[Cite as *State v. Moon*, 2009-Ohio-4830.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 08CA875
vs.	:	
SHAWN MOON,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT:[1] Lisa Rothwell, 307 North Market Street, West Union, Ohio 45693

COUNSEL FOR APPELLEE: Aaron Haslam, Adams County Prosecuting Attorney, 110 West Main Street, West Union, Ohio 45693

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 8-25-09

ABELE, J.

{¶ 1} This is an appeal from an Adams County Common Pleas Court judgment of conviction and sentence. The jury found Shawn Moon, defendant below and appellant herein, guilty of illegal assembly or possession of chemicals for the manufacture of drugs, in violation of R.C. 2925.041(A).

{¶ 2} Appellant raises the following assignments of error for review:

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[1] Different counsel represented appellant during the trial court proceedings.

FIRST ASSIGNMENT OF ERROR:

"THE JURY VERDICT ON THE ILLEGAL ASSEMBLY OR POSSESSION OF CHEMICALS FOR THE MANUFACTURE OF DRUGS WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE DENYING APPELLANT DUE PROCESS OF LAW."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS ANY STATEMENTS MADE BEFORE THE SCHEDULED POLYGRAPH TEST DENYING APPELLANT DUE PROCESS OF LAW."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE STATE EXHIBITS EIGHT AND NINE DENYING APPELLANT DUE PROCESS OF LAW."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE STATE EXHIBITS SEVEN, EIGHT, TEN, AND THIRTEEN DENYING APPELLANT DUE PROCESS OF LAW."

FIFTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN IT ALLOWED THE JURY INSTRUCTIONS TO INCLUDE CONSTRUCTIVE POSSESSION."

{¶ 3} On April 19, 2008, two Adams County Sheriff deputies responded to a complaint of suspicious activity at a residence. Upon arrival, the deputies observed an individual entering a van and another individual entering the residence. Deputy Donald Adams exited his vehicle, approached the van and requested that the individual to open the door. When he did, a "strong odor" that "smelled like ammonia or ether" emanated from the van and stung Deputy Adams' eyes. Deputy Adams suspected that the van

contained a methamphetamine lab and requested additional officers to respond to the scene.

{¶ 4} Meanwhile, Deputy Cross[2] observed movement inside the residence. Both deputies then "took cover" and ordered the subjects out of the house. Two male individuals and appellant exited the house. After additional officers arrived, they searched the premises and the vehicles. Inside a camper, the detectives found two, twenty-five pound propane cylinders believed to contain anhydrous ammonia. Inside the house, the freezer smelled of ammonia. The officers discovered an active methamphetamine lab in the van. Inside the trunk of appellant's step-father's vehicle, officers uncovered a small cooler that contained lithium strips, anhydrous ammonia, starting fluid, plastic tubing, liquid fire drain cleaner, and pills in the process of extracting. The officers also found a jar that contained methamphetamine in the making.

{¶ 5} On April 24, 2008, the Adams County Grand Jury returned an indictment charging appellant with illegal assembly or possession of chemicals for the manufacture of drugs, in violation of R.C. 2925.041.

{¶ 6} On June 17, 2008, the parties entered into a stipulation regarding a polygraph examination. The agreement provided that appellant would submit to a polygraph test. The agreement also provided that appellant "has been fully advised of her constitutional and statutory rights, and by signing this entry, she knowingly, intelligently and voluntarily waives her right to remain silent and her right to seek advise

[2] Deputy Cross did not testify at trial and his full name is not otherwise apparent in the record.

of counsel during any stage of the administration of the polygraph test procedure. Admissions or other culpatory statements made by the defendant before, during and after 'testing' shall be admissible and may be testified to during the trial of this case." The court held an oral hearing regarding the stipulation and reviewed it with appellant. Appellant stated that she understood and agreed to it.

{¶ 7} On August 1, 2008, appellant filed a "motion in limine" to exclude the introduction of the videotaped statement that she made during the scheduled polygraph examination. She further requested the court order the prosecution to refrain from referring to the statement. She alleged that before the polygraph examination, she withdrew her consent to the stipulation. She alleged that under paragraph 12 of the stipulation, her withdrawal means the agreement is for naught.[3]

{¶ 8} The trial court indicated that it held a hearing regarding appellant's motion in limine, but the record on appeal does not include a transcript of this hearing.

{¶ 9} On August 7, 2008, the trial court overruled appellant's motion in limine:

> "During the pretest dialogue, [appellant] responded to inquiries by the examiner, Kenneth Dick, stating that she participated in certain activities, and/or had knowledge of events occurring on the night in question. Said statements of [appellant] caused Kenneth Dick to believe that said culpatory statements would constitute an element or elements of the offense for which she is under indictment, thereby negating [appellant]'s ability to pass the polygraph examination for truthfulness when questioned during the actual polygraph examination. Based upon the acknowledgment by [appellant] as to certain actions taken by [appellant] and/or knowledge of events occurring in her presence on the date in question as set forth in the indictment, Kenneth Dick determined that it would be futile to further conduct a polygraph examination."

