[Cite as *State v. Thompson*, 2010-Ohio-4535.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 23581

v. : T.C. NO. 2009 CR 01237

RYAN KEITH THOMPSON : (Criminal appeal from Common Pleas Court)

Defendant-Appellant :

:

. . . . . .

O P I N I O N

Rendered on the 24th day of September, 2010.

. . . . . .

R. LYNN NOTHSTINE, Atty. Reg. No. 0061560, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

SCOTT N. BLAUVELT, Atty. Reg. No. 0068177, 246 High Street, Hamilton, Ohio 45011
Attorney for Defendant-Appellant

. . . . . .

FROELICH, J.

{¶ 1} Ryan K. Thompson was convicted after a jury trial in the Montgomery County Court of Common Pleas of one count of possession of crack cocaine, a second degree felony. The trial court sentenced him to a mandatory term of four years in prison, ordered him to pay a mandatory fine of $10,000, and suspended his driver's license for four

years.

{¶ 2} Thompson appeals from his conviction, raising four assignments of error. For the following reasons, the trial court's judgment will be affirmed.

I

{¶ 3} We begin with Thompson's fourth assignment of error, which states:

{¶ 4} "THE PROSECUTION FAILED TO PRESENT SUFFICIENT EVIDENCE OF GUILT AT TRIAL AND THE JURY VERDICT WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 5} Thompson claims that his conviction was based on insufficient evidence and was against the manifest weight of the evidence. The State's evidence at trial, if believed, established the following facts:

{¶ 6} At approximately 2:40 p.m. on April 15, 2009, Dayton Police Detectives Ronald Velez and Eric Steckel were patrolling the area of Sylvan Drive and Almond Avenue in Dayton, driving in a marked cruiser and wearing police uniforms. It had rained earlier in the day, it was drizzling at that time, and the ground was very wet and soggy.

{¶ 7} As the detectives drove down Sylvan Drive, they observed a black Dodge Charger with darkly tinted windows driving in the opposite direction. As the Charger passed, Detective Velez was unable to see inside the vehicle due to the heavy tint. Velez, who was driving, turned the cruiser around so that the detectives could cite the Charger's driver, who was later identified as Thompson, for the dark window tint.

{¶ 8} When the detectives caught up with the Charger, the vehicle had just parked in front of 4314 Sylvan Drive. Detective Velez pulled behind the Charger, initiated the

emergency lights, and gave a short burst of the siren in order to notify the driver of their presence. Thompson opened the door and exited his vehicle. The detectives also got out of their vehicle and asked Thompson to come to the cruiser. Thompson looked "straight at" Detective Velez for "a couple seconds" and then turned and fled down Sylvan. Detective Velez pursued Thompson on foot; Detective Steckel went to the driver's side of the cruiser so that he could follow in the vehicle.

{¶ 9} As Detective Velez chased Thompson, he repeatedly told Thompson, "Stop. This is the Dayton Police Department." Thompson failed to comply and, as he ran, he "started digging in his right pocket." Thompson ran from the street onto the front lawn of 4302 Sylvan, a vacant house. As Thompson ran, he began to slip on the wet grass. Detective Velez observed Thompson make a throwing motion with his right hand toward the evergreen tree on the front lawn. Thompson was apprehended approximately two to three feet from the pine tree, three or four houses away from the Charger. Thompson was handcuffed with the assistance of Detective Steckel, who had driven up the street in the cruiser.

{¶ 10} After Thompson was handcuffed, Detective Velez looked "real quick" to the right side of where Thompson was apprehended. The detective saw a set of keys, picked them up, and then began to walk Thompson back to the cruiser with Detective Steckel. Thompson began to yell that his shoulder had been separated. In response, the detectives adjusted his handcuffs by adding a second set and placed Thompson in the cruiser.

{¶ 11} While this was occurring, Anthony Wilkins approached the detectives and asked for the keys to the Charger that Thompson had been driving. The detectives asked

Wilkins to return to his house; they did not give Wilkins the keys to Thompson's vehicle. Another individual also approached and asked Detective Velez if he could ask Thompson for a phone number; Velez did not permit the individual to speak with Thompson. The detectives went to the Charger to secure the vehicle. The detectives subsequently conducted a thorough search of the vehicle which, according to the detectives, took approximately five minutes. Nothing illegal was found in the car.

