[Cite as *State v. Layne*, 2010-Ohio-2308.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-07-043
	:	O P I N I O N
- vs -		5/24/2010
	:	
FLOYD LAYNE,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 09CR00216

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 North Third Street, Batavia, Ohio 45103-3033, for plaintiff-appellee

Keith L. O'Korn, 440 Polaris Parkway, Suite 150, Westerville, Ohio 43082, for defendant-appellant

BRESSLER, P.J.

{¶1} Defendant-appellant, Floyd Layne, appeals his convictions in the Clermont County Court of Common Pleas for illegal assembly or possession of chemicals for the manufacture of drugs and conspiracy to commit the illegal manufacture of drugs.

{¶2} On March 13, 2009, appellant, Jack Keith, and two women traveled in Keith's truck to the Eastgate Meijer store in Clermont County. While at the store, appellant instructed Keith and the women to purchase two boxes of pills containing

pseudoephedrine.[1] After the purchases, the members of the group returned and departed the store parking lot in Keith's truck. A Meijer store employee became suspicious and notified the Union Township Police Department that the members of the group left the parking lot in a white Chevrolet truck with New Mexico license plates. At that time, Officer Chris Holden was investigating another reported crime at the store, and exited the store just as the driver of a truck matching this description was pulling out of the parking lot.

{¶3} Officer Holden attempted to follow the white truck, but eventually lost sight of it. As Officer Holden was returning to the store, he saw the truck and resumed his pursuit. After stopping the truck, Officer Holden noticed the passengers in the back seat, appellant and a woman, moving furtively and apparently doing something with their hands near the floor of the truck. When another officer arrived, Officer Holden approached the truck and spoke to Keith. Officer Holden asked Keith what he purchased at Meijer and why he purchased it, and Keith responded that he purchased Sudafed and he purchased it for methamphetamine purposes. Officer Holden then asked Keith if there was anything in the truck he should know about, and Keith asked to speak to the officer in private. Once Officer Holden and Keith were in private, Keith informed the officer that there was a tank in the back of the truck that belonged to appellant and that he did not know what was in it.

{¶4} Officer Holden then spoke to appellant and asked him his name, age, date of birth, social security number, and the address of his residence. Appellant responded that his name is James Layne, he was born in September of 1979, is 39 years of age, he did not know his social security number, and he resided at an address in Portsmouth,

1. Pseudoephedrine is a decongestant ingredient in many over-the-counter cold medicines, including Sudafed, and is a necessary ingredient in the manufacture of methamphetamine.

Ohio. Officer Holden then asked appellant if that information was correct because he could not be 39 years of age if he was born in 1979, and appellant reiterated that he was born in September of 1979.

{¶5} During the time Officer Holden was questioning the occupants of Keith's truck, Clermont County Narcotics Task Force agents searched Keith's truck and found the tank Keith described. Agent Kenneth Mullis conducted a field test of the substance in the tank and discovered the tank contained anhydrous ammonia. Agent Mullis also discovered a glass jar with a white powder residue inside, a gasoline container which appeared to contain gasoline, a can of starter fluid, a blister package containing pills which appeared to contain pseudoephedrine, a container which appeared to contain muriatic acid, a cylinder that tested positive for anhydrous ammonia, a piece of paper with numeric codes that correspond to police dispatch instructions, a digital scale, a lithium battery, and salt. According to the testimony of Agent Mullis, all of this evidence is consistent with methamphetamine production.

{¶6} Appellant was arrested and transported to the Clermont County Jail. When Officer Holden ran a search on appellant's identity using the information he provided, the officer learned appellant had given him false information. Officer Holden then questioned appellant again, and appellant admitted he had provided false information and then provided the officer with the correct information.

{¶7} Appellant was charged with one count of the illegal assembly or possession of chemicals for the manufacture of drugs in violation of R.C. 2925.041(A) and one count of conspiracy to commit the illegal manufacture of drugs in violation of R.C. 2923.01(A)(2).

{¶8} Appellant waived a jury trial, and after a bench trial, the trial court found appellant guilty on both counts, imposed a sentence of three years in prison on each

count, to be served consecutively, and ordered appellant to pay court costs, fees, and court-appointed counsel costs. Appellant appeals his conviction, raising four assignments of error.

