{¶10} After considering all the evidence, the trial court found St. John guilty as charged. The case proceeded immediately to sentencing. St. John and his counsel both gave brief statements in mitigation. On Count I (possession of drug paraphernalia), the trial court sentenced St. John to thirty days in jail with fifteen days suspended on the following conditions: (1) he pay a fine of \$100.00, plus court costs of \$85.00; (2) he does not violate any laws of the State of Ohio or any municipality for one year; and, (3) he pays fines and costs in all cases. In addition, the trial court suspended St. John's driver's license for 180 days. On Count II (possession of marijuana), the trial court imposed a \$100.00 fine, plus costs of \$10.00. The court also suspended St. John's driver's license for 180 day days, which was to run concurrent with the suspension in Count I unless St.

John violated probation. On April 24, 2009, the trial court granted a stay of St. John's sentence with the exception of the suspension of his driver's license.

Manifest Weight

{¶11} In his sole assignment of error St. John asserts:

{¶12} "The Court erred in entering the verdict of guilty in this case as it was against the manifest weight of the evidence."

{¶13} In determining whether a verdict is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences and determine 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 reversed and a new trial ordered. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541. "Weight of the evidence concerns the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other." *Id.* (emphasis sic.) In making its determination, a reviewing court is not required to view the evidence in a light most favorable to the prosecution but may consider and weigh all of the evidence produced at trial. *Id.*

{¶14} However, a conviction will only be reversed as against the manifest weight of the evidence in exceptional circumstances. *Id.* This is so because the trier of fact is in a better position to determine credibility issues, since he personally viewed the demeanor, voice inflections and gestures of the witnesses. *State v. Hill* (1996), 75 Ohio St.3d 195, 204, 661 N.E.2d 1068; *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 39 O.O.2d 366, 227 N.E.2d 212.

{¶15} Ultimately, "the reviewing court must determine whether the appellant or the appellee provided the more believable evidence, but must not completely substitute its judgment for that of the original trier of fact 'unless it is patently apparent that the factfinder lost its way.'" *State v. Pallai*, 7th Dist. No. 07MA198, 2008-Ohio-6635, at ¶31, quoting *State v. Woulard*, 158 Ohio App.3d 31, 2004-Ohio-3395, 813 N.E.2d 964, at ¶81. In other words, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to

choose which one we believe." *State v. Dyke*, 7th Dist. No. 99CA149, 2002-Ohio-1152, at ¶13, citing *State v. Gore* (1999), 131 Ohio App.3d 197, 201, 722 N.E.2d 125.

{¶16} Here St. John was convicted of two counts, the first of which is possession of drug paraphernalia, defined by R.C. 2925.14(C)(1) as: "[n]o person shall knowingly use, or possess with purpose to use, drug paraphernalia." R.C. 2925.14(A) provides a lengthy definition of drug paraphernalia and also a non-exhaustive list of examples including: "[a] scale or balance for weighing or measuring a controlled substance." R.C. 2925.14(A)(6). Further, "[i]n determining if any equipment, product, or material is drug paraphernalia, a court or law enforcement officer shall consider, in addition to other relevant factors the 'proximity of the equipment, product, or material to any controlled substance.'" R.C. 2925.14(B)(C)

{¶17} St. John was also convicted of drug possession, defined as: "[n]o person shall knowingly obtain, possess, or use a controlled substance." R.C. 2925.11(A). "'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. 2925.01(K).

{¶18} St. John argues that his convictions were against the manifest weight of the evidence because the trial court clearly lost its way in finding that St. John "knowingly possessed" the marijuana and paraphernalia. St. John also contends that the trial court improperly weighed the credibility of the witnesses. Both of these arguments are meritless.

