[Cite as *State v. Harrison*, 2015-Ohio-1419.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
LOGAN COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 8-14-16**

v.

KANDALE L. HARRISON, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Logan County Common Pleas Court
Trial Court No. CR 13-04-0084

Judgment Affirmed

Date of Decision: April 13, 2015

APPEARANCES:

Marc S. Triplett **for Appellant**

Eric C. Stewart **for Appellee**

PRESTON, J.

{¶1} Defendant-appellant, Kandale L. Harrison ("Harrison"), appeals the June 20, 2014 judgment entry of sentence of the Logan County Court of Common Pleas following his conviction for complicity to possession of drugs. For the reasons that follow, we affirm.

{¶2} On June 11, 2013, the Logan County Grand Jury indicted Harrison and Gregory A. Abbott ("Abbott") on Count One of complicity to possession of drugs in violation of R.C. 2923.03 and 2925.11(A), a fourth-degree felony, Count Two of complicity to possession of drugs in violation of R.C. 2923.03 and 2925.11(A), a third-degree felony, and Count Four of complicity to possession of drugs in violation of R.C. 2923.03 and 2925.11(A), a second-degree felony. (Doc. No. 11). The Grand Jury indicted Abbott only on Count Three of possession of drugs in violation of R.C. 2925.11(A), a fifth-degree felony. (*Id.*). The indictment contained forfeiture specifications as to Counts One and Two and as to Harrison and Abbott. (*Id.*).

{¶3} The trial court found Harrison indigent and appointed counsel to represent him. (Doc. No. 25). On June 14, 2013, Harrison entered pleas of not guilty to the counts and specifications in the indictment applicable to him. (Doc. No. 26).

{¶4} On October 1, 2013, the trial court granted Harrison's request to continue his trial. (Doc. No. 38). The trial court rescheduled trial for February 13 and 14, 2014. (Doc. No. 45).

{¶5} On October 2, 2013, Abbott pled guilty to Count Three of the indictment and agreed to forfeit the cash seized on the date of arrest, and the State agreed to dismiss Counts One, Two, and Four against him. (Doc. Nos. 40, 42). The trial court found Abbott guilty of Count Three and the forfeiture specification, and dismissed Counts One, Two, and Four against him. (Doc. No. 42).

{¶6} On January 13, 2014, the State moved to amend the indictment against Harrison so that the indictment would contain Count One of complicity to possession of drugs in violation of R.C. 2923.03 and 2925.11(A), a third-degree felony, Count Two of complicity to possession of drugs in violation of R.C. 2923.03 and 2925.11(A), a third-degree felony, and a forfeiture specification as to Count One.[1] (Doc. No. 63). Count One stemmed from a March 16, 2013 traffic stop, during which officers discovered Oxycodone and Hydrocodone pills. (Doc. No. 64). Count Two stemmed from a May 12, 2013 traffic stop, during which officers discovered cocaine. (*Id.*). The trial court granted the State's motion on

[1] Specifically, the State moved to dismiss Count One and to amend Count Four from a second-degree felony to a third-degree felony. (Doc. No. 63). Based on the dismissal of Count One, and because Count Three applied only to Abbott, the State moved to renumber the counts of the indictment so that Count Two would become Count One and Count Four, as amended, would become Count Two. (*Id.*).

February 4, 2014 and amended and renumbered the counts of the indictment as requested. (Doc. No. 84).

{¶7} On February 12, 2014, at the request of Harrison, who notified the trial court that he retained new counsel, the trial court continued Harrison's trial until March 20 and 21, 2014. (Doc. No. 90). (*See also* Doc. No. 94).

{¶8} On March 17, 2014, Harrison filed a motion to suppress evidence seized during the traffic stops, arguing, among other things, that the Ohio Highway Patrol trooper who performed the May 12, 2013 traffic stop lacked reasonable suspicion to stop him. (Doc. No. 122). The trial court held a hearing on Harrison's motion on March 18, 2014. (Mar. 18, 2014 Tr. at 4). The trial court denied Harrison's motion to suppress and continued Harrison's trial until March 25 and 26, 2014. (*Id.* at 79-80, 88).

{¶9} On March 21, 2014, the trial court held a hearing after Harrison's trial counsel informed the trial court that Harrison wanted someone else to represent him. (Mar. 21, 2014 Tr. at 3). The trial court denied Harrison's request. (*Id.* at 22).

{¶10} On March 24, 2014, Harrison's counsel moved to withdraw as counsel, arguing, "Despite our conversations, and counsels [sic] advise [sic] this

was not in his best interest our relationship has become untenable."[2] (Doc. No. 136).

{¶11} Also on March 24, 2014, Harrison filed in the Supreme Court of Ohio an affidavit seeking the disqualification of the trial court judge. (Doc. No. 138). The trial court stayed the case and vacated the March 25 and 26, 2014 trial dates. (Doc. No. 139). The Supreme Court of Ohio dismissed Harrison's affidavit as untimely on March 31, 2014. (Doc. No. 141).

{¶12} On April 4, 2014, the trial court scheduled trial for May 8 and 9, 2014. (Doc. No. 142).

{¶13} Two days before trial, on May 6, 2014, Harrison, acting pro se, filed a letter to the trial court judge dated April 30, 2014. (Doc. No. 160). In the letter, Harrison stated, "I would like to dismiss my current Attorney * * * due to conflict of interest that we have been dealing with for the past month." (*Id.*). At trial, the trial court denied Harrison's request. (Trial Tr., Vol. One, at 124).

{¶14} A jury trial was held on May 8 and 9, 2014. (Trial Tr., Vol. One, at 5). The jury found Harrison not guilty of Count One and the corresponding forfeiture specification, but it found him guilty of Count Two. (Doc. No. 165). (*See also* Doc. No. 167).

[2] It does not appear that the trial court ruled on this motion.

{¶15} The trial court sentenced Harrison on June 13, 2014 and filed its judgment entry of sentence on June 20, 2014. (Doc. No. 172).

{¶16} On July 16, 2014, Harrison filed a notice of appeal. (Doc. No. 187). He raises nine assignments of error for our review. We address Harrison's assignments of error out of order, and we address his ninth and second assignments of error together.

Assignment of Error No. I

The trial court erred when it denied appellant's motion to suppress. [3/18/14 Tr. 79-80]

{¶17} In his first assignment of error, Harrison argues that the trial court erred by denying his motion to suppress because the trooper that pulled Harrison over lacked "an articulable and reasonable suspicion that Appellant had violated R.C. 4511.33." (Appellant's Brief at 6).

{¶18} A review of the denial of a motion to suppress involves mixed questions of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. At a suppression hearing, the trial court assumes the role of trier of fact and, as such, is in the best position to evaluate the evidence and the credibility of witnesses. *Id. See also State v. Carter*, 72 Ohio St.3d 545, 552 (1995). When reviewing a ruling on a motion to suppress, "an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence." *Burnside* at ¶ 8, citing *State v. Fanning*, 1 Ohio St.3d 19 (1982). With

respect to the trial court's conclusions of law, however, our standard of review is de novo, and we must independently determine whether the facts satisfy the applicable legal standard. *Id.*, citing *State v. McNamara*, 124 Ohio App.3d 706 (4th Dist.1997).

{¶19} At the March 18, 2014 hearing on Harrison's motion to suppress, the trial court found that the video of the May 12, 2013 traffic stop was "less definitive" than the video of the March 16, 2013 traffic stop, but nevertheless concluded "that the trooper's testimony establishes probable cause for the traffic stop." (Mar. 18, 2014 Tr. at 79-80). While the trial court did not make any specific factual findings aside from relying on the trooper's testimony, "[t]he extensive record of the suppression hearing is 'sufficient to allow full review of the suppression issues.'" *State v. Sapp*, 105 Ohio St.3d 104, 2004-Ohio-7008, ¶ 96, quoting *State v. Waddy*, 63 Ohio St.3d 424, 443 (1992). *See also State v. Jones*, 1st Dist. Hamilton No. C-130359, 2014-Ohio-3110, ¶ 10 ("Because the trial court did not make any findings of fact in its decision denying the suppression motion, we must review the record to determine whether sufficient evidence exists to support the trial court's legal decision."), citing *State v. Shields*, 1st Dist. Hamilton No. C-100362, 2011-Ohio-1912, ¶ 9, citing *State v. Brown*, 64 Ohio St.3d 476 (1992), syllabus. Accordingly, we review the record to determine the facts and then determine whether those facts satisfy the applicable legal standard.

{¶20} At the suppression hearing, Trooper Andrew Rea ("Rea") testified that Harrison garnered his attention based on an "illegal marked lane violation" in Bellefontaine, Ohio. (Mar. 18, 2014 Tr. at 34). When asked by the State's counsel to describe what he observed, Rea responded, "He originally was in the left turn lane at the intersection to head north on U.S. 68, and then as the light turned green he transferred to the right through lane, crossing the solid white line." (*Id.*). In other words, instead of turning left, Harrison changed lanes and went straight through the intersection. (*Id.*). At the time he observed Harrison's lane change, Rea was traveling west as he approached the intersection, and Harrison was facing east. (*Id.* at 34, 44). According to Rea, he initiated his blue lights, turned around, and stopped the vehicle operated by Harrison. (*Id.* at 35).

{¶21} Rea identified State's Exhibit 2 as a copy of his cruiser's video recording of his traffic stop of Harrison, which Rea said included video of Harrison's "lane change." (*Id.* at 42-43). Rea testified that as Harrison was sitting in the left-turn lane, Harrison's vantage point would have possibly allowed him to see an "OVI checkpoint" that was "just north of this location." (*Id.* at 45). On cross-examination, Rea testified that he was approximately 300 feet away from Harrison's vehicle when he observed Harrison's lane change. (*Id.* at 52). There were no cars behind or to the side of Harrison when he changed lanes. (*Id.*).

When asked by Harrison's counsel what the citation was, Rea responded, "Marked lane violation. He crossed that white line." (*Id.* at 53).