[3]Paragraph 12 states, in part: "* * * [T]he defendant may withdraw from this agreement as herein agreed at any time prior to the commencement of the test procedures, in which event this entry shall be set aside and held for naught."

The court determined that the stipulation covered statements made during the pre-test interview and, thus, overruled appellant's motion in limine.

{¶ 10} On August 7, 2008, the trial court held a jury trial. Deputy Adams testified that several of the items recovered from the search of the premises and the vehicles are commonly used to manufacture methamphetamine, including: anhydrous ammonia, lithium strips, liquid fire (which is an industrial type drain cleaner), ephedrine, coffee filters, salt, and ether from starting fluid. Detective Cooley testified that when he arrived at the scene, he smelled a strong odor of methamphetamine cooking.

{¶ 11} Adams County Prosecutor's Office Investigator Kenneth Dick testified that he interviewed appellant on June 20, 2008. During the interview, appellant stated that on April 19, 2008 she was with Kerry Hammonds, who picked up the cooler that contained the items used to manufacture methamphetamine. Appellant knew that the cooler contained items to manufacture methamphetamine. Appellant advised Investigator Dick that she and Hammonds had hid the cooler at an earlier date, that Hammonds forgot the cooler's location and that she helped him retrieve it. She informed Investigator Dick that she let the air out a can of starting fluid in order to extract the liquid and handed it to Hammonds. At this point, law enforcement officers arrived. She indicated that she knew methamphetamine was being manufactured. Investigator Dick testified that appellant admitted that she participated in the process.

{¶ 12} On August 8, 2008, the jury found appellant guilty of the illegal assembly or possession of chemicals to manufacture drugs. The trial court sentenced appellant to serve four years in prison. This appeal followed.

{¶ 13} In her first assignment of error, appellant asserts that her conviction for the illegal assembly or possession of chemicals for the manufacture of drugs is against the manifest weight of the evidence. Appellant argues that the prosecution did not present any physical evidence that she touched any of the chemicals or that she had any intent to distribute an illegal drug.

{¶ 14} When an appellate court considers a claim that a conviction is against the manifest weight of the evidence, the court must dutifully examine the entire record, weigh the evidence, and consider the credibility of witnesses. The reviewing court must bear in mind, however, that credibility generally is an issue for the trier of fact to resolve. See State v. Issa (2001), 93 Ohio St.3d 49, 67, 752 N.E.2d 904; State v. DeHass (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. Once the reviewing court finishes its examination, the court may reverse the judgment of conviction only if it appears that the fact-finder, in resolving conflicts in evidence, "'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" Thompkins, 78 Ohio St.3d at 387, quoting State v. Martin (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶ 15} If the prosecution presented substantial evidence upon which the trier of fact reasonably could conclude, beyond a reasonable doubt, that the essential elements of the offense had been established, the judgment of conviction is not against the manifest weight of the evidence. See State v. Eley (1978), 56 Ohio St.2d 169, 383 N.E.2d 132, syllabus. A reviewing court should find a conviction against the manifest weight of the evidence only in the "'exceptional case in which the evidence weighs heavily against conviction.'" Thompkins, 78 Ohio St.3d at 387, quoting Martin, 20 Ohio

App.3d at 175; see, also, State v. Lindsey (2000), 87 Ohio St.3d 479, 483, 721 N.E.2d 995.

{¶ 16} Moreover, in determining whether substantial evidence exists, courts should equally weigh circumstantial and direct evidence. See Jenks, 61 Ohio St.3d at 272 ("Circumstantial evidence and direct evidence inherently possess the same probative value [and] in some instances certain facts can only be established by circumstantial evidence."). When reviewing the value of circumstantial evidence, we note that "the weight accorded an inference is fact-dependent and can be disregarded as speculative only if reasonable minds can come to the conclusion that the inference is not supported by the evidence." Wesley v. The McAlpin Co. (May 25, 1994) Hamilton App. No. C-930286, unreported (citing Donaldson v. Northern Trading Co. (1992), 82 Ohio App.3d 476, 483, 612 N.E.2d 754).

{¶ 17} In the case at bar, we do not believe that the evidence adduced at trial weighs heavily against conviction. The prosecution presented substantial evidence to support the essential elements of the offense of illegal assembly or possession of chemicals for the manufacture of drugs.

{¶ 18} R.C. 2925.041(A) sets forth the essential elements of illegal assembly or possession of chemicals for the manufacture of drugs and states: "(A) No person shall knowingly assemble or possess one or more chemicals that may be used to manufacture a controlled substance * * * with the intent to manufacture a controlled substance * * *." In the case sub judice, appellant asserts that the weight of the evidence fails to show that she "knowingly," "possessed" one or more chemicals with the "intent" to distribute methamphetamine. We note that appellant argues that R.C.