{¶9} Assignment of Error No. 1:

{¶10} "THE TRIAL COURT PLAINLY ERRED BY NOT SUPPRESSING ALL THE STATE'S EVIDENCE, INCLUDING ANY STATEMENTS MADE BY ANY OF THE PASSENGERS AT ANY TIME AND ALL EVIDENCE GATHERED FROM THE TRUCK, WHEN THE POLICE ILLEGALLY STOPPED AND SEARCHED THE TRUCK AND DETAINED ALL THE PASSENGERS, THEREBY VIOLATING THE FOURTH AMENDMENT OF THE U.S. CONSTITUTION AND SECTION 14, ARTICLE I OF THE OHIO CONSTITUTION AND SECTION 14, ARTICLE I OF THE OHIO CONSTITUTION AGAINST [sic] UNREASONABLE SEARCH AND SEIZURES."

{¶11} In his first assignment of error, appellant argues that Officer Holden illegally stopped Keith's truck, and that the trial court should have suppressed all evidence seized and statements made as a result of that stop. Appellant maintains the trial court's failure to do so is a violation of the United States and Ohio Constitutions.

{¶12} We note that appellant raises this issue for the first time on appeal. The proper method for asserting challenges to exclude evidence obtained as a result of police conduct is a motion to suppress. *State v. Freeman*, Cuyahoga App. No. 92286, 2009-Ohio-5226, ¶23, citing *State v. French*, 72 Ohio St.3d 446, 1992-Ohio-32. Crim.R. 12(C)(3) requires that a defendant file a motion to suppress evidence with the trial court prior to trial, and the failure to do so "shall constitute waiver of the defenses or objections" for purposes of trial. Crim.R. 12(H); see, also, *State v. Montgomery*, Licking App. No.2007 CA 95, 2008-Ohio-6077. Further, appellant's failure to file a motion to suppress constitutes a waiver of the issue on appeal. *City of Xenia v. Wallace* (1988),

37 Ohio St.3d 216, 218; *City of Marion v. Brewer*, Marion App. No. 9-09-12, 2008-Ohio-5401, ¶11.

{¶13} Appellant's first assignment of error is overruled.

{¶14} Assignment of Error No. 2:

{¶15} "THE STATE'S NON-DISCLOSURE OF SURVEILLANCE TAPES FROM MEIJER'S [sic] AND MR. KEITH'S COMPLETE CRIMINAL RECORD VIOLATED APPELLANT'S DUE PROCESS RIGHTS UNDER *BRADY V. MARYLAND* AND THE FEDERAL AND OHIO CONSTITUTIONS AND OHIO CRIM. R. 16."

{¶16} In his second assignment of error, appellant argues the state improperly withheld evidence from the defense. Appellant alleges the state failed to preserve and produce video logs, surveillance footage, written logs, or other records from Meijer. Further, appellant claims the state failed to produce all Keith's criminal records, including those from New Mexico.

{¶17} In *Brady v. Maryland* (1963), 373 U.S. 83, 87, 83 S.Ct. 1194, the United States Supreme Court held, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Evidence is "material" only if there is a reasonable probability that the proceeding would have turned out differently had the evidence been disclosed to the defense. *United States v. Bagley* (1985), 473 U.S. 667, 682, 105 S.Ct. 3375. "A successful *Brady* claim requires a three-part showing: (1) that the evidence in question be favorable; (2) that the state suppressed the relevant evidence, either purposefully or inadvertently; (3) and that the state's actions resulted in prejudice." *State v. Davis*, Licking App. No. 2008-CA-16, 2008-Ohio-6841, ¶53, citing *Strickler v. Greene* (1999), 527 U.S. 263, 281-282, 119 S.Ct. 1936. Further, it is the burden of the defense to prove a *Brady* violation has risen

to the level of denial of due process. *State v. Jackson* (1991), 57 Ohio St.3d 29, 33.

{¶18} The record indicates appellant filed a written motion for the preservation and production of video logs, surveillance footage, written logs, or other records from Meijer, and all of Keith's criminal records. However, there is nothing in the record to indicate the state actually obtained any of these materials. Moreover, appellant fails to prove that these missing materials contained materially exculpatory evidence. Even where the state has admitted to possessing and failing to preserve a surveillance video recording of the alleged act, the defense is still required to prove the video recording contained materially exculpatory evidence. See *State v. Durham*, Cuyahoga App. No. 92681, 2010-Ohio-1416. However, we reiterate that there is nothing in the record to show the state even possessed these materials. Accordingly, we find the state did not violate *Brady*.

{¶19} Appellant's second assignment of error is overruled.

{¶20} Assignment of Error No. 3:

{¶21} "APPELLANT'S CONVICTIONS WERE BOTH AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WERE NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS I, 10 & 16 OF THE OHIO CONSTITUTION."

