[Cite as *State v. Jamison*, 2008-Ohio-2065.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22177
v.	:	T.C. NO. 2006 CR 1378
BRIAN A. JAMISON	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 29th day of February, 2008.

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DONOVAN, J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Brian Anthony Jamison, filed May 15, 2007. On April 10, 2006, Jamison was indicted on four counts of drug possession, one count of possession of criminal tools, and one count of having weapons while under a disability. On May 4, 2006, Jamison pled not guilty to the charges. Jamison filed a

Motion to Suppress on May 16, 2006. On July 6, 2006, following a hearing, the trial court issued a Decision Entry and Order Overruling Defendant's Motion to Suppress. Following a trial to a jury, Jamison was found guilty of possession of crack cocaine in an amount equal to or greater than 25 grams but less that 100 grams, guilty of possession of cocaine in an amount equal to or greater than 5 grams but less than 25 grams, guilty of possession of heroin, guilty of possession of criminal tools with the intent to use the tools to commit the above possession offenses, guilty of having a weapon while under a disability, and guilty of aggravated possession of drugs.

{¶ 2} The events giving rise to this matter began on March 31, 2006. Jeff Hieber, a police officer for the City of Dayton, drove his cruiser from an alley into a gas station parking lot adjacent to North Main Street. Hieber noticed Jamison backing his car toward him in the parking lot. Hieber's lights were on, but he was unsure if Jamison saw him, so he paused to observe Jamison. Jamison momentarily stopped his car and then sped forward out of the parking lot onto North Main Street. Hieber followed Jamison's vehicle and observed that Jamison was speeding and repeatedly changing lanes without signaling. Hieber eventually stopped Jamison on Helena Street. Sergeant Adrian Sargent, a supervisor for the Ranger Division of Five Rivers Metro Parks, was completing paper work in his cruiser in the area of the stop and assisted Hieber.

{¶ 3} Jamison was alone in the vehicle, which he had borrowed from Jenille Early, his girlfriend. Jamison told Hieber that his license was suspended. Hieber removed Jamison from the vehicle, and after patting him down, Hieber advised Jamison that he was under arrest, placing him in the rear of his cruiser.

{¶ 4} Hieber and Sargent returned to Jamison's vehicle and, pursuant to department policy, conducted an inventory search of its contents prior to having it towed. After taking inventory of the passenger compartment, the officers opened the trunk of the car. Hieber immediately noticed a "black case pretty much in the middle of the trunk area in plain view with what looked like a clear plastic container with some type of a drug that was in it." The visible container was in an unzipped side pouch of the case and appeared to Hieber to contain heroin gel caps.

{¶ 5} Hieber next opened the main portion of the case and found several objects. Hieber removed a Dr. Pepper can with a false cap that he unscrewed to reveal "all types of drugs – powdered cocaine, crack cocaine, many different amounts in different baggies * * * ." Hieber also found a loaded Smith and Wesson .38 caliber revolver in the bag, along with a set of digital scales, a bottle of 60 Percocet pills, some marijuana and a set of keys. Attached to the set of keys was a toy dinosaur that contained a laser light in its mouth. Hieber also recovered $981.00 from Jamison's person.

{¶ 6} Hieber then read Jamison his rights, and Jamison appeared to understand them. Jamison did not ask any questions nor did he ask for an attorney. According to Hieber, Jamison did not appear to be under the influence of anything, but he seemed "very distraught and exhausted." Hieber did not interview Jamison.

{¶ 7} Jamison was transported to the police station, and there he was interviewed by Detectives Phillip Olinger and Bill Elholz. Olinger completed a pre-interview form for Jamison's signature. Olinger went over Jamison's rights one at a time and confirmed that Jamison understood them. Jamison signed the Waiver of Rights section of the form. Jamison

did not ask any questions, and he did not ask for a lawyer. Jamison did not ask to end the interview. He did not appear to be under the influence of alcohol or drugs, and he appeared to be coherent, according to Olinger.

