

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

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 9-13-73

v.

DEREK A. MAXIE,

OPINION

DEFENDANT-APPELLANT.

Appeal from Marion County Common Pleas Court
Trial Court No. 13-CR-0440

Judgment Affirmed

Date of Decision: March 9, 2015

APPEARANCES:

Robert C. Nemo for Appellant

Adam D. Meigs for Appellee

WILLAMOWSKI, J.

Introduction

{¶1} Defendant-appellant, Derek Maxie (“Maxie”), brings this appeal from the judgment of the Marion County Court of Common Pleas, which entered his conviction after a jury found him guilty of two counts of trafficking in cocaine, with forfeiture specifications as to each count for the use of his 2000 Ford Explorer as an instrumentality of the crimes. Maxie challenges the jury’s findings of guilty and of forfeiture as being against the manifest weight of the evidence. He further claims that the trial court erred to his prejudice in failing to grant his motion for acquittal, by assisting the State in the presentation of its case, and by failing to grant a mistrial as a result of the State’s allegedly prejudicial comments in its closing statement. Maxie additionally asserts that his trial counsel was ineffective. For the reasons that follow, we affirm the trial court’s judgment.

Facts and Procedural History

{¶2} On May 10, 2013, Detective Mark Elliot (“Detective Elliot”), from the Marion City Police Department, who is a member of the Marion Metropolitan Drug Task Force (“MARMET”), was contacted by a confidential informant (“CI”). The CI told Detective Elliot that she would be able to purchase drugs from Maxie. The CI informed Detective Elliot that she owed Maxie \$50.00, so she

would need to settle the debt before purchasing narcotics. A controlled buy operation was scheduled for the same day.

{¶3} The CI called Maxie and arranged a meeting to buy \$50.00 worth of crack cocaine. The phone call was recorded by MARMET. The CI was given \$100.00, which included \$50.00 to settle the prior debt and \$50.00 to complete the purchase. The CI was equipped with a wire and a video camera to record the transaction. Then, one of MARMET employees, Amanda Snyder (“Officer Snyder”), drove the CI to the meeting location, which was a parking lot of Whitey’s bar, located within 1000 feet of a school. Several other MARMET detectives were there, prepared to observe the meeting from a distance and to listen to the audio of the events in real time. The CI exited the vehicle and walked up to Maxie’s car. The meeting between the CI and Maxie lasted a few seconds. After that, the CI returned to the car and Officer Snyder took her back to meet with Detective Elliot. The CI gave Detective Elliot the drugs and completed paperwork about the transaction.

{¶4} The CI offered to make another buy on the same day. Therefore, she placed another phone call to Maxie, which was again audio-recorded by MARMET. Although the CI wanted to purchase another \$50.00 worth of drugs, Maxie told her that he only had \$70.00 worth of drugs available, which he was willing to sell to her for \$60.00. A meeting to purchase the drugs was set up at the Duke Station on Fairground Street. Officer Snyder again drove the CI to the

meeting location, where Maxie was waiting. The CI again left the vehicle and met with Maxie alone. The meeting lasted a few seconds and MARMET detectives observed the encounter from a distance and listened to the live audio. The CI returned to the vehicle to be taken back to meet with Detective Elliot, where she gave Detective Elliot the narcotics allegedly purchased from Maxie and filled out a report.

{¶5} As a result of the evidence collected during the two controlled buys, Maxie was indicted on two counts of trafficking in cocaine. Count I charged Maxie with trafficking in cocaine “on school premises, in a school building, or within 1,000 feet of the boundaries of any school premises,” in violation of R.C. 2925.03(A)(1)/(C)(4), a felony of the fourth degree. (R. at 22.) Count II charged Maxie with trafficking in cocaine in violation of R.C. 2925.03(A)(1)/(C)(4), a felony of the fifth degree. The indictment contained forfeiture specifications for Maxie’s 2000 Ford Explorer, which was alleged to have been used as an instrumentality of the crimes.

{¶6} Maxie pled not guilty and the matter proceeded to trial. The trial was divided into two stages. The first stage involved the evidence concerning trafficking in cocaine. When the jury found Maxie guilty on both counts of trafficking, the trial court allowed for presentation of additional evidence concerning forfeiture specifications. The jury then deliberated again and found that forfeiture was warranted as to each count. The trial court sentenced Maxie to

a term of twelve months in prison on each of the counts, to be served concurrently, for a total sentence of twelve months. The trial court then ordered forfeiture of Maxie's 2000 Ford Explorer to the State of Ohio. Maxie now appeals the trial court's judgment raising six assignments of error for our review.

Assignments of Error

- 1. THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR ACQUITTAL.**
- 2. THE JURY'S GUILTY VERDICTS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.**
- 3. THE JURY ERRED IN FINDING THAT UNDER THE SPECIFICATION FILED, APPELLANT'S AUTOMOBILE SHOULD HAVE BEEN FORFEITED.**
- 4. APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL AS A RESULT OF THE TRIAL COURT ASSISTING APPELLEE IN THE PRESENTATION OF ITS CASE.**
- 5. APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.**
- 6. THE TRIAL COURT COMMITTED PLAIN ERROR BY FAILING TO GRANT A MISTRIAL AS A RESULT OF APPELLEE'S PREJUDICIAL COMMENTS IN CLOSING STATEMENT USING THE GOLDEN RULE ARGUMENT.**

*First and Second Assignments of Error—
Evidentiary Support for Maxie's Convictions*

{¶7} Although Maxie's first assignment of error is labeled as a challenge to the trial court's failure to grant his Crim.R. 29 motion for acquittal, his only argument here concerns credibility of the CI's testimony. Yet, a Crim.R. 29

motion challenges the sufficiency of the evidence only and does not concern the issues of credibility, which are for the jury to weigh. *State v. Kline*, 11 Ohio App. 3d 208, 213, 464 N.E.2d 159 (6th Dist.1983) (“In determining whether appellant’s motion [for acquittal] should have been granted, our analysis of the evidence focuses not upon its weight or credibility, which are ordinarily matters for the jury, but rather its *quantitative sufficiency* to establish beyond a reasonable doubt each element of the offense.”) (Emphasis sic.); *State v. Barnes*, 3d Dist. Henry No. 7-79-13, 1980 WL 352051, *8 (Nov. 14, 1980) (holding that the trial court “did not commit prejudicial error in overruling the motion for acquittal at the close of all the evidence” where the evidence was in conflict because “the issues of weight and credibility [are] for the jury”). Therefore, Maxie’s arguments under this assignment of error should properly be made in the discussion of his second assignment of error, which challenges the manifest weight of the evidence.

{¶8} The proper standard for deciding a Crim.R. 29 motion for acquittal focuses on the sufficiency of the evidence. *State v. McMillen*, 113 Ohio App.3d 137, 140, 680 N.E.2d 665 (3d Dist.1996). When reviewing a criminal case for the sufficiency of the evidence, “our inquiry focuses primarily upon the adequacy of the evidence; that is, whether the evidence submitted at trial, if believed, could reasonably support a finding of guilt beyond a reasonable doubt.” *In re Willcox*, 3d Dist. Hancock No. 5-11-08, 2011-Ohio-3896, ¶ 10, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Importantly, this test raises a

question of law and does not allow us to weigh the evidence. *In re Willcox* at ¶ 10. In spite of the caption for this assignment of error, Maxie makes no arguments concerning the sufficiency of the evidence in his brief. Consequently, he has failed to comply with App.R. 16(A), which requires each assignment of error to be supported by an argument explaining “the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies.” App.R. 16(A)(7); *See State v. Brocar*, 2d Dist. Montgomery No. 21002, 2006-Ohio-5561, ¶ 12.

{¶9} In the second assignment of error, which is labeled as a challenge to the manifest weight of the evidence, Maxie states that he “incorporates by reference herein” the arguments made in the first assignment of error. (App’t Br. at 7.) As stated above, the arguments made in the first assignment of error concern the credibility of the CI’s testimony. As a result of this incorporation and of Maxie’s failure to support the first assignment of error with any arguments concerning the sufficiency of the evidence, the two assignments of error effectively make the same challenge: that the jury verdicts were against the manifest weight of the evidence due to the allegedly doubtful credibility of the CI’s testimony. Therefore, we address the two assignments of error together under the standard for the manifest weight of the evidence.

{¶10} The question of the manifest weight of the evidence concerns an “effect in inducing belief” and as such, it is not subject to a mathematical analysis.

Thompkins at 387. When reviewing a conviction challenged as being against the manifest weight of the evidence, an appellate court acts as a “thirteenth juror” and may disagree with the jury’s resolution of the conflicting testimony. *Id.*, quoting *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). But the appellate court must give due deference to the findings of the jury, because

[t]he fact-finder occupies a superior position in determining credibility. The fact-finder can hear and see as well as observe the body language, evaluate voice inflections, observe hand gestures, perceive the interplay between the witness and the examiner, and watch the witness’s reaction to exhibits and the like. Determining credibility from a sterile transcript is a Herculean endeavor. A reviewing court must, therefore, accord due deference to the credibility determinations made by the fact-finder.

(Alterations omitted.) *State v. Dailey*, 3d Dist. Crawford, No. 3-07-23, 2008-Ohio-274, ¶ 7, quoting *State v. Thompson*, 127 Ohio App.3d 511, 529, 713 N.E.2d 456 (8th Dist.1998). Therefore, an argument that a conviction is against the manifest weight of the evidence will only succeed if the appellate court finds that “in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶11} To prove that Maxie was engaged in trafficking in cocaine, as alleged in the Indictment, the State had to prove that on or about May 10, 2013, Maxie sold or offered to sell “cocaine or a compound, mixture, preparation, or

substance containing cocaine.” R.C. 2925.03 (A)(1) and (C)(4). The parties stipulated that the meeting between the CI and Maxie occurred within 1000 feet of the school. (Tr. of Proceedings at 250-254, Nov. 19-20, 2013.) Therefore, this element of the conviction in Count I is not in dispute.

{¶12} In its case in chief, the State presented testimony of multiple witnesses, including the CI, Detective Elliot, Officer Snyder, and Deputy Christie Utley (“Deputy Utley”). The CI testified that on May 10, 2013, she purchased crack cocaine from Maxie during two controlled drug buy transactions. (Tr. at 179-182, 248.) She confirmed that the transactions were audio and video recorded. The CI testified about the audio and video recordings, attesting that they accurately represented the events of May 10, 2013. (Tr. at 183.) After the recordings were played to the jury, the CI testified as to what they represented, further describing the two drug transactions. (Tr. at 183-213.)

