**[Cite as *State v. Robinson*, 2008-Ohio-5580.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 90731**

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## STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

## LAMARK ROBINSON

DEFENDANT-APPELLANT

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**JUDGMENT:**
**AFFIRMED**

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Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-493774

**BEFORE:** Boyle, J., Cooney, P.J., and Kilbane, J.

**RELEASED:** October 30, 2008

**JOURNALIZED:**

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BOYLE, M.J., J.:

**{¶ 1}** Defendant-appellant, Lamark Robinson, appeals from a judgment finding him guilty of drug trafficking, drug possession, and possessing criminal tools. Finding no merit to the appeal, we affirm.

**{¶ 2}** Robinson was indicted on two counts of drug trafficking, in violation of R.C. 2925.03, with schoolyard specifications; two counts of drug possession, in violation of R.C. 2925.11; and one count of possessing criminal tools ("money and/or 2006 Toyota Highlander"), in violation of R.C. 2923.24. Robinson pled not guilty to the charges.

**{¶ 3}** On the morning of trial, the prosecutor and defense counsel learned (at the same time) that Robinson had allegedly made statements to the police that were not included in the written police report. The court continued the trial to allow defense counsel to file a motion to suppress the statements. Robinson then filed a motion to suppress, which the trial court denied after a full hearing. The following evidence was presented at the suppression hearing and trial.

**{¶ 4}** The state presented two police officers and a scientific examiner from the Cleveland Police Department. Officers John Franko and Richard Jackson testified that in February 2007, they were on routine patrol when they observed Robinson make an illegal turn on red. They ran a LEADS report on the SUV Robinson was driving and determined that the vehicle was registered to a woman. They followed him for approximately three-quarters of a mile before

stopping the SUV. Officer Franko stated that Robinson stopped "[w]ithin a thousand linear feet" from Iowa Middle School.

**{¶ 5}** The officers asked Robinson for his driver's license, but he told them that he did not have one, and that his license was suspended. Robinson gave the officers his identifying information, and they verified that his license was suspended. They arrested him and read him his *Miranda* rights. Officer Jackson found a small amount of marijuana in Robinson's pocket when he did a "quick pat-down for officer safety."

**{¶ 6}** As part of a routine inventory before impounding the vehicle, Officer Franko found 26.66 grams of crack cocaine and 69.78 grams of powder cocaine in the center console of the SUV.[1] Officer Franko said he went back to the police cruiser, told Officer Jackson that he found the drugs, and read Robinson his *Miranda* rights again. Officer Franko then asked Robinson if he knew "anything about the drugs," and Robinson told him that the drugs were his, that he had just bought them in Toledo, and that he paid $3,000 for them. Officer Franko further testified that Robinson told him, "I just want to get this shit over with right now."

**{¶ 7}** Robinson also had $3,600 in his possession, in mostly small denominations. Officer Franko explained that drug dealers carry small

[1] The scientific examiner from the Cleveland Police Department's forensic laboratory verified the type of drugs and the respective amounts.

denominations when they sell drugs because "they're not in the business of making change" for people. The officers towed the vehicle and took Robinson to the station for booking. Officer Jackson wrote the report, but not until the end of the day. The written report only indicated that Robinson had made one statement; that he did not have "a license on him." Officer Franko did not review the report, but both officers stated that was standard procedure.

**{¶ 8}** Neither officer could explain why Robinson's alleged statements about the drugs were not in the written report. Officer Franko testified that he thought Officer Jackson heard Robinson admit that the drugs were his. But Officer Jackson could not recall if he heard Robinson make the statements or, if Officer Franko had told him that Robinson made the statements.

**{¶ 9}** Both officers testified that Officer Jackson was not in the car the entire time Officer Franko was questioning Robinson about the drugs. Officer Jackson had been "in another zone car using [its] computer" because the computer in his zone car was not working. Officer Jackson agreed that if Officer Franko had told him about the statements, he would have put them in his written report. Officer Jackson also explained that with all the commotion going on at the scene, it was possible that they did not discuss Robinson's statements.

