[Cite as *State v. Leonard*, 2009-Ohio-6191.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

The State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	Case No. 08CA24
	:	
vs.	:	
	:	
Ronald Leonard,	:	DECISION AND JUDGMENT
	:	ENTRY
Defendant-Appellant.	:	
	:	File-stamped date: 11-18-09

APPEARANCES:

Dennis G. Day, Columbus, Ohio, for Appellant.

C. David Warren, Athens County Prosecutor, and George Reitmeier, Athens County Assistant Prosecutor, Athens, Ohio, for Appellee.

Kline P.J.:

{¶1} Ronald Leonard appeals the judgment of the Athens County Court of Common Pleas. After a jury trial, the trial court found Leonard guilty of third-degree felony cultivation of marihuana in violation of R.C. 2925.04(A) and R.C. 2925.04(C)(5)(d). On appeal, Leonard contends that (1) that there was insufficient evidence to support his conviction and (2) that his conviction was against the manifest weight of the evidence. We disagree. First, we believe that any rational trier of fact could have found the essential elements of third-degree felony cultivation of marihuana proven beyond a reasonable doubt. And second, we find substantial evidence upon which the jury could have reasonably concluded that all the elements of third-degree felony cultivation of marihuana were proven beyond a reasonable doubt. Next, Leonard contends that he was

denied a fair trial because of prosecutorial misconduct. We disagree. First, Leonard cannot demonstrate that the prosecutor's failure to provide timely discovery deprived him of a fair trial. Second, the prosecutor's reference to the subject matter of a suppression hearing lacked prejudicial effect because the trial court sustained Leonard's objection to the reference. And finally, the prosecutor's references to the suppression hearing itself did not rise to the level of plain error. Leonard also contends that he received ineffective assistance of counsel. We disagree because Leonard (1) has not overcome the presumption that his trial counsel engaged in sound trial strategy and (2) has not demonstrated that his trial counsel's performance resulted in prejudice for him. Accordingly, we overrule all of Leonard's assignments of error and affirm the judgment of the trial court.

I.

{¶2} In September 2005, a wildlife technician discovered some marihuana plants while mowing a brushy section of the Fox Lake Wildlife Area in Athens County, Ohio. At about the same time, some confidential informants told Officer Terry Hawk of the Ohio Department of Natural Resources (hereinafter "ODNR") about suspicious activity in the area. Based on these reports, Officer Hawk and ODNR Officer Thomas Donnelly drove to that section of the Fox Lake Wildlife Area and found marihuana plants growing in two blue pots and one black pot. The two blue pots each contained two marihuana plants. The black pot also contained two marihuana plants and was located about seventy-five yards away from the two blue pots.

{¶3} On September 9, 2005, Officers Hawk and Donnelly set up a surveillance camera in the area of the marihuana plants. The surveillance camera was designed to start recording upon sensing any seismic activity in the area. On September 13, 2005, the surveillance camera recorded a white male approaching the marihuana plants while carrying a blue jug. Subsequently, the seismic activity from a nearby gas line caused the surveillance camera to record near continuously. As a result, the surveillance camera quickly ran out of power and recorded nothing else related to the marihuana plants.

{¶4} On September 20 and 21, 2005, Officers Hawk and Donnelly, along with other ODNR officers, set up live surveillance in the area of the marihuana plants. The officers observed nothing related to the marihuana on September 20, 2005. Before starting surveillance on September 21, 2005, one of the officers checked the marihuana in the blue pots and noticed that the soil was dry.

{¶5} At approximately 5:22 p.m. on September 21, 2005, Officer Donnelly observed a red jeep driving towards the area of the marihuana plants. The driver of the red jeep parked in a wooded area, got out of his car, and walked towards the area of the marihuana plants; i.e., the brushy area. Officer Hawk and another ODNR officer testified that they saw the suspect, later identified as Leonard, carrying a blue jug.

{¶6} Leonard then entered the brushy area that hid the blue pots. After Leonard entered this particular area, Officer Hawk testified that he saw the tops of the marihuana plants move and heard the sound of water pouring. (One of the ODNR officers later checked the blue pots and discovered that the soil was wet.)

When Leonard emerged from the brushy area, Officer Hawk apprehended Leonard and ordered him to the ground. At this point, ODNR officers found loose marihuana lying on the ground next to Leonard.