{¶13} The first audio recording played to the jury was of the phone call during which the first meeting was arranged. (Tr. at 183-184.) The CI testified that in the audio, she was telling Maxie that she had \$50.00 that she owed him and that she had another \$50.00 “for a fifty worth of crack.” (Tr. at 185.) Next, a video depicting the first meeting was played, which the CI described as follows.

You witnessed me meeting Derek at Whitey’s and giving him \$50 that we agreed upon that I owed him and then giving him \$50 for the crack, and we drove back to the meeting place that we met at and that’s where the wire and everything turns off. I give them the dope and I fill out the statement.

(Tr. at 187.)

{¶14} The CI then testified about the second phone call to Maxie, during which “[she] told him that [she] needed some more.” (Tr. at 205.) An audio recording of that phone call was played to the jury. (Tr. at 208.) The CI answered the questions about the recording as follows.

A: I told him that I wanted to get another fifty. He said all he had was a seventy, but he would let me have it for sixty.

Q: What does that mean?

A: That means he has 70 worth of crack but he’s going to let me have it for \$60.

(*Id.*)

{¶15} The CI testified that she met Maxie at the Duke Station, where she was driven by “[t]he female detective.” (Tr. at 206.) She walked to the car, made the exchange, got back in the truck, went to meet Detective Elliot, and gave him the drugs. (*Id.*) She was wearing audio and video equipment throughout that second transaction. (*Id.*) The video recording depicting the second meeting was played for the jury and the CI testified that it showed “[t]he second buy * * * of crack.” (Tr. at 209.) The video showed the CI holding a little package in her hand, which she identified as “the drugs that I just bought.” (Tr. at 213.)

{¶16} The CI testified that her purse was searched prior to and after the controlled buy action, but her body was not searched. (Tr. at 180, 224, 241.) She

testified that there was a female police officer in the car with her the entire time, driving her to the meeting locations. (Tr. at 180.) The CI did not talk to the police officer about the drugs. (Tr. at 230-232.) The CI testified that she was never alone with Maxie during the controlled buys because her vehicle was parked right next to Maxie's and the police officer was in the car, right next to her. (Tr. at 242.)

{¶17} On cross-examination, the CI admitted that in May 2013, when the transactions took place, she was using drugs. (Tr. at 219.) She testified that she had been involved in more controlled buy actions with the police and she admitted that during the last one, she stole a package of crack cocaine that was the subject of the controlled buy. (Tr. at 220.) She was asked about the payments she received for her work as the CI and admitted that the payments were "pretty good money." (Tr. at 218.) She also admitted to having about twenty theft convictions. (Tr. at 223.)

{¶18} The CI acknowledged that the video recordings did not show Maxie handing the drugs to her. (Tr. at 227.) In both buys, the only thing seen being exchanged was money. (Tr. at 242.) The CI further acknowledged that there was nothing expressly said about the drugs in the recordings; she claimed that it was "implied" because she did not call Maxie for any other reason. (Tr. at 230.) The CI explained the terminology used when buying drugs and stated that if she used the words such as "drugs," it would be suspicious. (Tr. at 229-230, 235, 247-248.)

She stated that she was “calling for one reason and one reason only,” being the purchase of crack cocaine. (Tr. at 247.) She stated that the dealers knew why she called them and there was no reason for her to call the drugs by their scientific names. (Tr. at 247-248.)

{¶19} When Detective Elliot took the stand, he testified about the CI’s phone calls to Maxie to set up the buys. (Tr. at 114.) He testified that he gave the CI \$100.00, which included \$50.00 to settle the debt with Maxie and another \$50.00 for the drugs. (*Id.*) He also placed the wires for audio recording on the CI and put the video camera in her purse. (Tr. at 127.) Although Detective Elliot had searched the CI’s belongings prior to sending her for the controlled buys, he could not remember whether he had searched her person as well. (Tr. at 111, 139.) Detective Elliot testified that an undercover officer, Officer Snyder, drove the CI to the meeting locations. (Tr. at 115-116.) Detective Elliot followed the vehicle and listened to the audio from the wire that the CI had on her person. (Tr. at 116-117.) He observed the meeting locations from the distance. (Tr. at 117.) After the meetings, Detective Elliot collected the recording devices and the drugs from the CI. (Tr. at 118, 121.) He also field-tested the drugs and he had the CI complete the paperwork. (*Id.*)

{¶20} On cross-examination, Detective Elliot acknowledged that it would be possible for the CI to have drugs on her person without his knowledge, but he pointed out that the undercover police officer was in the car with the CI the entire

time. (Tr. at 139.) Detective Elliot admitted that he did not observe the drug transaction occur, but he saw Maxie's vehicle and saw the driver, whom he recognized as Maxie. (Tr. at 141-143.) He also listened to live audio of the meeting. (Tr. at 147.) He identified other detectives who were in the parking lot when the transaction occurred as "Detective Utley and Detective Isom," who were there in plain clothes and unmarked vehicles. (Tr. at 145-146.) Detective Elliot testified that the meeting between the CI and Maxie lasted about a minute, "maybe two" and after that, the CI got back in the vehicle with the undercover officer and went to meet with Detective Elliot at the prearranged location and give him the drugs. (Tr. at 146-149.) Detective Elliot admitted that the bills given to the CI were not marked. (Tr. at 150.)

{¶21} Officer Snyder took the stand and testified that she drove the CI to the two meetings with Maxie during the controlled drug buy operations, but she did not remember the particular date of these events happening. (Tr. at 256.) She described the first meeting, testifying that when they pulled into Whitey's parking lot, the CI pointed at the dark-colored SUV and told her to stop. (Tr. at 257-258.) The CI got out of the vehicle and walked up to the SUV, which was a "car length and a half maybe" away. (Tr. at 258-259.) Officer Snyder was able to see into that SUV from her position in the driver seat, but not very well. (Tr. at 259.) She did not see exactly what happened during the meeting because the CI "was right there in the view of the window," standing at the window of the SUV. (Tr. at

260.) Officer Snyder testified that the meeting lasted “[v]ery, very minimal time.” (*Id.*) After that, the CI got back in the vehicle and they left the parking lot to meet with Detective Elliot. (*Id.*) The CI did not give the narcotics to Officer Snyder and Officer Snyder could not remember whether she saw the narcotics in the CI’s hand. (*Id.*)

{¶22} Officer Snyder testified that the CI placed another phone call and arranged the second controlled buy. (Tr. at 261-262.) The second transaction happened in a similar manner. Officer Snyder recognized the vehicle from the first meeting. (Tr. at 263.) This time, she parked “[v]ery, very close” to it and she saw the driver of the vehicle well enough to identify him as Maxie. (Tr. at 263-264.) She tried not to look into the vehicle during the meeting between the CI and Maxie because she did not “want to seem too eager like I’m being nosy of what they’re doing.” (Tr. at 264.) Officer Snyder testified that this meeting was shorter than the first one. (Tr. at 266.)

{¶23} On cross-examination, Officer Snyder admitted that she drove the CI’s vehicle to the two controlled-buy meetings and that the vehicle had not been searched before or during the transactions. (Tr. at 269.) She admitted that it was “conceivable to think” that the CI “could have reached somewhere” while she was driving the vehicle, but she did not see the CI “rooting around for anything” in the car and she did not get the impression that the CI was hiding anything from her. (Tr. at 278.) Although she saw the CI and Maxie during the meetings, she did not

see “any hand-to-hand contact” and could not testify that “any drugs were exchanged.” (Tr. at 272-273.) She was also unable to testify that the CI got back in the car with any drugs. (Tr. at 277.)

{¶24} Deputy Utley also testified for the State about the controlled buys. She was one of the MARMET officers assigned to observe the transactions from a “crash car”—one that is close, surveying the area and listening to the live audio, prepared to intervene if necessary. (Tr. at 280-281.) She testified that on May 10, 2013, she was with Detective Isom in the parking lot, “four or five car lengths” away from Whitey’s, where the meeting between the CI and Maxie was taking place. (Tr. at 281-282.) She saw a dark-colored SUV arrive at Whitey’s parking lot and a few minutes later, she saw the CI’s vehicle with the undercover Officer Snyder arrive at the location as well. (Tr. at 282.) Deputy Utley saw the CI get out of the vehicle and walk over to the SUV, but she was not able to see any kind of exchange “[b]ecause Detective Isom was in the way.” (Tr. at 283.) According to Deputy Utley, the transaction lasted a “couple of seconds maybe” and the CI got back into the vehicle. (Tr. at 284.) Deputy Utley described the second transaction in a similar way. (See Tr. at 285-291.) She did not observe any money or drugs exchange hands. (Tr. at 292.) After Deputy Utley’s testimony, the State rested.

{¶25} The defense called Detective Elliot to the stand and asked him whether the CI’s vehicle was searched prior to the controlled buys. (Tr. at 304.)

Detective Elliot answered in the negative and admitted a possibility that “the drugs that were recovered from both transactions could have been there.” (Tr. at 305.)

{¶26} Maxie testified in his defense, denying selling crack cocaine to the CI and denying trafficking in cocaine for which he was being tried. (Tr. at 307, 314.) He claimed that the CI owed him money for a prior transaction, involving a purchase by Maxie of a food stamp card, which the CI later cancelled, and he thought that she “was trying to straighten out the debt.” (Tr. at 310-312.) Maxie confirmed that the audio recordings represented the conversations he had with the CI. (Tr. at 317, 324.) Testifying about the first phone call, Maxie stated:

She had fifty of my money, but then she said she got fifty and she wanted fifty, you know what I’m saying? And at first I was just thinking that she was talking about weed, but you know, she already called me prior to that time and stated that she was going to give me 170 altogether.

* * *

She said she was going to give me 170 altogether for waiting a couple months and that she wanted to make it right.

(Tr. at 311-312.) Maxie answered further questions about the debt.

Q: The 170 was repayment for what?

A: Repayment of the card. The card was worth like 148. And like I told her, like I told her that the person that wanted it would be thirsty, you know what I’m saying, but I’m not going to turn down money. Why?

Q: Okay. Let’s back up. Just stay with me and keep on track here so I can keep this straight for the jury. During the first call she called you and said, I’ve got fifty for you; that fifty was for what?

A: The fifty was towards the money of the card.

Q: Okay. And then she said in that call as well, I have fifty, I'll give you fifty later, and you thought that was for what?

A: She just said she was—she'd call me later, but yeah, I was just thinking that she was trying to straighten out the debt basically.

Q: Now, during the second call, now can you explain what you meant by if someone's thirsty.

A: If someone's thirsty, you know what I'm saying, that they would charge her the whole 150 and do something or like basically break into her house and take it or catch her on the street, go to McDonald's where she worked at, you know and make her give her—give them the whole 150, but, you know, at that time, you know, I was like, no, just give me my \$50.