{¶ 12} Afterward, Detective Steckel "retraced the footsteps of [Detective] Velez's foot chase" and searched the area where Detective Velez had taken Thompson into custody. Detective Steckel testified that no one else had been in the front yard of 4302 Sylvan between the time that Thompson had run and the time he (Steckel) went back to search the area. Detective Steckel found a bag of what appeared to be crack cocaine lying under the branches of the pine tree. The bottom of the bag appeared to be wet and the top of the baggie was dry; there was no debris on top of the baggie. Upon testing, the bag was found to contain 19.75 grams of crack cocaine, which was worth approximately $2,000. During a search of Thompson incident to his arrest, Detective Velez found $3,800, packaged in two bundles of $1,000 and one bundle of $1,800; Detective Velez indicated that bundles of $1,000 are often carried to facilitate large drug transactions.

{¶ 13} After the State rested, Thompson presented two witnesses, Tiffany and Anthony Wilkins, both residents of 4314 Sylvan Drive, to testify on his behalf. Tiffany Wilkins testified that at approximately 2:40 p.m. on April 15, 2009, Thompson came to her home to pick up her father, Anthony Wilkins. Tiffany observed through the front screen door that Thompson was waiting in his car. She walked away from the door to prepare a

bottle for her baby cousin, and when she returned, she saw Thompson being handcuffed by police officers. Tiffany did not see Thompson get out of his car. Tiffany observed the officers take Thompson to their police cruiser, which was parked in front of her home behind Thompson's car. Tiffany indicated that, after putting Thompson in the cruiser, they searched Thompson's vehicle; the search lasted approximately twenty minutes. Tiffany described Thompson as a close family friend who socializes with her father several days per week.

{¶ 14} According to Anthony Wilkins, at approximately 2:40 p.m. on April 15, 2009, he was waiting in his house for Thompson, his best friend who he had known since junior high school, to pick him up. At that time, Anthony's mother, who also resides at 4314 Sylvan, told Anthony that the police just came down the street. When Anthony looked outside, Thompson was two houses down the street, in handcuffs, and the police were bringing him back to their cruiser. Anthony stated that the police cruiser was parked behind Thompson's car, which was in front of his (Anthony's) house. After Thompson was placed in the cruiser, the police spent fifteen to twenty minutes searching Thompson's vehicle. Afterward, Anthony observed one of the officers walk to 4302 Sylvan, the "abandoned" house where Thompson had been arrested, and return with a baggie. Anthony testified that he had approached the officers to get his (Anthony's) phones and CDs out of Thompson's car; the officers told him to "step back" and Anthony returned to his house.

{¶ 15} After deliberations, the jury convicted Thompson of possession of crack cocaine. In a separate interrogatory, the jury found that Thompson had "in his possession crack cocaine in an amount more than or equal to ten grams but less than 25 grams."

Thompson claims that the State presented insufficient evidence that Thompson possessed the crack cocaine and that his conviction was against the manifest weight of the evidence.

{¶ 16} "A sufficiency of the evidence argument disputes whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law." *State v. Wilson*, Montgomery App. No. 22581, 2009-Ohio-525, ¶10, citing *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52. When reviewing whether the State has presented sufficient evidence to support a conviction, the relevant inquiry is whether any rational finder of fact, after viewing the evidence in a light most favorable to the State, could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 430, 1997-Ohio-372, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d. 560. A guilty verdict will not be disturbed on appeal unless "reasonable minds could not reach the conclusion reached by the trier-of-fact." Id.

{¶ 17} In contrast to the sufficiency of the evidence standard, "a weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive." *Wilson* at ¶12. When evaluating whether a conviction is contrary to the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins*, 78 Ohio St.3d at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 18} Because the trier of fact sees and hears the witnesses at trial, we must defer to the factfinder's decisions whether, and to what extent, to credit the testimony of particular witnesses. *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288. However, we may determine which of several competing inferences suggested by the evidence should be preferred. Id.

{¶ 19} The fact that the evidence is subject to different interpretations does not render the conviction against the manifest weight of the evidence. *Wilson* at ¶14. A judgment of conviction should be reversed as being against the manifest weight of the evidence only in exceptional circumstances. *Martin*, 20 Ohio App.3d at 175.

