[Cite as *State v. Jackson*, 2015-Ohio-2473.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO Appellee v. CLIFTON A. JACKSON Appellant	C.A. No. 14CA010555 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 11CR083104

DECISION AND JOURNAL ENTRY

Dated: June 22, 2015

SCHAFER, Judge.

{¶1} Defendant-Appellant, Clifton Jackson, appeals the judgment of the Lorain County Court of Common Pleas convicting him of three drug-related offenses, sentencing him to a total prison term of 11 years, and ordering him to repay the fees incurred by his court-appointed counsel. After review, we affirm Jackson's conviction and prison term. However, we reverse the trial court's order that Jackson repay his court-appointed attorney fees and remand this matter for the limited purpose of deciding his ability to repay the amount of the fees.

I.

{¶2} On August 21, 2011, Jackson was indicted on (1) one count of trafficking in drugs in violation of R.C. 2925.03(A)(2), a felony of the first degree; (2) one count of possession of drugs in violation of R.C. 2925.11(A), a felony of the first degree; and (3) one count of possessing criminal tools in violation of R.C. 2923.24(A), a felony of the fifth degree. The

trafficking in drugs and possession of drugs counts both included a major drug offender specification. The trafficking count also included a forfeiture specification.

{¶3} These charges arose from a June 14, 2011 incident in which law enforcement officials conducted an investigatory stop of Jackson's vehicle. Ohio State Highway Patrol Trooper Christopher Beyer indicated that he pulled Jackson's vehicle over because he observed it driving too close behind a recreational vehicle. After initiating the stop and receiving contradictory answers from Jackson regarding the ownership of the vehicle and his destination, Trooper Beyer went to his patrol car, called for a canine unit to perform a sniff test, and attempted to run a background check on Jackson. However, at that time, the LEADS background check system was down.

{¶4} Trooper Beyer then returned to the vehicle and asked Jackson to get out and sit in the backseat of the patrol car while Trooper Beyer performed the background check. Approximately seven minutes and 30 seconds after the stop's initiation, Trooper Michael Trader of the canine unit arrived and the sniff test was conducted. The dog alerted at the back door on the driver side of Jackson's vehicle approximately eight minutes after the stop was initiated. At the time of the positive alert, the LEADS system still had not been restored nor had Jackson's background check been completed. Upon learning of the positive sniff test, Jackson informed Trooper Beyer that all of the vehicle's contents belonged to him. Trooper Beyer and Trooper Trader then searched the vehicle, found a duffle bag in the vehicle's trunk, and discovered that it contained over two kilograms of cocaine and drug packaging materials. Trooper Beyer also found $1,262.00 in cash on Jackson's person.

{¶5} The trial court held a pretrial hearing on September 19, 2011. The journal entry from this hearing noted that "**DEFENDANT [JACKSON] WAIVES STATUTORY TIME**

FOR SPEEDY TRIAL PURSUANT TO RC 2945.71 et. [sic] seq." Jackson signed the entry containing the waiver of his rights, which contained no time limitation. He subsequently filed a motion to suppress the evidence obtained from the investigatory stop on the basis that the stop was unsupported by reasonable suspicion and that its duration was unjustifiably extended.

{¶6} After a hearing on the motion to suppress, the trial court denied Jackson's motion to suppress by judgment entry dated September 28, 2012. In November 2012, Jackson requested that the trial court reconsider its denial of the motion to suppress and he filed a supplemental brief in support on December 7, 2012. The trial court summarily denied the motion to reconsider on December 11, 2012.

{¶7} Beginning with the May 22, 2013 pretrial hearing, Jackson stopped signing the speedy trial waivers that were contained in the trial court's entries journalizing the results of pretrial hearings. Instead, he interlineated into the standard form language that he was not waiving his speedy trial rights. However, Jackson never filed a jury trial demand and objection that specifically re-invoked his speedy trial rights. Nevertheless, on February 7, 2014, Jackson filed a motion to dismiss the indictment on the basis that his speedy trial rights were violated. The trial court denied the motion.

{¶8} Trial commenced on February 11, 2014 and concluded the next day. The State offered the testimony of the investigating police officers and a forensic chemist as well as the discovered cocaine, packaging materials, and $1,262.00 in cash into evidence. It also offered the video and audio recording of the traffic stop. The jury returned guilty verdicts on all counts alleged in the indictment. It additionally found that Jackson was a major drug offender for both the trafficking and possession counts. However, it did not find that the forfeiture specification was proven. As to the possessing criminal tools count, the jury's verdict form included the

following caption: "**Verdict, Count No. 3** Possessing Criminal Tools R.C. §2923.24(A) – F5." It also contained the following language regarding the conviction: "We, the jury, find the Defendant CLIFTON A. JACKSON, * guilty of Possessing Criminal Tools, as charged in Count No. 3 of the indictment."

