[Cite as *State v. Locke,* 2015-Ohio-1067.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2014-L-053**
- vs -	:	
CORY D. LOCKE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 13 CR 000229.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel,* Assistant Prosecutor, Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Pamela D. Kurt, 30432 Euclid Avenue, Suite 101, Wickliffe, OH 44092 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Cory D. Locke, appeals his convictions and sentences for multiple counts of Trafficking in Heroin, Failure to Comply with Order or Signal of Police Officer, Tampering with Evidence, and Possession of Heroin, following a jury trial in the Lake County Court of Common Pleas. Locke was sentenced to an aggregate prison term of eleven years, including maximum and consecutive sentences. The issues before this court are whether convictions for Trafficking in Heroin are

supported by the weight of and sufficient evidence when based on the testimony of a confidential informant whose identity is not revealed until trial; whether Trafficking in Heroin and Possession of Heroin are allied offenses of similar import where the defendant sold a quantity of heroin and retained a quantity for future sale; whether an extensive criminal history, including violent crimes, justifies the imposition of maximum and consecutive sentences; whether a defendant is entitled to discharge his third appointed counsel where the motion is made on the day of trial and after prior counsel sought leave to withdraw; whether a defendant may be found competent to stand trial based on the conclusions of a stipulated psychological evaluation; whether trial counsel is ineffective in failing to seek an independent psychological evaluation in the absence of incompetency on the face of the record; whether trial counsel is ineffective for not filing a motion to suppress and raising other objections in the absence of justification for taking such actions; and whether it is error to order a defendant to appear in restraints during trial when the restraints are not visible to the jury. For the following reasons, we affirm Locke's convictions and sentence.

{¶2} On July 8, 2013, the Lake County Grand Jury returned an Indictment against Locke for: Trafficking in Heroin (Count 1), a felony of the fourth degree in violation of R.C. 2925.03(A)(1); Trafficking in Heroin (Count 2), a felony of the fifth degree in violation of R.C. 2925.03(A)(1); Trafficking in Heroin (Count 3), a felony of the fourth degree in violation of R.C. 2925.03(A)(1); Failure to Comply with Order or Signal of Police Officer (Count 4), a felony of the third degree[1] in violation of R.C. 2921.331(B); Failure to Comply with Order or Signal of Police Officer (Count 5), a felony of the fourth degree in violation of R.C. 2921.331(B); Tampering with Evidence (Count 6), a felony of

1. By amendment, dated July 29, 2013.

the third degree in violation of R.C. 2921.12(A)(1); and Possession of Heroin (Count 7), a felony of the fifth degree in violation of R.C. 2925.11. Counts 1, 2, 3, and 7 contained Forfeiture Specifications pursuant to R.C. 2941.1417 and 2981.04.

{¶3} On July 12, 2013, the trial court accepted Locke's waiver of the right to be present at arraignment and entered pleas of "Not Guilty" to all charges.

{¶4} On March 17 and 18, 2014, Locke's case was tried before a jury. The following persons testified on behalf of the prosecution:

{¶5} Aaron McArdle testified that he agreed to act as a confidential informant (CI-137) for the Wickliffe Police Department in order to have misdemeanor charges for drug abuse instruments and driving under suspension against him dismissed.

{¶6} McArdle testified that, on February 27, 2013, he placed a phone call to a person known as "B" to arrange a purchase of heroin. An audio recording of the call was played for the jury. On the recording, McArdle arranges to buy "two jeezies" (two grams) for "three bills" (three hundred dollars) at his mother's home at 2831 Green Ridge Drive in Wickliffe. A video recording of the buy was played for the jury. The recording contained no visual images of the buy. McArdle can be heard giving directions to his home. The man with whom McArdle is speaking asks to be called "Unc." In court, McArdle identified Locke as Unc, the man who sold him two grams of heroin for three hundred dollars on February 27, 2013.

{¶7} McArdle testified that, on March 4, 2013, he again contacted Unc and arranged to purchase a "jeezy." An audio recording of the call was played for the jury. McArdle testified that Unc came to his home where he sold him a gram of heroin for one

hundred fifty dollars. A video recording of the buy was played for the jury in which Unc is visible.

{¶8} McArdle testified that, on March 6, 2013, he contacted Unc for a third time, arranging to buy "two of them" for "three bucks." An audio recording of the call and a video recording of the buy in which Unc is visible was played for the jury.

{¶9} McArdle testified that each of the three buys took place in Wickliffe; the person with whom he arranged the buys was the person who delivered the heroin; and that person was Locke. For each of the buys, Locke remained in his vehicle.

{¶10} Lieutenant John Bush of the Wickliffe Police Department assisted in the February 27, 2013 buy. Bush was observing the approach to Green Ridge from an unmarked vehicle. He followed a white Cadillac, identified as the vehicle in which the buy occurred, from Green Ridge to Route 2 where he lost sight of the Cadillac.

{¶11} Lieutenant Bush assisted in the March 4, 2013 buy, again in an unmarked vehicle. Bush noticed the same white Cadillac observed previously park on the street in front of the Green Ridge residence, and McArdle exit the residence to conduct "some type of transaction" with a male seated in the passenger seat. A video of Bush's surveillance was played for the jury. After the Cadillac departed, Bush recovered two plastic baggies containing heroin from McArdle.

{¶12} Patrolman Daniel Sabruno of the Wickliffe Police Department testified that, on March 6, 2013, he was positioned on I-90 near the Route 2 split and ordered to stop a black Honda, identified by license plate number and operated by "a black male with a shaved head, wearing a blue t-shirt." After observing a vehicle matching the description, Sabruno initiated a traffic stop. The Honda exited the freeway and stopped

at East 232nd Street in Euclid. As Sabruno approached the Honda on foot, the Honda sped away. Sabruno began pursuit and observed two plastic baggies thrown from the driver's side window. Sabruno pursued the Honda north on East 222nd Street to Tracey Avenue, driving through a red light and passing through a construction zone with workers present. At Tracey Avenue, Sabruno broke off the pursuit. He then recovered the baggies thrown from the window. One of the baggies was empty and the other contained two smaller baggies of heroin.

