[Cite as *State v. Crocker*, 2015-Ohio-2528.]

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

STATE OF OHIO,	:	Case No. 14CA3640
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
JAMES D. CROCKER,	:	
Defendant-Appellant.	:	**RELEASED: 6/16/2015**

APPEARANCES:

Matthew F. Loesch, Portsmouth, Ohio, for appellant.

Mark E. Kuhn, Scioto County Prosecuting Attorney, Portsmouth, Ohio, for appellee.

Harsha, J.

{¶1} Following a bench trial the Scioto County Court of Common Pleas convicted James Crocker of trafficking and possession of heroin, trafficking and possession of cocaine, and tampering with evidence. Crocker claims that his convictions are against the manifest weight of the evidence and are not supported by sufficient evidence. However, the trial court reasonably concluded that Crocker possessed the drugs because Crocker knew about the heroin and cocaine and he exercised dominion and control over the drugs by knowingly transporting them in the rental car. We overrule this part of his first assignment of error.

{¶2} Nevertheless, based on the Supreme Court's recent decision in *State v. Straley*, 139 Ohio St.3d 339, 2014-Ohio-2139, 11 N.E.2d 1175, we agree the record does not contain sufficient evidence to support Crocker's conviction for tampering with evidence. At the time his passenger concealed the drugs in her vagina, there was no

proceeding or investigation that they either knew was in progress or was likely to occur. We sustain this portion of Crocker's first assignment of error.

{¶3} Next Crocker challenges the admissibility of his jailhouse telephone calls because a deputy sheriff who identified his voice obtained a postindictment voice exemplar from him without his counsel being present. We reject Crocker's contention because a state trooper with personal knowledge authenticated Crocker's voice on the recorded phone calls so that any error was harmless beyond a reasonable doubt.

{¶4} Crocker also asserts that the trial court should have excluded the report of a forensic computer specialist. Because the text messages contained in the report were not hearsay and the specialist was sufficiently qualified as an expert to render an opinion, we reject this assignment of error.

{¶5} Next Crocker claims that the trial court erred when it overruled his speedy-trial motion to dismiss. Crocker did not establish that the trial court violated his speedy-trial rights. He agreed to toll the time until 30 days after the trial court's ruling on his motion to suppress. And the trial court granted a reasonable continuance of the suppression hearing based on the unavailability of the prosecutor. Because of these tolling events, his claim is meritless.

{¶6} Finally, Crocker contends that the trial court "abused its discretion" by denying his motion to suppress the evidence derived from the traffic stop. Because the stop was based on his violation of traffic law, the stop was valid. And the scope and duration of the stop was reasonable given the relatively brief time involved and Crocker's inability to properly identify his passenger. The passenger's subsequent

admission that Crocker had given her contraband, which she had concealed on her body, justified the resulting expansion of the scope and duration of the stop.

{¶7} In sum, we reverse Crocker's conviction for tampering with evidence and remand the cause to the trial court to vacate that conviction. We affirm the remaining convictions.

I. FACTS

{¶8} The Scioto County Grand Jury returned an indictment charging Crocker with one count of trafficking in heroin, one count of possession of heroin, one count of trafficking in cocaine, one count of possession of cocaine, and one count of tampering with evidence. After receiving appointed counsel and entering a plea of not guilty, Crocker filed motions to suppress evidence and to dismiss the case based on the speedy-trial provisions of R.C. 2945.71. The trial court conducted hearings on the motions and denied them. Crocker then waived his right to a jury trial and the trial court held a bench trial, which produced the following evidence.

{¶9} While on routine patrol, Ohio State Highway Patrol Trooper Michael Erwin noticed a blue 2012 Ford Fusion that was traveling southbound on U.S. Route 23. He observed that vehicle committing a marked-lanes violation by travelling approximately six inches over the white fog line on the right side of the road for about sixty yards. He approached the vehicle and asked that the two occupants provide him with identification. From the information provided, Trooper Erwin identified Crocker as the driver and Dicey Deselle[1] as the passenger.

[1] Although her name is noted as "Diselle" in the trial transcript, it is denominated "Deselle" in the suppression hearing transcript, the property control forms submitted as evidence at trial, and the parties' appellate briefs; we refer to her by the latter name in this opinion.

{¶10} After the trooper gathered the paperwork, Crocker agreed to exit the vehicle. The trooper patted him down to make sure he did not have any weapons, and placed him in the cruiser while the trooper went over the information. Crocker informed the trooper that his fiancée had rented the car. Crocker also told the trooper that the passenger was his cousin, India Ruffin, and that they were taking a trip to North Carolina. Because Crocker's statements about the passenger's identity did not correspond to the identification provided by the passenger that she was Dicey Deselle, Trooper Erwin left his cruiser. He approached Deselle, who confirmed that she was Dicey Deselle, and after additional conversation, the trooper advised her that her story did not match Crocker's story, so he gave her *Miranda* warnings. At that point Deselle agreed to go back to the patrol post to remove an item from her vaginal cavity[2]. Based on this information the trooper placed Crocker under arrest and seized two cellphones from the driver's seat and $1,080 in cash from Crocker's person. Law enforcement officers also recovered two additional identification cards from Deselle's purse for an India Ruffin, although Ruffin's picture did not match Deselle's face.

{¶11} At the patrol post Trooper Carla Taulbee observed Deselle, who indicated she was scared of Crocker, as she removed an object covered in black tape from her vagina. Trooper Erwin unwrapped the object, which included three separate baggies containing drugs that had been prepared for transportation. The troopers sent the baggies to the Ohio State Highway Patrol Crime Laboratory, which tested the materials inside the baggies and determined that they contained 55.49 grams of cocaine and 49.61 grams of heroin.

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[2] Deselle did not testify and based on hearsay Crocker's counsel objected to some of Trooper Erwin's testimony at trial concerning what she told him. But there was no objection to the evidence cited here and no error is assigned on appeal concerning it.

{¶12} Christopher McGee, a forensic computer specialist with the Ohio State Highway Patrol, extracted data from the cellphones seized from Crocker's driver's seat in the rental car. One of the cellphones included an e-mail account associated with Crocker—jaycrockjc@gmail.com. Three days before Crocker's arrest, one of his cellphones had been used to search for Hertz Rental Car locations and discounts. On the day of his arrest, one of Crocker's cellphones included the following text conversation:

Crocker's phone: "How he know Im comin"

One Luv: "We stil on rite im tryin 2 make sum paper I got peepz waitn"

One Luv: "Gary heard me talkin 2 my peepz"

Crocker's phone: "And I got my own shit now"

One Luv: "Cool but we still good"

Crocker's phone: "They owe"

One Luv: "How much they owe?"