{¶ 8} Olinger showed Jamison two Polaroid pictures that Olinger had taken of the handgun and the black bag with the drugs and the other evidence in it. Olinger asked Jamison if the items were his, and Jamison put his head down and stopped talking to Olinger. When Olinger then asked Jamison if the items belonged to Jamison's girlfriend, Jamison admitted to Olinger that the items belonged to him. Jamison refused to tell Olinger where the drugs came from, and Olinger's testimony was, "they would kill him if he did." Jamison never denied knowing that the drugs were in the trunk. Jamison told Olinger no one was in the car but him from the time he picked up the car from Early until he was arrested. Near the end of the interview, Jamison stated that someone else put the drugs in the trunk of the car but did not elaborate. Olinger showed Jamison the set of keys that were removed from the black bag in the trunk, and Jamison denied having seen the keys before.

{¶ 9} At trial, Jenille Early testified that she loaned Jamison the car so that he could go get some money orders for Early and some cigarettes for himself. Early testified that the black case was not in the trunk of her car when she loaned the car to Jamison. Hieber and Sargent also testified at trial regarding the traffic stop of Jamison. Craig Stiver, an evidence technician for the City of Dayton Police Department, testified that he processed the weapon found in the car for fingerprints and did not obtain a print. Timothy Duerr, a fire arms and tool mark examiner with the Miami Valley Regional Crime Laboratory in Dayton, testified that he determined that the weapon retrieved from the scene was operable. Gary Shaffer, a forensic

chemist with the Miami Valley Regional Crime Laboratory, testified that he processed the drugs that were removed from the scene.

{¶ 10} Margaret Ann Jamison, Jamison's mother, testified that Olinger interviewed her at her home and showed her the set of keys removed from the black bag. According to Jamison's mother, she told Olinger that she had seen the dinosaur toy before but did not remember where she had seen it. Olinger, however, testified that, in the course of the interview, he lied to Jamison's mother, telling her that he found the set of keys in the interview room at the police station and did not know whose they were. Olinger asked Jamison's mother if the keys belonged to Jamison, and Olinger stated that she told him that she had seen the dinosaur toy on Jamison's key chain, and that Jamison played with the dinosaur toy with her grandson two days before the interview.

{¶ 11} Patrice Phillips, an "acquaintance, not friend necessarily" of Jamison's, testified that she and Raymond Sokoloski were "out, basically getting high," when they observed Jamison in Early's car. Phillips allegedly flagged Jamison down and asked him for a ride to Sokoloski's apartment. Jamison initially refused, according to Phillips, but then agreed when she gave him ten dollars for gas. Phillips stated that Sokoloski was carrying a black case and a duffel bag that he had just removed from a nearby crack house. When the couple got into Early's car, Phillips testified that Jamison told Sokoloski to put the bags in the trunk. When Jamison dropped Phillips and Sokoloski off, Sokoloski removed the duffel bag from the trunk but not the black bag, according to Phillips. Phillips stated that she came forward because she wanted to "do what's right." She further stated that the last time she saw Jamison, other than in court, was the day she and Sokoloski got into Early's car with him.

{¶ 12} Later in the trial, in rebuttal, Thomas Oney, a police officer with the City of Dayton, testified that on March 3, 2007, just a few days before trial, Phillips was observed in a hotel room with Jamison and another individual.

{¶ 13} Wanda Johnson, another acquaintance of Jamison's, testified that she was at Sokoloski's home, waiting to see Sokoloski, when Jamison dropped off Sokoloski and Phillips. Johnson stated that Sokoloski asked her for Jamison's phone number, explaining to her that Sokoloski had left a bag in Early's car. Johnson stated that she tried to contact Jamison three or four times for Sokoloski via cell phone, but Johnson was unable to reach Jamison.

{¶ 14} Jamison asserts six assignments of error. Jamison's first assignment of error is as follows:

{¶ 15} "THE TRIAL COURT ERRED IN OVERRULING THE APPELLANT'S MOTION TO SUPPRESS."

{¶ 16} According to Jamison, Hieber lacked reasonable suspicion to stop Jamison, and the trial court accordingly erred in not suppressing the evidence recovered as a result of the inventory search. Specifically, Jamison argues that Hieber's testimony regarding Jamison's speed and the distance over which Hieber observed Jamison is not plausible, and that Hieber "did not actually see the Defendant commit any traffic violations." Jamison argues that the stop of Jamison was "a pretextual stop." In response, the State argues that the trial court did not err in crediting Hieber's testimony regarding Jamison's driving over the testimony of Jamison.

