[Cite as *State v. Marshall*, 2010-Ohio-1958.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELATE DISTRICT
GALLIA COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No: 09CA13
	:	
v.	:	
	:	**DECISION AND**
Danjuma Marshall,	:	**JUDGMENT ENTRY**
	:	
Defendant-Appellant.	:	File-stamped date: 4-29-10

APPEARANCES:

Timothy Young, State Public Defender, and Jeremy J. Masters, Assistant State Public Defender, Office of the Ohio Public Defender, Columbus, OH, for Appellant.

C. Jeffrey Adkins, Gallia County Prosecuting Attorney, and Eric R. Mulford, Gallia County Assistant Prosecuting Attorney, Gallipolis, OH, for Appellee.

Kline, J.:

{¶1} Danjuma Marshall (hereinafter "Marshall") appeals the judgment of the Gallia County Court of Common Pleas, which found him guilty of trafficking in cocaine and possession of cocaine. On appeal, Marshall contends that the trial court erred in denying his request for self-representation. We disagree. Because Marshall made his request out of anger and frustration, Marshall did not unequivocally invoke the right to self-representation. Next, Marshall contends that his indictment is flawed because it misidentifies the relevant drug as "cocaine" instead of "crack cocaine." Because the evidence shows that Marshall possessed and trafficked in 120.9 grams of the base form of cocaine, and because the Revised Code's definition of cocaine includes the base

form of cocaine, we disagree. Accordingly, we overrule both of Marshall's assignments of error and affirm the judgment of the trial court.

I.

{¶2} A Gallia County Grand Jury returned a two-count indictment against Marshall. First, the Grand Jury indicted Marshall for trafficking in cocaine, a second-degree felony, in violation of R.C. 2925.03(A)(2). In relevant part, count one of the indictment states that Marshall did "prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute Cocaine, a schedule II controlled substance, in an amount equal to or exceeding one hundred grams, but is less than 500 grams of cocaine, to-wit: 126 grams, when Danjuma L. Marshall knew or had reasonable cause to believe that the controlled substance was intended for sale or resale, in violation of Section 2925.03(A)(2) of the Ohio Revised Code." Second, the Grand Jury indicted Marshall for possession of cocaine, a second-degree felony, in violation of R.C. 2925.11(A). In relevant part, count two of the indictment states that Marshall did "knowingly obtain, possess, or use Cocaine, a schedule II controlled substance, in an amount equal to or exceeding 100 grams, but is less than 500 grams of cocaine, to-wit: 126 grams, in violation of Section 2925.11(A) of the Ohio Revised Code." Subsequently, Marshall pled not guilty to both counts.

{¶3} At his May 2, 2008 arraignment, the trial court appointed Marshall his first attorney (hereinafter "Attorney One"). On May 12, 2008, Marshall filed a pro se motion, which the trial court later denied because Marshall had court-appointed counsel. On May 22, 2008, Marshall filed the following Motion to Dismiss Counsel: "I am petitioning the courts of Gallia County Ohio and filing a Motion to Dismiss Counsel; [Attorney One]

and appoint new counsel. I recently fired [Attorney One] because we have had a failure to communicate and he has mishandled my cases and as a result misrepresented me because of his incompetence." The trial court granted Marshall's motion and appointed him a new attorney (hereinafter "Attorney Two").

{¶4} On August 4, 2008, the state filed a motion to amend Marshall's indictment because the field weight of the cocaine (126 grams) was greater than the laboratory weight (120.9 grams). The trial court granted the state's motion, and Marshall's indictment was amended accordingly. In relevant part, the amended indictment is exactly the same as the original indictment except for the change in weight.

{¶5} Attorney Two represented Marshall at an August 11, 2008 suppression hearing. The trial court subsequently denied Marshall's Motion to Suppress.

{¶6} For reasons unrelated to Marshall's case, the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio recommended that Attorney Two be permanently disbarred. As a result, on September 25, 2008, the trial court (1) relieved Attorney Two from representing Marshall and (2) appointed Marshall his third attorney (hereinafter "Attorney Three").

{¶7} Marshall failed to appear before the court on both December 8 and 17, 2008. At a subsequent hearing, Marshall explained his failure to appear. "I did everything that I was supposed to do while out on bond, but here come[s] the Sheriff knocking on my mother's door and said I had warrants because I didn't appear to court because I wasn't notified by my court appointed attorney, but it wasn't his fault because he didn't receive my file from… I don't know how that happened. You know he said the last guy didn't give it to him or whatever, I don't know what happened, but my file somehow got lost

and didn't get to where it was supposed to get so I wasn't notified." Pre-Trial Transcript of Proceedings (Complete) at 115-16 (ellipses sic).