{¶7} ODNR Investigator Charles Stone took possession of the marihuana evidence a few days later. Investigator Stone testified that, because he had not worked a marihuana cultivation case before, he called the Athens County Prosecutor's office for guidance. Investigator Stone further testified that he operated under the following guidelines: "Keeping the three pots separate and removing the leaves and buds from the stalks of each of the two plants in each of the three planters, and putting them in separate boxes. So we ended up with three boxes. And because our scales were not on site at the District office I was given some advice to take it [sic] the State Highway Patrol office in Athens and utilizing their digital scales to weigh the contents of each of the boxes. That process occurred on [September] 26th." Transcript of Jury Trial Proceedings, Day Two at 221. According to Investigator Stone's testimony, the first box of marihuana plants weighed 426.86 grams; the second box of marihuana plants weighed 1,361.10 grams; and the third box weighed 1,079.29 grams. Therefore, according to Investigator Stone's testimony, the total weight of the marihuana was 2,867.25 grams.

{¶8} On February 27, 2006, an Athens County Grand Jury indicted Leonard for one count of third-degree felony cultivation of marihuana, in violation of R.C. 2925.04(A) and R.C. 2925.04(C)(5)(d).

{¶9} Sometime after Investigator Stone weighed the marihuana, ODNR officers transferred the marihuana evidence to the Ohio Attorney General's Bureau of Criminal Identification and Investigation (hereinafter "Ohio BCI" or "BCI"). A BCI analyst weighed the marihuana plants on May 16, 2007. According to the analyst's report, the marihuana weighed 747.1 grams. (Investigator Stone weighed the marihuana evidence again on August 28, 2007. The weight obtained by Investigator Stone that day was consistent with the weight obtained by the BCI analyst.)

{¶10} During his arrest on September 21, 2005, Leonard stated that he took the loose marihuana for his own use and, also, that he was growing the marihuana for his own use. On July 27, 2007, Leonard filed a motion to suppress that statement. Leonard also filed a motion in limine to prohibit the state from introducing into evidence (1) any marihuana seized subsequent to Leonard's arrest and (2) the September 13, 2005 surveillance videotape. After a suppression hearing that addressed these issues, the trial court granted the motion to suppress the statement because Leonard had not been read his Miranda rights. However, the trial court denied Leonard's motion in limine.

{¶11} On February 4, 2008, Leonard filed a Motion for Disclosure of the Identity of the Informant. The trial court denied that motion. Leonard subsequently filed another motion requesting the confidential informant's identity. Again, the trial court denied that motion. On July 7, 2008, the state filed a Notice of Citizen Information. In that Notice, the prosecutor stated that "[g]iven the fact that Supervisor Donnelly was watching for a certain vehicle, it became apparent

to me that there was another individual who had provided information to the officers. This individual was not present on September 21, 2005, this individual is a not a suspect in the case, and this individual had no other relationship to this case."

{¶12} On July 8, 2008, before the voir dire process in Leonard's trial, the judge ruled that the prosecutor should provide the name of the confidential informant to Leonard's attorney. The trial court judge said that the prosecutor "did not say that the individual that he's told us about and filed a notice about was a confidential informant. He just said it was somebody that they saw there who gave some general information when asked. And I think to allay any suspicions or anything the name and the address of that person should be given. It doesn't have to be published. Just something so counsel can call this person and talk to this person." Transcript of Jury Trial Proceedings, Day One (Pre-Voir Dire) at 5.

{¶13} The prosecutor provided the name of the informant to Leonard's trial counsel. But instead of providing an address or phone number, the prosecutor merely provided a street name. When Leonard's trial counsel complained, the trial court offered to help him make contact with the informant. However, it appears that nobody was able to contact the informant before the end of Leonard's trial.

{¶14} During the three-day jury trial, the prosecution called Officer Hawk, Officer Donnelly, Investigator Stone, and two other ODNR officers as witnesses. Leonard called the BCI analyst as a witness. After the trial, the jury found Leonard guilty of cultivation of marihuana, a felony of the third degree.

{¶15} On July 23, 2008, Leonard filed a motion for a new trial pursuant to Crim.R. 33. However, the trial court disregarded Leonard's arguments under Crim.R. 33(A)(2) and (3) because his motion did not include the necessary supporting affidavits. See Crim.R. 33(C). Further, the trial court found that Leonard's arguments under Crim.R. 33(A)(1) were without merit. As a result, the trial court denied Leonard's motion for a new trial.

{¶16} Leonard appeals his conviction, asserting the following three assignments of error: I. "THE CONVICTION WAS BASED UPON INSUFFICIENT EVIDENCE AND WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE." II. "APPELLANT WAS DENIED A FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT." And, III. "APPELLANT WAS DENIED A FAIR TRIAL DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL."

II.

{¶17} In his first assignment of error, Leonard contends (1) that there was insufficient evidence to support his conviction and (2) that his conviction was against the manifest weight of the evidence.