{¶13} Later that day, Patrolman Sabruno responded to a report that a suspect was in custody near East 164th Street and Arcade Avenue in Cleveland. Sabruno identified Locke as the driver of the black Honda and as the suspect taken into custody.

{¶14} Detective Donald Dondrea of the Wickliffe Police Department was involved in the March 4, 2013 buy and followed the white Cadillac in an unmarked vehicle to a residence on East 161st Street in Cleveland.

{¶15} Detective Dondrea was also involved in the March 6, 2013 buy. From an unmarked vehicle, Dondrea observed a black Honda Civic pull in the driveway of the Green Ridge residence, and McArdle exit the residence and enter the Honda's front passenger's side. A video of Dondrea's surveillance was played for the jury. After the Honda departed, Dondrea recovered four plastic baggies containing heroin from McArdle.

{¶16} When Detective Dondrea heard of the black Honda's flight from Patrolman Sabruno, he responded to the area of Cleveland where he had previously followed the white Cadillac. On East 164th Street, he began to follow the white Cadillac. At the corner of Arcade Avenue, Dondrea observed Locke approach the Cadillac. Dondrea

arrested Locke and the Cadillac drove away. The black Honda was located on East 169th Street.

{¶17} Lieutenant Pat Hengst of the Wickliffe Police Department testified that he was the lead investigator on Locke's case. Hengst described the February 27, 2013 and March 4, 2013 buys as "buy walks" "meaning we intended to let the money walk away and not make an arrest that day" because "we wanted an opportunity to attempt to build a case" and "identify our suspect."

{¶18} Lieutenant Hengst testified that, on February 27, he recovered a small baggie of heroin from McArdle following the buy. Hengst also determined that the white Cadillac was titled to Locke's mother, Brenda D. Locke.

{¶19} Lieutenant Hengst testified that, following the March 4, 2013 buy, he followed the white Cadillac to a residence at 365 East 161st Street, at which a black Honda was parked. This address was searched through OHLEG (the Ohio Law Enforcement Gateway) and Locke was associated with the address. By comparing Locke's driver's license photo with the video recording of the March 4, 2013 buy, Unc was identified as Locke.

{¶20} Lieutenant Hengst testified that, following the March 6, 2013 buy bust, he followed the black Honda Accord[2] onto I-90 westbound until it stopped at East 232nd Street. Hengst observed the Honda pull away from Patrolman Sabruno "at a high rate of speed" and run the red light at East 222nd Street. Hengst advised Sabruno to discontinue pursuit "fearing the real possibility of a crash." After the Honda's flight, Hengst proceeded to the residence on East 161st Street. Following Locke's arrest, Hengst recovered $300 in marked bills (provided to McArdle for the purchase two grams

2. Lieutenant Hengst testified that Detective Dondrea was mistaken about the Honda's make.

of heroin) from his front right pants pocket, $400 from his wallet, and $9 from his front left pants pocket. Hengst also recovered four cell phones and a key for the Honda from Locke's person.

{¶21} Ray Jorz, the senior fingerprint and firearms examiner of the Lake County Crime Laboratory, testified that he tested the plastic baggies containing heroin for latent prints but was not able to develop any.

{¶22} Kimberly Gilson, a forensic chemist at the Lake County Crime Laboratory, testified that the baggie recovered from McArdle on February 27, 2013, contained 1.61 grams of heroin; the baggies recovered from McArdle on March 4, 2013, contained 0.35 and 0.46 grams of heroin; the baggies recovered from McArdle on March 6, 2013, contained 0.34, 0.35, 0.57, and 0.53 grams of heroin; and the baggies recovered during the pursuit of the Honda on March 6, 2013, contained 0.38 and 0.48 grams of heroin.

{¶23} At the close of the State's case, Locke moved for acquittal pursuant to Criminal Rule 29(A).

{¶24} On March 19, 2014, the jury returned a verdict finding Locke guilty of all charges. At this time, the trial court merged Failure to Comply with Order or Signal of Police Officer (Count 5) with Failure to Comply with Order or Signal of Police Officer (Count 4).

{¶25} On April 24, 2014, the sentencing hearing was held. Locke was sentenced to eighteen months in prison for Trafficking in Heroin (Count 1); twelve months in prison for Trafficking in Heroin (Count 2); eighteen months in prison for Trafficking in Heroin (Count 3); thirty-six months in prison for Failure to Comply with Order or Signal of Police Officer (Count 4); thirty-six months in prison for Tampering

with Evidence (Count 6); and twelve months in prison for Possession of Heroin (Count 7). The trial court ordered the sentences to be served consecutively for an aggregate prison term of eleven years. The court ordered the forfeiture of the contraband, instrumentalities (cell phones), and $500 in U.S. currency. The court suspended Locke's driver's license for life. The court advised Locke that post-release control was optional for a period of up to three years.

{¶26} On April 30, 2014, Locke's sentence was memorialized in a written Judgment Entry of Sentence.

{¶27} On May 28, 2014, Locke filed a Notice of Appeal. On appeal, Locke raises the following assignments of error:

{¶28} "[1.] The appellant's convictions on each and all counts were based upon insufficient evidence and were otherwise against the sufficient and/or manifest weight of the evidence and not beyond a reasonable doubt contrary to Ohio law and the state and federal constitutions."

{¶29} "[2.] The trial court erred in not granting the appellant's motion on all counts for acquittal and renewed motion pursuant to Rule 29 of the Ohio Rules of Criminal Procedure and Ohio and federal law and constitutions."

{¶30} "[3.] The trial court erred in convicting and sentencing the appellant to separate, consecutive prison terms for Trafficking in Drugs and Possession of Drugs as these crimes are allied offenses of similar import and should have been merged at the very least."

{¶31} "[4.] The appellant was denied due process by a sentence contrary to Ohio law and the state and federal constitutions including maximum prison terms and an order that all counts be served consecutively."

{¶32} "[5.] The trial court erred to the prejudice of the appellant and violated constitutional, statutory and all other rights and privileges when the trial court denied his request to terminate the services of his appointed trial counsel."