2925.041(A) requires the prosecution to prove that she intended to distribute methamphetamine. Instead, the statute requires the state to prove that she intended to manufacture methamphetamine.

{¶ 19} R.C. 2901.22(B) states that "[a] person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2925.01(K) defines "possession" as "having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found." Possession may be actual or constructive. See State v. Butler (1989), 42 Ohio St.3d 174, 175, 538 N.E.2d 98 ("To constitute possession, it is sufficient that the defendant has constructive possession * * *."); State v. Hankerson (1982), 70 Ohio St.2d 87, 434 N.E.2d 1362, syllabus.

> "'Actual possession exists when the circumstances indicate that an individual has or had an item within his immediate physical possession. Constructive possession exists when an individual is able to exercise dominion or control of an item, even if the individual does not have the item within his immediate physical possession.' [State v.] Fry[, Jackson App. No. 0326, 2004-Ohio-5747,] at ¶39, citing State v. Hankerson (1982), 70 Ohio St.2d 87, 24 O.O.3d 155, 434 N.E.2d 1362, syllabus, and State v. Wolery (1976) 46 Ohio St.2d 316, 329, 75 O.O.2d 366, 348 N.E.2d 351. '"[F]or constructive possession to exist, '[i]t must also be shown that the person was conscious of the presence of the object.'"' State v. Huckleberry, Scioto App. No. 07CA3142, 2008-Ohio-1007, 2008 WL 623342, at ¶34, quoting State v. Harrington, Scioto App. No. 05CA3038, 2006-Ohio-4388, 2006 WL 2457218, ¶15, quoting Hankerson, 70 Ohio St.2d at 91, 24 O.O.3d 155, 434 N.E.2d 1362. Although a defendant's mere proximity is in itself insufficient to establish constructive possession, proximity to the object may constitute some evidence of constructive possession. Fry at ¶40. Thus, presence in the vicinity of contraband, coupled with another factor or factors probative of dominion or control over the contraband, may establish constructive possession. State v. Riggs (Sept. 13, 1999), Washington App. No. 98CA39, 1999 WL 727952."

State v. Kingsland, 177 Ohio App.3d 655, 2008-Ohio-4148, 895 N.E.2d 633, at ¶13.

{¶ 20} "With regard to the ability to prove an offender's intentions, the Ohio Supreme Court has recognized that 'intent, lying as it does within the privacy of a person's own thoughts, is not susceptible [to] objective proof.'" State v. Wilson, Warren App. No. CA2006-01-007, 2007-Ohio-2298, ¶41, quoting State v. Garner (1995), 74 Ohio St.3d 49, 60, 656 N.E.2d 623. Accordingly, "[i]ntent must often * * * be inferred from the act itself and the surrounding circumstances, including the acts and statements of the defendant surrounding the time of the offense." Id.; State v. Hutchinson (1999), 135 Ohio App.3d 459, 457. Because no one can know the mind of another, a defendant's intent is "not discernible through objective proof." State v. Huffman (1936), 131 Ohio St. 27, 1 N.E.2d 313, at paragraph four of the syllabus. Rather, a defendant's intent in acting must be "determined from the manner in which it [the act] is done, the means used, and all other facts and circumstances in evidence." State v. Wellman (2007), 173 Ohio App.3d 494, 2007-Ohio-2953, 879 N.E.2d 215, at ¶15. Intent "can never be proved by the direct testimony of a third person and it need not be. It must be gathered from the surrounding facts and circumstances * * *." State v. Lott (1990), 51 Ohio St.3d 160, 168, 555 N.E.2d 293, quoting Huffman, supra.

{¶ 21} In Kingsland, we concluded that the prosecution failed to present sufficient evidence to prove that the defendant knowingly possessed chemicals used to manufacture methamphetamine. In Kingsland, the defendant was a passenger in a truck that a law enforcement officer stopped for a traffic violation. The officer thought

the defendant acted nervous and he then smelled what he believed to be ether. Upon further inspection of the bed of the truck, the officer uncovered items used to manufacture methamphetamine. Although the officer suspected that he had discovered a methamphetamine lab, he asked the defendant what was in the back of the truck. The defendant denied ownership of the items. The defendant also requested the officers to fingerprint the items, but they did not. The prosecution subsequently indicted the defendant for illegal assembly or possession of chemicals for the manufacture of methamphetamine. We determined that the evidence in this case failed to show that the defendant knowingly exercised dominion or control over the items. We observed that the items that officers recovered from the pick-up truck were concealed in plastic bags and that the officer testified that the items were not readily apparent. We also noted that the prosecution did not present any evidence that the defendant "had any specialized knowledge regarding methamphetamine production or that he should have recognized these objects as components in the production of methamphetamine." Id. at ¶16. We concluded that the officer's observation that the defendant seemed "somewhat very nervous" was not sufficient to prove that the defendant knew that the chemicals were in the truck. We further disagreed with the prosecution's argument that the defendant's immediate denial of ownership of the items showed guilty intent. In reaching our conclusion that the evidence did not sufficiently show possession, we stated:

> "The state's evidence showed that the drugs were found in the pickup, that neither the driver nor Kingsland owned the pickup, and that Kingsland was a passenger in the pickup for some unknown duration. The driver did not testify. None of the state's evidence indicates that Kingsland should have or could have known that he was in close proximity

> to illegal chemicals based upon their appearance and location in the truck. In order to conclude that it was Kingsland who was in control of the chemicals, jars, and bottles rather than the driver or the owner of the truck, the jury would have to speculate. Officer Caldwell testified that Kingsland appeared 'somewhat very nervous,' but we do not believe that an individual acting 'somewhat very nervous' in itself suffices to show guilt in the absence of any other evidence. See State v. Bush, Cuyahoga App. No. 81959, 2003-Ohio-4054, 2003 WL 21757516, at ¶12-14 (holding that insufficient evidence proved constructive possession when the defendant was merely in the vicinity of PCP, the smell of PCP was in the air, the defendant had 34 one-dollar bills, and there was no evidence that the defendant knew what PCP smelled like); State v. Mayer, Cuyahoga App. No. 80168, 2003-Ohio-1, at ¶6-12 (concluding that insufficient evidence supported driver's conviction for possession of cocaine when driver sped up after a police cruiser pulled behind him, the packet of crack cocaine was not in driver's reach or line of sight, no one saw driver duck down, it was dark outside and inside the truck, and the state merely speculated that the defendant rather than the passenger placed the packet on the floor beside the transmission hump); see also State v. Smith, Logan App. No. 8-04-40, 2005-Ohio-3233, 2005 WL 1503954, at ¶7 (holding that insufficient evidence supported the defendant's conviction for possession of cocaine when officers executed a warrant on a small one-room apartment and found 'large quantities of crack-cocaine' in plain view; although the defendant supplied police with a false name when they questioned him at the apartment, there was no evidence that the defendant had drugs on his person or that he had ever used cocaine)."

Id. at ¶20. Thus, we reversed the defendant's conviction.

{¶ 22} Kingsland is distinguishable from the case at bar. Unlike the situation in Kingsland, in the case sub judice appellant was not a mere passenger in a car, but, rather she was located inside a home that contained evidence of active methamphetamine production. Chemicals used to manufacture methamphetamine were located on the premises and in the trunk of appellant's step-father's vehicle. Appellant's step-father was not present at the scene, so the logical inference is that appellant had been in control of the car. The chemicals were located inside a cooler that appellant had helped a friend hide and subsequently retrieve. Appellant admitted to

opening a can of starting fluid for producing methamphetamine. All of this circumstantial evidence supports a finding that appellant exercised dominion and control over at least one chemical used to manufacture methamphetamine. Unlike the defendant in Kingsland, appellant was not simply in proximity to the chemicals; rather, she admitted that she physically handled at least one of the chemicals used to manufacture methamphetamine. See R.C. 2925.041(B) (stating that "[t]he assembly or possession of a single chemical that may be used in the manufacture" of methamphetamine with the requisite intent is sufficient to support an R.C. 2925.041(A) conviction).

{¶ 23} Furthermore, even if the jury believed appellant's statement that the chemicals belonged to a friend, she admitted taking part in the production of methamphetamine (by letting the air out of a can of starting fluid). Her admission shows that she knowingly possessed a chemical (starting fluid) used to produce methamphetamine and that she intended to produce methamphetamine. Appellant fails to explain why she would have let the air out of the can of starting fluid if her intent was to not manufacture methamphetamine. The only reasonable inference based upon the evidence presented is that her intent in opening the can was to manufacture methamphetamine.

{¶ 24} This same evidence also shows that appellant knowingly assembled one or more chemicals used to manufacture methamphetamine with the intent to produce it. Even if appellant's participation was, as she suggests, minimal, appellant nonetheless played a role in the manufacturing of methamphetamine. Thus, unlike the defendant in Kingsland who denied knowledge of the contents of the truck, in the case at bar

appellant admitted taking part in the process. Additionally, in the car registered to appellant's step-father, the officers uncovered active methamphetamine. All of these circumstances combined help to show that appellant knowingly assembled or possessed one or more chemicals for the manufacture of methamphetamine with the intent to manufacture methamphetamine. Her assertion that the prosecution lacks direct, physical evidence to tie her to the crime may be correct as certainly worthy of argument before the trier of fact, but nothing prohibits the prosecution from proving the elements of the crime with circumstantial evidence.[4]

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[4] The evidence also reveals that appellant is guilty under the complicity statute (although the prosecution did not pursue this theory at trial). "Complicity" is defined in R.C. 2923.03(A)(2) as follows: "No person, acting with the kind of culpability required for the commission of an offense, shall * * * [aid or abet another in committing the offense." Under R.C. 2923.03(F), a defendant "may be convicted of [an] offense upon proof that he was complicit in its commission, even though the indictment is 'stated * * * in terms of the principal offense' and does not mention complicity.'" State v. Herring, 94 Ohio St.3d 246, 251, 2002-Ohio-796, 762 N.E.2d 940.