{¶18} Here, based on the jury's verdict, the trial court found Leonard guilty of violating R.C. 2925.04(A) and R.C. 2925.04(C)(5)(d). R.C. 2925.04(A) states that "[n]o person shall knowingly cultivate marihuana or knowingly manufacture or otherwise engage in any part of the production of a controlled substance." R.C. 2925.01(F) defines the word "cultivate" to include "planting, watering, fertilizing, or tilling" marihuana. And R.C. 2925.04(C)(5)(d) provides: "If the amount of marihuana involved equals or exceeds one thousand grams but is less

than five thousand grams, illegal cultivation of marihuana is a felony of the third degree[.]"

A. Sufficiency of the Evidence

{¶19} When reviewing a case to determine if the record contains sufficient evidence to support a criminal conviction, we must "examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Smith*, Pickaway App. No. 06CA7, 2007-Ohio-502, ¶33, citing *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. See, also, *Jackson v. Virginia* (1979), 443 U.S. 307, 319.

{¶20} The sufficiency of the evidence test "raises a question of law and does not allow us to weigh the evidence." *Smith* at ¶34, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Instead, the sufficiency of the evidence test "'gives full play to the responsibility of the trier of fact [to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *Smith* at ¶34, quoting *Jackson* at 319. This court will "reserve the issues of the weight given to the evidence and the credibility of witnesses for the trier of fact." *Smith* at ¶34, citing *State v. Thomas* (1982), 70 Ohio St.2d 79, 79-80; *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶21} Here, we find sufficient evidence to support Leonard's conviction. On September 21, 2005, ODNR officers observed Leonard drive into a secluded area and walk towards the brushy area that contained the marihuana plants. According to Officer Hawk's testimony, Leonard was carrying a blue jug at the time. Importantly, on September 13, 2005, the ODNR's surveillance camera recorded a white male also carrying a blue jug in the vicinity of the marihuana plants. At the start of the September 21, 2005 live surveillance, the soil in the blue marihuana plant containers appeared to be dry. Officer Hawk testified that he saw the tops of the marihuana plants move and heard the sound of water pouring after Leonard entered the brushy area. And after Leonard had emerged from the brushy area, the soil in the containers was wet. Finally, after ordering Leonard to the ground, ODNR officers found loose marihuana lying next to him.

{¶22} Regarding the weight of the marihuana plants, Investigator Stone testified that he weighed the plants on September 26, 2005. According to Investigator Stone's testimony, the first box of marihuana plants weighed 426.86 grams; the second box of marihuana plants weighed 1,361.10 grams; and the third box weighed 1,079.29 grams. Therefore, according to Investigator Stone's testimony, the total weight of the marihuana was 2,867.25 grams.

{¶23} Consequently, after viewing the evidence in a light most favorable to the state, we find that any rational trier of fact could have found the essential elements of third-degree felony cultivation of marihuana proven beyond a reasonable doubt.

B. Manifest Weight of the Evidence

{¶24} "The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *State v. Thompkins* (1997), 78 Ohio St.3d 380, at paragraph two of the syllabus. Sufficiency is a test of the adequacy of the evidence, while "[w]eight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other[.]'" *State v. Sudderth*, Lawrence App. No. 07CA38, 2008-Ohio-5115, at ¶27, quoting *Thompkins* at 387.

{¶25} "Even when sufficient evidence supports a verdict, we may conclude that the verdict is against the manifest weight of the evidence, because the test under the manifest weight standard is much broader than that for sufficiency of the evidence." *Smith* at ¶41. When determining whether a criminal conviction is against the manifest weight of the evidence, we "will not reverse a conviction where there is substantial evidence upon which the [trier of fact] could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt." *State v. Eskridge* (1988), 38 Ohio St.3d 56, paragraph two of the syllabus. See, also, *Smith* at ¶41. We "must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial granted." *Smith* at ¶41, citing *State v. Garrow* (1995), 103 Ohio App.3d 368, 370-371; *Martin* at 175. However, "[o]n the trial of a case, * * * the weight to be

given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *DeHass*, at paragraph one of the syllabus.

{¶26} Here, we also find that Leonard's conviction is not against the manifest weight of the evidence. In making this finding, we considered the same evidence that we discussed in our resolution of Leonard's sufficiency of the evidence challenge.

{¶27} Unquestionably, Leonard's cross-examination of the prosecution's witnesses revealed several flaws in ODNR's investigation. Most notably, ODNR officers may not have kept appropriate photo logs and apparently mislabeled several photographs. Furthermore, Leonard's cross-examination of Officer Hawk and ODNR Officer Robert Nelson called into question whether either officer actually saw Leonard carrying the blue jug. However, in our view, these flaws do not outweigh the following evidence against Leonard: (1) the prosecution's eyewitness testimony regarding Leonard's actions on September 21, 2005; (2) the wet soil in the blue marihuana plant containers after Leonard left the brushy area; and (3) the loose marihuana found lying next to Leonard after ODNR officers had arrested him.

