[Cite as *State v. James,* 2016-Ohio-7660.]

jaCOURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- ALEX M. JAMES, II Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P. J. Hon. John W. Wise, J. Hon. Patricia A. Delaney, J. Case No. CT2015-0059 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. CR2015-0174
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 31, 2016

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
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Wise, J.

{¶1} Appellant Alex M. James II appeals the denial of his suppression motion and subsequent conviction of cocaine possession in the Court of Common Pleas, Muskingum County. Appellee is the State of Ohio. The relevant facts leading to this appeal are as follows.

{¶2} On March 11, 2015, at approximately 1:00 PM, appellant's then-girlfriend Norel Crawford was driving a 2008 Mazda automobile on eastbound Interstate 70 in Muskingum County. Appellant James was sitting in the Mazda's front passenger seat.

{¶3} At that time, Ohio State Highway Patrol Trooper Samuel Hendricks was watching traffic from his stationary cruiser in the median near mile marker 153. Upon noticing what appeared to be illegal window tinting on the Mazda as it passed his location, the trooper commenced a pursuit of said vehicle.

{¶4} When Trooper Hendricks caught up with Crawford's Mazda, he observed it travelling in the left-hand lane (as generally required for thru-traffic within the city limits of Zanesville). Crawford moved her vehicle into the right-hand lane, as did several other vehicles, as the trooper's cruiser approached. Crawford thereupon pulled over just east of the on-ramp at the 7th Street interchange.

{¶5} Trooper Hendricks pulled up behind the Mazda, got out of his cruiser, and approached the vehicle from the passenger side. He informed Crawford of his basis for the traffic stop. During the discussion, the trooper told her he smelled an odor of "raw" marijuana emanating from the passenger compartment. Crawford and Appellant James were subsequently removed from the Mazda and placed in the back of the trooper's cruiser.

{¶6} Upon the arrival of a back-up trooper, Hendricks searched the passenger compartment of the Mazda, at which time he observed marijuana "shake" on the floor board and center console. He next searched the trunk, but found nothing illegal. However, upon opening the engine hood, he located next to the battery a plastic bag containing two "food saver" bags of cocaine. Furthermore, the second trooper found a set of digital scales in the glove box.[1]

{¶7} Crawford and appellant were taken into custody and transported to the local highway patrol post. Appellant initially was released without charges. In the meantime, Crawford declined to talk about the discovery of the cocaine. She was detained and subsequently indicted for possession of more than one-hundred grams of cocaine and a major drug offender specification. Tr. at 259.

{¶8} About two months later, Crawford negotiated a deal with the prosecutor's office. In exchange for her agreement to testify against appellant, the State offered to reduce her sentencing exposure from a mandatory eleven years to three years imprisonment. Tr. at 272.

{¶9} On May 27, 2015, the Muskingum County Grand Jury indicted Appellant James on one count of possessing one-hundred or more grams of cocaine and a major drug offender specification, and one count of possessing drug paraphernalia, *i.e*., a set of digital scales.

{¶10} On September 15, 2015, appellant filed a motion to suppress, concerning the evidence seized during the aforesaid warrantless vehicle search by the troopers on

[1] The record indicates that the second trooper did not *report* to his dispatcher collecting the scales until after Trooper Hendricks had seized the bags of cocaine. However, Hendricks testified the scales were discovered first. *See* Supp. Tr. at 46-47, 20-21.

March 11, 2015. The trial court, following an evidentiary hearing on October 2, 2015, denied the suppression motion.

{¶11} The case then proceeded to a jury trial on October 20 and 21, 2015. The State's case included Norel Crawford's testimony. No defense witnesses were called. Appellant was found guilty of possession of cocaine and the major drug offender specification. The drug paraphernalia count was dismissed at the request of the prosecutor at the close of the State's case. *See* Tr. at 342.