{¶33} "[6.] The trial court erred in finding the appellant competent to stand trial pursuant to Section 2945.371 of the Ohio Revised Code and all other Ohio, federal and constitutional law."

{¶34} "[7.] The appellant was denied effective assistance of counsel contrary to Ohio law and the state and federal constitutions due to his ineffective assistance of trial counsel."

{¶35} "[8.] The trial court erred to the prejudice of the appellant when the court denied his motion to appear at the trial without restraints."

{¶36} Locke's first two assignments of error challenge the sufficiency and/or manifest weight of the evidence against him.

{¶37} The manifest weight of the evidence and the sufficiency of the evidence are distinct legal concepts. *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, 857 N.E.2d 547, ¶ 44. With respect to the sufficiency of the evidence, "[t]he 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, 574 N.E.2d 492 (1991),

paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

{¶38} Whereas "sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, * * * weight of the evidence addresses the evidence's effect of inducing belief." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1997). "In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's?" *Id.* An appellate court considering whether a verdict is against the manifest weight of the evidence must consider all the evidence in the record, the reasonable inferences, the credibility of the witnesses, and 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." *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶39} In order to convict Locke of Trafficking in Heroin, the State had to prove that he knowingly sold or offered to sell heroin. R.C. 2925.03(A)(1). Locke contends "the State failed to prove beyond a reasonable doubt that it was the Appellant himself who sold a controlled substance to the Confidential Informant and that, even if so, the substance in the Confidential Informant's possession after the alleged 'sale' was actually transferred from the Appellant, and not the Confidential Informant (a self-proclaimed criminal and Heroin addict) * * *." Appellant's brief at 14. Locke also contends that the State failed to prove that he "knowingly" sold heroin "because the State of Ohio had no eyewitness other than the Confidential Informant and had no

statement or utterance from the Appellant regarding his state of mind." Appellant's brief at 15.

{¶40} We find no deficiency in the evidence identifying Locke as the person who sold McArdle heroin on February 27, March 4, and March 6, 2013. McArdle was an eyewitness to all three transactions and unequivocally identified Locke as the person who sold him heroin. For the March 4 and 6 buys, McArdle's testimony was corroborated by video recordings containing images of the person with whom McArdle is dealing. McArdle's testimony is further corroborated by the facts that the February 27 and March 4 buys were conducted from a white Cadillac titled to Locke's mother, Patrolman Sabruno identified Locke as the sole occupant of the black Honda involved in the March 6 buy, and marked money used in the March 6 buy was recovered from Locke's person. As to whether Locke actually transferred to McArdle the heroin recovered after the buys, McArdle's testimony is corroborated by the phone calls initiating the transactions. In each of these calls, McArdle directs Unc to his residence to purchase heroin. It is reasonable to infer that, when Locke arrives at McArdle's residence, it is for the purpose of selling McArdle heroin. The jury's acceptance of McArdle's testimony did not create a miscarriage of justice.

{¶41} In order to convict Locke of Possession of Heroin, the State had to prove that he knowingly possessed heroin, meaning that he had "control over" the heroin (but may not be inferred solely from "mere access"). R.C. 2925.11(A) and 2925.01(K). Locke contends the jury improperly inferred possession of the heroin "solely from the Appellant being in or near the [vehicle] pulled over on the March 6, 2013 third attempted drug bust." Appellant's brief at 15.

{¶42} We disagree. Patrolman Sabruno observed two bags thrown from the driver's side window of the black Honda he was pursuing. Locke was the sole occupant of the vehicle and necessarily exercised control over the bags in order to throw them out of the window. There was also testimony that heroin in the bags thrown from the Honda was packaged in a manner similar to the heroin sold to McArdle. The Possession conviction was supported by sufficient and credible evidence.

{¶43} In order to convict Locke of third degree Failure to Comply, the State had to prove that he willfully fled from a police officer after receiving a signal from the officer to stop his vehicle, while causing "a substantial risk of serious physical harm to persons or property." R.C. 2921.331(B) and (C)(5)(a)(ii). A substantial risk connotes "a strong possibility, as contrasted with a remote or significant possibility." R.C. 2901.01(A)(8). Locke contends that the State failed to "proffer competent, credible evidence that the Appellant was the driver of the vehicle in question" or that there was "physical harm or any substantial risk thereof." Appellant's brief at 16.

{¶44} Locke's identity as the operator of the black Honda was established by McArdle's testimony and the video recording of the buy. It was also established by Patrolman Sabruno who observed Locke operate the Honda on I-90. Sabruno observed Locke flee through a "business district" and "construction zone," travelling at a high rate of speed, passing left-of-center, and driving through red lights. Sabruno's testimony was corroborated by Lieutenant Hengst's observations. In light of this testimony, there was nothing improper with the jury concluding that Locke's conduct created a strong possibility of physical harm.

{¶45} In order to convict Locke of Tampering with Evidence, the State had to prove that he, knowing that an investigation was in progress, purposely removed and disposed of the plastic baggies so as to impair their availability as evidence. R.C. 2921.12(A)(1). Locke contends that the State failed to prove "that it was Appellant who had possession of the alleged Heroin baggies or that he was the one who threw the baggies out of the car window." Appellant's brief at 17.

{¶46} Locke's possession of the baggies and identity as the sole occupant of the Honda was established by the evidence discussed above. The Tampering conviction was supported by competent and credible evidence.

{¶47} Locke raises additional arguments under these assignments of error relating to the evidence against him.

{¶48} Locke contends that the trial court "erred in refusing to timely compel the Appellee to reveal the identity of the confidential informant and his deal."

{¶49} On August 26, 2013, Locke filed a Motion to Reveal Deal and Identity of Confidential Informant.

{¶50} On September 10, 2013, the State filed Supplemental Discovery consisting of the confidential informant's redacted criminal history. On October 2, 2013, the State filed a Response, advising that the confidential informant "was cooperating with law enforcement on this case for a positive recommendation on Possessing Drug Abuse Instruments charges."

{¶51} On November 26, 2013, the trial court denied the Motion to Reveal Deal and Identity of Confidential Informant, noting "that the state has provided the defendant with information regarding the deal with the confidential informant."