{¶28} Finally, we must address an argument made by Leonard regarding the weight of the marihuana plants. Leonard argues that Investigator Stone was not qualified to weigh the marihuana plants and, as a result, the evidence did not support a conviction for third-degree felony marihuana cultivation. Leonard bases his argument on R.C. 2925.51, which provides: "In any criminal prosecution for a violation of this chapter or Chapter 3719. of the Revised Code,

a laboratory report from the bureau of criminal identification and investigation, a laboratory operated by another law enforcement agency, or a laboratory established by or under the authority of an institution of higher education that has its main campus in this state and that is accredited by the association of American universities or the north central association of colleges and secondary schools, primarily for the purpose of providing scientific services to law enforcement agencies and signed by the person performing the analysis, stating that the substance that is the basis of the alleged offense has been weighed and analyzed and stating the findings as to the content, weight, and identity of the substance and that it contains any amount of a controlled substance and the number and description of unit dosages, is prima-facie evidence of the content, identity, and weight or the existence and number of unit dosages of the substance." Leonard contends that Investigator Stone was incompetent to testify as to the weight of the marihuana plants because Investigator Stone did not meet the requirements of R.C. 2925.51.

{¶29} However, we believe that Leonard has misinterpreted R.C. 2925.51. We agree with the state's argument. Namely, we do not believe that R.C. 2925.51 establishes standards that a witness must meet in order to competently testify about the weight of marihuana plants. Rather, R.C. 2925.51 merely establishes how a laboratory report may serve as prima facie evidence of the content, weight, and identity of a controlled substance. Here, the state did not attempt to introduce a report from Investigator Stone as prima facie evidence of the weight of the marihuana. Instead, the state called Investigator Stone as a

witness to testify about the weight of the marihuana and his methods for obtaining that weight. Therefore, the requirements of R.C. 2925.51 do not apply to the present case.

{¶30} Next, we will address the discrepancy in the weight of the marihuana plants. The BCI analyst testified that she weighed the marihuana plants on May 16, 2007. According to her report (which meets the requirements of R.C. 2925.51), the marihuana weighed 747.1 grams. Because of this, Leonard argues that the evidence supports only a conviction for fifth-degree marihuana cultivation pursuant to R.C. 2925.04(C)(5)(c), which provides: "If the amount of marihuana involved equals or exceeds two hundred grams but is less than one thousand grams, illegal cultivation of marihuana is a felony of the fifth degree[.]"

{¶31} Here, we do not believe that the jury created a manifest miscarriage of justice by convicting Leonard under R.C. 2925.04(C)(5)(d) (a third-degree felony) instead of R.C. 2925.04(C)(5)(c) (a fifth-degree felony). Leonard had the opportunity to cross-examine Investigator Stone about his methods for weighing the marihuana and his experience with marihuana plants. Therefore, the jury was in the best position to determine whether the weight obtained by Investigator Stone was credible. Further, we note that other Ohio courts have agreed with the conclusion that drugs "can be weighed as received and ha[ve] upheld convictions of higher degrees in cases where later testing of [the drugs] showed a lower weight." *State v. Jones*, Mahoning App. No. 06 MA 17, 2007-Ohio-7200, at ¶25, citing *State v. Burrell,* Cuyahoga App. No. 86702, 2006-Ohio-2593, at ¶3. See, also, *State v. Kuntz* (Oct. 2, 2001), Ross. App. No. 01CA2604, 2001-Ohio-

2591; *State v. Hunter* (Aug. 19, 1999), Licking App. No. 99CA0036. And although Investigator Stone obtained a lower weight when he weighed the marihuana a second time, he agreed that the marihuana had "dried up quite a bit" from September 26, 2005 through August 28, 2007.

{¶32} We believe that our decision in *Kuntz* is relevant to the present case. In *Kuntz*, the defendant's marihuana weighed over 200 grams at the time of the offense. However, the marihuana weighed less than 200 grams on the day of the defendant's trial. In resolving a manifest weight of the evidence challenge, this court upheld the defendant's conviction for possession of marijuana weighing over two hundred grams but less than one thousand grams. A police officer testified that, over time, marihuana loses weight because of dehydration. And this court found that testimony to be an "alternate explanation to the theory that the scale [was] inaccurate or unreliable." *Kuntz*. Implicit in that finding is our belief that law enforcement officials need not let marihuana "dry out" before weighing it. See, also, *Jones* at ¶29 ("Although the crack cocaine in count four may not have been as dry as it will be in the future * * * the lab need not allow the crack to dry at all."). As a result, we cannot conclude that the jury clearly lost its way in resolving the conflict in the evidence between a weight of 2,867.25 grams (a third-degree felony) and a weight of 747.1 grams (a fifth-degree felony).