{¶12} On November 2, 2015, the trial court sentenced appellant to eleven years in prison. On December 1, 2015, appellant filed a notice of appeal. He herein raises the following six Assignments of Error:

{¶13} "I. THE DENIAL OF DEFENDANT-APPELLANT'S MOTION TO SUPPRESS THE COCAINE FOUND IN THE ENGINE COMPARTMENT OF THE VEHICLE WAS ERRONEOUS AS A MATTER OF LAW AND VIOLATED HIS RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 14 OF THE OHIO CONSTITUTION DUE TO THE ABSENCE OF ANY TESTIMONY FROM THE STATE TROOPER THAT THE QUANTITY OF 'SHAKE' IN THE PASSENGER COMPARTMENT WAS INSUFFICIENT TO EXPLAIN THE ODOR OF RAW MARIJUANA.

{¶14} "II. DEFENDANT-APPELLANT WAS DENIED HIS RIGHT UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION TO A FULL AND FAIR OPPORTUNITY TO LITIGATE HIS FOURTH AMENDMENT CLAIM DUE TO THE TRIAL COURT'S PRECONCEIVED OPINIONS REGARDING THE CREDIBILITY OF THE

TROOPER WHO CONDUCTED THE SEARCH AND ITS REFUSAL TO PERMIT DEFENSE COUNSEL TO CROSS-EXAMINE HIM WITH THE DASHCAM RECORDING OF THE VEHICLE STOP.

{¶15} "III. DEFENDANT-APPELLANT'S CONVICTION FOR POSSESSION OF 100 OR MORE GRAMS OF COCAINE AND MAJOR DRUG OFFENDER SPECIFICATION IS NOT SUPPORTED BY EVIDENCE SUFFICIENT TO SATISFY THE REQUIREMENTS OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION DUE TO THE LACK OF ANY EVIDENCE REGARDING THE AMOUNT OF ACTUAL COCAINE THAT HE ALLEGEDLY POSSESSED.

{¶16} "IV. DEFENDANT-APPELLANT WAS DENIED A FUNDAMENTALLY FAIR TRIAL AND DEPRIVED OF HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS DUE TO THE ERRONEOUS ADMISSION OF TESTIMONY REGARDING A) 'COMMON BEHAVIORS ASSOCIATED WITH DRUG COURIERING,' AND B) A VISIT BY AN ATTORNEY WHO ALLEGEDLY INFORMED DEFENDANT-APPELLANT'S FORMER GIRLFRIEND SHE DID NOT HAVE TO TESTIFY.

{¶17} "V. DEFENDANT-APPELLANT WAS DENIED A FUNDAMENTALLY FAIR TRIAL AND DEPRIVED OF HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS DUE TO IMPROPER REMARKS BY THE PROSECUTOR ACCUSING DEFENSE COUNSEL OF MISREPRESENTING THE FORMER GIRLFRIEND'S COOPERATION AGREEMENT AND ACCUSING DEFENDANT-APPELLANT OF 'DISPATCHING' AN ATTORNEY TO PERSUADE THE FORMER GIRLFRIEND NOT TO TESTIFY.

{¶18} "VI. THE TRIAL COURT'S REFUSAL TO GIVE DEFENDANT-APPELLANT'S REQUESTED INSTRUCTION DIRECTING THE JURY TO BASE ITS DRUG QUANTITY FINDING ON THE AMOUNT OF ACTUAL COCAINE VIOLATED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A JURY DETERMINATION AT [SIC] TO ALL SENTENCING ENHANCEMENT FACTORS."

I.

{¶19} In his First Assignment of Error, appellant contends the trial court erred in denying his motion to suppress the evidence obtained as a result of the traffic stop. We disagree.

{¶20} The Fourth Amendment to the United States Constitution and Section 14, Article I, Ohio Constitution, prohibit the government from conducting unreasonable searches and seizures of persons or their property. *See Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889; *State v. Andrews* (1991), 57 Ohio St.3d 86, 87, 565 N.E.2d 1271.