{¶52} On January 30, 2014, the State filed Supplemental Discovery, advising that the confidential informant "was cooperating with law enforcement on this case for a positive recommendation on a Driving Under Suspension charge (in addition to the Possessing Drug Abuse Instruments charge already disclosed)."

{¶53} "The identity of an informant must be revealed to a criminal defendant when the testimony of the informant is vital to establishing an element of the crime or would be helpful or beneficial to the accused in preparing or making a defense to criminal charges." *State v. Williams*, 4 Ohio St.3d 74, 446 N.E.2d 779 (1983), syllabus. "In general, courts have compelled disclosure in cases involving 'an informer who helped to set up the commission of the crime and who was present at its occurrence' whenever the informer's testimony may be helpful to the defense." *State v. Bays*, 87 Ohio St.3d 15, 25, 716 N.E.2d 1126 (1999). The decision to reveal a confidential informant's identity lies within the trial court's discretion. *Id.*

{¶54} "If the prosecuting attorney does not disclose materials or portions of materials under [Criminal Rule 16], the prosecuting attorney shall certify to the court that the prosecuting attorney is not disclosing material or portions of material otherwise subject to disclosure" and the reasons therefor. Crim.R. 16(D). "Protecting the safety of a witness is a permissible reason for non-disclosure of materials under Crim.R.16(D)(1)." *State v. Howard*, 2d Dist. Greene No. 2012-CA-39, 2013-Ohio-2343, ¶ 51.

{¶55} In the present case, the State did not disclose the identity of its confidential informant prior to trial and did not file a certificate of nondisclosure. However, we find the trial court's failure to compel disclosure of McArdle's identity

harmless beyond a reasonable doubt. Crim.R. 52(A) ("[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded"). The State disclosed the conditions under which McArdle agreed to work for the Wickliffe Police Department and his criminal history. The State also made available to Locke the audio and video recordings documenting the buys. As a practical matter, Locke knew who the informant was and where he lived. Locke did not object to McArdle's testimony at trial and has made no demonstration of prejudice. In his opening statement at trial, counsel for Locke demonstrated a familiarity with McArdle's history with the Wickliffe Police Department and the circumstances of his involvement in the three controlled buys. Where the reviewing court determines that the alleged error "did not affect the defendant's substantial rights," i.e. was not prejudicial, "then the error is harmless and 'shall be discarded.'" (Citation omitted.) *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.2d 1153, ¶ 23; *State v. Singh*, 8th Dist. Cuyahoga No. 96049, 2011-Ohio-6447, ¶ 16 ("Singh failed to make any showing whatsoever that disclosure of the CI's identity would be helpful in preparing his defense"); *State v. Kidan*, 6th Dist. Lucas No. L-88-118, 1989 Ohio App. LEXIS 767, 8 (Mar. 10, 1989) ("even were disclosure required in this case, the denial of disclosure would be harmless error * * * because appellant knew the identity of the police informant").

{¶56} Locke also contends that the trial court erred by admitting the audio and video recordings on the grounds that the "State failed to lay the proper foundation of these alleged recordings, the persons are not properly or sufficiently identified, and certainly contain prejudicial and inadmissible hearsay." Appellant's brief at 13.

{¶57} "[A] trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence." *Rigby v. Lake Cty.*, 58 Ohio St.3d 269, 271, 569 N.E.2d 1056 (1991).

{¶58} "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A). The Rules of Evidence, "[b]y way of illustration only, and not by way of limitation," expressly sanction the following methods of authentication: "Testimony that a matter is what it is claimed to be," "Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker," and "Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result." Evid.R. 901(B)(1), (5), and (9).

{¶59} "To be admissible, a tape recording must be authentic, accurate, and trustworthy." *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶ 109. "The threshold for admission is quite low * * *." *State v. Long*, 2014-Ohio-4416, 19 N.E.3d 981, ¶ 25 (11th Dist.); *State v. Nixon*, 2014-Ohio-4303, 20 N.E.3d 404, ¶ 33 (11th Dist.).

{¶60} In the present case, McArdle testified that the audio recordings fairly and accurately reflected the conversations he engaged in to arrange the buys. Similarly, McArdle testified that the video recordings fairly and accurately reflected the buys. McArdle created the recordings with equipment provided by the Wickliffe Police

Department. McArdle identified the person in the audio recordings as the same person who sold him the heroin on three occasions and Locke as that person. Lieutenant Bush testified that he provided McArdle with recording devices on February 27 and March 4, 2013. Following the buys, Bush recovered the recordings made by McArdle and downloaded them onto the police server. Lieutenant Hengst testified that, following the March 4, 2013 buy, he took the SD card from the informant's recording device and played the video using Quick Time. He was able to pause a frame and use the Microsoft Office "snipping tool" to create still images from the video, in this case depicting Locke as the person conducting the transactions with McArdle. Hengst used the same technique to produce still images from the video of the March 6, 2013 buy. Finally, Hengst testified that he was familiar with Locke's voice and identified the voice on the audio recordings as Locke's.

{¶61} The testimony of McArdle, Lieutenant Bush, and Lieutenant Hengst provided a sufficient foundation to establish the audio and video recordings were what the State claimed that they were – recordings documenting Locke selling heroin on three occasions. The threshold for admissibility is low and other courts have found it satisfied based on comparable testimony. *Long* at ¶ 25 (the victim was able to identify the defendant's voice in conversation with a third party); *State v. Munion*, 4th Dist. Scioto No. 12CA3520, 2013-Ohio-3776, ¶ 20 (the detective "searched the informant for contraband, issued the recording device, then sent the informant into the driveway of Ms. Collier's residence [to purchase methamphetamine], * * * [a]fter the informant came out * * *, [he] collected the video device"); *State v. Bell*, 3rd Dist. Seneca No. 13-12-39, 2013-Ohio-1299, ¶ 45 (the detective "indicated that he personally placed the video and

audio recording device on the confidential informant[,] * * * removed the device once the controlled buy operation was complete and downloaded its contents into the evidence database"); *State v. Cox*, 2d Dist. Greene No. 2011 CA 19, 2012-Ohio-2100, ¶ 74 (detective who conducted undercover buy "would be able to state his opinion on voice identification, thus identifying Cox's voice as the one on the recordings").