{¶33} After reviewing the record, we find substantial evidence upon which the jury could have reasonably concluded that all the elements of third-degree felony cultivation of marihuana were proven beyond a reasonable doubt. Therefore, we

cannot find that the jury, as the trier of fact, clearly lost its way and created such a manifest miscarriage of justice that Leonard's conviction must be reversed.

{¶34} Accordingly, we overrule Leonard's first assignment of error.

III.

{¶35} In his second assignment of error, Leonard contends that the prosecutor's misconduct denied Leonard a fair trial. First, Leonard claims that the prosecutor failed to provide Leonard with timely discovery. Leonard further argues that the prosecutor improperly and repeatedly referred to the "suppression hearing" during the trial.

{¶36} The test for prosecutorial misconduct is whether the conduct was improper and, if so, whether the rights of the accused were materially prejudiced. *State v. Smith*, 97 Ohio St.3d 367, 2002-Ohio-6659, at ¶45, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14; *State v. Givens*, Washington App. No. 07CA19, 2008-Ohio-1202, at ¶28. "The 'conduct of a prosecuting attorney during trial cannot be grounds for error unless the conduct deprives the defendant of a fair trial.'" *Givens* at ¶28, quoting *State v. Gest* (1995), 108 Ohio App.3d 248, 257. See, also, *State v. Keenan* (1993), 66 Ohio St.3d 402, 405; *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 24. "Prosecutorial misconduct constitutes reversible error only in rare instances." *State v. Edgington*, Ross App. No. 05CA2866, 2006-Ohio-3712, at ¶18, citing *Keenan* at 406. The "touchstone of analysis * * * is the fairness of the trial, not the culpability of the prosecutor. * * * The Constitution does not guarantee an 'error free, perfect trial.'" *Gest* at 257 (citations omitted); *Edgington* at ¶18.

A. The Failure to Provide Timely Discovery

{¶37} Leonard argues that the prosecutor engaged in misconduct by failing to provide timely discovery. As part of this argument, Leonard contends that the prosecutor failed to provide timely discovery of relevant videotapes and an evidence report. However, Leonard makes no attempt to explain how he would have benefited from the timely disclosure of these items. Therefore, Leonard cannot demonstrate that the prosecution's failure to provide timely discovery of the videotapes or the evidence report resulted in either prejudice or an unfair trial. See, e.g., *State v. Chatman*, Franklin App. No. 08AP-803, 2009-Ohio-2504, at ¶55 ("[W]ithout any evidence, we are left only with speculation and conjecture, and cannot find prosecutorial misconduct, much less prejudice to the defendant, based on the same."). Accordingly, we cannot find misconduct based on the prosecutor's failure to provide timely discovery of the videotapes and the evidence report.

{¶38} Leonard also contends that the prosecutor engaged in misconduct by failing to reveal the identity of the confidential informant. Even though the trial court ordered a limited disclosure of the informant's identity just before trial, Leonard has not demonstrated that the prosecutor was required to reveal the identity of the confidential informant at any time. "Courts have held consistently that where the informant was not an active participant in the criminal activity, but only a tipster, disclosure is not required[.]" *State v. Parsons* (1989), 64 Ohio App.3d 63, 67-68. See, also, *State v. Bays*, 87 Ohio St.3d 15, 25, 1999-Ohio-

216. Here, there is no evidence that the confidential informant was an active participant in the cultivation of marihuana.

{¶39} "Additionally, it is clear that the burden rests with defendant to establish the need for disclosure. * * * Something more than speculation about the possible usefulness of an informant's testimony is required. The mere possibility that the informer might somehow be of some assistance in preparing the case is not sufficient to satisfy the test that the testimony of the informant would be helpful or beneficial to the accused in preparing or making a defense to criminal charges." *Parsons* at 69 (citations omitted). Here, Leonard freely admits that "whether the defendant would have benefited from the information sought [the identity of the confidential informant] cannot be demonstrated." Brief of Appellant at 18.

{¶40} For the foregoing reasons, we cannot find misconduct based on the prosecutor's failure to reveal the identity of the confidential informant.

B. References to the Suppression Hearing

{¶41} We also find that the prosecutor's references to the suppression hearing do not warrant reversal. The prosecutor mentioned the suppression hearing twice during the trial. The state claims that "[t]he second reference was objected to by the defense and sustained." Brief of Appellee State of Ohio at 11. However, we do not agree with the state's description of this sequence of events. The transcript reveals the following exchange between the prosecutor and Officer Hawk:

{¶42} "Q: (Inaudible) suppression hearing in October of 2007, weren't you?

{¶43} A: Yes.

{¶44} Q: And that had to do with statements, didn't it?