"To support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal. Such intent may be inferred from the circumstances surrounding the crime."

State v. Johnson (2001), 93 Ohio St.3d 240, 754 N.E.2d 796, syllabus. "'Participation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed.'" Id. at 245 (quoting State v. Pruett (1971), 28 Ohio App.2d 29, 34, 273 N.E.2d 884).

However, "'the mere presence of an accused at the scene of a crime is not sufficient to prove, in and of itself, that the accused was an aider and abettor.'" Id. at 243, quoting State v. Widner (1982), 69 Ohio St.2d 267, 269, 431 N.E.2d 1025. "This rule is to protect innocent bystanders who have no connection to the crime other than simply being present at the time of its commission." Id.

{¶ 25} Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

II

{¶ 26} In her second assignment of error, appellant contends that the trial court erred by denying her "motion to suppress" the statements she made before the polygraph test.[5]

{¶ 27} Initially, we observe that appellant did not file a "motion to suppress" the statements. Rather, she filed a "motion in limine."

> "A 'motion to suppress' is defined as a '[d]evice used to eliminate from the trial of a criminal case evidence which has been secured illegally, generally in violation of the Fourth Amendment (search and seizure), the Fifth Amendment (privilege against self incrimination), or the Sixth Amendment (right to assistance of counsel, right of confrontation etc.), of U.S. Constitution.' Black's Law Dictionary (6 Ed.1990) 1014. Thus, a motion to suppress is the proper vehicle for raising constitutional challenges based on the exclusionary rule first enunciated by the United States Supreme Court in Weeks v. United States (1914), 232 U.S. 383, 34 S.Ct. 341, and made applicable to the states in Mapp v. Ohio (1961), 367 U.S. 643, 81 S.Ct. 1684. Further, this court has held that the exclusionary rule will not ordinarily be applied to suppress evidence which is the product of police conduct that violates a statute but falls short of a

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> In the case sub judice, appellant's admission shows that she aided and abetted others in the illegal assembly or possession of chemicals for the manufacture of methamphetamine with the intent to manufacture it.
>
> Consequently, appellant's conviction is not against the manifest weight of the evidence.

[5]Initially, we note that appellant does not cite any authority to support her second through fifth assignments of error. We may disregard any assignment of error that fails to present any citations to case law or statutes in support of its assertions. See App.R. 16(A)(7); App.R. 12(A)(2); Frye v. Holzer Clinic, Inc., Gallia App. No. 07CA4, 2008-Ohio-2194, at ¶12; State v. Askew, Ross App. No. 05CA2877, 2006-Ohio-4769, at ¶50; Albright v. Albright, Lawrence App. No. 06CA35, 2007-Ohio-3709, at ¶16. Nonetheless, in the interest of justice we will consider all of appellant's assignments of error.

> constitutional violation, unless specifically required by the legislature. Kettering v. Hollen (1980), 64 Ohio St.2d 232, 235, 416 N.E.2d 598, 600. * * *."

State v. French (1995), 72 Ohio St.3d 446, 449, 650 N.E.2d 887.

The French Court also described the use and nature of a motion in limine:

> "A 'motion in limine' is defined as '[a] pretrial motion requesting [the] court to prohibit opposing counsel from referring to or offering evidence on matters so highly prejudicial to [the] moving party that curative instructions cannot prevent [a] predispositional effect on [the] jury.' Black's Law Dictionary, supra, at 1013. The purpose of a motion in limine "is to avoid injection into [the] trial of matters which are irrelevant, inadmissible and prejudicial[,] and granting of [the] motion is not a ruling on evidence and, where properly drawn, granting of [the] motion cannot be error." Id. at 1013-1014. See State v. Maurer (1984), 15 Ohio St.3d 239, 259, 473 N.E.2d 768, 787."

Id. at 450.

> "[A] motion in limine may be used in two ways. It may be used as a preliminary means of raising objections to evidentiary issues to prevent prejudicial questions and statements until the admissibility of the questionable evidence can be determined outside the presence of the jury. It may also be used as the functional equivalent of a motion to suppress evidence that is either not competent or improper due to some unusual circumstance not rising to the level of a constitutional violation. Palmer, Ohio Rules of Evidence, Rules Manual (1984) 446, cited in State v. Maurer, 15 Ohio St.3d 239, 259, 473 N.E.2d at 787, fn. 14."

Id.