**{¶ 10}** In an October 30, 2007 judgment, the trial court set forth the jury verdict. The jury found Robinson guilty of all five charges, but found him not guilty of the schoolyard specifications.

**{¶ 11}** In a November 6, 2007 judgment, the trial court stated that on a former day, the jury found Robinson guilty of all charges, but did not indicate that the jury found Robinson not guilty of the schoolyard specifications. The trial court then sentenced Robinson to a total of three years in prison and five years of postrelease control. It is this November 6, 2007 judgment that Robinson is appealing.

**{¶ 12}** This court sua sponte addresses whether the November 6, 2007 judgment is a final appealable order in light of a recent Ohio Supreme Court case, *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330. For the reasons that follow, we conclude that it is a final appealable order – even though the judgment does not include the means of exoneration of the schoolyard specifications.

**{¶ 13}** In *Baker*, the Supreme Court held that "[a] judgment of conviction is a final appealable order under R.C. 2505.02 when it sets forth (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) the time stamp showing journalization by the clerk of court." Id., syllabus.

**{¶ 14}** The Ninth District Court of Appeals had dismissed Baker's appeal, finding that it was not a final appealable order because the "judgment of conviction did not contain [Baker's] plea." *Baker* at _3. In reversing the lower court's decision, the Supreme Court held that Baker's judgment of conviction did

not need to include the "plea entered at arraignment, but that it must include the sentence and the means of *conviction*." (Emphasis added.) Id. at _17.

**{¶ 15}** The Supreme Court explained:

**{¶ 16}** "We first observe that we are discussing a 'judgment of conviction.' In *State v. Tuomala*, 104 Ohio St.3d 93, 2004-Ohio-6239, _14, we explored the meaning of the word 'conviction': 'A "conviction" is an "act or process of judicially finding someone guilty of a crime; the state of having been proved guilty." Black's Law Dictionary (7th Ed.1999) 335. Thus, the ordinary meaning of "conviction," which refers exclusively to a finding of "guilt," is not only inconsistent with the notion that a defendant is not guilty ***, it is antithetical to that notion. Indeed, the notion that a person is convicted by virtue of being found not guilty is an oxymoron (a "not guilty conviction")." Id. at _9.

**{¶ 17}** Indeed, the Supreme Court determined that Baker's judgment of conviction was a final appealable order – despite the fact that it *did not* include the jury's verdict of not guilty on two other offenses, or the trial court's acquittal of three additional offenses. See *Baker* at fn. 1; Summit County Court of Common Pleas, Case No. CR 2006093464A.

**{¶ 18}** On the authority of *Baker*, we conclude that a judgment of conviction does not need to dispose of every charge in an indictment, including dismissed or nolled counts, or not guilty findings. But it must include the sentence and the "means of conviction" – meaning how the defendant was convicted of each charge

(one of four ways: a defendant may plead guilty, plead no contest, be found guilty by a jury, or be found guilty in a bench trial). See *Baker* at _10, 17.

**{¶ 19}** Accordingly, we conclude that Robinson's judgment of conviction (i.e., the sentencing order he is appealing) is a final appealable order even though it includes only the charges of which he was convicted (found guilty), and not the specifications of which he was exonerated (found not guilty).[2]

**{¶ 20}** It is from Robinson's judgment of conviction that he appeals, raising the following seven assignments of error:

**{¶ 21}** "[1.] The court erred, or abused its discretion, when it failed to sanction the state for a certain discovery violation.

**{¶ 22}** "[2.] The court erred, or abused its discretion, when it failed to exclude the accused's alleged confession.

**{¶ 23}** "[3.] The trial court erred or abused its discretion in refusing to allow the jury to learn that the person who entrusted the vehicle to the appellant had taken the fifth.

**{¶ 24}** "[4.] The court erred or abused its discretion, and in the wake thereof, the appellant was denied due process when the court refused to allow

[2]Prior to oral argument, we remanded this case so that the trial court could issue a single judgment that disposed of all counts, including the schoolyard specifications. Upon further reflection, we conclude that the November 6, 2007 judgment was a final appealable order as originally issued by the trial court.

the defense to call a witness, who had advised the court he would assert the fifth amendment.

