[Cite as *State v. Johnson*, 2026-Ohio-3185.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee/ Cross-Appellant,	:	No. 24AP-673 (C.P.C. No. 23CR-593)
v.	:	(REGULAR CALENDAR)
Brandon R. Johnson,	:	
Defendant-Appellant/ Cross-Appellee.	:	

DECISION

Rendered on August 18, 2026

On brief: *Shayla D. Favor*, Prosecuting Attorney, and *Michael A. Walsh*, for plaintiff-appellee/cross-appellant. **Argued:** *Michael A. Walsh*.

On brief: *Mitchell A. Williams*, Public Defender, and *George M. Schumann*, for defendant-appellant/cross-appellee. **Argued:** *George M. Schumann*.

APPEAL from the Franklin County Court of Common Pleas

LELAND, J.

{¶ 1} Defendant-appellant/cross-appellee, Brandon R. Johnson, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to jury verdict, of possession of cocaine with a firearm specification, possession of a fentanyl-related compound with a firearm specification, and having weapons while under disability ("WUD"). Plaintiff-appellee/cross-appellant, State of Ohio, has filed a cross-appeal. For the following reasons, we affirm in part and reverse in part.

I. Facts and Procedural History

{¶ 2} On February 3, 2023, the state indicted appellant on one count of possession of cocaine in violation of R.C. 2925.11, a felony of the first degree; one count of possession of a fentanyl-related compound in violation of R.C. 2925.11, a felony of the first degree; and one count of WUD in violation of R.C. 2923.13, a felony of the third degree. The drug possession charges both carried firearm specifications. Following several continuances, the case proceeded to a jury trial on September 9, 2024. The state presented the following pertinent evidence at trial.

{¶ 3} On the evening of December 1, 2021, Officers Jeremy Hubbell and Edward Chung of the Columbus Police Department ("CPD") were driving on West Broad Street in Columbus, Ohio. When the officers neared the I-270 overpass, they discovered two vehicles that appeared to have just been in a traffic accident. Although the location of the traffic accident was in the jurisdiction of the Franklin County Sheriff's Office ("FCSO"), Officers Hubbell and Chung stopped to assist the occupants of the vehicles.

{¶ 4} Appellant was the sole occupant of the first vehicle the officers approached. Appellant exited his vehicle holding a purple and cream-colored backpack and informed Officer Hubbell he "lost control of the vehicle." (Tr. Vol. 2 at 265-66.) Officer Hubbell told appellant to "have a seat on the median" while he checked on the occupants of the other vehicle. (Tr. Vol. 2 at 267.) The two occupants of the other vehicle, a male and an elderly female, informed Officer Hubbell they were okay.

{¶ 5} Officer Chung spoke to appellant while he was seated on the median. Officer Chung suspected appellant was intoxicated because "[t]here was a strong odor of marijuana coming from [appellant's] vehicle at the time." (Tr. Vol. 4 at 806.) Two deputies from the FCSO arrived on the scene and Officers Hubbell and Chung informed the deputies regarding what they knew about the accident.

{¶ 6} The horn on appellant's vehicle had been continuously blaring since the officers initially approached the scene. As such, Officers Hubbell and Chung opened the hood of appellant's vehicle and attempted to disengage the horn. While the officers worked on the horn, appellant began running across Broad Street away from the scene of the accident. The officers noticed appellant running and began to run after him.

{¶ 7} Officer Hubbell's body-worn camera recorded the sound of gun shots as the officers chased appellant. Officer Chung stated that during the foot chase he saw the "muzzle flash from [appellant's] firearm." (Tr. Vol. 4 at 810-11.) Officer Chung fired his weapon at appellant in response. Appellant fell to the ground near a Red Roof Inn located across Broad Street from the traffic accident and the officers apprehended him. As Officer Hubbell began to handcuff appellant, he discovered a firearm in appellant's waistband and exclaimed to the other officers, "another gun in the waist, another gun in the waist!" (Tr. Vol. 2 at 279; State's Ex. A, clip 2 at 4:30.) Officer Chung took the firearm Officer Hubbell recovered from appellant and placed it on the grass away from appellant. The officers discovered appellant had been shot in his leg and radioed for medical assistance.

{¶ 8} Once appellant was secured, Officer Hubbell returned to the scene of the traffic accident and began looking for appellant's backpack. Officer Hubbell noted the backpack was an "object of suspicion based on suspicious behavior at the accident." (Tr. Vol. 2 at 284-85.) As Officer Hubbell was standing next to appellant's vehicle, the male driver of the other vehicle, subsequently identified as Anothony Morris, approached Officer Hubbell and attempted to hand him appellant's backpack. Officer Hubbell directed Morris to set the backpack down on the ground next to appellant's vehicle.

{¶ 9} Deputy William Ball of the FCSO arrived on the scene as the officers were placing appellant in handcuffs. When the medics arrived to assist appellant, Deputy Ball accompanied appellant in the ambulance. Deputy Ball explained that an officer had to be present in the ambulance with appellant because he was under arrest. Once inside the ambulance, Deputy Ball conducted a pat-down search of appellant. Deputy Ball discovered "a live round in [appellant's pants] pocket" and a "mass of something" about the "size of a baseball" in appellant's coat pocket. (Tr. Vol. 2 at 337.) The baseball sized item consisted of a plastic bag "containing other small plastic bags" and Deputy Ball could see "some type of powder and some type of rock-like substance, multiple different things" in the bags. (Tr. Vol. 2 at 342.) Deputy Ball suspected the baseball sized item contained narcotics.

{¶ 10} Because Deputy Ball did not have access to evidence bags in the ambulance, he placed the live round and the ball of suspected drugs into separate, clear latex gloves. The ambulance was still located near the scene of the incident at this time, and Deputy Ball handed the suspected narcotics to "Deputy Tulloch, who c[a]me to the side of the medic finally." (Tr. Vol. 2 at 340.) Deputy Ball then accompanied appellant to the hospital. Deputy Paul Tulloch subsequently handed the suspected narcotics off to Deputy Robert Tischler.

{¶ 11} Special Agent Sarah Taylor of the Ohio Bureau of Criminal Investigation ("BCI") crime scene search unit assisted with the investigation into the officer-involved shooting. Agent Taylor arrived at the scene on Broad Street late in the evening on December 1, 2021, and began to photograph the scene. In the area where the officers arrested appellant, Agent Taylor photographed two firearms, appellant's wallet, appellant's cellphone, and various other personal items lying on the ground. (State's Ex. C-29 through C-83.) At the scene of the traffic accident, Agent Taylor photographed the purple and cream-colored backpack sitting on the ground next to appellant's vehicle. (State's Ex. C-99 through C-101.) After Agent Taylor photographed the backpack, she placed it into appellant's vehicle and placed clear tape on the vehicle's doors "to preserve the vehicle." (Tr. Vol. 2 at 405-06.) The FCSO then towed the vehicle to the FCSO property garage.

{¶ 12} The following day, the state obtained warrants to search appellant's vehicle and backpack, and Agent Taylor went to the FCSO property garage to process the warrants. Agent Taylor noted the clear tape she placed on the vehicle's doors the night before remained intact. Inside the vehicle, Agent Taylor discovered "one cartridge case" in the backseat and a bag of suspected marijuana on the front passenger seat. (Tr. Vol. 2 at 422.) Inside the backpack, Agent Taylor discovered five different bags containing a green leafy substance that appeared to be marijuana, the stock of a gun, two small bags containing a white substance, a folded piece of tinfoil, and a latex examination glove containing a white substance. Agent Taylor placed the items from the backpack on the floor and photographed them. Deputy Ball viewed Agent Taylor's photograph of the backpack and its contents at trial, and stated the photograph depicted the glove containing the "clear plastic bag that [he] removed from Mr. Johnson's person." (Tr. Vol. 2 at 346.)

{¶ 13} Because Agent Taylor was only tasked with assisting in the investigation into the officer-involved shooting, when she discovered the suspected narcotics in the backpack she informed the FCSO they "[could] collect" the evidence. (Tr. Vol. 2 at 424.) Detective Scott Randall of the FCSO then took the backpack to his office and opened it. Detective Randall explained how he took each item from the backpack, placed the item into an evidence bag, and logged the item into a software system called Matrix. The Matrix software assigned each item a property number, and Detective Randall then placed a sticker on each evidence bag depicting the item's property number, sealed the bag and deposited it into a secured locker at the FCSO property room. Detective Randall described the latex glove appearing to contain a white substance as "[c]ocaine (crack) 1 latex glove containing white rock," and the Matrix system assigned the item property number 3478. (State's Ex. I-2.) Detective Randall described one of the bags containing a white substance as "1 clear bag containing off white rock like substance," and the Matrix system assigned the item property number 3479. (State's Ex. I-2.) Detective Randall described the other bag containing a white substance as "1 clear bag containing off white powder like substance," and the Matrix system assigned the item property number 3481. (Tr. at 482; State's Ex. I-3, O-10.)[1]

{¶ 14} After Detective Randall inventoried and impounded the evidence, Detective Sherard Pollard of the FCSO retrieved the evidence from the FCSO property room. Detective Pollard "separate[ed]" and "weigh[ed] the narcotics," then "place[d each item] right back in the bag. Seal[ed] it up," and returned the items to the FCSO property room. (Tr. Vol. 3 at 517, 541.) Detective Pollard then submitted the evidence in property numbers 3478, 3479, and 3481 to the BCI laboratory for testing. Marjorie Cox, a civilian employee at the FCSO, transported the evidence from the FCSO property room to the BCI laboratory.

{¶ 15} Megan Snyder, a forensic chemist employed by BCI, tested the items in property numbers 3478, 3479, and 3481. Snyder noted the evidence bags were sealed when she received them, she verified the property numbers on each bag, and she initialed each evidence bag when she opened it. Snyder noted the evidence in property number 3478 consisted of various "different bags of substance" that "visually looked a little bit different from each other." (Tr. Vol. 3 at 597.) As such, Snyder separated the items in property number 3478 into five "sub items," and repackaged the substances in her "own lab packaging" to make her analysis "easier." (Tr. Vol. 3 at 597, 593.) For each item of evidence, Snyder initially used a color test to determine whether a certain "class or a group of drugs [were] present." (Tr. Vol. 3 at 599.) Snyder then used a gas chromatograph mass

[1] Detective Randall also inventoried and impounded the tin foil and suspected marijuana present in the backpack. However, the FCSO chose not to send these items to the BCI laboratory for testing and the state brought no charges related to these items.

spectrometer ("GCMS") to accurately identify each substance. Snyder explained the GCMS would produce a report demonstrating "peaks of compounds that were identified" in each substance and then compare the peaks to a "known library" of narcotics to discover if the substance matched a known narcotic. (Tr. Vol. 3 at 601-02.)

{¶ 16} Snyder identified State's Exhibit LL as her report regarding the substances she tested in the present case. Snyder's results demonstrated the following: the items in property number 3478 consisted of 25.55 grams of cocaine and fentanyl,[2] 3.94 grams of fentanyl, 12.82 grams of fentanyl, 5.97 grams of cocaine and fentanyl; and 1.39 grams of cocaine and fentanyl; the item in property number 3479 consisted of 6.06 grams of cocaine; and the item in property number 3481 consisted of 3.35 grams of cocaine. Snyder explained BCI was a "qualitative" rather than a "quantitative lab," meaning her results identified the "substance contain[ed]" within each item, but not the precise amount of each substance contained within a mixture. (Tr. Vol. 3 at 609.)