(Tr. at 312-313.) Maxie admitted that he met the CI in Whitey's parking lot on May 10, 2013, but he claimed that money was the only thing exchanged during the two meetings recorded on audio and video that day. (Tr. at 315, 317.) He denied giving anything to the CI in exchange for the money. (Tr. at 327-328.)

{¶27} On cross-examination, the State played the recording of the first phone call and then questioned Maxie as follows:

Q: * * * what did you just hear on the tape?

A: That she got fifty out of me and she want fifty.

Q: Fifty what?

A: Fifty what?

Q: You said want fifty, fifty what?

A: She said she got fifty that she owed me and she want—she got another fifty.

Q: Right. And you said she want fifty, what does that mean, she want fifty?

A: That could mean anything, you know what I'm saying? As of this time, before this time had came, you know what I'm saying, I will admit, I used to sell marijuana, that's what I used to do. You know what I'm saying? * * *

* * *

Q: Now, she says, I got the fifty I owe you and I got another fifty, you said that means she wants a fifty?

A: Fifty of marijuana.

Q: Fifty of what?

A: Fifty of marijuana.

* * *

Q: You're saying that's a fifty of what?

A: It could be different grades of marijuana.

Q: I'm sorry, if you just tell me what you're saying, you're saying she wasn't calling you for cocaine, she was calling you for marijuana?

A: That's what she was calling me for.

Q: The story you just gave us then when you were speaking with Mr. Spitzer was it was all money for the food stamp card.

A: The food stamp card.

Q: But now you're telling me it was actually for a marijuana transaction?

A: Like I'm saying, it was 170 that she was going to give me. 170 she was going to give me. She gave me 100 the first time. I gave her nothing. She gave me sixty the second time. I gave her nothing.

* * *

A: She called and stated the second buy supposedly, she called and stated that I have fifty, can I get a fifty. I said, I got seventy. Sixty. That's all street. That's me and her street talk.

* * *

Q: Okay. Just to clarify, you're saying that it was a marijuana transaction that you were setting up, is that your argument?

A: Basically it was just me getting my money and not giving her nothing and not dealing with her ever again.

(Tr. at 319-323.) At redirect, Maxie confirmed that in street lingo, "I got fifty" could be money. (Tr. at 328.) During his testimony, Maxie volunteered information about spending over eight years in prison for attempted felonious assault, felonious assault, and intimidation. (Tr. at 326, 328.)

{¶28} Based upon the testimony summarized above, the jury found Maxie guilty of trafficking in crack cocaine. Maxie argues that the jury lost its way in believing the CI, where the State failed to present any corroborating testimony that would show any sale actually taking place. He suggests that the CI, who admitted to having twenty theft convictions and to "pinching" drugs from MARMET, could have had the drugs prior to the meeting and lied when she claimed that she had purchased them from Maxie.

{¶29} As we stated above, the issues of credibility are for the jury to decide and we give due deference to the jury's findings unless we find that "in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541. The conflict in the evidence alleged by Maxie is between the testimony of the CI, who claimed to have purchased drugs from him, and Maxie's testimony, who claimed that he had met with the CI only to receive money.

{¶30} Although apart from the CI, no one testified that any drugs exchanged hands, the jury had the right to believe the CI, where her testimony about other details surrounding the two meetings was corroborated by Detective Elliot, Officer Snyder, and Deputy Utley. The audio and video recordings confirmed the CI's testimony about the content of the conversations she had with Maxie. There was a dispute regarding the interpretation of the conversations. The CI claimed that she was asking for crack cocaine, while Maxie claimed that she was offering to settle a debt. He contradicted himself, however, when he testified at one point that they were talking about a purchase of marijuana.

{¶31} The jury had to choose which version of events to believe. Both the CI and Maxie admitted to having prior felony convictions and being involved with drugs. There were no obvious inconsistencies in the CI's testimony, like there were in Maxie's. The only contradiction to the CI's version of events came from

Maxie's unsupported speculations that she could have had drugs with her prior to the meetings with him. We do not find that the jury lost its way in believing the CI over Maxie.

{¶32} The remaining elements of the crime being undisputed, we reject Maxie's assertion that the jury verdicts finding him guilty of trafficking in cocaine are against the manifest weight of the evidence. Accordingly, we overrule the first and second assignments of error.

***Third Assignment of Error—
Forfeiture Specification***

{¶33} Maxie makes two arguments regarding the forfeiture of the vehicle. He contends that the jury erred in finding that his vehicle was an instrumentality of the crime. (App't Br. at 8.) He also asserts that "[f]orfeiture was disproportionate to the offenses herein," considering the fact that the value of the vehicle was \$1,801.00 and "the total amount of money paid for the alleged sale of drugs [was] \$110.00." (*Id.*)

a. Maxie's Vehicle as an Instrumentality of the Crime

{¶34} Forfeiture of the property that was an instrumentality of a crime is authorized by R.C. 2981.02(A)(3). This section of the Revised Code further states that

[i]n determining whether an alleged instrumentality was used in or was intended to be used in the commission or facilitation of an offense or an attempt, complicity, or conspiracy to commit an offense in a manner sufficient to warrant its forfeiture, the trier of

fact shall consider the following factors *the trier of fact determines are relevant*:

- (1) Whether the offense could not have been committed or attempted but for the presence of the instrumentality;
- (2) Whether the primary purpose in using the instrumentality was to commit or attempt to commit the offense;
- (3) The extent to which the instrumentality furthered the commission of, or attempt to commit, the offense.

(Emphasis added.) R.C. 2981.02(B). Maxie alleges that his 2000 Ford Explorer was not an instrumentality of the crime because he “could have selected any location and the fact that he selected a location to where he could drive had little effect on the importance of the use of the instrumentality in the within cause.” (App’t Br. at 8.)

{¶35} “A forfeiture action, while instituted as a criminal penalty, is a civil proceeding.” *State v. Clark*, 173 Ohio App.3d 719, 2007-Ohio-6235, 880 N.E.2d 150, ¶ 8 (3d Dist.) Therefore, the state must prove *by a preponderance of the evidence* “that the seized property is subject to forfeiture under R.C. 2981.02.” *MARMET Drug Task Force v. Paz*, 3d Dist. Marion No. 9-11-60, 2012-Ohio-4882, ¶ 23. In reviewing the jury’s finding that Maxie’s vehicle was an instrumentality of the crime with which he was charged, “we neither weigh the evidence nor judge the credibility of the witnesses.” *In re Hill*, 5th Dist. Guernsey No. 08 CA 17, 2009-Ohio-174, ¶ 40. Instead, we focus on determining “whether

there is relevant, competent and credible evidence upon which the fact finder could base its judgment.” *Id.*

{¶36} The State presented evidence that Maxie was selling crack cocaine from his 2000 Ford Explorer in a location to which he drove that same vehicle. This was competent and credible evidence to support at least the third statutory factor. The jury was only required to consider the statutory factors that it deemed relevant. R.C. 2981.02(B). Maxie did not present any evidence that would create a conflict for the jury to resolve. He did not show that the offense could have been committed without his vehicle. Therefore, his argument on appeal that the jury lost its way in not speculating about his ability to sell crack cocaine to the CI without the use of his vehicle lacks merit.

{¶37} The dissent cites two cases from the Ninth District Court of Appeals in support of his position that the jury’s finding that Maxie had used his vehicle as an instrumentality of the crime was against the manifest weight of the evidence. We find these cases unpersuasive. The first case, *State v. Trivette*, 195 Ohio App.3d 300, 2011-Ohio-4297, 959 N.E.2d 1065 (9th Dist.), is distinguishable on its facts. In *Trivette*, forfeiture was sought based on an allegation that the defendant was guilty of “complicity to commit theft.” *Id.* at ¶ 3. “The only testimony regarding the actual use of the vehicle was that Trivette drove Conley to Walmart on two separate occasions, wherein he committed theft.” *Id.* at ¶ 14. “The state did not present any argument on the individual factors contained in

R.C. 2981.02(B) in the court below.” *Id.* at ¶ 15. “[T]he testimony that the state elicited did nothing more than show that Trivette used her vehicle to help Conley commit theft.” *Id.* As a result, the court of appeals affirmed the trial court’s finding that the state failed to satisfy its burden of proving that Trivette used her vehicle “ ‘in a manner sufficient to warrant its forfeiture.’ ” *Id.*, quoting R.C. 2981.02(B). It is important to note that in *Trivette*, under the standard of review, deference was given to the trial court’s *denial* of forfeiture. *Id.* at ¶ 7, 12, 16. Therefore the court of appeals could not reverse the trial court’s denial of forfeiture if the record contained “competent, credible evidence in support of the judgment.” *Id.* at ¶ 7, 12.

{¶38} Here, we are reviewing the jury’s decision finding that forfeiture was warranted. As long as the jury’s finding is supported by “competent, credible evidence” *in favor of forfeiture*, we will not reverse the judgment. *State v. Bustamante*, 3d Dist Seneca Nos. 13-12-26, 13-13-04, 2013-Ohio-4975, ¶ 34. Unlike in *Trivette*, the State here provided some evidence for the individual factors of R.C. 2981.02(B). Furthermore, while the defendant in *Trivette* was guilty of complicity for driving another person to a crime location, Maxie was the perpetrator of the crime *committed from inside of the vehicle* at issue. Thus, the use of the vehicle in Maxie’s situation was much more extensive than in *Trivette*, supporting the jury’s finding that the vehicle was used “in a manner sufficient to warrant its forfeiture.” R.C. 2981.02(B).

{¶39} We additionally note that the decision in *Trivette* did not have a majority opinion, as judges Belfance, P.J., and Dickinson, J., concurred in judgment only. In that the opinion failed to receive the requisite support of at least two judges, it does not serve as a binding precedent. *See Kraly v. Vannewkirk*, 69 Ohio St.3d 627, 633, 635 N.E.2d 323 (1994); *Progressive Cas. Ins. Co. v. Oakford*, 79 Ohio App.3d 97, 98, 606 N.E.2d 1036 (11th Dist.1992). In his separate opinion, Judge Dickinson noted that the reason the state failed to “prove any of the factors listed in R.C. 2981.02(B)” was Trivette’s statement in the trial court “that she wanted a hearing only on whether the value of the Explorer was disproportionate to the severity of the offense.” *Trivette* at ¶ 23, Dickinson, J., concurring. Therefore, in Judge Dickinson’s view, the trial court erred in holding that the state failed to carry its burden of proving that the vehicle was subject to forfeiture where that question was not properly before the court. *Id.* at ¶ 34. Judge Dickinson recognized that the error was harmless due to the trial court’s alternative finding that the value of the vehicle was disproportionate to the severity of the offenses. *Id.* Therefore, Judge Dickinson ultimately concurred in the judgment.