Crocker's phone: "1800 dat gary stole"

{¶13} In his report McGee concluded that both cellphones "appear to have evidence of the sale/transportation of illegal narcotics." Crocker objected to McGee's testimony and report on several grounds, including that they contained hearsay and inadmissible opinion testimony, but the trial court overruled his objections in part. McGee testified that although he had never been a lead investigator in a narcotics investigation or a narcotics officer, he had done "upwards of fifty" examinations of cellphones in drug cases. His involvement in narcotics investigations has been through

his analysis of cellphones, personal computers, and tablets, as well as training about narcotics while at his previous job as a Columbus code enforcement officer.

{¶14} While incarcerated at the Scioto County Jail, Crocker made calls on the jail's telephone system, which recorded the calls with the knowledge of both parties to the conversation. Captain Hall of the Scioto County Sheriff's Office testified that he went to the jail the week before trial and told Crocker that he would be testifying about the telephone system and that he wanted to hear Crocker's voice so that he could verify that Crocker was the person talking on the recordings. At trial Crocker objected to the admission of three recorded tapes of his telephone calls because his counsel was not notified and present when Captain Hall approached Crocker to identify that it was his voice on the recorded calls. The trial court found Captain Hall's conduct surprised and concerned it, but overruled the objection because Hall elicited no incriminating information from Crocker. The trial court further noted that third-party statements during the recorded conversations would not be used to prove the truth of the statements. Trooper Erwin, who had talked with Crocker during the stop and arrest, previously testified that he had listened to Crocker's jail-system telephone recordings and he recognized Crocker's voice as the person who placed those calls from the Scioto County Jail.

{¶15} The court admitted three of the recorded jail-system phone calls into evidence. In the first phone call Crocker told a woman that he was with some girl named India Ruffin, that his cousin had rented the car, that he was the driver of the car, and that he did not know the girl, but "My homeboy, Bode, know her. He put me up on her." Crocker also was concerned about the trooper taking his cellphones.

{¶16} In the second phone call Crocker told the person that "Brick" should know, by saying "But tell him—I need you to tell him—that Bode set me up with that girl, and she told on me." When hearing that Brick was mad at him, Crocker responded, "How? I did everything this nigger told me to do. I did what the nigger told me to do, and then, if I would have did what I wanted to do, I would have been straight. I would have left." Later, after being told that Brick was mad because Crocker did not want to listen to him, Crocker said, "I listen to him. What he saying? As soon as I tell you—I've been coming by myself right? They say, man, don't go by yourself man. Do it the same way I've been telling you. Ok, I'm going to do it how you all tell me. So why don't you all plug me in, and I'll do it how you all tell me."

{¶17} In the third phone call Crocker seemed anxious to contact Deselle and to have her not testify: "All I want to know is what the hell she said because she the one who got us in this shit. We would have been straight" and "[i]f she don't come to court, we straight." Crocker stated that it was Deselle's fault he was arrested: "Because she gave me the wrong name. And when I tell them that's the name she gave me, they saying no, this ain't her name" and "the name she gave me that I gave them, there was an ID in her purse with that name on it, but just not her face." He reiterated that it was Bode's idea that he use her.

{¶18} The trial court convicted Crocker of trafficking in heroin, possession of heroin, trafficking in cocaine, possession of cocaine, and tampering with evidence. The trial court merged the counts involving heroin and involving cocaine and imposed a prison sentence. The court also sentenced Crocker to a concurrent term of imprisonment on the tampering-with-evidence conviction.

II. ASSIGNMENTS OF ERROR

{¶19} Crocker assigns the following errors for our review:

1. The Appellant's convictions for (a) aggravated drug possession and trafficking of heroin and cocaine, and (b) tampering with evidence were against the manifest weight and sufficiency of the evidence.

2. The Trial Court committed reversible error when it failed to exclude the jailhouse phone calls from evidence after appellant's right to counsel was violated when Captain Hall obtained a voice exemplar from the Appellant.

3. The Trial Court committed reversible error when it failed to exclude the report of Christopher McGee from evidence.

4. The Trial Court erred when it overruled defendant's motion to dismiss based on the speedy trial provisions of O.R.C. 2945.71.

5. The Trial Court abused its discretion in denying Appellant's motion to suppress.

III. LAW AND ANALYSIS

A. Manifest Weight and Sufficiency of the Evidence

1. Standard of Review

{¶20} Crocker claims that his convictions are against the manifest weight of the evidence and are not supported by sufficient evidence. "When a court reviews a record for sufficiency, '[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' " *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 146, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). "The court must defer to the trier of fact on questions of credibility and the weight assigned to the evidence."

State v. Dillard, 4th Dist. Meigs No. 13CA9, 2014-Ohio-4974, ¶ 27, citing *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 132.

{¶21} In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of 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. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6254, 960 N.E.2d 955, ¶ 119.

{¶22} "Although a court of appeals may determine that a judgment is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence." *Thompkins* at 387. But the weight and credibility of evidence are to be determined by the trier of fact. *Kirkland* at ¶ 132. The trier of fact is free to believe all, part, or none of the testimony of any witness, and we defer to the trier of fact on evidentiary weight and credibility issues because it is in the best position to gauge the witnesses' demeanor, gestures, and voice inflections, and to use these observations to weigh their credibility. *Dillard* at ¶ 28, citing *State v. West*, 4th Dist. Scioto No. 12CA3507, 2014-Ohio-1941, ¶ 23.

2. Drug Offenses

{¶23} The trial court convicted Crocker of trafficking in heroin and cocaine in violation of R.C. 2925.03(A)(2) and possession of heroin and cocaine in violation of R.C. 2925.11(A). R.C.2925.03(A)(2) provides that "[n]o person shall knowingly * * * "[p]repare for shipment, ship, transport, deliver, prepare for distribution, or distribute a

controlled substance or a controlled substance analog, when the offender knows or has reasonable cause to believe that the controlled substance or a controlled substance analog is intended for sale or resale by the offender or another person." And R.C. 2925.11(A) provides that "[n]o person shall knowingly obtain, possess or use a controlled substance or a controlled substance analog."