**{¶ 25}** "[5.] Counsel for the state in personally vouching for the credibility of the state's chief witness, violated the defendant's right to a fair trial and due process.

**{¶ 26}** "[6.] The court erred when it refused to instruct the jury on the issues of intent, a crucial element in the charged offense.

**{¶ 27}** "[7.] The verdicts finding the defendant guilty are against the manifest weight of the evidence and are contrary to law."

## Crim.R. 12(F)

**{¶ 28}** This court will first address an issue that Robinson raises in his first and second assignments of error, which both address the denial of his motion to suppress.[3] Robinson claims that when the trial court denied his motion, it did not state its findings of fact on the record and therefore, erred by not adhering to Crim.R. 12(F). Crim.R. 12(F) provides in part that "where factual issues are involved in determining a motion, the court shall state its essential findings on the record." Although we agree that the better practice would be for a trial court to adhere to Crim.R. 12(F), we disagree that the trial court erred in this instance.

[3]The other arguments raised in Robinson's first two assignments of error will be addressed separately, infra.

**{¶ 29}** "It is well-settled in Ohio *** that in order for a court to have a duty to issue findings of fact, there must be a request from the defendant." *State v. Martin*, 8th Dist. No. 89030, 2007-Ohio-6062, _13, citing *State v. Brown* (1992), 64 Ohio St.3d 476, 481; *Bryan v. Knapp* (1986), 21 Ohio St.3d 64, 65; *State v. Benner* (1988), 40 Ohio St.3d 301, 317-318.

**{¶ 30}** The record here reveals that Robinson did not request the trial court to issue findings of fact when it denied his motion to suppress. Thus, the trial court did not have a duty to issue findings of fact. See *State v. Little* (Oct. 12, 2000), 8th Dist. No. 77258. Moreover, this court is able to determine, from the transcript of the suppression hearing, the correctness of the trial court's suppression ruling. See *Martin*, supra, at _13, citing *State v. Harris*, 8th Dist. No. 85270, 2005-Ohio-2192; *State v. Casalicchio* (Feb. 14, 2002), 8th Dist. No. 79431, at 15-16.

**Crim.R. 16/Discovery Violations and Sanctions**

**{¶ 31}** In his first assignment of error, Robinson argues that the trial court erred when it refused to sanction the state for violating the discovery rules. Specifically, he claims that the trial court should have excluded evidence regarding Robinson's confession since the prosecutor failed "to notify the Accused, until the very eve of trial that the Accused had fully confessed to the police," and this "created an unfair, an unwarranted surprise that violated due process."

**{¶ 32}** Crim.R.16(B)(1)(a) provides that upon written request of the defendant, the prosecutor must disclose any written or oral statements made by the defendant to the prosecuting attorney, law enforcement officials, or the grand jury.

**{¶ 33}** Crim.R. 16(E)(3) vests the trial court with discretion in determining the sanction to be imposed for the state's nondisclosure of discoverable material; the court is not bound to exclude such material, but may do so at its option. *State v. Parson* (1983), 6 Ohio St.3d 442, 445. Thus, our inquiry is limited to determining whether the trial court's action constituted an abuse of discretion. Id., citing *State v. Weind* (1977), 50 Ohio St.2d 224, 235; *State v. Edwards* (1976), 49 Ohio St.2d 31, 42.

**{¶ 34}** It is undisputed that the prosecutor and defense counsel did not learn until the day of trial that Robinson had confessed to Officer Franko that the drugs were his. Upon learning of this additional evidence, defense counsel argued to the court:

**{¶ 35}** "I think, Your Honor, that the sanction that has to be issued, the way we can get these things to stop happening is to exclude the statement. I would ask the Court that we proceed here this morning, with trial, we are prepared to go forward, but that the statement be excluded."