{¶ 17} Appellant testified in his own defense at trial. Appellant initially explained that he ran from the police following the traffic accident because an officer shined a flashlight in his face and he thought the flashlight "looked to [him] like it was a gun." (Tr. Vol. 3 at 655.) Appellant stated he became "afraid" when he saw the gun because there are "a lot of officer-involved shootings." (Tr. Vol. 3 at 656.) Appellant also stated that he did not possess any guns or drugs on December 1, 2021. When the state asked appellant to explain how the officers discovered firearms on him after the shooting, appellant stated the officers "might have planted" the guns on him as part of a "cover-up conspiracy." (Tr. Vol. 4 at 755, 746.) Appellant claimed he only had clothes inside his purple and cream-colored backpack on the night of December 1, 2021.

{¶ 18} The parties stipulated that appellant had a prior conviction for second degree felony burglary, an offense of violence, from August 24, 2016. The parties also stipulated that the two firearms recovered from the scene on December 1, 2021 were test fired and found to be operable.

{¶ 19} During deliberations, the jury informed the court they were at an impasse on the drug possession charges. The court provided the jury with the instruction stated in *State v. Howard*, 42 Ohio St.3d 18 (1989), at paragraph two of the syllabus ("*Howard*

[2] Snyder explained that "fentanyl is classified under fentanyl-related compounds." (Tr. Vol. 3 at 615.)

charge"). Following the *Howard* charge, the jury returned verdicts finding appellant guilty on all counts and specifications charged in the indictment.

{¶ 20} The court held a sentencing hearing on September 20, 2024. The parties agreed that the two drug-possession charges merged for purposes of sentencing and the state elected to sentence appellant on the possession of cocaine charge in Count 1 of the indictment. The court sentenced appellant to a minimum prison term of 5 years and a maximum prison term of 7.5 years on Count 1, along with an additional 12-month prison term for the firearm specification, and to a 3-year prison term on the WUD charge in Count 3 of the indictment. The court ordered the sentence on the specification to run consecutive to the sentence on Count 1, and for the sentences on Counts 1 and 3 to run concurrent to each other, for a total minimum prison sentence of 6 years and a total maximum prison sentence of 8.5 years. The court notified appellant he would receive a period of post-release control of 1 to 3 years following his release from prison.

II. Assignments of Error

{¶ 21} Appellant appeals, assigning the following five assignments of error for our review:

> [I.] The defendant-appellant was entitled to discharge for delay in trial pursuant to R.C. 2945.73 where the time for trial required by R.C. 2945.71 had expired.
>
> [II.] Trial counsel rendered ineffective assistance in violation of the defendant-appellant's rights to counsel and to a fair trial under U.S. Const. Amend. V, VI, and XIV, and Ohio Const. Art. I, §10 and 16.
>
> [III.] The trial court violated the defendant-appellant's right to a speedy trial under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 of the Ohio Constitution. (This assignment of error is subject to plain error review.).
>
> [IV.] The trial court committed plain error and abused its discretion when the trial court allowed a sleeping juror to remain on the jury panel throughout the trial, in violation of the defendant-appellant's rights to due process and a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 16 of the Ohio Constitution.

> [V.] The verdicts of guilt for drug possession are against the manifest weight of the evidence.

III. First Assignment of Error – Statutory Speedy-Trial Rights

{¶ 22} In his first assignment of error, appellant contends the state violated his right to a speedy trial by not bringing him to trial within the time required by R.C. 2945.71. Appellant filed a motion to dismiss the case based on a violation of his statutory speedy-trial rights on August 6, 2024. The court denied the motion. Appellant renewed the motion to dismiss at the start of trial on September 9, 2024, and the court again denied the motion.

{¶ 23} The right to a speedy trial in criminal prosecutions is guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution. *State v. Smith*, 2021-Ohio-1936, ¶ 38 (10th Dist.). "In response to this constitutional mandate, Ohio . . . enacted R.C. 2945.71 to 2945.73, which designate specific time requirements for the state to bring an accused to trial." *State v. Baker*, 1997-Ohio-229, ¶ 8. *Accord State v. Glass*, 2011-Ohio-6287, ¶ 11 (10th Dist.), citing *Brecksville v. Cook*, 1996-Ohio-171, ¶ 6 (noting that "Ohio's speedy trial statutes, found in R.C. 2945.71 et seq., were implemented to enforce those constitutional guarantees").

{¶ 24} R.C. 2945.71(C)(2) requires that a person facing a "pending" felony charge be brought to trial within 270 days of being arrested, except as otherwise provided in R.C. 2945.73(C). Thus, because appellant faced felony charges in the present case, the state was required to bring him to trial within 270 days. A person charged with a felony who is not brought to trial within the time required by R.C. 2945.71 "is eligible for release from detention." R.C. 2945.73(C)(1).[3]

{¶ 25} The statutory speedy-trial provisions are mandatory and require strict compliance by prosecutors, as well as strict enforcement by courts. *State v. Loel*, 2014-

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[3] Effective April 4, 2023, the General Assembly amended portions of R.C. 2945.71 through 2945.73. Prior to the amendments, R.C. 2945.73 provided that, upon motion, "a person charged with an offense shall be discharged" if they were not brought to trial within the time required by R.C. 2945.71. Former R.C. 2945.73(B). Following the amendments, R.C. 2945.73(C)(2) now provides that, "[u]pon motion made at or before the commencement of trial, but not sooner than fourteen days before the day the person would become eligible for release" under R.C. 2945.73(C)(1), "the charges shall be dismissed with prejudice unless the person is brought to trial on those charges within fourteen days after the motion is filed and served on the prosecuting attorney." Thus, R.C. 2945.73(C)(2) now provides for a 14-day savings period during which the state may bring a defendant to trial following a defense motion to dismiss on speedy-trial grounds. *See State v. Mohamed*, 2025-Ohio-659, ¶ 7 (10th Dist.). Because we find the state brought appellant to trial within 270 days, we need not address whether the 14-day savings provision in R.C. 2945.73(C)(2) applies to the present case.

Ohio-3045, ¶ 6 (10th Dist.), citing *State v. Bayless*, 2002-Ohio-5791, ¶ 16 (10th Dist.). A defendant establishes a prima facie violation of their statutory speedy-trial right by demonstrating that more than 270 days elapsed before trial. *State v. Williams*, 2023-Ohio-1002, ¶ 14 (10th Dist.). Once a defendant establishes a prima facie case, the state bears the burden of proving that the speedy-trial period was sufficiently extended. *Id.*

{¶ 26} Speedy-trial time may be waived by the defendant or tolled pursuant to R.C. 2945.72. *State v. Pilgrim*, 2009-Ohio-5357, ¶ 40 (10th Dist.); *State v. Juarez-Hernandez*, 2012-Ohio-4835, ¶ 9 (10th Dist.). "While a defendant's waiver of speedy trial time requires an intentional relinquishment of a known right that must be expressed in writing or made in open court on the record, the tolling of speedy trial time under R.C. 2945.72 is automatic and extends the speedy trial time 'whether or not a waiver has been executed.' " *Juarez-Hernandez* at ¶ 9, quoting *State v. Blackburn*, 2008-Ohio-1823, ¶ 18. R.C. 2945.72 presents an exhaustive list of events and circumstances that toll speedy-trial time. *State v. Brown*, 2019-Ohio-4753, ¶ 29 (10th Dist.).

{¶ 27} A trial court's decision on a motion to dismiss based on a speedy-trial violation presents a mixed question of law and fact. *State v. Brown*, 2026-Ohio-1622, ¶ 12 (10th Dist.), citing *Williams* at ¶ 11. "On review, we give deference to the trial court's factual findings if they are supported by competent, credible evidence, but we independently review whether the trial court appropriately applied the law to those facts." *Id.* When presented with a statutory speedy-trial challenge, "the appellate court is tasked with counting the number of days that have passed while determining to which party the time is chargeable as directed in R.C. 2945.71 and 2945.72." *State v. Childs*, 2024-Ohio-4699, ¶ 26 (10th Dist.). *See Williams* at ¶ 14 (stating that "[o]n appeal of an order denying a motion to dismiss based on a statutory speedy-trial violation, [the appellate court must] independently calculate whether the time to bring a defendant to trial expired").

{¶ 28} The state filed the indictment against appellant in the present case, Franklin C.P. No. 23CR-593, on February 3, 2023. The state also filed a separate indictment against appellant on February 10, 2023, in Franklin C.P. No. 23CR-712. The indictment in case No. 23CR-712 charged appellant with four counts of felonious assault and two counts of WUD resulting from the officer-involved shooting on December 1, 2021. Appellant was arrested on both indictments on February 14, 2023. The arrest date is not chargeable to the state when computing speedy-trial time. *State v. Adams*, 2015-Ohio-3954, ¶ 82, fn. 7; *Pilgrim* at ¶ 41. Appellant's trial began on September 9, 2024. Accordingly, from the day following appellant's arrest to the start of appellant's trial, 573 days passed. As such, appellant established a prime facie violation of his statutory right to a speedy trial.

{¶ 29} R.C. 2945.71(E) provides that "each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days." Appellant remained in jail from the time he was arrested on February 14, 2023 until his trial began. However, the triple count provision in R.C. 2945.71(E) "is applicable only to those defendants held in jail in lieu of bail solely on the pending charge." *State v. MacDonald*, 48 Ohio St.2d 66 (1976), paragraph one of the syllabus. Accordingly, the triple count provision "does not apply when a defendant is being held in custody pursuant to other charges." *State v. Sanchez*, 2006-Ohio-4478, ¶ 7.

{¶ 30} Although appellant was being held in jail pursuant to charges in both case Nos. 23CR-593 and 23CR-712, he claims the multiple charges should be considered collectively as a "pending charge" for purposes of R.C. 2945.71(E). (Appellant's Brief at 23.) Appellant notes the charges in case Nos. 23CR-593 and 23CR-712 arose from a single criminal incident occurring on December 1, 2021, he was arrested on both indictments on February 14, 2023, the cases were assigned to the same trial court judge, and the cases were continued jointly 16 times.

{¶ 31} Appellant also claims his speedy-trial time in the present case began when he was initially arrested on a complaint filed in the Franklin County Municipal Court under M.C. No. 2021 CRA 17372. The municipal court complaint, time stamped December 2, 2021 at 2:48 a.m., charged appellant with four counts of felonious assault resulting from the officer-involved shooting on December 1, 2021. On December 14, 2021, appellant was arrested on the charges in case No. 2021 CRA 17372 and the Adult Parole Authority ("APA") placed a holder on him for an alleged PRC violation.[4] On December 23, 2021, the state dismissed the municipal court complaint for future indictment. Appellant asserts there are

[4] Appellant remained in prison on the PRC violation until September 15, 2022. (Appellant's Brief at 24.)

9 days of speedy-trial time chargeable to the state resulting from the municipal court complaint.[5] (Appellant's Brief at 25.)