{¶21} There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's finding of fact. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this third type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in the given case. *See State v. Fanning* (1982), 1 Ohio St.3d 19, 437

N.E.2d 583; *State v. Williams* (1993), 86 Ohio App.3d 37, 619 N.E.2d 1141; *State v. Curry* (1994), 95 Ohio App.3d 93, 96, 641 N.E.2d 1172; *State v. Claytor* (1993), 85 Ohio App.3d 623, 627, 620 N.E.2d 906; *State v. Guysinger* (1993), 86 Ohio App.3d 592, 621 N.E.2d 726. The United States Supreme Court has held that "*** as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal." *Ornelas v. U.S.* (1996), 517 U.S. 690, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911.

{¶22} For purposes of this assigned error, appellant herein has forthrightly narrowed the analytical focus to the question of probable cause to search the entire vehicle (as opposed to the question of the validity of the initial traffic stop), and he has assumed for present argumentative purposes that "competent evidence existed to support the trial court's finding that the trooper smelled an odor of raw marijuana as he approached the Mazda." *See* Appellant's Brief at 5, 6. However, appellant maintains that the trooper's testimony did not justify an extension of the search from the passenger compartment to the engine compartment, as a matter of law.

{¶23} A warrantless search of an automobile, where police officers have probable cause to believe such vehicle contains contraband, is one of the well-recognized exceptions to the constitutional requirement of a search warrant. *See*, *e.g*., *State v. Griffin*, 6th Dist. Erie No. E–88–45, 1989 WL 126928, citing *United States v. Ross* (1982), 456 U.S. 798, 809, 102 S.Ct. 2157, 72 L.Ed.2d 572. This "automobile exception" allows a police officer to conduct a warrantless search of portions of a motor vehicle provided he or she has probable cause to believe it contains evidence of a crime. *See Carroll v. United States,* 267 U.S. 132, 158-59, 45 S.Ct. 280, 69 L.Ed.2d 543 (1925).

{¶24} The Ohio Supreme Court has determined that "* * * a law enforcement officer, who is trained and experienced in the detection of marijuana, should not be prohibited from relying on his or her sense of smell to justify probable cause to conduct a search for marijuana." *State v. Moore,* 90 Ohio St.3d 47, 51, 2000–Ohio–10. A "strong smell" of marijuana emanating from a vehicle justifies a search of a vehicle, including the trunk, pursuant to the automobile exception to the warrant requirement. *State v. Whatley*, 5th Dist. Licking No. 10–CA–93, 2011-Ohio-2297, ¶ 25, citing *State v. Williams,* 8th Dist. Cuyahoga Nos. 92009, 92010, 2009–Ohio–5553, ¶ 26.

{¶25} We note that on direct examination, Trooper Hendricks recalled he told Norel Crawford at the scene that the smell of raw marijuana from the passenger compartment of the vehicle provided him with probable cause to search the entire vehicle. Suppr. Tr. at 19. On cross-examination, he stated the smell "wasn't like really strong but, yeah, I could smell the odor." Suppr. Tr. at 39. When questioned further, the trooper indicated the amount of raw marijuana "shake" on the Maza's floorboard and the center console area explained the smell, stating "[t]hat's why it had that odor of raw marijuana." Suppr. Tr. at 40-41.

{¶26} Appellant directs us to our decision in *State v. Fogel,* 5th Dist. Licking No. 11-CA-97, 2012-Ohio-1960, which also involved a suppression issue related to the smell of marijuana in an automobile. In that case, the trooper testified at the suppression hearing that the "little bit" of marijuana he had found on the floorboards was not enough to explain the definite odor of marijuana he detected in the vehicle. *See Fogel* at ¶ 3. In affirming the denial of the defendant's motion to suppress, this Court stated: "The trooper's testimony [that] the small amount of marijuana discovered on the floorboards

was insufficient to explain the detected odor of raw marijuana emanating from the vehicle is crucial to our decision the officers were justified in searching the trunk of the vehicle in addition to the driver's compartment." *Id.* at ¶ 24.