{¶24} Crocker argues that his drug convictions are not supported by sufficient evidence because the state failed to establish that he constructively possessed the heroin and cocaine concealed in his passenger Deselle's vagina. He asserts it was not readily accessible to him, Deselle did not testify at trial, and the jail-phone calls and cellphone text messages were too vague and unreliable to support the convictions. "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B). "[P]ossession" is defined as "having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found." R.C. 2925.01(K). "Possession may be actual or constructive." *State v. Moon*, 4th Dist. Adams No. 08CA875, 2009–Ohio–4830, ¶ 19, citing *State v. Butler*, 42 Ohio St.3d 174, 175, 538 N.E.2d 98 (1989) ("[t]o constitute possession, it is sufficient that the defendant has constructive possession").

{¶25} " 'Actual possession exists when the circumstances indicate that an individual has or had an item within his immediate physical possession.' " *State v. Kingsland*, 177 Ohio App.3d 655, 2008–Ohio–4148, 895 N.E.2d 633, ¶ 13 (4th Dist.),

quoting *State v. Fry*, 4th Dist. Jackson No. 03CA26, 2004–Ohio–5747, ¶ 39. "Constructive possession exists when an individual knowingly exercises dominion and control over an object, even though that object may not be within his immediate physical possession." *State v. Hankerson*, 70 Ohio St.2d 87, 434 N.E.2d 1362 (1982), syllabus; *State v. Brown*, 4th Dist. Athens No. 09CA3, 2009–Ohio–5390, ¶ 19. For constructive possession to exist, the state must show that the defendant was conscious of the object's presence. *Hankerson* at 91; *Kingsland* at ¶ 13. Both dominion and control, and whether a person was conscious of the object's presence may be established through circumstantial evidence. *Brown* at ¶ 19. "Moreover, two or more persons may have joint constructive possession of the same object." *Id.*

{¶26} "Although a defendant's mere proximity is in itself insufficient to establish constructive possession, proximity to the object may constitute some evidence of constructive possession. * * * Thus, presence in the vicinity of contraband, coupled with another factor or factors probative of dominion or control over the contraband, may establish constructive possession." *Kingsland* at ¶ 13; *State v. Criswell*, 4th Dist. Scioto No. 13CA3588, 2014-Ohio-3941, ¶ 11.

{¶27} The following evidence supported the trial court's conclusion that Crocker had knowledge of the drugs and exercised dominion and control over them. A few days before Crocker's arrest, one of his cellphones was used to search for rental car locations. On the day of his arrest, his cellphone received a text about whether they were still "on" because the other person had to make some "paper"; the response was that he had his "own shit now" and that the other people owed him $1,800. Crocker drove the rental car that transported the drugs; thus he was in position to control the

contraband. When he was stopped for the traffic violation, Crocker informed the trooper that Deselle was his cousin and that her name was India Ruffin. This did not correspond to the identification that Deselle provided to the trooper. Crocker told the trooper that his fiancée rented the car, when he claimed in one of his jail phone calls that his cousin rented it. In one of the phone calls Crocker admitted that he did not know the passenger, but that one of his friends had set him up with her. In another phone call he indicated that he had previously done this by himself and that he only went with another person this time because he had been told to do it that way. Finally, in the last phone call Crocker suggested that it was Deselle's fault that they were arrested and that things would be ok if she did not testify.

{¶28} Based on this evidence the trial court could reasonably conclude that Crocker knew about the heroin and cocaine and that he exercised dominion and control over the drugs by knowingly transporting them in the rental car. The evidence indicated that Crocker was an experienced drug mule who followed the instructions of others that he transport the drugs on this occasion by using a woman as his passenger. This case is consequently distinguishable from our recent holding in *Criswell*, 4th Dist. Scioto No. 13CA3588, 2014-Ohio-3941, where the state failed to prove beyond a reasonable doubt that the defendant had actual or constructive possession of cocaine. The defendant in *Criswell* was not the driver or owner of the car that was transporting the drugs; and the drugs were not in an area of the car that was accessible to him. In fact, there were various other occupants who were in a better position to exercise dominion had control over the contraband. Not so here. After reviewing the record, weighing the evidence and all reasonable inferences, and considering the credibility of witnesses, we find that

the trial court did not clearly lose its way and create such a manifest miscarriage of justice that we must reverse the drug convictions. These convictions are not against the manifest weight of the evidence.

{¶29} Moreover, "[w]hen an appellate court concludes that the weight of the evidence supports a defendant's conviction, this conclusion necessarily also includes a finding that sufficient evidence supports the conviction." *State v. Adkins*, 4th Dist. Lawrence No. 13CA17, 2014-Ohio-3389, ¶ 27. Having already determined that Crocker's drug trafficking and possession convictions are not against the manifest weight of the evidence, we necessarily rejected Crocker's additional claim that these convictions are not supported by sufficient evidence. Therefore, we overrule this portion of his first assignment of error.

3. Tampering with Evidence

{¶30} In the remaining portion of his first assignment of error Crocker claims that his conviction for tampering with evidence is not supported by sufficient evidence. We agree with this contention. R.C. 2921.12(A)(1) provides that "[n]o person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall * * * [a]lter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation." As the Supreme Court of Ohio recently stated, "[t]here are three elements of this offense: (1) knowledge of an official proceeding or investigation in progress or likely to be instituted, (2) the alteration, destruction, concealment, or removal of the potential evidence, (3) the purpose of impairing the potential evidence's

availability or value in such proceeding or investigation." *State v. Straley*, 139 Ohio St.3d 339, 2014-Ohio-2139, 11 N.E.2d 1175, ¶ 11.

{¶31} The state relies on the progeny of *State v. Schmitz*, 10th Dist. Franklin No. 05AP-200, 2005-Ohio-6617, ¶ 17, to support Crocker's conviction for tampering with evidence. In *Schmitz* the court of appeals stated that "[w]hen an offender commits an unmistakable crime, the offender has constructive knowledge of an impending investigation of the crime committed." *Id.* In *State v. Nguyen*, 4th Dist. Athens No. 12CA14, 2013-Ohio-3170, ¶ 89, and *State v. Gerald*, 4th Dist. Scioto No. 12CA3519, 2014-Ohio-3629, ¶ 42, we relied on the statement from *Schmitz* to uphold convictions for tampering with evidence in cases where the defendant concealed, altered or destroyed items used in crimes including rape and kidnapping (*Nguyen*) and aggravated murder and aggravated arson (*Gerald*).