{¶62} With respect to the alleged hearsay contained in the recordings, Locke identifies no specific statements as being hearsay or prejudicial. With respect to McArdle's statements, "tape recordings of controlled drug buys are not considered hearsay," based on the rationale "that the confidential informant's statements on the tape are not offered to show the truth of the matters asserted, but rather to show context for the drug transaction." *State v. Thompson*, 7th Dist. Columbiana No. 08 CO 41, 2010-Ohio-3278, ¶ 35 (cases cited). Likewise, "[a] defendant's own out-of-court statements, offered against him at trial, are not hearsay." *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 112, citing Evid.R. 801(D)(2)(a) ("[a] statement is not hearsay if * * * [t]he statement is offered against a party and is * * * the party's own statement").

{¶63} Locke also argues under this assignment of error that "a juror member * * * witnessed [him] bound in chains during the trial," and, "[a]s a result, that juror was clearly and naturally prejudiced and likely poisoned the other jury's objectivity [sic]." Appellant's brief at 14.

{¶64} During trial, counsel for Locke advised the court that "my client [has] informed me that juror number 11 saw him coming out of the elevator being escorted * * * in custody." At the close of trial, counsel for Locke declined having a voir dire of the

juror, opting instead for a curative instruction. The trial court subsequently instructed the jury as follows:

> Some of you jurors may have seen the Defendant, Cory Locke, accompanied by a Sheriff's Deputy. Mr. Locke is presently in the custody of the Sheriff because he has not been able to post bail. You're to draw no adverse inference whatsoever because he is in custody, or because he has not been able to post bail. That has nothing to do with the issues presented to you for your determination.

{¶65} We note that Locke's trial counsel agreed to the curative instruction and, thus, there was no objection or motion for mistrial. Any error would have to constitute plain error to be reversible. *State v. Spees*, 5th Dist. Stark No. 2002CA00420, 2003-Ohio-7278, ¶ 61.

{¶66} The Ohio Supreme Court has held that, "where a juror's view of defendants in custody is brief, inadvertent and outside of the courtroom," the "danger of prejudice to defendants is slight," and "[a]ny error which may have resulted from the failure to conduct a voir dire of the lone juror [is] harmless * * * given the brief, single observation and the general corrective instruction given thereafter." *State v. Kidder*, 32 Ohio St.3d 279, 286, 513 N.E.2d 311 (1987).

{¶67} In the present case, the juror's observation of Locke was brief, inadvertent, and outside the courtroom and the trial court removed the possibility of prejudice by giving a curative instruction. *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 220 ("the fact that the jury observed appellant handcuffed

on one occasion did not deprive him of a fair trial," and "the trial court's curative instruction removed any prejudice"); *State v. Davis*, 2d Dist. Clark No. 2011 CA 15, 2012-Ohio-1225, ¶ 19 ("[w]hen jurors have briefly glimpsed a defendant in shackles outside of the courtroom, the proper procedure is for the trial court to give a curative instruction"). We find no error, harmless or otherwise.

{¶68} The first two assignments of error are without merit.

{¶69} In his third assignment of error, Locke contends the trial court erred by convicting him and sentencing him for Trafficking in Heroin (Count 3) and Possession of Heroin (Count 7) on the grounds that these were allied offenses of similar import.

{¶70} Ohio's multiple counts statute or allied offenses of similar import statute provides:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

R.C. 2941.25.

{¶71} In considering if two offenses are allied offenses of similar import, the trial court must determine "whether it is possible to commit one offense *and* commit the other with the same conduct." *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 48. "If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" (Citation omitted.) *Id.* at ¶ 49; *State v. Logan*, 60 Ohio St.2d 126, 131, 397 N.E.2d 1345 (1979) (the use of the term "animus" in R.C. 2941.25(B), interpreted as meaning "purpose or, more properly, immediate motive," requires an examination of "the defendant's mental state in determining whether two or more offenses may be chiseled from the same criminal conduct").

{¶72} "An appellate court should apply a de novo standard of review in reviewing a trial court's R.C. 2941.25 merger determination." *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 28.

{¶73} To commit Trafficking in Heroin, a person must "knowingly * * * [s]ell or offer" heroin. R.C. 2925.03(A)(1). To commit Possession of Heroin, a person must "knowingly obtain, possess, or use" heroin. R.C. 2925.11(A). Inasmuch as selling heroin necessarily entails the obtaining, possession, and/or use of heroin, the two offenses may be committed by the same conduct. *State v. Montoya*, 12th Dist. Clermont No. CA2012-02-015, 2013-Ohio-3312, ¶ 63.

{¶74} In the present case, the trafficking of the heroin sold to McArdle and the possession of the heroin thrown from the Honda were differentiated both by the conduct underlying the commission of each offense and by the animus motivating the conduct,

i.e., Locke's state of mind or immediate purpose. Locke sold a quantity of heroin to McArdle. That transaction was completed, yet Locke still possessed heroin for some purpose other than sale to McArdle. Whether Locke retained the heroin for sale to another customer or for personal use does not matter, only that his animus for retaining part of the heroin was distinct from the animus which motivated the sale to McArdle. This is a distinction recognized in case law. *State v. Brown*, 5th Dist. Richland No. 13 CA 43, 2014-Ohio-1409, ¶ 64 (separate convictions for Trafficking and Possession upheld based upon the defendant's having driven "to Columbus to purchase a quantity of heroin large enough to keep some for personal use and allow him to sell the remainder for profit to cover his personal use"); *State v. Lewis*, 12th Dist. Clinton No. CA2008-10-045, 2012-Ohio-885, ¶ 21 (Trafficking convictions did not merge, where "Lewis sold less than five grams of crack cocaine to an undercover agent, left the scene, and when stopped by law enforcement, discarded other crack cocaine rocks, and a bag of crack cocaine rocks was found near him after he was tackled").