{¶22} "Marked lane" and "lane change" violations are governed by R.C. 4511.33, which provides, in relevant part:

> (A) Whenever any roadway has been divided into two or more clearly marked lanes for traffic, or wherever within municipal corporations traffic is lawfully moving in two or more substantially continuous lines in the same direction, the following rules apply:
>
> (1) A vehicle or trackless trolley shall be driven, as nearly as is practicable, entirely within a single lane or line of traffic and shall not be moved from such lane or line until the driver has first ascertained that such movement can be made with safety.

R.C. 4511.33(A)(1). *See State v. Shaffer*, 3d Dist. Paulding No. 11-13-02, 2013-Ohio-3581, ¶ 20; *State v. Ross*, 9th Dist. Wayne No. 12CA0008, 2013-Ohio-1488, ¶ 11. This statute, sometimes called the "marked lanes statute," may be violated when a motorist "drift[s] over the lane markings," "unless the driver cannot reasonably avoid straying," or when a motorist maneuvers out of a lane without first "ascertain[ing] that such movement can be made with safety."[3] *State v. Mays*,

[3] Other statutes govern movement between lanes. For example, R.C. 4511.39, requires that a motorist signal before moving "right or left upon a highway." R.C. 4511.39(A); *State v. Evans*, 12th Dist. Warren No. CA2009-08-116, 2010-Ohio-4402, ¶ 15.

119 Ohio St.3d 406, 2008-Ohio-4539, ¶ 18, 25. *See also State v. Burwell*, 3d Dist. Putnam No. 12-09-06, 2010-Ohio-1087, ¶ 12.

{¶23} The Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution generally prohibit warrantless searches and seizures, and any evidence that is obtained during an unlawful search or seizure will be excluded from being used against the defendant. *State v. Jenkins*, 3d Dist. Union No. 14-10-10, 2010-Ohio-5943, ¶ 9; *State v. Steinbrunner*, 3d Dist. Auglaize No. 2-11-27, 2012-Ohio-2358, ¶ 12. "Neither the Fourth Amendment to the United States Constitution nor Section 14, Article I of the Ohio Constitution explicitly provides that violations of its provisions against unlawful searches and seizures will result in the suppression of evidence obtained as a result of such violation, but the United States Supreme Court has held that the exclusion of evidence is an essential part of the Fourth Amendment." *Jenkins* at ¶ 9, citing *Mapp v. Ohio*, 367 U.S. 643, 649, 81 S.Ct. 1684 (1961) and *Weeks v. United States*, 232 U.S. 383, 394, 34 S.Ct. 341 (1914).

{¶24} "A traffic stop constitutes a seizure and implicates the protections of the Fourth Amendment" but "'is constitutionally valid if an officer has a reasonable and articulable suspicion that a motorist has committed, is committing, or is about to commit a crime.'" *State v. Dillehay*, 3d Dist. Shelby No. 17-12-07, 2013-Ohio-327, ¶ 13, citing *State v. Johnson*, 3d Dist. Hancock No. 5-07-43,

2008-Ohio-1147, ¶ 16; *State v. Aldridge*, 3d Dist. Marion No. 9-13-54, 2014-Ohio-4537, ¶ 10, quoting *Mays* at ¶ 7. "The Supreme Court of Ohio has defined 'reasonable articulable suspicion' as 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion [upon an individual's freedom of movement].'" *Shaffer* at ¶ 18, quoting *State v. Bobo*, 37 Ohio St.3d 177, 178 (1988). "In determining whether reasonable articulable suspicion exists, a reviewing court must look to the totality of the circumstances." *Steinbrunner* at ¶ 14, citing *State v. Andrews*, 57 Ohio St.3d 86, 87-88 (1991). "A police officer's testimony alone is sufficient to establish reasonable articulable suspicion for a stop." *State v. McClellan*, 3d Dist. Allen No. 1-09-21, 2010-Ohio-314, ¶ 38, citing *State v. Claiborne*, 2d Dist. Montgomery No. 19060, 2002-Ohio-2696.

{¶25} In addition to a reasonable and articulable suspicion of criminal activity, "[p]robable cause is certainly a complete justification for a traffic stop," but it is not required to justify a traffic stop. *Mays*, 119 Ohio St.3d 406, at ¶ 23. "Probable cause" is a stricter standard than and subsumes "reasonable and articulable suspicion." *Id.*, citing *State v. Evans*, 67 Ohio St.3d 405, 411 (1993). Accordingly, "an officer who witnesses a traffic violation possesses probable cause, and a reasonable articulable suspicion, to conduct a traffic stop." *State v.*

Haas, 3d Dist. Henry No. 7-10-15, 2012-Ohio-2362, ¶ 16, citing *United States v. Arvizu*, 534 U.S. 266, 273, 122 S.Ct. 744 (2002). *See also Mays* at ¶ 24.

{¶26} Rea testified that he stopped Harrison because he observed Harrison perform an "illegal marked lane violation." According to Rea, Harrison's vehicle was stopped at a stop light, and when the light turned green, Harrison changed lanes by crossing the solid white line separating the left-turn lane and the through-traffic lane. In his testimony, Rea did not specify where Harrison's vehicle was in proximity to the intersection or whether Harrison used a turn signal when he changed lanes. Nor did Rea specify whether he stopped Harrison because Rea suspected Harrison did not first ascertain that he could change lanes with safety, as required by R.C. 4511.33(A)(1). However, State's Exhibit 2, the video of Harrison's lane change and Rea's traffic stop of Harrison, supports the conclusion that Harrison did not first ascertain that he could change lanes with safety and, therefore, violated R.C. 4511.33(A)(1).

{¶27} It appears from the video that Harrison was very close to or in the intersection when he changed lanes, and there was at least one vehicle, Rea's cruiser, approaching the intersection from the opposite direction. Despite these circumstances, it appears from the video that Harrison did not signal when he changed lanes, which would lead to the reasonable conclusion that he did not first ascertain that he could change lanes with safety, in violation of R.C.

4511.33(A)(1). Moreover, although Rea did not testify that he relied on a violation of the turn-signal statute, R.C. 4511.39, to stop Harrison, it appears from the video that Harrison moved from one lane to another without signaling, in violation of R.C. 4511.39. *See* R.C. 4511.39(A) ("No person shall turn a vehicle * * * or move right or left upon a highway unless and until such person has exercised due care to ascertain that the movement can be made with reasonable safety nor without giving an appropriate signal in the manner hereinafter provided."); *City of Brecksville v. Bayless*, 8th Dist. Cuyahoga No. 70973, 1997 WL 156693, *4 (Apr. 3, 1997) ("R.C. 4511.39 requires that a vehicle's turn signal be activated before engaging in a lane change."). *See also Burwell*, 2010-Ohio-1087, at ¶ 14 (noting that "the evidence presented at the suppression hearing demonstrated an additional, independent reason justifying the stop").

{¶28} Because Rea's traffic stop of Harrison was based on probable cause and reasonable, articulable suspicion of criminal activity, we conclude that the trial court did not err in denying Harrison's motion to suppress.

{¶29} Harrison's first assignment of error is overruled.

Assignment of Error No. III

The trial court abused its discretion when it granted the State's challenge for cause as to Prospective Juror No. 99. [Tr. 98]

{¶30} In his third assignment of error, Harrison argues that the trial court abused its discretion by granting the State's challenge for cause to a prospective

juror who apparently had a felony conviction, after the trial court failed to ask the prospective juror if his rights had been restored. The State argues that "the juror disclosed in his jury questionnaire that he could not serve because he had a felony on his record,"[4] that Harrison has not "shown how this issue would have changed anything in the outcome of this trial," and that, had the trial court denied the State's challenge for cause, "either party may have used a peremptory challenge on the juror." (Appellee's Brief at 13-14).

{¶31} "'[T]he determination of whether a prospective juror should be disqualified for cause is a discretionary function of the trial court. Such determination will not be reversed on appeal absent an abuse of discretion.'" *State v. Allsup*, 3d Dist. Hardin No. 6-10-09, 2011-Ohio-404, ¶ 47, quoting *Berk v. Matthews*, 53 Ohio St.3d 161, 169 (1990). "This is so because a trial court is in the best position to assess the potential juror's credibility." *Id.* "Accordingly, the trial court's determination will be affirmed absent a showing that the court's attitude is arbitrary, unreasonable, or unconscionable." *Id.*, citing *Berk* at 169.

{¶32} For-cause juror challenges in a criminal case are governed by Crim.R. 24(C) and R.C. 2945.25. *State v. Triplett*, 5th Dist. Stark No. 2013CA00209, 2014-Ohio-3101, ¶ 30. Crim.R. 24(C)(1) provides: "A person called as a juror may be challenged for the following causes: That the juror has

[4] The juror's questionnaire does not appear in the record, nor did the State direct us to a statement in the record indicating the contents of the juror's questionnaire responses.

been convicted of a crime which by law renders the juror disqualified to serve on a jury." R.C. 2945.25(I) similarly provides: "A person called as a juror in a criminal case may be challenged for the following causes: That he has been convicted of a crime that by law disqualifies him from serving on a jury * * *." Similarly to Crim.R. 24(C) and R.C. 2945.25, R.C. 2313.17(B)(1) provides: "The following are good causes for challenge to any person called as a juror: That the person has been convicted of a crime that by law renders the person disqualified to serve on a jury * * *." *See State v. Madrigal*, 87 Ohio St.3d 378, 393 (2000) (applying R.C. 2313.17's predecessor statute, R.C. 2313.42, in a criminal case), citing *Berk* at syllabus.

{¶33} In this case, when the trial court asked the prospective jurors, "Is there anyone here that's been convicted of a crime classified as a felony that involves a possible prison penalty[?]," Juror No. 99 indicated that that he had. (Trial Tr., Vol. One, at 52). The trial court did not ask Juror No. 99 if his rights were restored. Later, in chambers, when the State challenged Juror No. 99 for cause, the trial court judge acknowledged that he should have asked Juror No. 99 whether his rights were restored:

> [State's Counsel]: Number 99 * * * indicated he had a felony conviction.
>
> [Harrison's Counsel]: Were his rights restored?