{¶9} The trial court immediately proceeded to sentencing. It merged the possession and trafficking offenses for sentencing purposes and the State elected to proceed on the trafficking count. The trial court subsequently sentenced Jackson to 11 years for the drug trafficking conviction with a major drug offender specification. It also imposed an 11 month sentence for the possessing criminal tools conviction, but this sentence was ordered to run concurrently with the sentence for drug trafficking. At the sentencing hearing, the trial court also ordered that Jackson repay the attorney fees incurred by his court-appointed counsel. However, before issuing this order, the trial court did not inquire into Jackson's ability to pay. Further, this order was not included in the judgment entry of conviction and sentence but the trial court subsequently issued a judgment entry ordering Jackson to repay $3,113.56 in attorney fees.

{¶10} Jackson now appeals his conviction and sentence, presenting ten assignments of error for our review. To facilitate our analysis, we address the assignments out of order.

II.

ASSIGNMENT OF ERROR I

DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT OVERRULED HIS MOTION TO SUPPRESS.

{¶11} In his first assignment of error, Jackson contends that the trial court erred in denying his motion to suppress the evidence obtained after the investigatory stop of his vehicle. We disagree.

A. Standard of Review for Motions to Suppress

{¶12} Our review of a trial court's ruling on a motion to suppress "presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. In considering this mixed question, we view the trial court as serving as the trier of fact and primary judge of witness credibility and the weight of the evidence presented. *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). Consequently, we must accept the trial court's findings of fact so long as they are supported by competent, credible evidence. *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, ¶ 100. However, we afford no such deference when considering the trial court's application of the law to the facts. Rather, we apply de novo review on this point. *Burnside* at ¶ 8; *accord State v. Clayton*, 9th Dist. Summit No. 27290, 2015-Ohio-663, ¶ 7 ("[T]his Court reviews the trial court's factual findings for competent, credible evidence and considers the legal conclusions de novo.").

B. The Fourth Amendment and Investigatory Stops

{¶13} Both the Fourth Amendment to the United States Constitution, which is incorporated against the States by the Fourteenth Amendment, and Article I, Section 14 of the Ohio Constitution protect individuals against unreasonable searches and seizures. Searches or seizures that are conducted without a warrant are presumptively unreasonable. *See, e.g.*, *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, ¶ 98. To overcome this presumption, the State has the burden of establishing that the warrantless search falls within one of the recognized exceptions to the warrant requirement, *State v. Kessler*, 53 Ohio St.3d 204, 207 (1978), and satisfies "Fourth Amendment standards of reasonableness," *Maumee v. Weisner*, 87 Ohio St.3d 295, 297 (1999). One well-delineated exception to the warrant requirement occurs where police officers perform an investigatory stop based on their reasonable suspicion that criminal activity

is afoot. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968) ("But we deal here with an entire rubric of police conduct – necessarily swift action predicated upon the on-the-spot observations of the officer on the beat – which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures."); *State v. Jones*, 9th Dist. Summit No. 20810, 2002 WL 389055, * 2 (Mar. 13, 2002) ("Under the Fourth Amendment, a police officer is justified in conducting an investigative stop of an individual only if he has reasonable and articulable suspicion that the individual is engaged in criminal activity.").

{¶14} "Reasonable suspicion constitutes something less than probable cause." *Brunswick v. Ware*, 9th Dist. Medina No. 11CA0114-M, 2011-Ohio-6791, ¶ 7. Accordingly, when considering the propriety of an investigatory stop, we merely engage in a two-step inquiry to decide "whether the officer's action was justified at [the stop's] inception" and "whether [stop] was reasonably related to the circumstances which justified the interference in the first place." *Terry* at 19-20. In conducting this review, we must assess whether the officer is able to enunciate "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *Id*. The emphasis in a reasonable suspicion analysis is not on any one factor alone, but on the totality of the circumstances. *State v. Bobo*, 37 Ohio St.3d 177 (1988), paragraph one of the syllabus. We have previously recognized that a totality of the circumstances review requires us to consider: "(1) [the] location [of the stop]; (2) the officer's experience, training, or knowledge; (3) the suspect's conduct or appearance; and (4) the surrounding circumstances." *State v. Biehl*, 9th Dist. Summit No. 22054, 2004-Ohio-6532, ¶ 14, citing *Bobo* at 178-179.

{¶15} It is well-established that a police officer who observes a traffic violation possesses reasonable suspicion to conduct an investigatory stop. *See, e.g., Dayton v. Erickson*, 76 Ohio St.3d 3 (1996), syllabus ("Where a police officer stops a vehicle based on probable cause that a traffic violation has occurred or was occurring, the stop is not unreasonable under the Fourth Amendment to the United States Constitution[.]"); *State v. Johnson*, 9th Dist. Medina No. 03CA0127-M, 2004-Ohio-3409, ¶ 11 ("The question of whether an insubstantial or minor violation of a traffic law will give rise to a reasonable suspicion to make an investigatory stop was resolved when the United States Supreme Court and the Ohio Supreme Court both held that *any* violation of a traffic law gives rise to a reasonable suspicion to make an investigatory stop of a vehicle."). But, "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500 (1983). Indeed, "[t]he lawfulness of the initial stop will not support a fishing expedition for evidence of crime." *State v. Gonyou*, 108 Ohio App.3d 369, 372 (6th Dist.1995). Still, "the detention of a stopped driver may continue beyond the normal time frame when additional facts are encountered to give rise to a reasonable, articulable suspicion of criminal activity beyond that which prompted the initial stop." *State v. Batchili*, 113 Ohio St.3d 403, 2007-Ohio-2204, ¶ 15. With these principles in mind, we now turn to the stop of Jackson's vehicle.