{¶ 17} "Appellate courts give great deference to the factual findings of the trier of facts. (Internal citations omitted). At a suppression hearing, the trial court serves as the trier of fact, and must judge the credibility of witnesses and the weight of the evidence. (Internal citations

omitted). The trial court is in the best position to resolve questions of fact and evaluate witness credibility. (Internal citations omitted). In reviewing a trial court's decision on a motion to suppress, an appellate court accepts the trial court's factual findings, relies on the trial court's ability to assess the credibility of witnesses, and independently determines whether the trial court applied the proper legal standard to the facts as found. (Internal citations omitted). An appellate court is bound to accept the trial court's factual findings as long as they are supported by competent, credible evidence." (Internal citations omitted). *State v. Purser*, Greene App. No. 2006 CA 14, 2007-Ohio-192.

{¶ 18} "A routine inventory search of a lawfully impounded vehicle is a valid exception to the Fourth Amendment warrant requirement when that search is conducted in good faith, not as subterfuge for an evidentiary search, and in accordance with standardized police procedures." *State v. Earley*, Montgomery App. No. 19161, 2002-Ohio-4112.

{¶ 19} At the suppression hearing, Hieber testified that he "paced" Jamison on North Main Street at a speed of 50 - 55 miles per hour, in 35 mile per hour zone, over an estimated distance of "anywhere between five or 700 yards." Hieber stated that Jamison made several lane changes without signaling. Hieber also described the Dayton police department's standard tow policy and his compliance therewith when he inventoried the vehicle once Jamison was arrested. Jamison maintained that he did not commit any traffic violations on March 31, 2006, and that he drove at a speed of 30 miles an hour while Hieber followed him on North Main Street.

{¶ 20} In overruling Jamison's motion to suppress, the trial court determined that Hieber had reasonable suspicion to stop Jamison's vehicle after observing Jamison

speeding and illegally changing lanes, "pursuant to *Terry v. Ohio*, (1968), 392 U.S. 1." Further, the trial court determined, upon discovering that Jamison was driving with a suspended driver's license, Officer Hieber had probable cause to arrest Jamison. In addition, since the vehicle was to be impounded, the trial court determined that the inventory exception to the Fourth Amendment warrant requirement allowed Hieber to search the entire vehicle, including the trunk and containers in the trunk, without a warrant, in order to produce an inventory of the vehicle's contents.

{¶ 21} We have thoroughly reviewed the record herein and, relying upon the trial court's ability to assess the credibility of Jamison's and Hieber's testimony regarding Jamison's driving, we conclude that Hieber had probable cause to stop Jamison. Further, the vehicle Jamison was driving was properly impounded following Jamison's arrest, and Hieber was permitted to inventory the vehicle's contents. There being no Fourth Amendment violation, the trial court properly overruled Jamison's motion to suppress. Jamison's first assignment of error is overruled.

{¶ 22} Jamison's second assignment of error is as follows:

{¶ 23} "THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S MOTION FOR ACQUITTAL SINCE THE STATE FAILED TO SUPPLY SUFFICIENT EVIDENCE AS TO ALL THE ELEMENTS NECESSARY TO SUPPORT THE CHARGES AGAINST THE DEFENDANT."

{¶ 24} Jamison argues that the fact that he was "in close proximity to the drugs and weapon" is insufficient to support the charges against him, and that the State "failed to present sufficient evidence to prove the elements of knowledge and possession." In response, the State argues that it sufficiently established Jamison's

dominion and control over the items in the trunk; Jamison was the only occupant of the car when it was stopped, Jamison admitted to Olinger that the drugs were his, and Jamison's key chain was found in the bag in the trunk.

{¶ 25} "In reviewing a claim of insufficient evidence, '[t]he relevant inquiry is whether, after reviewing 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. McKnight*, 107 Ohio St.3d 101, 112, 837 N.E.2d 315, 2005-Ohio-6046 (Internal citations omitted).