[Trial Court]:	I don't know. We didn't pursue the question in there. Court has to accept responsibility for that. * * * [D]efense wish to take any other position besides that very pertinent position?
[Harrison's Counsel]:	No.
[Trial Court]:	Challenge for cause sustained.

(*Id.* at 97-98).

{¶34} Even if we assume that the trial court abused its discretion by granting the State's for-cause challenge to Juror No. 99, Harrison has not shown how this prejudiced him. *See State v. Coonrod*, 4th Dist. No. Pickaway No. 11CA3, 2012-Ohio-6302, ¶ 30 ("[E]ven if we assume that the trial court erred by excusing Juror Number 5, appellant has not shown how this alleged error prejudiced him."). Crim.R. 52(A) provides: "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." "In other words the error must have been prejudicial, i.e., it must have affected the outcome of the trial." *Coonrod* at ¶ 30, citing *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, ¶ 7. Harrison did not explain how granting the State's for-cause challenge to Juror No. 99 affected the outcome of the trial. And at any rate, "[a]ny argument that Juror Number [99] would have voted to acquit is speculative." *Id.* at ¶ 31. Therefore, even assuming the trial court abused its discretion by granting

the State's for-cause challenge, Harrison failed to demonstrate how the error is anything other than harmless error. *See id.*, citing *State v. Brown*, 2d Dist. Montgomery No. 24541, 2012-Ohio-1848, ¶ 53. *See also State v. Sanders*, 92 Ohio St.3d 245, 249 (2001) ("[A]n erroneous excusal for cause, on grounds other than the venireman's views on capital punishment, is not cognizable error, since a party has no right to have any particular person sit on the jury.").

{¶35} Harrison's third assignment of error is overruled.

Assignment of Error No. IV

The trial court erred when it accepted appellant's waiver of his constitutional right to testify on his own behalf. [Tr. 366]

{¶36} In his fourth assignment of error, Harrison argues that the trial court erred by accepting his waiver of his constitutional right to testify in his own defense because he "did not voluntarily waive his fundamental right to testify on his own behalf." (Appellant's Brief at 11). Rather, Harrison argues, "his waiver was the product of undue pressure brought on him by trial counsel and the court." (*Id.*).

{¶37} "Generally, the defendant's right to testify is regarded both as a fundamental and a personal right that is waivable only by an accused." *State v. Bey*, 85 Ohio St.3d 487, 499 (1999), citing *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704 (1987), *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308 (1983), and *Brown v. Artuz*, 124 F.3d 73, 77 (2d Cir.1997). However, in Ohio, "a trial court is

not *required* to conduct an inquiry with the defendant concerning the decision whether to testify in his defense." (Emphasis sic.) *Id.* Still, "*Bey* does not prohibit the court's questioning of a defendant." *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, ¶ 100.

{¶38} Despite Harrison's arguments that he was "brow-beaten by his counsel, the court, and the prosecutor" and that he "did not knowingly and intelligently waive his fundamental right to testify," nothing in the record suggests that Harrison wished to testify but was denied the opportunity to do so. (Appellant's Brief at 13). *See State v. Green*, 90 Ohio St.3d 352, 375 (2000) ("As in *Bey*, nothing in the record suggests that Green 'wanted to testify and was denied the opportunity to do so.'"), quoting *Bey* at 500. Despite his counsel's advice to the contrary, Harrison initially wished to testify. (Trial Tr., Vol. Two, at 361). However, after the trial court informed Harrison that the State's counsel would ask him about his criminal history on the stand, and after the State's counsel said that he intended to ask Harrison about his getting "caught in November with cocaine in his underwear at the Tri-County Jail," Harrison informed the trial court that he wished to speak with his attorney. (*Id.* at 364-365).

{¶39} After Harrison spoke with his counsel, Harrison's counsel informed the trial court that, while it was a "[c]lose call," Harrison would not be testifying. (*Id.* at 365). The trial court confirmed that Harrison did not wish to testify:

> [Trial Court]: So is it a fair statement that you've talked to your lawyer and as a result of all of the information that has been exchanged between the two of you you're determining that you will accept the advice not to testify?
>
> [Harrison]: Yes, Your Honor.

(*Id.* at 366). Therefore, while the trial court was not required to conduct an inquiry with Harrison concerning the decision whether to testify in his defense, it did so, and Harrison stated that he accepted his counsel's advice not to testify. The trial court did not err. *See State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, ¶ 119 (quoting the holding in *Bey* and rejecting the appellant's argument "that the trial court violated his constitutional rights by failing to question him to ensure that he made a knowing, intelligent, and voluntary waiver of his right to testify").

{¶40} Harrison's fourth assignment of error is overruled.

Assignment of Error No. VIII

> **The State produced insufficient evidence to meet its burden of proof beyond a reasonable doubt that appellant was guilty of the offense of complicity to the possession of drugs. [Tr. 448-50]**

{¶41} In his eighth assignment of error, Harrison argues that his conviction is not supported by sufficient evidence. Specifically, Harrison argues that the State failed to produce sufficient evidence demonstrating that he either "solicited

or procured another to commit the offense," "aided or abetted in committing the offense," or "conspired with another to commit the offense." (Appellant's Brief at 22).

{¶42} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1981), paragraph two of the syllabus, superseded by state constitutional amendment on other grounds as stated in *State v. Smith*, 80 Ohio St.3d 89 (1997). Accordingly, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id.* "In deciding if the evidence was sufficient, we neither resolve evidentiary conflicts nor assess the credibility of witnesses, as both are functions reserved for the trier of fact." *State v. Jones*, 1st Dist. Hamilton Nos. C-120570 and C-120571, 2013-Ohio-4775, ¶ 33, citing *State v. Williams*, 197 Ohio App.3d 505, 2011-Ohio-6267, ¶ 25 (1st Dist.). *See also State v. Berry*, 3d Dist. Defiance No. 4-12-03, 2013-Ohio-2380, ¶ 19 ("Sufficiency of the evidence is a test of adequacy rather than credibility or weight of the evidence."), citing *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997).

{¶43} Harrison was convicted of complicity to possession of drugs in violation of R.C. 2925.11(A) and 2923.03. R.C. 2925.11(A) states: "No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog." "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). R.C. 2923.03(A) provides:

> No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:
>
> (1) Solicit or procure another to commit the offense;
>
> (2) Aid or abet another in committing the offense;
>
> (3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;
>
> (4) Cause an innocent or irresponsible person to commit the offense.

Specifically under R.C. 2923.03(A)(2), "[t]o support a conviction for complicity by aiding and abetting * * *, the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal." *State v. Johnson*, 93 Ohio St.3d 240 (2001), syllabus. "Such intent

may be inferred from the circumstances surrounding the crime." *Id.* "Such support, assistance, encouragement or cooperation [']may be inferred from presence, companionship and conduct before and after an offense is committed.'" *State v. Birky*, 6th Dist. Williams No. WM-06-010, 2007-Ohio-4470, ¶ 26, quoting *State v. Jackson*, 10th Dist. Franklin No. 03AP-273, 2003-Ohio-5946, ¶ 32.

{¶44} In his brief, Harrison challenges the sufficiency of the evidence only as to complicity, not drug possession. (*See* Appellant's Brief at 22). In other words, Harrison does not challenge the sufficiency of the evidence related to the principal's commission of the offense of drug possession. *See State v. Allen*, 5th Dist. Delaware No. 2009-CA-13, 2010-Ohio-4644, ¶ 121 ("Although the state need not establish the principal's identity, it must, at the very least, prove that a principal committed the offense."), citing *State v. Perryman*, 49 Ohio St.2d 14 (1976), paragraph four of the syllabus, vacated on other grounds by *Perryman v. Ohio*, 438 U.S. 911, 98 S.Ct. 3136 (1978). Therefore, we will address only whether, viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found one of the four alternatives under R.C. 2923.03(A) proven beyond a reasonable doubt. *See State v. Ayala*, 3d Dist. Union No. 14-13-22, 2014-Ohio-2576, ¶ 26.

{¶45} At trial, Rea testified that he initiated a traffic stop of the vehicle operated by Harrison, and Harrison pulled over. (Trial Tr., Vol. Two, at 251).

Abbott was a passenger in the vehicle Harrison was operating. (*Id.* at 252). According to Rea, when he asked Harrison for paperwork for the vehicle, Harrison began reaching into the backseat of the vehicle. (*Id.* at 253). Rea shined his flashlight into the backseat and noticed a black book bag in the backseat that had "a side pouch that was wide open." (*Id.* at 253-255). In the side pouch, Rea "observed two tied-off baggies with white powder in them." (*Id.* at 253). Rea testified that he asked Harrison what the baggies contained, and Harrison "rolled his window up at that point leaving approximately a two-inch gap." (*Id.*). According to Rea, Harrison then said he wanted to call his lawyer, but Rea told him that needed to wait and ordered Harrison to unlock the doors and exit the vehicle. (*Id.*). Rea testified that Harrison was "reaching back trying to move the bag away from [Rea]." (*Id.* at 259).

{¶46} Rea called for a supervisor and for an additional unit, while continuing to order Harrison to unlock the door and exit the vehicle. (*Id.* at 253). Rea was eventually able to open a back door of the vehicle, and he grabbed the baggies and put them on top of the vehicle. (*Id.* at 254). Rea handcuffed Harrison, advised him of his *Miranda* rights, and searched the black book bag that contained the baggies. (*Id.* at 255-256). According to Rea, the bag contained "documents and other paperwork with Mr. Harrison's information on it." (*Id.* at 256, 263). Rea testified that also in the bag was a prescription for an individual

who was not in the vehicle. (*Id.* at 256). According to Rea, Harrison knew the first name of his passenger, Abbott, but had trouble recalling his last name. (*Id.* at 260). The State played for the jury State's Exhibit 6, which is a video recording of Rea's traffic stop of Harrison. (*Id.* at 258).