{¶75} The third assignment of error is without merit.

{¶76} In the fourth assignment of error, Locke challenges the trial court's imposition of maximum prison terms to be served consecutively. Locke argues broadly that the court "fail[ed] to engage in a proportionality analysis," "fail[ed] to properly consider Section 2929.11(B)," "did not, on the record, engage in an analysis required under Section 2929.14," and imposed an aggregate term of imprisonment "grossly disproportionate to the sentences for other similar offenses, resulting in cruel and unusual punishment." Appellant's brief at 24 and 26.

{¶77} The overriding purposes of felony sentencing in Ohio "are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources." R.C. 2929.11(A). "A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders." R.C. 2929.11(B).

{¶78} It is well-recognized that a sentencing court "has discretion to determine the most effective way to comply with the purposes and principles of sentencing." R.C. 2929.12(A).

> In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct, the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism, and the factors set forth in division (F) of this section pertaining to the offender's service in the armed forces of the United States and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

Id.

{¶79} The Ohio Supreme Court has described a sentencing court's discretion as "full discretion to impose a prison sentence within the statutory range." *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, paragraph three of the syllabus. "[T]he trial court is not obligated, in the exercise of its discretion, to give any particular weight or consideration to any sentencing factor." *State v. Holin*, 174 Ohio App.3d 1, 2007-Ohio-6255, 880 N.E.2d 515, ¶ 34 (11th Dist.).

> If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part

> of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

R.C. 2929.14(C)(4).

{¶80} "The court hearing an appeal [of a felony sentence] shall review the record, including the findings underlying the sentence or modification given by the sentencing court." R.C. 2953.08(G)(2). "The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing * * * if it clearly and convincingly finds * * * [t]hat the record does not support the sentencing court's findings under division * * * (C)(4) of section 2929.14, or * * * [t]hat the sentence is otherwise contrary to law." R.C. 2953.08(G)(2)(a) and (b).

{¶81} In passing sentence on Locke, the trial court stated on the record:

> The Court has considered the record, the oral statements made, the pre-sentence report, my conference in chambers with counsel and probation, and the statements of the Defendant and Defendant's counsel. The Court has also considered the overriding purposes of felony sentencing pursuant to R.C. 2911 * * *. * * * I have reasonably calculated this sentence to achieve the two overriding purposes of felony sentencing, and to be commensurate with and not demeaning to the seriousness of this offender's

conduct and its impact on society, and to be consistent with sentences imposed for similar crimes committed by similar offenders. In using my discretion to determine the most effective way to comply with the purposes and principles of sentencing, I have considered all relevant factors including the seriousness and recidivism factors * * *. The Court determines that there are no factors making any of these offenses less serious. In terms of recidivism, the Court finds that the Defendant has a long and violent criminal history, that there has been rehabilitation failure after failure, after these previous convictions, including a conviction for one of the same crimes we have here, the fleeing from the police; that the Defendant has failed to respond in the past to probation or parole. The Court finds no genuine remorse. The Court finds no factors making recidivism less likely, in fact the Court finds that the Defendant has the greatest likelihood of committing future crimes. The Court determines that a prison sentence is needed to protect the public from future crime, that consecutive sentences are necessary to protect the public and punish the offender. Consecutive sentences would not be disproportionate to the Defendant's conduct and the danger he poses. * * * That the harm was so great or unusual that a single term would not adequately reflect the seriousness of his conduct, and his criminal history shows that consecutive terms are needed. * * * This Court

> finds that the Defendant committed a worst form of each of these offenses, particularly * * * the tampering with evidence and the failure to comply.

{¶82} Contrary to Locke's arguments, the trial court fully complied with the directives of R.C. 2929.11 and 2929.12 in imposing its sentence upon him, and with the directives of R.C. 2929.14(C)(4) in ordering consecutive prison terms. The sentence was not contrary to law and the record clearly and convincingly supported the court's findings with respect to consecutive sentences. Locke, age forty-three at the time of sentencing, has an uninterrupted criminal history dating back to 1992 which includes convictions for, inter alia, Assault, Domestic Violence, Failure to Comply, Rape, Compelling Prostitution, and Promoting Prostitution.

{¶83} The fourth assignment of error is without merit.

{¶84} In his fifth assignment of error, Locke maintains that he "was deprived of his Sixth Amendment right to effective assistance of counsel because the trial court refused to allow [him] to terminate his appointed trial counsel and obtain new trial counsel." Appellant's brief at 26.

{¶85} Locke was represented by three attorneys during the course of these proceedings. On April 16, 2013, the trial court appointed Attorney Mark A. Glinski to represent Locke. On June 28, 2013, for reasons not apparent from the face of the record, the court withdrew Glinski as counsel and appointed Attorney Joseph R. Klammer to represent Locke.

{¶86} On October 10, 2013, Klammer filed a Motion to Withdraw as Counsel, based on "D.R. 20110(C)(1)(a) [which] allows withdraw[al] where the client insists on

pursuing a position that is not warranted; * * * where the client's conduct 'renders it unreasonabl[y] difficult for the lawyer to carry out' the relationship; * * * where the client insists that the attorney 'engage in conduct that is contrary to the judgment and advice of the lawyer, but not prohibited under the Disciplinary Rules;' and * * * where the attorney 'believes in good faith * * * that the tribunal will find the existence of other good cause for withdrawal.'"

{¶87} On December 4, 2013, the trial court granted Klammer's Motion to Withdraw and appointed Attorney Aaron Baker to represent Locke.

{¶88} In the trial court's March 20, 2014 Journal Entry on July Trial Proceedings, there is a note that, on March 17, 2014 (the first day of trial), "the court heard and overruled the defendant's oral motion to discharge counsel." Locke's oral motion to discharge counsel was not included in the transcripts prepared for appeal.

{¶89} The decision whether to allow an indigent defendant to discharge his or her counsel or seek substitute counsel is within the discretion of the trial court. *State v. Burrell*, 11th Dist. Lake No. 2013-L-024, 2014-Ohio-1356, ¶ 21.