{¶8} On February 20, 2009, the assistant prosecuting attorney and Attorney Three jointly filed a Pretrial Settlement Conference Report, which included Marshall's request that Attorney Three withdraw from the case. A letter from Marshall to Attorney Three was attached to the report. In that letter, Marshall asked Attorney Three to "please notify the courts and let them know that you are no longer my professional legal advisor."

{¶9} On March 3, 2009, the trial court held a hearing to consider Attorney Three's motion to withdraw. At this hearing, Marshall stated that he wanted to represent himself. Thus, in addition to Attorney Three's withdrawal motion, the trial court also considered Marshall's request for self-representation.

{¶10} During the hearing, the trial court engaged in a lengthy discussion with Marshall. First, Marshall expressed his dissatisfaction with his various attorneys. Then, the trial court questioned Marshall about his background and legal knowledge. Finally, the trial court strongly encouraged Marshall to proceed with counsel. Despite being warned of the risks, Marshall repeatedly maintained that he wanted to represent himself. Marshall explained that "out of anger, [he] decided what's the point of having an attorney when they don't give you no legal advice or counsel, they don't speak to you." Pre-Trial Transcript of Proceedings (Complete) at 147.

{¶11} The trial court denied Marshall's request for self-representation. For fourteen reasons, the trial court found that Marshall was unable to make a knowing, intelligent, and voluntary waiver of the right to counsel. Most of these reasons focused on

Marshall's lack of legal knowledge and experience. However, the trial court's other reasons included (1) Marshall testing positive for drugs prior to the hearing; (2) the trial court's belief that the request was a delay tactic; and (3) Marshall making the request out of anger with Attorney Two. As a result, the trial court ordered Marshall to proceed with Attorney Three as his appointed counsel.

{¶12} After Marshall failed to appear for a March 16, 2009 trial date, the case finally proceeded to trial on May 5, 2009. During the trial, a Forensic Scientist testified that the substance at issue contained 120.9 grams of "cocaine base." The jury later found Marshall guilty of trafficking in cocaine and possession of cocaine, both second-degree felonies.

{¶13} In relevant part, the first jury verdict form states "[w]e, the jury in this case, duly impaneled, sworn and affirmed, find the Defendant, Danjuma L. Marshall, guilty of Trafficking in Drugs, a felony of the second degree, in a manner and form as he stands charged in the Indictment."

{¶14} And the second jury verdict form states "[w]e, the jury, find the Defendant, Danjuma L. Marshall, guilty of Possession of Drugs, a violation of Section 2925.11(A) of the Ohio Revised Code and a felony of the second degree, in a manner and form as he stands charged in the Indictment."

{¶15} Marshall appeals and asserts the following two assignments of error: I. "A criminal defendant has a constitutional right to waive counsel and to represent himself or herself when the waiver is made knowingly, intelligently, and voluntarily. The trial court committed reversible error by denying Danjuma Marshall the right to self-representation. Sixth and Fourteenth Amendments to the United States Constitution;

Sections 10 and 16, Article I, Ohio Constitution." And, II. "The trial court erred by convicting Danjuma Marshall based upon a defective indictment that failed to state a necessary element of the charged offense. Section 10, Article I, Ohio Constitution."

II.

{¶16} In his first assignment of error, Marshall contends that he knowingly, intelligently, and voluntarily waived the right to counsel. For that reason, Marshall argues that the trial court should have granted him the right of self-representation.

{¶17} "The Sixth Amendment, as made applicable to the states by the Fourteenth Amendment, guarantees that a defendant in a state criminal trial has an independent constitutional right of self-representation and that he may proceed to defend himself without counsel when he voluntarily, and knowingly and intelligently elects to do so." *State v. Gibson* (1976), 45 Ohio St.2d 366, at paragraph one of the syllabus, citing *Faretta v. California* (1975), 422 U.S. 806. See, also, *State v. Doyle*, Pickaway App. No. 04CA23, 2005-Ohio-4072, at ¶9. "If a trial court denies the right to self-representation, when properly invoked, the denial is per se reversible error." *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, at ¶32, citing *State v. Reed*, 74 Ohio St.3d 534, 535, 1996-Ohio-21; *McKaskle v. Wiggins* (1984), 465 U.S. 168, 177. "To establish an effective waiver of the right to counsel, 'the trial court must make sufficient inquiry to determine whether [the] defendant fully understands and intelligently relinquishes that right.'" *Cassano* at ¶32, quoting *Gibson* at paragraph two of the syllabus (alteration in original). "Further, the invocation of the right to self-representation must be 'clear and unequivocal.'" *State v. Hadden*, Trumbull App. No.