C. Reasonable Suspicion for the Traffic Stop

{¶16} The State contends that Trooper Beyer had reasonable suspicion to effectuate the traffic stop based on his observation of Jackson's vehicle following a recreational vehicle too closely. This argument implicates R.C. 4511.34(A), which relevantly provides that "[t]he operator of a motor vehicle * * * shall not follow another vehicle * * * more closely than is

reasonable and prudent, having due regard for the speed of such vehicle * * * and the traffic upon and the condition of the highway." *Id*.

{¶17} At the suppression hearing, Trooper Beyer testified that he was positioned in the median at mile marker 133 of the Ohio Turnpike when he first observed Jackson's vehicle following a recreational vehicle too closely. After this observation, Trooper Beyer pulled out of the median and then followed Jackson's vehicle until mile marker 137. Throughout his pursuit, Trooper Beyer never lost sight of Jackson's vehicle and he consistently saw that the vehicle was only two to three car lengths away from the recreational vehicle, "which is extremely close and a traffic hazard." The trooper explained his basis for concluding that Jackson's vehicle was too close to the recreational vehicle as follows:

> Because, from the calculations that our reconstruction unit has done, you need quite a bit distance more than [two to three car lengths] to safely stop if you had to from the vehicles in front of you. At the speed I later paced [Jackson] at, between 65 and 60 [miles per hour], you need 143 feet of distance. So two to three car lengths away, it's maybe 45 to 50 feet. So you would need better than two times more than that stopping distance.

This testimony provided some competent credible evidence to support the trial court's determination that Office Beyer had the necessary reasonable suspicion of a R.C. 4511.34(A) violation to effectuate a traffic stop of Jackson's vehicle.

{¶18} Jackson counters that Trooper Beyer did not observe a R.C. 4511.34(A) violation and he claims that the video of the traffic stop supports his argument. In advancing his argument, Jackson relies on *State v. Harper*, 9th Dist. Medina No. 12CA0076-M, 2014-Ohio-347. There, we reversed the trial court's denial of a motion to suppress where we found that the video of the subject traffic stop refuted the police officer's testimony regarding his observation of a R.C. 4511.34(A) violation. *Id*. at ¶ 16. However, upon review of the video in this matter, we find that it supports the trial court's finding that Trooper Beyer observed a R.C. 4511.34(A)

violation, which renders *Harper* inapplicable here. Consequently, we conclude that there is competent credible evidence in the record to support the trial court's finding that Trooper Beyer had reasonable suspicion to stop Jackson's vehicle for a violation of R.C. 4511.34(A).

D. Canine Sniff Test

{¶19} Jackson asserts that even if the original traffic stop was proper, his Fourth Amendment rights were still violated when the investigating officers extended the duration of the traffic stop to perform a canine sniff test without reasonable suspicion. We disagree.

{¶20} The United States Supreme Court has recognized that "[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). The Ohio Supreme Court has previously stated that the time reasonably required to complete the mission of issuing a traffic citation "includes the period of time sufficient to run a computer check on the driver's license, registration, and vehicle plates." *Batchili*, 2007-Ohio-2204, at ¶ 12. Based on this reasoning, "[a] traffic stop is not unconstitutionally prolonged when permissible backgrounds checks have been diligently undertaken and not yet completed at the time a drug dog alerts on the vehicle." *Id.* at paragraph one of the syllabus. This rule complements the United States Supreme Court's declaration that "[a] dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment." *Caballes* at 410.

{¶21} Here, Trooper Beyer initiated the traffic stop of Jackson's vehicle at 8:44 a.m.[1] He approached the vehicle and asked Jackson several questions. Jackson stated that his cousin owned the vehicle, but then produced a rental agreement that identified the renter as an individual named Latrice Thomas and made no reference to Jackson. This led to the following exchange between Trooper Beyer and Jackson:

> I asked when she rented the vehicle. He stated, "Yesterday, actually." He then stated that she had the vehicle for a while and gave it to him. And he goes on to state that his girlfriend's name was Latrice Thomas as well, which was kind of confusing. I'm not sure what that was all about. There was something going on there. * * * He had told me his cousin owned the vehicle, which wasn't the case. It was actually rented by Latrice. Then he was saying now his girlfriend is his cousin. That was kind of – okay.

Jackson then gave a confusing response when pressed as to his destination. He indicated that he was going to "Stoney Brook" or "Stoney Point" in the Cleveland area, but Trooper Beyer testified that he knew of no such locations.

{¶22} After this two minute discussion with Jackson, Trooper Beyer returned to his police cruiser to review the rental agreement, which he described as "cumbersome" and containing fine print, and to begin checking Jackson's license and registration. Trooper Beyer also called for the canine unit to assist him. However, at this time, the LEADS system was down and the background check could not be completed. At approximately 8:49 a.m., Trooper Beyer went back to Jackson's vehicle and said: "Mind coming back for a minute. See if everything checks out, we'll get you outta here." Jackson complied and sat in the backseat of Trooper Beyer's cruiser. Trooper Beyer testified that Jackson was removed from his vehicle to ensure safety during the canine sniff test.