{¶ 20} Thompson was convicted of violating R.C. 2925.11(A). To establish a violation of that statute, the State was required to prove beyond a reasonable doubt that Thompson knowingly possessed the plastic baggie containing crack cocaine that the police found under the pine tree. R.C. 2925.11(A); *State v. Byrd*, Montgomery App. No. 23323, 2010-Ohio-2128, ¶13. The relevant inquiry is not whether Thompson had possession of the crack cocaine when it was found; rather, the State must prove that Thompson possessed the crack cocaine before police found it. *Byrd* at ¶16.

{¶ 21} "Possession" is defined as "having control over a thing or substance." R.C. 2925.01(K). However, possession "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." Id. Under R.C. 2901.22(B), "[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."

{¶ 22} The State's evidence, construed in the light most favorable to the State, was sufficient to establish beyond a reasonable doubt that Thompson possessed the crack cocaine found beneath the evergreen tree. Detective Velez, who was chasing Thompson on foot, observed Thompson "digging" into his pocket as he ran and, when Thompson began to slip, Velez saw Thompson make a throwing motion toward the pine tree. The baggie containing crack cocaine was located under the evergreen tree located approximately two to three feet from where Thompson was apprehended.

{¶ 23} In addition, the baggie was dry, except for the portion that had touched the ground, and there was no debris on the baggie. Considering that it had been raining, the ground and trees were wet, and it was drizzling when Thompson was apprehended, these facts strongly suggested that the baggie had been placed under the tree very shortly before it was retrieved by Detective Steckel. Steckel did not see anyone at 4302 Sylvan Drive between Thompson's apprehension and his search of that area. Based on this evidence, the State presented sufficient evidence that Thompson had possessed the baggie of crack cocaine and had thrown it toward the evergreen tree immediately before his apprehension by Detective Velez.

{¶ 24} Moreover, Thompson had fled from the police when the detectives initially exited their cruiser. Detective Steckel testified, without objection, that "people that run from the police either have three things[:] either have a warrant, have a gun, or have drugs on them, on their person;" Thompson had a valid driver's license and there were no warrants for his arrest. The jury was permitted to infer

guilt from Thompson's flight from the officers. *State v. Beal*, Clark App. No. 07-CA-86, 2008-Ohio-4007, ¶7.

{¶ 25} Thompson argues that his conviction was against the manifest weight of the evidence, because (1) his arrest occurred in a high crime area, (2) the weight of the evidence indicated that the search of Thompson's vehicle took approximately fifteen to twenty minutes, (3) there was ample time for someone else to place the crack cocaine in the location where the baggie was found, and (4) "it cannot be believed that [the police] were able to consistently and diligently watch the area where the drugs were located while also diligently conduct[ing] the thorough search of the vehicle described in their testimony."

{¶ 26} This was not an implausible defense and, although the jury could have chosen to believe the Wilkinses' testimony that the search of Thompson's vehicle took longer than indicated by the officers, we cannot conclude that the jury "lost its way" when it convicted Thompson of possession of crack cocaine. The jury was presented with strong circumstantial evidence that Thompson committed the offense (e.g., Thompson's flight, his throwing motion toward the evergreen tree, and the condition of the baggie upon its discovery), and there was no evidence that anyone entered the front yard of 4302 Sylvan while Thompson's car was being searched.

{¶ 27} The fourth assignment of error is overruled.

II

{¶ 28} Thompson's first assignment of error states:

{¶ 29} "THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE AND

VIOLATED HIS RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION WHEN IT PROHIBITED THE ELICITATION OF TESTIMONY REGARDING APPELLANT'S FAILURE TO ADMIT POSSESSION OF CRACK COCAINE."

{¶ 30} In his first assignment of error, Thompson claims that the trial court erred in prohibiting him from eliciting testimony during his cross-examination of the police detectives that he did not admit ownership or possession of the crack cocaine.

{¶ 31} During opening statements, defense counsel attempted to argue that Thompson "emphatically" denied possessing the crack cocaine. The trial court prohibited that argument. The court reasoned that, under the hearsay rule, Thompson could not introduce his own statements without testifying on his own behalf. At the conclusion of opening statements, the State made an oral motion in limine to exclude Thompson's statements to the detectives, arguing that Thompson was prohibited from introducing his own self-serving statements through the State's witnesses. The trial court granted the motion.

{¶ 32} During Thompson's cross-examination of Detective Steckel, defense counsel asked the detective, "And my client never made any admissions to you ***." The prosecutor objected to the question, and the court sustained the objection, stating in a sidebar discussion that defense counsel was trying "to get your client's hearsay in by a negative question." In discussions outside the hearing of the jury after the State rested, the trial court again told defense counsel that he could not

argue during closing arguments that Thompson did not confess.