**{¶ 36}** The prosecutor replied, "[y]our Honor, counsel is correct. The statement was revealed recently. This officer here is not the report writer. The

report writing officer actually was on the phone with him yesterday and we discovered that there was an additional statement that was not included in the report. Defense counsel was standing there present at the very same time that I was made aware of that additional statement. I would never try to conceal or hide evidence from a defense attorney, especially if it is paramount to the case."

**{¶ 37}** The trial court then denied Robinson's request to exclude the evidence as a sanction under Crim.R. 16(E)(3). Upon denial, Robinson's defense counsel then requested a continuance for additional time to file a motion to suppress the newly discovered evidence, which the trial court granted.

**{¶ 38}** In *Parson*, supra, the Ohio Supreme Court held at the syllabus:

**{¶ 39}** "Where, in a criminal trial, the prosecution fails to comply with Crim. R. 16(B)(1)(a)(ii) by informing the accused of an oral statement made by a co-defendant to a law enforcement officer, and the record does not demonstrate (1) that the prosecution's failure to disclose was a willful violation of Crim. R. 16, (2) that foreknowledge of the statement would have benefited the accused in the preparation of his defense, or (3) that the accused was prejudiced by admission of the statement, the trial court does not abuse its discretion under Crim. R. 16(E)(3) by permitting such evidence to be admitted."

**{¶ 40}** We find no abuse of discretion in this case. Although Robinson's alleged confession was discoverable, the prosecutor's failure to disclose it was not

a *willful* violation of Crim.R. 16. See *State v. Stephenson* (Aug. 7, 1991), 9th Dist. No. 90CA004942, at 9-10, citing *Parson*, supra.

**{¶ 41}** In addition, Robinson does not show how he was prejudiced by not receiving the alleged confession earlier. Robinson's counsel, when requesting additional time to file a motion to suppress, informed the trial court that "had I been given [the statements], I obviously would have filed a motion to suppress in a timely manner." The record, however, demonstrates that the trial court granted Robinson's request for additional time to file a motion to suppress, and then held a full hearing on the matter. Robinson's defense counsel thoroughly cross-examined the two police officers with regard to any inconsistencies and discrepancies in their testimony. And when the trial court denied Robinson's motion to suppress, he did not request a further continuance to prepare for trial. Thus, Robinson was not prejudiced by the delay in any way.

**{¶ 42}** Accordingly, Robinson's first assignment of error is overruled.

**Voluntary Confession**

**{¶ 43}** In his second assignment of error, Robinson contends that the trial court erred when it denied his motion to suppress his alleged confession.

**{¶ 44}** In reviewing a trial court's ruling on a motion to suppress, a reviewing court must keep in mind that weighing the evidence and determining the credibility of witnesses are functions for the trier of fact. *State v. DePew* (1988), 38 Ohio St.3d 275, 277. A reviewing court is bound to accept those

findings of fact if supported by competent, credible evidence. *State v. Polk*, 8th Dist. No. 84361, 2005-Ohio-774, _2 The reviewing court, however, must decide de novo whether, as a matter of law, the facts meet the appropriate legal standard. Id.

**{¶ 45}** Although it is difficult to decipher what Robinson is arguing in this assignment of error, he argued in his motion to suppress that his alleged statements should be suppressed because Robinson "did not have counsel and did not knowingly and intelligently waive his rights." At the hearing, Robinson reiterated his arguments that the confession should be suppressed because of "the discovery violation," and then simply requested that the court grant his motion to suppress because "[t]his was not a knowingly, intelligent and voluntarily made statement."

**{¶ 46}** In *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, _57, the Ohio Supreme Court stated:

**{¶ 47}** "A trial court, in determining whether a pretrial statement is involuntary, 'should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.' *** The same considerations apply to whether [a defendant] understood and voluntarily waived his *Miranda* rights." (Internal citations omitted.)

**{¶ 48}** The state presented two police officers who testified that they read Robinson his *Miranda* rights two times: first, when he was arrested for driving under suspension and second, when Officer Franko found the drugs. Officer Franko testified that after he read Robinson his *Miranda* rights, Robinson admitted the drugs were his, and offered that he had just purchased them in Toledo for $3,000. Officer Franko also testified that Robinson declared, "I just want to get this shit over with right now."