{¶32} However, in *State v. Cavalier*, 2d Dist. Montgomery No. 24651, 2012-Ohio-1976, the Second District Court of Appeals reversed a conviction for tampering with evidence. *Cavalier* involved a person arrested for loitering to solicit and solicitation. The court cautioned at ¶ 49-53 that the statement in *Schmitz* should not be applied so literally and liberally:

> There is no evidence to establish when Cavalier put the hypodermic syringe inside her underwear, but she clearly did not do so after she was arrested, or the officers would have noticed.
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> Police officers Orick, Orndorff, and Campbell testified at trial that when they had Cavalier under observation, before she was arrested, they were attempting not to be noticed by her, and they believed that she did not notice them. The State contends that Cavalier nevertheless knew that an official investigation was about to be, or was likely to be, instituted. The State cites *State v. Schmitz*, 10th Dist. Franklin No. 05AP–200, 2005–Ohio–6617, ¶ 17, for the proposition that: "When an offender commits an unmistakable crime, the offender has constructive knowledge of an

> impending investigation of the crime committed." While *State v. Schmitz* does contain this quoted sentence, we doubt that it should be taken so literally. To begin with, this proposition was not necessary to the court's holding, which was that there was insufficient evidence that the defendant in that case had intended to delete the evidence, which were photographs, from a computer disc.
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> The quoted sentence in *State v. Schmitz* cites two previous Tenth District cases, *State v. Cockroft*, 10th Dist. Franklin No. 04AP–608, 2005–Ohio–748; and *State v. Jones*, 10th Dist. Franklin No. 02AP–1390, 2003–Ohio–5994. Both of those cases involved fatal shootings, where it was reasonable to suppose that the shootings would be investigated. *Schmitz* at least involved a crime, Gross Sexual Imposition, with a person likely to complain. By contrast, the offense Cavalier had committed—Loitering to Solicit, or even Solicitation—was a crime without anyone who was likely to complain. Cavalier had no great reason to suppose that she would be the subject of an official investigation.
>
> The State argues that anyone who commits an offense is on constructive notice that an official investigation will ensue. In our view, this argues too much. If the State is correct, then anyone who commits the offense of changing lanes without signaling, continues on home, and then parks in a closed garage, would be guilty of Tampering with Evidence, a third-degree felony, since the offender would be on constructive notice that an official investigation is likely to result, and by parking the vehicle used in the commission of the offense in a closed garage, the offender has impaired its availability as evidence—an investigating police officer will be less likely to find it.
>
> We conclude that the evidence in this record does not support a finding that Cavalier knew, before she was arrested, that an official investigation was likely to be instituted.

{¶33} Notwithstanding the reservations expressed in *Cavalier*, in a 2-1 decision we applied *Schmitz* to uphold a conviction for tampering with evidence in a case similar to this one. *State v. Barry*, 4th Dist. Scioto No. 13CA3569, 2014-Ohio-4452. In *Barry* the driver of a vehicle stopped for traffic infractions was convicted of tampering with evidence for concealing a baggie of heroin in her vagina. At ¶ 12 of the opinion[3] we

[3] The author of the opinion here dissented from that portion of the court's opinion in *Barry*, by noting that the decision in *Cavalier* "correctly cautions against applying the dicta in *Schmitz, supra*, too literally or to situations where the crime and the act of tampering are in essence one and the same." *Barry* at ¶ 28

rejected the defendant's reliance on the Second District's opinion in *Cavalier* and relied on our holding in *Nguyen*, which had in turn relied on *Schmitz*:

> Despite Appellant's argument and the reasoning set forth in *Cavalier*, *supra*, we decline to depart from our prior reasoning in *State v. Nguyen*, *supra*. Appellant committed unmistakable crimes of drug trafficking, drug possession and conspiracy to traffic in drugs. She admitted as much through her testimony at trial and does not challenge those convictions on appeal. Those crimes, while they may not have victims likely to make reports, are not victimless crimes. Appellant knew at the time she concealed the drugs at issue and climbed into a vehicle to drive from Middletown, Ohio to Huntington, West Virginia that she was committing the unmistakable crimes of drug possession and trafficking. She admitted at trial that her intended purpose in putting the drugs into her vagina was to conceal them. Thus, she had constructive knowledge of an impending investigation.

{¶34} However, our decision in *Barry* did not have the benefit of the Supreme Court's more recent decision in *Straley*, 139 Ohio St.3d 339, 2014-Ohio-2139, 11 N.E.3d 1175, which is cited and relied on by Crocker here. In *Straley*, two plainclothes narcotics detectives in an unmarked police vehicle stopped the defendant's car for travelling left of center, and after noting the smell of alcohol in the vehicle, the defendant's slurred speech, and her inability to produce a driver's license, they obtained her consent to search her vehicle and bag and found no contraband. The detectives decided not to charge her, but as they were attempting to arrange transportation home for the defendant, she stated she needed to urinate, ran around the corner of a building, and relieved herself. One of the detectives walked back to the area where the defendant had been and retrieved a clear, urine soaked cellophane baggie that contained crack cocaine. She was convicted of trafficking and possession of cocaine

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(Harsha, J., concurring in part and dissenting in part). In January 2015, the Supreme Court certified *Barry* as a conflict case on the pertinent issue raised here. *State v. Barry*, 141 Ohio St.3d 1452, 2015-Ohio-239, 23 N.E.3d 1195.

and tampering with evidence. On appeal the same court that decided *Cavalier*—the Second District Court of Appeals—reversed the judgment of conviction related to tampering with evidence. The Supreme Court affirmed the judgment of the court of appeals by holding that "[a] conviction for the offense of tampering with evidence pursuant to R.C. 2921.12(A)(1) requires proof that the defendant intended to impair the value or availability of evidence that related to an existing or likely official investigation or proceeding." *Id.* at syllabus.