{¶ 28} "[A] decision on a motion in limine is a pretrial, preliminary, anticipatory ruling on the admissibility of evidence. A ruling on a motion in limine is interlocutory, usually dealing with the potential admissibility of evidence at trial. It therefore cannot serve as the basis for an assignment of error on appeal." Krotine v. Neer, Franklin App. No. 02AP-121, 2002-Ohio-7019, at ¶10, citing State v. Grubb (1986), 28 Ohio St.3d 199, 201-202, 503 N.E.2d 142. A ruling on a motion in limine reflects the court's "anticipatory treatment of the evidentiary issue. In virtually all circumstances finality

does not attach when the motion is granted. Therefore, should circumstances subsequently develop at trial, the trial court is certainly at liberty 'to consider the admissibility of the disputed evidence in its actual context.'" Grubb, 28 Ohio St.3d at 201-202, quoting State v. White (1982), 6 Ohio App.3d 1, 4, 451 N.E.2d 533. For those reasons, a motion in limine does not preserve for purposes of appeal any error in the disposition of the motion in limine. "'An appellate court need not review the propriety of such an order unless the claimed error is preserved by a timely objection when the issue is actually reached during the trial.'" Grubb, 28 Ohio St.3d at 203, quoting State v. Leslie (1984), 14 Ohio App.3d 343, 344, 471 N.E.2d 503. The failure to object at trial to the allegedly inadmissible evidence constitutes a waiver of the challenge. State v. Wilson (1982), 8 Ohio App.3d 216, 456 N.E.2d 1287; State v. Draughon, Franklin App. No. 02AP-958, 2003-Ohio-1705, at ¶22.

{¶ 29} In the case sub judice, appellant's motion did not raise a constitutional challenge. Rather, she sought to preclude her statements arising out of the polygraph stipulation. Thus, contrary to her argument, it was not a motion to suppress, but a motion in limine. Because appellant objected to the admission of the evidence at trial, however, she properly preserved the alleged error for appellate review. Thus, we are not reviewing the trial court's decision to overrule her motion in limine, but rather, the trial court's decision to overrule her objection at trial to the admission of the evidence.

{¶ 30} The admissibility of polygraph results is within a trial court's discretion. See Souel, syllabus (stating that "the admissibility of the test results is subject to the discretion of the trial judge"). An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary, or

unconscionable. State v. Wolons (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443; State v. Adams (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 31} In Souel, the court outlined when the results of a polygraph examination are admissible:

> "The results of a polygraphic examination are admissible in evidence in a criminal trial for purposes of corroboration or impeachment, provided that the following conditions are observed:
>
> (1) The prosecuting attorney, defendant and his counsel must sign a written stipulation providing for defendant's submission to the test and for the subsequent admission at trial of the graphs and the examiner's opinion thereon on behalf of either defendant or the state.
>
> (2) Notwithstanding the stipulation, the admissibility of the test results is subject to the discretion of the trial judge, and if the trial judge is not convinced that the examiner is qualified or that the test was conducted under proper conditions he may refuse to accept such evidence.
>
> (3) If the graphs and examiner's opinion are offered in evidence the opposing party shall have the right to cross-examine the examiner respecting:
>
> (a) the examiner's qualifications and training;
>
> (b) the conditions under which the test was administered;
>
> (c) the limitations of and possibilities for error in the technique of polygraphic interrogation; and,
>
> (d) at the discretion of the trial judge, any other matter deemed pertinent to the inquiry.
>
> (4) If such evidence is admitted the trial judge should instruct the jury to the effect that the examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged, and that it is for the jurors to determine what weight and effect such testimony should be given."

Id. at syllabus. In Souel, the stipulation that the parties entered read:

> "By agreement among the defendant, the defendant's counsel, and counsel for the State of Ohio, certain understandings and stipulations have been reached and entered into by said parties, as hereafter follows: 1. The defendant will submit to an examination process utilizing in part, a device commonly known as a 'polygraph' or 'lie detector,' which examination process may involve a series of interviews and tests employing such device; 2. Counsel for the State of Ohio shall arrange all necessary appointments for such examination process hereinafter referred to as 'Polygraph Testing' or, simply, 'testing'; 3. Counsel for the State of

