[Cite as *State v. Parker*, 2011-Ohio-1059.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93835

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL PARKER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-521078

BEFORE: Celebrezze, J., Stewart, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: March 10, 2011

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Michael Parker, challenges his convictions for drug possession and possession of criminal tools and his resultant ten-year prison term. After a thorough review of the record and law, we affirm appellant's convictions and sentence.

{¶ 2} Using a new confidential informant, Detective Michael Alexander with the Cleveland Police Department initiated a controlled purchase of several pounds of marijuana from co-defendant Robert Moore on February 13,

2009. Officers followed Moore for several hours after the buy until it was apparent to the surveillance detail that Moore had discovered their presence. They then arrested him. Following the arrest, officers searched him and his vehicle and found various items, including a rent receipt dated the same day for a warehouse on South Miles Road in Warrensville Heights, Ohio (the "warehouse").

{¶ 3} Officers executed search warrants for the warehouse and for Moore's residence on Concord Drive in Beachwood, Ohio (the "Concord home"). Appellant was previously the record owner of the Concord home, which he transferred to his father in 2001, and he signed the lease agreement for the warehouse.

{¶ 4} While the officers waited for the search warrants to be approved, they used Moore's keys to enter both the warehouse and the Concord home to secure the premises to ensure no one was inside. After securing these locations, the officers set up surveillance outside and waited for the warrants to be issued. At the Concord home, the officers found close to $400,000, marijuana, packaging materials, drug ledgers, bank statements, guns, ammunition, and a bullet-proof vest. A search of the warehouse revealed suspected drug ledgers, packaging materials, and items for a business that contained the names of appellant and Moore. Officers also found slashed tires, which are indicative of one method used to transport drugs.

{¶ 5} The confidential informant told the police that a large quantity of marijuana would be delivered to Moore. The informant did not know when the delivery would occur, but said it would be delivered by "some Mexicans." Because the detectives knew that Moore had recently paid rent for the warehouse, even though he told officers that this business was no longer operating, they set up surveillance at the warehouse on the night of February 14, 2009 and into the early morning hours the next day.

{¶ 6} Just after 6:00 a.m. on Sunday, February 15, a semi-truck pulled into the warehouse; no other businesses appeared to be open at that time. After the semi-truck pulled into the lot, Det. Alexander stopped a car traveling down the driveway to the warehouse. This vehicle, titled to appellant, had two occupants — Tiodoso Higuera and Juan Huerta. These two men were eventually arrested. Appellant arrived a few hours later and was stopped and detained while the police arranged a search warrant to examine the contents of the semi-truck. The police discovered approximately one-and-one-half tons of marijuana, and appellant was arrested.

{¶ 7} On February 18, 2009, appellant was indicted, along with several co-defendants, on charges of drug trafficking and drug possession in excess of 20,000 grams, carrying a concealed weapon, and possession of criminal tools. The first two counts each carried a one-year firearm specification, and all counts carried forfeiture specifications.

{¶ 8} Appellant filed a motion to suppress evidence obtained from the search of his home and the warehouse. On May 5, 2009, a suppression hearing was held where appellant challenged the propriety of the search of the Concord home and warehouse. He alleged that officers entered these locations prior to obtaining a search warrant and that any subsequent search pursuant to a warrant was invalid as a result. The trial court denied appellant's motion to suppress on May 29, 2009. However, on June 5, 2009, appellant moved to reopen the suppression hearing arguing that the search warrant affidavits contained materially false information. A *Franks* [1] hearing was conducted, which concluded with the trial court denying appellant's motion.

{¶ 9} Appellant's trial was severed from those of his co-defendants, and the indictment was revised accordingly. Appellant also moved to try the forfeiture specification to the bench. Trial began on July 21, 2009 and concluded with the jury finding appellant not guilty of drug trafficking, but guilty of drug possession and possession of criminal tools. The trial court had granted appellant's Crim.R. 29 motion for the charge of carrying a concealed weapon because appellant had a valid concealed carry permit. The trial court found in the state's favor on the forfeiture specifications. On April

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[1] See *Franks v. Delaware* (1978), 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667.

6, 2009, appellant was sentenced to an aggregate term of incarceration of ten years.[2] Appellant then filed the instant appeal.

Law and Analysis

{¶ 10} Appellant argues six assigned errors and eleven supplemental assigned errors in the instant appeal.[3]

Invalid Indictment

{¶ 11} In appellant's first assignment of error, he argues that the indictment was defective, stating, "[t]he conviction of appellant is in violation of [his] right to a valid grand jury indictment in contravention of Section X, Article I of the Ohio Constitution." Appellant argues that the indictment actually lists a number of separate incidents involving drugs that should be charged separately.

{¶ 12} "The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated,

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[2] Appellant was sentenced to an eight-year term for drug possession, to be served consecutively to the one-year firearm specification and also consecutively to a one-year term for possession of criminal tools.

[3] Appellant's assignments of errors are included in the appendix to this opinion.

not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances." *U.S. v. Cruikshank* (1875), 92 U.S. 542, 558, 23 L.Ed. 588.

{¶ 13} When reviewing an indictment, the Ohio Supreme Court has directed appellate courts to apply a structural-error analysis. *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732, 803 N.E.2d 770, ¶19. "Structural errors" are constitutional defects that "defy analysis by 'harmless error' standards" because they "'affect[ ] the framework within which the trial proceeds, rather than simply [being] an error in the trial process itself.'" (Citations omitted.) Id. at ¶20. An error in the foundation of the proceedings, the indictment, causes error throughout the entire proceeding and undermines the reliability of a trial as a means to determine guilt. Id. Further, "Crim.R. 7(D) embodies the protections guaranteed in Section 10, Article I, of the Ohio Constitution, which provides that 'no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury.'" *State v. Roberts*, Cuyahoga App. No. 89236, 2008-Ohio-1942, ¶22, citing *State v. Strozier* (Oct. 5, 1994), 2d Dist No. 14021.

{¶ 14} Relying on *State v. Vitale* (1994), 96 Ohio App.3d 695, 645 N.E.2d 1277, appellant argues that one could never know what the jury's findings actually were because the indictment listed several periods of time alleging

when appellant possessed or trafficked drugs. However, *Vitale* is distinguishable. In that case, the state amended the indictment to change the identity of crimes after presentation to the grand jury.