{¶22} In his third assignment of error, appellant argues there is insufficient evidence to support his convictions for illegal assembly or possession of chemicals for the manufacture of drugs and conspiracy to commit the illegal manufacture of drugs. Further, appellant argues his convictions are against the manifest weight of the evidence.

{¶23} Whether the evidence presented is legally sufficient to sustain a verdict is

a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. An appellate court, in reviewing the sufficiency of the evidence supporting a criminal conviction, examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Carroll*, Clermont App. Nos. CA2007-02-030, CA2007-03-041, 2007-Ohio-7075, ¶117. After examining the evidence in a light most favorable to the prosecution, the appellate court must then determine if "any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id. Proof beyond a reasonable doubt is "proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs." R.C. 2901.05(D).

{¶24} Unlike a sufficiency of the evidence challenge, a manifest weight challenge 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. *Carroll* at ¶118. An appellate court considering whether a conviction was against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of witnesses. *State v. Good*, Butler App. No. CA2007-03-082, 2008-Ohio-4502, ¶25, citing *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶39. Under a manifest weight challenge, the question is 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. *Good* at ¶25. This discretionary power is to be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. *State v. Hart*, Warren App. No. CA2008-06-079, 2009-Ohio-997, ¶18.

{¶25} "Because sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding

of sufficiency." *State v. Smith*, Fayette App. No. CA2006-08-030, 2009-Ohio-197, ¶73. As a result, a determination that a conviction is supported by the manifest weight of the evidence will also be dispositive of the issue of sufficiency. *State v. Rodriguez*, Butler App. No. CA2008-07-162, 2009-Ohio-4460, ¶62.

{¶26} Appellant was convicted of the illegal assembly or possession of chemicals for the manufacture of drugs in violation of R.C. 2925.041, which provides in part:

{¶27} "(A) No person shall knowingly assemble or possess one or more chemicals that may be used to manufacture a controlled substance in schedule I or II with the intent to manufacture a controlled substance in schedule I or II in violation of section 2925.04 of the Revised Code.

{¶28} "(B) In a prosecution under this section, it is not necessary to allege or prove that the offender assembled or possessed all chemicals necessary to manufacture a controlled substance in schedule I or II. The assembly or possession of a single chemical that may be used in the manufacture of a controlled substance in schedule I or II, with the intent to manufacture a controlled substance in either schedule, is sufficient to violate this section."

{¶29} Appellant was also convicted of conspiracy to commit the illegal manufacture of drugs in violation of R.C. 2923.01(A) and R.C. 2925.04. R.C. 3719.41 provides that methamphetamine is a schedule II controlled substance.

{¶30} R.C. 2923.01 provides, in part:

{¶31} "(A) No person, with purpose to commit or to promote or facilitate the commission of * * * a felony drug trafficking, manufacturing, processing, or possession offense * * * shall do either of the following:

{¶32} "(1) With another person or persons, plan or aid in planning the commission of any of the specified offenses;

{¶33} "(2) Agree with another person or persons that one or more of them will engage in conduct that facilitates the commission of any of the specified offenses."

{¶34} Further, R.C. 2925.04 provides in part, "(A) No person shall knowingly cultivate marihuana or knowingly manufacture or otherwise engage in any part of the production of a controlled substance."

{¶35} At the trial, Keith testified that he gave the pills containing pseudoephedrine to appellant after appellant instructed Keith to buy them. Keith further testified that the tank of anhydrous ammonia belonged to appellant and that appellant had put the tank in Keith's truck approximately two days before they were arrested. Keith also testified that when Officer Holden initiated the traffic stop, appellant told him not to stop because of the items in the back of the truck. In addition, Keith testified he had witnessed appellant "cooking" methamphetamine once in another county. Although Keith admitted the state offered him leniency with regard to his own criminal charges in exchange for his testimony against appellant, appellant did not present any evidence to rebut Keith's testimony.

{¶36} In addition, Agent Mullis testified that he found the pills containing pseudoephedrine and the lithium battery in the backseat area of the truck near where appellant had been sitting. Agent Mullis stated that these items, along with the anhydrous ammonia and most of the other items in Keith's truck, are necessary for the production of methamphetamine. Further, Officer Holden testified that Keith admitted they had purchased the pills containing pseudoephedrine for "meth purposes."