{¶ 33} Thompson asserts that his failure to make an admission was not a "statement" within the meaning of the hearsay rule and was distinguishable from an express denial of culpability.

{¶ 34} Evid.R. 801(C) defines hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A "statement," as included in the definition of hearsay, is an oral or written assertion or nonverbal conduct of a person if that conduct is intended by him as an assertion. Evid.R. 801(A). "An assertion, for hearsay purposes, is a statement about an event that happened or a condition that existed." *In re K.B.*, Franklin App. No. 06AP-04, 2006-Ohio-5205, ¶23 citing *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶61.

{¶ 35} "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, ¶50. "A trial court's discretion to admit or exclude relevant evidence does not include the discretion to admit hearsay; Evid.R. 802 mandates the exclusion of hearsay unless any exceptions apply." *In re Lane*, Washington App. No. 02CA61, 2003-Ohio-3755, ¶11.

{¶ 36} Certain statements are excluded from the definition of hearsay, including statements of a party-opponent where the statement is offered against that party. Evid. R. 801(D)(2)(a). "It is on that basis that confessions are readily admitted. That does not mean that the reverse, a denial of civil or criminal liability, is likewise admissible. A denial does not have the same inherent reliability as a

person's admission against his own interest. It is, or at least very well may be, self-serving. Therefore, a denial remains inadmissible hearsay if the proponent offers the statement to prove the truth of the matter involved." *State v. Beeson*, Montgomery App. No. 19312, 2002-Ohio-4341, ¶55.

{¶ 37} Although the trial court correctly prohibited Thompson from eliciting from the officers any express statements that he made, defense counsel's question to Detective Steckel regarding whether Thompson made any admission does not violate the hearsay rule. Thompson's failure to admit that the drugs were his was not the same as a denial that he owned or possessed the drugs. The absence of an admission simply means that Thompson did not confess; Thompson's failure to confess was not a tacit assertion or "verbal act" of innocence.

{¶ 38} We question whether evidence that Thompson did not make any admission is even relevant to Thompson's guilt or innocence, in the absence of contrary evidence by the State that he did confess. Evidence that is not relevant is inadmissible. Evid.R. 402. Evidence is relevant only if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401.

{¶ 39} Thompson's failure to make any admissions did not tend to prove or disprove whether Thompson committed the offense. The State cannot use evidence of a defendant's silence or lack of denial in its case-in-chief since that puts the defendant in the position of having to choose between allowing the jury to infer guilt from his lack of denial or being forced to take the stand to explain his

apparent lack of denial and thereby surrendering his right not to testify. *State v. Perez*, Defiance App. No. 4-03-49, 2004-Ohio-4007, ¶20. See, also, *State v. Leach*, 102 Ohio St.3d 135, 2004-Ohio-2147; *State v. Riffle*, Medina App. No. 07CA0114-M, 2008-Ohio-4155. The question thus becomes whether the defendant can utilize his lack of admission as evidence from which the jury could infer lack of guilt.

{¶ 40} Silence, which in this case is what the jury would have been led to believe was Thompson's response, is of inherently dubious probative value and, at best, asks the jury to speculate. See, e.g., Thompson, Methinks the Lady Doth Protest Too Little: Reassessing the Probative Value of Silence (2008), 47 U.Louis.L.Rev. 21. As such, whatever probative value the lack of admission had with the facts before the trial court, it was substantially outweighed by the danger of confusing the issues or misleading the jury. Evid.R. 403(A). The trial court has broad discretion to determine whether probative evidence is substantially outweighed by its prejudicial effects. *State v. Diaz*, Montgomery App. No. 22604, 2009-Ohio-2738, ¶58, citing *State v. Jones*, 91 Ohio St.3d 335, 2001-Ohio-57. The trial court did not abuse its discretion in prohibiting Thompson from eliciting testimony from Detective Steckel regarding his (Thompson's) lack of an admission.

{¶ 41} Moreover, even assuming that the jury should have been allowed to construe the lack of an admission as a denial of the charge, the jury was already aware that Thompson denied the charge based on Thompson's having entered a not guilty plea and being on trial. Indeed, the jury was instructed that "[t]he plea of not guilty is a denial of the charge and puts in issue all of the essential elements of

the crime." And, the State did not present any evidence that Thompson made any admission, which the State would have offered had Thompson confessed. Accordingly, any error by the trial court in excluding evidence that Thompson did not make any admissions would be harmless.