{¶ 26} "The law is clear that '[n]o person shall knowingly * * * possess or use a controlled

{¶ 27} substance.' R.C. 2925.11(A). 'A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.' R.C. 2901.22(B). 'Possess' or 'possession' means having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found.' R.C. 2925.01(k).

{¶ 28} "'Possession * * * may be either actual physical possession or constructive possession. A person has constructive possession of an item when he is conscious of the presence of the object and able to exercise dominion and control over that item, even if it is not within his immediate physical possession.' (Citations omitted.) * * * 'The State may prove dominion and control solely through circumstantial evidence.'" *State v. Dillard*, Montgomery App. No. 21704, 2007-Ohio-5651.

{¶ 29} We agree with the State that sufficient evidence was adduced to establish Jamison's constructive possession of the items in the black bag in the trunk of the car. Reviewing the evidence in a light most favorable to the State, while Phillips testified that Sokoloski put the bag into the trunk, Oney's rebuttal testimony regarding Phillips' presence in a hotel room with Jamison days before trial likely impacted the jury's assessment of her credibility. While Jamison's mother, who has an interest in protecting her son, testified that she did not know where she had seen the dinosaur toy attached to the key chain, Olinger testified that, before Jamison's mother understood the significance of the dinosaur toy in this matter, she stated that she recognized the dinosaur toy as Jamison's and that she recently observed Jamison playing with it with her grandson. Finally, according to Olinger, Jamison stated that he was the sole occupant of the vehicle on March 31, 2006, and he admitted that the contents of the bag were his. Olinger noted that Jamison never denied knowledge that the drugs were in the trunk. Given the sufficient evidence before the jury, any rational trier of fact could have found that the State proved that Jamison knowingly possessed the items in the trunk beyond a reasonable doubt. Since the State established Jamison's possession of the contents of the black bag, the trial court did not err in overruling his motion for acquittal. Jamison's second assignment of error is overruled.

{¶ 30} Jamison's third assignment of error is as follows:

{¶ 31} "THE JURY'S VERDICTS SHOULD BE REVERSED AS THEY WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 32} Jamison argues that both Hieber's and Olinger's testimony "conflicted greatly," and that the jury lost its way in finding Jamison guilty given the officers'

inconsistent testimony. Specifically, Jamison argues that Hieber lacks credibility because he stated on direct examination that he did not find anything in the passenger compartment of the vehicle, and then on redirect, he stated that there was a white flaky substance on the carpet within the passenger compartment. Further, Jamison argues that Hieber's testimony should be discredited because he initially stated that he "pulled out a red plastic egg [from the black bag] and looked at it" and then later stated "that he did not have to move the bag in any way to see the plastic egg." Finally, Jamison argues that Hieber's testimony that he observed Stiver checking the Dr. Pepper can, the scales and the weapon for fingerprints was contradicted by Stiver's testimony that he only checked the gun for fingerprints.

{¶ 33} As to Olinger, Jamison argues that his mother's testimony that she did not know where she had seen the dinosaur toy refutes Olinger's statement that Jamison's mother recognized the dinosaur toy on the key chain. Jamison further argues that the record does not support Olinger's testimony that Jamison admitted possession of the drugs, and that "these alleged admissions were made at the same time that the Detective threatened the Defendant that he would involve his girlfriend in the investigation."

{¶ 34} The State responds that "the jury found the law enforcement witnesses more credible than the lay witnesses who testified."

{¶ 35} "When an appellate court analyzes a conviction under the manifest weight of the evidence standard it must review the entire record, weigh all of the evidence and all the reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the fact finder clearly lost

its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. (Internal citations omitted). Only in exceptional cases, where the evidence 'weighs heavily against the conviction,' should an appellate court overturn the trial court's judgment." *State v. Dossett*, Montgomery App. No. 20997, 2006-Ohio-3367.