{¶27} Appellant in the case *sub judice* argues that *Fogel* thus requires reversal, maintaining that Trooper Hendricks believed the amount of "shake" in the passenger area of the Mazda adequately explained the odor of raw marijuana. We conclude otherwise. First, we do not read *Fogel* as establishing a bright-line test regarding marijuana smell issues. In appellate review of suppression motions, a court generally takes a "totality of the circumstances" approach. *See*, *e.g.*, *State v. Koogler*, 12th Dist. Preble No. CA2010-04-006, 2010-Ohio-5531, ¶ 17; *State v. Jones,* 6th Dist. Sandusky No. 5-98-033, 1999 WL 278113. Even so, the suppression transcript before us reveals that Trooper Hendricks, during his cross-examination, did not concede that the smell of marijuana was generated by a minute amount collected from the interior of the Mazda. While the trooper confirmed there were no large quantities or multiple packages of marijuana observed in the interior, he noted: "There was *a lot* of raw marijuana shake material in between the seats that we couldn't collect. We collected just a little bit to have tested to show that there was raw marijuana in the vehicle." Suppr. Tr. at 40 (emphasis added).

{¶28} We therefore hold the trial court did not err in denying the motion to suppress in this regard.

{¶29} Appellant's First Assignment of Error is therefore overruled.

II.

{¶30} In his Second Assignment of Error, appellant contends he was deprived of his right to a fair hearing on the issue of suppression. We disagree.

Claim of Judicial Bias

{¶31} Appellant first challenges the fairness of the suppression hearing by directing us to a comment made by the trial court in response to defense counsel's final arguments, including counsel's questioning of the believability of Trooper Hendricks' testimony regarding some of the traffic stop events. The trial court at that time stated: "First of all, this officer's testified in this courtroom numerous times recently. The Court has found no reason ever to question his credibility or to indicate that he was not telling the truth." Tr. at 87.

{¶32} We begin with the general presumption under Ohio law that a judge is fair and impartial. *See State v. Dennison*, 10th Dist. Franklin No. 12AP–718, 2013-Ohio-5535, ¶ 49. Judicial bias has been described as "a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and the facts." *State v. Dean*, 127 Ohio St.3d 140, 2010-Ohio-5070, 937 N.E.2d 97, ¶ 48 (2010), quoting *State ex rel. Pratt v. Weygandt* (1956), 164 Ohio St. 463, 58 O.O. 315, 132 N.E.2d 191, paragraph four of the syllabus. If a trial judge forms an opinion based on facts introduced or events occurring during the course of the current or prior proceedings, this does not rise to the level of judicial bias, unless the opinions display a deep-seated favoritism or antagonism that would make fair judgment impossible. *State v. Hough*, 8th Dist. Cuyahoga Nos. 98480, 98482. 990 N.E.2d 653, 2013-Ohio-1543, ¶ 11 (internal citations omitted).

{¶33} At a suppression hearing, a trial judge, as the fact finder, is responsible for evaluating the credibility of witnesses. *See State v. Shrewsbury,* 4th Dist. Ross No.

13CA3402, 2014–Ohio–716, ¶ 11, We emphasize that the judge's comment in this instance was made in the context of a response to defense counsel's final remarks at the suppression hearing that the trooper's testimony of smelling raw marijuana upon walking up to the Mazda was a "stretch." *See* Suppr. Tr. at 84. We also emphasize that the comment, while arguably more problematic had it been uttered before a jury, was made at the close of a suppression hearing, where, for example, the rules of evidence do not strictly apply. *See State v. Simmons*, 8th Dist. Cuyahoga No. 86499, 2006-Ohio-4751, ¶ 37. We therefore do not find a demonstration of "deep-seated favoritism" in this matter rising to the level of judicial bias under the totality of the circumstances.

Use of Dashcam Video at Suppression Hearing

{¶34} Appellant secondly challenges the trial court's refusal to allow appellant to cross-examine the trooper using snippets of the dashcam video from the cruiser.