{¶35} In so holding, the Supreme Court reasoned at ¶ 16-18:

> Based on our reading of the tampering statute, we agree with the Second District that the evidence tampered with must have some relevance to an ongoing or likely investigation to support a tampering charge. R.C. 2921.12(A)(1) requires the state to prove that an offender, with knowledge of an ongoing (or likely) investigation or proceeding, tampered with (altered, destroyed, concealed, or removed) a record, document, or thing "with purpose to impair its value or availability as evidence in such proceeding or investigation." (Emphasis added.) The word "such" is an adjective commonly used to avoid repetition. It means "having a quality already or just specified." Webster's Third New International Dictionary 2283 (1986). In this instance, "such" investigation refers back to the investigation just specified, i.e., the one that that the defendant knows is ongoing or is likely to be instituted. Therefore, the evidence must relate to that investigation; otherwise, the word "such" loses all meaning. The state's argument that all evidence recovered in an investigation should be included in the ambit of the tampering statute would require us to change the language from "such" proceeding or investigation to "any" proceeding or investigation.
>
> Our resolution in this case is similar to the decision that we reached in *State v. Malone*, 121 Ohio St.3d 244, 2009-Ohio-310, 903 N.E.2d 614. In *Malone*, we were asked to resolve a conflict between the districts regarding whether a conviction for intimidation of a witness under R.C. 2921.04(B) requires the state to show that the witness was involved in a criminal action or proceeding at the time the act of intimidation occurred. We stated, "The statute simply does not apply to witnesses or attorneys who might become involved in a criminal action or proceeding. It applies only to witnesses and attorneys who are involved in a criminal action or proceeding." (Emphasis sic.) *Id*. at ¶ 25. Similarly, the tampering statute

> applies only when a person intends to impair availability or value of evidence in an ongoing investigation or proceeding.
>
> In this case, the state also brought additional charges related to the contraband that Straley discarded. And Straley pled no contest to both the trafficking and possession charges. Our holding simply requires that to establish a violation of the tampering statute, the state must show that the defendant, with knowledge of a proceeding or investigation that is in progress or likely to be instituted, altered, destroyed, concealed, or removed any "record, document, or thing" with the purpose to impair its value or availability as evidence in that proceeding or investigation. There is no need to expand the reach of the statute beyond its plain meaning.

{¶36} Similarly, at the time Deselle concealed the heroin and cocaine in her vagina, there was no proceeding or investigation that either she or Crocker knew was in progress. Nor did the "unmistakable evidence" of the crimes of drug trafficking and possession provide them with knowledge that an investigation was likely to occur. Based upon *Straley* and *Cavalier*, 2d Dist. Montgomery No. 24651, 2012-Ohio-1976, we narrow our decision in *Barry*, 4th Dist. Scioto No. 13CA3569, 2014-Ohio-4452, to restrict the "unmistakable crime" cases to situations in which the pertinent conduct, e.g., murder, arson, rape, and gross sexual imposition, involves crimes with persons likely to complain or where discovery and investigation is almost certain to occur due to the death of or severe injury to the victim. That is, we will not apply this doctrine in contravention of the plain language of the tampering statute to crimes that do not at the time of concealment involve a crime with persons likely to complain, where discovery and investigation are likely to occur, or to situations where the crime and the act of tampering are in essence one and the same like concealing drugs intended for trafficking in a body cavity.

{¶37} Tampering with evidence has three elements: (1) knowledge of an official

proceeding or investigation in progress or likely to be instituted, (2) the alternation, destruction, concealment, or removal of the potential evidence, and (3) the purpose of impairing the potential evidence's availability or value in such proceeding or investigation. For the third element of "purpose" to be met, the act that constitutes tampering must be a separate act from those that make up the crime itself. Here the defendant transported drugs in a concealed manner to successfully carry out the crime of transporting them. In a situation in which a person transports drugs in any secretive container or even a body cavity, the purpose of the concealment is the successful achievement of the crime – successful transportation of the drugs. The crime and the act of tampering are in essence one and the same. The purpose of the concealment is to transport, not to tamper with evidence in an investigation.

{¶38} This conclusion is consistent with the strict construction of criminal statutes, including the Supreme Court's interpretation of R.C. 2921.12(A)(1). *Straley* at ¶ 10 (under the rule of lenity in R.C. 2901.04(A), "ambiguity in a criminal statute is construed strictly so as to apply the statute only to conduct that is clearly proscribed").

{¶39} Here, the mere fact that Deselle concealed the drugs in her vagina to avoid detection while it was transported did not provide sufficient evidence of either an existing or likely impending official investigation at the time she concealed it. Therefore, we agree that Crocker's conviction for tampering with evidence is not supported by a sufficient evidence. Therefore we sustain that portion of Crocker's first assignment of error and reverse his conviction with instructions on remand for the trial court to vacate that conviction and discharge him in that regard. *See, e.g., State v. Wilcox*, 2d Dist. Clark No. 2013-CA-94, 2014-Ohio-4954.

{¶40} We overrule the portion of Crocker's first assignment of error challenging his drug convictions but we sustain the remaining portion contesting his conviction for tampering with evidence. By so holding, Crocker's alternative argument that this conviction is also against the manifest weight of the evidence is rendered moot.

B. Right To Counsel for Pretrial Voice Identification

{¶41} In his second assignment of error Crocker claims that Captain Hall violated his right to counsel when Hall obtained a voice exemplar from him. Thus, he contends the tapes were not properly authenticated and should have been excluded. He raised this objection below, and the trial court overruled it.

{¶42} As the state argues, "[a]lthough courts have criticized the practice of using a single voice exemplar or photo as suggestive when seeking a witness identification, this practice is not per se improper and does not necessarily result in the inadmissibility of the identification[;] [i]nstead, the ultimate inquiry is 'whether, based on the totality of the circumstances, there is a very substantial likelihood of misidentification.' " *State v. Dickess*, 174 Ohio App.3d 658, 2008-Ohio-39, 884 N.E.2d 92 (4th Dist.), citing *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, ¶ 24, and quoting *State v. Madison*, 64 Ohio St.2d 322, 332, 415 N.E.2d 272 (1980).

{¶43} Moreover, the state notes that when a court orders an indicted defendant to submit to a recorded voice exemplar to be used solely for identification purposes to compare with prior recorded telephone conversations, the voice is merely a physical characteristic that is outside the scope of the Fifth Amendment privilege against self-incrimination. *See State v. Olderman*, 44 Ohio App.2d 130, 133-134, 336 N.E.2d 442

(8th Dist.1975), citing *United States v. Dioniso*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973).

{¶44} Nevertheless, the cases cited by the state do not involve the claim that Crocker raises here-the denial of his Sixth Amendment right to counsel following indictment and appointment of counsel when Captain Hall approached Crocker to identify his voice. *Dickess* involved a preindictment identification, and the trial court in *Olderman* assured the defendant of the right to counsel at all pertinent stages of the proceeding.