{¶45} A: Pardon?

{¶46} BY [LEONARD'S TRIAL COUNSEL]: Objection.

{¶47} Q: The suppression.

{¶48} BY [LEONARD'S TRIAL COUNSEL]: Objection.

{¶49} BY THE JUDGE: Basis, counsel?

{¶50} BY [LEONARD'S TRIAL COUNSEL]: Can we approach?

{¶51} BY THE JUDGE: Yes you can.

{¶52} BENCH CONFERENCE

{¶53} BY [LEONARD'S TRIAL COUNSEL]: (Inaudible) statements that were being made (inaudible) court issued an order as to what was suppressed. I think it's highly inappropriate now to infer (inaudible) statements were an issue and that he's not going to be able to elaborate in the presence of the jury. Thank you.

{¶54} * * *

{¶55} BY THE JUDGE: [Leonard's trial counsel] has been very careful to always refer to it as a hearing. He never said what kind of a hearing. You have referred to it as what kind of hearing it was. *If he had made an objection to that point I would have sustained his objection because I don't think the jury needs to know that*.

{¶56} BY [THE PROSECUTOR]: Okay.

{¶57} BY THE JUDGE: And they don't need to know what the subject was for that hearing. Objection sustained. " Day Two Transcript at 159-160 (emphasis added).

{¶58} Based on the trial transcript, we do not believe that Leonard's trial counsel objected to the mere mention of the suppression hearing. Instead, we believe that Leonard's trial counsel objected to the prosecutor's reference to the *subject matter* of the suppression hearing; that is, Leonard's suppressed statement about the marihuana. As a result, "[e]ven if the prosecutor's remark [about the subject matter of the suppression hearing] is considered misconduct, it lacks prejudicial effect warranting reversal because the court sustained [Leonard's] objection." *State v. Carter*, Mahoning App. No. 06-MA-187, 2009-Ohio-933, at ¶89, citing *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, at ¶94.

{¶59} Contrary to the state's assertions, we believe that Leonard's trial counsel failed to object to the prosecutor's second reference to the suppression hearing. For that reason, Leonard has forfeited all but plain error on this issue. See *State v. Williams*, 79 Ohio St.3d 1, 12 (applying the plain error standard to a prosecutorial misconduct claim).

{¶60} Pursuant to Crim.R. 52(B), we may notice plain errors or defects affecting substantial rights. "Inherent in the rule are three limits placed on reviewing courts for correcting plain error." *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶15. "First, there must be an error, *i.e.,* a deviation from the legal rule. * * * Second, the error must be plain. To be 'plain' within the meaning

of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. * * * Third, the error must have affected 'substantial rights.' We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial." Id. at ¶16, quoting *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, (omissions in original). We will notice plain error "only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of syllabus. "Prosecutorial misconduct rises to the level of plain error if it is clear the defendant would not have been convicted in the absence of the improper comments." *State v. Tumbleson* (1995), 105 Ohio App.3d 693, 700; *State v. Olvera-Guillen*, Butler App. No. CA2007-05-118, 2008-Ohio-5416, at ¶36.

{¶61} Here, we have already found that substantial evidence supports Leonard's conviction. Therefore, we do not believe that the jury convicted Leonard because of the prosecutor's references to the suppression hearing. In other words, we believe that Leonard would have been convicted even if the prosecutor had never referred to the suppression hearing during the trial. And as a result, those references do not constitute plain error.

{¶62} Accordingly, for the foregoing reasons, we overrule Leonard's second assignment of error.

IV.

{¶63} In his third assignment of error, Leonard contends that he received ineffective assistance of counsel for the following reasons: Leonard's trial counsel (1) failed to object to improper statements and testimony; and (2) filed

ineffective motions regarding the marihuana evidence, the confidential informant, and Leonard's request for a new trial.

{¶64} "'In Ohio, a properly licensed attorney is presumed competent and the appellant bears the burden to establish counsel's ineffectiveness.'" *State v. Countryman*, Washington App. No. 08CA12, 2008-Ohio-6700, at ¶20, quoting *State v. Wright*, Washington App. No. 00CA39, 2001-Ohio-2473; *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-56, cert. den. *Hamblin v. Ohio* (1988) 488 U.S. 975. To secure reversal for the ineffective assistance of counsel, one must show two things: (1) "that counsel's performance was deficient* * * " which "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[;]" and (2) "that the deficient performance prejudiced the defense* * *[,]" which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington* (1984), 466 U.S. 668, 687. See, also, *Countryman* at ¶20. "Failure to satisfy either prong is fatal as the accused's burden requires proof of both elements." *State v. Hall*, Adams App. No. 07CA837, 2007-Ohio-6091, at ¶11, citing *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, at ¶205.

