[Cite as *State v. Werber*, 2010-Ohio-4883.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93716

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

GREGORY WERBER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-501932-B

BEFORE: McMonagle, J., Gallagher, A.J., and Cooney, J.

RELEASED AND JOURNALIZED: October 7, 2010

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CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Gregory Werber, appeals his conviction, rendered after a jury trial, for drug trafficking, drug possession, and possession of criminal tools. We affirm.

I. PROCEDURAL HISTORY

{¶ 2} In October 2007, Werber and his codefendant, Martin Baxter, were charged with drug trafficking, in an amount equal to or exceeding

20,000 grams; possession of drugs, in an amount equal to or exceeding 20,000 grams; and possession of criminal tools.

{¶ 3} Each count contained four identical forfeiture specifications. Two of the specifications applied only to Werber; one specification applied only to Baxter; and one specification applied to both defendants. The two specifications relating to Werber alleged that he was the owner and/or possessor of $6,080 in U.S. currency and a laptop computer used or intended to be used for drug trafficking. The specification pertaining to Baxter alleged that he was the owner and/or possessor of $1,080 in U.S. currency used or intended to be used for drug trafficking. The specification that related to both Werber and Baxter alleged that they owned and/or possessed cell phones used or intended to be used for drug trafficking.

{¶ 4} After plea negotiations, both defendants pleaded guilty under amended Count 1, drug trafficking, in an amount equal to or exceeding 5,000 grams but less than 20,000 grams, a third degree felony. Counts 2 and 3 of the indictment were nolled. As part of the plea agreement, the defendants agreed to a five-year sentence and to forfeit the items specified in the specifications. The court accepted Werber's plea, found him guilty, and sentenced him to five years incarceration.

{¶ 5} This court reversed and remanded on appeal. *State v. Werber*, Cuyahoga App. No. 90888, 2008-Ohio-6482.[1] On remand to the trial court, Werber represented himself throughout the proceedings, which included a jury trial, at the conclusion of which, he was found guilty of all three counts and several of the forfeiture specifications. At sentencing, the trial court merged Counts 1 and 2, drug trafficking and drug possession, respectively, and sentenced Werber to eight years on Count 1. The court further sentenced him to one year on Count 3, possession of criminal tools, and ordered that sentence to run consecutively to the sentence on Count 1, for a nine-year total. The court also imposed a $15,000 fine, but waived it based on Werber's indigency; three years of postrelease control was also imposed. Werber was ordered to forfeit $6,080 and cell phones and to pay court costs.

II. FACTS

{¶ 6} The following facts were elicited at a hearing on Werber's motion to suppress. Special Agent Kirk Johns and his partner, Special Agent Mike Gardner, had been working on a drug investigation; they had been using a confidential informant ("CI"), who had been communicating with the target of

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[1]This court found that by advising Werber at the plea hearing that he would be forfeiting $1,080, but then ordering forfeiture of $6,080 against him in the sentencing entry, the trial court erroneously advised him about the consequences of his plea, and therefore, did not substantially comply with Crim.R. 11(C). This court further found that the trial court erroneously advised Werber about postrelease control. Id. at ¶12-13.

the investigation, codefendant Martin Baxter. During the investigation, the CI and Baxter had arranged for Baxter to sell the CI a large amount of marijuana that Baxter would bring into Cleveland from another location; the police did not know the specifics of the arrangement. In making the arrangements for the sale, Baxter used the word "we" when referring to the people who would be bringing the marijuana into Cleveland.

{¶ 7} On the date of the incident, September 29, 2007, the CI and Baxter talked and agreed to consummate the deal in a hotel parking lot behind a restaurant in Brooklyn, Ohio. After the conversation, the CI drove to pick up Baxter. Upon arriving at the parking lot where the transaction was to take place, Baxter and the CI saw a police car on the lot (which was not there related to this incident) and drove around the lot waiting for it to leave. While they were driving around, the CI noted that Baxter showed interest in a Dodge Durango that was parked in the parking lot. Baxter told the CI that he needed more time for the police to leave the area before the transaction could be completed.