{¶45} In *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 126, 18 L.Ed.2d 1149 (1967), the Supreme Court of the United States held that "a post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth Amendment right to counsel and calls in question the admissibility at trial of the in-court identifications of the accused by witnesses who attended the lineup." *See Gilbert v. California*, 388 U.S. 263, 272, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967), describing the holding in *Wade*. In *Wade* the defendant, who was charged with robbing a bank, was compelled to appear in a lineup for bank employees and speak the words uttered by the robber. The court held that the absence of the defendant's counsel at the pretrial identification violated his right to counsel so that the witnesses' courtroom identification was inadmissible unless the state proved by clear and convincing evidence that the in-court identification was based on observations of the suspect other than the pretrial identification. Consequently, a "Sixth Amendment violation occurs at a line-up when counsel is not provided or notified,

if already retained or appointed, unless there is an intelligent waiver of the right by the defendant." Katz, Martin, Lipton, Giannelli, and Crocker, *Baldwin's Ohio Practice Criminal Law*, Section 28:9 (3d Ed.2014).

{¶46} Although we agree that Crocker's Sixth Amendment right to counsel was violated, the constitutional harmless-error rule is applicable to pretrial-identification violations. *Id.* at Section 28:9, citing *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *see also State v. Tingler*, 31 Ohio St.2d 100, 285 N.E.2d 710 (1972) (holding that error in failing to order exclusion of post-charge, pretrial identification of defendant by victim because it violated his right to counsel was not prejudicial under the circumstances of the case). The state bears the burden of establishing that any error was harmless beyond a reasonable doubt. *State v. Bryant*, 4th Dist. Ross No. 14CA3434, 2014-Ohio-5535, ¶ 26.

{¶47} The primary purpose of Captain Hall's testimony here was not to identify Crocker as the perpetrator of the crimes. Indeed, Hall did not witness the crimes. Instead, this testimony was to authenticate the jail recordings as phone calls Crocker made when he was incarcerated on the pending charges. We discussed the requirements for the authentication of recordings of telephone conversations in *State v. Tyler*, 196 Ohio App.3d 443, 2011-Ohio-3937, 964 N.E.2d 12, ¶ 25-26 (4th Dist.), citing Evid.R. 901(A), and noted that the threshold for admission is "quite low" with the proponent needing only to submit "evidence sufficient to support a finding that the matter in question is what its proponent claims." To be admissible a sound recording of a telephone call must be "authentic, accurate, and trustworthy," *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶ 109. Evid.R. 901(B)(5) permits

authentication by voice identification, "whether heard firsthand or through mechanical or electronic transmission or recording."

{¶48} Trooper Erwin had already testified that he had listened to the sound recordings of Crocker's jail telephone calls and he identified Crocker's voice on the recordings before Captain Hall testified. This testimony, as well as the unobjectionable portion of Captain Hall's testimony that described the jail's phone recording system, provided sufficient, uncontested evidence satisfying the low authentication standard for the admission of the recordings. Therefore, Captain Hall's additional identification of Crocker's voice on the recorded phone calls was unnecessary and merely cumulative. Under these circumstances, the error in Hall's postindictment contact with Crocker in the absence of his counsel was harmless beyond a reasonable doubt. *See State v Williams*, 38 Ohio St.3d 346, 353, 528 N.E.2d 910 (1988) (holding that constitutional error in the admission of evidence was harmless beyond a reasonable doubt because the evidence was "largely cumulative of the testimony of other witnesses" at trial); *Bryant* at ¶ 28. We overrule Crocker's second assignment of error.

C. Hearsay and Opinion Testimony

{¶49} In his third assignment of error Crocker asserts that the trial court committed reversible error when it admitted the report of Christopher McGee, the Ohio State Highway Patrol forensic computer specialist, into evidence. " 'The admission or exclusion of relevant evidence rests within the sound discretion of the trial court.' " *State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, ¶ 185, quoting *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343 (1987), paragraph two of the syllabus. We will not reverse the trial court's decision absent an abuse of discretion,

which implies an unreasonable, unconscionable, or arbitrary attitude. *State v. Inman*, 4th Dist. Ross No. 13CA3374, 2014-Ohio-786, ¶ 20.

{¶50} McGee's report included the following text message sent by an unidentified person to Crocker's cellphone: "We stil on rite im tryin 2 make sum paper I got peepz waitn,"; to which Crocker responded, "And I got my own shit now." Crocker claims that the statement by the unidentified texter was inadmissible hearsay. " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). But a statement is not hearsay when offered for a purpose other than to prove the truth of the matter asserted, e.g., to show its effect on the listener. *State v. Osie*, 140 Ohio St.3d 131, 2014-Ohio-2966, 16 N.E.3d 588, ¶ 118, 122. Therefore, " 'testimony which explains the actions of a witness to whom a statement was directed, such as to explain the witness' activities, is not hearsay.' " *State v. Lamar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶ 59, quoting *State v. Maurer*, 15 Ohio St.3d 239, 262, 473 N.E.2d 768 (1984). In *Lamar*, the Supreme Court of Ohio held that an inmate's testimony that he heard an inmate tell the defendant to "Get your boys together and come. Come on with me," was not hearsay because it was admissible as a nonhearsay statement showing that the defendant heard the instruction and acted upon it. *Id.* at ¶ 59-60.

{¶51} Similarly, the challenged evidence here was not admitted to prove the truth of the text sent to Crocker, but to explain Crocker's activities and give context to Crocker's responses. *See generally State v. Jones*, 4th Dist. Gallia No. 09CA1, 2010-Ohio-865, ¶ 24 (recording of a controlled drug transaction does not violate the

Confrontation Clause because it contains admissions of the defendant and comments of the confidential informant that give context to the defendant's statements).

Therefore, the trial court did not abuse its broad discretion in refusing to exclude McGee's report of the text messages on Crocker's cellphones on the basis of hearsay.

{¶52} Next Crocker objects to McGee's opinion that Crocker's cellphones "appear to have evidence of the sale/transportation of illegal narcotics." He claims that McGee was not properly qualified as an expert to render this opinion. Pursuant to Evid.R. 702 a witness may testify as an expert when three criteria are satisfied. First, the witness's testimony must "either relate[ ] to matters beyond the knowledge or experience possessed by lay persons or dispel[ ] a misconception common among lay persons." Evid.R. 702(A). Second, the witness must be "qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony." Evid.R. 702(B). A witness does not need either complete knowledge of a field or special education or certification to qualify as an expert. *State v. Baston*, 85 Ohio St.3d 418, 423, 709 N.E.2d 128 (1999). Finally, the witness's testimony must be "based on reliable scientific, technical, or other specialized information." Evid.R. 702(C). In addition, all expert testimony remains subject to other evidentiary rules.

{¶53} Crocker claims that McGee lacked the requisite experience in narcotics cases. The state counters that McGee's conclusion did not constitute an opinion. Although we disagree with the state's interpretation of the challenged statement in McGee's report, we hold that McGee was sufficiently qualified as an expert to provide the opinion.