**{¶ 49}** Although Officer Jackson did not record Robinson's oral statements about the drugs in the written police report, and could not even recall if Officer Franko had told him about them, the trial court was free to believe Officer Franko's testimony that Robinson made the statements. Indeed, the fact that Officer Jackson could not recall if Officer Franko told him about Robinson's statements affected the credibility of the officers – not the admissibility – of the statements. Accordingly, we find no abuse of discretion in the trial court's denial of Robinson's motion to suppress the statements.

**{¶ 50}** Robinson's second assignment of error is overruled.

**Witness Invoking the Fifth**

**{¶ 51}** In his third and fourth assignments of error, Robinson claims that the trial court erred when it refused to allow him to call his brother, L.C. Robinson ("L.C."), as a witness, despite the fact that the court knew that L.C. would not testify and instead, planned to invoke his Fifth Amendment right

against self-incrimination. Thus, we will address these two assignments of error together since they are related.

**{¶ 52}** After the state rested its case, Robinson informed the trial court that his brother was going to testify on his behalf. Prior to allowing him to testify, and out of the presence of the jury, the trial court addressed L.C.'s attorney. The attorney informed the court that "if in fact [L.C.] was prosecuted in federal district court, *** he would be deemed a career offender." Thus, the attorney stated that he advised L.C. that he could either answer the questions or invoke his Fifth Amendment privilege.

**{¶ 53}** The trial court then personally questioned L.C.; he stated his name and told the court that he was residing at Lorain Correctional Institution. L.C. also said that he was serving an eight-year prison term, which began on June 7, 2007. He then refused to answer any other questions from the trial court or from Robinson's attorney, including whether the drugs were his, whether he had possession of the vehicle the drugs were found in, or even whether he knew Robinson.

**{¶ 54}** Robinson maintains that the jury should have been permitted to draw an adverse inference against L.C., based on his refusal to answer questions that the drugs were his and not Robinson's. Robinson also argues that by not allowing L.C. to testify on his behalf, his right to present witnesses was traversed.

**{¶ 55}** The state relies on an Ohio Supreme Court case, *State v. Kirk* (1995), 72 Ohio St.3d 564, that is directly on point. In *Kirk*, the defendant wanted to call a witness as part of his defense, even though the witness made it clear to the court and to counsel that the witness would claim the protection of the Fifth Amendment. At paragraph one of the syllabus, the Court held:

**{¶ 56}** "A trial court may exclude a person from appearing as a witness on behalf of a criminal defendant at trial if the court determines that the witness will not offer any testimony, but merely intends to assert the Fifth Amendment privilege against self-incrimination."

**{¶ 57}** In *Kirk*, the defendant argued, as Robinson does here, that although the state was prohibited from calling a witness who intended to invoke the Fifth Amendment, he should not be prohibited from doing so. The defendant in *Kirk* further argued, as Robinson does here, that his right to compulsory process to procure the attendance of witnesses on his behalf was violated. Id. at 567.

**{¶ 58}** The Supreme Court reasoned that the defendant's right to compulsory process was not violated because the trial court had "voir-dired" the witness in the middle of trial and determined that the witness "did not intend to testify 'on behalf of' the defendant." The Court reiterated, "[i]n fact, [the witness] did not intend to testify at all." Id. at 568.

**{¶ 59}** In order to "reduce the danger that the jury would, in fact, draw an inference from the absence of a witness" from the defense, however, the Supreme

Court made it clear that "[w]here a defendant is not entitled to call a witness to the stand because of the witness' intention to assert the Fifth Amendment privilege against self-incrimination, the defendant is entitled to request an instruction that the jury should draw no inference from the absence of the witness because the witness was not available to either side." Id. at paragraph two of the syllabus.

**{¶ 60}** After refusing to allow L.C. to testify in front of the jury, the trial court informed Robinson, "I will, if you request, give a curative instruction advising the jury that I was misinformed and it was my fault that you intended to call a witness, and that you were caught off guard. And I could further advise them that *** the defendant had no burden in this matter, *** and that the defendant had no obligation to call any witnesses on his own behalf." But Robinson declined the trial court's offer of a curative instruction.