{¶47} Viewing this evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found, beyond a reasonable doubt, that Harrison aided or abetted another in committing the offense of possession of drugs. The evidence sufficiently demonstrates multiple ways in which Harrison assisted the principal in the commission of the offense of possession of drugs and that Harrison shared the criminal intent of the principal. As soon as Rea saw the baggies in the book bag's side pouch, Harrison rolled up his window and refused to comply with Rea's orders to unlock and exit the vehicle. Harrison attempted to move the bag containing the baggies away from Rea. Harrison's resisting Rea's orders and his attempt to conceal the bag from Rea are evidence of Harrison's knowledge that the bag contained illegal drugs. *See State v. Moore*, 7th Dist. Mahoning No. 12 MA 8, 2013-Ohio-1435, ¶ 132 ("[A]n accused's flight, his resistance to arrest, acts of concealment, and related conduct are admissible evidence of consciousness of guilt, which is evidence of guilt itself."), citing *State v. Williams*, 79 Ohio St.3d 1, 11 (1997); *State v. Holloway*, 10th Dist. Franklin Nos. 99AP-1455 and 99AP-1456, 2000 WL

1455686, *10 (Sept. 28, 2000). Based on this evidence, a rational trier of fact could have inferred that Harrison knew the bag contained illegal drugs and that he aided and abetted the principal by transporting the drugs in a vehicle and by attempting to conceal the drugs from Rea. Therefore, Harrison's conviction is not based on insufficient evidence.

{¶48} Harrison's eighth assignment of error is overruled.

Assignment of Error No. V

The court erred when it permitted improper closing argument. [Tr. 384, 411-12, 416]

{¶49} In his fifth assignment of error, Harrison argues that the trial court erred by allowing improper closing argument. Specifically, Harrison argues that the prosecutor "argued facts not in evidence," "engaged in improper inflammatory argument," and "improperly argued that [the jury] should convict appellant because of the problem with drugs in the community." (Appellant's Brief at 15-16). Harrison argues that "[t]he cumulative effect of this misconduct rendered the trial fundamentally unfair." (*Id.* at 16).

{¶50} The test regarding prosecutorial misconduct during closing arguments is whether the remarks were improper and, if so, whether they prejudicially affected the defendant's substantial rights. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶ 231, citing *State v. Smith*, 14 Ohio St.3d 13, 14 (1984). "In making this determination, an appellate court should consider several factors:

(1) the nature of the remarks, (2) whether an objection was made by counsel, (3) whether corrective instructions were given by the court, and (4) the strength of the evidence against the defendant." *State v. Braxton*, 102 Ohio App.3d 28, 41 (8th Dist.1995). "Misconduct of a prosecutor at trial will not be considered grounds for reversal unless the conduct deprives the defendant of a fair trial." *Id.*, citing *State v. Apanovitch*, 33 Ohio St.3d 19 (1987) and *State v. Maurer*, 15 Ohio St.3d 239 (1984). "The touchstone of the analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" *Davis* at ¶ 231, quoting *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940 (1982).

{¶51} "Parties have wide latitude in their closing statements, particularly 'latitude as to what the evidence has shown and what inferences can be drawn from the evidence.'" *State v. Wolff*, 7th Dist. Mahoning No. 07 MA 166, 2009-Ohio-7085, ¶ 13, quoting *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, ¶ 213. "'A prosecutor may comment upon the testimony and suggest the conclusion to be drawn by it, but a prosecutor cannot express his personal belief or opinion as to the credibility of a witness or as to the guilt of an accused, or go beyond the evidence which is before the jury when arguing for conviction.'" *State v. Manns*, 5th Dist. Richland No. 08 CA 101, 2009-Ohio-3262, ¶ 20, quoting *State v. Smith*, 12th Dist. Butler No. CA2007-05-133, 2008-Ohio-2499, ¶ 7. *See also State v.*

Stober, 3d Dist. Putnam No. 12-13-09, 2014-Ohio-1568, ¶ 133, citing *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, ¶ 16.

{¶52} First, Harrison argues that the State's counsel improperly "argued that it was his experience in criminal cases involving drug offenses, that the investigating officers are never able to find fingerprints." (Appellant's Brief at 15). The relevant portion of the trial transcript from the State's counsel's rebuttal closing argument reveals the following:

> [State's Counsel]: [Harrison's counsel] is playing a lot toward things you've probably seen on TV. Talking over and over and over and over about fingerprints. I've been prosecuting cases for over 14 years, and I can tell you out of the thousands of cases I've seen, only a handful of them, less than ten have been resolved by fingerprints.
>
> Plastic baggies with cocaine. You heard the officer testify. You've got – these plastic bags are all crinkled up and – in ball form as he pulls them out of the bag. You're not going to get a

good fingerprint off that bag. I could tell you case after case that's been submitted –

[Harrison's Counsel]: Your Honor, object. I don't think his personal experience –

[State's Counsel]: He talked all about his experience in DUIs.

[Trial Court]: The objection's overruled.

[Harrison's Counsel]: That's true.

[State's Counsel]: – of cases submitted, and if you don't have a good, smooth, solid surface you're not going to get a good fingerprint. We've got a plastic baggy that's all crinkled up. It's not even worth their time or resources. * * * Fingerprints, I've never seen fingerprint tests in drug cases. Yes, they are – they do look for fingerprints in car thefts and burglaries, things like that. 14 years, I've never seen drugs submitted for fingerprint testing.

(Trial Tr., Vol. Two, at 411-412).

{¶53} We agree with Harrison that the State's counsel's remarks were improper to the extent he referred to his personal experience, rather than evidence in the record, regarding fingerprinting in drug cases. *See State v. Brown*, 4th Dist. Athens No. 09CA3, 2009-Ohio-5390, ¶ 32 (agreeing with the defendant-appellant that it was improper for the prosecutor to suggest that the State's forensic expert "would have testified that it is difficult to obtain fingerprints from plastic in general and cigarette packs specifically"). Nevertheless, Harrison has not demonstrated how the remarks prejudicially affected his substantial rights and deprived him of a fair trial. *See id.* at ¶ 32-33.

{¶54} The State's counsel's remarks did not prejudicially affect Harrison's substantial rights and deprive him of a fair trial. First, the trial court instructed the jury that counsel's closing arguments are not evidence. (Trial Tr., Vol. Two, at 421). *See Brown* at ¶ 33. Second, evidence demonstrated that drug containers are not tested for fingerprints. The State's counsel asked Trooper Jeremy Allen ("Allen"), "In your experience as a trooper, do you guys test fingerprints on drug containers?" (Trial Tr., Vol. One, at 191-192). Allen responded, "I've never seen it done, no." (*Id.* at 192). Third, Harrison's counsel argued that the State should have used its "resources" and collected fingerprints. (Trial Tr., Vol. Two, at 392). Harrison's counsel stated, "Because we have technology. We have the ability to take fingerprints. * * * They didn't do that." (*Id.* at 403-404). At another point,

Harrison's counsel told the jury, "In all honesty, you should be thinking to yourself, are you kidding me? You guys could have provided me with a fingerprint." (*Id.* at 409). The State's counsel responded to those arguments in his rebuttal closing argument. *See State v. Thompson*, 9th Dist. Lorain No. 95CA006047, 1996 WL 27977, *4 (Jan. 24, 1996). For these reasons, though improper, the State's counsel's rebuttal-closing-argument remarks regarding his experience with fingerprinting in drug cases did not deprive Harrison of a fair trial. *See Brown* at ¶ 32-33 (concluding that, though improper, the prosecution's comments during closing argument did not deprive the defendant-appellant of a fair trial).

{¶55} Second, Harrison argues that the State's counsel "illicitly inflame[d] the passions of the jurors" by arguing during closing argument about Harrison, "He's driving this vehicle with drugs in it, bringing it to Bellefontaine, driving around Bellefontaine after midnight going to all these places, going to bars. You can consider all of those things in considering did he aide [sic] and abet in committing the offense of possession of drugs." (Trial Tr., Vol. Two, at 384). Harrison's counsel did not object to this statement, but Harrison argues on appeal that "[n]one of the facts are relevant to the charge of complicity in the possession of drugs." (Appellant's Brief at 15-16). Harrison is incorrect. Aiding and abetting may be established by overt acts of assistance, such as transporting drugs

in a car. *See State v. Coleman*, 12th Dist. Butler No. CA2010-12-329, 2011-Ohio-4564, ¶ 9 ("Aiding and abetting may also be established by overt acts of assistance such as driving a getaway car or serving as a lookout."), citing *State v. Salyer*, 12th Dist. Warren No. CA2006-03-039, 2007-Ohio-1659, ¶ 26. Therefore, the State's counsel's remarks regarding Harrison's operating a vehicle containing drugs were not improper.

{¶56} Third, Harrison argues that "[i]t is improper for the prosecutor to urge the jury to convict to help eliminate crime in the community" and that the State's counsel "made this forbidden argument." (Appellant's Brief at 16). During Harrison's counsel's closing argument, he suggested that among his 30 to 40 clients, he "can't remember what happened" because "these guys are arresting people day in and day out." (Trial Tr., Vol. Two, at 400). Harrison's counsel asked "for a quick verdict so you can send a message to the police department." (*Id.* at 405). During rebuttal closing argument, the State's counsel said:

> We get complaints over and over about drugs in the community, the crime that's in our community because of drugs. Here's your chance to do something about it. I'm not asking you to do this, to find him guilty to do something about it *but because he is guilty*. Clearly, he's got the cocaine in his car.

(Emphasis added.) (*Id.* at 416). Harrison's counsel did not object to this statement.