A. Failing to Object to Improper Statements and Testimony

{¶65} Leonard claims ineffective assistance of counsel because his trial counsel failed to object to statements and testimony regarding the suppression hearing. Leonard also claims that his trial counsel should have objected to the following testimony from Officer Donnelly: "Well Mr. Leonard kind of disappeared

and we weren't in court for quite a while. * * * So there was nearly a two year window that Mr. Leonard, or a long period of time, I can't tell you exactly, but Mr. Leonard was nowhere to be found." Transcript of Jury Trial Proceedings Day One (Post-Voir Dire) at 64-65. Leonard argues that, because of these statements, "[t]he jurors were free to develop a picture of the defendant as technical obstructionist [sic] who was on the lam for an extended period of time[.]" Brief of Appellant at 22.

{¶66} First, Leonard has not overcome the presumption that his trial counsel's failure to object to the relevant statements and testimony might be considered sound trial strategy. "When considering whether trial counsel's representation amounts to deficient performance, 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' * * * Thus, 'the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.'" *State v. Dickess* (2008), 174 Ohio App.3d 658, 2008-Ohio-39, at ¶61, quoting *Strickland* at 689.

{¶67} Here, Leonard's "[c]ounsel could reasonably have decided against raising an objection * * * for fear that an objection would only call the jury's attention to the [suppression hearing.]" *State v. Patrick* (Sept. 8, 1994), Lawrence App. No. 94CA02. See, also, *State v. Dixon*, 152 Ohio App.3d 760, 2003-Ohio-2550, at ¶42-43; *State v. Zack* (June 14, 2000), Lorain App. Nos. 99CA007321, 98CA007270; *State v. Lawson* (June 4, 1990), Clermont App. No. CA88-05-044. This is especially true because Leonard's trial counsel did object

to the mention of the *subject matter* of the suppression hearing. Therefore, it is reasonable to conclude that, as a matter of trial strategy, Leonard's trial counsel differentiated between references to the subject matter of the suppression hearing and the mere mention of the suppression hearing itself. Counsel may have reasonably found that it was best not to call attention to the fact that a suppression hearing took place, but felt compelled to object when the prosecutor went further and mentioned Leonard's statements.

{¶68} Furthermore, Leonard has not demonstrated that his trial counsel's failure to object to the relevant statements deprived Leonard of a fair trial. Leonard claims that the jurors were free to form a picture of Leonard as an "obstructionist who was on the lam," but we can only speculate as to whether the jurors actually formed such a picture. "Speculation regarding the prejudicial effects of counsel's performance will not establish ineffective assistance of counsel." *State v. Cromartie*, Medina App. No. 06CA0107-M, 2008-Ohio-273, at ¶25, citing *State v. Downing*, Summit App. No. 22012, 2004-Ohio-5952, at ¶27.

B. Ineffective Motions

{¶69} Leonard also argues that his trial counsel filed ineffective motions. First, Leonard claims ineffective assistance of counsel based on the motion to exclude the marihuana evidence. Leonard contends that his trial counsel "should have sought to exclude the evidence of weight offered by [Investigator Stone] on the grounds that he did not qualify as an analyst under [R.C.] 2925.51 and he would not otherwise qualify as an expert under Evidence Rule 702." Brief of Appellant at 20-21. We have already found that Leonard has misinterpreted

R.C. 2925.51. The qualifications mentioned in R.C. 2925.51 do not apply to the present case because the state did not attempt to introduce a report from Investigator Stone as prima facie evidence of the weight of the marihuana. Therefore, we cannot find ineffective assistance of counsel for reasons related to R.C. 2925.51.

{¶70} Similarly, we cannot find ineffective assistance of counsel for reasons related to Evid.R. 702. In relevant part, Evid.R. 702 provides: "A witness may testify as an expert if * * * the witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons[.]" Here, we do not believe that Investigator Stone's testimony was beyond the knowledge or experience of the average lay person. Although most people have probably never weighed a marihuana plant, the average person (1) understands the concept of weight and (2) has weighed something during their lives. Additionally, the Supreme Court of Ohio has "determined that the state has no burden to separate any portion of the marijuana plant when determining weight for purposes of statutory drug offenses." *State v. Davis* (1985), 16 Ohio St.3d 34, 34, citing *State v. Wolpe* (1984), 11 Ohio St.3d 50, 52. Therefore, a person need not have specialized knowledge of marihuana to weigh a marihuana plant; e.g., differentiating between stalks, leaves, and buds. Rather, weighing a marihuana plant requires nothing more than (1) placing the plant on an accurate scale and (2) recording the correct weight. Such an act is within the experience of the average lay person.