{¶ 8} The CI then dropped Baxter off, and Baxter went into the nearby restaurant, where he stayed for approximately ten to 15 minutes. Upon leaving the restaurant, Baxter met Werber outside of another nearby restaurant. Detective Christopher Frey, of the Brooklyn Police Department and a member of the surveillance team, saw Baxter and Werber talk to each

other and then get into a Chevy Impala, with Werber driving and Baxter in the passenger seat.

{¶ 9} Detective Frey followed the Impala, but Werber was driving it in a manner described by the police as "typical counter-surveillance."[2] The surveillance of the Impala was stopped, and the police then focused on the Durango that was still in the parking lot. Meanwhile, the CI and Baxter were communicating over the phone in an attempt to complete the drug transaction. During one of these recorded conversations, Baxter told the CI that he was getting a storage unit and the deal could be completed at the unit.

{¶ 10} Shortly after that conversation, Werber and Baxter (with Werber driving) returned in the Impala to the parking lot where the Durango was still parked. The CI and Baxter spoke again and agreed to complete the sale at the storage unit. Baxter then got out of the Impala, got into the Durango, and both cars drove away. As the defendants were driving the cars in the direction of the storage unit facility, the police saw large boxes in the Durango. Under orders from Agent Johns, a felony stop of both vehicles was made.

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[2]For example, last minute lane changes, falsely signaling, and increasing then decreasing speed.

{¶ 11} Upon approaching Werber's vehicle, the police told him why he was under arrest and read him his *Miranda* rights. After being advised of his rights, Werber wanted to speak with the police. Special Agent Johns testified that Werber "understood his rights. He wanted to cooperate with us. I mean, from the beginning he was very cooperative and — the only thing he would not talk about is where the drugs came from in Detroit. Other than that, he admitted that the $6,000 in his pocket was to be paid to Baxter for coordinating this drug deal." Two hundred seventy pounds of marijuana were recovered from the Durango that Baxter was driving.

{¶ 12} Werber testified to the following at the suppression hearing. He was driving his car, when he was suddenly surrounded by police cars and ordered out of the car. He testified that the officers got out of their cars aggressively, yelling, screaming, and with their guns drawn. According to Werber, the police commands were contradictory (some were commanding him to put his hands on the steering, others were commanding him to turn off the car, and yet others were commanding that he hold up his hands), so he "held [his] hands up in utter fear, and [ ] actually defecated * * *[,]" before being pulled out of the car at gunpoint. He denied ever being advised of, or waiving, his *Miranda* rights.

{¶ 13} When questioned on cross-examination about what he told Agents Johns and Gardner, Werber responded, "[w]ell, I can say this: From what I've seen of the statements purported to me, those are not my statements." He refused to testify to what his statements were that he claimed he was coerced into making. He testified that he told the police he wanted a lawyer. Werber admitted that he had been incarcerated in an Arizona prison with Baxter.

{¶ 14} The following additional facts were elicited at trial. Special Agent Johns testified that phone calls were recorded between Baxter and the CI and that the agreement between the two was that Baxter was going to sell the CI 290 pounds of marijuana for approximately $200,000. During the conversations, Baxter referenced a partner with whom he would be working and indicated that a Chevrolet vehicle would also be used in the transaction. The marijuana, approximately 270 pounds, which was recovered from the Durango, was packaged in 18 individually shrink-wrapped bundles and placed into large moving boxes with packing peanuts.

{¶ 15} At the time of his arrest, Werber had two California drivers licenses — one in the name of Gregory Werber and the other in the name of "Leon Hawkins." Special Agent Johns testified that Werber agreed to talk to the police because he wanted to stay out of jail and return to California. In sum, Werber told the police that he flew into Detroit, met Baxter there,

and the two drove to Cleveland in the Durango to sell the marijuana. Werber had $6,000 cash, which he told the police he was going to pay to Baxter as part of the deal.