{¶40} The second case cited by the dissent, also from the Ninth District Court of Appeals, is distinguishable on similar grounds. Unlike in the current case, in *State v. Jelenic*, 9th Dist. Medina No. 10CA0024-M, 2010-Ohio-6056, the court of appeals was reviewing the *denial* of forfeiture by the trial court; thus, it

gave deference to the trial court's findings against forfeiture. The evidence showed that Jelenic drove his vehicle to the meeting locations, a park and a Burger King, where he sold marijuana to a confidential informant. *Id.* ¶ 2, 9. There was no evidence that Jelenic was selling marijuana from his vehicle. Rather, "[t]he State sought to forfeit Jelenic's vehicle solely because he drove it to the locations where he committed the offenses." *Id.* at ¶ 16. The court of appeals agreed that the vehicle was an instrumentality of the crime. *Id.* at ¶ 9. Nevertheless, it affirmed the trial court's decision because the state did not point to any evidence to contradict the trial court's finding that the state had failed to satisfy its burden under R.C. 2981.02(B). *Id.* at ¶ 9, 20-22. The Eighth District Court of Appeals declined to extend *Jelenic* in a case where the "defendant used his vehicle while committing the offense." *State v. Bandarapalli*, 8th Dist. Cuyahoga No. 96319, 2011-Ohio-6158, ¶ 31-32 (8th Dist.). Similarly, we refuse to extend it to Maxie's case, where he used the vehicle in the commission of the offense, as opposed to mere transportation to the location of the crime.

b. Proportionality of the Forfeiture to the Offense

{¶41} Other sections of R.C. Chapter 2981 outline procedures to be followed when seizing the property subject to forfeiture and protections afforded to the property owner. As relevant to this assignment of error, R.C. 2981.01 states that one of the "purposes" governing forfeitures under this chapter is "[t]o ensure that seizures and forfeitures of instrumentalities are proportionate to the offense

committed.” R.C. 2981.01(A)(2). R.C. 2981.09 focuses on the “[v]alue of property subject to forfeiture” and states that “[p]roperty may not be forfeited as an instrumentality under this chapter to the extent that the amount or value of the property is disproportionate to the severity of the offense.” R.C. 2981.09(A).

{¶42} Here, however, the burden to argue and prove “that the amount or value of the property is disproportionate to the severity of the offense” is upon the defendant. *Id.*

The owner of the property shall have the burden of going forward with the evidence and the burden to prove by a preponderance of the evidence that the amount or value of the property subject to forfeiture is disproportionate to the severity of the offense.

(Emphasis added.) *Id.* R.C. 2981.09(C) and (D) further describe how the value of the property subject to forfeiture and the severity of the offense should be determined.

{¶43} In the instant case, the parties entered stipulations regarding the ownership and value of Maxie’s vehicle. (Tr. at 382-384.) The parties also stipulated that “that was the vehicle that was driven on May 10, [2013].” (Tr. at 384.) Apart from these stipulations, the parties did not present any new evidence in the part of the trial concerning forfeiture, relying solely on the previously presented evidence and the stipulations. (*See* Tr. at 382-385.) Of note, Maxie

presented no evidence on the issue of the severity of the crimes of which he was found guilty.¹

{¶44} The jury found that “the Defendant has not proven that the amount or value of the vehicle is disproportionate to the severity of the offense.” (R. at 72, 74, Jury Verdicts.) Maxie alleges that the jury lost its way in so finding. Yet, as the statute provides, a defendant who wishes to contest forfeiture on proportionality grounds bears the burden of proving “that the amount or value of the property subject to forfeiture is disproportionate to the severity of the offense.” R.C. 2981.09(A); *accord Hill*, 5th Dist. Guernsey No. 08 CA 17, 2009-Ohio-174, at ¶ 41. Since Maxie did not provide any evidence in support of the argument that the severity of the offense was not sufficiently great to warrant forfeiture, he failed to satisfy his burden in the trial court.

{¶45} Maxie argues that forfeiture was disproportionate because the “total amount of money paid for the alleged sale of drugs totaled \$110.00,” while the value of his vehicle was \$1,801.00. (App’t Br. at 8.) In order for the trial court to deny forfeiture, the forfeiture must be disproportionate to the *severity of the*

¹ As the factors to be considered in determining the severity of the offense, R.C. 2981.09(C) lists the following nonexclusive factors:

- (1) The seriousness of the offense and its impact on the community, including the duration of the activity and the harm caused or intended by the person whose property is subject to forfeiture;
- (2) The extent to which the person whose property is subject to forfeiture participated in the offense;
- (3) Whether the offense was completed or attempted.

offense, not to the value of the contraband. Therefore, the Eleventh District Court of Appeals found forfeiture of the defendant's \$25,950.00-interest in his home was not disproportionate to the severity of the offense where the defendant sold \$300.00 worth of heroin, because the court considered other factors for the proportionality analysis. *State v. Adams*, 11th Dist. Ashtabula No. 2012-A-0025, 2013-Ohio-1603, ¶ 69, *appeal not allowed*, 136 Ohio St.3d 1493, 2013-Ohio-4140, 994 N.E.2d 464, (2013). The court cited "other cases in which forfeiture of real estate has been ordered where drug sales of a similar value were committed within the home." *Id.*, citing *State v. Scheibelhoffer*, 11th Dist. Lake No. 98-L-039, 1999 WL 476106 (June 30, 1999), and *In re Forfeiture of 1081 West State Street*, 7th Dist. Columbiana No. 94-C-23, 1996 WL 257512 (May 13, 1996).

{¶46} We acknowledge that forfeiture is not favored by the law. *State v. Hill*, 70 Ohio St.3d 25, 31, 1994-Ohio-12, 635 N.E.2d 1248 (1994). Nevertheless, we cannot agree that the jury's finding that Maxie failed to prove that the amount or value of the vehicle is disproportionate to the severity of the offense is against the manifest weight of the evidence, where Maxie did not present any evidence regarding severity of the offense being so minor as to result in a disproportionate result.

{¶47} For the foregoing reasons, we overrule the third assignment of error.²

² We disagree with the dissent's reasoning and legal conclusion that the indictment in this case was so defective as to result in lack of notice of forfeiture to Maxie and to deprive the trial court of jurisdiction

Fourth Assignment of Error—Fair Trial

{¶48} Maxie asserts that his trial was not fair as a result of the trial court allegedly assisting the State in the presentation of its case. He points to several statements and comments made by the trial court, asserting that “the trial court’s involvement provided assistance to appellee in obtaining the conviction of appellant.” (App’t Br. at 12.) For example, when Detective Elliot was testifying about the envelopes in which he put the crack cocaine brought to him by the CI, the trial court stated, “there’s two different envelopes in the package. For the record, you’re holding up two different envelopes.” (Tr. at 123.) The trial court continued:

The court: Let’s mark those as separate exhibits, maybe 1A and 1B, unless the State has a different suggestion.

Mr. Meigs: No, Your Honor, that’s fine.

The witness: That’s the second buy, first buy.

The court: For the record, I believe you’ve now marked the manila envelopes. The manila envelopes are the ones you actually recorded and it contains [sic] the property card that you actually filled out in each case.

The witness: Yes, sir, basically the front side is mine.

The court: And 1A is from which transaction?

The witness: 1A is the first transaction at Whitey’s. 1B would be the second transaction at the Duke Station.

over the forfeiture issue. We thus refuse to assume the role of counsel in this case and argue an issue in our opinion that was neither raised nor briefed by the parties.

The court: Okay. And then those two items within container in the plastic, clear plastic envelope, which has been marked State's Exhibit 1 which is not your packaging, it's packaging you would understand to come from the crime lab?

The witness: yes.

(Tr. at 123-124.) Maxie did not object to the trial court's questions.

{¶49} The State further questioned Detective Elliot about "those packages."

(Tr. at 125.) The trial court interrupted, asking, "By those packages, you're referring to Exhibits 1A and 1B in the manila envelopes, correct?" (*Id.*) The trial court then explained,

You know, for the record, the reason this becomes important, from the printed record that the court reporter takes, a reference to "this package," unless you're here to see that, we're not videotaping these proceedings, so it is important that the record accurately reflects what happened.

(Tr. at 125.) There was no objection to this explanation.

{¶50} Maxie points out that the trial court asked about the yellow piece of paper that was in the evidence envelope. (Tr. at 159-160.) Detective Elliot explained that he had placed it into the envelope to hold the loose powder, to prevent it from falling out. (*Id.*) The trial court asked Detective Elliot to describe "the appearance and size of the item [he] actually collected," and clarified one of Detective Elliot's answers asking, "It appeared you were holding your fingers apart, what, a quarter of an inch maybe?" (Tr. at 160.) No objections were raised to the trial court's involvement.

{¶51} Upon the State's attempt to play a video recording of the meeting between Maxie and the CI, the trial court raised an issue of foundation for the recording. (Tr. at 129.) At the sidebar discussion, the trial court suggested, "I think through other officers you can lay that foundation, but I don't think you've gotten there yet." (Tr. at 130.) As a result of this self-raised objection, the trial court did not allow the State to play the recording at this point. (*Id.*) Maxie did not protest against the trial court raising the objection and preventing the State from playing the recording. Neither did he complain about the trial court's suggestion that foundation could be laid through other officers.

{¶52} Maxie complains that the trial court repeated the prosecutor's question to Detective Elliot regarding whether he listened to the audio recording as the transaction was taking place. (*See* Tr. at 130.) He also complains that the trial court corrected Maxie's counsel as to the amount of money to which the CI would be entitled for her involvement in the transactions, and commented, "Let's not mislead anyone." (Tr. at 219.) Although Maxie did not object in the trial court, he now claims that these comments were inappropriate.

{¶53} At the beginning stages of the trial, before the parties entered stipulations, the trial court discussed the jury instructions with the counsel outside of the presence of the jury. (Tr. at 173.) The trial court suggested to the State, "you may want to look at the definition of school specifically with respect to what evidence you're going to present to establish this is within the vicinity of the

school.” (*Id.*) After the parties rested and the jury started deliberations on the trafficking charges, the trial court had discussions with the counsel regarding jury instructions and verdict forms relevant to the specification. (Tr. at 371.) The trial court stated,

It does appear to me the State will need to present some additional evidence, probably not a lot, but somehow you’re going to need to identify the vehicle, establish that it was the vehicle used in these transactions. * * * It seems like it would make sense if you introduced a copy of the title into evidence which would give us the VIN number and establish the defendant’s ownership interest which would also establish whether there’s any liens on the vehicle.

(Tr. at 372-373.) These discussions were held outside of the presence of the jury. Maxie did not object to the trial court’s comments. He now speculates that the later stipulations would not have been entered but for the trial court’s suggestions. (App’t Br. at 11-12.)