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[1] The video of the traffic stop has different times listed than Trooper Beyer's testimony. However, he indicated that the video had the incorrect times listed and that his testimony was based on the notes contained in the computer-aided dispatch system.

{¶23} The canine unit arrived five to six minutes after Trooper Beyer called for its dispatch to his location and approximately seven minutes and 30 seconds after the traffic stop. The dog alerted at the back door of the car's driver side on its first sniff of the vehicle's exterior. The total duration of the traffic stop, with the canine sniff test, was approximately eight minutes. At the time that the dog alerted on the vehicle, the LEADS system was still down, Jackson's license and registration check still had not been completed, and the traffic citation still had not been issued.

{¶24} These facts fit squarely within those we addressed in *State v. Delossantos*, 9th Dist. Lorain No. 11CA009951, 2012-Ohio-1383. There, the defendant, who was stopped for a traffic violation, was driving a vehicle rented to another individual and despite stating that the vehicle was rented to his girlfriend, he could not state her last name. The canine unit arrived and the defendant was asked to get out of the vehicle and wait in the police cruiser while the background check and citation were completed. *Id*. at ¶ 9. The dog subsequently alerted on the defendant's vehicle for the presence of drugs. We rejected the defendant's argument that evidence obtained from the search should have been suppressed since the traffic stop was impermissibly extended. Rather than find a constitutional violation, we reasoned that "[w]hen the dog alerted, [the officer] had not completed the license and registration checks, nor written the citation. Given the facts in this case, we cannot conclude that [the officer] impermissibly extended the stop." *Id*. at ¶ 10.

{¶25} Nearly the same facts are present here, which compels us to reach the same result as we did in *Delossantos*. At the time that the dog alerted on Jackson's vehicle, no background check had been performed and Trooper Beyer had not completed a citation. Also, like the defendant in *Delossantos*, Jackson had given answers to Trooper Beyer that were contradictory

and suspicious. In light of these critical similarities between *Delossantos* and this matter, we do not find that the trial court erred in finding that Trooper Beyer did not impermissibly extend the duration of the traffic stop. *See also Caballes*, 543 U.S. at 410 (finding no constitutional violation where canine sniff test occurred less than 10 minutes after the initiation of the traffic stop, the defendant was placed in a police cruiser, the police officer had not yet issued a citation at the time of the alert on the defendant's vehicle); *Batchili*, 2007-Ohio-2204, at ¶ 14 (stating that there "simply [was] no evidence to suggest that [the defendant]'s detention for the traffic violation was of sufficient length to make it constitutionally dubious" where the dog alerted eight minutes and 56 seconds into the stop and neither the background check nor the traffic citation had been completed yet). Our finding that this matter does not implicate a constitutional violation is further bolstered by the fact that the canine sniff test produced a positive alert less than 10 minutes after the traffic stop of Jackson's vehicle started. *Compare State v. Ramos*, 155 Ohio App.3d 396, 2003-Ohio-6535, ¶ 24 (2d Dist.) (finding constitutional violation where canine sniff test was conducted 53 minutes after the initiation of the traffic stop) *with State v. Carlson*, 102 Ohio App.3d 585, 599 (9th Dist.1995) (finding no constitutional violation where canine sniff test was conducted 19 minutes after initiation of the traffic stop and police officer was still waiting for results of background check).

{¶26} In his argument for reversal, Jackson relies on *State v. Lewis*, 9th Dist. Lorain No. 12CA010146, 2012-Ohio-5114, and *State v. Davenport*, 9th Dist. Lorain No. 11CA010136, 2012-Ohio-4427. But, those companion cases have significant differences from this matter that render them inapposite here. There, the police officer who originally effectuated the stop had already completed the necessary background checks, which revealed no outstanding warrants for the defendants, and had issued the warning citation for the traffic violation before the canine unit

even arrived on the scene to perform the sniff test. *Lewis* at ¶ 2; *Davenport* at ¶ 2. Due to these crucial differences, we decline to apply *Lewis* and *Davenport* to this matter.

{¶27} Jackson also analogizes to *United States v. Bonilla*, 357 Fed.Appx. 693 (6th Cir.2009), but the comparison is not apt and we likewise reject its application here. There, the canine unit did not arrive until 22 minutes after the initiation of the investigatory stop. *Id*. at 697. At the time of the canine unit's arrival, the background checks of the defendant had already been completed and the original police officer had started to write the traffic citation. *Id*. at 694. It was under these facts that the Sixth Circuit Court of Appeals found that there was a constitutional violation arising from the impermissible extension of the investigatory stop's duration. *Id*. at 697. This matter presents a starkly different scenario. First, the total length of the stop from initiation to canine sniff test was approximately eight minutes, not 22. And, second, at the time of the canine sniff test, neither the background ground check nor the citation for Jackson's traffic citation had been completed. Consequently, we find that *Bonilla* is inapplicable here.