{¶54} McGee testified that he had done around 50 forensic examinations of cellphones, personal computers, and tablets seized in drug cases in his three years as a forensic computer specialist with the Ohio State Highway Patrol and that he attended training about narcotics at his previous job as a code enforcement officer. *See State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, at ¶ 127, quoting *Scott v. Yates*, 71 Ohio St.3d 219, 221, 643 N.E.2d 105 (1994) ("a 'witness need not be the best witness on the subject' to be qualified as an expert. Instead, the witness simply 'must demonstrate some knowledge on the particular subject superior to that possessed by an ordinary juror' "). Moreover, it appears from the court's comments made at the conclusion of the trial that the trial court did not rely on this opinion testimony, or for that matter, the text messages contained in McGee's report. Therefore, the trial court did not abuse its considerable discretion in admitting McGee's report. We overrule Crocker's third assignment of error.

D. Speedy Trial

{¶55} In his fourth assignment of error Crocker asserts that the trial court erred when it denied his motion to dismiss based on the speedy-trial provisions of R.C. 2945.71. Appellate review of a trial court's decision on a motion to dismiss for a speedy-trial violation involves a mixed question of law and fact. *State v. Sinkovitz*, 2014-Ohio-4492, 20 N.E.3d 1206, ¶ 6 (4th Dist.). We defer to the trial court's factual findings if some competent, credible evidence supports them, but we review de novo the court's application of the law to those facts. *Id.*

{¶56} R.C. 2945.71(C)(2) provides that a person against whom a felony charge is pending shall be brought to trial within 270 days after arrest. If an accused is in jail in

lieu of bail solely on the pending charge, each day counts as three days for purposes of the speedy-trial calculation. R.C. 2945.71(E). Crocker claims that he was not brought to trial within the statutory limit because 105 days, which were subject to the triple-count provision, were not tolled while he was being held in jail in lieu of bail solely on the underlying charges. He contends that the 105 days include: (1) forty five days from his arrest on February 12, 2013, until the date he filed his requests for discovery and a bill of particulars on March 29, 2013, (2) twenty four days from when the state responded to his request for discovery on April 4, 2013, and he filed his motion to suppress on April 29, 2013, (3) twenty nine days from the original suppression hearing date of August 8, 2013, until the rescheduled date of September 6, 2013, continued on request of the state, and (4) seven days from the March 26, 2014 date, which was thirty days after the trial court's decision on the motion to suppress and the April 2, 2014 date that Crocker filed the motion to dismiss.

{¶57} The trial court properly denied Crocker's motion to dismiss. First, " '[a]s long as the trial court's disposition occurs within a reasonable time, a defendant's motion to suppress tolls the speedy trial clock from the time the defendant files the motion until the trial court disposes of the motion.' " *State v. Gartrell*, 2014-Ohio-5203, 24 N.E.3d 680, ¶ 107 (3d Dist.), quoting *State v. Curtis*, 3d Dist. Marion No. 9-02-11, 2002-Ohio-5409, ¶ 12; *State v. Waldron*, 4th Dist. Ross No. 93 CA 1978, 1994 WL 510046, *2. Here, Crocker executed a waiver of the speedy-trial limits for a period until 30 days following a decision on his motion to suppress. Under the circumstances, this waiver was reasonable and tolled the time until 30 days after the trial court's ruling on his motion.

{¶58} Second, in August 2013, the trial court granted the state's motion to continue the previously scheduled August 8, 2013 suppression hearing because the prosecutor would be unavailable on that date. The court rescheduled the hearing for September 6, 2013 and determined that "the continuance is reasonable and necessary under the circumstances of the unavailability of the assistant prosecuting attorney assigned to the * * * case." (*Id.*) R.C. 2945.72(H) provides that the speedy trial time may be tolled by "[t]he period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion." A continuance granted on the state's motion due to the unavailability of the prosecutor can toll the speedy-trial time. *See, e.g., State v. Watson*, 10th Dist. Franklin No 13AP-148, 2013-Ohio-5603, ¶ 20; *State v. Carmon*, 10th Dist. Franklin No. 11AP-818, 2012-Ohio-1615, ¶ 18-19; *see also State v. Fisher*, 4th Dist. Ross No. 11CA3292, 2012-Ohio-6144, ¶ 25 (lead opinion).[4] We are persuaded that the trial court properly tolled the time period for the 29-day continuance it granted due to the unavailability of the prosecutor i.e. it was reasonable under the circumstances. Thus the unjustified delay only amounts to 76 days. Applying the triple-count provision to this period, it comes to 228 days, which is less than the 270-day statutory limit.

{¶59} Because the trial court did not err in denying Crocker's motion to dismiss based on speedy-trial grounds, we overrule his fourth assignment of error.

E. Motion to Suppress

[4] The principal opinion in *Fisher* was the minority view of the court, but that case involved an appeal challenging the granting of "five continuances for the state to secure its witness and a trial attorney." *Id.* at ¶ 37 (Harsha, J., concurring). Here, Crocker is contesting only one 29-day continuance requested by the state.

{¶60} In his fifth assignment of error Crocker asserts the trial court abused its discretion in denying his motion to suppress. However, appellate review of a trial court's decision on a motion to suppress raises a mixed question of law and fact, not the abuse of discretion. *State v. Hobbs*, 133 Ohio St.3d 43, 2012–Ohio–3886, 975 N.E.2d 965, ¶ 6. Because the trial court acts as the trier of fact in suppression hearings and is in the best position to resolve factual issues and evaluate the credibility of witnesses, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Burnside*, 100 Ohio St.3d 152, 2003–Ohio–5372, 797 N.E.2d 71, ¶ 8. Accepting these facts as true, we must then "independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Hobbs* at ¶ 8, citing *Burnside* at ¶ 8. Crocker does not attack the trial court's factual findings in its decision denying his motion to suppress. Therefore, the dispositive issue is whether these facts satisfied the Fourth Amendment's reasonableness standard and supported the trial court's decision to deny the motion. *See State v. Shrewsbury*, 4th Dist. Ross No. 13CA3402, 2014-Ohio-716, ¶ 11.