{¶ 32} Appellant asserts that, because the state alleged he possessed both guns and drugs while shooting at the police on December 1, 2021, the state "could have added drug possession charges to the [municipal court complaint] with the felonious assault charges." (Appellant's Brief at 26.) The trial court rejected this argument, explaining that the state "couldn't have charged him with [the drugs in the municipal court complaint] because they didn't know they were actually drugs. And they did have to get an analysis to go ahead and indict him." (Aug. 8, 2024 Hearing Tr. at 24.)

{¶ 33} " '[W]hen new and additional charges arise from the same facts as did the original charge and the state knew of such facts at the time of the initial indictment, the time within which trial is to begin on the additional charge is subject to the same statutory limitations period that is applied to the original charge.' " *State v. Adams*, 43 Ohio St.3d 67, 68 (1989), quoting *State v. Clay*, 9 Ohio App.3d 216 (11th Dist. 1983). *See also State v. Parsley*, 82 Ohio App.3d 567, 571 (10th Dist. 1993). Conversely, when additional criminal charges arise from different facts from those supporting an original charge, or the state was unaware of such facts at the time it filed the original charge, the state is not required to bring the accused to trial within the same statutory period as the original charge. *Baker*, 1997-Ohio-229, ¶ 13. In other words, "when new facts come to light after an arrest, additional offenses charged may be subject to a new speedy-trial period." *State v. Sanford*, 2022-Ohio-3107, ¶ 25.

{¶ 34} To determine whether the state knew of the facts supporting an additional offense at the time it filed initial charges, "[t]he proper inquiry is to consider whether at the time the initial charges were filed, the state had all the information necessary to bring additional related charges." *Id.* at ¶ 29. "If the state had the necessary information at the outset, then the additional charges are subject to the same speedy-trial period as the original charges. If not, then the additional charges will trigger a new speedy-trial clock." *Id.* The determination in this regard involves a fact-dependent inquiry. *Id.* at ¶ 30.

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[5] Appellant does not argue for triple-counting the 9 days. As noted, the APA placed a holder on appellant when he was arrested. "The existence of a valid parole holder prevents application of the triple-count provisions of R.C. 2945.71(E)." *State v. Brown*, 1996-Ohio-96, ¶ 12. *Accord State v. Olverson*, 2003-Ohio-1274, ¶ 31 (10th Dist.).

{¶ 35} In *Sanford*, the court concluded the state did not have the information necessary to charge the defendant with an operating a vehicle while under the influence of alcohol or drugs ("OVI") per se offense when the state initially charged the defendant with a felony traffic offense. The court explained that, because the OVI per se offense was based on the results of a blood draw, and the state did not receive the toxicology report from the blood draw until after it filed the initial traffic charge, the OVI per se charge was based on "new information unknown to the state at the time of the defendant's arrest." *Id.* at ¶ 3. As such, the speedy-trial period for the OVI per se offense did not include the period applicable to the initial felony traffic offense. *Id.* at ¶ 32. *Accord State v. Mitchell*, 2022-Ohio-4646, ¶ 27 (5th Dist.); *State v. Skinner*, 2007-Ohio-6320 (4th Dist.); *State v. Cantrell*, 2001 Ohio App. LEXIS 3936, *5 (2d Dist. Sept. 7, 2001). However, the court in *Sanford* cautioned there could be situations "in which investigating officers have enough information to charge an offense based on other evidence, and a subsequent test result would merely be cumulative. . . . In such a case, the original speedy-trial period would still apply." *Sanford* at ¶ 30. *See State v. Davis*, 2026-Ohio-1798, ¶ 16-17 (6th Dist.) (finding the state had "the information necessary to bring the marijuana-related charges at the time that the initial traffic charges were filed," where the record demonstrated the arresting officer knew the substance in the car was marijuana based on "(1) [the officer's] olfactory detection, (2) [the defendant's] admission, and (3) the recovery of four lbs. of marijuana from [the defendant's] vehicle").

{¶ 36} When a laboratory analysis is necessary to identify a particular substance, this court has held that laboratory results "that were not known at the time of the original indictment constitute[] 'additional facts,' which warrant[] the triggering of a new speedy trial clock." *State v. Mohamed*, 2009-Ohio-6658, ¶ 42 (10th Dist.). Indeed, a majority of the Ohio appellate districts "have held that a subsequent indictment for a drug offense, which was dependent upon a lab analysis to identify the drug and was not available to the state at the time of the original indictment, is an additional fact that starts the running of a new speedy trial clock for the subsequent charge." *State v. Havens*, 2022-Ohio-1712, ¶ 15 (4th Dist.). *See State v. Vasquez*, 2014-Ohio-224, ¶ 39 (10th Dist.) (concluding that because the lab report identifying the substance as heroin was an "additional fact not known to the state at the time of the [initial] indictment," the state was not "subject to the speedy trial timetable of the initial indictment"); *State v. Jones*, 2024-Ohio-2959, ¶ 35-36 (3d Dist.) (explaining that because a laboratory report identifying the pressed pills as methamphetamine, rather than ecstasy as claimed by the defendant, was "imperative" for the state to bring the proper charges against the defendant, the lab report was an additional fact that "was not available to the State at the time it brought the [initial] charges"); *State v. Armstrong*, 2004-Ohio-726, ¶ 10 (9th Dist.); *State v. Dalton*, 2004-Ohio-3575, ¶ 13 (2d Dist.); *State v. Riley*, 2000 Ohio App. LEXIS 2468, *5, (12th Dist. June 12, 2000).

{¶ 37} When the state filed the felonious assault complaint in municipal court on December 2, 2021, it did not have all the information necessary to charge appellant with either possession of cocaine or possession of a fentanyl-related compound. The FCSO submitted the suspected narcotics recovered from the backpack to the BCI laboratory for testing on December 16, 2021, Snyder conducted her analysis on April 25, 2022, and Snyder issued her report regarding the substances on May 25, 2022. Thus, the state did not have the lab report identifying the substances as cocaine and fentanyl when it filed the initial complaint in municipal court.

{¶ 38} Appellant, however, contends the state could have filed the drug possession charges when it filed the municipal court complaint because Deputy Ball "suspected" the items he recovered from appellant in the ambulance "were illegal drugs." (Appellant's Brief at 25.) Deputy Ball explained at trial that, while he thought he "kn[e]w what some of the [items] were" that he recovered from appellant, "[t]o this day, [he didn't] know specifically what the [items] were." (Tr. Vol. 2 at 342.) While Deputy Ball stated he suspected the items were "miscellaneous drugs," he never stated that he suspected the substances were cocaine or fentanyl. (Tr. Vol. 2 at 337.) *See State v. Brown*, 2012-Ohio-5903, ¶ 13 (10th Dist.) (noting that even when an arresting officer "suspect[s] that the seized contraband was cocaine," if a subsequent laboratory analysis is necessary to "confirm[] those suspicions," the laboratory report constitutes "an additional fact not known to the state at the time of the original charges"); *State v. Clark*, 2004-Ohio-334, ¶ 73 (11th Dist.); *State v. Scott*, 2009-Ohio-6785, ¶ 22 (10th Dist.).

{¶ 39} Appellant also notes that "police have field testing and substance weighing capability and routinely use it to combat the possession of illegal drugs." (Appellant's Reply Brief at 10.) Thus, appellant appears to argue that the state could have included drug possession charges in the municipal court complaint because officers could have field tested the drugs. *Sanford*, however, directs this court to consider the information the state had at the time it filed the initial charges, not the information the state could have had. Deputy Ball testified that he did not carry a drug testing kit with him while on patrol and that he did not field test the items he recovered from appellant.[6] When the state filed the felonious assault complaint in municipal court at 2:48 a.m. on December 2, 2021, the FCSO had not yet processed the search warrant for appellant's backpack.

{¶ 40} Accordingly, because a laboratory test was necessary to confirm Deputy Ball's suspicion that the items he recovered from appellant were illegal narcotics, and to identify the type of narcotics at issue, the BCI lab report identifying the drugs was an additional fact that was not known to the state when it filed the municipal court complaint. Therefore, the speedy-trial time in the present case did not include the 9 days resulting from the municipal court complaint.[7]

{¶ 41} Thus, the speedy-trial clock in the present case began the day following the second time appellant was arrested on February 14, 2023. On February 16, 2023, appellant filed a demand for discovery and a motion for a bill of particulars. R.C. 2945.72(E) provides that the time within which an accused must be brought to trial may be extended by "[a]ny period of delay necessitated by reason of a . . . motion . . . made or instituted by the accused." "A demand for discovery or a bill of particulars is a tolling event pursuant to R.C. 2945.72(E)." *State v. Brown*, 2002-Ohio-7040, syllabus. "A discovery request tolls speedy-trial time for a reasonable amount of time necessary to allow the state to respond to

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[6] Snyder also explained at trial how the "little testing kits" police use in the field to identify an unknown substance could only "indicate that there could be a class or a group of drugs present." (Tr. Vol. 3 at 598-99.) She explained the field-testing kits could not "tell you a specific" substance, and stated that "sometimes there [would be] false positives. So you are not even sure that [a given substance] could truly be there." (Tr. Vol. 3 at 598.)

[7] Appellant's arguments regarding the municipal court complaint focus solely on the state's ability to bring the drug possession charges in that complaint. Appellant does not present a specific argument regarding the WUD charge. Because it is not the job of this court to make an argument for an appellant, we will not address this issue. *See State v. England*, 2006-Ohio-5087, ¶ 16 (10th Dist.) (noting it is "inappropriate for this court to construct the legal arguments in support of an appellant's appeal"); *Cook v. Wilson*, 2006-Ohio-234, ¶ 15 (10th Dist.), quoting *Helman v. EPL Prolong, Inc.*, 139 Ohio App.3d 231, 240 (7th Dist. 2000) (stating that "[c]ourts of appeal 'cannot and will not search the record in order to make arguments on appellant['s] behalf' ").

the request." *State v. Belville*, 2022-Ohio-3879, ¶ 21. The state filed its response to appellant's demand for discovery and filed a bill of particulars on April 14, 2023.

{¶ 42} Additionally, on March 14, 2023, the parties made a joint motion to continue the case from March 14 to April 13, 2023. The court granted the continuance and appellant, his attorney, and the prosecutor all signed the continuance entry. The continuance entry stated appellant "waive[d] the right to a speedy trial for the period of th[e] continuance." (Mar. 14, 2023 Continuance Entry.) R.C. 2945.72(H) provides that the time within which an accused must be brought to trial may be extended by "[t]he period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion." A continuance granted upon the joint motion of the parties tolls speedy-trial time pursuant to R.C. 2945.72(H) because the motion is made, in part, by the defendant. *State v. Watson*, 2013-Ohio-5603, ¶ 19 (10th Dist.). *Accord State v. Dillon*, 2006-Ohio-3312, ¶ 35 (10th Dist.) (noting that because joint motions for a continuance were "requested, in part, by [the defendant], they tolled the speedy-trial time" pursuant to R.C. 2945.72(H)); *State v. Barbour*, 2008-Ohio-2291, ¶ 17 (10th Dist.). The only continuances which must be reasonable to toll the statutory time under R.C. 2945.72(H) are those "requested by the state or sua sponte ordered by the trial court." *Glass*, 2011-Ohio-6287, at ¶ 16 (10th Dist.). Thus, from appellant's arrest on February 14 to April 14, 2023, only one day of speedy-trial time was chargeable to the state.