{¶ 36} The credibility of the witnesses and the weight to be given to the evidence are matters for the trier of facts to resolve. *State v. DeHass* (1997), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. "Because the factfinder * * * has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288. This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of fact lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 37} On direct examination, Hieber testified that the passenger compartment of the vehicle was very clean, and that he did not locate anything in that area of the car during his inventory search. On redirect examination, Hieber stated, "The vehicle had two seats with an armrest that was in the – between the two. And between the passenger right front seat and the armrest, there was some white flaky substances on

the carpet." This inconsistency in Hieber's testimony is minor; the issue before us is whether or not Jamison's conviction is against the manifest weight of the evidence, and the jury was free to find Hieber's testimony credible despite such a minor inconsistency. Further, the charges brought against Jamison were solely based on the items found in the black bag in the trunk of the car and not on the substance, if there was any, in the passenger compartment. We note that Sargent testified that Hieber showed Sargent "some white flakes or crumbs that were on the floorboard" in the course of the inventory search of the passenger compartment.

{¶ 38} Additionally, having reviewed the record, we do not find Hieber's testimony regarding the container in the side pouch of the bag to be inconsistent as Jamison argues. Hieber stated on direct examination that the zipper on the side of the bag was unzipped, and that he observed "a small plastic container that had a pinkish red top on it. * * * It caught my attention because it was red. I pulled it out and I looked. It looked as though there was small gel caps, or capsules, inside of it - - which looked to me like there were heroin gel caps in it." Later during direct examination, Hieber again stated that the side pouch was open and that he did not have to move the bag in any way to see "that plastic egg." We agree with the State's argument that Hieber's stated ability to observe the egg inside the bag without moving the bag is not inconsistent with his need to remove the egg for further inspection.

{¶ 39} Finally, regarding the fingerprinting of any items removed from the black bag, Hieber's testimony makes clear that he contacted an "E-Crew" to process the contents of the bag for prints, and that Hieber was not responsible for fingerprinting any of the items. When asked if the Dr. Pepper can, scale, gun and other items were

individually tested for fingerprints, Hieber responded, “I believe it was,” and “I believe so.” Hieber also indicated, “I saw the E-Crew evidence technician checking the contents of the bag with the powder,” and “We had called for an E-Crew. We asked them to come to check for prints and he had the dust and he was dusting the items in the bag.” Stiver testified that he only checked the gun for fingerprints. We note that Sargent testified that he only observed the E-Crew technician test the gun for fingerprints. Again, such a minor inconsistency between Hieber and Stiver’s testimony does not establish that Jamison’s conviction is against the manifest weight of the evidence; Hieber was not responsible for obtaining the prints, and the jury was free to weigh his testimony regarding the process accordingly.

{¶ 40} Regarding the inconsistency between Olinger’s testimony and that of Jamison’s mother, Olinger testified, “She told me that she didn’t recognize the keys but she recognized the dinosaur being on his key ring. At that point, I handed her the keys and I asked her how she recognized the dinosaur. And without me telling her anything, she opened the mouth and said, there’s a laser light in here. He played with the two-year-old two days ago.” In contrast, Jamison’s mother testified that she had “seen toys like that before, * * * I don’t know where I’ve seen toys like this before. I got a three-year-old grandson that has lots and lots of toys. It could’ve been his. I had a boyfriend at that time that might’ve been on his key ring or I might’ve seen it in a store coming through the cashier’s line. I don’t know where I seen it, but I seen it before.” Jamison’s mother denied telling Olinger that she had seen Jamison playing with the toy with her grandson. The jury was free to find Olinger’s testimony more credible than that of Jamison’s mother, and we cannot say that the jury lost its way in concluding that

Jamison's mother changed her story to protect her son once she learned of the significance of the dinosaur toy.

{¶ 41} Finally, Jamison's argument that the record does not support Olinger's testimony that Jamison admitted ownership of the drugs lacks merit. According to Olinger, when he confronted Jamison with the photographs, Jamison "immediately put his head down and he stopped talking to me. And I asked him, do I need to talk to your girlfriend. Could it be hers? And at that point he did admit to having the stuff. He stated that, you got me. You know, it's not hers. I'm the only one involved. He went on and on." The jury was free to believe Olinger's testimony that Jamison admitted owning the drugs. Further, the veracity of Phillips, who testified that Sokoloski put the drugs in the trunk and left them there accidentally, was challenged by the testimony of Oney. Even if the jury chose to believe Phillips that Sokoloski put the black bag in the trunk of the car, the jury could also believe that Sokoloski did so at Jamison's request.