{¶ 15} In the present case, the indictment was amended, but only to reflect the separation of co-defendants. The same charges that were previously submitted to the grand jury as Counts 4, 5, and 7 were renumbered as Counts 1, 2, and 3. Appellant claims that the amounts of drugs specified varied from the original indictment or that the amounts varied within the indictments. The counts related to Moore listed an amount of drugs exceeding 5,000 grams but less than 20,0000 grams, while the counts related to appellant at all times listed an amount of drugs exceeding 20,000 grams.

{¶ 16} In Count 4, the indictment indicates that the grand jury found "that the defendant(s) unlawfully did knowingly obtain, possess, or use a controlled substance, to-wit: Marijuana, a schedule I drug, in an amount equal to or exceeding 20,000 grams." The dates listed for all three counts are "February 13, 2009 — February 15, 2009." The bill of particulars supplied by the state listed several dates ranging from February 13, 2009 through February 15, 2009, where it alleges that appellant arranged or cooperated in obtaining a shipment of marijuana greater than 20,000 grams. The bill of particulars and indictment alleged only one instance where appellant

participated in the acquisition of over 20,000 grams of marijuana — the shipment of drugs on the semi-truck — but that his assistance in obtaining these drugs occurred over the span of three days.

{¶ 17} Appellant attacks the validity of the indictment throughout his supplemental briefs because it failed to charge complicity or aiding and abetting. However, "[a] person who is complicit in an offense may be charged and punished as if he were the principal offender, and a charge of complicity may be stated under R.C. 2923.03 or in terms of the principal offense. R.C. 2923.03(F)." *State v. Ousley*, Montgomery App. Nos. 23496 and 23506, 2010-Ohio-3116, ¶18. Appellant also argues that the indictment merely tracks the language of the statute and does not properly inform him of each and every element of the charges. Appellant relies on the holdings in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 ("*Colon I*"), reconsidered in *State v. Colon*, 2008-Ohio-3749, 119 Ohio St.3d 204, 893 N.E.2d 169 ("*Colon II*"), dealing with specifying a necessary mens rea in an indictment. Here, the indictment and bill of particulars properly specified a mens rea of knowingly. Further, *Colon II* was recently overruled by *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26. The *Horner* court noted that "[t]he purpose of a grand jury indictment has always been to give notice to the accused: '[A] criminal offense must be charged with reasonable certainty in the indictment so as to apprise the defendant of that

which he may expect to meet and be required to answer; so that the court and jury may know what they are to try, and the court may determine without unreasonable difficulty what evidence is admissible.'" Id. at ¶10, quoting *Horton v. State* (1911), 85 Ohio St. 13, 19, 96 N.E. 797. The court went on to note that "'[t]he purposes of an indictment are to give an accused adequate notice of the charge, and enable an accused to protect himself or herself from any future prosecutions for the same incident.'" Id. at ¶11, quoting *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, 853 N.E.2d 1162, ¶7, citing *Weaver v. Sacks* (1962), 173 Ohio St. 415, 417, 183 N.E.2d 373, and *State v. Sellards* (1985), 17 Ohio St.3d 169, 170, 478 N.E.2d 781.

{¶ 18} Here, the indictment tracks the language of the statute and places the appellant on notice of the charges he must defend against. It was also not impermissibly amended after presentment to the grand jury. Therefore, appellant's indictment is not defective. Appellant's first assignment of error is overruled.

Sufficiency and Manifest Weight

{¶ 19} Appellant argues in his second and third assignments of error and his tenth supplemental assignment of error that his convictions are against the sufficiency and manifest weight of the evidence.

{¶ 20} Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio St. 486, 124 N.E.2d 148.

A conviction based on legally insufficient evidence constitutes a denial of due process. *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 72 L.Ed.2d 652, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 21} Where there is substantial evidence upon which the trier of fact has based its verdict, a reviewing court abuses its discretion in substituting its judgment for that of the trier of fact as to the weight and sufficiency of the evidence. *State v. Nicely* (1988), 39 Ohio St.3d 147, 156, 529 N.E.2d 1236.

{¶ 22} The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. On review, the appellate court must determine, after viewing the evidence in a light most favorable to the prosecution, whether 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, 273, 574 N.E.2d 492; *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 23} Sufficiency of the evidence is subjected to a different standard than is manifest weight of the evidence. Article IV, Section 3(B)(3) of the Ohio Constitution authorizes appellate courts to assess the weight of the evidence independently of the factfinder. Thus, when a claim is assigned concerning the manifest weight of the evidence, an appellate court "has the

authority and duty to weigh the evidence and to determine whether the findings of * * * the trier of facts were so against the weight of the evidence as to require a reversal and a remanding of the case for retrial." *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303, 345, 82 N.E.2d 709.

{¶ 24} Appellant first argues that the state failed to produce any evidence that he possessed or aided or abetted others in the possession of marijuana.[4]

{¶ 25} Appellant was found guilty of drug possession in violation of R.C. 2925.11(A), which states, "[n]o person shall knowingly obtain, possess, or use a controlled substance." Possession is defined in R.C. 2925.01(K) to mean "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." Appellant was also found guilty of possession of criminal tools in violation of R.C. 2923.24(A), which states, "[n]o person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally."

{¶ 26} R.C. 2923.03(A)(2) provides in part that "[n]o person, acting with the kind of culpability required for the commission of an offense, shall * * *

[4] Appellant also claims that the state failed to present evidence to show that the amount of marijuana seized was over 20,000 grams. However, appellant stipulated to the identity and amount

[a]id or abet another in committing the offense." "'A person aids and abets another when he assists another in the accomplishment of a common design or purpose.' *State v. Worley*, 8th Dist. No. 85791, 2005-Ohio-6356, ¶18, citing *State v. Minor* (Mar. 2, 2000), 5th Dist. No. 99CA63. 'In order to constitute aiding and abetting, the accused must have taken some role in causing the commission of the offense.' Id. at ¶20, citing *State v. Sims* (1983), 10 Ohio App.3d 56, 460 N.E.2d 672." *State v. Adams*, Cuyahoga App. No. 93513, 2010-Ohio-4478, ¶15.

{¶ 27} The state presented evidence that appellant arrived at the warehouse — where the police found money, scales, ledgers, and other items indicative of a large-scale drug operation — several hours after a semi-truck loaded with thousands of pounds of marijuana docked. Appellant's name was on the lease for the warehouse. Two co-defendants arrived shortly after the semi-truck driving a car titled to appellant. While he was under police surveillance, appellant was observed to be in contact with Moore, exchanging items. Co-defendant Juan Madrigal testified that appellant had been at the warehouse in the past when Madrigal arrived with previous drug shipments. A cell phone found in appellant's possession was registered to the same California address as several other cell phones in the possession of various co-defendants.