{¶54} Due to Maxie’s failure to object to the trial court’s allegedly improper involvement throughout the trial, he forfeited of all but plain error on appeal. *See State v. Quarterman*, Ohio No. 2013–1591, 2014-Ohio-4034, ¶ 15; *State v. Jackson*, 92 Ohio St.3d 436, 438, 2001-Ohio-1266, 751 N.E.2d 946 (2001); *State v. Brown*, 85 Ohio App.3d 716, 719, 621 N.E.2d 447 (3d Dist.1993). The standard of review under plain error “is a strict one.” *State v. Murphy*, 91 Ohio St.3d 516, 532, 747 N.E.2d 765 (2001).

“[A]n alleged error ‘does not constitute a plain error or defect under Crim.R. 52(B) unless, but for the error, the outcome of the trial clearly would have been otherwise.’ ” We have warned that the plain

error rule is not to be invoked lightly. “Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.”

Id., quoting *State v. Campbell*, 69 Ohio St.3d 38, 41, 630 N.E.2d 339 (1994), and *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraphs two and three of the syllabus. Under the plain error standard, “the *defendant* bears the burden of demonstrating that a plain error affected his substantial rights” and “[e]ven if the defendant satisfies this burden, an appellate court has discretion to disregard the error and should correct it only to ‘prevent a manifest miscarriage of justice.’ ” (Emphasis sic.) *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 14, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002), and *Long* at paragraph three of the syllabus. “Even constitutional rights ‘may be lost as finally as any others by a failure to assert them at the proper time.’ ” *Murphy* at 532, quoting *State v. Childs*, 14 Ohio St.2d 56, 62, 236 N.E.2d 545 (1968).

{¶55} Here, Maxie does not even allege that a plain error occurred or that his substantial rights have been affected in any way. He claims that the trial court “crossed the line” and for that reason, his conviction must be reversed. (App’t Br. at 12.) Under the benchmark provided by the Ohio Supreme Court that “[n]otice of plain error * * * is to be taken with the utmost caution,” *Murphy* at 532, and that the defendant carries the burden “of demonstrating that a plain error affected

his substantial rights,” *Perry* at ¶ 14, we choose not to proceed on plain error analysis because Maxie has not raised it and consequently, he has failed to satisfy his burden on appeal. *See Quarterman* at ¶ 18-20 (refusing to address an issue of whether the alleged error would constitute a plain error where the defendant “made no assertion” of plain error); *id* at ¶ 17 (“failure to include issue in brief ‘would warrant our refusal to consider it’ ”), quoting *State v. Carter*, 27 Ohio St.2d 135, 139, 272 N.E.2d 119 (1971).

{¶56} This court has previously addressed a similar issue in *State v. Rodriguez*, 3d Dist. Defiance No. 4-94-7, 1995 WL 614072 (Oct. 17, 1995). A criminal defendant in *Rodriguez* alleged that the trial court “erred when it conducted its own questioning of a state’s witness.” *Id.* at *1. The defendant failed to raise an objection to the trial court’s questioning. *Id.* at *2. We held that because the defendant “has not demonstrated plain error resulting from the court’s questioning of a state’s witness,” his claim was without merit. *Id.*

{¶57} We further note that no manifest miscarriage of justice is apparent from the record. As this court has recognized, “A court is permitted to question witnesses to develop issues in the interests of justice so long as such prerogative is not abused.” *State v. Bennett*, 3d Dist. Putnam, No. 12-77-10, 1978 WL 215734, *5 (June 14, 1978). R.C. 2945.03, which governs a judge’s control of a trial, states that “[t]he judge of the trial court shall control all proceedings during a criminal trial, and shall limit the introduction of evidence and the argument of

counsel to relevant and material matters with a view to expeditious and effective ascertainment of the truth regarding the matters in issue.” In addition, Evid.R. 611(A) provides that “[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.” Evid.R. 614 further permits the court to “interrogate witnesses, in an impartial manner, whether called by itself or by a party.” But it has been recognized that “[i]n a trial before a jury, the court’s participation by questioning or comment must be scrupulously limited, lest the court, consciously or unconsciously, indicate to the jury its opinion on the evidence or on the credibility of a witness.” *State ex rel. Wise v. Chand*, 21 Ohio St.2d 113, 256 N.E.2d 613 (1970), paragraph three of the syllabus. “While the court can ask neutrally phrased questions, its questions should not suggest disbelief in a witness’s testimony.” *State v. Prokos*, 91 Ohio App.3d 39, 44, 631 N.E.2d 684 (4th Dist.1993). Generally, a court reviewing a trial court’s comments and interrogation of witnesses must determine whether the trial court abused its discretion. *State v. Davis*, 79 Ohio App.3d 450, 454, 607 N.E.2d 543 (4th Dist.1992).

{¶58} Maxie does not allege that the trial court was biased or prejudiced against him. While the trial court interjected itself in the proceedings, the majority

of the complained-of behavior simply and properly served to preserve the record. The instances in which the trial court seemed to have been “helping” the parties, like instructing the State it needed to prove that the meeting occurred within 1000 feet of the school and that the vehicle belonged to Maxie, do not amount to prejudice. Maxie does not even suggest a possibility that the State would have failed to establish those elements, and such a suggestion would be speculative.

{¶59} A review of the record shows that the trial court assisted the defense on several occasions. For example, the trial court instructed the State to “stick to the facts of this case” upon the State’s question whether Detective Elliot had bought drugs from Maxie before. (Tr. at 110.) The trial court interrupted the State’s questioning of Detective Elliot, instructing that he could only “testify to what he personally observed.” (Tr. at 116.) Shortly after that, the trial court instructed the State to not refer to the meeting between the CI and Maxie as “the buy” because “there’s not been established that there was a buy.” (Tr. at 117.) When the State first attempted to play a recording of the meeting between the CI and Maxie, the trial court raised an objection due to a lack of foundation. (Tr. at 129.) The trial court struck Detective Elliot’s identification of crack cocaine stating, “This officer isn’t the one that did the lab analysis.” (Tr. at 165.) In response to the State’s argument that Detective Elliot “did do a field test analysis,” the trial court objected, “Field test analysis is insufficient.” (*Id.*) On multiple

other occasions the trial court interrupted the State's questioning. (*See, e.g.*, Tr. at 184, 189-190.)

{¶60} We cannot concede that the trial court abused its power when it assisted the defense as much as the prosecution in preserving the record and in the questioning of the witnesses. Likewise, in our careful review of the record, we cannot conclude that the trial was unfair or that the outcome of the trial would have been different but for the trial court's interjections. Accordingly, we overrule the fourth assignment of error.

Fifth Assignment of Error—Ineffective Assistance of Counsel

{¶61} In his fifth assignment of error, Maxie contends that he was not effectively assisted by his trial counsel. In order to prevail on a claim of ineffective assistance of counsel, a criminal defendant must first show that the counsel's performance was deficient in that it fell "below an objective standard of reasonable representation." *State v. Keith*, 79 Ohio St.3d 514, 534, 684 N.E.2d 47 (1997). Second, the defendant must show "that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial." *Id.*, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to demonstrate prejudice, the defendant must prove a reasonable probability that the result of the trial would have been different but for his or her counsel's errors. *Id.* In applying these standards, the court must " 'indulge a strong presumption that counsel's conduct falls within the wide range of

reasonable professional assistance.’ ” *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81, ¶ 108, quoting *Strickland* at 669. Therefore, the court must be highly deferential in its scrutiny of counsel’s performance. *State v. Walker*, 90 Ohio App.3d 352, 359, 629 N.E.2d 471 (3d Dist.1993), quoting *Strickland* at 689.

{¶62} Maxie points to multiple reasons for his allegation of ineffective assistance of counsel and we discuss them as follows.

a. Testimony about the Food Card Transaction

{¶63} Maxie’s major complaint concerns his trial counsel’s failure to edit or exclude parts of the recordings where the CI talked about the origins of her \$50.00 debt to Maxie, as well as failure to object to the CI’s testimony about the debt’s origins. The recordings and the testimony revealed that the \$50.00 debt was a result of the CI “selling” Maxie a food card, which was worth about \$140.00, for \$50.00 worth of drugs. (Tr. at 181.) The CI testified, “the dope that he gave me wasn’t real, so I called and canceled the card.” (*Id.*) She further explained, “in order to get him to serve me again, I had to pay him for the dope that he had given me.” (*Id.*) Maxie asserts that this testimony and the recording of the conversation that mentioned the food card transaction revealed prior bad acts and were very prejudicial to him. (App’t Br. at 13.) Maxie further criticizes his counsel for mentioning the food card transaction in the opening statement.

{¶64} It is clear from the reading of the transcript that the line of defense employed by Maxie’s counsel in the trial court was that the meeting between the CI and Maxie on May 10, 2013, concerned paying off a past debt, rather than a drug purchase. (*See, e.g.*, Tr. at 104-105.) On appeal, Maxie suggests that his trial counsel should have attempted to limit the testimony about the prior debt to an explanation that the \$50.00 “simply related to a prior arrangement/debt,” instead of allowing for an introduction of testimony about a prior bad act, which is an illegitimate purchase of a food card. (App’t Br. at 14.)

{¶65} We decline to find that the trial counsel’s strategy, which used the testimony about the food card transaction to support Maxie’s version of events, was so unreasonable as to fall below an objective standard of reasonable representation. Moreover, given the overwhelming evidence supporting the finding of a drug transaction, rather than multiple meetings to settle one fifty-dollar debt, we cannot say that the result of the trial would have been different had the CI testified that the \$50.00 “simply related to a prior arrangement/debt,” as Maxie now suggests.

b. Failures to Object

{¶66} Maxie’s second contention under this assignment of error relates to multiple instances of the trial counsel’s alleged failures to object to the State’s questions and statements made by witnesses, including statements made by Maxie himself. Yet, “failure to object to error, alone, is not enough to sustain a claim of

ineffective assistance.” *Campbell*, 69 Ohio St.3d at 52-53, 630 N.E.2d 339, quoting *State v. Holloway*, 38 Ohio St.3d 239, 244, 527 N.E.2d 831 (1988). “Because ‘objections tend to disrupt the flow of a trial, and are considered technical and bothersome by the fact-finder,’ competent counsel may reasonably hesitate to object in the jury’s presence.” (Alterations omitted.) *Id.* at 53, quoting Jacobs, *Ohio Evidence* (1989), at iii-iv.