{¶37} We remind appellant that even when conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the finder of fact believed the prosecution testimony. *State v. Bates*, Butler App. No. CA2009-06-174, 2010-Ohio-1723, ¶11. After a thorough review of the record, we find

that the state presented substantial, credible evidence to support appellant's convictions beyond reasonable doubt, and that appellant's convictions are not against the manifest weight of the evidence. Further, we find the finder of fact did not lose its way in finding appellant guilty of illegal assembly or possession of chemicals for the manufacture of drugs and conspiracy to commit the illegal manufacture of drugs. Our determination that appellant's convictions are supported by the weight of the evidence is also dispositive of the issue of sufficiency. *Rodriguez*, 2009-Ohio-4460 at ¶62.

{¶38} Appellant's third assignment of error is overruled.

{¶39} Assignment of Error No. 4:

{¶40} "TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 10, 16 [sic] OF THE OHIO CONSTITUTION."

{¶41} In his fourth assignment of error, appellant argues his trial counsel was ineffective for failing to file a motion to suppress evidence, failing to object to the admission of evidence, failing to subpoena surveillance video or personnel from Meijer, failing to object to the imposition of court costs, and failing to object to alleged prosecutorial misconduct.

{¶42} To prevail on an ineffective assistance claim, an appellant must show that his trial counsel's performance fell below an objective standard of reasonableness and that appellant was prejudiced as a result. *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 693, 104 S.Ct. 2052. Prejudice exists where there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. at 694. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of appellant's trial. Id.

{¶43} First, appellant argues his trial counsel was ineffective for failing to file a

motion to suppress evidence based on the alleged improper stop of Keith's truck. In support of his argument, appellant maintains Officer Holden did not have reasonable, articulable suspicion to stop Keith's truck, and that his trial counsel should have moved to suppress all evidence seized and statements made following the stop.

{¶44} The Fourth Amendment to the United States Constitution protects all persons against unreasonable searches and seizures. *Arizona v. Evans* (1995), 514 U.S. 1, 10, 115 S.Ct. 1185. The stop of a motor vehicle, even if for a limited purpose or a brief amount of time, constitutes the seizure of a person under the Fourth Amendment. *United States v. Martinez-Fuerte* (1976), 428 U.S. 543, 556-558, 96 S.Ct. 3074.

{¶45} It is well-settled that there are two types of traffic stops, each requiring a different constitutional standard. *State v. Baker*, Warren App. No. CA2009-06-079, 2010-Ohio-1289, ¶49, citing *State v. Moeller* (Oct. 23, 2000), Butler App. No. CA99-07-128, at 4. One is a typical noninvestigatory stop where an officer directly observes a traffic violation, giving rise to probable cause to stop the vehicle. *Whren v. United States* (1996), 517 U.S. 806, 810, 116 S.Ct. 1769. The second type of stop is an investigative or "*Terry*" stop, which occurs where an officer has a reasonable suspicion based upon specific and articulable facts that criminal behavior has occurred or is imminent. *Terry v. Ohio* (1968), 392 U.S. 1, 21, 88 S.Ct. 1868. The propriety of an investigative stop must be viewed in light of the totality of the surrounding circumstances. *State v. Batchili*, 113 Ohio St.3d 403, 2007-Ohio-2204, paragraph two of the syllabus.

{¶46} A failure to file a motion to suppress evidence seized does not necessarily constitute ineffective assistance of counsel. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448, citing *Kimmelman v. Morrison* (1986), 477 U.S. 365, 384, 106 S.Ct. 2574. "To establish ineffective assistance of counsel for failure to file a motion to

suppress, a defendant must prove that there was a basis to suppress the evidence in question." *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, ¶65, citing *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, ¶35. See, also, *State v. Gibson* (1980), 69 Ohio App.2d 91, 95, (finding where there is no justification for filing a suppression motion, appellant has not met the burden of showing his counsel's performance was deficient).

{¶47} Judicial scrutiny of counsel's performance must be highly deferential. *Strickland*, 466 U.S. at 689. We find that appellant fails to overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Id. A reviewing court is not permitted to use the benefit of hindsight to second-guess the strategies of trial counsel. *State v. Gleckler*, Clermont App. No. CA2009-03-021, 2010-Ohio-496, ¶10, citing *State v. Hoop*, Brown App. No. CA2004-02-003, 2005-Ohio-1407, ¶20. Even debatable trial strategies and tactics do not constitute ineffective assistance of counsel. Id. The failure to file a motion to suppress constitutes ineffective assistance of counsel only when the record establishes that the motion would have been successful if made. *State v. Robinson* (1996), 108 Ohio App.3d 428, 433. Further, even if the record contains some support for a motion to suppress, we presume that trial counsel was effective if counsel could reasonably have decided that the filing of a motion to suppress would have been a futile act. *State v. Brown*, Warren App. No. CA2002-03-026, 2002-Ohio-5455, ¶11.