{¶ 42} Having thoroughly reviewed the entire record, we cannot say that the jury lost its way and created such a manifest miscarriage of justice that Jamison's conviction must be reversed and a new trial ordered. Jamison's argument that his conviction is against the manifest weight of the evidence fails, and Jamison's third assignment of error is overruled.

{¶ 43} Jamison fourth assignment of error is as follows:

{¶ 44} "THE PROSECUTOR MADE IMPROPER REMARKS DURING CLOSING ARGUMENT THAT PREJUDICIALLY AFFECTED SUBSTANTIAL RIGHTS OF THE APPELLANT AND AMOUNTED TO PROSECUTORIAL MISCONDUCT."

{¶ 45} According to Jamison, the prosecutor erred when she stated, "this was

not a routine traffic stop. This was a drug bust. This was a weapons bust." Jamison also asserts that the prosecutor erred when she stated that Jamison confessed to the offenses, stipulated to the existence of the drugs, and knew that they were in the trunk with the gun, since "[t]here was no confession and there was no independent proof that the Defendant has any knowledge of the contents of the trunk or of the black cases in the trunk." In response, the State argues that Jamison waived his arguments in this assignment of error since he failed to object during the State's closing argument. The State also asserts that, even if the remarks were improper, the jury would have found Jamison guilty in their absence.

{¶ 46} "'The prosecution is normally entitled to a certain degree of latitude in its concluding remarks.'" *State v. Givens*, Clark App. No. 2006 CA 76, 2007-Ohio-4201, quoting *State v. Baker*, Greene App. No. 2004 CA 29, 2005-Ohio-45. "The test regarding prosecutorial misconduct is 'whether remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused.' (Citations omitted). The touchstone of analysis 'is the fairness of the trial, not the culpability of the prosecutor.' (Citations omitted). When an appellate court reviews allegations of prosecutorial misconduct, it reviews the alleged misconduct in the context of the entire trial. (Citation omitted). A defendant's conviction will not be reversed when it is clear beyond a reasonable doubt that the jury would have found the defendant guilty even absent the prosecutor's comments. Furthermore, failure to object to the alleged wrongful conduct waives all but plain error for the purposes of appellate review. (Citation omitted). In order to find plain error, the reviewing court must find that 'but for the error, the outcome of the trial clearly would have been otherwise.'" *State v. Gay*,

Montgomery App. No. 21581, 2007-Ohio-2420.

{¶ 47} Having thoroughly reviewed the transcript of the State's closing argument, we agree with the State that, given Jamison's failure to object to the prosecutor's remarks, he has waived his right to assign error to them herein. Further, we see no plain error. It seems unlikely that these remarks influenced the verdict. Jamison's fourth assignment of error is overruled.

{¶ 48} We will consider Jamison's fifth and sixth assignments of error together. They are as follows:

{¶ 49} " THE APPELLANT WAS DENIED HIS DUE PROCESS RIGHTS UNDER THE UNITED STATES AND OHIO CONSTITUTIONS WHEN HE WAS DENIED THE RIGHT TO CONFRONT A KEY WITNESS IN HIS DEFENSE."

{¶ 50} And,

{¶ 51} "THE DEFENDANT WAS DEPRIVED A FAIR TRIAL THROUGH HIS COUNSEL'S INEFFECTIVE ASSISTANCE IN RELEASING A WITNESS FROM SUBPOENA ON SELF-INCRIMINATION GROUNDS WITHOUT ANY HEARING ON THE ISSUE."

{¶ 52} Jamison's fifth and sixth assignments of error involve Sokoloski, who was subpoenaed to testify for Jamison and who allegedly would have testified, consistent with Phillips' testimony, that he, Sokoloski, retrieved the black bag from a crack house and placed it in the trunk of the car Jamison was driving. After being advised of his Fifth Amendment right not to incriminate himself, Sokoloski indicated to his appointed public defender that he would invoke that right were he called to the stand, and counsel for Jamison released Sokoloski from his subpoena.