**{¶ 61}** An appellate court which reviews the trial court's admission or exclusion of evidence must limit its review to whether the lower court abused its discretion. In light of our standard of review on a trial court's evidentiary ruling, and upon the authority of *Kirk*, we find no abuse of discretion in the trial court's refusal to allow Robinson to call L.C. as a witness when the record reflects that his brother did not intend to "testify" on his behalf.

**{¶ 62}** Robinson's third and fourth assignments of error are overruled.

## Prosecutorial Misconduct

**{¶ 63}** In his fifth assignment of error, Robinson maintains that the prosecutor's remarks during closing arguments violated his right to a fair trial. Specifically, he argues that the prosecutor improperly vouched for the credibility of Officer Franko.

**{¶ 64}** Our review of the record shows that Robinson failed to object to the prosecutor's comments and thus, waived all but plain error. *State v. Frazier*, 115 Ohio St.3d 139, at _169, 2007-Ohio-5048, citing *State v. Slagle* (1992) 65 Ohio St.3d 597, 604. Under a plain error analysis, Robinson must show that there is a reasonable probability that, but for the prosecutor's misconduct, the result of the proceeding would have been different. *State v. Loza* (1994), 71 Ohio St.3d 61, 78-79, overruled on other grounds.

**{¶ 65}** The test for prosecutorial misconduct is whether the remarks were improper and, if so, whether they prejudicially affected the accused's substantial rights. *State v. Smith* (1984), 14 Ohio St.3d 13, 14. The record as a whole must be reviewed in its entirety to determine whether the disputed remarks were unfairly prejudicial. *State v. Moritz* (1980), 63 Ohio St.2d 150, 157. The touchstone of the analysis "is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips* (1982), 455 U.S. 209, 219.

**{¶ 66}** Although a prosecutor is afforded wide latitude during closing arguments, it must avoid assertions which are calculated to mislead a jury. *State v. Braxton* (1995), 102 Ohio App.3d 28, 42; *Smith*, supra, at 14. It is improper for an attorney to express his personal belief or opinion as to the guilt or credibility of a witness, or allude to matters outside the record. Id. However, "[i]solated comments by a prosecutor are not to be taken out of context and be given their most damaging meaning." *State v. Hill* (1996), 75 Ohio St.3d 195, 204, citing *Donnelly v. DeChristoforo* (1974), 416 U.S. 637, 647.

**{¶ 67}** The prosecutor's remarks at issue were stated in her rebuttal argument:

**{¶ 68}** "Firstly, just to address the admission or the confession, as it's called. This officer testified of his years of experience and the fact that he makes over hundreds of arrests. I submit to you, ladies and gentlemen, what does he have to gain by saying anything against Lamark Robinson? Lamark Robinson is one of many defendants to him that he will encounter during the course of his day. *I venture to say he would not put his career on the line by testifying in court to something that did not occur*." (Emphasis added.)

**{¶ 69}** We agree with Robinson that the prosecutor's remark that the officer's career would be on the line if he lied was improper. There was no testimony by Officer Franko that his job as a police officer would be in jeopardy if he lied under oath. It was the prosecutor's personal opinion as to the officer's

credibility. The credibility, or lack thereof, of a witness is exclusively for the trier of fact. *State v. Jackson* (Apr. 20, 2000), 8th Dist. No. 76141.

**{¶ 70}** Although we agree that the remark was improper, we must still determine whether it was so prejudicial as to deny Robinson a fair trial. *State v. Willard* (2001), 144 Ohio App.3d 767, 776, citing *State v. Freeman* (2000), 138 Ohio App.3d 408, 419. As the court in *Willard* stated:

**{¶ 71}** "The improper conduct must be assessed in the context of the entire case, and a reviewing court must also consider the cumulative effect of improper comments, because errors that are separately harmless may, when considered together, violate a person's right to a fair trial. Id. (Citations omitted.)"