{¶48} Previously, this court has determined that an investigative stop was justified under facts similar to those in this case. In *State v. Wilson*, Warren App. No. CA2006-01-007, 2007-Ohio-2298, ¶15, this court determined that Warren County Sheriff's Office deputies had reasonable, articulable suspicion to stop and detain men who had just purchased two boxes of pills containing pseudoephedrine from a grocery

store pharmacy. In *Wilson*, the deputies received a tip that these men purchased the pills with cash, purchased no other items, and left the store parking lot in a vehicle with out-of-state license plates. Id. Similarly, in this case, Officer Holden received a tip that three individuals purchased two boxes of pills containing pseudoephedrine and exited the store parking lot in a vehicle with out-of-state license plates. While there is not enough evidence in the record to determine conclusively whether a motion to suppress evidence would have been granted, based on the similarity of the facts in *Wilson* to those in this case, we find counsel could reasonably presume that the filing of a motion to suppress would have been a futile act. See *Brown* at ¶11.

{¶49} Next, appellant argues his trial counsel was ineffective for failing to object to the state's failure to authenticate photographs of the chemicals and production materials found in Keith's truck. However, the failure to raise objections "is not a per se indicator of ineffective assistance of counsel, because counsel may refuse to object for tactical reasons." *State v. Nowlin*, Muskingum App. No. CT2007-0008, 2008-Ohio-2830, 32, citing *State v. Gumm*, 73 Ohio St.3d 413, 428, 1995-Ohio-24. When the state moved to admit these photographs into evidence, appellant's counsel stated on the record:

{¶50} "Your Honor, if it would save the Court time I can stipulate to the fact that those items were there. The other officer has already testified that they're commonly used in the process to make methamphetamine, and * * * we went through item by item in the list about what those items were. So * * * if the point is to just show that there is a process that those items are commonly used there [sic], I can stipulate to that."

{¶51} We find trial counsel's failure to object to the authentication of the photographs to be trial strategy, and within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. Moreover, even if counsel's failure to object

was error, appellant has failed to explain how he was prejudiced by the omission. *Strickland*, 466 U.S. at 693-694.

{¶52} Next, appellant argues his trial counsel was ineffective for failing to obtain by subpoena surveillance video from Meijer or personnel from Meijer concerning surveillance video, and that his counsel should have fully investigated Keith's out-of-state criminal records. As we found earlier, there is nothing in the record to indicate that surveillance video even existed. Even if a surveillance video existed and trial counsel should have obtained it, appellant has failed to explain how he was prejudiced by the failure to obtain it. *Strickland*, 466 U.S. at 693-694. Likewise, appellant has failed to explain how he was prejudiced by trial counsel's failure to obtain Keith's out-of-state criminal records, if in fact Keith had even been convicted of any crimes while in another state. Id.

{¶53} In general, an attorney's failure to subpoena a witness is within the realm of trial strategy, and absent a showing of prejudice is not considered a denial of effective assistance of counsel, especially in the absence of any showing that the testimony of such witness would have assisted the defense. *State v. Hill*, Montgomery App. No. 23468, 2010-Ohio-500, ¶18. "Without any evidence regarding what testimony the potential witnesses might offer, appellate counsel has failed to demonstrate that the actual outcome of the trial would have been different." Id. Given that appellant has failed to explain how he was prejudiced by the absence of testimony by Meijer personnel, we find the failure to subpoena such a witness to be trial strategy, and within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689.

{¶54} Next, appellant argues his trial counsel was ineffective for failing to object to the imposition of court costs and fees. In *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, the Ohio Supreme Court noted that R.C. 2947.23 does not prohibit a court

from assessing costs against an indigent defendant, but "rather it *requires* a court to assess costs against all convicted defendants." (Emphasis sic.) Id. at ¶8. Accordingly, a trial court may constitutionally assess court costs as part of the sentence imposed on an indigent defendant convicted of a felony. Id. at ¶9. Thus, trial counsel's failure to object to the imposition of costs of prosecution and court fees does not constitute ineffective assistance of counsel because such an objection would not have been successful.