{¶ 43} When the state filed its response to appellant's demand for discovery on April 14, 2023, it also filed a reciprocal demand for discovery. However, appellant did not respond to the state's demand for discovery. The state again filed demands for discovery on July 21, 2023 and July 23, 2024, but appellant did not respond to any of the state's demands for discovery.

{¶ 44} In *State v. Palmer*, 2007-Ohio-374, paragraph one of the syllabus, the court held that the "failure of a criminal defendant to respond within a reasonable time to a prosecution request for reciprocal discovery constitutes neglect that tolls the running of speedy-trial time pursuant to R.C. 2945.72(D)." R.C. 2945.72(D) tolls "[a]ny period of delay occasioned by the neglect or improper act of the accused." *See State v. Wilcox*, 2025-Ohio-891, ¶ 14, (11th Dist.), quoting *State v. Bradley*, 2005-Ohio-6572, ¶ 27 (11th Dist.) (noting that " '[c]ourts in Ohio have repeatedly held that when the State lawfully requests reciprocal discovery from the defendant and the defendant fails to comply, the speedy trial time remains tolled and is charged to the defendant under R.C. 2945.72(D)"). *Palmer* noted the trial court should "determine the date by which a defendant should reasonably have responded to a reciprocal discovery request based on the totality of facts and circumstances of the case, including the time established for response by local rule, if applicable." *Palmer* at paragraph three of the syllabus. The state is under no obligation to demonstrate it was prejudiced by the defendant's failure to respond to its demand for discovery. *Id.* at ¶ 21. *See also Sanchez*, 2006-Ohio-4478, ¶ 26.

{¶ 45} "Under *Palmer*, it is the period of time that constitutes *neglect by the defendant*, i.e., the period of time *after* the reasonable response time, not the period of time that constitutes the reasonable response time itself, that is properly tolled." (Emphasis in original.) *State v. Geraci*, 2015-Ohio-2699, ¶ 25 (8th Dist.), citing *Palmer* at ¶ 23. *Accord State v. Miller*, 2010-Ohio-5795, ¶ 59 (11th Dist.) (explaining that, because the defendant failed to respond to the state's request for reciprocal discovery, the speedy-trial time "tolled on April 17, 2009, which [was] 30 days after the state filed its request for discovery on March 17, 2009"); *State v. Saultz*, 2011-Ohio-2018, ¶ 4, 11-16 (4th Dist.); *State v. Suleiman Abdullah Jama*, 2024-Ohio-2657, ¶ 14 (6th Dist.).

{¶ 46} Appellant acknowledges he did not respond to the state's demands for reciprocal discovery but asks that we ignore this issue because the state did not raise *Palmer* in response to his motion to dismiss in the trial court. (Appellant's Reply Brief at 11.) While this court typically refuses to consider arguments raised for the first time on appeal, we have held that "based upon our standard of review that requires us to review a speedy trial case by independently calculating when the time to bring a defendant to trial expires, . . . the state did not waive [a particular] argument" regarding speedy-trial time by failing to raise it in the trial court. *State v. Pritchard*, 2013-Ohio-1255, ¶ 12 (10th Dist.). *Accord State v. Toler*, 2009-Ohio-6669, ¶ 24 (4th Dist.) (explaining that because an appellate court's duty when "reviewing an alleged speedy trial violation is to independently review the record and to calculate the speedy trial time," whether the state "raised this particular argument during the trial court proceeding [was] inconsequential"); *State v. Williams*, 2008-Ohio-1532, ¶ 38 (7th Dist.). *Compare State v. Kemper*, 2025-Ohio-4481, ¶ 15 (2d Dist.).

{¶ 47} Appellant also asserts his trial counsel's failure to file a formal response to the state's demand for discovery demonstrates "trial counsel's ineffectiveness" under his second assignment of error. (Appellant's Reply Brief at 11.) This court addressed, and rejected, the same argument in *State v. Neer*, 2020-Ohio-279 (10th Dist.). There we explained that a defendant cannot establish prejudice under the test for ineffective assistance of counsel by claiming that, if their trial counsel had complied with *Palmer* and responded to the state's request for discovery, the state then would have violated the defendant's speedy-trial rights. We noted that to find prejudice under such a scenario would require this court to impermissibly presume that " ' "the trial court and the State would have sat idly by and permitted the * * * charges * * * to [lapse] due to a violation of [the defendant's] speedy trial rights." ' " *Neer* at ¶ 6, quoting *State v. Miller*, 2008-Ohio-1002, ¶ 6 (9th Dist.), quoting *State v. Hillard*, 2006-Ohio-3918, ¶ 13 (9th Dist.). Furthermore, while appellant claims he did not have any reciprocal discovery to provide, a defendant still "must respond to the discovery request by notifying the State" that they have "no discovery to provide." *Suleiman Abdullah Jama* at ¶ 15.

{¶ 48} Applying *Palmer* to the present case, we find that the remainder of the speedy-trial time tolled pursuant to R.C. 2945.72(D) following the period within which appellant should have responded to the state's April 14, 2023 demand for discovery. Loc.R. 75.03 of the Franklin County Court of Common Pleas, General Division provides that a party must respond to a discovery demand within 21 days. In *State v. Brown*, 2019-Ohio-4753 (10th Dist.), we observed that Loc.R. 75.03 "set[] a reasonable time period" within which a defendant should respond to the state's demand for discovery. *Brown* at ¶ 31. In *Palmer*, the court found a 30-day response time to be reasonable. *Palmer*, 2007-Ohio-374, at ¶ 23. *See also State v. Fluker*, 2026-Ohio-1278, ¶ 137 (8th Dist.) (noting that, "under most circumstances, [the court had] considered 30 days to be a reasonable time for a defendant to respond"). Adding the one prior day of speedy-trial time to either a 21-day or 30-day response period would demonstrate that either 22 or 31 days of speedy-trial time passed before the remainder of the speedy-trial time tolled. Even applying the triple-count provision to either number, the state brought appellant to trial well within 270 days.

{¶ 49} Moreover, even if we were to ignore the *Palmer* violation, we would still find the state brought appellant to trial within 270 days in the present case. On April 13, 2023, the court granted a continuance on the joint motion of the parties, continuing the trial to May 16, 2023. The speedy-trial time tolled during this period pursuant to R.C. 2945.72(H).

{¶ 50} On May 16, 2023, the court granted another continuance, continuing the case to June 27, 2023. Although the continuance stated it was requested by the "parties," neither appellant nor appellant's counsel signed the May 16, 2023 continuance entry. The trial court found the time resulting from the May 16, 2023 continuance chargeable to the state. We agree and find 43 days resulting from the May 16, 2023 continuance. Thus, as of June 27, 2023, the speedy-trial time totaled 44 days.[8]

{¶ 51} On June 27, 2023, the court sua sponte continued the case to July 5, 2023. The court did not provide any reason for the continuance. Accordingly, we find the 8 days resulting from the court's sua sponte continuance chargeable to the state. Thus, as of July 5, 2023, the statutory speedy-trial time totaled 52 days.

{¶ 52} From July 5, 2023 to August 6, 2024, the court granted 12 consecutive continuances made either upon the joint motion of the parties or on the motion of appellant.[9] The continuance entries all contained language demonstrating that appellant

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[8] On May 26, 2023, appellant filed a one-page pro se motion "to reassert his fast and speedy trial rights, pursuant to R.C. 2945.71." Because appellant was represented by counsel, the pro se motion was not proper and the trial court had no obligation to consider it. *See State v. Davis*, 2006-Ohio-5039, ¶ 12 (10th Dist.); *State v. Rice*, 2009-Ohio-5419, ¶ 8 (9th Dist.). The state argues the pro se motion tolled speedy-trial time pursuant to R.C. 2945.72(E). (Appellee's Brief at 24.) *See State v. Hill*, 2019-Ohio-5329, ¶ 11 (9th Dist.) (holding that "the filing of pro se motions by the defendant, even when he or she is represented by counsel, does toll the speedy trial clock for a reasonable period of time pursuant to R.C. 2945.72(E)"). However, under R.C. 2945.72(E), "a trial court must resolve a defendant's motion within a reasonable time. Otherwise, tolling ceases." *State v. Adams*, 2025-Ohio-483, ¶ 18 (2d Dist.). *Accord State v. Kendall*, 2025-Ohio-10 (2d Dist.). In *Akron v. Schaffer*, 2026-Ohio-2017 (9th Dist.), the court found the defendant's pro se motions tolled speedy-trial time pursuant to *Hill* but further concluded that because the trial court "never determined what constituted a reasonable amount of time to review the pro se motions for speedy trial purposes" the matter had to be "reversed and remanded for the trial court to make [that] initial determination." *Id.* at ¶ 22. In the present case, the trial court neither ruled on the pro se motion nor determined what a reasonable response period would be. As such, while we acknowledge that pro se motions can toll speedy-trial time pursuant to R.C. 2945.72(E) in certain scenarios, we will not include the pro se motion in our present speedy-trial calculation.

[9] Although the entry continuing the case from July 5 to July 31, 2023 was not filed until August 2, 2023, it was nevertheless filed within the 270-day speedy-trial limit. As such, the entry validly tolled the speedy-trial time during the period of the continuance. *See State v. Littlefield*, 2002-Ohio-3399, ¶ 11 (3d Dist.) (observing that, "although the [continuance] entry was not filed until one month after the originally scheduled trial date, it was filed within the statutory time period," and therefore finding that the continuance validly tolled the statutory speedy-trial time); *State v. Humphreys*, 2026-Ohio-373, ¶ 34 (2d Dist.) (noting that, although the trial court "filed its continuance entries a few days after the scheduled trial dates, the lag time was nevertheless part of the tolling period as the entries were filed within the statutory speedy-trial time limit").

waived his right to a speedy trial during the period of the continuance. Although appellant refused to sign many of the continuance entry forms, his attorney approved and signed the entries. "It is well-established that a defendant is bound by the actions of counsel in waiving speedy trial rights by seeking or agreeing to a continuance, even over the defendant's objections." *Glass*, 2011-Ohio-6287, at ¶ 17 (10th Dist.), citing *State v. McQueen*, 2009-Ohio-6272, ¶ 37 (10th Dist.). *Accord State v. Taylor*, 2002-Ohio-7017, ¶ 33, citing *State v. McBreen*, 54 Ohio St.2d 315 (1978) (noting a "defendant is bound by his counsel's waiver of speedy trial rights, even though the waiver might have been executed without his consent"); *State v. Brime*, 2009-Ohio-6572, ¶ 18 (10th Dist.). Accordingly, the speedy-trial time tolled from July 5, 2023 to August 6, 2024, pursuant to R.C. 2945.72(H).

{¶ 53} On August 6, 2024 appellant, through counsel, filed a motion to dismiss the case based on a violation of his statutory speedy-trial rights. The court denied the motion on August 8, 2024. Accordingly, the period from August 6 to August 8, 2024, tolled pursuant to R.C. 2945.72(E). *See Juarez-Hernandez*, 2012-Ohio-4835, at ¶ 14 (10th Dist.) (noting the filing of "appellant's motion to dismiss tolled time until the date the trial court denied the motion").