{¶35} A trial court has the inherent authority to manage its own proceedings and control its own docket. *Love Properties, Inc. v. Kyles,* 5th Dist. Stark No. 2006CA00101, 2007–Ohio–1966, ¶ 37, citing *State ex rel. Nat. City Bank v. Maloney,* 7th Dist. Mahoning No. 03 MA 139, 2003–Ohio–7010, ¶ 5. We first observe the trial court did not summarily prohibit appellant from playing portions of the dashcam video. Instead, the court asked appellant's counsel what information the video would convey. After appellant's counsel responded, the trial court found that what would be seen was either irrelevant for the suppression hearing or would be unnecessarily repetitive. *See* Suppr. Tr. at 48-54. The following exchange also took place on the record:

{¶36} "THE COURT: Is [video review] going to change the testimony that [Trooper Hendricks] thought he saw the windows too tinted, he pulled out, he chased the car down, he stopped it and tested, it was too tinted, and that's why he stopped the car?

{¶37} "DEFENSE COUNSEL MR. BELLI: Well, it's not going to change that, but -- but what I would propose to do is offer the video into evidence. Perhaps the State is going to make that offer."

{¶38} Suppr. Tr. at 52.

{¶39} Ultimately, the State offered the dashcam video into evidence. Upon review, we hold appellant was not prejudiced by the court's limitation of showing the video, nor was he deprived of a proper suppression hearing in order to protect his Fourth Amendment rights.

{¶40} Appellant's Second Assignment of Error is therefore overruled.

III., VI.

{¶41} In his Third Assignment of Error, appellant contends his conviction for cocaine possession, with a major drug offender specification, was not supported by sufficient evidence. In his Sixth Assignment of Error, appellant argues, in a related vein, that the trial court erred in declining to give the jury his requested defense instruction essentially directing them to base their finding concerning the seized drug's quantity on the amount or weight of actual cocaine in the substance. We disagree on both counts.

{¶42} In reviewing a defendant's claim of insufficient evidence, "[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. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶43} When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case. *State v. Klusty*, 5th Dist. Delaware No. 14 CAA 07 0040, 2015-Ohio-2843, ¶ 25.

{¶44} In the case *sub judice,* appellant was indicted on the first count under R.C. 2925.11(A), which states: "No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog."

{¶45} Appellant was also charged as a "major drug offender," R. C. 2941.1410, which is defined in pertinent part as "an offender who is convicted of or pleads guilty to the possession of, sale of, or offer to sell any drug, compound, mixture, preparation, or substance that consists of or contains *** at least one hundred grams of cocaine ***." R.C. 2929.01(W).

{¶46} Appellant presently maintains that without testimony as to the amount of actual cocaine seized by the troopers, the State presented insufficient evidence to convict him for possession of cocaine with a major drug offender specification. He points out that the lab supervisor who testified for the State, Heather Sheskey, conceded that she had utilized qualitative testing, which is for determining whether a substance "contain[s] some form of cocaine." Tr. at 305. She further explained that she typically does not test for a substance's cocaine "purity." Tr. at 306. In this instance, the weight of the first sample was over 230 grams, while the weight of the second sample was over 32 grams. Tr. at 301.

{¶47} The issue thus presented is currently before the Ohio Supreme Court on a certified conflict between the decision of the Sixth District Court of Appeals in *State v. Gonzales,* 6th Dist. Wood No. WD–13–086, 2015–Ohio–461, and the decision of the Second District Court of Appeals in *State v. Smith,* 2nd Dist. Greene No. 2010–CA–36, 2011–Ohio–2658. However, in *State v. Chandler*, 157 Ohio App.3d 672, 2004-Ohio-3436, 813 N.E.2d 65, we held, in a cocaine trafficking (major drug offender) sentencing case, that the State is required to prove (1) the identity of the controlled substance and (2) a *detectable amount* of that substance. *Id.* at ¶ 29, emphasis added.[2]

{¶48} We herein apply our rationale expressed in *Chandler*, and thereby overrule appellant's Third and Sixth Assignments of Error. *See*, *also*, *State v. Reese*, 5th Dist. Muskingum No. CT2015–0046, 2016-Ohio-1591, ¶ 6, *appeal allowed,* 146 Ohio St.3d 1427, 2016-Ohio-4606, 52 N.E.3d 1203 (2016).