**{¶ 72}** After reviewing the entire record, we do not find that the prosecutor's improper remark materially prejudiced Robinson such that it affected his right to a fair trial. The remark was on rebuttal, after the prosecutor had already effectively and properly argued the case. And the remark was limited to a single comment, out of pages of argument. That is not to say that a single isolated comment – if serious enough – could not require a reversal, but that is not the case here.

**{¶ 73}** In cases where this court has found that a prosecutor's remarks affected the substantial rights of the defendant, such that a new trial should be granted, the prosecutor's misconduct was much more extensive. In those cases, we determined that the cumulative effect, when reviewed in light of the entire

case, denied the defendant a fair trial. See, e.g., *State v. Thornton*, 8th Dist. No. 80136, 2002-Ohio-6824 (several pages of transcript served as evidence of the prosecutor's flagrant misconduct; during her closing argument, the prosecutor repeatedly denounced the credibility of defense witnesses and vouched for the veracity of the state's witnesses); *State v. Jackson*, 8th Dist. No. 88074, 2007-Ohio-2494 (the prosecutor stated facts that were not in evidence, extensively gave his personal opinion as to the credibility of the witnesses, denigrated the defense, and appealed on behalf of the victims to the sympathy of the jurors).

**{¶ 74}** We further agree with the state that in a similar case, *State v. Saddler* (Oct. 21, 1999), 8th Dist. No. 74218, this court found that although the prosecutor's remarks were "imprudent," they did "not rise to the exceptional level necessary to constitute plain error." Id. at 35. This court did not find plain error in *Saddler*, despite the fact that the prosecutor assured the jury that the police did "a good, good job," and commented, "[t]hey're not going to come in here and make something up. It's scrutinized before they come in this court room. It's not going to happen. And I submit to you it did not happen in this case." Id. at 33-34.

**{¶ 75}** Moreover, the trial court instructed the jurors that they were the "sole judges of the facts, [and] of the credibility of the witnesses." And further instructed, as the judge did in *Saddler*, that "closing arguments are not

evidence." A jury is presumed to follow the instructions given to it by a trial judge. *Loza*, supra, at 75.

**{¶ 76}** Consequently, Robinson has not demonstrated that the state's improper comment constituted plain error or that there is a reasonable probability that the outcome of the trial clearly would have been different if the comment was excluded.

**{¶ 77}** Robinson's fifth assignment of error is overruled.

**Constructive Possession**

**{¶ 78}** In his sixth assignment of error, Robinson argues that the trial court erred when, over his objection, it improperly instructed the jury on constructive possession. He did not object to an instruction of "constructive possession" being given to the jury. Rather, he argued that the instruction was "just a little bit misleading" because it only included language that the person must be "conscious of the presence of the contraband," and left out language that the person "intend[ed] to possess it, as well."

**{¶ 79}** It is well-settled that a criminal defendant is entitled to complete jury instructions on all issues raised by the evidence. *State v. Williford* (1990), 49 Ohio St.3d 247, 251. In reviewing a trial court's decision on jury instructions, an appellate court's role is to ascertain whether the trial court abused its discretion in refusing to give a proposed instruction and, if so, whether that refusal was prejudicial. *State v. Glossip*, 12th Dist. No. CA2006-04-040, 2007-

Ohio-2066, _40; *Wilson v. United Fellowship Club of Barberton*, 9th Dist. No. 23241, 2007-Ohio-2089, _8.

**{¶ 80}** To prove that Robinson was guilty of possession of drugs under R.C. 2925.11(A), the state had to show that he did "knowingly obtain, possess, or use a controlled substance."