{¶ 54} On August 7, 2024 the court granted the state's motion to continue the case to August 19, 2024. The language on the August 7, 2024 continuance entry form indicating appellant waived his right to a speedy trial during the period of the continuance was crossed out. The only reason stated for the August 7, 2024 continuance was "to set for trial." (Aug. 7, 2024 Continuance Entry.) Because the state did not provide any further reason for the continuance, we find the time resulting from the August 7, 2024 continuance chargeable to the state. *Compare State v. Crocker*, 2015-Ohio-2528, ¶ 58 (4th Dist.) (noting that "[a] continuance granted on the state's motion due to the unavailability of the prosecutor can toll the speedy-trial time"). As such, from the date the court ruled on appellant's motion to dismiss on August 8 to August 19, 2024, 11 days of speedy-trial time passed. Thus, as of August 19, 2024, the speedy-trial time chargeable to the state totaled 63 days.

{¶ 55} On August 19, 2024, the court sua sponte continued the case to September 9, 2024. The reason stated for the continuance was to "set for trial after M.H. First Available Date." (Aug. 19, 2024 Continuance Entry.) The statement indicating appellant waived his right to a speedy trial during the period of the continuance was again crossed out, and defense counsel signed the August 19, 2024 continuance "over objection." (Aug. 19, 2024 Continuance Entry.) "Generally, a continuance due to the trial court's engagement in another trial is reasonable provided that the number of days for which it is continued does not render the continuance unreasonable." *State v. Miller*, 2006-Ohio-4988, ¶ 14 (10th Dist.), citing *State v. Munns*, 2006-Ohio-1852 (5th Dist.). *Accord State v. Barnes*, 2000 Ohio App. LEXIS 2537, *7 (7th Dist. May 19, 2000). Indeed, "[s]cheduling and docketing conflicts have been held to be reasonable grounds for extending an accused's trial date." *State v. Glass*, 2004-Ohio-4402, ¶ 11 (3d Dist.)

{¶ 56} Nevertheless, even if we were to find the period from August 19 to September 9, 2024, a period of 21 days, chargeable to the state, the speedy-trial time would total 84 days. Even applying the triple-count provision to this number, the state still brought appellant to trial within 252 days.[10] Accordingly, the state brought appellant to trial within the 270-day limit provided in R.C. 2945.71(C).

{¶ 57} Based on the foregoing, we find the state did not violate appellant's right to a speedy trial under R.C. 2945.71 to 2945.73. We therefore overrule appellant's first assignment of error.

IV. Third Assignment of Error – Constitutional Speedy-Trial Rights

{¶ 58} In his third assignment of error, appellant contends the trial court violated his right to a speedy trial under the United States and Ohio Constitutions. Appellant did not allege a violation of his constitutional speedy-trial rights in the trial court. As such, we review appellant's third assignment of error for plain error. *See State v. Blacker*, 2024-Ohio-5611, ¶ 64 (10th Dist.).

{¶ 59} Crim.R. 52(B) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." For an error to constitute "plain error" under Crim.R. 52(B), it must satisfy three prongs: (1) there must be an error, meaning a deviation from a legal rule, (2) the error must be "plain," meaning an "obvious" defect in the trial proceedings, and (3) the error must have affected "substantial rights," meaning the error must have affected the outcome of the trial. *State*

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[10] Notably, while the speedy-trial time in the present case did not include the 9 days resulting from the municipal court complaint, even if we were to include those 9 days in our calculation the state still would have brought appellant to trial within the 270-day period.

v. Barnes, 2002-Ohio-68, ¶ 20. An appellate court recognizes plain error with the utmost caution, under exceptional circumstances, and only to prevent a miscarriage of justice. *Pilgrim*, 2009-Ohio-5357, at ¶ 58 (10th Dist.), citing *State v. Saleh*, 2009-Ohio-1542, ¶ 68 (10th Dist.). The defendant bears the burden of demonstrating plain error. *State v. Perry*, 2004-Ohio-297, ¶ 14.

{¶ 60} The Sixth Amendment to the United States Constitution guarantees that, in all criminal prosecutions "the accused shall enjoy the right to a speedy and public trial." Article I, Section 10 of the Ohio Constitution also guarantees an accused the right to "a speedy public trial." Although statutory and constitutional speedy-trial rights are generally coextensive, the constitutional right, as embodied in the Ohio Constitution and the United States Constitution, " 'may be broader than the * * * statutory right' in some circumstances." *State v. Wagner*, 2021-Ohio-1671, ¶ 14 (2d Dist.), quoting *State v. Kadunc*, 2016-Ohio-4637, ¶ 19 (10th Dist.).

{¶ 61} When a defendant alleges the state violated their constitutional right to a speedy trial, courts analyze the claim using the test set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). *See, e.g.*, *State v. Selvage*, 1997-Ohio-287, ¶ 8-18 (applying *Barker*). The court in *Barker* identified four factors courts use to evaluate speedy-trial violations: (1) whether the delay before trial was uncommonly long; (2) whether the government or the criminal defendant is more to blame for the delay; (3) whether the defendant asserted their right to a speedy trial; and (4) whether the defendant suffered prejudice as a result of the delay. These four factors are balanced together considering the totality of the circumstances, with no one factor controlling. *Barker* at 533; *Selvage* at ¶ 8.

{¶ 62} The first factor, however, regarding the length of the delay, is "to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors." *Barker* at 530. Generally, a delay that approaches one year is presumptively prejudicial. *Adams*, 2015-Ohio-3954, at ¶ 90, citing *Doggett v. United States*, 505 U.S. 647, 652, fn. 1 (1992). The state filed the indictment in the present case on February 3, 2023, and appellant's trial commenced well over one year later on September 9, 2024. Accordingly, the delay was presumptively prejudicial.

{¶ 63} The second factor concerns the reasons for the delay and whether the state or defendant was more to blame for the delay. In *Barker*, the court observed that a deliberate attempt by the state to delay the trial "in order to hamper the defense should be weighted heavily against the government," while a "valid reason, such as a missing witness, should serve to justify appropriate delay." *Barker* at 531. The court also noted that a "more neutral reason" such as "overcrowded courts" should be weighted less heavily. *Id.*

{¶ 64} The record demonstrates that a large portion of delay in the present case resulted from continuances requested jointly by the parties. Indeed, the parties requested 12 joint continuances that continued the trial for a total of 430 days. Appellant requested 2 continuances on his own that continued the trial for a period of 31 days. The state requested 1 continuance on its own, continuing the trial for 11 days, and the court sua sponte requested 2 continuances, continuing the trial for a total of 29 days. The reasons stated in the continuances do not demonstrate any attempt by the state to delay the trial for its own benefit. Several of the joint continuances demonstrate the parties requested the continuance for reasons relating to appellant, including that appellant was "awaiting receipt of [his] medical and military records," appellant's need to get "all medical records," and because "defense counsel [was] obtaining material." (*See* Jan. 9, Feb. 27, and Apr. 11, 2024 Continuance Entries.) Some of the other reasons stated in the joint continuances include discussions, negotiations, discovery, and because appellant had a new attorney.

{¶ 65} Although appellant refused to sign many of the continuance entry forms, appellant's attorney approved and signed the entries. The jointly requested continuances also all contained language demonstrating that appellant waived his right to a speedy trial during the period of the continuance. "[A]n accused's express written waiver of his statutory rights to a speedy trial, made knowingly and voluntarily, also constitutes a waiver of his speedy trial rights guaranteed by the United States and Ohio Constitutions." *State v. King*, 1994-Ohio-412, ¶ 9. The court in *King* also noted that "a defendant's statutory right to a speedy trial may be waived, with or without the defendant's consent, by the defendant's counsel." *Id.*, citing *McBreen*, 54 Ohio St.2d 315, syllabus. Thus, a large part of the delay in the present case was attributable to continuances requested at least in part by appellant, signed by defense counsel, and that included an express waiver of appellant's speedy-trial rights. *See State v. Diallo*, 2025-Ohio-5812, ¶ 21 (10th Dist.) (noting that "despite the omission of [the defendant's] signature on the joint continuances" it "remain[ed] significant that the trial delay in th[e] case was attributable to continuances that were requested by the parties, signed by defense counsel, and included an express speedy trial waiver"). As such, the second *Barker* factor does not weigh in appellant's favor.

{¶ 66} The third *Barker* factor concerns whether the defendant asserted their right to a speedy trial. On May 26, 2023, appellant filed a pro se motion "to reassert his fast and speedy trial rights, pursuant to R.C. 2945.71," and, on August 6, 2024, appellant's counsel filed a motion to dismiss the case based on a violation of appellant's speedy-trial rights. "Generally, when the defendant has filed a motion to dismiss based on speedy trial violations, courts will weigh the third *Barker* factor in the defendant's favor." *Watson*, 2013-Ohio-5603, at ¶ 29 (10th Dist.). Appellant did not request any continuances after filing the motion to dismiss on August 6, 2024. *Compare State v. Day*, 2019-Ohio-1327, ¶ 16 (10th Dist.) (explaining that "[r]equesting continuances after asserting the right to a speedy trial diminishes the weight given to the defendant's" assertion of the right). The third *Barker* factor weighs in appellant's favor.

{¶ 67} The fourth *Barker* factor concerns prejudice to the defendant resulting from the delay. Courts assess prejudice in light "of the interests of defendants which the speedy trial right was designed to protect." *Blacker*, 2024-Ohio-5611, at ¶ 72 (10th Dist.). Those interests are (1) to prevent oppressive pre-trial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility that the defense will be impaired. *Barker*, 407 U.S. at 532. Of these, the "most serious" is the possibility the defense would be impaired "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.* Indeed, if witnesses die or disappear or memories fade during the delay, the prejudice to the defendant "is obvious." *Id. Accord Watson* at ¶ 30.

{¶ 68} Because the bulk of the delay in the present case was attributable to continuances requested by appellant, we do not find appellant's pre-trial incarceration to be oppressive. *See Watson* at ¶ 32. Appellant notes the length of his pre-trial incarceration and the fact he asserted his speedy-trial rights, and contends the record demonstrates he was "concerned and anxious about having a speedy trial." (Appellant's Brief at 48.) While "facing criminal charges for an extended period of time necessarily entails some level of anxiety and concern, [a defendant's] bare allegation of anxiety and concern presents no particular reason for this factor to weigh heavily in our consideration." *Glass*, 2011-Ohio-6287, at ¶ 26 (10th Dist.). *Accord State v. Eicher*, 2007-Ohio-6813, ¶ 33 (8th Dist.) (noting an appellant's "blanket statement, without more, that she 'suffered much anxiety and concern' " during her pre-trial incarceration was "insufficient to show the type of prejudice required for a violation of constitutional speedy trial rights"). Appellant's bare allegation of anxiety and concern does not demonstrate prejudice under the fourth *Barker* factor.

{¶ 69} Critically, appellant fails to identify any way in which the pre-trial delay impaired his defense. Indeed, appellant does not claim that any witnesses died or otherwise became unavailable during the delay. Appellant's defense at trial was that he did not possess guns or drugs on December 1, 2021, and appellant does not explain how the pre-trial delay impacted this defense. It would appear the delay would have equally weakened the memories of both appellant's and the state's witnesses. *See State v. Walker*, 2007-Ohio-4666, ¶ 35 (10th Dist.) (noting that "both defendant's and the state's ability to prepare cases was potentially weakened by possible lapses of memory and possible loss of physical evidence"). Accordingly, the fourth *Barker* factor does not weigh in appellant's favor. *See Diallo*, 2025-Ohio-5812, at ¶ 24 (10th Dist.).