{¶ 16} Carol Anderson, an employee at the storage unit facility where the transaction was to have occurred, testified as to her interaction with appellant, whom she knew as "Leon Hawkins." She testified that on the day of the incident Werber and Baxter came to the business and she showed them storage units. Werber paid for two storage units in cash and provided Anderson his "Leon Hawkins" drivers license. Anderson testified that she mainly dealt with Werber in renting the units.

{¶ 17} Anderson further testified that very shortly after Baxter and Werber rented the units, she saw them being arrested on the side of the road. She approached the police and Werber and provided documentation showing that Werber rented storage units using the name "Leon Hawkins." Anderson testified that Werber and the police were "talking," and she did not observe any yelling or other confrontational behavior.

{¶ 18} Keys to a storage unit were found on Werber's person. A bank statement that showed Werber purchased an airline ticket on September 4, 2007 was also recovered. The investigation further revealed that Werber had rented both the Chevrolet Impala and the Dodge Durango under his name, but listed Baxter as an additional driver on the Durango. The

Durango was rented in Michigan, on the morning of the same day the transaction was finalized and was supposed to have occurred. A search of the Impala revealed the following: (1) an unused moving box, similar to the ones where the drugs had been found in the Durango; (2) a kit with latex gloves, packing tape, sharpie markers, a utility knife, a bag of packing peanuts, a roll of unused shrink wrap, and rolls of bubble wrap; (3) a Howard Johnson's hotel room key, similar to one that had been recovered from Baxter; (4) an address book with a Massachusetts address for "Martin Baxter"; and (5) three cell phones.

{¶ 19} Baxter requested an attorney upon his arrest and was not questioned. The following was recovered from him or the Durango: (1) approximately $1,000; (2) a Massachusetts driver's license; (3) a Howard Johnson's hotel key; and (4) two cell phones.

III. LAW AND ANALYSIS

{¶ 20} Werber's first three assignments of error read as follows:

{¶ 21} "Assignment of Error No. 1: On remand the trial court erred by proceeding to trial, convicting, and sentencing Werber on previously dismissed counts two and three.

{¶ 22} "Assignment of Error No. 2: On remand the trial court erred by amending count one to increase it from a third degree to a second degree felony offense.

{¶ 23} "Assignment of Error No. 3: On remand Werber's double jeopardy rights were violated by convicting and sentencing him on count one as a felony two."

{¶ 24} Werber contends in these assignments of error that he should have received the benefit of his previous plea agreement with the state. We disagree.

{¶ 25} The Twelfth Appellate District addressed this issue in *State v. Prom*, Butler App. No. CA2004-07-174, 2005-Ohio-2272. There, the defendant was charged with aggravated murder with a three-year firearm specification. The charge carried a mandatory life sentence, to be served consecutive to a three-year term for the firearm specification. After negotiations with the state, the defendant pleaded guilty to a reduced charge of murder with a firearm specification. The maximum penalty for that charge was 18 years to life, consecutive to three years for the firearm specification.

{¶ 26} The defendant challenged her plea on appeal, arguing that it was not knowingly made because the trial court incorrectly informed her that she would be subject to postrelease control rather than parole. The Twelfth Appellate District agreed with the defendant, reversed the trial court's decision accepting her guilty plea, vacated the judgment of conviction and sentence, and remanded for further proceedings.

{¶ 27} On remand, the defendant filed a motion to compel the state to offer its prior plea bargain, which the trial court denied. The defendant entered a no contest plea to the charge of aggravated murder with the firearm specification. The trial court found her guilty and sentenced her to life in prison, consecutive to a three-year term for the firearm specification.