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of the drugs seized, as noted in the record.

{¶ 28} The Ohio Supreme Court has noted that "'[p]articipation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed.'" *State v. Johnson*, 93 Ohio St.3d 240, 245, 2001-Ohio-1336, 754 N.E.2d 796, quoting *State v. Pruett* (1971), 28 Ohio App.2d 29, 34, 273 N.E.2d 884. This is sufficient evidence that appellant aided and abetted in the possession of marijuana and criminal tools.

{¶ 29} While appellant argues that he presented plausible explanations for all of these occurrences and he was found not guilty of drug trafficking, that does not demonstrate that the jury lost its way in convicting him of drug possession and possession of criminal tools. Appellant's involvement surfaced throughout the investigation and inextricably tied him to the thousands of pounds of marijuana in the back of a semi-truck. Appellant has failed to show that his convictions constitute a manifest miscarriage of justice requiring reversal. Assignments of error two and three and supplemental assignment of error ten are overruled.

Suppression

{¶ 30} In his fourth assignment of error, appellant attacks the decision of the trial court related to various issues raised in pretrial suppression motions.

{¶ 31} When considering a trial court's grant or denial of a motion to suppress, this court's standard of review is divided into two parts. In *State v. Lloyd* (1998), 126 Ohio App.3d 95, 100-101, 709 N.E.2d 913, the court stated, "our standard of review with respect to motions to suppress is whether the trial court's findings are supported by competent, credible evidence. *State v. Winand* (1996), 116 Ohio App.3d 286, 288, 688 N.E.2d 9, citing *Tallmadge v. McCoy* (1994), 96 Ohio App.3d 604, 608, 645 N.E.2d 802. This is the appropriate standard because "'[i]n a hearing on a motion to suppress evidence, the trial court assumes the role of trier of facts and is in the best position to resolve questions of fact and evaluate the credibility of witnesses.'" *State v. Hopfer* (1996), 112 Ohio App.3d 521, 548, 679 N.E.2d 321, quoting *State v. Venham* (1994), 96 Ohio App.3d 649, 653, 645 N.E.2d 831. However, once we accept those facts as true, we must independently determine, as a matter of law and without deference to the trial court's conclusion, whether the trial court met the applicable legal standard."

a. Pre-warrant Entry

{¶ 32} While waiting for search warrants for the Concord home and the warehouse, Cleveland police officers used Moore's keys to enter both locations. Detective Dwayne Duke testified that he arrived at the warehouse on February 13, 2009, and met with Detective Matt Baeppler to locate the suite leased by appellant. Det. Baeppler had Moore's keys, and they used them to enter the suite. Det. Duke stated that they entered the warehouse to secure the premises and to do a sweep for occupants for his safety because a light was on inside the warehouse when they arrived and two vehicles were parked close to the entrance. Moore had also discovered that the police were following him prior to his arrest and could have used that time to alert co-conspirators to impending police involvement. Once it was confirmed that no one was inside, the officers left the warehouse and set up surveillance outside.

{¶ 33} Detective James Cudo testified that after Dets. Duke and Baeppler had swept the warehouse for occupants, he entered the warehouse with Sergeants Hartman and Pillow, who began looking through things inside. He testified that they entered in order to locate the rear entrance to set up surveillance on it because they could not locate the rear entrance from the outside. The complex was large and labyrinthian with several divided suites throughout the facility. However, he testified that, while inside, Sgt.

Hartman called him into an office within the suite where he had found a shoe box containing a large sum of money. The officers returned the box to where they found it and left to set up surveillance.

{¶ 34} Det. Alexander testified that he conducted a sweep of the Concord home while waiting for the search warrant to ensure that no one was inside destroying evidence. Officers quickly searched the house to ensure that no one was there, then exited and set up surveillance outside. While these searches were being conducted, Detective Todd Clark was at the Justice Center preparing search warrant paperwork. Appellant argues that these entries were in violation of his constitutional rights and require the suppression of all evidence obtained from the subsequent searches conducted pursuant to warrants.

{¶ 35} In rendering its decision, the trial court stated, "[appellant] alleges that the police engaged in an illegal warrantless search of suite 38 [the warehouse], which resulted in the subsequent warranted searches being rendered unconstitutional. Additionally Parker argues that the search warrants were not based upon probable cause. The court finds that exigent circumstances existed thereby justifying the officers' entry to the premises in order to secure the locations until a search warrant could be obtained. *State v. King* (January 30, 2003), Cuy. App. No. 80573, 2003-Ohio-400."

{¶ 36} The Ohio Supreme Court has determined that there are "four exceptions to the warrant requirement which justify a warrantless search of a home: (1) an emergency situation, (2) search incident to an arrest, (3) 'hot pursuit' and (4) easily destroyed or removed evidence. *State v. Cheers* (1992), 79 Ohio App.3d 322, 325, 607 N.E.2d 115." *King* at ¶16. The *King* court set forth the elements that would justify an intrusion based on the destruction of evidence, stating, "'[a] police officer can show an objectively reasonable belief that contraband is being, or will be, destroyed within a residence if he or she can demonstrate: 1) a reasonable belief that third parties are inside the dwelling; and 2) a reasonable belief that these third parties may soon become aware the police are on their trail so that the destruction of evidence would be in order.'" Id. at ¶17, quoting *State v. Baker* (Apr. 25, 1991), Cuyahoga App. Nos. 60352 and 60353.

{¶ 37} Here, the trial court found that the officers demonstrated a reasonable belief that evidence was or could be destroyed. Moore had just engaged in a large drug transaction and had detected police officers following him. He could have notified cohorts of his impending arrest. Officers arrived at the warehouse to find two cars parked close to the entrance of appellant's leased premises and a light on inside. The trial court did not err in finding that the first intrusion into the warehouse was justified based on this exception.

{¶ 38} However, the entry into the home had none of the indicia of exigency. Police officers could not initially locate the Concord home because everything was dark. Further, no cars were parked outside, and no noises were heard within. Officers did not have a reasonable belief that people were inside the Concord home destroying evidence. Likewise, the second intrusion into the warehouse cannot be justified based on this exception because officers had already entered and confirmed that no one was inside. Therefore, the intrusion into the home and second entry into the warehouse were improper. There was no indication that transitory evidence was being or about to be destroyed.