{¶ 70} After balancing the *Barker* factors we conclude that, under the particular facts of this case, appellant was not deprived of his right to a speedy trial as guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10, of the Ohio Constitution. As such, we find appellant failed to demonstrate plain error.

{¶ 71} Based on the foregoing, we overrule appellant's third assignment of error.

V. Fifth Assignment of Error – Manifest Weight of the Evidence

{¶ 72} In his fifth assignment of error, appellant asserts his convictions for possession of cocaine and possession of a fentanyl-related compound were against the manifest weight of the evidence due to breaks in the chain of custody.

{¶ 73} "[T]he criminal manifest weight of the evidence standard addresses the evidence's effect of inducing belief." *State v. Cassel*, 2010-Ohio-1881, ¶ 38 (10th Dist.), citing *State v. Wilson*, 2007-Ohio-2202, ¶ 25. When considering an appellant's claim that a conviction is against the manifest weight of the evidence, this court sits as the "thirteenth juror" and may disagree "with the factfinder's resolution of the conflicting testimony." *State v. Thompkins*, 1997-Ohio-52, ¶ 25, citing *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). *See State v. Reillo*, 2026-Ohio-2701, ¶ 27. In making this determination, we must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins* at ¶ 25; *State v. Martin*, 2022-Ohio-4175, ¶ 26. An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at ¶ 25, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist. 1983).

{¶ 74} Thus, in addressing a manifest weight of the evidence argument, we are able to consider the credibility of the witnesses. *State v. Cattledge*, 2010-Ohio-4953, ¶ 6 (10th Dist.). "But '[i]n weighing the evidence, the court of appeals must always be mindful of the presumption in favor of the finder of fact.' " *Reillo* at ¶ 28, quoting *Eastley v. Volkman*, 2012-Ohio-2179, ¶ 21. Thus, in conducting our review, we are guided by the presumption that the jury " 'is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' " *Cattledge* at ¶ 6, quoting *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984). Accordingly, we afford great deference to the jury's determination of witness credibility. *State v. Redman*, 2011-Ohio-1894, ¶ 26 (10th Dist.), citing *State v. Jennings*, 2009-Ohio-6840, ¶ 55 (10th Dist.). *See State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus (stating that "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts"). To reverse a jury verdict as being against the manifest weight of the evidence, a unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required pursuant to Article IV, Section 3(B)(3) of the Ohio Constitution. *Bryan-Wollman v. Domonko*, 2007-Ohio-4918, ¶ 2-4, citing *Thompkins* at paragraph four of the syllabus.

{¶ 75} Evidence demonstrating the chain of custody for an item "is a part of the authentication and identification mandate set forth in Evid.R. 901." *State v. Brown*, 107 Ohio App.3d 194, 200 (3d Dist. 1995), citing *State v. Barzacchini*, 96 Ohio App.3d 440, 457-58 (6th Dist. 1994). *See State v. Haeckl*, 1979 Ohio App. LEXIS 9269, *3 (1st Dist. Nov. 28, 1979) (explaining that "[c]hain of custody is a term of art which describes the process by which the possession or control of physical evidence sought to be introduced at trial is traced backward to a relevant point of reference in the operative facts of a lawsuit"); *Barzacchini* at 457 (stating that "[w]hen evidence is to be used to prove some fact, it is not competent evidence unless it is shown to be in essentially the same condition as when it was discovered"). Evid.R. 901(A) provides that the proponent of the evidence bears the burden of authenticating it by producing "evidence sufficient to support a finding that the matter in question is what its proponent claims." Authentication, however, demands " 'a very low threshold.' " *State v. Patterson*, 2018-Ohio-3348, ¶ 13 (1st Dist.), quoting *State v. White*, 2004-Ohio-6005, ¶ 61 (4th Dist.). Indeed, testimony by a witness with knowledge "that a matter is what it is claimed to be" is an acceptable method of authentication. Evid.R. 901(B)(1). Circumstantial evidence can be used to authenticate an item, and the state is under no obligation to establish a " 'perfect, unbroken chain of custody' " to admit evidence. *In re T.B.*, 2026-Ohio-1309, ¶ 53 (1st Dist.), quoting *State v. Gross*, 2002-Ohio-5524, ¶ 57.

{¶ 76} Breaks in the chain of custody go to the credibility or weight of the evidence, rather than its admissibility. *State v. Franklin*, 2002-Ohio-5304, ¶ 43; *State v. Wallace*, 2008-Ohio-5260, ¶ 27 (10th Dist.). "It is the jury's province to weigh the credibility of evidence and determine whether any irregularities diminish its persuasive value." *State v. Laughbaum*, 2026-Ohio-1783, ¶ 52 (5th Dist.), citing *DeHass*, 10 Ohio St.2d 230, paragraph two of the syllabus. "[I]f the evidence is properly admissible under Evid.R. 901(A), '[t]he state need not negate all possibilities of tampering or substitution;

instead, the state need only establish that it is reasonably certain that substitution, alteration, or tampering did not occur.' " *State v. Ohara*, 2014-Ohio-5532, ¶ 8 (9th Dist.), quoting *State v. Hickman*, 2002-Ohio-3406, ¶ 20 (9th Dist.). *Accord State v. Woodfork*, 2014-Ohio-3608, ¶ 15 (10th Dist.); *State v. Blevins*, 36 Ohio App.3d 147, 150 (10th Dist. 1987).

{¶ 77} The parties do not direct this court to any Ohio case where a court reversed a conviction as being against the manifest weight of the evidence due to breaks in the chain of custody. However, courts from other jurisdictions have addressed this scenario. In *People v. Whirl*, 351 Ill.App.3d 464 (2004), the court reversed the defendant's conviction where the chain of custody for the suspected drugs was "missing too many links." *Whirl* at 471. The facts in *Whirl* demonstrated that, when officers brought the defendant to the jail on other charges, Deputy Korman searched the defendant. Deputy Korman saw the defendant had something in his mouth; the defendant told Deputy Korman "it was gum and spit it out into a garbage can." *Id.* at 470. Deputy Korman searched the defendant's mouth again, and the defendant "spit out 'another pack.' " *Id.* at 470. Deputy Korman then gave two black baggies to the officers who brought the defendant to jail and he "assumed that the baggies were submitted to the crime lab for testing." *Id.* at 470. Subsequent testing revealed that one of the two black baggies contained cocaine. Deputy Korman identified a photograph of the black baggies at the defendant's trial for possession of a controlled substance and stated the "photograph showed the baggies as they appeared on July 11, 2001, the date of defendant's arrest." *Id.* at 470.

{¶ 78} The *Whirl* court explained that, under Illinois law, the state was not obligated to "exclude all possibilities that the evidence may have been subjected to tampering; however, the State must demonstrate that it took reasonable protective measures from the time that the evidence was seized and that the evidence ha[d] not been changed in any important respect." *Id.* at 471, citing *People v. Cowans*, 336 Ill.App.3d 173, 177 (2002). The court observed that while the evidence demonstrated the defendant spit out "one packet during the second search of his mouth; left unsaid was when and where the other pack was found." *Id.* at 471. Although Deputy Korman "testified that the photograph showed the baggies as they appeared on the night they were recovered," the court noted "there was no evidence as to where the second baggie was found, the length of time it was unaccounted for before it was found, who handled the baggies between the time Korman turned them over to the transport officers and the time the baggies were delivered to the crime lab, when the baggies were delivered to the crime lab, and which baggie tested positive for cocaine." *Id.* at 471. Considering these deficiencies, the court found the weight of the evidence did not support the defendant's conviction. *See also Rabovsky v. Commonwealth*, 973 S.W.2d 6, 7-8 (Ky. 1998) (noting that, while "[g]aps in the chain normally go to the weight of the evidence rather than to its admissibility," where "[n]o evidence was introduced to prove who collected the blood samples [from the victim at the hospital], how they were stored, how they were transported to [the first lab], how they were transported (if they were) to [the second lab], or what method was used to test the samples," the weight of the evidence did not support the defendant's murder conviction because there was a "total failure of the Commonwealth to establish a chain of custody of the blood samples").

{¶ 79} The evidence in the present case demonstrated major breaks in the chain of custody of both the backpack and the ball of suspected narcotics Deputy Ball recovered from appellant in the ambulance. Regarding the backpack, Officer Hubbell noted that when he was trying to disengage the horn on appellant's vehicle, he observed the backpack "on the front passenger's seat of [appellant's] vehicle." (Tr. Vol. 2 at 299.) After the shooting incident, however, the backpack was no longer present in appellant's car. As Officer Hubbell looked for the backpack, the driver of the other vehicle, Morris, approached Officer Hubbell holding the backpack. Morris told Officer Hubbell "he had picked up the bag after [appellant] had ran and took it to or by his car." (Tr. Vol. 2 at 285.) Officer Hubbell asked Morris where the backpack was located when he took possession of it, and Morris responded stating the backpack was "by the open passenger door [of appellant's vehicle] kind of in the road." (Tr. Vol. 2 at 285.)

{¶ 80} Although Morris attempted to hand Officer Hubbell the backpack, Officer Hubbell directed him to set the backpack down on the ground next to appellant's car. Morris set the backpack down and then walked back to his car. Shortly thereafter, Officer Hubbell's body-worn camera records him running over to Morris's car to assist several officers who are placing Morris in handcuffs. As Morris is being handcuffed, the video records him stating "*it came out of the bag*" and "I didn't do nothing wrong." (Emphasis added.) (State's Ex. A, clip 2 at 10:00.)

{¶ 81} During opening statements, defense counsel informed the jury the evidence would demonstrate that, when officers searched Morris, they "recover[ed] fentanyl or fentanyl-related compound" from him. (Tr. at Vol. 2 242-43.) However, when defense counsel asked Officer Hubbell at trial if he was aware that officers discovered "a quantity of fentanyl . . . on [Morris]," Officer Hubbell responded stating he "was not aware of that, no." (Tr. Vol. 2 at 309-10.) Officer Hubbell stated that, to his understanding, the other officers placed Morris in handcuffs because "they were told that someone had removed a bag from a car, and [Morris] matched that description." (Tr. Vol. 2 at 289.) Thus, while Officer Hubbell did not know whether the other officers recovered fentanyl from Morris, Officer Hubbell indicated Morris was detained for removing the backpack from appellant's car. As noted, Officer Hubbell testified appellant's backpack was located on the passenger seat in appellant's car before appellant ran, while Morris told Officer Hubbell the backpack was on the road next to appellant's car when he grabbed it. Officer Hubbell estimated that, from the time appellant ran until he returned to the accident scene, approximately five to eight minutes passed when the backpack was in Morris's unsupervised possession. Officer Hubbell affirmed that he did not know whether Morris took anything out of, or put anything into, the backpack during that time.

{¶ 82} Agent Taylor noted she photographed the backpack next to appellant's car at the scene on Broad Street because the FCSO informed her "they were working to get a search warrant for the vehicle as well as the bookbag." (Tr. Vol. 2 at 404.) Agent Taylor explained she did not open the backpack at the scene because, "[w]ithout a search warrant, [she] ha[d] no legal authority to open up the bookbag." (Tr. Vol. 2 at 404.) Defense counsel asked Agent Taylor whether the backpack was secured in any manner at the Broad Street scene before she placed it into appellant's vehicle, and Agent Taylor responded stating, "[i]t was still on the ground. So, no." (Tr. Vol. 2 at 434.) Agent Taylor affirmed there was no evidence tape on the backpack or a sign stating, "Do not disturb." (Tr. Vol. 2 at 434.)