Ohio shall designate the person who will administer and conduct the testing of the defendant, such person to be selected from those persons employed by the Ohio State Patrol as properly trained, experienced and qualified to conduct such testing; 4. Such person designated by counsel for the State of Ohio shall be permitted if called as a witness by the State of Ohio or the Defendant, to testify at trial of this cause as an 'expert' regarding all aspects of the test administered, and such testimony shall be offered and received as evidence in the trial of this cause without objections of any kind by any party to this agreement except as to the weight of evidence it is to be given. EXCEPTION: Should any person administering such test pursuant to this Entry determine the results of such test to be 'inconclusive' as to deception, or lack thereof, on the part of the defendant, then such 'inconclusive' test shall not be the subject of any testimony whatsoever and this entire 'Entry of Stipulation of Use of Polygraph Test' shall be set aside and held for naught; 5. The defendant and his counsel are under obligation to disclose prior to any testing, any known condition which might affect the reliability of testing pursuant to this Entry; for example, the concealment of medication used by the defendant shall be regarded as a willful breach of this Entry and shall be dealt with as provided in paragraph 9 of this Entry; 6. The person chosen to administer the testing may refuse to administer the test, if, in the judgment of such person the defendant is not deemed a proper subject for examination at the time of examination (e. g., the defendant is or appears to be under the influence of a drug which might distort test results); in such situation, the person chosen to administer the examination process may determine whether reasonable delay of examination would permit a reliable rest (sic test) to be given and may conduct said test at the appropriate time. If, in the judgment of the person chosen to administer the examination process, the defendant can, through no fault of his own, never be reliably tested, this Entry shall be set aside and held for naught; 7. Prior to signing this Entry and agreeing thereby to submit to 'Polygraph Testing,' the defendant has been fully advised of his constitutional and statutory rights, and by signing this Entry, he knowingly, intelligently, and voluntarily waives his right to remain silent and his right to seek advise of counsel during any stage of the administration of the polygraph test procedure. Admissions or other inculpatory statements made by the defendant during 'testing' shall be admissible and may be testified to during the trial of this cause. 8. No testimony or other evidence concerning polygraph test or tests of the defendant shall be received at any stage of the trial of this cause unless such test or test(s) had been conducted pursuant to this or any subsequent Entry. 9. It is further understood by all parties that upon signing this Entry of Stipulation of Use of Polygraph Test, permitting the results of such test to be introduced into evidence, all parties and their successors in interest (i.e. such other counsel as the State of Ohio or the defendant may retain or employ or be

> represented by for the trial of this cause) shall be mutually bound to the terms of said Entry. The willful refusal of any party to submit to or comply with any provision of this Entry shall be the proper subject of evidence and testimony to be adduced during the case in the trial of this cause, and may, further, in the Court's discretion, be punishable by additionally appropriate civil and/or criminal contempt remedies and procedures; except that the State of Ohio or the defendant may withdraw from this agreement as herein agreed at any time prior to the commencement of the test procedure in which event this Entry shall be set aside and held for naught; 10. It is further understood, in keeping with normal testing procedure, that the polygraph examiner will hold in confidence any admissions or statements made by the defendant which pertain to matters not under investigation."

Id. at fn.1.

{¶ 32} In the case sub judice, the stipulation that appellant and the prosecution entered into mirrors the stipulation that the Souel court endorsed. Thus, the trial court did not abuse its discretion by admitting appellant's statements.

{¶ 33} Appellant nevertheless argues that her statements occurred before the test actually began and, thus, are not admissible. She claims that because she was not physically connected to the polygraph machine at the time she made the statements, the statements did not occur during the testing procedure. At least one other court has considered and rejected this specious argument. See State v. Madison, Franklin App. No. 06AP-1126, 2007-Ohio-3547, at ¶9 ("Although counsel for Mr. Madison argues that only statements made while Mr. Madison was fully wired for the actual physiological reactions were admissible, the stipulation includes a series of interviews. The construction of the entry of stipulation argued on Mr. Madison's behalf is forced at best and does not reflect the reality of the polygraph testing procedure as commonly known and understood in the criminal justice system."). Moreover, the agreement provided that statements made before the test would be admissible.

{¶ 34} Furthermore, we note that appellant failed to ensure that the record on appeal contains a transcript of the purported hearing regarding this motion in limine. In the absence of a transcript, we must presume the validity of the trial court's decision. Knapp v. Edwards Lab. (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384.

{¶ 35} Accordingly, based upon the foregoing reasons, we overrule appellant's second assignment of error.

III

{¶ 36} Appellant's third and fourth assignments of error challenge two evidentiary rulings. Because these assignments of error involve the same standard of review, we consider them together.

{¶ 37} In her third assignment of error, appellant argues that the trial court erred by permitting the prosecution to introduce photographs depicting a jewelry box. She claims that the prosecution failed to properly authenticate them. She also alleges that the testifying officer improperly stated, when explaining the photographs, that it is common to find stolen items when investigating methamphetamine labs.

{¶ 38} In her fourth assignment of error, appellant contends that the trial court erred by permitting the prosecution to introduce photographs that depicted a cell phone. Appellant contends that before officers photographed the cell phone, they moved it from its original location, and, thus, the photographs do not portray a true and accurate description of the cell phone. She further asserts that the trial court should have prohibited the evidence because the prosecution did not present any evidence connecting her to the cell phone.

A

{¶ 39} The admission or exclusion of evidence rests within the sound discretion of the trial court. State v. Haines, 112 Ohio St.3d 393, 2006-Ohio-6711, 860 N.E.2d 91, at ¶50; State v. Robb (2000), 88 Ohio St.3d 59, 68, 723 N.E.2d 1019. Absent an abuse of discretion, an appellate court will not disturb a trial court's ruling regarding the admissibility of evidence. State v. Martin (1985), 19 Ohio St.3d 122, 129, 483 N.E.2d 1157. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. State v. Wolons (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443; State v. Adams (1980), 62 Ohio St.2d 151, 157, 16 O.O.3d 169, 404 N.E.2d 144.