{¶ 39} Even if the officers were not able to justify their intrusions into the warehouse and home under the above exception, the trial court also found that "[t]he search warrants were not premised on any information or observation made by officers when they entered the two locations, but rather, probable cause was established from independent sources. *Segura v. United States,* (1984) [468 U.S. 796,] 104 S.Ct. 3380[, 82 L.Ed2d 599]; *U.S. v. Jenkins*, ([C.A. 6,] 2005), 396 F.3d 751 * * *."

{¶ 40} In *Segura*, the Supreme Court noted, "'[i]f knowledge of [the challenged evidence] is gained from an independent source[, it] may be proved like any other[ ].'

{¶ 41} "In short, it is clear from our prior holdings that 'the exclusionary rule has no application [where] the Government learned of the evidence "from an independent source."'" (Internal citations omitted.) Id. at 805.

{¶ 42} Addressing the state's ability to secure a home while waiting for a warrant, the Court held, "the initial entry — legal or not — does not affect the reasonableness of the seizure. Under either method — entry and securing from within or a perimeter stakeout — agents control the apartment pending arrival of the warrant; both an internal securing and a perimeter stakeout interfere to the same extent with the possessory interests of the owners." Id. at 811.

{¶ 43} The Court determined that the exclusion of evidence should not occur in *Segura* where "[n]one of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioners' apartment; the information came from sources wholly unconnected with the entry and was known to the agents well before the initial entry. No information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant. It is therefore beyond dispute that the information possessed by the agents before they entered the apartment constituted an independent source for the discovery and seizure of the evidence now challenged." Id. at 814.

{¶ 44} This "good-faith exception" exists because "evidence observed by police during an illegal entry need not be excluded if the evidence is later discovered during the execution of a valid search warrant issued on information wholly unconnected to the prior entry." *State v. Carter*, 69 Ohio St.3d 57, 68, 1994-Ohio-343, 630 N.E.2d 355. In order for the exception to apply, "the government must establish that (1) no information presented in the affidavit for the warrant was seen during the initial entry, and (2) the agents' decision to seek the warrant was not prompted by what they had seen during the initial entry." Id., citing *Murray v. U.S.* (1988), 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472.

{¶ 45} Here, officers entered the warehouse and the home to secure the premises and maintain the status quo while search warrants were being obtained. The documents used to obtain those warrants did not rely on information gained from the entries, but were based on the police investigation conducted prior to entry. The evidence used to establish probable cause for the warrants was obtained from the prior controlled buy and information from Moore and his vehicle following his arrest. Therefore, the trial court did not err in denying appellant's motions to suppress the evidence obtained in these searches where the state had an independent source of information sufficient to demonstrate probable cause to obtain the search warrants. Any error committed by the trial court in ruling that the

intrusions were justified by the destruction-of-evidence exception to the warrant requirement was harmless.

b. Validity of Supporting Affidavit

{¶ 46} Appellant also challenges the sufficiency of the affidavit used to obtain the search warrant of the semi-truck because of statements therein that indicated that an officer observed marijuana inside the semi-truck and heard people moving within. In *Franks*, supra, the Supreme Court held, "(1) where a defendant made a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in his affidavit for a search warrant, and if the alleged false statement was necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request so that he might challenge the truthfulness of factual statements made in the affidavit[,] and (2) if at such a hearing the defendant established by a preponderance of the evidence the allegation of perjury or reckless disregard, and, with the affidavit's false material to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause were lacking on the face of the affidavit." *State v. Cisternino* (July 10, 1980), Cuyahoga App. Nos. 39894 and 39916, 11.

{¶ 47} The trial court held "that the statements in question were not made recklessly or intentionally in disregard for the truth. The court finds that the allegations of material misstatement or reckless disregard were not proven by a preponderance of the evidence and that the statements were made negligently or as an innocent mistake. Finally, even if the affidavit contained false statements in paragraphs 31 & 32 that were made intentionally or recklessly, the affidavit's remaining content is sufficient to establish probable cause."

{¶ 48} While there is significant testimony about the challenged affidavit, this affidavit is not within the record before this court; therefore, we are prevented from conducting a proper analysis of this issue. In the absence of evidence contained within the record, we must presume regularity in the proceedings below. *State v. Farris*, Cuyahoga App. No. 84795, 2005-Ohio-1749, ¶9. Therefore, appellant has failed to demonstrate error on the part of the trial court in denying appellant's motion to suppress pursuant to *Franks*.

c. *Terry* Stop

{¶ 49} Appellant also argues that the stop of his vehicle and his arrest outside the warehouse were impermissible.

{¶ 50} The Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures, rendering them per se

unreasonable unless an exception applies. *Katz v. U.S.* (1967), 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576. An investigative stop, or "*Terry* stop," is a common exception to the Fourth Amendment warrant requirement. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889.

{¶ 51} A law enforcement officer may properly stop an individual under the *Terry*-stop exception if the officer possesses the requisite reasonable suspicion based on specific and articulable facts that the person is, was, or is about to be engaged in criminal activity. *Delaware v. Prouse* (1979), 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660; *State v. Gedeon* (1992), 81 Ohio App.3d 617, 618, 611 N.E.2d 972; *State v. Heinrichs* (1988), 46 Ohio App.3d 63, 545 N.E.2d 1304; *U.S. v. Cortez* (1981), 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 721. Whether reasonable grounds for a stop exist must be viewed in light of the totality of the circumstances. *London v. Edley* (1991), 75 Ohio App.3d 30, 32, 598 N.E.2d 851.

{¶ 52} Based on the foregoing case law, the police in this case could only lawfully stop appellant if they had reasonable suspicion that criminal activity was afoot. In arguing against the validity of the stop, appellant claimed the state impermissibly relied on an untested confidential informant. After the informant participated in the drug buy from Moore, the informant told officers that a large shipment of marijuana was arriving in Cleveland in a semi-truck. Officers may rely on information provided from individuals

outside the police force when determining the presence of reasonable suspicion. *State v. Ramsey* (Sept. 20, 1990), Franklin App. Nos. 89AP-1298 and 89AP-1299. "A tip which standing alone would lack sufficient indicia of reliability may establish reasonable suspicion to make an investigatory stop if it is sufficiently corroborated through independent police work." Id.

{¶ 53} Det. Alexander admitted that he had never used this confidential informant before he conducted the marijuana buy from Moore, but during this transaction, the informant produced reliable information that led to the arrest of Moore and the seizure of pounds of marijuana. Because the informant had proven himself to be reliable, utilizing the information he provided when the police decided to stake out the warehouse was not unreasonable.