2008-T-0029, 2008-Ohio-6999, at ¶62, citing *Cassano* at ¶38; *United States v. Frazier-El* (C.A.4, 2000), 204 F.3d 553, 558.

{¶18} "There is no single, definitive test to determine whether a defendant voluntarily, knowingly, and intelligently waives the right to counsel; rather, we conduct an independent review to see whether the totality of the circumstances demonstrates that the defendant voluntarily, knowingly, and intelligently waived his right to counsel." *State v. Bristow*, Scioto App. Nos. 07CA3186 & 07CA3187, 2009-Ohio-523, at ¶17, citing *Wellston v. Horsley*, Jackson App. No. 05CA18, 2006-Ohio-4836, at ¶10. Furthermore, we recognize that the United States Supreme Court "has instructed that courts must draw every inference against supposing that the defendant wishes to waive the right to counsel." *People v. Marshall* (Cal. 1997), 931 P.2d 262, 272, citing *Brewer v. Williams* (1977), 430 U.S. 387, 404. See, also, *State v. Ferguson*, Jackson App. No. 04CA13, 2005-Ohio-1438, at ¶18.

{¶19} "After a trial has commenced, the decision about whether to grant a defendant's request to represent himself is within the discretion of the trial court." *State v. Reed* (Nov. 6, 1996), Hamilton App. No. C-940315 & C-940322, citing *Robards v. Rees* (C.A.6, 1986), 789 F.2d 379, 384. See, also, *State v. Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193, at ¶51-53 (holding "that the trial court did not abuse its discretion and properly refused appellant's request to represent himself after voir dire had been completed and on the first day that evidence was to be presented"); *State v. Willis*, Franklin App. No. 08AP-536, 2009-Ohio-325, at ¶¶4, 6, 10. Here, because Marshall requested self-representation before his trial commenced, the trial court did not have to "balance [Marshall's] interest in self-representation against the potential disruption of the

proceedings already in progress." *State v. Gordon*, Franklin App. No. 03AP-281, 2004-Ohio-2644, at ¶31. Accordingly, we believe that an abuse-of-discretion review is inappropriate in the present case. Instead, we will review the denial of Marshall's right to self-representation de novo. See *United States v. Cano* (C.A.5, 2008), 519 F.3d 512, 515-16; *United States v. Mackovich* (C.A.10, 2000), 209 F.3d 1227, 1236, citing *United States v. Boigegrain* (C.A.10, 1998), 155 F.3d 1181, 1185; *People v. Danks* (Cal. 2004), 82 P.3d 1249, 1267; *People v. Abdu* (Colo.App. 2009), 215 P.3d 1265, 1267 ("Other appellate courts have conducted de novo review to determine whether a trial court improperly denied a defendant's right of self-representation."). Cf. *Bristow* at ¶17 (reviewing trial court's grant of the right to self-representation de novo); *Wellston* at ¶10 (same).

{¶20} Here, we find that Marshall did not unequivocally invoke the right to self-representation. Numerous courts have held "that a motion made out of * * * annoyance or frustration, is not unequivocal – even if the defendant has said he or she seeks self-representation." *Marshall*, 931 P.2d at 271 (citations omitted). For example, in *Danks*, the Supreme Court of California found that the defendant's "references to self-representation were equivocal, born primarily of frustration regarding the granting of counsel's requests for continuances and his desire to avoid further psychiatric examination." *Danks* at 1267. Similarly, the United States Ninth Circuit Court of Appeals found that a defendant's request for self-representation was equivocal because the request "was an impulsive response to the trial court's denial of his request for substitute counsel. * * * [The defendant's] comments did not demonstrate unequivocally that he desired to represent himself. Instead, it is quite clear that he wanted to be

represented by a different attorney[.]" *Jackson v. Ylst* (C.A.9, 1990), 921 F.2d 882, 888-89. And finally, the United States Eighth Circuit Court of Appeals found, in part, that a request for self-representation was not clear and unequivocal because the defendant "was merely expressing his frustration[.]" *Reese v. Nix* (C.A.8, 1991), 942 F.2d 1276, 1281. See, also, *State v. Steele*, 155 Ohio App.3d 659, 2003-Ohio-7103, at ¶20 (stating that the defendant's requests for self-representation "were more in the name of impulsive acts expressing frustration with his first counsel than unequivocal requests to represent himself"); *Marshall*, 931 P.2d at 272-73 ("A motion for self-representation made in passing anger * * * may be denied.").