{¶ 83} Regarding the suspected narcotics, Deputy Ball stated he recovered a bag containing suspected narcotics from appellant in the ambulance and placed the bag into a clear latex examination glove. Deputy Ball estimated he had the item in his possession for approximately 12 to 15 minutes before he handed the suspected narcotics to Deputy Tulloch. Deputy Ball further testified that he was "there when [Deputy Tulloch] had given custody [of the glove containing the suspected narcotics] to Deputy Tischler, who was [Deputy Ball's] trainee at the time." (Tr. Vol. 2 at 367.) Deputy Ball stated the hand off from Deputy Tulloch to Deputy Tischler occurred "at a later time" on the "same night" as the shooting incident, but at a location away from the incident. (Tr. Vol. 2 at 367-68.) Deputy Ball explained that although he "thought [Deputy Tischler] gave [the suspected narcotics] to detectives on scene," it did not say that "in [Deputy Ball's] statement," so Deputy Ball "[could not] say" that he knew what Deputy Tischler did with the evidence. (Tr. Vol. 2 at 368.) The state did not call Deputy Tulloch or Deputy Tischler to testify at trial.

{¶ 84} Detective Randall testified regarding the Matrix software system the FCSO used to catalog evidence. Detective Randall identified State's Exhibit I as the evidence list the Matrix software system produced documenting the evidence in the present case. Detective Randall explained that, for each item on the list, somebody "type[d it] in and submit[ted] the evidence onto the Matrix." (Tr. Vol. 3 at 502.) While State's Exhibit I depicts the items Detective Randall inventoried and impounded under property numbers 3478, 3479, and 3481, the list contains another entry under property number 3461. The entry under property number 3461 states, "1 clear baggie with white powder substance inside Drug Powder," and then states, "[l]ocation: Robert M. Tischler since 12/2/2021, 0303." (State's Ex. I-2.) However, the entirety of the entry under property number 3461 has been crossed out, and it is the only entry on the evidence list to be crossed out. Defense counsel asked Detective Randall about the crossed-out entry at trial, but Detective Randall stated he "[didn't] know" why the information had been crossed out. (Tr. Vol. 3 at 504.) The state presented no evidence to explain who created the entry for property number 3461 or why the entry was eventually crossed out.

{¶ 85} The state's failure to explain what Deputy Tischler did with the suspected narcotics he received from Deputy Tulloch constituted a major break in the chain of custody of this item. In its brief, the state asserts that the "ball of drugs ended up inside Johnson's backpack—presumably [having been] placed there by an officer trying to consolidate evidence." (Appellee's Brief at 58.) However, there is no evidence in the record indicating that an officer placed the glove containing the drugs into the backpack. Notably, once police have seized a container, such as a backpack, "[t]here is no justification for allowing the officer to forego a warrant before opening the closed container." *State v. Burroughs*, 2022-Ohio-2146, ¶ 16. *See United States v. Williams*, 41 F.3d 192, 197 (4th Cir. 1994) (noting that "although the plain view doctrine may support the warrantless seizure of a container believed to contain contraband, any subsequent search of its concealed contents must either be accompanied by a search warrant or justified by one of the exceptions to the warrant requirement"); *United States v. Corral*, 970 F.2d 719, 725 (10th Cir. 1992), citing *Texas v. Brown*, 460 U.S. 730, 749-51 (1983) (Stevens, J., concurring). Accordingly, the state's presumption that an officer opened appellant's backpack and placed the drugs inside asks us to presume that an officer violated established Fourth Amendment search and seizure law.

{¶ 86} In addition to the major breaks in the chain of custody, the record also contains several minor breaks in the chain of custody for the suspected drugs. Initially, Agent Taylor testified that when she processed the warrant for the backpack on December 2, 2021, she took all the items out of the backpack and set them on the floor of the FCSO property garage. Agent Taylor explained that, after she photographed the items, she left the items on the ground, and a FCSO deputy "collected it from the ground there . . . picked it up, put it back in the backpack." (Tr. Vol. 2 at 428.)

{¶ 87} Detective Randall testified he was present at the FCSO property garage when a BCI employee searched the backpack. Detective Randall stated the BCI employee asked him "to impound" the backpack and he stated the backpack "was closed" when it was handed to him. (Tr. Vol. 3 at 462.) Detective Randall affirmed the "only way [he] saw [the backpack at the FCSO property garage] was just as a backpack not opened." (Tr. Vol. 3 at 473.) Detective Randall also noted that when the backpack was "handed to [him]" he did not know what was "inside of it other than what [BCI] represented." (Tr. Vol. 3 at 462.) Thus, Detective Randall's testimony demonstrated he received a closed backpack from BCI containing the evidence, while Agent Taylor's testimony demonstrated she left the backpack and all its contents out on the floor of the FCSO property garage. Agent Taylor's and Detective Randall's differing testimonies in this regard demonstrated a potential break in the chain of custody of the backpack and its contents.

{¶ 88} Detective Randall also explained that he put the entire, unopened glove containing the suspected narcotics into the evidence bag with property number 3478.

Detective Randall affirmed that, "without removing anything, whatever it might be in the glove, [he] put the whole [glove], in tact, into that one evidence bag." (Tr. Vol. 3 at 476.) However, when Snyder received the evidence bag with property number 3478, she stated the evidence in the bag consisted of "a plastic bag and within that plastic bag that was another plastic bag that contained an unknown substance and there was a disposable examination glove, and within that disposable examination glove there were four more bags of substance." (Tr. Vol. 3 at 595.) Thus, she affirmed there was "one bag of substance and then the four bags of substance within the glove." (Tr. Vol. 3 at 595.) Thus, the evidence demonstrated that the contents of property number 3478 changed from the time Detective Randall inventoried the item to when Snyder received the evidence at the BCI lab. Although Detective Pollard testified he separated and weighed the suspected narcotics before sending them to the BCI lab for testing, Detective Pollard never testified to how he repackaged the items in property number 3478. The state did not elicit any testimony to explain how an additional bag of substance outside of the glove came to be present in property number 3478 by the time Snyder received the evidence.

{¶ 89} Detective Pollard stated that after he weighed the evidence, he prepared his "request to be sent out to [the] BCI laboratory" for testing. (Tr. Vol. 3 at 517.) Detective Pollard identified State's Exhibit L as the BCI submission form for the suspected narcotics. The submission form identified Detective Pollard as both the case investigator and the submitting officer. While the submission form identified the offense as "Possession of Drugs," the subject as "Johnson[,] Brandon," and the location of the offense as West Broad Street, the form also identified appellant's race as "[w]hite" and the date of the offense as "11-23-21." (State's Ex. L.) The record, however, demonstrated appellant's race was black and that the offense date was December 1, 2021. Thus, while the evidence submission form stated that "[o]n the *listed date*, time, and location, the above listed person was in possession of the above listed items," the listed date on the form had no connection to the present case. (Emphasis added.) (State's Ex. L.)

{¶ 90} At trial, the state showed Deputy Ball the photographs Agent Taylor took of the backpack and its contents at the FCSO property garage, and Deputy Ball stated that the latex glove in the photograph was the glove he placed "the clear plastic bag" into after he "removed [it] from Mr. Johnson's person." (Tr. Vol. 2 at 346.) Deputy Ball also identified

State's Exhibits O1-O5 as photographs taken shortly before trial of the items contained in property number 3478. Viewing the photographs, Deputy Ball stated he "recognize[d] the glove" and "recognize[d] multiple baggies containing powdery substance and rock-like substances" as the items he recalled removing from appellant. (Tr. Vol. 2 at 356.) Deputy Ball's testimony in this regard was sufficient to satisfy the low threshold for authentication of the drugs under Evid.R. 901. *See* Evid.R. 901(B)(1); *Woodfork*, 2014-Ohio-3608, at ¶ 17 (10th Dist.).

{¶ 91} Thus, while the evidence may have been admissible, we must determine whether the evidence demonstrated with reasonable certainty that substitution, alteration, or tampering did not occur to the narcotics at issue in the present case. Reviewing the evidence, we do not find the state carried its burden. Initially, the evidence demonstrated that Morris had the backpack in his unsupervised possession for five to eight minutes during the shooting, and that Morris exclaimed to police "*it came out of the bag*" while he was being handcuffed after he possessed the backpack. (Emphasis added.) (State's Ex. A, clip 2 at 10:00.) Morris's unsupervised possession of the backpack and his exclamation while being handcuffed presented more than an abstract possibility that he tampered with the contents of the backpack. *Compare State v. Robinson*, 675 S.W.3d 326, 328, 330 (Tex.App. 2023), quoting *Bonds v. State*, 573 S.W.2d 528, 533 (Tex.App. 1978) (finding a bong inadmissible due to breaks in the chain of custody where the police allowed a woman to enter the room where the bong was located unsupervised, and the woman attempted to hide the bong under some clothes while she was alone in the room, and explaining that because the woman affirmatively tampered with the bong a " 'more elaborate foundation' [was] required before the evidence [could] be admitted").[11]

{¶ 92} While Deputy Ball testified that the state's photographs appeared to depict the suspected narcotics he recovered from appellant in the ambulance, no evidence was presented to explain how the glove containing the drugs came to be present in the backpack, what Deputy Tischler did with the glove, how long Deputy Tischler possessed the glove, or

[11] The Tenth Circuit Court of Appeals has held that "when evidence is open to alteration or tampering, a more elaborate chain of custody is required. 'The standard required is a chain of custody "with sufficient completeness to render it improbable that the original item has either been exchanged with another or been contaminated or tampered with." ' " (Emphasis and citation omitted.) *United States v. Rodriguez-Garcia*, 983 F.2d 1563, 1569 (10th Cir. 1993), quoting *United States v. Clonts*, 966 F.2d 1366, 1369 (10th Cir. 1992).

who made the crossed-out entry under property number 3461 in the Matrix software. Thus, while we defer to the jury's resolution of Deputy Ball's credibility, Deputy Ball's testimony simply did not explain how the items he recovered from appellant in the ambulance came to be present in appellant's backpack at the scene on Broad Street.[12] While finding drugs inside a latex glove may be unusual, neither the suspected drugs nor the latex glove themselves contained any unique characteristics that would render them readily identifiable.[13] Furthermore, as noted, Agent Taylor's and Detective Randall's testimonies differed regarding whether the suspected narcotics were inside or outside of the backpack when Detective Randall took possession of the backpack, the contents of property number 3478 changed from the time Detective Randall inventoried the evidence to when Snyder received the evidence at the BCI lab, and the form used to submit the evidence to BCI listed the offense date as November 23, 2021, a date unrelated to the present case. When all the breaks in the chain of custody of the backpack and the suspected narcotics are considered, we find the evidence failed to establish with any level of certainty that substitution, alteration, or tampering did not occur to the narcotics in the present case.