{¶ 28} On a second appeal, the defendant challenged the trial court's denial of her motion seeking to compel the state to offer its prior plea bargain. The court of appeals rejected her challenge, stating: "Contrary to appellant's argument, we find that it is reasonably well-established that "'when a defendant repudiates the plea bargain * * * by successfully challenging [her] conviction on appeal there is no double jeopardy (or other) obstacle to restoring the relationship between defendant and state as it existed prior to the defunct bargain.' *United States v. Moulder* (C.A.5, 1988), 141 F.3d 568, 571, quoting *Fransaw v. Lynaugh* (C.A.5, 1987), 810 F.2d 518, 524-525. See, also, *Hardwick v. Doolittle* (C.A.5, 1977), 558 F.2d 292, 301. Ohio courts have likewise held that 'being convicted of the original charge and receiving a greater sentence is a chance that one takes when [one] seeks to withdraw from a plea agreement containing a state-amended lesser charge.' *State v. Griffin*, Mahoning App. No. 01CA151, 2003-Ohio-1599, ¶9.

{¶ 29} "Nor are we persuaded by appellant's argument that the state's refusal to offer the same plea agreement is the result of vindictiveness for her successful appeal. Appellant's prior appeal resulted in the invalidation of her plea, and the reinstatement of the charge for which she was originally indicted. Where the underlying purpose of the plea agreement is frustrated, the prosecution may, 'without explanation, refile charges against a defendant whose bargained-for guilty plea to a lesser charge has been withdrawn or overturned on appeal, provided that an increase in the charges is within the limits set by the original indictment.' *Moulder* at 572. After her conviction was reversed on appeal, appellant entered a plea of NGRI to the charge of aggravated murder for which she was indicted. This charge was within the limits set by the original indictment, and we do not find that proceeding under this charge was the result of vindictiveness. Appellant's second assignment of error is overruled." *Prom* at ¶16-17.

{¶ 30} For the reasons set forth by the Twelfth District in *Prom*, we overrule the first, second, and third assignments of error.

{¶ 31} Werber's fourth and fifth assignments of error read: "Assignment of Error No. 4: The trial court erred in denying Werber's motion to suppress evidence from his warrantless arrest lacking probable cause in violation of his Fourth Amendment rights.

{¶ 32} "Assignment of Error No. 5: The trial court erred in denying Werber's motion to suppress his statements obtained through coercive custodial interrogation, after Werber requested an attorney, and without a *Miranda* warning or a *Miranda* waiver, in violation of Fifth Amendment rights."

{¶ 33} In these assignments of error, Werber contends that the trial court should have (1) found his warrantless arrest was made without probable cause, and (2) suppressed his post-arrest statements because he was not advised of his *Miranda* warnings prior to making them and he was coerced into making them.

{¶ 34} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶8. In deciding a motion to suppress, the trial court assumes the role of trier of fact. Id. A reviewing court is bound to accept those findings of fact if they are supported by competent, credible evidence. Id. But with respect to the trial court's conclusion of law, we apply a de novo standard of review and decide whether the facts satisfy the applicable legal standard. Id., citing *State v. McNamara* (1977), 124 Ohio App.3d 706, 707 N.E.2d 539.

{¶ 35} We first consider the warrantless arrest of Werber. The Fourth Amendment to the United States Constitution, made applicable to the states

by its incorporation into the Fourteenth Amendment, provides that people are "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures * * * and no Warrants shall issue, but upon probable cause * * *."

{¶ 36} An arrest without a warrant is constitutionally invalid unless the arresting officer had probable cause to make the arrest. The test for probable cause to justify an arrest is "whether at that moment the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [arrestee] had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142. Whether a Fourth Amendment violation has occurred "turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time." *Scott v. United States* (1978), 436 U.S. 128, 136, 98 S.Ct. 1717, 56 L.Ed.2d 168.