{¶21} A review of the March 3, 2009 hearing demonstrates that Marshall requested to represent himself out of anger and frustration. After Marshall described the problems he had with his court-appointed attorneys, the trial court judge asked the following question: "So the problem you really have then is a conflict with the way you believe your case should proceed as opposed to the way that it has proceeded?" Pre-Trial Transcript of Proceedings (Complete) at 116. Marshall replied, "[y]es." Later, Marshall admitted that he decided to represent himself "out of anger."

{¶22} "COURT: Mr. Marshall you have been involved in this case in this particular Court since May of last year. You have now been represented by three separate court appointed attorneys. Tell me how it is now less than two weeks before this scheduled trial that you have now decided that you can obtain retained counsel to act as standby counsel when for the last nine months or however long ago it's been that you have not had retained counsel, that you've had court appointed counsel.

{¶23} "MR. MARSHALL: Well it's been my decision since um, and the case has been going on since April but it's been my decision, I came to that decision um, sometime before I was supposed to go to trial in August um, when I was uh, appointed [Attorney Two] and I sat in Scioto County jail for two months and I didn't hear from nobody. I didn't receive no letters. I wrote [Attorney Two], I called, but he didn't receive or didn't accept none of my calls. That's when, out of anger, I decided what's the point of having an attorney when they don't give you no legal advice or counsel, they don't speak to you. They're supposed to you know, answer your calls so you can talk about the case or come visit you. I received none of that in four months that I sat incarcerated, so I said that I would be better off representing myself you know." Pre-Trial Transcript of Proceedings (Complete) at 146-47.

{¶24} Because Marshall acted out of anger and frustration, Marshall did not unequivocally demonstrate that he wanted to represent himself. Therefore, no constitutional violation occurred when the trial court denied Marshall's request for self-representation.

{¶25} Accordingly, we overrule Marshall's first assignment of error.

III.

{¶26} In his second assignment of error, Marshall contends that his indictment does not include an essential element of the charged offenses; that is, the indictment misidentifies the relevant drug as "cocaine" instead of "crack cocaine." For that reason, Marshall contends that his indictment is flawed and, therefore, violates Section 10, Article I, of the Ohio Constitution.

{¶27} Marshall failed to object to his indictment at the trial court level. Further, Marshall has not argued that his indictment led to multiple, inextricable errors. See, generally, *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, at ¶7 (stating that "when a defendant fails to object to an indictment that is defective because the indictment did not include an essential element of the charged offense, a plain-error analysis is appropriate"). Therefore, Marshall must demonstrate that any error rises to the level of plain error.

{¶28} Pursuant to Crim.R. 52(B), we may notice plain errors or defects affecting substantial rights. "Inherent in the rule are three limits placed on reviewing courts for correcting plain error." *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶15. "'First, there must be an error, *i.e.*, a deviation from the legal rule. * * * Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. * * * Third, the error must have affected 'substantial rights.' We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial.'" Id. at ¶16, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68 (omissions in original). We will notice plain error "only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, at paragraph three of syllabus. And "[r]eversal is warranted only if the outcome of the trial clearly would have been different absent the error." *State v. Hill*, 92 Ohio St.3d 191, 203, 2001-Ohio-141, citing *Long*, at paragraph two of the syllabus.

{¶29} Here, Marshall argues that the trial court committed plain error because of the supposedly defective indictment. Section 10, Article I, of the Ohio Constitution states that "no person shall be held to answer for a capital, or otherwise infamous, crime,

unless on presentment or indictment of a grand jury[.]" "The essential purpose of the indictment is to compel the government to aver all material facts alleged to constitute the essential elements of the offense, and thereby afford the accused adequate notice of the charges and an opportunity to defend himself against them." *In re C.C.*, Cuyahoga App. Nos. 88320 & 88321, 2007-Ohio-2226, at ¶22, citing *State v. Sellards* (1985), 17 Ohio St.3d 169, 170. See, also, *State v. Riffe*, Lawrence App. No. 09CA6, 2009-Ohio-6202, at ¶14.