IV.

{¶49} In his Fourth Assignment of Error, appellant contends the trial court erred in allowing (1) testimony by Trooper Hendricks regarding behaviors associated with drug courier activity and (2) testimony by Norel Crawford (the driver of the Mazda) that another attorney had informed her she did not have to testify despite her plea deal. We disagree.

{¶50} The admission or exclusion of relevant evidence rests in the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 180, 510 N.E.2d

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[2] The trafficking sentencing statutes involved in *Chandler* were R.C. 2925.03(A) and (C)(4)(g). The Ohio Supreme Court subsequently accepted the case as a discretionary appeal and affirmed, holding as follows: "A substance offered for sale must contain some detectable amount of the relevant controlled substance before a person can be sentenced as a major drug offender under R.C. 2925.03(C)(4)(g)." *State v. Chandler*, 109 Ohio St.3d 223, 2006-Ohio-2285, 846 N.E.2d 1234 (2006), syllabus.

343. As a general rule, all relevant evidence is admissible. Evid.R. 402; cf. Evid.R. 802. Our task is to look at the totality of the circumstances in the case *sub judice*, and determine whether the trial court acted unreasonably, arbitrarily or unconscionably in allowing or excluding the disputed evidence. *State v. Oman,* 5th Dist. Stark No. 1999CA00027, 2000 WL 222190.

Courier "Behavior" Activity

{¶51} During the trial, over defense objection, the prosecutor elicited testimony from Trooper Hendricks regarding "the common behaviors associated with drug couriering." He asked the trooper whether in his experience, it is common practice for a narcotics trafficker to utilize a female with a driver's license and no criminal record to transport drugs for him. Following objections and related counsel colloquy, the trooper was allowed to respond, stating: "In my experience, yes, sir, it is. I've had three [drug] seizures right off I can think off my head where the females were the drivers and I found significant * * * amount of narcotics in the vehicles." Tr. at 198-99.

{¶52} The trial court overruled defense counsel's objections and denied his motion for a mistrial. *See* Tr. at 200-202. It later overruled his objection to the prosecutor's closing argument referencing this testimony. Tr. at 352-356.

{¶53} Evid.R. 701 states as follows: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

{¶54} We have stated that "police officers combating the illegal narcotics trade would generally be expected to develop basic familiarity with many of the scientific aspects involved ***." *State v. Grier*, 5th Dist. Stark No. 2010CA00246, 2011-Ohio-3815, ¶ 18. We have also recognized that a police officer " 'is permitted to testify concerning his own expertise as to the behavioral and language patterns of people commonly observed on the streets, including people associated with criminal activities, in a manner helpful for the jury's clear understanding of the factual issues involved.' " *State v. Mason*, 5th Dist. Stark No. 2003CA00438, 2004-Ohio-4896, ¶ 34, quoting *State v. Barnett*, 10th Dist. Franklin No. 92AP-345, 1992 WL 246000.

{¶55} In the case *sub judice*, the trooper's testimony in this regard was buttressed by Crawford herself, who testified that she had driven appellant to locations including Bellaire, Ohio and Wheeling, West Virginia for drug transactions, although she admitted on cross-examination that she had told investigators that she had never seen appellant in possession of cocaine on March 11, 2015 or during any of the prior trips. *See* Tr. at 248-251, 281-282.

{¶56} Upon review, we find no abuse of discretion by the trial court or unfair prejudice to appellant in the allowance of the trooper's "common behaviors" testimony. We also reach a similar finding in regard to appellant's secondary claim that the probative value of said testimony was outweighed by its prejudicial value under Evid.R. 403(A).