{¶19} Ohio courts have held that possession may be actual or constructive. See *State v. Hankerson* (1982), 70 Ohio St.2d 87, 90-91, 24 O.O.3d 155, 434 N.E.2d 1362; *State v. Nichols*, 7th Dist. No. 07JE50, 2009-Ohio-1027, at ¶27. "Actual possession exists when the circumstances indicate that an individual has or had an item within his immediate physical possession." *State v. Kingsland*, 177 Ohio App.3d 655, 2008-Ohio-4148, 895 N.E.2d 633, at ¶13 (citations omitted). To establish constructive possession, the state must prove that the defendant was conscious of the object, and able to exercise

dominion or control over it even though that object may not be within his immediate physical possession. *Hankerson* at 90-91. The case sub judice involves actual possession, since the contraband was found in the pocket of a jacket worn by St. John.

{¶20} St. John claims he was unaware of the presence of the contraband, and that the trial court's finding that he "knowingly" possessed the items was against the manifest weight of the evidence. "A person acts knowingly, regardless of his 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). "A trial court must consider 'all the attendant facts and circumstances in order to determine if a defendant knowingly possessed a controlled substance.'" *State v. Smith*, 162 Ohio App.3d 208, 2005-Ohio-3579, 832 N.E.2d 1286, at ¶21, quoting, *State v. Greene*, 8th. Dist. No. 82948, 2004-Ohio-2008, at ¶16, citing *State v. Teamer* (1998), 82 Ohio St.3d 490, 492, 696 N.E.2d 1049.

{¶21} Further, since the fact-finder can never truly get inside the defendant's mind, mens rea is often proved by circumstantial evidence. "When the disputed issue is the culpable mental state, such as knowledge, the trial court must often rely on circumstantial evidence because direct evidence will rarely be available." *State v. Ha*, 9th Dist. No. 07CA0089-M, 2009-Ohio-1134, at ¶32, citing, *State v. Lott* (1990), 51 Ohio St.3d 160, 168, 555 N.E.2d 293. See, also, *Hankerson* at 92 (noting that "certain elements of certain crimes can only be proved by circumstantial evidence, absent an admission by the accused.")

{¶22} At trial, St. John claimed he had no knowledge that the marijuana and paraphernalia were in the pockets of the jacket he was wearing. He said he put on the jacket just as the officer arrived because he was cold. He testified he got the jacket from the truck bed and that it belonged to his brother. He said that his brother did not speak up and claim ownership, because his brother did not want to get in trouble and go to jail. St. John claimed that he himself did not deny ownership because he knew he was already going to jail on the outstanding warrant.

{¶23} The officer testified he found the marijuana, scale, and rolling papers inside pockets of the jacket St. John was wearing. The officer said that no one else at the scene claimed ownership and that St. John never claimed the drugs and paraphernalia did not belong to him. The officer testified that St. John stated: "it doesn't appear as it seems," after the officer found the scale and the rolling papers. St. John argues on appeal that this comment was a clear declaration of innocence. However, the trial court could have reasonably interpreted that statement otherwise.

{¶24} In the end, neither the State's version of events nor the defense's version is completely unbelievable, but considering that St. John never claimed lack of knowledge or ownership at the scene, the State's version has more credence. Resolution of this case hinged on credibility determinations best left to the trial court as fact-finder. The trial court properly assessed the credibility of the witnesses in this case and did not clearly lose its way so as to create a manifest miscarriage of justice.

{¶25} Further, St. John's reliance on *State v. Brown*, 4th Dist. No. 04CA3, 2004-Ohio-5887, in support of his manifest weight argument is misplaced. In *Brown*, the court upheld the defendant's drug possession conviction, despite the defendant's claim that the pants he was wearing (in which the drugs were found) did not belong to him. *Id.* at ¶12-14. In so doing the court deferred to the credibility determinations made by the fact-finder. *Id.* We will likewise defer to the trial court's credibility determinations in this case. St. John's conviction is not against the manifest weight of the evidence and his sole assignment of error is therefore meritless. Accordingly, the judgment of the trial court is affirmed.

Vukovich, P.J., concurs.

Waite, J., concurs.