{¶30} According to Marshall, his indictment is flawed because the drug at issue is actually crack cocaine, not cocaine. Marshall relies on *State v. Yslas*, 173 Ohio App.3d 396, 2007-Ohio-5646, wherein the Second District Court of Appeals found plain error in an indictment that misidentified the controlled substance. The indictment in *Yslas* states: "On or about March 6, 2005 in Miami County, Ohio Ramon M. Yslas, violated Ohio Revised Code § 2925.11(A)(C)(4)(b) in that he did, knowingly obtain, possess, or use a Schedule II controlled substance, to wit: Crack-Cocaine, in an amount that equals or exceeds five grams but is less than twenty-five grams, thus against the peace and dignity of the State of Ohio." *Yslas* at ¶12. However, the defendant in *Yslas* actually possessed powder cocaine, not crack cocaine. Id. at ¶13.

{¶31} The Second District Court of Appeals found the distinction between powder cocaine and crack cocaine to be "important because the type of cocaine or controlled substance possessed, in conjunction with its amount, determines the degree of the offense and thus the potential penalties." Id. Further, the *Yslas* court explained that "R.C. 2925.11(C)(4)(b) identifies two fourth-degree felonies arising from possession of cocaine. One involves possession of *powder cocaine* in an amount more than five but

less than twenty-five grams by weight. The other involves possession of *crack cocaine* in an amount more than one but less than five grams by weight. The problem here is that count two of the indictment charged defendant with possession of *crack cocaine* in an amount more than five but less than 25 grams by weight, the quantity which R.C. 2925.11(C)(4)(b) applies to possession of powder cocaine. That section does not prohibit possession of crack cocaine in that same gross quantity. Therefore, count two of the indictment to which defendant entered a plea of no contest fails to charge a valid statutory offense." Id. at ¶19 (emphasis sic). Because "[t]he identity of a controlled substance involved in a drug offense is an essential element of the crime that must be included in the indictment[,]" and because powder cocaine is not crack cocaine, the Second Circuit Court of Appeals reversed the defendant's conviction. Id. at ¶20. See, also, *State v. Jennings*, Hamilton App. No. C-080389, 2009-Ohio-2481, at ¶8, quoting *State v. Headley* (1983), 6 Ohio St.3d 475, 479.

{¶32} The holding in *Yslas* does not apply to the present case because (1) Marshall's indictment does charge valid statutory offenses and (2) the evidence shows that Marshall possessed and trafficked in 120.9 grams of cocaine. Therefore, the evidence produced at Marshall's trial comports with his indictment. The *Yslas* court correctly found that powder cocaine *is not* crack cocaine. R.C. 2925.01(GG) defines "crack cocaine" as "a compound, mixture, preparation, or substance that is or contains any amount of cocaine that is analytically identified as the *base form of cocaine* or that is in a form that resembles rocks or pebbles generally intended for individual use." (Emphasis added.) However, R.C. 2925.01(X)(1) provides: "'Cocaine' means * * * [a] cocaine salt, isomer, or derivative, a salt of a cocaine isomer or derivative, or the *base*

form of cocaine[.]" (Emphasis added.) Therefore, by definition, the "base form of cocaine" *is both* crack cocaine and cocaine. See, e.g., *State v. Banks*, 182 Ohio App.3d 276, 2009-Ohio-1892, at ¶14 (stating that "the definitions of both cocaine and crack cocaine include the base form of cocaine"); *State v. Crisp*, Allen App. No. 1-05-45, 2006-Ohio-2509, at ¶21. Thus, the present case is factually distinguishable from *Yslas*.

{¶33} During Marshall's trial, the Forensic Scientist testified about her findings.

{¶34} "Q. And what was submitted to you for analysis?

{¶35} "A. I received two brown paper bags. One of them contained um, two foam coffee cups, which were stacked inside each other and that contained a plastic bag, which contained a white substance. * * *

{¶36} "Q. Okay. Did you ultimately perform an analysis of that substance?

{¶37} "A. Yes, I did.

{¶38} "Q. And what was your purpose in doing so?

{¶39} "A. Do [sic] determine whether or not the substance contained a controlled substance.

{¶40} * * *

{¶41} "Q. And upon performing the test or the examination in this case what was your conclusion?

{¶42} "A. I concluded that the, that the substance contains cocaine.

{¶43} "Q. And did you uh, determine a weight of the substance that was submitted to you?

{¶44} "A. Yes, I did.

{¶45} "Q. And what was that weight?

{¶46} "A. 120.9 grams.

{¶47} "Q. And referring to your laboratory report again, which you have in front of you as an exhibit uh, I want you to direct your attention to the findings section where there's a number one and a number two.