Testimony by Crawford Suggesting Witness Tampering

{¶57} During the trial, an issue arose concerning Norel Crawford's out-of-court contact with an unnamed attorney, who allegedly advised her that she would not have to

testify despite her agreement with the State. During Ms. Crawford's first appearance on the witness stand, the prosecutor asked her: “Did some attorney turn up out of the blue?"

{¶58} Defense counsel objected. Tr. at 261. The court initially denied the prosecutor's request to continue this line of inquiry. Tr. at 264-65. However, the State recalled Ms. Crawford later that day to question her regarding the written cooperation agreement. The prosecutor, on re-direct, returned to the subject of the attorney visit. This time, over defense objection, Crawford affirmed that “somebody” had "informed" her that she did not have to testify. Tr. at 334-335. The prosecutor brought the subject up again during closing arguments. Tr. at 393.

{¶59} Appellant, citing *State v. Wilson*, 8th Dist. Cuyahoga No. 86092, 2006-Ohio-1333, ¶ 6, urges that an attempt to influence a prosecution witness that is not known or authorized by the accused is generally too prejudicial to admit into trial because it may seem to a jury as if the accused must be guilty.[3] While we recognize in the present case that Crawford’s testimony implicating appellant as the possessor of the cocaine was crucial to the State’s case, upon review, we conclude the allowance of her limited and somewhat vague testimony concerning potential influence from an outside attorney was harmless beyond a reasonable doubt, and the trial court did not abuse its discretion in allowing same.

{¶60} Appellant's Fourth Assignment of Error is therefore overruled.

V.

{¶61} In his Fifth Assignment of Error, appellant argues the State engaged in prosecutorial misconduct during rebuttal closing remarks as to the agreement signed by

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[3] *Wilson* dealt with an attempted bribery of a witness.

Norel Crawford (driver of the Mazda) regarding her participation as a prosecution witness. We disagree.

{¶62} A conviction will be reversed for prosecutorial misconduct only where it is clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury would not have found the defendant guilty. *State v. Benge,* 75 Ohio St.3d 136, 141, 661 N.E.2d 1019, 1996–Ohio–227. Furthermore, isolated comments by a prosecutor are not to be taken out of context and given their "most damaging meaning." *See Donnelly v. DeChristoforo* (1974), 416 U.S. 637, 647, 94 S.Ct. 1868, 40 L.Ed.2d 431. Generally, a prosecutor's conduct at trial is not grounds for reversal unless that conduct deprives the defendant of a fair trial. *State v. Loza* (1994), 71 Ohio St.3d 61, 78, 641 N.E.2d 1082.

{¶63} As a background, appellant herein directs us to Paragraph 8 of the State's May 2015 agreement with Ms. Crawford, which states in pertinent part as follows:

{¶64} "If it is determined by the Muskingum County Prosecutor's Office that at any time the Defendant fails to cooperate fully, refuses to testify, or testifies falsely in any proceeding, [or] intentionally gives false, misleading, or incomplete information or testimony, * * * then the Muskingum County Prosecutor's Office *may reinstate the original charges* against the Defendant as well as any additional charges which may be appropriate."

{¶65} *See* State's Exhibit K (emphasis added).

{¶66} Appellant first urges that the aforesaid Paragraph 8 is "potentially misleading" because it does not clearly set forth that reinstatement of charges against the witness prior to sentencing requires judicial action. Appellant's Brief at 25. In closing arguments at the trial, appellant's counsel stated as follows on this point:

{¶67} "DEFENSE COUNSEL MR. BELLI: *** But this - - this - - the wording of this agreement, Paragraph 8, remember, we - - I asked Miss Crawford to read it verbatim. The prosecutor's office determines whether someone who signs that agreement agrees to become a State's witness, whether that person is abiding by that agreement to tell the truth.

{¶68} "Why is that? Person's going to take the oath in court. That should be enough. And the State seems to - - doesn't seem to think much of our argument that this is a tool of control. So the prosecutor's office decides whether a cooperating witness is cooperating, I say in very loose terms, is telling the truth. Not the jury. Not the judge. An advocate in the case.