{¶ 42} The first assignment of error is overruled.

III

{¶ 43} Thompson's second assignment of error states:

{¶ 44} "THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE AND VIOLATED HIS RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION WHEN IT IMPROPERLY LIMITED LEGITIMATE ASPECTS OF THE DEFENSE CLOSING ARGUMENT."

{¶ 45} In his second assignment of error, Thompson claims that the trial court erred when it sustained two of the State's objections to his closing argument.

{¶ 46} "The purpose of closing argument is to summarize the evidence at trial." *John F. Bushelman Const., Inc. v. Glacid Group, Inc.* (June 26, 1996), Hamilton App. Nos. C-950412, C-950438. Prosecutors and defense counsel are afforded a wide degree of latitude during closing arguments to address what the evidence has shown and what reasonable inferences may be drawn from that evidence. *State v. Black*, 181 Ohio App.3d 821, 2009-Ohio-1629, ¶33, citing *State v. Lott* (1990), 51 Ohio St.3d 160, 165.

{¶ 47} As summarized in Thompson's appellate brief, defense counsel attempted to argue during closing argument that "anyone could have been the

possessor of the cocaine in question when it was found, after a considerable delay, under the branches of an evergreen tree in the yard of a home located in a high crime area that had been abandoned for several years." Thompson claims that his right to make a closing argument was violated when the court: "(1) prohibited defense counsel from arguing that the house where cocaine was found was 'abandoned' despite the testimony of Anthony Wilkins that the house had been abandoned for three or four years; and, (2) sustained an objection to defense counsel's statement during closing argument that the prosecution bore the burden of proof beyond a reasonable doubt." Thompson asserts that the trial court exacerbated its error regarding defense counsel's argument on the State's burden of proof by stating, "It's not proper argument."

{¶ 48} The relevant portion of defense counsel's closing argument is as follows:[1]

{¶ 49} "MR. WELLER [DEFENSE COUNSEL]: *** They're asking us, we believe the State is, that when they apprehended Ryan by the tree (indiscernible) officers (indiscernible) missed the crack that there by the tree. They saw the keys. They missed the crack. (Indiscernible) Where did the drugs come from? I don't know. You don't know. Remember, when we (indiscernible) it's not our job to prove. It's their job.

{¶ 50} "Ladies and gentlemen, I submit to you (indiscernible) finding crack

[1] Thompson does not provide citations to the relevant portions of his closing argument in the trial transcript. We presume, as does the State, that he is contesting the objections appearing on pages 188-189 of the transcript.

(indiscernible) crack house –

{¶ 51} "MR. MUENNICH [PROSECUTOR]: Objection.

{¶ 52} "THE COURT: Sustained. The jury will disregard that. There was no evidence of that.

{¶ 53} "MR. WELLER: The house has been abandoned.

{¶ 54} "MR. MUENNICH: Objection, Your Honor.

{¶ 55} "THE COURT: Sustained.

{¶ 56} "MR. WELLER: Your Honor, there was testimony that house was abandoned.

{¶ 57} "THE COURT: The testimony was that no one was living there.

{¶ 58} "MR. WELLER: There's doubt here, folks, very much doubt. Now, Judge Huffman will instruct you on the law, what the prosecution must prove in drug possession. The Court will also instruct you that the State of Ohio has the burden of proof in this case. Although we presented evidence in this case, we're not required to prove anything. It's the State of Ohio that's required to prove that Ryan Thompson possessed drugs beyond a reasonable doubt. Now who among you can't say at this point that you have –

{¶ 59} "MR. MUENNICH: Objection.

{¶ 60} "THE COURT: Sustained.

{¶ 61} "MR. WELLER: – reasonable doubt –

{¶ 62} "MR. MUENNICH: Objection.

{¶ 63} "THE COURT: Sustained. It's not proper argument."

{¶ 64} With respect to defense counsel's discussion of the house at 4302

Sylvan Drive, the trial court properly curtailed any suggestion by defense counsel that the house was a crack house. The house was described by witnesses as "vacant" and "abandoned;" there was no testimony that illegal drugs were regularly sold from that house.