{¶ 54} The police also took steps to corroborate the information provided by the confidential informant. For example, the police searched Moore's residence and the warehouse for drugs prior to staking out the warehouse. In addition, the officers had already seen appellant exchange items with Moore once before during their surveillance. Officers also recognized the tan Ford F-150 appellant was driving from the prior surveillance.

{¶ 55} The police began to stake out the warehouse after learning Moore was to receive a large shipment of marijuana being delivered by "some Mexicans." A few days later, around 6:00 a.m., a semi-truck with a Hispanic

driver pulled in. After stopping the semi-truck and waiting for the arrival of a drug dog, the police saw another vehicle with two additional males pull in. Det. Alexander stopped the vehicle and was able to determine that it was registered to appellant. The two Hispanic males inside the vehicle were detained pending a search of the semi-truck.

{¶ 56} A few hours later, the officers observed appellant driving his tan F-150 truck up the driveway toward the warehouse, and they stopped the vehicle. Appellant was placed in the back of a detective's car while officers obtained a warrant for the semi-truck and the warehouse. The search revealed approximately 3,000 pounds of marijuana, and appellant was then arrested.

{¶ 57} It was not until the police discovered that the semi-truck contained a large quantity of marijuana delivered to appellant's business location, and two Hispanic individuals were stopped and arrested who were driving a car titled to appellant that he was arrested. Based on the totality of the circumstances, the police were justified in conducting an investigatory stop of appellant and detaining him until they could obtain a search warrant for the semi-truck.

{¶ 58} The trial court did not err in overruling appellant's motions to suppress the evidence obtained from the warehouse and the Concord home or from his detention and subsequent arrest.

Evidentiary Rulings

{¶ 59} Appellant argues in his fifth assignment of error that the trial court erred when it made several unfavorable evidentiary rulings. Supplemental assignment of error two also deals with these evidentiary rulings.

{¶ 60} It is well established that, pursuant to Evid.R. 104, the introduction of evidence at trial falls within the sound discretion of the trial court. *State v. Heinish* (1990), 50 Ohio St.3d 231, 553 N.E.2d 1026; *State v. Sibert* (1994), 98 Ohio App.3d 412, 648 N.E.2d 861. Therefore, "[a]n 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" *State v. Finnerty* (1989), 45 Ohio St.3d 104, 107, 543 N.E.2d 1233. A trial court abuses its discretion when it acts in an unreasonable, arbitrary, or unconscionable manner. A reviewing court should not substitute its judgment for that of the trial court. See, generally, *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, 473 N.E.2d 264. *Finnerty* at 107-108.

{¶ 61} An abuse of discretion implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

a. Other Acts Evidence

{¶ 62} Appellant first asserts that the trial court erred in allowing certain "other acts" evidence in violation of Evid.R. 404(B). With regard to the admissibility of "other acts" evidence, it is well established that evidence tending to prove that the accused has committed other acts independent of the crime for which he is on trial is inadmissible to show that the defendant acted in conformity with his bad character. *State v. Gumm*, 73 Ohio St.3d 413, 1995-Ohio-24, 653 N.E.2d 253.

{¶ 63} However, R.C. 2945.59 states: "In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant." See, also, Evid.R. 404(B).

{¶ 64} In order to establish that evidence as to other acts falls within this exception, the state must demonstrate that the evidence or testimony presented falls into one of these categories. Appellant claims the testimony of Madrigal is prejudicial "other acts" evidence that should not have been

allowed at trial. Madrigal testified that, in the past, appellant was present at the warehouse at least once before when Madrigal arrived with a shipment of marijuana. This evidence tends to negate appellant's argument that he had no knowledge of the drugs being present.

{¶ 65} Addressing the common law other acts exception, Chief Justice Bartley, in *Farrer v. State* (1853), 2 Ohio St. 54, 80, explained, "it appears to me clearly admissible upon the general doctrine of evidence in cases of conspiracy and fraud, where other acts in furtherance of the same general design are admissible * * * to repel the suggestion that the acts might be fairly attributed to accident, mistake, or innocent rashness or negligence. In most cases of conspiracy and fraud, the question of intent or purpose, or design in the act done, whether innocent or illegal, whether honest or fraudulent, rarely admits of direct and positive proof; but it is to be deduced from various circumstances of more or less stringency * * *. And in all cases, where the guilt of the party depends upon the intent, purpose, or design, with which the act was done, or upon his guilty knowledge thereof, I understand it to be a general rule that collateral facts may be examined into, in which he bore a part, for the purpose of establishing such guilty intent, design, purpose, or knowledge."

{¶ 66} Knowledge is a central element of the state's aiding and abetting case. It is relevant here because appellant claims his arrival at the

warehouse was a coincidence. It also shows a lack of mistake on appellant's part in arriving at the warehouse a few hours after the arrival of the semi-truck. Appellant relies on *State v. Ben*, 185 Ohio App.3d 832, 2010-Ohio-238, 925 N.E.2d 1045, to argue that the evidence should not have been allowed; however, that case is distinguishable. The state argued that prior instances where Ben had been found with ecstacy were properly admitted to show absence of mistake. This court rejected this argument. Ben never tried to show that his presence at a home where police found a large quantity of ecstacy was some mistake — he claimed he was there to smoke marijuana and knew of the presence of drugs. Id. at ¶21. Also, the prior instances were temporally distant and did not involve the same location.

{¶ 67} In *State v. Burrell* (May 22, 1995), Stark App. No. 1994 CA 00314, the Fifth District allowed Evid.R. 404(B) evidence to circumstantially establish knowledge of drugs on the part of the defendant from his presence at the same residence during two prior controlled drug buys. This is similar to the situation here. Madrigal testified that appellant was present twice before when drugs were being unloaded from Madrigal's semi-truck. The instances were in October and December 2008 — only a few months before appellant was arrested in February 2009. Further, the trial court advised the jury to view Madrigal's testimony, that of an accomplice, with "grave suspicion." This evidence was not admitted in error.

b. Expert Testimony

{¶ 68} Appellant also argues that the trial court erred in allowing two Cleveland police detectives to be qualified as experts to render an opinion about the common practices of drug dealers and what they determined were drug ledgers. Evid.R. 702, which controls the admission of expert testimony during the course of trial, provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." The determination of whether a witness possesses the qualifications necessary to allow expert testimony lies within the sound discretion of the trial court. In addition, the qualification of an expert witness will not be reversed unless there is a clear showing of an abuse of discretion on the part of the trial court. *State v. Maupin* (1975), 42 Ohio St.2d 473, 330 N.E.2d 708; *State v. Minor* (1988), 47 Ohio App.3d 22, 546 N.E.2d 1343.