{¶67} Maxie does not point out how the alleged failures to object prejudiced him. As a result, he fails to satisfy the second prong of the *Strickland* test, which would require a proof of a reasonable probability that the result of the trial would have been different had the counsel objected. *Keith*, 79 Ohio St.3d at 534, 684 N.E.2d 47, citing *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052, 80 L.Ed.2d 674.

c. Other Convictions

{¶68} As his final complaint in this assignment of error, Maxie asserts that his counsel was deficient for “allow[ing] the jury to hear of [his] additional convictions.” (App’t Br. at 18.) During cross-examination, Maxie volunteered information about spending over eight years in prison. (Tr. at 326.) On redirect, his counsel asked him to explain and clarify that the prior convictions did not concern trafficking in drugs. (Tr. at 328.) His counsel further inquired and Maxie testified that he completed his parole conditions related to the conviction. (Tr. at 329.) Maxie points out that admissibility of these prior convictions was discussed

during the pretrial proceedings, when the trial court “indicated that it had not made a ruling on that issue as of yet.” (App’t Br. at 19; *see* Tr. at 16.) Maxie suggests that his counsel should have avoided a possibility of such a voluntary testimony about prior convictions coming up by “pressing for a ruling” that would prohibit any questioning about these prior convictions. (App’t Br. at 19.)

{¶69} We note that before Maxie volunteered information about his prior incarceration, the State had not asked any questions about these past convictions. Any ruling by the trial court would have prevented the State from asking questions; it would not have prevented Maxie from volunteering this testimony. Accordingly, the result of the trial would not have been different had the trial counsel “press[ed] for a ruling.” This allegation is thus insufficient to satisfy the *Strickland* test.

{¶70} For all of the foregoing reasons, we hold that Maxie has failed to establish that his trial counsel was ineffective under *Strickland* and we overrule fifth assignment of error.

Sixth Assignment of Error—Golden Rule Argument

{¶71} In his final assignment of error, Maxie alleges prejudice from the State’s use of the so-called golden rule argument. Maxie refers to the State’s closing statements, where the prosecuting attorney suggested to the jury that their children or grandchildren “may have stumbled upon a drug transaction in progress,” and that the transaction “could have happened in any parking lot where

you may have been.” (Tr. at 345, 386.) Even though no objection was raised to the State’s use of these statements, Maxie asserts that plain error occurred “as a matter of law” and that the trial court should have, sua sponte, declared a mistrial. (App’t Br. at 22.)

{¶72} The golden rule argument has been described as one “where the jurors are asked to put themselves in the place of plaintiff.” *Boop v. Baltimore & O. R. Co.*, 118 Ohio App. 171, 174, 193 N.E.2d 714 (3d Dist.1963). While we have previously recognized that this has been observed in civil cases, *State v. Vaughn*, 3d Dist. Seneca No. 13-81-11, 1981 WL 6738, *4 (Dec. 9, 1981), other courts prohibit similar comments in criminal cases as well, *see, e.g., State v. Tucker*, 12th Dist. Butler No. CA2010–10–263, 2012-Ohio-139, ¶ 44.

{¶73} We need not decide whether the prosecuting attorney’s comments that the children “may have stumbled upon a drug transaction,” fall squarely within the bounds of the golden rule argument, because Maxie’s claim in this assignment of error has no merit. Although we have in the past held that the golden rule argument “is objectionable and incompetent in that it constitutes an appeal to the jurors to abandon their positions of impartiality and to exercise their discretion in the guise of an interested party,” such an argument is not considered “prejudicial per se.” *Skinner v. Colonial Fed. S. & L.*, 3d Dist. Logan No. 8-87-19, 1989 WL 129413, *1 (Oct. 24, 1989); *Lykins v. Miami Valley Hosp.*, 157 Ohio App.3d 291, 2004-Ohio-2732, 811 N.E.2d 124, ¶ 31 (2d Dist.); *Tucker* at ¶ 44

(“Such arguments, while generally prohibited, are ‘not per se prejudicial so as to warrant a new trial.’ ”), quoting *State v. Southall*, 5th Dist. Stark No.2008 CA 00105, 2009-Ohio-768, ¶ 115. “Instead, the test is whether such an argument ‘prejudicially affected substantial rights of the defendant.’ ” *Tucker* at ¶ 44, quoting *State v. Ross*, Montgomery App. No. 22958, 2010–Ohio–843, ¶ 126. The foregoing case law contradicts Maxie’s assertion that in this case plain error occurred as a matter of law as a result of the State’s alleged use of the golden rule argument.

{¶74} Maxie failed to object to the prosecutor’s comments at trial and he fails to explain how the allegedly improper comments prejudicially affected his substantial rights. Accordingly, the sixth assignment of error lacks merit and is thus overruled.

Conclusion

{¶75} Having reviewed the arguments, the briefs, and the record in this case, we find no error prejudicial to Appellant in the particulars assigned and argued. The judgment of the Marion County Court of Common Pleas is therefore affirmed.

Judgment Affirmed

PRESTON, J., concurs.

/jlr

ROGERS, P.J., concurs in part and dissents in part.

{¶76} While I concur fully with the majority’s analysis of Maxie’s first and second assignments of error, I must respectfully dissent from his third assignment of error. I believe that Maxie’s forfeiture specification was deficient, that the jury erred in finding that his vehicle was an instrumentality of the crime, and that the forfeiture was disproportionate to the offense. I would also sustain Maxie’s fifth assignment of error insofar as it relates to Maxie’s deficient forfeiture specification. Lastly, I concur in judgment only as to Maxie’s fourth and sixth assignments of error. I will address each argument in turn.

Deficient Indictment

{¶77} Maxie’s forfeiture specification in his indictment was deficient, depriving him of the notice requirements contained in Ohio’s forfeiture statute. I understand that Maxie did not raise this defect before the trial court, or on appeal. “However, the court’s jurisdiction to adjudicate the forfeiture of property is special and limited by statute. Therefore, strict compliance with the statutory requirements is necessary to invoke the subject matter jurisdiction of the trial court.” *Erie Cty. Sheriff’s Office v. Lacy*, 6th Dist. Erie Nos. E-14-023, E-14-022, 2015-Ohio-72, ¶ 22; *see also State v. Little*, 12th Dist. Butler No. CA2014-01-020, 2014-Ohio-4756, ¶ 34, fn. 4 (“Notice * * * is a procedural requirement contained in both R.C. 2981.04(A)(1) and (2) that must be given to the alleged offender in order to establish the trial court’s authority to order forfeiture.”); *State v. Cavin*,

12th Dist. Butler No. CA2003-08-197, 2004-Ohio-4978, ¶ 18 (failure to strictly comply with forfeiture statute renders a forfeiture inappropriate). Thus, a deficient forfeiture specification implicates subject matter jurisdiction, which can never be waived. *Little* at ¶ 34, fn. 4; *see also State v. Christian*, 2d Dist. Montgomery No. 25256, 2014-Ohio-2672, ¶ 136. “Because subject-matter jurisdiction involves a court’s power to hear a case, the issue can never be waived or forfeited and may be raised at any time.” *State v. Mbodji*, 129 Ohio St.3d 325, 2011-Ohio-2880, ¶ 10.

{¶78} “Moreover, this Court *must* raise jurisdictional issues sua sponte.” (Emphasis added.) *State v. O’Black*, 3d Dist. Allen No. 1-09-46, 2010-Ohio-192, ¶ 4;³ *In re Murray*, 52 Ohio St.3d 155, 159-160, fn. 2 (1990); *Whitaker-Merrell Co. v. Geupel Constr. Co.*, 29 Ohio St.2d 184 (1972). Not only is this court required to raise jurisdictional issues, but appellate courts may also consider an error that was not objected to at trial when that error is a “plain error.” *State v. Slagle*, 65 Ohio St.3d 597, 604 (1992), citing Crim.R. 52(B).

{¶79} R.C. 2941.1417 requires that the State include a forfeiture specification in a charging instrument, such as an indictment. *State v. Brimacombe*, 195 Ohio App.3d 524, 2011-Ohio-5032, ¶ 53 (6th Dist.). R.C. 2941.1417(A) states:

³ Again, a court *must* raise jurisdictional issues sua sponte. I disagree with the majority’s second footnote where it implies that I am “assum[ing] the role of counsel * * *.” I am only addressing an issue that I am constitutionally obligated to raise.

(A) Property is not subject to forfeiture in a criminal case unless the indictment, count in the indictment, or information charging the offense specifies, to the extent it is reasonably known at the time of filing, *the nature and extent of the alleged offender's interest in the property, a description of the property, and, if the property is alleged to be an instrumentality, the alleged use or intended use of the property in the commission or facilitation of the offense.* The specification shall be stated at the end of the body of the indictment, count, or information and shall be in substantially the following form:

“SPECIFICATION (or SPECIFICATION TO THE FIRST COUNT). The grand jurors (or insert the person's or prosecuting attorney's name when appropriate) further find and specify that (*set forth the alleged offender's interest in the property, a description of the property subject to forfeiture, and any alleged use or intended use of the property in the commission or facilitation of the offense.*)”

(Emphasis added.) This prohibition is repeated in R.C. 2981.04(A)(1), which outlines the initiation of the criminal forfeiture process. *Brimacombe* at ¶ 57.

That section states:

Property described in division (A) of section 2981.02 of the Revised Code may be forfeited under this section only if the * * * indictment * * * charging the offense * * * contains a specification of the type described in section 2941.1417 of the Revised Code that sets forth all of the following to the extent it is reasonably known at the time of the filing:

- (a) The nature and extent of the alleged offender's * * * interest in the property;
- (b) A description of the property;
- (c) If the property is alleged to be an instrumentality, the alleged use or intended use of the property in the commission or facilitation of the offense.

{¶80} The Sixth District Court of Appeals recently held that the following forfeiture specification was deficient and did not provide notice to the defendant:

SPECIFICATION OF CRIMINAL FORFEITURE PURSUANT TO O.R.C. SEC. 2981.02 AS TO BOTH COUNTS: The Grand Jurors further find and specify that Charlene M. Lacy was in possession of, and/or owner of, a 2011 Chevrolet Cruze, VIN# ending in 3231, said *cash* being proceeds and/or instrumentalities in the commission of the offense under both Counts of the indictment.

(Emphasis added.) *Lacy*, 2015-Ohio-72, ¶ 13. The trial court found that the forfeiture specification was not sufficient “because it indicated that *cash* was the proceeds and/or instrumentalities used in the commission of the offense, not the *car*.” (Emphasis sic.) *Id.* at ¶ 14. While it seemed clear that this was merely a typographical error, the Sixth District affirmed the trial court’s decision stating that the forfeiture statutes must be strictly construed and applied. *Id.* at ¶ 20. This underlying principle of the forfeiture statute “still applies to the more limited failures to provide the required published notice and to include an accurate forfeiture specification in the charging instrument.” *Id.* at ¶ 21. Indeed, the Sixth District’s reasoning is in line with the well-established principle that “forfeiture is not favored in Ohio,” *Marmet Drug Task Force v. Paz*, 3d Dist. Marion No. 9-11-60, 2012-Ohio-4882, ¶ 24, and that whenever possible, forfeiture statutes “ ‘must be construed so as to avoid a forfeiture of property[.]’ ” *id.*, quoting *State v. Lilliock*, 70 Ohio St.2d 23, 26 (1982).