{¶ 37} Probable cause requires more than a generalized suspicion of criminal conduct, although less certainty than proof beyond a reasonable doubt. *State v. Watson* (Apr. 27, 1995), Cuyahoga App. No. 67396. Probable cause must exist at the time of the arrest; it cannot be established later by evidence gathered from the suspect after his illegal arrest. *Beck*, supra.

{¶ 38} Werber contends that he was arrested because of his "mere association" with Baxter. We disagree. The evidence presented at the suppression hearing established that prior to Werber's arrest, the police had been working on a drug investigation, the target of which was codefendant Baxter. During the course of the investigation, the police used a CI; the CI and Baxter had been communicating with one another and arranged that Baxter would sell the CI a large amount of marijuana that Baxter would bring to Cleveland from another location. In arranging the transaction, Baxter used the word "we" when referring to the people who would be bringing the marijuana into Cleveland.

{¶ 39} On the date of the incident, the CI and Baxter talked and agreed to the specific location where the transaction would occur. After that conversation, the CI drove to meet Baxter. The transaction did not occur at the location originally agreed upon because of police presence (unrelated to this case) in the area. Baxter and the CI then drove around the area, waiting for the police to leave. While driving, the CI observed that Baxter was interested in a Dodge Durango parked in the area. Baxter was hesitant to complete the sale at that time because of the police presence and told the CI he needed more time. The CI then dropped Baxter off at a nearby restaurant.

{¶ 40} Baxter went into the restaurant and stayed for approximately ten to 15 minutes. Upon leaving, he went across the street where he met Werber outside of another restaurant; the two talked to each other and then got in a Chevy Impala, with Werber driving. The police followed the Impala, but Werber was driving in a counter-surveillance manner, causing the police to stop surveillance of the car. The CI and Baxter were still communicating in an attempt to complete the drug transaction. During one of their conversations, Baxter told the CI that he was getting a storage unit and the deal could be completed at the unit.

{¶ 41} Shortly after that conversation, Werber drove himself and Baxter to the parking lot where the Durango was still parked. The CI and Baxter spoke again and agreed to complete the sale at the storage unit. Baxter then got out of the Impala, got into the Durango, and both cars drove away. As the defendants were driving the cars in the direction of the storage unit facility, the police saw large boxes in the Durango and made felony stops of both vehicles.

{¶ 42} This record supports a probable cause determination that Werber and Baxter were working together to complete a sale of a large quantity of marijuana; the record does not support Werber's contention that he was arrested because of his "mere association" with Baxter.

{¶ 43} We next consider Werber's post-arrest statements to the police. This issue turns on the credibility of the witnesses. Because the trial court assumes the role of the trier of fact, it is in the best position to resolve factual questions and evaluate the credibility of a witness. *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972.

{¶ 44} Werber contends that he was not advised of his *Miranda* rights and that he was coerced into making statements. But Special Agent Johns testified that after Werber was arrested, he was advised of his *Miranda* rights, indicated he understood them, and agreed to waive his rights and speak to the police because he wanted to "stay out of jail and go back to California." Werber told the police of the entire plan of transporting marijuana from Detroit to Cleveland for sale and his involvement, including renting the storage units under the alias of "Leon Hawkins." Johns testified that the only lawyer Werber requested was a government lawyer, so that he could work out a deal to stay out of jail.

{¶ 45} Special Agent Johns's testimony that Werber voluntarily talked to the police was corroborated by Carol Anderson, an employee from the storage unit facility, who testified that she approached Werber and the police while they were "talking" and did not see a confrontational encounter. On this record, the trial court's finding was supported by some competent

credible evidence that Werber was advised of his *Miranda* rights and voluntarily waived them; we will not disturb that finding.

{¶ 46} In light of the above, the fourth and fifth assignments of error are overruled.

{¶ 47} Werber's sixth assigned error reads: "The trial court erred by denying Werber's motion to disclose or produce the confidential informant." Werber contends in this assignment that he needed the CI to testify so that he could prove his defense — that he was "duped by Baxter and was an unknowing participant in Baxter's marijuana trafficking."