B

{¶ 40} In the case sub judice, we do not believe that the trial court abused its discretion by permitting the jewelry box photographs. "To authenticate photographs, there is no need to call the individual who took the photographs. A witness with personal knowledge of the subject of the photograph may authenticate it by testifying that the photograph fairly and accurately depicts the subject at the time the photographs were taken." State v. Hannah (1978), 54 Ohio St.2d 84, 88, 374 N.E.2d 1359.

{¶ 41} In the case at bar, Detective Cooley testified that he was involved in the search of the premises and that he discovered several items used to manufacture methamphetamine. He testified that the photographs fairly and accurately depicted the items found. Nothing in his testimony suggests otherwise. Thus, the trial court did not abuse its discretion by allowing photographs of the jewelry box.

{¶ 42} Appellant's main issue with the jewelry box is that the testifying detective explained that it is common to find stolen items at methamphetamine labs–the

implication being that the items in the jewelry box were stolen. She contends that his statement was prejudicial because it implied to the jury that she is a thief. Appellant did not, however, object to his statement at trial. As such, she has waived all but plain error. Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." For a reviewing court to find plain error, the following three conditions must exist: (1) an error in the proceedings; (2) the error must be plain, i.e., the error must be an "obvious" defect in the trial proceedings; and (3) the error must have affected "substantial rights," i.e., the trial court's error must have affected the outcome of the trial. See, e.g., State v. Noling, 98 Ohio St.3d 44, 56, 2002-Ohio-7044, 781 N.E.2d 88; State v. Barnes, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240; State v. Sanders (2001), 92 Ohio St.3d 245, 257, 750 N.E.2d 90; State v. Hill (2001), 92 Ohio St.3d 191, 200, 749 N.E.2d 274. Furthermore, the Ohio Supreme Court has stated that Crim.R. 52(B) is to be invoked "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." State v. Landrum (1990), 53 Ohio St.3d 107, 111, 559 N.E.2d 710; see, also, State v. Long (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus. A reviewing court should consider noticing plain error only if the error ""seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."" Barnes, 94 Ohio St.3d at 27, quoting United States v. Olano (1993), 507 U.S. 725, 736, 113 S.Ct. 1770, 123 L.Ed.2d 508, quoting United States v. Atkinson (1936), 297 U.S. 157, 160, 56 S.Ct. 391, 80 L.Ed. 555).

{¶ 43} In light of appellant's confession, we believe that the officer's comment regarding the contents of the jewelry box, while gratuitous, did not seriously affect the

fairness of the judicial proceedings. As we explained in our discussion of appellant's first assignment of error, substantial evidence supports her conviction. Therefore, any error associated with the officer's comment did not affect the outcome of the proceedings and does not, therefore, rise to the level of plain error.

C

{¶ 44} Even if we assume for purposes of argument that the trial court erred by admitting the cell phone evidence, appellant has not explained how the error pejudiced her. "Harmless trial errors are to be disregarded and the erroneous admission of evidence is not reversible unless it affects a substantial right that prejudices the defendant." State v. Jeffers, Gallia App. No. 08CA7, 2009-Ohio-1672, at ¶19 (citations omitted). We are unable to discern any danger that the jury convicted appellant based upon photographs of a cell phone discovered at the scene.

{¶ 45} Accordingly, based upon the foregoing reasons, we overrule appellant's third and fourth assignments of error.

IV

{¶ 46} In her fifth assignment of error, appellant contends that the trial court erred by giving the jury a constructive possession instruction when the prosecution did not present any evidence of actual possession.

{¶ 47} Generally, a trial court has broad discretion to decide how to fashion jury instructions. The trial court must not, however, fail to "fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder." State v. Comen (1990), 50 Ohio St.3d 206, 553 N.E.2d 640, paragraph two of the syllabus. Additionally, a trial court may not omit a

requested instruction, if such instruction is "'a correct, pertinent statement of the law and [is] appropriate to the facts * * *.'" State v. Lessin (1993), 67 Ohio St.3d 487, 493, 620 N.E.2d 72, quoting State v. Nelson (1973), 36 Ohio St.2d 79, 303 N.E.2d 865, paragraph one of the syllabus.

{¶ 48} In the case sub judice, we do not believe that the trial court erred by giving the jury a constructive possession instruction. As we stated in our discussion of appellant's first assignment of error, possession may be either actual or constructive. Nothing requires the prosecution to prove actual possession before a trial court may give a constructive possession instruction. In the case at bar, the evidence supported a constructive possession instruction.

{¶ 49} Moreover, the wording of the trial court's instruction appears to be a correct statement of the law. The court gave the following instruction: "Constructive possession exists when an individual exercises dominion and control over, even though that object may not be within his or her immediate physical possession." This instruction comports with the cases defining constructive possession that we discussed under appellant's first assignment of error. Consequently, appellant's argument is meritless.

{¶ 50} Accordingly, based upon the foregoing reasons, we overrule appellant's fifth assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the 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 Adams County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

Kline, P.J.: Concurs in Judgment Only
McFarland, J.: Concurs in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.