{¶ 93} Notably, several of the law enforcement officers in the case testified to the importance of an accurate chain of custody. Deputy Ball affirmed there should be "some form of documentation" recording each time someone handled a piece of evidence. (Tr. Vol. 2 at 366.) Detective Randall explained the purpose of recording the chain of custody for an item was to "maintain the integrity of the evidence" and ensure it was "not tampered with." (Tr. Vol. 3 at 487.) Detective Pollard affirmed that "any time somebody handle[d] that piece of evidence, there should be a notation in the system made," and he acknowledged that, without a proper chain of custody, you could have "the wrong evidence

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[12] Notably, the substances from the latex glove in property number 3478 were necessary to support both first-degree felony drug possession charges in the present case. Possession of cocaine is a felony of the first degree if the amount involved equals or exceeds 27 grams but is less than 100 grams; possession of a fentanyl-related compound is a felony of the first degree if the amount involved equals or exceeds 20 grams but is less than 50 grams. R.C. 2925.11(C)(4), (11). The items in property numbers 3479 and 3481 consisted only of 9.41 grams of cocaine. (State's Ex. LL.)

[13] *See Saxton v. Commonwealth*, 671 S.W.3d 1, 11 (Ky. 2022) (noting that "[f]or drugs and drug paraphernalia—items which are fungible and not readily identifiable or distinguishable—a stronger foundational showing is required than for non-fungible or readily identifiable evidence"); *Grundy v. Commonwealth*, 25 S.W.3d 76, 80 (Ky. 2000) (explaining that "if the offered evidence is of such a nature as not to be readily identifiable, or to be susceptible to alteration by tampering or contamination," a "more elaborate" foundation may be required for admission).

associated with the wrong case." (Tr. Vol. 3 at 518, 555.) Considering such testimony in light of the noted breaks in the chain of custody, we find the present case is the exceptional case where the evidence weighs heavily against conviction.

{¶ 94} Accordingly, after reviewing the record and weighing the evidence and all reasonable inferences, we find appellant's convictions for possession of cocaine and possession of a fentanyl-related compound to be against the manifest weight of the evidence. We therefore sustain appellant's fifth assignment of error, reverse appellant's convictions for drug possession, and remand the case for a new trial on these charges. *See State v. Fips*, 2020-Ohio-1449, ¶ 1 (explaining that "[o]nce a reviewing court determines that a criminal conviction is against the manifest weight of the evidence, the remedy is a new trial"). Because appellant's fifth assignment of error asserts only that his convictions for drug possession were against the weight of the evidence, our holding on this issue does not impact appellant's WUD conviction.

VI. Fourth Assignment of Error – Sleeping Juror

{¶ 95} In his fourth assignment of error, appellant asserts the trial court committed plain error by allowing a sleeping juror to remain on the jury panel. Having reversed appellant's drug possession convictions, we analyze this assignment of error only with respect to appellant's WUD conviction.

{¶ 96} During the state's closing argument, the court interrupted the prosecutor stating as follows:

> THE COURT: Hold on. Juror No. 9, you got to wake up, sir. Poke him, please. Thank you.
>
> Hey, you have been nodding off, sir, a fair amount. I don't want to call you out, but it's happened throughout the trial. If it happens again I'm going to replace you with an alternate. Let's try to stay awake sir. If you need to stand up if you need a cup of coffee -- this case is important to both sides for you to be missing chunks of the trial. All right. Do you want to be excused or do you want to stay?
>
> JUROR NUMBER 9: I'll stay.
>
> THE COURT: All right. Go ahead.

(Tr. Vol. 4 at 850.)

{¶ 97} Appellant did not object or ask the court to take any additional action with respect to the sleeping juror. As such, we review for plain error. *See State v. McKnight*, 2005-Ohio-6046, ¶ 185.

{¶ 98} Sleeping during trial is a form of juror misconduct. *State v. Bond*, 2023-Ohio-1226, ¶ 30 (2d Dist.), citing *United States v. Sherrill*, 388 F.3d 535 (6th Cir. 2004). Indeed, a juror who sleeps through large portions of the trial "cannot be expected to perform his or her duties." *Id.*, citing *United States v. Warner*, 690 F.2d 545 (6th Cir. 1982). The trial judge is in the best position " 'to determine the nature of the alleged jury misconduct' and the 'appropriate remedies for any demonstrated misconduct.' " *Sherrill* at 537, quoting *United States v. Copeland*, 51 F.3d 611, 613 (6th Cir. 1995). As such, "[a] trial court 'has considerable discretion in deciding how to handle a sleeping juror.' " *State v. Sanders*, 2001-Ohio-189, ¶ 53, quoting *United States v. Freitag*, 230 F.3d 1019, 1023 (7th Cir. 2000).

{¶ 99} Appellant initially contends the trial court should have "ask[ed] the juror . . . questions to determine what the juror had missed." (Appellant's Brief at 53.) However, appellant did not ask the court to make such an inquiry, and " '[t]here is no *per se* rule requiring an inquiry in every instance of alleged [juror] misconduct.' " *Sanders* at ¶ 52, quoting *United States v. Hernandez*, 921 F.2d 1569, 1577 (11th Cir. 1991). *See State v. Suarez*, 2014-Ohio-1350, ¶ 28 (11th Dist.) (stating that in the absence of a request from the defendant for the court to question the allegedly sleeping juror, the appellate court would not "find that the trial court committed plain error by not questioning the juror"); *State v. Steagall*, 2004-Ohio-5035, ¶ 27 (8th Dist.). Accordingly, the court's failure to question juror No. 9 did not amount to plain error.

{¶ 100} While the court noted juror No. 9 had been nodding off throughout the trial, there is nothing in the record demonstrating what portions of the trial the juror may have missed. With respect to the WUD charge, the parties stipulated to appellant's prior burglary conviction and both Officers Hubbell and Chung testified that appellant possessed a firearm on December 1, 2021. The only recorded incident of juror No. 9 nodding off occurred during the state's closing argument, rather than the presentation of evidence. *See Suarez* at ¶ 30 (concluding that a juror sleeping during "closing arguments," and not "during presentation of any evidence," did not prejudice the defendant). Accordingly, the record does not demonstrate that juror No. 9 missed large or critical portions of the trial with respect to the WUD charge. As such, appellant is unable to establish any prejudice resulting from the sleeping juror. *See State v. Brenaman*, 2020-Ohio-4151, ¶ 57 (2d Dist.), quoting *State v. Montgomery*, 2016-Ohio-5487, ¶ 112 (noting that if a sleeping juror did not miss " 'large or critical portions' " of the trial, no prejudice results from the juror remaining on the jury panel); *Sanders* at ¶ 53.

{¶ 101} Based on the foregoing, we overrule appellant's fourth assignment of error.

VII. Second Assignment of Error – Ineffective Assistance of Counsel

{¶ 102} In his second assignment of error, appellant asserts his trial counsel rendered constitutionally ineffective assistance. Again, we analyze this assignment of error only with respect to appellant's WUD conviction.

{¶ 103} To prevail on an ineffective assistance of counsel claim, appellant must satisfy a two-part test. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 141-42 (1989). "First, the defendant must show that counsel's performance was deficient." *Strickland* at 687. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* "Questionable trial strategies and tactics, however, do not rise to the level of ineffective assistance of counsel." *State v. Mohamed*, 2017-Ohio-7468, ¶ 18, citing *State v. Clayton*, 62 Ohio St.2d 45, 49 (1980). " 'Judicial scrutiny of counsel's performance is to be highly deferential, and reviewing courts must refrain from second-guessing the strategic decisions of trial counsel.' " *State v. Sallie*, 1998-Ohio-343, ¶ 9, quoting *State v. Carter*, 1995-Ohio-104, ¶ 41.

{¶ 104} The second prong of the *Strickland* test requires the defendant to "show that the deficient performance prejudiced the defense." *Strickland* at 687. To establish prejudice, a defendant must demonstrate "there exists a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *State v. Davis*, 2020-Ohio-309, ¶ 10, citing *Bradley* at paragraphs two and three of the syllabus. " 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Bradley* at 142, quoting *Strickland* at 694. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on as having produced a just result." *Strickland* at 686.

{¶ 105} Appellant initially contends his trial counsel rendered ineffective assistance when counsel renewed the motion to dismiss on speedy-trial grounds at the start of trial. Appellant asserts his counsel performed deficiently by failing to argue that the final two continuances in the case "established that the time for trial under R.C. 2945.71 had elapsed and Mr. Johnson was subject to discharge." (Appellant's Brief at 36.) However, in our analysis of appellant's first assignment of error, we determined the state brought appellant to trial within 270 days even including the time resulting from the final two continuances. Accordingly, appellant cannot establish prejudice resulting from his attorney's failure to specifically include the final two continuances in the renewed motion to dismiss. *See State v. Barbour*, 2008-Ohio-2291, ¶ 14 (10th Dist.); *State v. Oller*, 2017-Ohio-814, ¶ 62 (10th Dist.) (noting it is "not generally ineffective assistance to fail to engage in futile tactics").

{¶ 106} Appellant also asserts his trial counsel rendered ineffective assistance by failing to object to how the court handled the sleeping juror issue. In our analysis of appellant's fourth assignment of error, however, we determined appellant did not establish plain error resulting from the court's handling of the sleeping juror. " '[W]here the failure to object does not constitute plain error, the issue cannot be reversed by claiming ineffective assistance of counsel.' " *State v. Roy*, 2014-Ohio-4587, ¶ 20 (10th Dist.), quoting *State v. Carson*, 2006-Ohio-2440, ¶ 51 (10th Dist.). *See State v. Rogers*, 2015-Ohio-2459, ¶ 22. Moreover, counsel may have had a tactical reason for not objecting, as counsel may have believed juror No. 9 would be favorable to the defense. *See State v. Graber*, 1995 Ohio App. LEXIS 3733, *11 (5th Dist. Apr. 3, 1995) (noting the fact that "trial counsel did not request removal of th[e sleeping] juror could as easily been the result of sound trial strategy rather than negligence," because counsel may have "felt that the juror in question was likely to be favorable to the defendant"). Thus, counsel's failure to object to how the court handled the sleeping juror did not amount to constitutionally ineffective assistance of counsel.

{¶ 107} Based on the foregoing, we overrule appellant's second assignment of error.

VIII. Cross-Appeal

{¶ 108} The state has filed a cross-appeal, and raises the following sole assignment of error for our review:

> The trial court imposed a post-release control sanction contrary to law.

{¶ 109} The state notes that, because appellant was convicted of a first-degree felony non-sex-offense, the trial court was required to impose a mandatory post-release control term of 2 to 5 years. R.C. 2967.28(B)(2). Because the court imposed a post-release control term of 1 to 3 years, the state contends the post-release control sanction was contrary to law. However, based on our analysis of appellant's fifth assignment of error, we have reversed appellant's first-degree felony convictions for drug possession and remanded the case for a new trial on those charges. As such, the state's cross-appeal with respect to appellant's former sentence is moot.

IX. Conclusion

{¶ 110} Having overruled appellant's first, second, third, and fourth assignments of error, but having sustained appellant's fifth assignment of error, thereby rendering moot the state's sole assignment of error on cross-appeal, we affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas and remand the case to that court for proceedings consistent with law and this decision.

Judgment affirmed in part and reversed in part;
case remanded;
cross-appeal rendered moot.

DORRIAN and JAMISON, JJ., concur.