{¶ 48} A trial court's decision regarding disclosure of the identity of a confidential informant will not be reversed unless the trial court has abused its discretion. *State v. Feltner* (1993), 87 Ohio App.3d 279, 282, 622 N.E.2d 15. A criminal defendant is entitled to disclosure only when the informant's testimony is either "vital" to establishing an essential element of the offense, or beneficial to the accused in preparing a defense. *State v. Williams* (1983), 4 Ohio St.3d 74, 77, 446 N.E.2d 779.

{¶ 49} The CI did not communicate with Werber; all of his communications were with Baxter. Further, in his conversations with the CI, Baxter did not refer to appellant by name, but rather used the word "we." Moreover, the drug transaction never took place and the CI never even met Werber. The CI therefore would not have been able to assist in Werber's

defense because he did not have any direct dealings with Werber. On this record, the trial court did not abuse its discretion by denying Werber's motion to reveal the identity of the CI, and the sixth assignment of error is overruled.

{¶ 50} Werber's seventh assignment of error reads: "The trial court erred by admitting prior bad acts, bad character, bad association, and guilt by association evidence at trial in violation of Evidence Rules 401-404."

{¶ 51} "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of the syllabus. We therefore review a trial court's decision regarding the admission of evidence under an abuse of discretion standard. Id.

{¶ 52} At trial, Werber challenged evidence (and argument) about (1) Werber meeting Baxter in an Arizona prison, and (2) Werber's knowledge of a fugitive and drug trafficker in Mexico. Agent Johns testified that Werber told him this information after he waived his rights and agreed to talk to him. Werber argued that he never made the statements and the police were making it up. Further, Werber sought to have the statement edited so that the jury would not learn that he had been in prison before. The trial court

allowed Werber to argue that the statements were false, but denied his request for redaction.

{¶ 53} The trial court did not abuse its discretion by not editing the statement. Werber claimed that his statements were false. The state presented evidence to corroborate that Werber and Baxter were inmates at the same time in the same Arizona prison, thus rebutting Werber's claim that the police made the statements up. Accordingly, the seventh assignment of error is overruled.

{¶ 54} Werber's eighth assignment of error reads: "The trial court erred in denying Werber's motion for a new trial because the prosecutor withheld discovery of a video recording of a meeting between co-defendant Baxter and the confidential informant, and a written summary of co-defendant Baxter's statements to the prosecutor, in violation of Criminal Rule 16(B)(1)(a)(i)-(ii)."

{¶ 55} An appellate court reviews a trial court's decision on a motion for new trial under an abuse of discretion standard. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 76, 564 N.E.2d 54.

{¶ 56} During pretrial discovery, Werber requested an audio or video recording of a meeting between the CI and Baxter. At a hearing on the matter, the assistant prosecuting attorney told the court that if the recording existed, the prosecutor's office did not have it. The assistant prosecutor told the court that he attempted to retrieve the recording, but could not. The

assistant prosecutor stipulated that if the recording did exist and the state never had it or failed to turn it over to Werber, the state could not use it at trial. The court accepted the stipulation.

{¶ 57} The prosecutor's contention that the state never had the recording was corroborated at trial by Special Agent Johns's testimony when asked by Werber about where the recording was: "I don't know. If the prosecutor does not have them, I don't know where they are. They may be on an FBI mainframe. I don't know. * * * [W]e looked, and we can't find it * * * we found the telephone ones."

{¶ 58} The record therefore indicates that the specific recording Werber sought was nonexistent, or in any event, not in the state's or its agents' possession. Thus, the trial court did not abuse its discretion by denying Werber's motion on this ground.