{¶55} In the trial court's judgment entry of sentence, the court also ordered appellant to pay "court appointed counsel costs." This court has previously determined that pursuant to R.C. 2941.51(D), the trial court must make an "affirmative determination on the record" that the accused has the ability to pay or may reasonably be expected to have the ability to pay such costs. *State v. Dunaway*, Butler App. No. CA2001-12-280, 2003-Ohio-1062, ¶39, citing *State v. Cooper*, 147 Ohio App.3d 116, 2002-Ohio-617, ¶71. There is no such finding in the record, although the trial court did apparently consider the presentence investigation report and specifically stated on the record that "[b]ecause of the finding of indigency, [the court] will not impose a fine."

{¶56} While the trial court's order to pay court-appointed counsel costs without the required finding constitutes reversible error, it would be inappropriate to find trial counsel ineffective for failing to object to the court's order. The trial court did not order appellant to pay these costs at the sentencing hearing, which took place on July 20, 2009. At the end of the sentencing hearing, trial counsel orally moved to withdraw as counsel of record so the trial court could appoint new counsel for purposes of appeal. The trial court apparently granted trial counsel's request, and appointed appellate counsel on July 21, 2009. The sentencing entry ordering appellant to pay court appointed counsel costs was filed after appellate counsel was appointed, on July 21,

2009. Therefore, trial counsel was not the counsel of record when the trial court committed the reversible error.

{¶57} We have previously held that ordering a defendant to pay court-appointed counsel fees without determining the defendant's ability to pay as required under R.C. 2941.51(D) constitutes plain error. *State v. Shannon*, Preble App. No. CA2003-02-005, 2004-Ohio-1866, ¶4. Accordingly, we find the trial court's decision ordering appellant to pay court-appointed counsel fees to be plain error. Therefore, we find appellant's argument that his counsel was ineffective for failing to object to the court's reversible error is moot.

{¶58} Finally, appellant argues his trial counsel was ineffective for failing to object to alleged prosecutorial misconduct during the state's closing argument. When reviewing statements during closing arguments for prosecutorial misconduct, a prosecutor is granted a certain degree of latitude. *State v. Smith* (1984), 14 Ohio St.3d 13, 13-14. Prosecutorial misconduct will only be found when remarks made during closing were improper and those improper remarks prejudicially affected substantial rights of the defendant. *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶62. In order to determine whether the remarks were prejudicial, the prosecutor's closing argument is reviewed in its entirety. *State v. Treesh*, 90 Ohio St.3d 460, 464, 2001-Ohio-4.

{¶59} During the state's closing argument, the prosecutor made two statements which appellant alleges are improper. First, in referencing appellant's girlfriend, the prosecutor stated, "[a]nd in this case what I think is so sad is that he's elicited the help of a 19-year-old girl who he impregnated. At age 44 he got a 19-year-old girl involved in meth * * * and now she's pregnant and has a warrant out for her." Later, the prosecutor stated, in reference to a recorded telephone conversation appellant had with another

person at the jail, "[a]nd I think a * * * telltale sign into the character of [appellant] is when * * * that female on the other line tells him his aunt dies. * * * And upon hearing that his aunt had died, the following sentence is, 'Let me talk about my charges.' Well, Judge, you know, I think that certainly gives some insight into [appellant]."

{¶60} After reviewing the entire record, including the state's closing argument, we conclude that appellant received a fair trial, despite any inadmissible evidence presented to the trial court. Prosecutorial misconduct is not grounds for reversal unless the defendant has been denied a fair trial because of the prosecutor's prejudicial remarks. *State v. Murphy*, Butler App. No. CA2007-03-073, 2008-Ohio-3382, ¶9, citing *State v. Maurer* (1984), 15 Ohio St.3d 239, 266. Further, "in reviewing a bench trial, an appellate court presumes that a trial court considered nothing but relevant and competent evidence in reaching its verdict. The presumption may be overcome only by an affirmative showing to the contrary by the appellant." *State v. Wiles* (1991), 59 Ohio St.3d 71, 86. Appellant has failed to present anything to overcome the presumption that that the trial court relied on only relevant and competent evidence in reaching its verdict.

{¶61} Appellant's fourth assignment of error is overruled.

{¶62} Judgment affirmed in part, and the portion of appellant's sentence ordering him to pay court-appointed counsel costs is hereby reversed and the matter remanded for a determination pursuant to R.C. 2941.51(D) regarding appellant's ability to pay court-appointed attorney fees. See *Cooper*, 2002-Ohio-617 at ¶72-73.

POWELL and HENDRICKSON, JJ., concur.