{¶57} Harrison cites *State v. Hicks*, in which the Supreme Court of Ohio said, "A prosecutor may not call for the jury to convict in response to public demand." 43 Ohio St.3d 72, 76 (1989), citing *State v. Davis*, 60 Ohio App.2d 355, 361-362 (1978). "However, the prosecutor's argument must be reviewed as a whole." *Id.*, citing *State v. Burgun*, 56 Ohio St.2d 354, 366 (1978). The prosecutor's statement is not improper if it is "'premised upon an establishment of the guilt of appellant.'" *Id.*, quoting *State v. Moritz*, 63 Ohio St.2d 150, 158 (1980). Here, Harrison omitted from his brief the portion of the State's counsel's statement—"but because he is guilty"—that demonstrates that he premised the statement on Harrison's guilt based on the evidence in this case. *See State v. Carter*, 89 Ohio St.3d 593, 603 (2000) ("Isolated comments by a prosecutor are not to be taken out of context and given their most damaging meaning."). Therefore, this statement by the State's counsel during rebuttal closing argument was not improper.

{¶58} Finally, Harrison argues that the "cumulative effect" of the prosecutor's allegedly improper remarks during "closing argument rendered Appellant's trial fundamentally unfair." (Appellant's Brief at 16). Harrison's argument fails for at least two reasons. First, of the three alleged instances of

improper remarks, we found that only one was improper. Therefore, there can be no "cumulative effect." *See State v. Carter*, 8th Dist. Cuyahoga No. 92859, 2010-Ohio-1661, ¶ 33, 37-38 (concluding that improper, personal-opinion remarks by the prosecutor did not have a cumulative effect that prejudicially affected the defendant's right to a fair trial). *See also State v. Perkins*, 12th Dist. Clinton No. CA2005-01-002, 2005-Ohio-6557, ¶ 21 (noting in the context of harmless error by the trial court that a single, harmless error "'certainly does not amount to cumulative error'"), quoting *State v. Reed*, 2d Dist. Montgomery Nos. 18417 and 18448, 2001 WL 815026, *7 (July 20, 2001). In fact, Harrison cites *Berger v. United States*, in which the Supreme Court of the United States observed, "[W]e have not here a case where the misconduct of the prosecuting attorney was slight or confined to a *single instance*, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." (Emphasis added.) 295 U.S. 78, 89, 55 S.Ct. 629 (1935). Second, even in the single instance in which we concluded the State's counsel's remarks were improper, we noted the reasons why those remarks did not prejudicially affect Harrison's substantial rights and deprive him of a fair trial. Therefore, we reject Harrison's "cumulative effect" argument.

{¶59} Harrison's fifth assignment of error is overruled.

Assignment of Error No. VI

The trial court erred when it denied appellant's request to instruct the jury that the State had the burden of proof by beyond a reasonable [sic] as to the quantity of cocaine. [Tr. 417]

{¶60} In his sixth assignment of error, Harrison argues that the trial court erred by not instructing the jury that the State was required to prove the amount of cocaine beyond a reasonable doubt. Specifically, Harrison argues that this violated his due-process rights, and he asks that we "remand to the trial court with instructions that the trial court reduce [Harrison's] conviction to a fifth degree felony and sentence him accordingly." (Appellant's Brief at 19).

{¶61} "An appellate court reviews a trial court's decision to give the jury a particular set of jury instructions under an abuse of discretion standard." *State v. Barker*, 11th Dist. Portage No. 2010-P-0044, 2012-Ohio-522, ¶ 91, citing *State v. Martens*, 90 Ohio App.3d 338, 343 (3d Dist.1993). An abuse of discretion suggests the trial court's decision is unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157 (1980).

{¶62} As we stated above, Harrison was indicted for and convicted of complicity to possession of drugs in violation of R.C. 2923.03, the complicity statute, and R.C. 2925.11(A), the drug-possession statute. The complicity statute provides, "Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal

offender." R.C. 2923.03(F). The principal offense under Count Two was possession of drugs in violation of R.C. 2925.11(A), which provides, "No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog." The degree of the offense of possession of drugs, including cocaine, is determined by the amount of controlled substance involved. *See State v. Townsend*, 2d Dist. Montgomery No. 18670, 2001 WL 959186, *4 (Aug. 24, 2001). Relevant to this case, R.C. 2925.11(C)(4) provides:

> If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates [R.C. 2925.11(A)] is guilty of possession of cocaine. The penalty for the offense shall be determined as follows: * * * (c) If the amount of the drug involved equals or exceeds ten grams but is less than twenty grams of cocaine, possession of cocaine is a felony of the third degree * * *.

R.C. 2925.11(C)(4)(c).

{¶63} "'When the severity of the offense is determined by the amount of controlled substance involved, the amount becomes an essential element of the offense. In order to obtain a conviction, the prosecution must prove that element, and the jury must so find, beyond a reasonable doubt.'" *State v. Cargile*, 8th Dist. Cuyahoga No. 89964, 2009-Ohio-6630, ¶ 13, quoting *State v. Chamblin*, 4th Dist.

Adams No. 02CA753, 2004-Ohio-2252, ¶ 13, citing *State v. Smith*, 14 Ohio App.3d 366, 371 (12th Dist.1983). *See also Townsend* at *4 ("An element elevates the degree of the offense, but an enhancement provision increases the penalty without elevating the offense."), citing *State v. Allen*, 29 Ohio St.3d 53 (1987). "[W]hen a jury instruction relieves the state of its burden of proving an element of the offense, it violates the defendant's due-process rights." *State v. Tsibouris*, 1st Dist. Hamilton Nos. C-120414 and C-120415, 2014-Ohio-2612, ¶ 23, citing *Adams* at 152-154.

{¶64} In this case, the amount of drug involved was an essential element of the principal offense, possession of drugs, such that to convict Harrison of a third-degree, drug-possession felony under R.C. 2925.11(C)(4)(c), the State was required to prove and the jury was required to find beyond a reasonable doubt the amount of drug involved—specifically, that "the amount of the drug involved equals or exceeds ten grams but is less than twenty grams of cocaine." *See Cargile* at ¶ 13-14. *See also Townsend* at *4 ("The possession of drugs in Ohio becomes a more serious offense based on the amount of drugs the defendant is found to have possessed."). Regarding the jury's verdict, R.C. 2945.75(A) provides, in relevant part:

> When the presence of one or more additional elements makes an offense one of more serious degree:

* * *

(2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.

R.C. 2945.75(A)(2).

In its jury instruction regarding Count Two, the trial court stated:

The defendant is charged in Count II with complicity in the commission of the offense of possession of drugs. Before you can find the defendant guilty, you must find, beyond a reasonable doubt, that on or about the 12th day of May, 2013, and in Logan County, Ohio, the defendant solicited or procured another to commit the offense or aided or abetted another in committing the offense.

All of the words and phrases defined for you in Count I have the same meaning in this count.

To find the defendant guilty of Count II, you must find as follows: One, the State proved beyond a reasonable doubt all the elements of this charge.

Two, if you find the defendant guilty you must determine the amount of the drug involved. If you find the State has failed to

> prove any element of this crime beyond a reasonable doubt, you must find the defendant not guilty.

(Trial Tr., Vol. Two, at 426-427). In its instructions as to Count One—also a complicity-to-possession-of-drugs offense—the trial court stated, "The defendant cannot be found guilty to complicity unless the offense was actually committed." (*Id.* at 425). Before the trial court instructed the jury, Harrison's trial counsel objected to this instruction, arguing "that it improperly shifts the burden" of proof by not specifying that, to find Harrison guilty, the jury was required to find that the State proved beyond a reasonable doubt the amount of drugs involved. (*Id.* at 417). The trial court did not revise the instruction in response to Harrison's objection, and it appears that the trial court overruled his objection. (*Id.* at 417-418).

{¶65} We conclude that the trial court's jury instruction concerning Count Two did not violate Harrison's due-process rights and that the trial court did not abuse its discretion by giving the instruction and not revising it in response to Harrison's objection. "[A]n appellate court must review jury instructions in the context of the entire charge." *State v. Barker*, 11th Dist. Portage No. 2010-P-0044, 2012-Ohio-522, ¶ 91, citing *State v. Hardy*, 28 Ohio St.2d 89, 92 (1971). The trial court instructed the jury that in order to find Harrison guilty of complicity to possession of drugs, it needed to find that the offense of possession of drugs

was actually committed. The trial court also instructed the jury that to find Harrison guilty, it needed to find that the State proved each element beyond a reasonable doubt. After instructing the jury to determine the amount of drug involved if it found Harrison guilty, the trial court instructed the jury that it could not find Harrison guilty if it found that the State failed to prove any element beyond a reasonable doubt. We conclude that these instructions, when reviewed in the context of the entire charge, did not violate Harrison's due-process rights. We reject Harrison's argument that the trial court needed to say in its instructions, something to the effect, "The amount of drug involved is an essential element to the offense of complicity to possession of drugs."

{¶66} Faced with a similar argument in *Townsend*, the Second District Court of Appeals reasoned:

> The trial court instructed the jury that if they found Townsend guilty of possession of drugs as possession was defined for them they should specify in their verdict whether Townsend possessed the amount specified in the indictment or some lesser amount in certain ranges.
>
> * * *
>
> In this case the trial court did not specifically tell the jury in its instructions that the State was required to prove as an "element" of

> the offense that Townsend possessed more than ten grams but less than twenty-five grams of crack cocaine. The judge did instruct the jury that they should specify in their verdict whether Townsend possessed the amount charged in the indictment or some lesser amount. We believe that the instruction adequately informed the jury of their duty to make the necessary factual determination required by law.

Townsend, 2001 WL 959186, at *4-5. We agree with the Second District.

{¶67} Harrison's sixth assignment of error is overruled.

Assignment of Error No. VII

The trial court twice erred when it failed to instruct the jury as to relevant issues concerning the credibility of the State's witnesses.