Here the indictment states:

Forfeiture Specification as to Counts 1 and 2 [R.C. 2941.1417]

The Grand Jurors further find and specify that pursuant to R.C. 2981.04 the State seeks forfeiture of the property described in this specification which was found in the Defendant's possession and for which it is believed that he may claim an ownership interest. The following described property are instrumentalities as defined as they were used or intended to be used in the commission or facilitation of the felony offense set forth in this count of the indictment ____

The following described property are [sic] contraband or proceeds:
2000 Ford Explorer VIN # 1FMZU72X8YZC18916

contrary to the form of the statute in such case made and provided,
and against the peace and dignity of the State of Ohio.

(Boldface sic.) (Docket No. 1, p. 2).

{¶81} To begin with, I find the indictment difficult to understand as it does not clearly identify whether Maxie's property is an "instrumentality," or "proceeds," or "contraband." First, the State alleges that the property found in Maxie's possession was an "instrumentalit[y] as defined as [it was] used or intended to be used in the commission or facilitation of the felony offense set forth in this count of the indictment[.]" It then describes the property as "contraband or proceeds," but not an instrumentality. Which one is it? How is Maxie properly on notice or able to prepare a defense when he does not know if the State is alleging that the property is an instrumentality, proceeds, or contraband?

{¶82} At trial, the State argued that Maxie's car was an instrumentality of his crime, not proceeds or contraband. Arguably, the State listed a sufficient "description" of the property by identifying the make and model of the car and by

providing its VIN number. However, the State does not list Maxie's interest in the Ford Explorer, nor does it explain how it was allegedly used as an instrumentality in the commission of a crime. Title to the vehicle could easily have been determined prior to indictment. How the property was used *must* have been part of the State's presentation to the grand jury or the grand jury could not have legitimately considered the specification. Without these two matters being specifically stated within the original indictment and specification, the vehicle simply "is not subject to forfeiture in [this] criminal case." R.C. 2941.1417.

{¶83} In *State v. Schmidt*, 3d Dist. Seneca No. 13-13-07, 2014-Ohio-758, the same majority erroneously decided a case with similar facts. In *Schmidt*, the defendant's indictment read:

SPECIFICATION: The Grand Jurors do further find and specify that a 2002 Jeep Cherokee (VIN: 1J4GW48S72C304030) was used to facilitate the commission of the offense and is subject to forfeiture.

(Emphasis sic.) *Id.* at ¶ 2. The State admitted, and the majority agreed, that the specification was deficient. *Id.* at ¶ 6 ("We recognize that *the specification language was deficient to a certain extent * * ** [and] *the State did not fully comply with R.C. 2941.1417.*"). The majority then inexplicably found that even though the indictment was deficient and violated R.C. 2941.1417 and R.C. 2981.04(A)(1), that Schmidt "waived" the issue by not objecting to it at trial. As I have already explained, this type of deficiency concerns the trial court's subject matter jurisdiction, cannot be waived, and may be raised *at any time*.

{¶84} If the same majority agreed that the indictment in *Schmidt* was deficient, it cannot possibly make the argument that the indictment in this case is sufficient. I believe the majority incorrectly decided *Schmidt*, and I believe it is making the same mistake again today. Maxie's indictment did not comply with the statute and thus the trial court was deprived of subject matter jurisdiction over the forfeiture.

{¶85} The language in R.C. 2941.1417 could not be more clear and unequivocal. "Property is *not* subject to forfeiture in a criminal case" unless the required information is contained in the specification. R.C. 2981.04(A)(1) is equally clear. To then allow property to be forfeited in the circumstances of *Schmidt* and in this case, when the language of the specification is incomplete and defective, is a manifest injustice and a violation of due process. Does the majority not recognize that it is the State who is in violation of the law? Two statutes prohibit the forfeiture of this property, and yet the majority sanctions that action.

{¶86} Further, because Maxie's trial counsel never objected to the defective indictment, I would sustain his fifth assignment of error insofar as it relates to the forfeiture issue in this case. The reason the majority in *Schdmit* affirmed the forfeiture order was because the appellant's trial counsel had "forfeited his chance to challenge [the indictment's specification] when he failed to object to it in the trial court." *Schmidt*, 2014-Ohio-758, ¶ 12. Here, Maxie's trial counsel failed to object to the indictment's specification. Had he objected, the trial court would

have realized the specification was defective and dismissed the forfeiture specification. Thus, Maxie was prejudiced as a result of his trial counsel's deficient performance.

Instrumentality

{¶87} While I believe the deficient indictment is enough to sustain Maxie's third assignment of error, I also believe that State failed to prove that the car was used as an instrumentality in the commission of a crime.

{¶88} Before I begin my analysis, I find it necessary to once again emphasize that "[g]enerally, forfeiture is not favored in Ohio." *Paz*, 2012-Ohio-4882, ¶ 23, citing *State v. Clark*, 173 Ohio App.3d 719, 2007-Ohio-6235, ¶ 8 (3d Dist.). " 'Whenever possible, [forfeiture] statutes must be construed so as to avoid a forfeiture of property.' " *Paz* at ¶ 24, quoting *Lilliock*, 70 Ohio St.2d at 26. "Moreover, forfeiture is only appropriate when 'the expression of the law is clear and the intent of the legislature manifest.' " *Id.*

{¶89} The majority reasons there is some evidence to support R.C. 2981.02(A)(3) because the State presented evidence that "Maxie was selling crack cocaine from his 2000 Ford Explorer in a location to which he drove the same vehicle." (Majority Opin. ¶ 23). However, the State needed to prove more than the mere fact that Maxie used his vehicle to commit a crime. It needed to prove that the person used the instrumentality "in a manner sufficient to warrant its forfeiture." R.C. 2901.02(B).

{¶90} It is clear that the General Assembly wanted to treat instrumentalities differently than proceeds and contraband when enacting the forfeiture statute. For example, R.C. 2981.01(A)(1) states that the purpose of forfeiture is to provide “economic disincentives and remedies to deter and offset the economic effect of offenses by seizing and forfeiting contraband, proceeds, and *certain* instrumentalities.” (Emphasis added.) R.C. 2981.01(A)(13) states that “[p]roperty subject to forfeiture’ includes contraband and proceeds and *may* include instrumentalities as provided in this chapter.” Thus, it is clear that while all contraband and proceeds of illegal activity will be subject to forfeiture, only certain instrumentalities will be subject to forfeiture.

{¶91} This is also supported when the old forfeiture statute is compared with the new forfeiture statute the General Assembly enacted in 2007. In the old forfeiture statute, the General Assembly’s definition of contraband not only included property that is illegal to possess, but also any lawful property that was used to transport contraband, and any other property involved in a crime. *See* former R.C. 2901.01(A)(13) and 2933.41(C). Thus, “instrumentalities” was included in the very broad definition of “contraband.” However, in 2007, the General Assembly repealed and replaced the forfeiture statutes “with a significantly different and comprehensive scheme under R.C. Chapter 2981.” *Brimacombe*, 2011-Ohio-5032, ¶ 33. Now, contraband and instrumentalities are

defined separately, both with narrower definitions. *See* R.C. 2901.01(A)(13) and 2981.01(B)(6), (8).

{¶92} Following this narrow definition of instrumentalities, other courts have held that the Revised Code does not provide for forfeiture based on the use of an instrumentality alone. For example, in *State v. Trivette*, 195 Ohio App.3d 300, 2011-Ohio-4297, ¶ 15 (9th Dist.), the court found that the State did not provide adequate evidence to support a finding that the defendant used her motor vehicle in a manner sufficient to warrant its forfeiture. The defendant had driven her boyfriend twice to a Walmart store, where he stole laptop computers. *Id.* at ¶ 2. The video surveillance from Walmart captured the defendant and her boyfriend together and using the defendant's vehicle as a means of transportation to and from the store. *Id.* The court found that while there "is no doubt that [the defendant] used her vehicle in committing the crime of complicity to commit theft[,] * * * [t]he Revised Code * * * does not provide for forfeiture based on use alone." *Id.* at ¶ 15. Instead, the State must prove that a person used the instrumentality "in a manner sufficient to warrant its forfeiture." *Id.*, quoting R.C. 2981.02(B). The court found that the only evidence the State presented was that the defendant used her vehicle to help her boyfriend commit a crime. *Id.* However, "As the party with the burden of proof, it was the state's responsibility to prove, not that [the defendant] used her vehicle, but that she used it 'in a manner sufficient to warrant its forfeiture.'" *Id.*

{¶93} In *State v. Jelenic*, 9th Dist. Medina No. 10CA0024-M, 2010-Ohio-6056, the court found that the defendant’s vehicle, which was used to traffic drugs, was not subject to forfeiture. *Id.* at ¶ 16. In *Jelenic*, the State sought to forfeit the defendant’s vehicle simply because he drove it to the locations where he committed the offenses. *Id.* The court held that “the mere usage of an instrumentality is an insufficient basis to warrant forfeiture.” *Id.* “In theory, [the trafficking offense] could have been committed regardless of how the defendant arrived at the scene.” *State v. Bandarapalli*, 8th Dist. Cuyahoga No. 96319, 2011-Ohio-6158, ¶ 31.

{¶94} In this case, the State did not present any evidence that the offense of trafficking could not have been committed *but for* the presence of Maxie’s car. R.C. 2981.02(B)(1). It did not provide any evidence that the *primary purpose* of Maxie’s car was to commit trafficking offenses. R.C. 2981.02(B)(2). Nor did the State present any evidence that Maxie’s car furthered the commission of his crime in any significant way. R.C. 2981.02(B)(3). Thus, the State did not provide any evidence that the vehicle was used “in a manner sufficient to warrant forfeiture,” and I would sustain Maxie’s third assignment of error and vacate the forfeiture order.

Forfeiture Disproportionate to Crime

{¶95} Not only did the State fail to prove that Maxie’s vehicle was used as an instrumentality “in a manner sufficient to warrant forfeiture,” I believe that

Maxie met his burden of proving that the forfeiture was disproportionate to the crime. The majority concludes that because Maxie “did not provide any evidence in support of the argument that the severity of the offense is not sufficiently great to warrant forfeiture, he failed to satisfy his burden in the trial court.” (Majority Opin., ¶ 27). I do not find that this statement is supported by the record, and have found evidence in the record which would suggest that the forfeiture was disproportionate.