{¶28} We finally note that during the pendency of this matter, the United States Supreme Court handed down its decision in *Rodriguez v. United States*, 135 S.Ct. 1609, which addresses the issue of whether a canine sniff test after a traffic stop was constitutionally sustainable. There, a police officer conducted a traffic stop after observing a vehicle driving on the shoulder. After conducting background checks on both the driver and passenger of the vehicle, the officer completed a warning citation and gave it to the driver approximately 20 minutes after the traffic stop. At that point, the officer had "got[ten] all the reason[s] for the stop out of the way[.]" *Id*. at 1613. Still, the officer would not allow the vehicle to exit the scene and instead ordered the driver and passenger to get out of the vehicle and wait for the arrival of the

canine unit, which finally arrived seven or eight minutes after "all the reason[s] for the stop [were] out of the way." *Id*. Approximately 28 minutes after the traffic stop initiated, the dog alerted on the vehicle for the presence of drugs. The Court found that these facts demonstrated that the police officer unjustifiably prolonged the traffic stop for a purpose unrelated to the original traffic stop, namely, to conduct the canine sniff test. *Id*. at 8.

{¶29} The result in *Rodriguez* does not deter us from affirming the trial court's denial of the motion to suppress. The Court recognized that its precedent "tolerate[s] certain unrelated investigations that [do] not lengthen the roadside detention." *Id.* at 5. It further noted that "[a]n officer * * * may conduct certain unrelated checks during an otherwise lawful stop[, but] he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Id*. at 6. Accordingly, we view *Rodriguez* not as a departure from precedent, but merely as an illustrative example of the type of canine sniff test that unjustifiably prolongs a traffic stop. Indeed, when applying the example of *Rodriguez* to the facts of this matter, we are further convinced that the stop of Jackson's vehicle was not unjustifiably prolonged by the canine sniff test. Unlike the defendant in *Rodriguez*, Jackson was not ordered to wait for an additional seven minutes after the issuance of a traffic citation, and nearly 28 minutes after the initiation of the stop, so that police could conduct a canine sniff test. Rather, that test was conducted within eight minutes of the stop's initiation while Trooper Beyer was still investigating Jackson's background and in the process of producing the citation. Surely, we cannot glean from *Rodriguez* that a scenario including these facts establishes an unjustifiable extension of the traffic stop.

{¶30} In sum, Trooper Beyer had reasonable suspicion to initiate the traffic stop of Jackson's vehicle because he observed the vehicle following a recreational vehicle too closely in

violation of R.C. 4511.34(A). Additionally, Trooper Beyer did not impermissibly extend the duration of the traffic stop for the purpose of the canine sniff test since at the time of the test, the background check for Jackson was not complete and the citation had not yet been issued. Finally, there was no evidence indicating that the police were not diligent and timely in the exercise of their duties. As a result, we can find no error in the trial court's denial of the motion to suppress.

{¶31} Accordingly, we overrule Jackson's first assignment of error.

ASSIGNMENT OF ERROR III

DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT OVERRULED HIS MOTION TO DISMISS BASED ON THE VIOLATION OF THE SPEEDY TRIAL STATUTE.

{¶32} In his third assignment of error, Jackson argues that the trial court should have dismissed the indictment since trial commenced well over the 270 day limitation contained in Ohio's speedy trial statute, R.C. 2945.71. However, since we find that Jackson waived his speedy trial rights and failed to properly re-invoke them, we disagree.

{¶33} Speedy trial issues present a mixed question of fact and law. *State v. Kist*, 173 Ohio App.3d 158, 2007-Ohio-4773, ¶ 18 (11th Dist.). Accordingly, "[w]hen reviewing an appellant's claim that he was denied his right to a speedy trial, this Court applies the de novo standard of review to questions of law and the clearly erroneous standard of review to questions of fact." *State v. Downing*, 9th Dist. Summit No. 22012, 2004-Ohio-5952, ¶ 36.

{¶34} Both the United States Constitution and the Ohio Constitution provide individuals with the right to a speedy trial. Sixth Amendment to the U.S. Constitution; Ohio Constitution, Article I, Section 10. "[T]o enforce the constitutional right to a public speedy trial," Ohio has enacted a speedy trial statute, R.C. 2945.71, that codifies the necessary time limitation for trial

based on the type of offense charged. *State v. Pachay*, 64 Ohio St.2d 218 (1980), syllabus. R.C. 2945.71 creates "a mandatory duty to try an accused within the timeframe provided by the statute" and trial courts must strictly comply with the statute. *State v. Ramey*, 132 Ohio St.3d 309, 2012-Ohio-2904, ¶ 14. Since Jackson was charged with three felonies, R.C. 2945.71(C)(2)'s limitation applies. It requires that a person charged with a felony "be brought to trial within two hundred seventy days after the person's arrest." R.C. 2945.71(C)(2).

{¶35} "It is well-settled law that an accused may waive his constitutional right to a speedy trial provided that such a waiver is knowingly and voluntarily made." *State v. King*, 70 Ohio St.3d 158, 160 (1994). The waiver must either be "in writing or made in open court on the record." *Id*. at syllabus. If the executed waiver "does not mention a specific time period, it is unlimited in duration." *State v. Troutman*, 9th Dist. Lorain No. 09CA009590, 2010-Ohio-39, ¶ 24. The execution of an unlimited waiver of speedy trial rights has significant consequences for the accused since after signing the waiver, "the accused is not entitled to a discharge for delay in bringing him to trial unless [he] files a formal written objection and demand for trial[.]" *State v. O'Brien*, 34 Ohio St.3d 7 (1987), paragraph two of the syllabus. It is only upon the filing of such an objection that the State is required to "bring the accused to trial within a reasonable time." *Id*.