{¶68} In his seventh assignment of error, Harrison argues that the trial court committed plain error when it failed to instruct the jury under *Ohio Jury Instructions*, CR Section 409.19 (2008) "concerning the credibility of an expert witness."[5] (Appellant's Brief at 21). Harrison argues that based on the testimony of one of the State's witnesses—Brandon Werry ("Werry"), laboratory director at

[5] Also under his seventh assignment of error, Harrison argues that the trial court erred by failing to give the accomplice-testimony jury instruction in R.C. 2923.03(D). In its brief, the State pointed out that Harrison's trial counsel failed to request the R.C. 2923.03(D) jury instruction or object to its omission, waiving all but plain error on appeal. Our review of the record reflects that Harrison did not request or object to the omission of the R.C. 2923.03(D) jury instruction. In his reply brief, Harrison requests that we "address the issue in the context of ineffective assistance of counsel rather than plain error." (Appellant's Reply Brief at 8). Therefore, we will consider this issue under Harrison's ninth assignment of error rather than under his seventh assignment of error.

the Ohio State Highway Patrol Crime Laboratory—the trial court should have given the expert-witness-credibility instruction.

{¶69} "'As a general rule, the failure to object at trial or to request specific jury instructions waives,' or forfeits, 'all but plain error with respect to the jury instructions given.'" *State v. Walburg*, 10th Dist. Franklin No. 10AP-1087, 2011-Ohio-4762, ¶ 46, quoting *State v. Johnson*, 10th Dist. Franklin No. 08AP-652, 2009-Ohio-3383, ¶ 37, citing *State v. Hartman*, 93 Ohio St.3d 274, 289 (2001). *See also State v. Vielma*, 3d Dist. Paulding No. 11-11-03, 2012-Ohio-875, ¶ 34. "Pursuant to Crim.R. 52(B), '[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.'" *Walburg* at ¶ 47. We recognize plain error with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *Vielma* at ¶ 34, citing *State v. Landrum*, 53 Ohio St.3d 107, 110 (1990). "For plain error to apply, the trial court must have deviated from a legal rule, the error must have been an obvious defect in the proceeding, and the error must have affected a substantial right." *Id.*, citing *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). "Under the plain error standard, the appellant must demonstrate that the outcome of his trial would clearly have been different but for the trial court's errors." *Id.*, citing *State v. Waddell*, 75 Ohio St.3d 163, 166 (1996).

{¶70} It is unclear what Harrison is arguing under this assignment of error. He suggests that *Ohio Jury Instructions*, CR Section 409.19 (2008) concerns "the credibility of an expert witness." However, that section, titled "Opinion of layman," addresses the limited circumstances under which a lay person may express an opinion and explains that the jury "will apply the usual rules for testing credibility and determining the weight to be given to testimony." *Ohio Jury Instructions*, CR Section 409.21 (2008), titled "Expert witness and hypothetical question," addresses the weight of expert testimony:

> 3. WEIGHT OF EXPERT TESTIMONY. (However,) As with other witnesses, upon you alone rests the duty of deciding what weight should be given to the testimony of the expert(s). In determining its weight, you may take into consideration his (their) skill, experience, knowledge, veracity, familiarity with the facts of this case, and the usual rules for testing credibility and determining the weight to be given to testimony.

We assume this is the jury instruction to which Harrison intended to refer notwithstanding his reference to CR Section 409.19.

{¶71} At any rate, it was not error, let alone plain error, for the trial court to not instruct the jury specifically concerning the credibility of expert witnesses. "A reviewing court must consider the effect of any alleged erroneous instruction in

the context of the overall charge rather than in isolation." *Martens*, 90 Ohio App.3d at 348, citing *Cupp v. Naughten*, 414 U.S. 141, 146-147, 94 S.Ct. 396 (1973) and *State v. Price*, 60 Ohio St.2d 136 (1979). The trial court instructed the jury generally regarding the credibility of witnesses:

> You are the sole judges of the facts, the credibility of the witnesses, and the weight of the evidence. To weigh the evidence, you must consider the credibility of the witnesses. You will apply the tests of truthfulness which you apply in your daily lives. These tests include the appearance of each witness upon the stand; his manner of testifying; the reasonableness of the testimony; the opportunity the witness had to see, hear, and know the things concerning which the witness testifies; accuracy of memory; frankness, or lack of it; intelligence; interest; and bias, if any, together with all of the facts and circumstances surrounding the testimony. Applying these tests, you will assign to each witness such weight as you deem proper.
>
> You're not required to believe the testimony of any witness simply because the witness was under oath. You may believe or disbelieve all or any part of the testimony of any witness. It is your

> province to determine what testimony is worthy of belief and what testimony is not worthy of belief.

(Trial Tr., Vol. Two, at 422).

{¶72} In response to the State's argument that the trial court "did nothing to highlight Mr. Werry's testimony or encourage the jury to consider it differently from any other witness's testimony," Harrison argues that the trial court "permitted the expert to render opinions on issues that lay witness [sic] would not have been permitted to render" and that the trial court "admitted into evidence the witness's reports." (Appellee's Brief at 23); (Appellant's Reply Brief at 9). Allowing an expert witness to render opinions and admitting the expert witness's report is not the equivalent of highlighting an expert's testimony and encouraging the jury to consider it differently from any other witness's testimony. *See Martens* at 348. For these reasons, it was not error, let alone plain error, for the trial court to give only a general jury instruction regarding the credibility of witnesses. *Id.* ("Considering the totality of the court's charge to the jury, we find no error prejudicial to appellant.").

{¶73} Harrison's seventh assignment of error is overruled.

Assignment of Error No. IX

> **The acts and omissions of trial counsel deprived appellant of his right to effective assistance of counsel.**

Assignment of Error No. II

The trial court abused its discretion when it denied appellant's motion to substitute counsel. [Tr. 124]

{¶74} In his ninth assignment of error, Harrison argues that he was denied his right to effective assistance of counsel. Specifically, he argues that his trial counsel performed deficiently by:

> 1) failing to establish a relationship with the offender that is not marred by irreconcilable conflict, 2) failing to prepare for a critical motion to suppress, 3) repeatedly asking inappropriate questions in voir dire and alienating the prospective jurors, 4) failing to cross examine the prosecution's witnesses as to critical factual issues and instead adduces inculpatory information, 5) failing to object to infirm jury instructions, and 6) failing to filed [sic] the required affidavit to waive a mandatory fine.

(Appellant's Brief at 24-25). Harrison argues he was prejudiced by these deficiencies. In addition, although originally included under his seventh assignment of error, Harrison in his reply brief asks us to consider "in the context of ineffective assistance of counsel" his trial counsel's failure to request the accomplice-testimony jury instruction in R.C. 2923.03(D). (Appellant's Reply Brief at 8). Finally, in his second assignment of error, Harrison argues that the trial court abused its discretion when it denied the request he made in his April 30,

2014 handwritten letter to the trial court judge that he be allowed to dismiss his attorney and retain new counsel. Specifically, Harrison argues that his trial counsel was unprepared for the hearing on his motion to suppress, performed unreasonably during voir dire, and developed an "irreconcilable conflict" with Harrison.

{¶75} A defendant asserting a claim of ineffective assistance of counsel must establish: (1) the counsel's performance was deficient or unreasonable under the circumstances; and (2) the deficient performance prejudiced the defendant. *State v. Kole*, 92 Ohio St.3d 303, 306 (2001), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). In order to show counsel's conduct was deficient or unreasonable, the defendant must overcome the presumption that counsel provided competent representation and must show that counsel's actions were not trial strategies prompted by reasonable professional judgment. *Strickland* at 687. Counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie*, 81 Ohio St.3d 673, 675 (1998). Tactical or strategic trial decisions, even if unsuccessful, do not generally constitute ineffective assistance. *State v. Carter*, 72 Ohio St.3d 545, 558 (1995). Rather, the errors complained of must amount to a substantial violation of counsel's essential duties to his client. *See State v. Bradley*, 42 Ohio St.3d 136, 141-142 (1989), quoting *State v. Lytle*, 48 Ohio St.2d

391, 396 (1976). In the event of deficient or unreasonable performance, prejudice results when "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 142, quoting *Strickland* at 694. "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.*, quoting *Strickland* at 694.

{¶76} As an initial matter, we note that, while the trial court initially appointed counsel to represent Harrison, Harrison later retained private trial counsel. The standard used to determine "if the accused had effective retained counsel is whether the accused, under all the circumstances, including the fact that he had retained counsel, had a fair trial and substantial justice was done." *State v. Hester*, 45 Ohio St.2d 71 (1976), paragraph four of the syllabus, holding modified on other grounds by *State v. Cole*, 2 Ohio St.3d 112 (1982), syllabus. *See also State v. Houseworth*, 6th Dist. Lucas No. L-07-1114, 2008-Ohio-974, ¶ 18, citing *State v. Harwell*, 149 Ohio App.3d 147, 2002-Ohio-4349, ¶ 15 (6th Dist.) and *Hester* at paragraph four of the syllabus. "In determining this issue, an appellate court applies the same test utilized in determining ineffective assistance of appointed counsel." *Houseworth* at ¶ 18, citing *State v. Jordan*, 10th Dist. Franklin No. 04AP-827, 2005-Ohio-3790, *State v. Castile*, 6th Dist. Erie No. E-

02-012, 2005-Ohio-41, and *State v. Zachery*, 5th Dist. Stark No. 2004CA00091, 2004-Ohio-6282.

{¶77} We now proceed to Harrison's arguments. We will first address together Harrison's first argument under his ninth assignment of error—that his trial counsel failed to establish a relationship with him that was not "marred by irreconcilable conflict"—and Harrison's second assignment of error. (Appellant's Brief at 24). Then, we will consider, in order, Harrison's second, third, and fourth arguments under his ninth assignment of error. Next, we will address together Harrison's fifth argument under his ninth assignment of error—that he was denied effective assistance of counsel by his trial counsel's failure "to object to infirm jury instructions"—and whether Harrison was denied effective assistance of counsel by his trial counsel's failure to request the accomplice-testimony jury instruction in R.C. 2923.03(D), an issue Harrison also raised under his seventh assignment of error. We will conclude by addressing Harrison's sixth argument under his ninth assignment of error.