{¶ 65} Although the dialogue between defense counsel and the court could suggest the objection was to defense counsel's statement that there was testimony that the house was "abandoned," considering that Anthony Wilkins had testified that the property had been "abandoned" for three to four years, the objection and the trial court's ruling appear to have dealt with the speculative conclusion that it was a crack house. The difference between "abandoned" and "vacant" was insignificant given the issues at trial, but certainly sustaining the objection to any reference to a "crack house" was not error.

{¶ 66} Thompson further claims that the trial court erred in sustaining the State's objection to his argument that the State bore the burden of proof beyond a reasonable doubt. However, at least temporally, the State's objection was directed to counsel's subsequent statement, "Now who among you can't say at this point that you have reasonable doubt," not to defense counsel's correct statement that the State bore the burden to prove its case beyond a reasonable doubt.

{¶ 67} We do not understand the court's ruling. Perhaps there was a concern with a perceived appeal to individual jurors rather than the jury as a single entity; perhaps it was a concern that the jury (and individual jurors) are not to start to form an opinion as to the guilt or innocence of a defendant until all the evidence has been admitted, the arguments made, final instructions given, and deliberations

begin. The court did not explain its rationale, counsel did not ask to approach the bench, and we are left with the cold record. Moreover, the court instructed the jury at the end of the trial that the defendant's plea of not guilty placed the burden of proof on the State to prove each and every element of the offense charged beyond a reasonable doubt.

{¶ 68} Even if this individual ruling were error, it was harmless beyond a reasonable doubt.

{¶ 69} The second assignment of error is overruled.

IV

{¶ 70} Thompson's third assignment of error states:

{¶ 71} "APPELLANT'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION WAS VIOLATED TO HIS PREJUDICE WHERE THE PROSECUTING ATTORNEY ENGAGED IN REPEATED PERVASIVE MISCONDUCT DURING HIS REBUTTAL CLOSING ARGUMENT."

{¶ 72} In his third assignment of error, Thompson asserts that the prosecutor made remarks during his rebuttal closing argument that denigrated defense counsel, improperly bolstered the credibility of the law enforcement officers, and asserted facts not in evidence to attack Anthony Wilkins's credibility. Thompson claims that this conduct resulted in the denial of a fair trial.

{¶ 73} In reviewing claims of prosecutorial misconduct, the test is "whether remarks were improper and, if so, whether they prejudicially affected substantial

rights of the accused." *State v. Jones*, 90 Ohio St.3d 403, 420, 2000-Ohio-187. "The touchstone of analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" Id., quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 947, 71 L.Ed.2d 78. Where it is clear beyond a reasonable doubt that a jury would have found the defendant guilty even absent the alleged misconduct, the defendant has not been prejudiced and his conviction will not be reversed. See *State v. Loza* (1994), 71 Ohio St.3d 61, 78, 1994-Ohio-409. We review the alleged wrongful conduct in the context of the entire trial. *State v. Stevenson*, Greene App. No. 2007-CA-51, 2008-Ohio-2900, ¶42, citing *Darden v. Wainwright* (1986), 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144.

{¶ 74} First, Thompson asserts that the prosecutor, in his rebuttal argument, improperly accused defense counsel of calling the police officers liars and fabricators of evidence. During his closing argument, defense counsel addressed the credibility of the two detectives. Thompson's counsel argued that the detectives did not secure the scene where Thompson was apprehended and they did not "even think there's any drugs up there." The detectives then spent fifteen to twenty minutes "tearing the car up", and it wasn't "until they get all mad about that that they even think about it [i.e. that drugs may be near the evergreen tree]."

{¶ 75} Defense counsel further argued that there was a discrepancy between Detective Velez's testimony that he was in a marked police cruiser and the police report, which indicated that the police vehicle was unmarked; defense counsel argued that Velez reviewed the report before testifying, but "they're saying well, I don't really know if the reports are accurate, [Detective Velez] acted like he didn't

really care." Counsel also noted that the Wilkinses had testified that the cruiser remained behind Thompson's car while the detectives testified that Detective Steckel drove the cruiser to 4302 Sylvan. Counsel argued that, when he had cross-examined Detective Steckel about how he had moved the cruiser, "[h]e couldn't remember, and I think all of a sudden the light went on."[2]

{¶ 76} The prosecutor began his rebuttal closing argument by stating:

{¶ 77} "*** Well, I'm not sure which it is here, ladies and gentlemen. Is it the police are liars or they're forgetful? The next time someone wants to insinuate that the police are lying, I'd at least expect them to have the respect to stand up and call them to their face –

{¶ 78} "MR. WELLER: Objection, Your Honor.