{¶36} Here, the trial commenced well over the 270 day limitation contained in R.C. 2945.71(C)(2). But, Jackson executed an unqualified waiver of his speedy trial rights at the September 19, 2011 pretrial hearing. The waiver does not list any time period so we treat Jackson's speedy trial waiver as unlimited in duration. To avoid the consequences of his waiver, Jackson had to file a formal demand for trial and objection to re-invoke his rights. *See State v. Skorvanek*, 9th Dist. Lorain No. 08CA009399, 2009-Ohio-3924, ¶ 19 (addressing same waiver as

one used in this matter). He never did so.[2] Consequently, Jackson's waiver was still in effect at the time of the trial's commencement and he was not entitled to a dismissal on speedy trial grounds.

{¶37} Jackson points out that after the May 22, 2013 pretrial hearing, he refused to sign the speedy trial waivers presented to him. Additionally, he handwrote into the waiver that he was not waiving his speedy trial rights. But, these interlineations in the speedy trial waivers are immaterial to our analysis. The Seventh District Court of Appeals addressed a similar factual scenario in *State v. Love*, 7th Dist. Mahoning No. 02 CA 245, 2006-Ohio-1762. There, the defendant had executed a speedy trial waiver. Three years later, he filed a pro se motion asking to withdraw the waiver. The Seventh District concluded that the motion was insufficient to re-invoke the defendant's speedy trial rights: "Although [the defendant] clearly indicated that he wanted to revoke his speedy trial waiver * * *, his attempt to withdraw the waiver did not include a demand for trial. As a result of [the defendant]'s failure to demand trial, the waiver * * * was still in effect because he did not follow the law as set forth in *O'Brien*." *Id*. at ¶ 134.

{¶38} Here, Jackson did even less than the defendant in *Love* since he never filed a motion asking to withdraw the waiver. But, like the defendant in *Love*, Jackson never filed a demand for trial. This is fatal to his speedy trial argument and we find no error in the trial

[2] Arguably, Jackson's motion to dismiss on speedy trial grounds asserted a formal demand for trial. Even if we were to treat this motion as a formal demand, we would still find that there was no speedy trial violation. Jackson's motion was filed on February 7, 2014 and the trial commenced four days later. Such a short duration between demand and trial would certainly satisfy *O'Brien*'s "reasonable time" requirement. *See Troutman* at ¶ 28 (finding that trial occurred within a reasonable time, as required by *O'Brien*, where there was a 41 day delay between formal demand and resolution); *State v. Bray*, 9th Dist. Lorain No. 03CA008241, 2004-Ohio-1067, ¶ 9 (finding that trial occurred within a reasonable time where there was a 20 day delay).

court's denial of his motion to dismiss on that basis. *See also State v. Howard*, 7th Dist. Mahoning No. 06-MA-31, 2007-Ohio-3170, ¶ 18 (following *Love*).

{¶39} Accordingly, we overrule Jackson's third assignment of error.

ASSIGNMENT OF ERROR X

DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT OVERRULED HIS MOTION FOR JUDGMENT OF ACQUITTAL.

{¶40} In his tenth assignment of error, Jackson asserts that the trial court should have granted his Crim.R. 29 motion for acquittal. We disagree.

{¶41} "We review a denial of a defendant's Crim.R. 29 motion for acquittal by assessing the sufficiency of the State's evidence." *State v. Slevin*, 9th Dist. Summit No. 25956, 2012-Ohio-2043, ¶ 15. A sufficiency challenge of a criminal conviction presents a question of law, which we review de novo. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). In carrying out this review, our "function * * * is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. After such an examination and taking the evidence in the light most favorable to the prosecution, we must decide whether "any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id*. Although we conduct de novo review when considering a sufficiency of the evidence challenge, "we neither resolve evidence conflicts nor assess the credibility of witnesses, as both are functions reserved for the trier of fact." *State v. Jones*, 1st Dist. Hamilton Nos. C-120570, C-120571, 2013-Ohio-4775, ¶ 33.

{¶42} Jackson was charged with violations of R.C. 2925.03(A)(2), R.C. 2925.11(A), and R.C. 2923.24(A). R.C. 2925.03(A)(2) provides that "[n]o person shall knowingly * * * [p]repare for shipment, ship, transport, prepare for distribution, or distribute a controlled substance * * *,

when the offender knows or has reasonable cause to believe that the controlled substance * * * is intended for sale or resale by the offender or another person." R.C. 2925.11(A) proscribes individuals from "knowingly obtain[ing], possess[ing], or us[ing] a controlled substance * * *." R.C. 2923.24(A) bars individuals from "possess[ing] or hav[ing] under [their] control any substance, device, instrument, or article, with purpose to use it criminally." A person is guilty of a felony of the fifth degree under R.C. 2932.24(A) when "circumstances indicate that the substance, device, instrument, or article involved in the offense was intended for use in the commission of a felony[.]" R.C. 2923.24(C).