{¶96} The State stipulated that the value of Maxie’s vehicle was \$1,801 and that his vehicle was in “very good” condition. Maxie also highlighted during the proportionality hearing that the drugs that were sold to the confidential informant were 2.2 grams and 2.5 grams. He also stated that the street value of the drugs was \$110. Further there was evidence presented at trial that demonstrated that Maxie’s crime was less severe and did not warrant forfeiture of his vehicle. Under R.C. 2981.09(C)(1), the trier of fact should consider the “duration of the activity” and the “harm caused” by the person whose property is subject to forfeiture. The evidence presented at trial showed that this was an isolated event and of short duration, as both drug transactions happened on the same day, within hours of one another. Maxie had never been convicted of any prior trafficking charges,⁴ and his indictment only charged him with two offenses that happened on the same day.

⁴ I note that during Maxie’s sentencing hearing, it was revealed that Maxie was convicted in 1992 for a misdemeanor drug abuse case. Sentencing Tr., p. 8.

Compare State v. Scheibelhoffer, 11th Dist. Lake No. 98-L-039, 1999 WL 476106, *5 (June 30, 1999) (“We harbor concerns over the state’s use of forfeiture statutes, particularly when the amount of a drug sale is relatively small when compared to the value of the property to be forfeited. However, we note that the trial court placed emphasis on the fact that this was appellant’s *second conviction for trafficking in drugs from the property within a short time span.*”). Although I realize that drug trafficking is a very serious offense, evidence was presented that no harm occurred in this case since the drugs were sold to a confidential informant and immediately seized by law enforcement.

{¶97} Not only did the State proceed with a defective forfeiture specification, divesting the trial court of subject matter jurisdiction to order forfeiture, I also believe that the State did not provide competent and credible evidence that the vehicle was used in a manner which would warrant forfeiture. Nor do I think that the forfeiture was proportional to Maxie’s crimes.

{¶98} Not to belabor the point, but I must conclude by reiterating that “forfeiture is not favored in Ohio.” *Paz*, 2012-Ohio-4882, ¶ 24. “Whenever possible, [forfeiture] statutes *must* be construed so as to *avoid forfeiture of property.*” (Emphasis added.) *Id.*, quoting *Lilliock*, 70 Ohio St.2d at 26. There are so many things that are wrong with the forfeiture in this case, yet the majority makes allowances for the State, in contradiction to well-established case law and the clear intent of the General Assembly. I refuse to reward the State’s laziness

and apathy, and instead, choose to protect due process and the property rights of the citizens of Ohio.

{¶99} For the above-stated reasons, I would sustain Maxie's third assignment of error.

Unfair Trial

{¶100} In Maxie's fourth assignment of error, he argues that his trial was unfair due to the trial court's assistance in the presentation of the State's case. I agree with the majority that Maxie failed to object to the improper interjections at trial, and failed to prove that but for the trial court's comments, the outcome of his trial would be different. However, I write separately because I do not condone the trial court's actions.

{¶101} It is wholly inappropriate for a trial court to continually remind the State what evidence it has presented, or has not presented, throughout the trial proceedings. Certainly, it should not suggest to the State the different ways it could introduce the missing evidence. I believe this case is somewhat similar to our decision in *State v. Land*, 3d Dist. Marion No. 9-13-39, 2014-Ohio-1877. In *Land* we held that a trial court cannot sua sponte raise and then grant a motion to suppress when the defense counsel made a conscious decision not to file a motion to suppress before trial. *Id.* at ¶ 19. We stated that “ [i]n our adversary system, in both civil and criminal cases, in the first instance on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues

for decision and assign to the courts the role of neutral arbiter of matters the parties present.” *Id.* at ¶ 14, quoting *Greenlaw v. United States*, 554 U.S. 237, 243-245, 128 S.Ct. 2559 (2008).

{¶102} It was the State’s responsibility to present the evidence it believed it needed to convict Maxie of the charges for which he was indicted. Perhaps the State did not feel it needed to produce evidence that the location of drug transaction was within 1,000 feet of a school, or that it needed to identify Maxie’s ownership in his car. If the trial court believes the State failed to meet its burden and produce evidence on all elements of the crime, then the proper time to say so is when it grants a motion of acquittal for the defendant.

{¶103} However, I recognize that these comments were not made at the conclusion of the State’s case, but rather during the middle of the trial proceedings. Therefore, it is likely that the State was planning on producing evidence of these elements but had not gotten to it at that point in the trial. As such, it is difficult to say that the outcome of Maxie’s trial would have been different but for these improper interjections by the trial court.

Golden Rule Argument

{¶104} I concur in judgment only as to Maxie’s sixth assignment of error. While I agree with the majority that Maxie has failed to show that he was materially prejudiced by the prosecutor’s statements, I write to express my doubts that *State v. Vaughn*, 3d Dist. Seneca No. 13-81-11, 1981 WL 6738 (Dec. 9,

1981), a case which the majority cites to, was decided correctly. Specifically, in *Vaughn*, the court held that the prohibition against golden rule arguments only applies to civil cases. *Vaughn* at *4. I disagree.

{¶105} A “golden-rule argument” is defined as:

A jury argument in which a lawyer asks the jurors to reach a verdict by imagining themselves or someone they care about in the place of the injured plaintiff *or crime victim*. Because golden-rule arguments ask the jurors to become advocates for the plaintiff *or victim* and to ignore their obligation to exercise calm and reasonable judgment, these arguments are widely condemned and are considered improper in most states.

(Emphasis added.) *Black’s Law Dictionary* 807 (10th Ed.2014). Almost every other Court of Appeals in Ohio has applied the golden rule argument in a criminal context. The Twelfth District Court of Appeals has stated that a golden rule argument, as it relates in a criminal context, exists when the prosecutor requests “‘that the jury accord a defendant the same treatment that the defendant accorded his victim.’” *State v. Tucker*, 12th Dist. Butler No. CA2010-10-263, 2012-Ohio-139, ¶ 44, quoting *State v. Hairston*, 1st Dist. Hamilton No. C-830127, 1984 WL 4184, *2 (Jan. 18, 1984); *see also State v. Ross*, 2d Dist. Montgomery No. 22958, 2010-Ohio-843, ¶ 126; *State v. Southall*, 5th Dist. Stark No. 2008CA00105, 2009-Ohio-768, ¶ 115; *State v. Robinson*, 6th Dist. Lucas No. L-06-1182, 2008-Ohio-3498, ¶ 260-262; *City of Akron v. Norman*, 9th Dist. Summit No. 22743, 2006-Ohio-769, ¶ 27; *State v. Breland*, 11th Dist. Ashtabula No. 2003-A-0066, 2004-Ohio-7238, ¶ 46; *State v. Crago*, 93 Ohio App.3d 621, 645 (10th Dist.1994).

{¶106} While it appears that the Supreme Court of Ohio has never decided whether golden rule arguments are prohibited in both criminal and civil cases, other State Supreme Courts have done so. *See McCoy v. State*, 147 So.3d 333, 344 (Miss.2014) (“[T]his Court [has] expanded the prohibition against the “golden rule” argument to criminal cases. The reason behind such a prohibition is the premise that a person should not be the judge of his own case * * *.”). “ ‘The golden rule argument is impermissible because it tends to subvert the objectivity of the jury. It is seen as an attempt to dissuade the jurors from their duty to weigh the evidence and instead to view the case from the standpoint of a [victim].’ ” *Brown v. State*, 332 P.3d 1168, 1175 (Wy.2014), quoting *King v. State*, 317 Ark. 293, 877 S.W.2d 583, 586 (1994). In addition to Mississippi, Wyoming, and Arkansas, countless other State Supreme Courts have addressed golden rule arguments made in a criminal context. *See Sheppard v. State*, 151 So.3d 1154, 1170-1171 (Fla.2014); *State v. Collings*, 450 S.W.3d 741, 763-764 (Mo.2014); *People v. Shazier*, 60 Cal.4th 109, 175 Cal.Rptr.3d 774, 331 P.3d 147, 174 (2014); *State v. Stephen J.R.*, 309 Conn. 586, 72 A.3d 379, 393-394 (2013); *Commonwealth v. Bizanowicz*, 459 Mass. 400, 945 N.E.2d 356, 371 (2011); *Brown v. State*, 383 S.C. 506, 680 S.E.2d 909, 915 (2009); *State v. Jones*, 753 N.W.2d 677, 692 (Minn.2008); *State v. Borboa*, 157 Wash.2d 108, 135 P.3d 469, 476 (2006); *State v. Corbett*, 281 Kan. 294, 130 P.3d 1179, 1194-1995 (2006); *State v. Roache*, 358 N.C. 243, 595 S.E.2d 381, 417 (2004); *Caudill v.*

Commonwealth, 120 S.W.3d 635, 675 (Ky.2003); *Christopher v. State*, 824 A.2d 890, 892 (Del.2003); *Ervin v. State*, 80 S.W.3d 817, 822 (Mo.2002); *People v. Dunlap*, 975 P.2d 723, 758-759 (Co.1999); *Sanborn v. State*, 107 Nev. 399, 812 P.2d 1279, 1286 (1991); *State v. Clements*, 175 W.Va. 463, 334 S.E.2d 600, 605-606 (1985); *Commonwealth v. Cherry*, 474 Pa. 295, 378 A.2d 800, 804 (1977).

{¶107} I believe that preserving the impartiality of the jury is even more important in criminal cases than in civil cases. While “[s]ympathy for suffering and indignation at wrong are worthy sentiments, * * * they are not safe visitors in the courtroom, for they may blind the eyes of Justice.” *F.W. Woolworth Co v. Wilson*, 74 F.2d 439, 443 (5th Cir.1934). Thus, golden rule arguments should be prohibited in both criminal and civil cases. However, because Maxie does not explain how he was materially prejudiced by the State’s comments in closing arguments, I concur with the result reached by the majority in regard to his sixth assignment of error.

{¶108} In conclusion, I believe that Maxie’s third assignment of error should be sustained because the trial court did not have subject matter jurisdiction over the forfeiture order since Maxie’s indictment was insufficient and violated the notice requirements mandated by the forfeiture statute. I also believe the State failed to prove that Maxie’s car was used as an instrumentality in a manner sufficient to warrant its forfeiture and that the forfeiture was disproportionate to Maxie’s crimes. Further, I would sustain Maxie’s fifth assignment of error only to

Case No. 9-13-73

the extent that his trial counsel failed to object to Maxie's insufficient forfeiture specification. Further, I concur in judgment only as to Maxie's fourth and sixth assignments of error.