{¶61} "The Fourth Amendment to the United States Constitution and the Ohio Constitution, Article I, Section 14, prohibit unreasonable searches and seizures." *State v. Emerson*,134 Ohio St.3d 191, 2012-Ohio-5047, 981 N.E.2d 787, ¶ 15. This constitutional guarantee is protected by the exclusionary rule, which mandates exclusion of the evidence obtained from the unreasonable search and seizure at trial. *Id.*

{¶62} An officer's decision to stop a motorist for a criminal violation, including a traffic violation, is valid if it is supported by a reasonable and articulable suspicion that the individual is engaged in or about to be engaged in criminal activity. *State v. Shook*, 4th Dist. Pike No. 13CA841, 2014-Ohio-3403, ¶ 21. Here, it is undisputed that Trooper Erwin's stop of Crocker's rental car was supported by probable cause that Crocker had committed a marked-lanes traffic violation. *State v. Harlow*, 4th Dist. Washington No. 13CA29, 2014-Ohio-864, ¶ 14; R.C. 4511.33. *See also*, Katz, Ohio Arrest, Search, and Seizure, Section 10:12 (2014), citing *Whren v. U.S.*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996) and *Dayton v. Erickson*, 76 Ohio St. 3d 3, 665 N.E.2d 1091 (1996). In 1996 both the United States and Ohio Supreme Courts "eliminated the ability to change [a pretextual stop], except when it is lacking in independent probable cause which would automatically make the stop or arrest illegal. Both Courts held that when an officer has probable cause to believe that a traffic violation is occurring, the stop is not unreasonable under the Fourth Amendment even if the officer had some ulterior motive for making the stop*. Id*.

{¶63} Thus, rather than contending the stop was pretexual, Crocker challenges its scope and duration. "The scope and duration of a routine traffic stop 'must be carefully tailored to its underlying justification * * * and last no longer than is necessary to effectuate the purpose of the stop.' " *State v. Jones*, 4th Dist. Washington No. 03CA61, 2004-Ohio-7280, ¶ 22. " 'When a law enforcement officer stops a vehicle for a traffic violation, the officer may detain the motorist for a period of time sufficient to issue the motorist a citation and to perform routine procedures such as a computer check on the motorist's driver's license, registration, and vehicle plates.' " *State v. Houston*, 4th

Dist. Scioto No. 12CA3472, 2013-Ohio-686, ¶ 25, quoting *State v. Aguirre*, 4th Dist. Gallia No. 03CA5, 2003–Ohio–4909, 2003 WL 22136234, at ¶ 36, citing *State v. Carlson*, 102 Ohio App.3d 585, 598, 647 N.E.2d 591 (9th Dist.1995). "In determining if an officer completed these tasks within a reasonable length of time, the court must evaluate the duration of the stop in light of the totality of the circumstances and consider whether the officer diligently conducted the investigation." *Aguirre* at ¶ 36, citing *State v. Cook*, 65 Ohio St.3d 516, 521–522, 605 N.E.2d 70 (1992), (fifteen minute detention was reasonable); *United States v. Sharp*, 470 U.S. 675, 105 S.Ct. 1568 (1985), (twenty minute detention was reasonable).

{¶64} Here, Trooper Erwin testified that only approximately 17 minutes elapsed from the time he activated his cruiser lights to stop the car driven by Crocker and the time he read him his rights and arrested him. During that time he stopped the vehicle and asked Crocker and Deselle for their identification. In accordance with protocol he requested, and Crocker agreed, to sit in the front passenger seat of his cruiser as he reviewed the information. Crocker advised him that the passenger was his cousin India Ruffin. However, this did not correspond to the information on the identification card provided by Deselle to the trooper. At that point Trooper Erwin approached Deselle in the rental car and asked her how she knew the driver, and she said he was her boyfriend and she had known him only a few days. Because of the inconsistent stories, Trooper Erwin read Deselle her *Miranda* rights. Despite the warning she confessed that Crocker had given her contraband when he had picked her up and that it was concealed

on her body[5]. At that point Erwin had probable cause to believe that more than a traffic violation had occurred. He was therefore justified in expanding the duration and scope of the stop. *See State v. Shook*, 4th Dist. Pike No. 13CA841, 2014-Ohio-3403, ¶ 29, quoting *State v. Rose*, 4th Dist. Highland No. 06CA5, 2006-Ohio-5292, ¶ 17 (" 'An officer may expand the scope of the stop and may continue to detain the vehicle without running afoul of the Fourth Amendment if the officer discovers further facts which give rise to a reasonable suspicion that additional criminal activity is afoot' "). Trooper Erwin arrested Crocker and seized cellphones from his car seat and over $1,000 in cash from his person.

{¶65} Based on a totality of the circumstances, the initial traffic stop justified Crocker's relatively brief detention. And the inconsistent stories concerning his passenger's identity and Deselle's subsequent admission that Crocker had given her contraband, which she had on her body, justified the additional detention. In addition, Crocker lacks standing to challenge the search of Deselle's person because he did not have a reasonable expectation of privacy in another person's body. *See Rakas v. Illinois*, 439 U.S. 128, 133-134, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978),quoting *Alderman v. United States*, 394 U.S. 165, 174, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969) (" 'Fourth Amendment rights are personal rights which * * * may not be vicariously asserted' "); *Emerson*, 134 Ohio St.3d 191, 2012-Ohio-5047, 981 N.E.2d 787, at ¶ 16. "[D]efendants may only claim the benefits of the exclusionary rule if their Fourth Amendment rights have been violated." *State v. Horsley*, 4th Dist. Scioto No. 12CA3473, 2013-Ohio-901, ¶ 16. After accepting the trial court's factual findings as true, we find that it properly

[5] At the suppression hearing, Crocker did not object to Trooper Erwin's testimony that Deselle "stated that she had something that Mr. Crocker had given her when he had picked her up, that it was concealed in the front of her pants." Nor does he claim on appeal that this testimony was improperly admitted.

applied the Fourth Amendment's provisions against unreasonable searches and seizures by denying Crocker's motion to suppress. We overrule his fifth assignment of error.

IV. CONCLUSION

{¶66} Having sustained the portion of Crocker's first assignment of error challenging his conviction for tampering with evidence based on insufficiency of evidence, we reverse and remand the cause to the trial court to vacate that conviction and discharge him on that offense. Having overruled Crocker's remaining assignments of error, we affirm the remainder of his convictions and sentence.

JUDGMENT AFFIRMED IN PART.
REVERSED IN PART,
AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED IN PART AND REVERSED IN PART and that the CAUSE IS REMANDED. Appellant and Appellee shall split the costs.

The Court finds there were reasonable grounds for this appeal.

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

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Abele, J.: Concurs in Judgment and Opinion.
McFarland, A.J.: Concurs in Part and Dissents in Part as to Tampering with Evidence.

For the Court

BY: _____
William H. Harsha, 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.