{¶43} Jackson challenges the evidence regarding his mental state. Specifically, he claims that the State did not offer sufficient evidence to show that he knowingly trafficked or possessed the cocaine or that he possessed the packaging materials for the purpose of using it criminally. R.C. 2901.22(B), which applies to the trafficking in drugs and possession of drugs counts, states that "[a] person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature." Moreover, "[a] person has knowledge of circumstances when the person is aware that such circumstances probably exist." *Id.* R.C. 2901.22(A), which applies to the possessing criminal tools count, states that "[a] person acts purposely when it is the person's specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is the offender's specific intention to engage in conduct of that nature."

{¶44} Both Trooper Beyer and Trooper Trader testified to finding a duffle bag in Jackson's trunk and then finding a wrapped brick inside that contained an illegal substance, specifically, over two kilograms of cocaine. They also testified to finding other packaging

materials, which Trooper Trader described as "wrapping materials they use to mask or try to conceal the cocaine that was in the vehicle." The State also played the video and audio recording of the traffic stop. Trooper Beyer testified that when he placed Jackson in the police cruiser, he activated the recording device that tapes all conversation in the cruiser's interior. He also indicated that there is a sign in the front seat of the cruiser stating that the interior of the cruiser was subject to audio recording. In the recording of the traffic stop, Jackson is heard telling Trooper Beyer that everything in the vehicle is his. He is then heard talking on a cell phone to an unnamed subject. In this conversation, Jackson is heard saying, after the police's discovery of the duffle bag and its contents, "They [Troopers Breyer and Trader] just found it in my luggage." The testimonies of both Trooper Beyer and Trooper Trader, combined with the audio recording of Jackson's own statements, provided a sufficient basis for the jury to convict Jackson on all three counts alleged in the indictment.

{¶45} Jackson argues that since the duffle bag and its contents were found in the trunk of the vehicle, and not the passenger compartment, and since the vehicle was rented to Latrice Thomas, not him, there was insufficient evidence to show that he knowingly possessed the bag and its contents. But, under the circumstances in this case, these facts are immaterial to a sufficiency analysis and this argument is unavailing. Here, Jackson told the investigating officers that everything in the vehicle was his, including the duffle bag, and the record reflects that he was the sole occupant and driver of the vehicle before the traffic stop. These facts are sufficient to prove that Jackson's knowledge of the cocaine's presence and his intent to use the packaging materials for criminal purposes. *See State v. Reed*, 10th Dist. Franklin No. 09AP-84, 2009-Ohio-6900, ¶ 21-24 (finding sufficient evidence that the defendant knowingly possessed crack cocaine in trunk of vehicle since he was previously seen driving the vehicle); *State v.*

Carpenter, 9th Dist. Medina No. 2667-M, 1998 WL 161289, * 7 (Apr. 8, 1998) (finding that sufficient evidence existed to find that the defendant knowingly possessed marijuana found in the trunk of a vehicle not owned by the defendant since the defendant was driving the vehicle and stated that the marijuana was "our head smoke"); *State v. Thomas*, 107 Ohio App.3d 239, 244-245 (5th Dist.1995) (finding sufficient evidence that the defendant knowingly possessed heroin in a locked briefcase that was found in the trunk of the vehicle because he was a passenger in the vehicle and he hid from police, indicating a consciousness of guilt).

{¶46} Accordingly, we overrule Jackson's tenth assignment of error.

ASSIGNMENT OF ERROR II

DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE PROSECUTOR OFFERED EVIDENCE OF DEFENDANT'S EXERCISE OF HIS CONSTITUTIONAL RIGHTS.

{¶47} In his second assignment of error, Jackson claims that the trial court improperly allowed the State to offer evidence of Jackson's exercise of his right to remain silent during the investigation. Because the State did not offer any evidence of silence as substantive evidence of guilt, we disagree.

{¶48} We preliminarily note that Jackson did not object to any of the testimony regarding the exercise of his right against self-incrimination. As a result, he has forfeited all but plain error. *See State v. Hess*, 9th Dist. Wayne No. 12CA0064, 2013-Ohio-4268, ¶ 18 (applying plain error to pre-*Miranda* silence evidence that was not objected to). The plain error doctrine, as it is outlined in Crim.R. 52(B), may only be invoked where the following three elements apply:

> 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" * * * [and] affected the outcome of the trial.

(Citations omitted.) *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). We are cautioned that plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus.