{¶48} "A. Yes.

{¶49} "Q. And number one you have a white substance, 120.9 grams found to contain cocaine base, crack cocaine.

{¶50} "A. Yes.

{¶51} "Q. And could you tell the jury um, what significance there is to the fact that that says cocaine base and then in parenthesis crack cocaine?

{¶52} "A. Cocaine base is another form of cocaine. Um, and I distinguished between cocaine hydrochloride and cocaine base in this case. Um, cocaine hydrochloride is the same cocaine molecule but it has a hydrogen and chlorine atom attached to it and in the base form of the substance that hydrogen and chlorine atoms are not present." Trial Transcript of Proceedings (Complete) at 181-84.

{¶53} Thus, Marshall possessed and trafficked in 120.9 grams of the base form of cocaine, which, according to R.C. 2925.01(X)(1), *is* cocaine. Both R.C. 2925.03(C)(4)(e) and R.C. 2925.11(C)(4)(d) apply "if the amount of the drug involved equals or exceeds one hundred grams but is less than five hundred grams of cocaine that is not crack cocaine or equals or exceeds ten grams but is less than twenty-five grams of crack cocaine[.]" These sections punish crack cocaine "more severely because, relative to powder, [crack cocaine's] negative individual and social effects are more pronounced." *State v. Wilkerson*, Montgomery App. No. 22693, 2008-Ohio-4750,

at ¶13. Thus, as used in these sections, we do not believe the term "cocaine that is not crack cocaine" serves to exclude any form of cocaine as defined by R.C. 2925.01(X). Instead, we believe this language merely distinguishes between the available punishments. Such a distinction is necessary because, essentially, cocaine and crack cocaine "are different forms of the same base substance." *Crisp* at ¶21. Accordingly, we believe the term "cocaine that is not crack cocaine" means, if the state charges a defendant with possession of crack cocaine, the weight of the drug must fall within the lower weight range. And if the state charges a defendant with possession of cocaine, the weight of the drug must fall within the higher weight range – even though that cocaine may also meet the statutory definition of crack cocaine. In other words, the more severe punishment may apply only to crack cocaine as defined by R.C. 2925.01(GG), but the less severe punishment may apply to any form of cocaine as defined by R.C. 2925.01(X).

{¶54} Furthermore, "[w]e must * * * construe statutes to avoid unreasonable or absurd results." *State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio St.3d 540, 543, 1996-Ohio-372, citing R.C. 1.47(C); *State ex rel. Brown v. Milton-Union Exempted Village Bd. of Edn.* (1988), 40 Ohio St.3d 21, 27. A different interpretation of "cocaine that is not crack cocaine" – an interpretation that excludes some forms of cocaine – would produce absurd results in this case. If the Forensic Scientist had testified merely that the substance contained 120.9 grams of cocaine, as opposed to 120.9 grams of cocaine base, there would be no issue at all. Pursuant to R.C. 2925.01(X)(1), the Forensic Scientist would have been correct if she had simply described the substance as "cocaine" and stopped there. And if the Forensic Scientist had simply called the

substance cocaine, the evidence would have clearly conformed to the indictment. Thus, the substance, in and of itself, conforms to Marshall's indictment because the substance meets the statutory definition of cocaine. We do not believe that Marshal's indictment is defective merely because the Forensic Scientist went beyond calling the substance cocaine. The substance itself did not change, and we do not believe that the Forensic Scientist's testimony can transform the substance from one that conforms to Marshall's indictment into a substance that renders Marshall's indictment defective.

{¶55} For the foregoing reasons, we find no error, let alone plain error, in Marshall's indictment. The evidence shows that Marshall possessed and trafficked in 120.9 grams of the base form of cocaine, which is cocaine. Therefore, Marshall's indictment does not misidentify the drug at issue. Moreover, 120.9 grams of cocaine meets the relevant weight ranges under both R.C. 2925.03(C)(4)(e) and R.C. 2925.11(C)(4)(d).

{¶56} Accordingly, we overrule Marshall's second assignment of error. Having overruled both of Marshall's assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED. Appellant shall pay 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 Gallia County Common Pleas Court to carry this judgment into execution.

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

Harsha, J.: Concurs in Judgment and Opinion as to Assignment of Error I and Concurs in Judgment Only as to Assignment of Error II.

McFarland, P.J.: Concurs in Judgment Only.

For the Court

BY:_____
Roger L. Kline, 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.