{¶ 69} Ohio courts have allowed the qualification of police officers as expert witnesses to expound about drugs and drug practices. *State v. Hancock*, Jefferson App. No. 09-JE-30, 2010-Ohio-4854, ¶48; *State v. Ross*, Montgomery App. No. 19036, 2002-Ohio-6084, ¶14; *In re Litterst* (June 26, 1998), Lake App. Nos. 97-L-135 and 97-L-136, fn.3; *State v. Campa*, Hamilton App. No. C-010254, 2002-Ohio-1932, 5.

{¶ 70} Lieutenant Michael Connelly and Det. Clark were qualified as experts to explain that the ledgers found in this case documented drug transactions and to comment on the practices of major drug dealers. During the voir dire of Lt. Connelly, it was elicited that he had been a police officer for over 19 years, with four of those years as lieutenant of the narcotics unit and major case squad investigating major drug offenders. He testified to his experience in the field of encountering systems of tracking supplies of drugs and money. He also stated that he attended the Drug Enforcement Administration's ("DEA") Drug Commanders Academy in Quantico, Virginia, as well as a lecture on deciphering drug ledgers.

{¶ 71} Det. Clark testified during his voir dire that he was a 17-year veteran of the Cleveland Police Department, with 12 years of service as a narcotics detective. He received extensive training through DEA narcotics investigation courses, one specifically addressing drug ledgers, as well as programs through the Bureau of Alcohol, Tobacco, and Firearms. He had participated in thousands of drug-related arrests and had interviewed dozens of individuals who, after being arrested, disclosed the details of large drug operations. Det. Clark testified that he had seized and interpreted drug ledgers in 50 to 60 prior cases.

{¶ 72} Although Lt. Connelly and Det. Clark had only been qualified as experts once before, the state presented sufficient information to show they

had specialized knowledge through experience and training that would aid the jury in understanding evidence outside of its normal understanding. The trial court did not err in qualifying the officers as experts in this case.

{¶ 73} Appellant also challenges the testimony of Felecia Simington, the state's fingerprint expert witness, when she failed to couch her testimony in terms of a reasonable degree of scientific certainty.

{¶ 74} "Ohio courts permit a qualified expert interpreting certain scientific or medical facts which are beyond the experience, knowledge or understanding of the jury to express an opinion as to the probability or actuality of a fact pertinent to an issue in the case." *State v. Brown* (1996), 112 Ohio App.3d 583, 597, 679 N.E.2d 361, citing *Brandt v. Mansfield Rapid Transit, Inc.* (1950), 153 Ohio St. 429, 92 N.E.2d 1.

{¶ 75} The Twelfth District has held that a failure of a fingerprint examiner to testify to a reasonable degree of scientific certainty goes to the weight of the evidence, not its admissibility. *State v. Harry*, Butler App. No. CA2008-01-0013, 2008-Ohio-6380. In so holding, the *Harry* court noted, "[the fingerprint examiner] testified that fingerprints matching appellant and co-defendant Craft were found on the evidence, namely appellant's prints were found on the magazine of the weapon * * *. While she did not use the term 'reasonable scientific certainty' to state her conclusions, her opinion was clearly admissible to the jury." Id. at ¶63. The exact same terminology was

used in this case, when both fingerprint examiners testified that the respective defendant's fingerprints were a "match" and failed to specify that determination was to a reasonable degree of scientific certainty. Therefore, the trial court did not err in failing to strike this testimony.

c. Hearsay

{¶ 76} Appellant also argues that the chart used during the testimony of Det. Alexander to summarize various phone calls between the co-defendants was improperly allowed. This chart was based on phone records the trial court excluded as hearsay. Evid.R. 801(C) defines hearsay as "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." Under this definition, the summary chart based on phone records that the trial court determined were hearsay is also hearsay. However, appellant failed to object to the chart at the time of its usage, but did object when the state proffered it as an exhibit to the jury at the close of its case. The trial court allowed the chart to be admitted over this objection.

{¶ 77} Where there is no reasonable possibility that the unlawful testimony contributed to a conviction, the error is harmless, and therefore will not be grounds for reversal. *State v. Lytle* (1976), 48 Ohio St.2d 391, 358 N.E.2d 623, paragraph three of the syllabus, vacated in part on other grounds in *Lytle v. Ohio* (1978), 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154.

{¶ 78} Assuming that the summary chart was inadmissible hearsay, since appellant failed to object to the testimony of Det. Alexander regarding phone calls based on hearsay and the use of that information as summarized on the chart, the chart's admission into evidence for consideration by the jury during deliberations was harmless. That information was already before the jury.

{¶ 79} Appellant has failed to show that the trial court abused its discretion when making evidentiary rulings in this case that amounted to more than harmless error. Therefore, assignment of error five and supplemental assignment of error two are overruled.

Ineffective Assistance of Counsel

{¶ 80} In his sixth assignment of error and his fourth and ninth supplemental assignments of error, appellant claims that his trial counsel was constitutionally ineffective. In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that: 1) the performance of defense counsel was seriously flawed and deficient; and 2) the result of appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407.

{¶ 81} In reviewing a claim of ineffective assistance of counsel, it must be presumed that a properly licensed attorney executes his legal duty in an ethical and competent manner. *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128; *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164.

{¶ 82} The Ohio Supreme Court held in *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373, that, "'[w]hen considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness.' *State v. Lytle*[, supra, at 396-397 * * *]. This standard is essentially the same as the one enunciated by the United States Supreme Court in *Strickland v. Washington* [supra] * * *."

{¶ 83} "Accordingly, to show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *Bradley* at 143.

{¶ 84} Appellant claims that his trial counsel failed in several respects regarding pretrial suppression motions and hearings. Appellant claims that

counsel should have argued in the suppression motion challenging the search warrants for the Concord home and warehouse that the warrantless entries into these locations were impermissibly used to obtain the search warrants. However, during the suppression hearing regarding these issues, counsel did argue such points and brought them to the attention of the trial court. Therefore, including them in the written suppression motion would not have resulted in a different outcome.

{¶ 85} The same is true of the second claimed error, that counsel failed to address discrepancies in testimony about when appellant arrived at the warehouse. The trial court heard this testimony and any discrepancies involved.

{¶ 86} Appellant also claims that trial counsel withheld exculpatory information, namely the warehouse lease agreement and cancelled checks showing that appellant had not made a rent payment on the warehouse since April 2008. However, appellant testified that he sublet the warehouse beginning in April 2008. This information was before the jury, and appellant's counsel was not ineffective for failing to provide this evidence.