{¶90} In the absence of a record, this court cannot speculate as to Locke's reasons for wanting to discharge trial counsel or the trial court's reasons for denying the motion. "When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980).

{¶91} The fifth assignment of error is without merit.

{¶92} In the sixth assignment of error, Locke asserts that the trial court erred in finding him competent to stand trial.

> A defendant is presumed to be competent to stand trial. If, after a hearing [as prescribed in R.C. 2945.37(B) through (E)], the court finds by a preponderance of the evidence that, because of the defendant's present mental condition, the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense, the court shall find the defendant incompetent to stand trial * * *.

R.C. 2945.37(G); *State v. Berry*, 72 Ohio St.3d 354, 359, 650 N.E.2d 433 (1995) (the United States Supreme Court has stated that the test to determine a defendant's competency for purposes of due process is "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him") (citation omitted).

{¶93} A reviewing court will not disturb the finding that a defendant is competent to stand trial if "there was some reliable, credible evidence supporting the trial court's conclusion that [the defendant] understood the nature and objective of the proceedings against him." *State v. Williams*, 23 Ohio St.3d 16, 19, 490 N.E.2d 906 (1986). "Deference on these issues should be given to those 'who see and hear what goes on in the courtroom.'" (Citation omitted.) *State v. Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193, 790 N.E.2d 303, ¶ 33; *State v. Cowans*, 87 Ohio St.3d 68, 84, 717 N.E.2d 298 (1999) ("[l]imited to reviewing the black-and-white record, we are in no position to

second-guess factual determinations made by a trial judge, which may be based on a person's demeanor, conduct, gestures, tone of voice, or facial expressions").

{¶94} On October 10, 2013, Locke filed a Motion to Determine Competency. The trial court referred Locke to the Lake County Adult Probation Department for a competency evaluation.

{¶95} On November 21, 2013, a competency hearing was held. The parties stipulated to the admission of a competency evaluation conducted by Dr. Rindsberg, in which Locke was found "capable of understanding the nature and objective of the proceedings against him and of assisting in his defense." Counsel for Locke made the following argument before the court:

> I put the motion [to determine competency] in because of my experiences with him, that they were just complicated and at some point, with all due respect to Cory, my experience was that he was confused about the proceedings against him and how we were gonna present a defense. I understand that criminal cases put a lot of pressure on clients, and all defenses can be complicated. But my experience with him was that he does lack a reasonable degree of rational understanding of the proceedings, or possible defenses, or, in fact, the evidence that is against him. Reviewing the evidence at time [sic] complicated for Cory to put them in perspective of a defense. I know this is tough for him to hear, but it's important for the record. But I think that my experience is, to the

extent that that's evidence, reaches the preponderance of the evidence burden per R.C. 2945.37(G).

{¶96} The trial court determined that Locke was competent to stand trial.

{¶97} Locke argues that Dr. Rindsberg's report was "the only evidence presented by either side" and that "trial counsel was ineffective for not requesting an independent competency evaluation." Appellant's brief at 28.

{¶98} We find no error. Dr. Rindsberg's report and the trial court's interactions with Locke were sufficient evidence on which to base a competency determination. Dr. Rindsberg acknowledged Locke's difficulties in working with his attorneys, but did not believe that they were related to incompetency or mental illness: "While he may be somewhat more difficult because he is so engrossed in what he believes is right and wrong with his case, Mr. Locke understands the ramifications of pursuing the defense that he wants to pursue."

{¶99} The trial court's interactions with Locke included a lengthy change of plea hearing conducted several months prior to the competency hearing, during which the court reviewed with Locke the charges against him. *State v. McQueen*, 10th Dist. Franklin No. 09AP-195, 2009-Ohio-6272, ¶ 14 ("[a]lthough the trial court did not hold a full evidentiary hearing, the court did consider the report submitted by NetCare [Forensic Psychiatry Center], and held a colloquy with appellant regarding his understanding of the proceedings"); *In re Lloyd*, 5th Dist. Richland No. 96 CA 86, 1997 Ohio App. LEXIS 1004, 1 and 5 (Jan. 27, 1997) ("[b]ased upon a [stipulated] report * * *, we find there was sufficient evidence presented to support the juvenile court's conclusion that appellant was competent to stand adjudication").

{¶100} Furthermore, we note that throughout the course of these proceedings Locke would speak on his own behalf before the trial court. In none of these interactions did Locke appear to lack an understanding of the nature and objective of the proceedings against him. Specific interactions of this sort will be set forth in greater detail in the next assignment of error.

{¶101} With respect to an independent competency evaluation, Locke cites no authority for the proposition that he was entitled to an independent evaluation or evidence that such an evaluation was necessary.

{¶102} When the issue of a defendant's competency is raised, it is within the trial court's discretion whether an evaluation should be conducted. R.C. 2945.371(A) ("[i]f the issue of a defendant's competence to stand trial is raised * * *, the court may order one or more evaluations of the defendant's present mental condition"); *State v. Bailey*, 90 Ohio App.3d 58, 67, 627 N.E.2d 1078 (11th Dist.1992) ("a trial court is not required to order an evaluation of the defendant's mental condition every time he raises the issue"); *State v. Alvarado*, 4th Dist. Ross No. 14CA3423, 2014-Ohio-5374. ¶ 6 (cases cited). Likewise, "'[a] defendant in a criminal case has no absolute right to an independent psychiatric evaluation' to determine competency." (Citation omitted.) *State v. Hill*, 177 Ohio App.3d 171, 2008-Ohio-3509, 894 N.E.2d 108, ¶ 106 (11th Dist.).

{¶103} Given the lack of any indicia of incompetency on the face of the record, we find no deficiency in Locke's trial counsel's decision not to seek an independent evaluation.

{¶104} The sixth assignment of error is without merit.

{¶105} In the seventh assignment of error, Locke contends that trial counsel's performance was constitutionally deficient.

{¶106} To reverse a conviction for ineffective assistance of counsel, the defendant must prove "(1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding." *State v. Madrigal*, 87 Ohio St.3d 378, 388-389, 721 N.E.2d 52 (2000), citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶107} Locke raises various instances of trial counsel's alleged deficiencies, none of which we find fell below an objective standard of reasonableness or compromised the reliability and fairness of the proceedings below.