{¶ 79} "THE COURT: Overruled.

{¶ 80} "MR. MUENNICH: – no[t] insinuate it. You've seen all the evidence in the case. That is your decision to believe these officers or not. But to get up and make bold face assertions of wholesale fabrication of evidence --

{¶ 81} "MR. WELLER: Objection, Your Honor.

---

[2]During his closing argument, defense counsel was admonished by the court for his repeated misstatements of the facts, his comments about what he thought about the evidence, and "these persistent comments about these nefarious suggestions about the officers." Although we appreciate the frustrations of the court, we see nothing improper in a defense counsel's making "nefarious suggestions" about a police officer's, or any witness's, testimony and motives, if supported by the evidence. See, e.g., *State v. Parks* (Mar. 22, 1996), Clark App. No. 95-CA-50 (where defense counsel's insinuations, such as "I don't like to call the police officers liars any more than you like to hear it," helped defeat a subsequent ineffective assistance of counsel claim that he did not attempt to emphasize the testimony of another witness over that of the police officers).

{¶ 82} "MR. MUENNICH: – is an outrage.

{¶ 83} "THE COURT: Overruled.

{¶ 84} "MR. WELLER: I did not do that.

{¶ 85} "THE COURT: That was the insinuation.

{¶ 86} "MR. MUENNICH: Is an outrage to the integrity of these police officers. It's up to you to decide what you believe, but there is no evidence that they did anything improper in this case. And for him to get up here and insinuate that, that's improper. The officers deserve better than that. If they were going to lie about it, don't you think we'd be better at it? I mean we put the drugs in his pocket. We'd have him, what, prying them out of his hands if we were making this up. Let alone I guess the Defendant was nice enough to get together with the police and say, 'Hey. You know what, guys, I'm going to make myself look really guilty. When you guys approach me, I'm going to run the opposite direction.' That was nice of him to play along and help fabricate this lie that defense counsel was insinuating. We didn't tell this Defendant to run. ***"

{¶ 87} Although the prosecutor spoke harshly about defense counsel and criticized counsel's closing argument, the prosecutor was responding to defense counsel's closing argument, which implied that the officers had lied during their testimony or acted improperly during their apprehension of Thompson. Upon review of the trial as a whole, we find no basis to conclude that Thompson was deprived of a fair trial as a result of the prosecutor's argument.

{¶ 88} Second, Thompson argues that the prosecutor falsely implied that a positive fingerprint analysis existed when he stated, "Defense counsel wants to talk

about fingerprints and stuff like that. Well, he has the same subpoena power as me. He's asking you to speculate on what coulda, shoulda, woulda." The prosecutor was responding to defense counsel's argument that, if the State's evidence were true, Thompson's fingerprints should have been found on the baggie of crack cocaine and that the absence of fingerprints "speaks volumes." (Defense counsel's argument actually misstated the evidence, since there was a failure to test for fingerprints, rather than affirmative evidence of lack of fingerprints.)

{¶ 89} We find nothing improper in the State's response to Thompson's fingerprint argument. Rather, the State was pointing out that the presence or lack of fingerprints was not addressed by the witnesses, and the State later emphasized that fingerprint analysis was unnecessary given the facts in this case.

{¶ 90} Finally, Thompson asserts that the prosecutor made an improper comment, in the absence of any evidence in the record, when he referenced Anthony Wilkins's approaching the officers and asking for Thompson's car keys and then asked, rhetorically, "Could it possibly be to try and get in the car before the police get in the car?" Thompson claims that the prosecutor sought "to leave the jurors with the impression that Mr. Wilkins should not be believed because he may have been involved in the alleged criminal activity."

{¶ 91} The purpose of closing argument is to persuade the jury and not to present additional evidence. *Xenia v. Myers* (Apr. 12, 1996), Greene App. No. 95-CA-50. The statement certainly could have been interpreted to create such an inference; although the argument borders on asking the jury to speculate, it does not cross the line into reversible error. The jury was instructed that closing

arguments are not evidence and that their decision must be based only on the evidence that was admitted.

{¶ 92} The third assignment of error is overruled.

V

{¶ 93} Having overruled each of the assignments of error, the trial court's judgment will be affirmed.

. . . . . .

DONOVAN, P.J. and GRADY, J., concur.

Copies mailed to:

R. Lynn Nothstine
Scott N. Blauvelt
Hon. Mary Katherine Huffman