**{¶ 81}** "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).

**{¶ 82}** "Possess" or "possession" 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).

**{¶ 83}** The trial court instructed the jury on "knowingly"and "possess" *exactly* as they are defined in R.C. 2925.01(K) and R.C. 2901.22(B). It then defined "constructive possession" as follows:

**{¶ 84}** "Constructive possession. Possession may be actual or constructive. While mere presence in the vicinity of contraband is insufficient to establish possession, constructive possession will be establish[ed] where the accused was able to exercise dominion or control over the contraband. Readily usable drugs in close proximity to an accused may constitute sufficient circumstantial

evidence to support a finding of constructive possession. However, the mere fact that contraband is located within the premises under one's control does not, of itself, constitute constructive possession. It must also be shown that the person was conscious of the presence of the contraband. Ownership is not necessary. A person may possess or control property belonging to another."

**{¶ 85}** In *State v. Mason* (July 5, 2001), 8th Dist. No. 78606, this court explained the terms possession and constructive possession:

**{¶ 86}** "Although the mere presence of a person at the residence in which contraband is discovered is not enough to support the element of possession, if the evidence demonstrates defendant was able to exercise dominion or control over the illegal objects, defendant can be convicted of possession. *State v. Wolery* (1976), 46 Ohio St. 2d 316, *State v. Haynes* (1971), 25 Ohio St.2d 264. Moreover, where a sizable amount of readily usable drugs is in close proximity to a defendant, this constitutes circumstantial evidence to support the conclusion that the defendant was in constructive possession of the drugs. *State v. Benson* (Dec. 24, 1992), 8th Dist. No. 61545; *State v. Pruitt* (1984), 18 Ohio App.3d 50. The same reasoning applies to the discovery of other contraband in close proximity to the defendant. *State v. Roundtree* (Dec. 3, 1992), 8th Dist. No. 61131. Furthermore, circumstantial evidence alone is sufficient to support the element of constructive possession. *State v. Jenks* [(1991), 61 Ohio St.3d 259]; *State v. Lavender* (Mar. 12, 1992), 8th Dist. No. 60493."

**{¶ 87}** After reviewing the jury instructions in their entirety and the law on constructive possession, this court cannot conclude that the instructions prejudiced Robinson in any way, or that the trial court abused its discretion.

**{¶ 88}** Robinson's sixth assignment of error is overruled.

**Manifest Weight of the Evidence**

**{¶ 89}** In his seventh and final assignment of error, Robinson argues that his convictions were against the manifest weight of the evidence.

**{¶ 90}** In *State v. Thompkins* (1997), 78 Ohio St.3d 380, at 387, the Supreme Court explained:

**{¶ 91}** "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence. *** Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence,* offered in a trial, to support one side of the issue rather than the other. *** Weight is not a question of mathematics, but depends on its *effect in inducing belief*.' (Emphasis added.)" (Internal citations omitted.)

**{¶ 92}** After reviewing the entire record, weighing the evidence and all reasonable inferences, considering the credibility of witnesses, and conflicts in the evidence, we do not find that Robinson's convictions were such that "the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." See *Thompkins*, supra.

**{¶ 93}** Officer Franko and Officer Jackson testified that when they stopped Robinson for a traffic violation, they discovered he had been driving under suspension. After they arrested him, they prepared to tow the vehicle he had been driving. Part of the routine preparation for towing included obtaining an inventory of the contents of the car. In that process, they found substantial amounts of crack cocaine and powder cocaine in the center console of the vehicle. They also found a large amount of money on Robinson, mostly in small denominations, which they testified was "common" during drug trafficking.

**{¶ 94}** In addition, Officer Franko testified that Robinson admitted that the drugs were his, what he paid for them, and where he bought them. Although Officer Jackson did not put Robinson's confession in his written report, Robinson's defense counsel thoroughly cross-examined both officers as to how and why this confession was not in the report. The officers could not adequately explain how it happened, but the jury clearly chose to believe that Officer Franko was not lying about Robinson's confession. As the trier of fact, the jury was free to do so. Thus, this is not "the exceptional case in which the evidence weighs heavily against the conviction."

**{¶ 95}** Accordingly, Robinson's seventh assignment of error is overruled.

**{¶ 96}** The judgment of the Cuyahoga County Court of Common Pleas is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

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MARY J. BOYLE, JUDGE

COLLEEN CONWAY COONEY, P.J., and
MARY EILEEN KILBANE, J., CONCUR