{¶ 87} Appellant has also failed to show that the outcome of the trial would have been different had counsel timely objected to various items, including the summary chart of phone calls reviewed above.

{¶ 88} Appellant has failed to show to this court that his trial counsel was constitutionally deficient. Therefore, assignment of error six and supplemental assignments of error four and nine are overruled.

False Information Presented to the Grand Jury

{¶ 89} Appellant argues in his first and sixth supplemental assignments of error that his "Due Process and Equal Protection rights were violated by the state's willful presentation of materially false evidence to the grand and petit jurors in violation of the [Fourth], [Fifth], and [Fourteenth] Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution."

{¶ 90} Appellant claims the evidence presented to the grand jury was fabricated or wholly related to co-defendant Moore and irrelevant to him. He also claims the state knowingly allowed fabricated evidence to be presented to the grand jury. However, appellant fails to appreciate the state's theory that appellant aided and abetted Moore in carrying on a drug trafficking operation. This evidence is applicable to appellant under this theory.[5] Further, appellant does not cite to the record in arguing these assigned errors or explain with specificity exactly what evidence he believes was fabricated. If the party presenting an assignment of error for review fails to identify in

[5] This discussion further resolves appellant's second supplemental assignment of error, where he argues that the trial court erred when it allowed the jury to hear evidence related to other

the record the error on which it is based, this court may disregard the assignment of error. App.R. 12(A)(2). Therefore, we decline to further address the matter. See App.R. 16(A)(7).

Jury Instructions

{¶ 91} Appellant next argues in his third and seventh supplemental assignments of error that "[t]he trial court's jury instructions invaded the province of the jury and denied [him] a fair trial under the Due Process Clause of the federal constitution."

{¶ 92} Appellant initially attacks his indictment in this assigned error, claiming he was prejudiced by being indicted together with his co-defendants. He next argues that marijuana is not a schedule I drug, which it is and which he so stipulated. He also argues that aiding and abetting or conspiracy must be charged in the indictment, which it does not. See *Ousley* at ¶18. In dismissing a similar argument, this court held that "R.C. 2923.03 permits a charge of conspiracy and/or complicity to commit an offense to be stated in terms of the principal offense. * * * Therefore, under the circumstances presented in this case, the trial court did not err in providing a jury instruction on conspiracy." *State v. Wheeler*, Cuyahoga App. No. 93011, 2010-Ohio-1753, ¶45-46.

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co-defendants.

{¶ 93} "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 instruction or giving an instruction constituted an abuse of discretion under the facts and circumstances of the case. See *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443. In addition, jury instructions are reviewed in their entirety to determine if they contain prejudicial error. *State v. Porter* (1968), 14 Ohio St.2d 10, 235 N.E.2d 520." *State v. Williams*, Cuyahoga App. No. 90845, 2009-Ohio-2026, ¶50. To constitute an abuse of discretion, the ruling must be more than legal error; it must be unreasonable, arbitrary, or unconscionable. *Blakemore*, supra.

{¶ 94} Appellant claims the trial court did not properly instruct on reasonable doubt, complicity, and constructive possession. However, the trial court gave a proper instruction on each of these issues. In reference to reasonable doubt, the court advised, "[e]very person accused of an offense is presumed innocent until proven guilty by evidence beyond a reasonable doubt. * * * Reasonable doubt is present when, after you have carefully considered all the evidence, that you cannot say that you are firmly convinced of the truth of the charge. Reasonable doubt is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is

proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his or her affairs." The trial court also gave an aiding and abetting instruction and an instruction on constructive possession. Therefore there was no abuse of discretion evident in the record.

{¶ 95} Appellant also claims that the trial court should have instructed on "character evidence" and "other acts evidence." Appellant did not request a character instruction or otherwise object to the instruction given, and therefore, he has waived all but plain error. *State v. McGrath*, Cuyahoga App. No. 93445, 2010-Ohio-4477, ¶90. Further, "[a]n erroneous jury instruction does not amount to plain error unless, but for the error, the result of the trial clearly would have been different." Id., citing *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804. Appellant has failed to demonstrate that the outcome of the trial would have been different with a character evidence instruction.

{¶ 96} Regarding an instruction on "other acts," the evidence appellant refers to is the testimony of co-defendant Madrigal, which the court advised the jury to viewed with "grave suspicion." Given this instruction, appellant cannot show that it was plain error for the trial court to fail to give an "other acts" instruction.

{¶ 97} Supplemental assignments of error three and seven are overruled.

Prosecutorial Misconduct

{¶ 98} Appellant argues in his eighth supplemental assignment of error that "[t]he cumulative misconduct of the prosecutor during the course of the trial denied [appellant] of a fair trial guaranteed by the [Fourteenth] Amendment of the United States Constitution, and Article 1, Section 10 of the Ohio Constitution."

{¶ 99} Appellant alleges that the state allowed perjured testimony to be presented to the jury and grand jury. "A prosecutor's knowing use of perjured testimony is a violation of due process and requires reversal of a criminal conviction if there is 'any reasonable likelihood that the false testimony could have affected the judgment of the jury.' *United States v. Agurs* (1976), 427 U.S. 97, 103, citing *Napue v. Illinois* (1959), 360 U.S. 264, 271. See, also, *Mooney v. Holohan* (1935), 294 U.S. 103. To establish a violation, it is sufficient to show that a prosecutor should have known of the perjury. *Agurs*, supra, at 103. Due process is also lacking when 'the state, although not soliciting false evidence, allows it to go uncorrected when it appears.' *Napue*, supra, at 269." *State v. Kimble* (Sept. 22, 1988), Cuyahoga App. No. 54154, 4.

{¶ 100} Nothing in the record here indicates that perjured testimony was introduced at trial, let alone that the state suborned perjury.

{¶ 101} Appellant inappropriately cites to perceived violations of the American Bar Association Model Rules of Professional Conduct as evidence of

the state's misconduct. In regard to comments made during trial, appellant claims that, throughout the proceedings, the state inappropriately commented on evidence it knew to be false or irrelevant. Generally, the state is afforded wide latitude in arguments. *State v. Woodards* (1966), 6 Ohio St.2d 14, 215 N.E.2d 568. "An appellant is entitled to a new trial only when a prosecutor asks improper questions or makes improper remarks and those questions or remarks substantially prejudiced appellant." *State v. Smith* (1984), 14 Ohio St.3d 13, 470 N.E.2d 883.