{¶71} We do not believe that weighing marihuana plants requires any "specialized knowledge, skill, experience, training, or education[.]" Evid.R. 702(B). And any motion to exclude Investigator Stone's testimony based on Evid.R. 702 would have been meritless. "Defense counsel's failure to raise meritless issues does not constitute ineffective assistance of counsel." *State v. Ross*, Ross. App. No. 04CA2780, 2005-Ohio-1888, at ¶9. See, also, *State v. Close*, Washington App. No. 03CA30, 2004-Ohio-1764, at ¶34.

{¶72} Leonard also claims ineffective assistance of counsel because his trial counsel failed to include sufficient information in the motion to disclose the confidential informant's identity. As we discussed in the resolution of Leonard's second assignment of error, Leonard freely admits that he does not know whether he would have benefited from knowing the identity of the confidential informant. Therefore, Leonard can only speculate as to whether he was prejudiced by his trial counsel's performance. Again, mere speculation is not enough to satisfy the second prong of the *Strickland* test. See *Cromartie* at ¶25.

{¶73} And finally, Leonard claims ineffective assistance of counsel because his motion for a new trial did not include the necessary supporting affidavits. In relevant part, Leonard's new trial motion made arguments under Crim.R. 33(A)(2) and (3). Crim.R. 33(C) provides: "The causes enumerated in subsection (A)(2) and (3) must be sustained by affidavit showing their truth[.]" Leonard's trial counsel did not submit the required affidavits. Therefore, we agree that Leonard's trial counsel erred by failing to follow the rules of criminal procedure. Nevertheless, Leonard has not demonstrated that his new trial motion would

have been meritorious if Leonard's trial counsel had included the required affidavits. Without such a showing, we cannot find that his trial counsel's error resulted in material prejudice. Furthermore, Leonard's new trial motion contained the same arguments that we have rejected in this appeal; i.e., that Leonard suffered prejudice as a result of misconduct and surprise. Therefore, we believe that Leonard's motion for a new trial would have been meritless, even if the motion had included the necessary affidavits.

{¶74} Accordingly, for the foregoing reasons, we overrule Leonard's third assignment of error. Having overruled all of Leonard's assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

Harsha, J., Concurring:

{¶75} Based upon the specific facts in this case, I concur in the principal opinion's conclusion that Leonard's conviction for cultivation of marihuana as a felony of the third degree is supported by the weight of the evidence. Initially, it is apparent that Leonard has benefited from the wildlife officer's decision to separate the leaves and buds of the plants from the stalks before weighing them. In *State v. Wolpe* (1984), 11 Ohio St.3d 50, the Supreme Court of Ohio held in a per curiam opinion that in a prosecution for trafficking marihuana, the State had no burden of separating any statutorily excluded portions of the plant from the quantity seized before weighing it. Id. at 52. The court reviewed the statutory definition of marihuana found in R.C. 3719.01(Q):

> "Marijuana" means all parts of any plant of the genus cannabis, whether growing or not, * * * (.)

Even though the definition went on to exclude mature stalks, sterilized seeds, and legitimately processed derivatives of the plant, the court held those materials need not be excluded from the weight of the plant unless they had already been separated (for legitimate use) from the plant at the time of seizure. In other words, the exclusion of mature stalks, sterilized seeds and by-products only applies where the substance consists solely of the excluded materials. As a consequence, the State has no burden to separate any statutorily excluded portions of the plant from the quantity of marihuana seized from a suspect. Id. This interpretation should also apply in cultivation cases like the one before us. Thus, the weight could have included the stalks that the officer chose not to use.

{¶76} More important, however, is Leonard's implicit assertion that the "dry weight" is the only proper measure of the quantity because the marihuana must be usable or suitable for consumption before it is measured. I see nothing in the statute's definition that supports this proposition. Moreover, it is reasonable to conclude that the moisture of the wet marihuana plant comes within the definition of marihuana found in the statute because water is a natural component of the plant. For a more detailed discussion of the issue of dry weight verses wet weight, see *North Carolina v. Gonzales* (2004), 596 S.E.2d 297, affirmed without opinion in *State v. Gonzales* (2005), 359 N.C. 420, 611 S.E.2d 832.

{¶77} However, I do recognize some concern over the inconsistent protocols used by different law enforcement agencies to determine the weight of marihuana. It seems somewhat arbitrary that one defendant could get charged with an elevated felony because an agency chose to use a "wet weight," while another defendant with an identical quantity of cannabis could face a lesser charge because a different agency used a "dry weight" measurement. Perhaps a legislatively or administratively mandated protocol is necessary to avoid unequal arbitrary application of the statute. However, that question is not presently before us.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and Appellant pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Harsha, J.: Concurs in Judgment and Opinion with Opinion.
McFarland, J.: Concurs in Judgment Only.

For the Court

BY: _____
Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.