{¶108} Locke argues trial counsel was incompetent for stipulating to the admission of Dr. Rindsberg's report and for not filing a motion to suppress. Appellant's brief at 30. However, Locke cites no legal or factual grounds for objecting to the report's admissibility or filing a motion to suppress. In the absence of grounds for taking these actions, Locke cannot demonstrate that counsel was ineffective for not doing so. *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶ 35 ("where the record contains no evidence justifying a motion to suppress, defendant has not met his burden of proving that his attorney violated an essential duty by failing to file the motion") (citation omitted).

{¶109} Locke contends that trial counsel was incompetent for not objecting to one of the jurors on the panel who, according to Locke, "had two people in her family that

died because of drug overdoses and that couldn't be fair through the trial." Appellant's brief at 30.

{¶110} We find no prejudice as Locke was allowed to raise the objection himself. The trial court rejected Locke's contention, stating that if the juror had claimed she could not be fair, he would have excused her. Trial counsel advised the court that he recalled the juror "specifically sa[ying] that despite the overdoses she could be fair." Locke disputed counsel's recollection of the juror's statement. Regardless, the voir dire of the jury has not been transcribed and made part of the record. In the absence of a record, we must defer to the court's ruling on Locke's objection.

{¶111} Locke also raised several instances of trial counsel's alleged ineffectiveness at sentencing. Locke disputed the content of a written stipulation that his mother is Brenda Locke and that he "has listed 365 E. 161st Street, Cleveland, Ohio, as his residence on documents." As noted by the court, Locke voluntarily signed the stipulation.

{¶112} Locke argues that the prosecutor had sent a letter to Attorney Klammer "concerning the mislabeling of some of the lab reports" and that trial counsel failed to raise the issue before the jury. Without the prosecutor's letter in the record, this court is unable to consider the merits of this argument.

{¶113} Finally, Locke claims trial counsel failed "to pursue the substantive, date, and time discrepancies in the phone and video recordings and the testimony of the various witnesses." Appellant's brief at 31. These otherwise unidentified discrepancies fail to establish grounds for reversing Locke's convictions. A review of the trial

proceedings reveal no such discrepancies of sufficient substance as to undermine the fundamental fairness of the proceedings.

{¶114} The seventh assignment of error is without merit.

{¶115} In the eighth assignment of error, Locke maintains the trial court erred by refusing to allow him to appear for trial without restraints.

> Ordinarily a prisoner is entitled to appear free of shackles or bonds which would restrict his free movements. It is uniformly held, however, that the prisoner may be shackled when such precaution is shown to be necessary to prevent violence or escape. It lies within the discretion of the trial court to determine such necessity, based upon the conduct of the accused. An appellate court will not reverse the trial court's action except in case of an abuse of that discretion.

State v. Woodards, 6 Ohio St.2d 14, 23, 215 N.E.2d 568 (1966); *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112, ¶ 82.

{¶116} The issue of whether a conviction should be reversed where the defendant has appeared in restraints is subject to a harmless error analysis. *Neyland* at ¶ 109, citing *Deck v. Missouri*, 544 U.S. 622, 635, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005); *United States v. Miller*, 531 F.3d 340, 346 (6th Cir.2008) ("[i]n *Deck*, the Supreme Court confirmed that harmless error analysis applies to the use of physical restraints on a criminal defendant at trial").

{¶117} In the present case, Locke filed a Motion to Permit Accused to Appear in Civilian Clothing without Restraints at All Proceedings on January 27, 2014. On

February 13, 2014, the trial court entered an Order that "defendant is permitted to wear civilian clothes for the duration of trial," but denied the request to appear without restraints. In the same Order, the court did instruct "the sheriff * * * to take all necessary precautions to keep any restraints worn by the defendant concealed."

{¶118} The State argues that Dr. Rindsberg's psychological evaluation of Locke and his history of violent crime, including "prior convictions for failure to comply and for failure to verify his address as sexual offender," justified the use of restraints during trial. Appellee's brief at 39. In particular, the State notes several violent incidents with other inmates during Locke's pre-trial captivity, a heated encounter with one of his defense attorneys, and antisocial personality traits.

{¶119} Apart from the observation of Locke by juror number 11 "being escorted * * * in custody," discussed under the first assignment of error, nothing in the record suggests that Locke was observed in restraints during the course of the trial. When witnesses identified Locke at trial, he was described as wearing civilian clothing.

{¶120} We find that any arguable error by the trial court in having Locke restrained during trial was harmless beyond a reasonable doubt given the facts that the court ordered the restraints to be concealed and that there is no evidence that the restraints were visible to members of the jury.

{¶121} The Ohio Supreme Court has held that a defendant, tried in restraints, "cannot establish any resulting prejudice, [where] nothing shows that the leg restraints were visible to the jury." *Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112, at ¶ 114; *Ochoa v. Workman*, 669 F.3d 1130, 1145 (10th Cir.2012) ("the trial court erred in requiring Ochoa to wear the shock sleeve [during trial] but the error was

harmless * * * [since] there was nothing in the record indicating the shock sleeve was visible to the jury") (cases cited); *compare State v. Ayers*, 12th Dist. Warren Nos. CA2010-12-119 and CA2010-12-120, 2011-Ohio-4719, ¶ 61 ("as it relates to his ineffective assistance claim resulting from his trial counsel's failure to object to him being shackled, appellant cannot establish any resulting prejudice for, as the trial court found, the jury was unable to see * * * him in shackles as he was 'under the skirts'") (cases cited).

{¶122} The Ohio Supreme Court also considered the fact that "overwhelming evidence of Neyland's guilt was presented at trial," and, thus, "little chance that leg restraints, even if observable, affected the verdict or the sentence in this case." *Neyland* at ¶ 110. The same consideration applies to the present case, where the evidence of Locke's guilt was substantial and uncontradicted.

{¶123} The eighth assignment of error is without merit.

{¶124} For the foregoing reasons, Locke's convictions and sentence are affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.