{¶ 59} Werber also based his motion for a new trial on a letter from Baxter he received post-trial. Werber told the court of the letter at sentencing. According to Werber, Baxter wrote that he told the assistant prosecutor that (1) Werber did not have anything to do with the drug transaction, (2) his only involvement was "as his friend," and (3) all he did on the day of the incident was drive Baxter to the hotel.

{¶ 60} However, on the record, the assistant prosecuting attorney stated that during his meeting with Baxter, Baxter told him that although he did

not want to incriminate himself, everything in Werber's written statement was true.

{¶ 61} On this record, the trial court did not abuse its discretion by denying Werber's motion for a new trial. The eighth assignment of error is therefore overruled.

{¶ 62} Werber's ninth assigned error reads: "The trial court erred in denying Werber's motion to find count one, marijuana trafficking, and count three, possession of criminal tools, allied offenses pursuant to R.C. 2941.25(A)."[3]

{¶ 63} R.C. 2941.25 governs multiple-count indictments and provides as follows: "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶ 64} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

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[3]The trial court merged Counts 1 and 2, drug trafficking and drug possession, respectively; in this assignment, Werber contends that the court should have also merged drug trafficking and possession of criminal tools.

{¶ 65} The Ohio Supreme Court has interpreted R.C. 2941.25 to involve a two-step analysis: "'In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's conduct is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.'" *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, 911 N.E.2d 882, ¶10, quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816; see, also, *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154; *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181.

{¶ 66} In determining whether offenses constitute allied offenses of similar import under R.C. 2941.25(A), courts must "compare the elements of offenses in the abstract, i.e., without considering the evidence in the case * * *." *Cabrales* at ¶27; see, also, *Harris* at ¶12. The elements need not, however, be identical for the offenses to constitute allied offenses of similar import. *Winn* at ¶12. The key word is "similar," not "identical." *Winn* at ¶12; see, also, *Harris* at ¶16 (stating that the offenses need not exactly align

to constitute allied offenses). Offenses constitute allied offenses of similar import if "'in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other * * *.'" *Winn* at ¶12, quoting *Cabrales* at ¶26.

{¶ 67} Werber was convicted under R.C. 2925.03(A)(2), which charged that he knowingly prepared for shipment, shipped, transported, delivered, prepared for distribution, or distributed a drug of abuse, knowing, or having reasonable cause to believe the drugs were intended for sale or resale by him or another. His conviction under R.C. 2923.24 for possession of criminal tools charged that he knowingly possessed or had under his control a substance, device, instrument, or article with purpose to use it criminally, and that the substance, device, instrument, or article was intended for use in the commission of a felony offense. Comparing the offenses here, an offender need not commit drug trafficking any time he commits the offense of possession of criminal tools; an offender likewise need not commit the offense of possession of criminal tools any time he commits the offense of drug trafficking. Therefore, drug trafficking and possession of criminal tools are not allied offenses and Werber's ninth assignment of error is overruled.

{¶ 68} Finally, Werber's tenth assignment reads: "Pro se Werber was denied his Sixth Amendment right to counsel during a critical stage of

proceedings when, over his objection, he was removed from the courtroom while the prosecutor remained to gather and send evidence, ex-parte, to the deliberating jury."

{¶ 69} The record shows that at the conclusion of the trial, the assistant prosecuting attorney who tried the case gathered the admitted evidence for submission to the jury; Werber and the trial judge were present. After all the admitted evidence was gathered, Werber requested that he be allowed to go with the court's bailiff when she took the evidence into the jury deliberation room, but his request was denied. The bailiff, along with one of the court reporters, placed the evidence in the jury deliberation room; the assistant prosecuting attorney did not go into the jury deliberation room with the evidence.

{¶ 70} On this record, Werber was not denied right to counsel during a critical stage of the proceeding and his tenth assignment of error is overruled.

Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

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

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

CHRISTINE T. McMONAGLE, JUDGE

SEAN C. GALLAGHER, A.J., and
COLLEEN CONWAY COONEY, J., CONCUR