{¶69} "You know, I'm biased. I am representing a client, and I'm going to advocate his position. The prosecutor also has a bias. He's representing the State of Ohio, and he's got a party to represent. And the system works perfectly as long as both sides are advocating their position.

{¶70} "But here, we've got an agreement that the prosecutor decides whether his witness is telling the truth? And if he decides that the witness is not telling the truth, go back to square one, you're going to face the original charge, the eleven years mandatory imprisonment but with the added burden that everything that that person has said during this proffer can be used as statements against that individual.

{¶71} "So when you retire to deliberate, examine that - - examine that document closely. It requires Miss Crawford to tell the truth, but whether she's telling the truth is up to the prosecutor. Ask yourself, why is that necessary, why would you need such an agreement."

{¶72} Tr. at 385-386.

{¶73} Appellant next directs us to the prosecutor's rebuttal to the foregoing:

{¶74} "ASSISTANT PROSECUTOR MR. LITLE: *** Now, there's a number of issues I want to address. But the first thing is Paragraph 8 in this defendant's agreement. Okay? You've heard a lot of talk about Paragraph 8. And the prosecutor basically is being - - it's in the State's hands to say you didn't comply with your agreement, you didn't tell the truth, so this deal's off the table.

{¶75} "Now, it's a misrepresentation to say that the State can just do that. It has to go through the Court. But there's a reason that this exists, and it's because criminals will dispatch people on the eve of trial to try to convince people not to testify.

{¶76} "MR. BELLI: Objection. There's no evidence of that.

{¶77} "THE COURT: It's an inference he can make. Go ahead."

{¶78} Tr. at 393.

{¶79} Appellant presently insists his defense counsel was not attempting to misrepresent the nature of Paragraph 8, and thus the prosecutor's rebuttal remarks to that effect were improper and prejudicial. However, upon review, we find the prosecutor was simply attempting to zealously assert the State's interpretation of the agreement in question, so that the jurors could fully assess the import and credibility of Crawford's testimony. We hold such rebuttal comments did not rise to the level of prosecutorial misconduct in this instance.

{¶80} Appellant continues by pointing out the following exchange, again during the prosecutor's rebuttal portion of closing arguments, concerning an allegation that an unnamed attorney, not directly involved in the trial, had counseled Crawford that she was

not obligated to testify, despite her agreement with the State (*see* Assignment of Error IV, above):

{¶81} "MR. LITLE: And that's what happened here. The day before trial, someone shows up and starts counseling Miss Crawford. Well, you don't have to testify, you don't want to testify against Mr. James if you don't like - - or you think you still like him, you don't have to testify if you don't want to. Well, yes, she does. And there's a reason that's in there. Because people don't want to testify against their ex-boyfriend, a guy they still care about, a co-defendant, or someone they're scared of. That is a deliberate effort at deception.

{¶82} "MR. BELLI: I'm going to object again. There is no evidence that any of this was initiated, if it happened, from our side. It is just totally improper.

{¶83} "THE COURT: You may proceed."

{¶84} Tr. at 393-394.

{¶85} As noted previously, the record reflects that Crawford confirmed, over defense objection, that this outside attorney had "informed" her that she did not have to testify. *See* Tr. at 334-335. While this alone does not answer the question of appellant's involvement in any attempt to influence trial testimony, we find the prosecutor's comments charging a "deliberate effort" at deception to be limited and ambiguous, and we are unable to conclude that the exchange in question deprived appellant of a fair trial. *Loza*, *supra*.

{¶86} We therefore find no reversible error on the basis of prosecutorial misconduct.

{¶87} Appellant's Fifth Assignment of Error is therefore overruled.

{¶88} For the foregoing reasons, the judgment of the Court of Common Pleas, Muskingum County, Ohio, is hereby affirmed.

By: Wise, J.

Hoffman, P. J., and

Delaney, J., concur.

JWW/d 0906