{¶ 53} Jamison argues that the court's failure to call Sokoloski and confirm that he would invoke his Fifth Amendment right and defense counsel's decision to release Sokoloski from his subpoena deprived Jamison of a fair trial.

{¶ 54} The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor * * * ." As the State correctly notes, however, the right to compulsory process does not include the right to trump Sokoloski's constitutional protections. See, *State v. Kirk*, 72 Ohio St.3d 564, 1995-Ohio-204, 651 N.E.2d 986.

{¶ 55} The record reveals that the following exchange regarding Sokoloski's testimony occurred between the court and counsel for Jamison, outside of the presence of the jury:

{¶ 56} "THE COURT: For the record, I want to indicate that defendant intended to call as a witness Raymond Sokoloski. * * * And based upon what counsel had said in opening statements and from conversations off the record, there was the possibility that Mr. Sokoloski may be asked questions in which answers may tend to incriminate him. * * *

{¶ 57} So the court thought it best to have the witness talk to a public defender so he could be advised of his rights regarding self-incrimination. And Mr. Sokoloski had an opportunity to [speak] with Julie Dubel from the Public Defender's office. And after discussions with her, [he] has decided that he would exercise his rights. And upon so advising defense counsel, Mr. Rion * * * has decided then not to call Mr. Sokoloski as a witness in this case and released him from the subpoena. Is that - - did

I say it correctly, Mr. Rion?

{¶ 58} "MR. RION: Yes."

{¶ 59} Later in the proceedings, the trial court allowed Jamison himself to address the dismissal of Sokoloski as witness. Jamison characterized Sokoloski's invocation of the Fifth Amendment as "them scaring that witness off," however the trial court explained to Jamison that Sokoloski had a Fifth Amendment right not to incriminate himself. Jamison, perhaps unrealistically, was hopeful Sokoloski would give testimony that exculpated him. However, this apparently was not going to happen.

{¶ 60} Counsel for Jamison elected to withdraw the subpoena and chose to release Sokoloski as a witness. While Jamison argued that Sokoloski chose not to testify because he was threatened, nothing in the record supports this argument. The record instead reveals that the trial court acted appropriately in appointing a public defender to advise Sokoloski of his rights. The fact that Sokoloski was not placed under oath to confirm both the representations made by the public defender and the court that Sokoloski intended to invoke the Fifth Amendment does not constitute a violation of Jamison's rights to due process or the Sixth Amendment. In fact, the law would have permitted the trial judge to exclude Sokoloski as a witness entirely if all he would do was invoke his Fifth Amendment right to be free from self-incrimination. *Kirk.* Lastly, Jamison cannot now complain of Sokoloski's release from subpoena, as his counsel voluntarily released him, and at the time of Sokoloski's release, Jamison did not object.

{¶ 61} With respect to the claim of ineffective assistance, "We review the alleged instances of ineffective assistance of trial counsel under the two prong analysis

set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, and adopted by the Supreme Court of Ohio in *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. Pursuant to those cases, trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. *Strickland*, 466 U.S. at 688. To reverse a conviction based on ineffective assistance of counsel, it must be demonstrated that trial counsel's conduct fell below an objective standard of reasonableness and that his errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. *Id.* Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel." (Internal citation omitted). *State v. Mitchell*, Montgomery App. No. 21957, 2008-Ohio-493.

{¶ 62} Jamison's failure to call Sokoloski, a witness who indicated he would invoke the Fifth Amendment, standing alone does not rise to the level of ineffective assistance. Even if we were to conclude that counsel was deficient in failing to make a proper evidentiary record of Sokoloski's invocation of his rights to be free from self-incrimination, we cannot say the outcome of the trial would have been different. Evidence of Jamison's guilt was overwhelming, given the physical evidence and admissions. There being no merit to Jamison's fifth and sixth assignments of error, they are overruled.

Judgment affirmed.

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WOLFF, P.J. and FAIN, J., concur.

Copies mailed to:

Jill R. Sink
Marshall G. Lachman
Hon. Charles Wittenberg,
Visiting Judge