{¶78} First, in support of his arguments under his ninth assignment of error that his retained trial counsel "fail[ed] to establish a relationship with the offender that is not marred by irreconcilable conflict" and "performed deficiently in his relationship with Appellant," Harrison simply incorporates the arguments he offers under his second assignment of error. Under that assignment of error, Harrison

argues that, in part because he and his trial counsel developed an "irreconcilable conflict" that deprived him of his right to the effective assistance of counsel, the trial court abused its discretion by denying his motion to substitute counsel.

{¶79} "[T]he request of a defendant to discharge his * * * counsel will be granted only if he can 'show a breakdown in the attorney-client relationship of such a magnitude as to jeopardize the defendant's right to effective assistance of counsel.'" *State v. Jackson*, 11th Dist. Trumbull No. 2004-T-0089, 2006-Ohio-2651, ¶ 43, quoting *State v. Coleman*, 37 Ohio St.3d 286 (1988), paragraph four of the syllabus. A "conflict of interest," a "complete breakdown of communication," and an "irreconcilable conflict which could cause an apparent unjust result" are three examples of good cause warranting the discharge of counsel. *Id.* at ¶ 44, citing *State v. Horn*, 6th Dist. Ottawa No. OT-03-016, 2005-Ohio-5257, ¶ 11. "In light of the nature of the three examples, it has been further held that the substitution of counsel should be allowed only if extreme circumstances exist." *Id.*, citing *State v. Glasure*, 132 Ohio App.3d 227, 239 (7th Dist.1999).

{¶80} "[T]he Supreme Court of Ohio has expressly said that the Sixth Amendment right to counsel was not intended to guarantee that a criminal defendant will have a 'rapport' with his attorney." *Id.* at ¶ 45, citing *State v. Henness*, 79 Ohio St.3d 53, 65 (1997), citing *Morris v. Slappy*, 461 U.S. 1, 13-14, 103 S.Ct. 1610 (1983). "Accordingly, the existence of hostility or a personal

conflict between the attorney and the defendant does not constitute a total breakdown so long as it does not inhibit the attorney from both preparing and presenting a competent defense." *Id.*, citing *State v. Meridy*, 12th Dist. Clermont No. CA2003-11-091, 2005-Ohio-241 and *State v. Mayes*, 4th Dist. Gallia No. 03CA9, 2004-Ohio-2027. "Moreover, the lack of communication must be permanent in nature before a finding of a complete breakdown can be made." *Id.*, citing *State v. Evans*, 153 Ohio App.3d 226, 2003-Ohio-3475, ¶ 32 (7th Dist.). "Finally, a dispute over the trial tactics or strategy of the attorney is not sufficient to establish the requisite breakdown." *Id.*, citing *Evans* at ¶ 32.

{¶81} "The '[s]ubstitution of counsel is within the discretion of the trial court.'" *State v. McDowell*, 3d Dist. Auglaize No. 2-07-26, 2008-Ohio-1339, ¶ 8, citing *State v. Kirk*, 3d Dist. Union No. 14-06-28, 2007-Ohio-1228, ¶ 56, citing *Wheat v. United States*, 486 U.S. 153, 108 S.Ct. 1692 (1988) and *State v. Jones*, 91 Ohio St.3d 335, 343-344 (2001). "Accordingly, the trial court's decision on substitution of counsel is reviewed under an abuse of discretion standard." *Id.*, citing *Kirk* at ¶ 56, citing *State v. Murphy*, 91 Ohio St.3d 516, 523 (2001). As we stated above, an abuse of discretion implies that the decision was unreasonable, arbitrary, or unconscionable. *Adams*, 62 Ohio St.2d at 157-158.

{¶82} The circumstances of this case are not "extreme," and the trial court did not abuse its discretion by denying Harrison's motion to substitute counsel.

Nor did Harrison receive ineffective assistance of counsel based on an "irreconcilable conflict" with his retained trial counsel. First, Harrison retained his counsel, which is a consideration in the ineffective-assistance-of-counsel analysis. *See Hester*, 45 Ohio St.2d 71, paragraph four of the syllabus; *State v. Forsee*, 12th Dist. Clermont Nos. CA85-03-018 and CA85-03-019, 1986 WL 1391, *4 (Jan. 31, 1986). Second, the record reflects that Harrison and his trial counsel communicated with one another before and throughout trial. (*See, e.g.*, Trial Tr., Vol. Two, at 232). Third, at the outset of the March 21, 2014 hearing concerning his request for new counsel, Harrison explained the reason for his request:

> [F]irst, Your Honor, this is not an issue about [trial counsel's] abilities to defend me. He's a great lawyer. The issue actually stems from the Court because I don't feel like it's legal for the Court to force my attorney to go to trial within 30 days when my attorney, on numerous occasions, expresses the fact that he has other things going on that he's not prepared to be able to go to trial.

(Mar. 21, 2014 Tr. at 3-4). At trial, Harrison reiterated his request for new counsel, citing a "conflict of interest." (Trial Tr., Vol. Two, at 231-232). When the trial court asked him what the "conflict of interest" was, Harrison responded, "I don't feel like I have to argue with my attorney * * * about stuff that I feel

that's relevant or should be done in my case * * *." (*Id.* at 232). Harrison continued, "There's certain things that I want asked or I want done, then it should be done. That's it." (*Id.* at 233).

{¶83} These statements by Harrison reflect that he was displeased with the trial court's decision not to continue trial and with some of his trial counsel's tactics and strategy. These are not the sorts of circumstances that constitute ineffective assistance of counsel and warrant a substitution of counsel. *See Jackson*, 2006-Ohio-2651, at ¶ 44. On appeal, Harrison argues that his trial counsel "chastised" him by, for example, informing the trial court at the March 18, 2014 hearing that Harrison was telling trial counsel "useless information that [trial counsel didn't] need right now." (Mar. 18, 2014 Tr. at 6). However, at the hearing three days later, Harrison said his trial counsel is "a great lawyer." (Mar. 21, 2014 Tr. at 3). For these reasons, the trial court did not abuse its discretion in denying Harrison's motion to substitute counsel, and Harrison did not receive ineffective assistance of counsel because of any "irreconcilable conflict."

{¶84} Second, Harrison argues that he received ineffective assistance of counsel because his trial counsel "performed deficiently at the motion to suppress." (Appellant's Brief at 25). Specifically, Harrison argues that his trial counsel "[i]nexplicably" did not review the video of the traffic stop before the suppression hearing. (*Id.*). Harrison is incorrect. The transcript of the

suppression hearing reveals that Harrison's trial counsel first received the traffic-stop video on the day of the hearing because of a "misunderstanding" between him and Harrison's previous trial counsel. (Mar. 18, 2014 Tr. at 4-5). Harrison's trial counsel said he would wait until the conclusion of the suppression hearing to see if he needed to request a continuance of the hearing. (*Id.* at 5). Harrison's trial counsel asked meaningful questions during his cross-examination of the State's witnesses at the suppression hearing. (*See, e.g.*, *id.* at 52). Therefore, Harrison's trial counsel did not perform deficiently at the suppression hearing. Moreover, whether to file a motion to suppress is a matter of trial strategy in the first instance, and counsel is not required to file a motion to suppress evidence in every case. *State v. Flors*, 38 Ohio App.3d 133, 139 (8th Dist.1987). For these reasons, Harrison's trial counsel's performance was not deficient or unreasonable under the circumstances, and Harrison was not denied the effective assistance of counsel in relation to his motion to suppress.

{¶85} Third, Harrison argues that his trial counsel "performed deficiently in voir dire." (Appellant's Brief at 26). "When evaluating claims of ineffective assistance at voir dire, [the Supreme Court of Ohio has] 'recognized that counsel is in the best position to determine whether any potential juror should be questioned and to what extent.'" *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, ¶ 225, quoting *State v. Murphy*, 91 Ohio St.3d 516, 539 (2001). "'Few decisions at

trial are as subjective or prone to individual attorney strategy as juror *voir dire*, where decisions are often made on the basis of intangible factors.'" *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, ¶ 64, quoting *Miller v. Francis*, 269 F.3d 609, 620 (6th Cir.2001). The Supreme Court of Ohio has "consistently declined to 'second-guess trial strategy decisions' or impose 'hindsight views about how current counsel might have voir dired the jury differently.'" *Id.* at ¶ 63, quoting *State v. Mason*, 82 Ohio St.3d 144, 157 (1998).

{¶86} Here, while Harrison's trial counsel may have employed a unique style, his actions during voir dire were obviously designed to demonstrate his passionate belief that Harrison was entitled to a fair trial. *See State v. Dawson*, 8th Dist. Cuyahoga No. 63122, 1993 WL 483805, *21 (Nov. 18, 1993). Any "arrogant" comments were part of his trial strategy. *Id.*, citing *Vaughn v. Maxwell*, 2 Ohio St.2d 299 (1965). Indeed, Harrison's trial counsel wanted to know if any juror with an adverse opinion of trial counsel's personality would let that affect his or her opinion about the case. (Trial Tr., Vol. One, at 88). Moreover, even assuming Harrison's trial counsel performed deficiently during voir dire, Harrison's arguments pertain to "prospective jurors." (Appellant's Brief at 26). Aside from the general assertion that "at least one juror would have reached a contrary result," Harrison fails to explain how the alleged deficient performance of his trial counsel during voir dire impacted any *seated* juror. (*Id.* at 29). In fact,

the jury found Harrison not guilty on one of the two charges. For these reasons, we reject Harrison's argument that he was denied the effective assistance of counsel during voir dire.

{¶87} Fourth, Harrison argues that his trial counsel "performed deficiently in the State's case in chief." (*Id*. at 27). Specifically, Harrison argues that his trial counsel should have subpoenaed Harrison's mother, to whom Rea apparently gave the bag, less the cocaine, in which Rea discovered the cocaine. He also argues that his trial counsel failed to object to Rea's testimony and to adequately cross-examine Abbott and Werry. "The decision to introduce evidence falls within the realm of trial strategy * * *." *State v. Cloud*, 5th Dist. Delaware No. 06CAA090068, 2007-Ohio-4241, ¶ 37. "The failure to make objections is not alone enough to sustain a claim of ineffective assistance of counsel and may be justified as a tactical decision." *State v. Brooks*, 3d Dist. Hancock No. 5-11-11, 2012-Ohio-5235, ¶ 113, citing *State v. Gumm*, 73 Ohio St.3d 413, 428 (1995). "'The scope of cross-examination falls within the ambit of trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel.'" *Id.*, quoting *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶ 101.

