

[Cite as *State v. Cargile*, 2009-Ohio-6630.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 89964**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**CLEVELAND L. CARGILE**

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-495049

**BEFORE:** McMonagle, P.J., Blackmon, J., and Boyle, J.

**RELEASED:** December 17, 2009

**JOURNALIZED:**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} This cause is before us on remand from the Ohio Supreme Court.

I

{¶ 2} In March 2007, defendant-appellant Cleveland Cargile was arrested on charges of robbery. Prior to taking him into the detention facility for processing, the arresting officer admonished him that he should tell the officer if he had any drugs or weapons on him because bringing such items into the facility could cause him to be charged with a felony. Cargile denied having any such items on his person.

{¶ 3} An officer searched Cargile again in the detention facility before he was placed in a jail cell. Suspicious of Cargile's evasive leg movements during the search, the officer searched Cargile's legs and found three bags of marijuana concealed in the cuff of his pants.

{¶ 4} Cargile was indicted on two counts of robbery and one count of illegal conveyance of prohibited items onto the grounds of a detention facility.

The jury found him not guilty of both robbery counts but guilty of the illegal-conveyance count; the trial court sentenced him to two years in prison.

{¶ 5} Cargile appealed and we vacated his conviction. *State v. Cargile*, Cuyahoga App. No. 89964, 2008-Ohio-2783. We reasoned that because

Cargile had entered the detention facility only as a result of his arrest and not through his own affirmative conduct, his conveyance of drugs into that facility was not voluntary for purposes of R.C. 2921.36(A)(2). The Ohio Supreme Court disagreed and concluded that Cargile's conduct in affirmatively concealing the drugs on his person rendered his possession of them when he entered the detention facility a voluntary act sufficient to meet the actus reus requirement for a violation of R.C. 2921.36(A)(2). *State v. Cargile*, 123 Ohio St.3d 343, 2009-Ohio-4939, ¶14, ¶20. The Court reversed our decision and instructed us upon remand to consider Cargile's first and second assignments of error, which we had found moot in light of our decision.

## II

{¶ 6} In his first assignment of error, Cargile contends that he was denied a fair trial because the prosecutor expressed his personal opinion and vouched for the credibility of the State's evidence during closing argument.

{¶ 7} The test for prosecutorial misconduct during opening statements and closing argument is whether the remarks made by the prosecutor were improper and, if so, whether they prejudicially affected a substantial right of the accused. *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, ¶44, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14. We review a prosecutor's closing argument in its entirety to determine whether the allegedly improper

remarks were prejudicial. *State v. Treesh* (2001), 90 Ohio St.3d 460, 466. “The touchstone of the analysis ‘is the fairness of the trial, not the culpability of the prosecutor.’” *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, ¶92, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78.

{¶ 8} Because Cargile failed to object at trial to the allegedly improper comments, he has waived all but plain error. Crim.R. 52(B); *State v. Slagle* (1992), 65 Ohio St.3d 597, 604. “We may invoke the plain error rule only if we find that (1) the prosecutor’s comments denied appellant a fair trial, (2) the circumstances in the instant case are exceptional, and (3) reversal of the judgment below is necessary to prevent a miscarriage of justice.” *State v. McGee*, Washington App. No. 05CA60, 2007-Ohio-426, ¶15, citing *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus.

{¶ 9} Cargile cites to nine pages of the transcript wherein the prosecutor allegedly made improper comments, but he does not tell us what comments he objects to or how he was allegedly prejudiced. It is not the duty of an appellate court to search the record for evidence to support an appellant’s argument. *State v. Anderson*, Cuyahoga App. No. 87828, 2007-Ohio-5068, ¶14. Nevertheless, we have reviewed the State’s closing argument in its entirety and we do not believe that the prosecutor’s comments, taken together, deprived Cargile of a fair trial. A prosecutor may

comment in closing argument on what the evidence has shown and what reasonable inferences he believes may be drawn from it. *State v. Lott* (1990), 51 Ohio St.3d 160, 165. Here, the prosecutor's argument, even if sometimes improperly phrased in personal terms, focused on the evidence presented at trial and the reasonable inferences the jury would be permitted to draw. This is not the exceptional case that requires reversal to prevent a miscarriage of justice and therefore the first assignment of error is overruled.

### III

{¶ 10} Cargile's second assignment of error challenges the jury instructions. He argues that as one must necessarily possess a controlled substance in order to illegally convey it into a detention facility, possession of drugs is a lesser-included offense of illegally conveying prohibited items into a detention facility and the trial court therefore erred in not instructing the jury on the lesser-included offense.

{¶ 11} An offense may be a lesser included offense of another if (i) one offense carries a greater penalty than the other, (ii) some element of the greater offense is not required to prove commission of the lesser offense, and (iii) the greater offense as statutorily defined cannot be committed without the lesser offense as statutorily defined also being committed. *State v.*

*Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, ¶26, clarifying *State v. Deem* (1988), 40 Ohio St.3d 205.

{¶ 12} Cargile’s argument fails with respect to the third prong of the test. Under R.C. 2921.36(A)(2), “[n]o person shall knowingly convey \* \* \* onto the grounds of a detention facility \* \* \* any drug of abuse.” The offense is a third degree felony, regardless of the amount of drugs involved. R.C. 2921.36(G)(2).

{¶ 13} The degree of the offense of possession of drugs, however, is determined by the amount of drugs involved. See R.C. 2925.11(C). “When the severity of the offense is determined by the amount of controlled substance involved, the amount becomes an essential element of the offense. In order to obtain a conviction, the prosecution must prove that element, and the jury must so find, beyond a reasonable doubt.” *State v. Chamblin*, 4<sup>th</sup> Dist. No. 02CA753, 2004-Ohio-2252, ¶13, citing *State v. Smith* (1983), 14 Ohio App.3d 366, 371.

{¶ 14} The amount of drugs involved is an element of the offense of possession of drugs that is not contained in the offense of illegal conveyance of prohibited items into a detention facility. Therefore, possession of drugs under R.C. 2925.11(A) is not a lesser included offense of illegally conveying a prohibited item into a detention facility under R.C. 2921.36(A)(2). And

accordingly, the trial court did not err in not instructing the jury on possession of drugs and the second assignment of error is overruled.

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 issue out of this court directing the common pleas 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.

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and  
MARY J. BOYLE, J., CONCUR