{¶ 102} Here, appellant claims that evidence relating to other co-defendants was improperly attributed to him. Again, this fails to consider the state's aiding and abetting theory and does not amount to improper comments. Further, appellant fails to cite any specific comments the state made that he deems improper.

{¶ 103} Having failed to demonstrate that improper comments prejudiced appellant, we overrule supplemental assignment of error eight.

Forfeiture of Seized Property

{¶ 104} In supplemental assignments of error five and eleven, appellant contends that the trial court failed to fulfill its obligations to comply with Ohio's forfeiture statute.

{¶ 105} The state is required to prove by a preponderance of the evidence that seized property is subject to forfeiture. R.C. 2981.02 defines these

requirements, stating: "(A) The following property is subject to forfeiture to the state or a political subdivision under either the criminal or delinquency process in section 2981.04 of the Revised Code * * *:

{¶ 106} "* * *;

{¶ 107} "(2) Proceeds derived from or acquired through the commission of an offense;

{¶ 108} "(3) An instrumentality that is used in or intended to be used in the commission or facilitation of any of the following offenses when the use or intended use, consistent with division (B) of this section, is sufficient to warrant forfeiture under this chapter:

{¶ 109} "(a) A felony;

{¶ 110} "* * *;

{¶ 111} "(c) An attempt to commit, complicity in committing, or a conspiracy to commit an offense of the type described in divisions (A)(3)(a) * * *."

{¶ 112} Division (B) of this statute directs the trier of fact to analyze "whether an alleged instrumentality was used in or was intended to be used in the commission or facilitation of an offense or an attempt, complicity, or conspiracy to commit an offense in a manner sufficient to warrant its forfeiture," and lists the following factors:

{¶ 113} "(1) Whether the offense could not have been committed or attempted but for the presence of the instrumentality;

{¶ 114} "(2) Whether the primary purpose in using the instrumentality was to commit or attempt to commit the offense;

{¶ 115} "(3) The extent to which the instrumentality furthered the commission of, or attempt to commit, the offense."

{¶ 116} Appellant argues that the state failed to prove a sufficient nexus between the underlying criminal offenses and the seized property and concludes that the seized property was not subject to forfeiture.

{¶ 117} R.C. 2981.04(A)(1) states that "[p]roperty * * * may be forfeited under this section only if the complaint, indictment, or information charging the offense or municipal violation, or the complaint charging the delinquent act, contains a specification of the type described in section 2941.1417 * * *."

{¶ 118} Here, the indictment contained such specifications for currency, cell phones, a DVD player, an iPod, a handgun, and two vehicles. However, the journal entry ordering forfeiture states only, "defendant to forfeit the following two vehicles to the Cleveland Police Department pursuant to R.C. 2933.41(D)(8), 2004 GMC VIN#1GK**********6041 and a 2003 Ford Truck VIN#1FT**********1303."

{¶ 119} Initially, we note that R.C. 2933.41 was repealed in 2007 and replaced by R.C. 2981, et seq. Pursuant to R.C. 2981.04(B), the trier of fact

is charged with determining whether the state has presented sufficient evidence of a nexus between the property subject to forfeiture and the convictions.

{¶ 120} Appellant chose to have the forfeiture specification tried to the bench, as evidenced by a signed waiver on July 20, 2009. A forfeiture hearing was conducted on July 29, 2009, where the court found that all items listed in the specifications were forfeited. The original journal entry memorializing appellant's sentence did not contain reference to the disposition of seized property. The trial court issued a nunc pro tunc entry that included the quoted passage above. Therefore, these are the only items appellant is required to forfeit, and review will be limited accordingly.

{¶ 121} In the case of the GMC Envoy, two co-defendants were driving the vehicle to the warehouse shortly after the semi-truck arrived. Appellant was driving his Ford F-150 truck to the warehouse, where approximately 3,000 pounds of marijuana were present. The jury found that these vehicles were criminal tools used in the furtherance of the possession of marijuana, and the trial court found that the state demonstrated they were subject to forfeiture. There is nothing in the record to disturb these findings.

{¶ 122} While the trial court's journal entry mistakenly references R.C. 2933.41, the trial court fulfilled its obligations under R.C. 2981.04. The two

vehicles described above were properly forfeited. Therefore, appellant's fifth and eleventh supplemental assignments of error are overruled.

Judgment 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 convictions 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.

FRANK D. CELEBREZZE, JR., JUDGE

MELODY J. STEWART, P.J., and
SEAN C. GALLAGHER, J., CONCUR

APPENDIX

Appellant's Assignments of Error:

I. "The conviction of appellant is in violation of appellant's right to a valid grand jury indictment in contravention of Section X, Article I of the Ohio Constitution."

II. "The guilty verdicts are based upon insufficient evidence."

III. "The conviction of appellant is against the manifest weight of the evidence."

IV. "The trial court erred and/or abused its discretion when it denied the motion to suppress."

V. "The trial court abused its discretion and prejudiced Michael Parker [sic] several evidentiary rulings."

VI. "Michael Parker was denied the effective assistance of counsel."

Appellant's Supplemental Assignments of error:

I. "Appellant's due process rights were violated when the state willfully presented false information to the grand jury to secure the indictment."

II. "Appellant's right to a fair trial was violated when the trial court impermissibly permitted prejudicial 'evidence' it claimed would be excluded."

III. "The trial court committed plain error in its instructions to the jury."

IV. "Appellant was denied the effective assistance of counsel in the failure to object to inadmissible evidence as well as the failure to demand proper jury instructions."

V. "The trial court erred when it forfeited all of appellant's non-contraband property without compliance with Ohio's forfeiture statute."

VI. "Appellant's Due Process and Equal Protections rights were violated by the state's willful presentation of materially false evidence to the grand and petit jurors in violation of the 4th, 5th, and 14th Amendments to the United States Constitution, and Article 1, section 10 of the Ohio Constitution."

VII. "The trial court's jury instructions invaded the province of the jury and denied appellant a fair trial under the Due Process Clause of the federal Constitution."

VIII. "The cumulative misconduct of the prosecuter [sic] during the course of trial denied appellant of a fair trial guarenteed [sic] by the 14th Amendment of the United States Constitution."

IX. "Appellant's Sixth and Fourteenth Amendment rights were violated when his counsel deliberately concealed key evidence favorable to the appellant."

X. "Appellants [sic] conviction for drug possession based solely on his mere association with co-defendant Moore warrants reversal of conviction and sentence."

XI. "The trial court erred when it forfeited all of appellants [sic] non-contraband property without compliance with Ohios [sic] forfeiture statute under R.C. 2981.02 and R.C. 2981.04."