{¶88} In this case, each of the arguments that Harrison offers in support of his assertion that his trial counsel performed deficiently during the State's case in chief does not constitute deficient or unreasonable performance. His trial counsel

may have decided not to introduce the bag in which Rea found the cocaine so as not to give a witness, such as Rea, the opportunity to reenact his discovery of the drugs. Harrison argues that his trial counsel should have more thoroughly cross-examined Abbott; however, Abbott's testimony on direct examination was favorable to Harrison to the extent Abbott testified, when asked if the bag containing the cocaine was Harrison's, "No. I never seen a bag so I can't say that it belonged to him." (Trial Tr., Vol. Two, at 348). We also will not second-guess Harrison's trial counsel's decision not to object when Rea testified that he was concerned who Harrison may have been calling while Rea was locked out of the vehicle during the traffic stop. On appeal, Harrison argues that this was improper speculation by Rea, and while it may have been, the decision whether to object to testimony is a tactical decision. Finally, Harrison argues that his trial counsel failed to adequately cross-examine Werry, who testified that the substance in the two baggies was cocaine. (*Id.* at 308). However, the record reflects that Harrison's trial counsel conducted a lengthy and probing cross-examination of Werry. (*Id.* at 310-327, 328-331). In fact, under his seventh assignment of error, Harrison argues that "[t]rial counsel challenged the credibility of [Werry] concerning as [sic] to chain of custody [Tr. 312-319], the reliability of the machine which identified the substance tested [Tr. 320-24], and the manner in which its weight was determined. [Tr. 329-31]." (Appellant's Brief at 21). For these

reasons, we reject Harrison's argument that he was denied the effective assistance of counsel during the State's case in chief.

{¶89} Fifth, Harrison argues that his trial counsel "performed deficiently as to the court's instructions." (*Id.* at 28). Specifically, Harrison references his seventh assignment of error and argues that his counsel should have requested a jury instruction concerning the credibility of expert witnesses and objected when the trial court did not give one. "An attorney's decision not to request a particular jury instruction is a matter of trial strategy and does not establish ineffective assistance of counsel." *State v. Morris*, 9th Dist. Summit No. 22089, 2005-Ohio-1136, ¶ 100, citing *State v. Fisk*, 9th Dist. Summit No. 21196, 2003-Ohio-3149, ¶ 9, citing *State v. Hill*, 73 Ohio St.3d 433, 443 (1995). *See also State v. Oates*, 3d Dist. Hardin No. 21196, 2013-Ohio-2609, ¶ 9. Moreover, "the failure to make a futile objection does not constitute deficient performance for an ineffective assistance of counsel claim." *State v. Corder*, 4th Dist. Washington No. 10CA42, 2012-Ohio-1995, ¶ 29, citing *State v. Washington*, 5th Dist. Stark No. 2005CA00050, 2006-Ohio-825, ¶ 21. As we explained above in our analysis of Harrison's seventh assignment of error, the trial court gave a general credibility instruction and did not err by not instructing the jury specifically concerning the credibility of expert witnesses. Therefore, not only was it a matter of trial strategy

whether to request an expert-witness-credibility jury instruction, an objection to the trial court's general credibility instruction would have been futile.

{¶90} Harrison also argues that his trial counsel should have requested the accomplice-testimony jury instruction in R.C. 2923.03(D). The trial court did not give the R.C. 2923.03(D) instruction, nor did Harrison's trial counsel request it or object to its omission. R.C. 2923.03(D) provides that a trial court shall give "substantially the following" jury instruction "[i]f an alleged accomplice of the defendant testifies against the defendant in a case in which the defendant is charged with complicity in the commission of * * * an offense":

> "The testimony of an accomplice does not become inadmissible because of his complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution.
>
> It is for you, as jurors, in the light of all the facts presented to you from the witness stand, to evaluate such testimony and to determine its quality and worth or its lack of quality and worth."

See State v. Wilson, 9th Dist. Summit No. 25652, 2011-Ohio-5638, ¶ 21 ("R.C. 2923.03(D) requires the accomplice instruction when the accomplice testifies

against the defendant."), citing *State v. Mitchell*, 9th Dist. Summit No. 24730, 2009-Ohio-6950, ¶ 14.

{¶91} Even assuming without deciding that the trial court was required to give the R.C. 2923.03(D) jury instruction or one substantially similar to it, we conclude that the trial court's failure to give the instruction was harmless for at least two reasons. First, Abbott's testimony was not unfavorable to Harrison. As we mentioned above, when the State's counsel asked Abbott if the bag containing the cocaine was Harrison's, Abbott responded, "No." (Trial Tr., Vol. Two, at 348). The circumstances of this case are similar to those in *State v. Hall*, in which the Fifth District Court of Appeals reasoned:

> While the State called [the accomplice] to the witness stand for the purpose of eliciting testimony against appellant, the record demonstrates that [the accomplice's] testimony was not harmful or adverse to appellant but was in fact beneficial to his defense. Accordingly, appellant has failed to demonstrate any prejudice from the trial court's failure to specifically give the R.C. 2923.03(D) accomplice instruction and has therefore failed to demonstrate plain error therefrom.

5th Dist. Richland No. CA-2761, 1991 WL 12807, *1 (Jan. 25, 1991). Second, disregarding Abbott's testimony, the other evidence against Harrison as to the

offense of which the jury convicted him was overwhelming. *See State v. Ross*, 8th Dist. Cuyahoga No. 98763, 2013-Ohio-3130, ¶ 39. "Thus, the outcome of the trial was not affected by the lack of instruction." *Id.* For these reasons, we conclude that Harrison failed to establish ineffective assistance of counsel regarding his trial counsel's failure to request or object to the omission of the R.C. 2923.03(D) instruction.

{¶92} Finally, Harrison argues that his trial counsel "performed deficiently at the sentencing hearing." (Appellant's Brief at 29). Specifically, Harrison argues that his trial counsel failed to file the required affidavit to waive the mandatory fine under R.C. 2929.18(B)(1). That statute provides, in relevant part:

> If an offender alleges in an affidavit filed with the court prior to sentencing that the offender is indigent and unable to pay the mandatory fine and if the court determines the offender is an indigent person and is unable to pay the mandatory fine described in this division, the court shall not impose the mandatory fine upon the offender.

R.C. 2929.18(B)(1). "'The failure to file an affidavit of indigency prior to sentencing may constitute ineffective assistance of counsel if the record shows a reasonable probability that the trial court would have found Defendant indigent and relieved him of the obligation to pay the fine had the affidavit been filed.'"

State v. Howard, 2d Dist. Montgomery No. 21678, 2007-Ohio-3582, ¶ 15, quoting *State v. Sheffield*, 2d Dist. Montgomery No. 20029, 2004-Ohio-3099, ¶ 5.

{¶93} In this case, the record does not show a reasonable probability that the trial court would have found Harrison indigent and waived the fine. Harrison posted bond in the amount of $5,000. (Doc. No. 1). *See Sheffield* at ¶ 15. The trial court later revoked the bond, and Harrison moved to reinstate it. (Doc. Nos. 97, 105). At the outset of the case and again after sentencing, Harrison filed affidavits of indigency for the purpose of appointing counsel to represent him. (Doc. Nos. 1, 24, 183). In those affidavits, Harrison indicated he had no income or liquid assets. (*Id.*). However, "[a]n offender's indigency for purposes of receiving appointed counsel is separate and distinct from his or her indigency for purposes of avoiding having to pay a mandatory fine." *State v. Pilgrim*, 184 Ohio App.3d 675, 2009-Ohio-5357, ¶ 79 (10th Dist.), citing *State v. Gipson*, 80 Ohio St.3d 626, 631-633 (1998). Moreover, while the trial court found Harrison indigent and appointed counsel to represent him at the outset of the case and on appeal, Harrison retained and was represented by private counsel before, during, and after trial, up to and including sentencing. (Doc. Nos. 25, 94); (June 13, 2014 Tr. at 43). *See Howard* at ¶ 17; *Sheffield* at ¶ 15.

{¶94} Harrison did not complete the presentence investigation questionnaire, but the sentencing-hearing transcript reveals that Harrison is 38

years old, has completed college courses, and, before his arrest, "was in the process of getting [his] articles of organization to get involved with maintaining and cleaning foreclosed properties through banks." (June 13, 2014 Tr. at 6, 19, 27). The presentence investigation report indicates that Harrison's "financial condition" is "unknown." (Presentence Investigation Report). At the sentencing hearing, and before the trial court sentenced Harrison, his trial counsel stated, "I understand the fine is mandatory 5,000, but the Court can also waive that if he finds he's indigent. Obviously he is." (June 13, 2014 Tr. at 10). The trial court nevertheless imposed the mandatory $5,000 fine. (*Id.* at 41). When discussing Harrison's indgency for purposes of appointing counsel for appeal, the trial court said, "That finding of indgency has been an on again/off again thing because of retained counsel, but the Court believes from all of the information in the record that defendant's indigent for purposes of appeal." (*Id.* at 43).

{¶95} Based on the record, there is no reasonable probability that the trial court would have found Harrison indigent and waived the mandatory fine of $5,000. Although Harrison's trial counsel did not file an affidavit under R.C. 2929.18(B)(1), he did raise the argument at the sentencing hearing, and the trial court was aware of it. However, in light of Harrison's retention of private counsel, which the trial court cited, and the other factors, such as Harrison's posting bond

and his statements at the sentencing hearing, the trial court chose to impose the fine.

{¶96} Harrison's ninth and second assignments of error are overruled.

{¶97} Having found no error prejudicial to the appellant herein in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

ROGERS, P.J., concurs in Judgment Only.

WILLAMOWSKI, J., concurs.

/jlr