{¶49} The United States Constitution provides that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself." Fifth Amendment to the United States Constitution. This federal constitutional protection has been incorporated against the States through the Fourteenth Amendment.[3] *State v. Graham*, 136 Ohio St.3d 125, 2013-Ohio-2114, ¶ 19. Once a criminal defendant invokes his right against self-incrimination, "the State cannot use the person's silence as substantive evidence in its case-in-chief." *State v. Bennett*, 9th Dist. Lorain No. 12CA010286, 2014-Ohio-160, ¶ 63, citing *Wainwright v. Greenfield*, 474 U.S. 284, 295 (1986) and *State v. Leach*, 102 Ohio St.3d 135, 2004-Ohio-2147, ¶ 30. This rule flows from the determination that "the [S]tate's substantive use of the defendant's * * * silence subverts the policies behind the Fifth Amendment privilege against self-incrimination and is not

[3] The incorporation of the federal protection against self-incrimination through the Fourteenth Amendment has particular significance since the Ohio Constitution's analog for this right is significantly different. Unlike the federal protection, the Ohio Constitution states that a witness's silence "may be considered by the court and jury and may be the subject of comment by counsel." Ohio Constitution, Article I, Section 10. But, our state Constitution's allowances for the jury to consider a defendant's silence and for counsel to comment on it are unenforceable due to the prevailing federal case law proscribing such allowances. *See Arnold v. Cleveland*, 67 Ohio St.3d 35, 42 (1993) ("In joining the growing trend in other states, we believe that the Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall.").

a legitimate governmental practice." *Leach* at ¶ 37. We have previously applied these principles and found that "where references to the criminal defendant's post-*Miranda* silence in both the State's case-in-chief and its closing argument have permeated the trial, the effect is prejudicial so as to deny the defendant the right to a fair trial." *State v. Harris*, 9th Dist. Lorain No. 11CA009991, 2012-Ohio-2973, ¶ 6, citing *State v. Riffle*, 9th Dist. Medina No. 07CA0114-M, 2008-Ohio-4155, ¶ 16.

{¶50} Jackson identifies two isolated instances from the two-day trial where investigating police officers commented on his invocation of the right against self-incrimination. The first instance involved the following exchange between the prosecutor and Detective Geno Taliano, a member of the Lorain County Drug Task Force:

> Q: And what, if anything, did you do with that investigation [at the site of the traffic stop]; did you assist in the investigation at all?
>
> A: [Another agent] attempted to interview Clifton Jackson, who was the suspect in the investigation, advised him of his Miranda rights, both verbally and written form. He signed the form, understood that, understood the rights, and opted not to speak with us, so there was no question.

The second instance was the following exchange between the prosecutor and Special Agent James Goodwin of the Drug Enforcement Agency:

> Q: And what did you do [when you responded to the site of the traffic stop]?
>
> A: * * * [The agents] responded to meet with the troopers in an effort to possibly interview the subject. If the person would cooperate, maybe we could attempt to further the investigation, possibly control delivery, determine maybe where the drugs came from, where they were going to, that we could send LEADS out to other offices.
>
> Q: Ultimately, were you able to do any of those things?
>
> A: No.

{¶51} After reviewing this testimony regarding Jackson's silence, we are unable to conclude that its admission constitutes plain error. The State did not seek to elicit the testimony and rather it was merely volunteered by its witnesses without any prodding. *Compare Riffle* at ¶ 11 (finding that State offered evidence of the defendant's silence as substantive evidence of guilt where the prosecutor asked questions designed to elicit testimony about that silence) *with State v. Abraham*, 9th Dist. Summit No. 26258, 2012-Ohio-4248, ¶ 45 (finding that State did not offer evidence of the defendant's silence as evidence of guilt since there was "no evidence that the State sought to elicit the [the testimony regarding silence]"). Moreover, the State made no comment about Jackson's silence during its summation or at any other point during the proceedings. Under these circumstances, we are unable to find that the evidence of Jackson's silence permeated the trial and that the State offered it as substantive evidence of guilt. *Compare State v. Stephens*, 24 Ohio St.2d 76 (1970), paragraph three of the syllabus ("Where, during an in-custody interrogation, a defendant chooses to remain silent, it is prejudicial error for the prosecutor, during his final argument to the jury, to comment upon that silence or any implications which may be drawn therefrom.") *with State v. Bennett*, 9th Dist. Lorain No. 12CA010286, 2014-Ohio-160, ¶ 66 (finding no plain error where evidence of the defendant's silence was volunteered by investigating officers during their testimony since "the prosecutor made no references to [the defendant] invoking his right to remain silent, his request for an attorney, or to the testimony of the [investigating officers regarding the silence]"). Finally, we are unable to see how the introduction of this evidence, even if it was improper substantive evidence of guilt, affected the outcome of the trial as required by plain error analysis. Excising the testimony regarding Jackson's silence still leaves the significant evidence offered by the State to prove each count alleged in the indictment, which precludes us from finding that this is

the exceptional case that requires reversal on plain error grounds. *See State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, ¶ 163 (finding that prosecutor's argument regarding the defendant's silence was harmless error "since overwhelming evidence was presented that established [the defendant]'s guilt").

{¶52} Accordingly, we overrule Jackson's second assignment of error.

ASSIGNMENT OF ERROR VI

DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO BE PRESENT WHEN THE COURT COMMENCED TRIAL WHEN DEFENDANT BELATEDLY APPEARED ON THE SECOND DAY OF THE TRIAL.

{¶53} In his sixth assignment of error, Jackson asserts that the trial court erred in starting the second day of trial proceedings without him present. We disagree.

{¶54} A defendant has "a fundamental right to be present at all critical stages of his criminal trial." *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶ 100. This right is enshrined in both the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution. Nevertheless, this right "is not absolute," *State v. White*, 82 Ohio St.3d 16, 26 (1998), and a defendant's absence "does not necessarily result in prejudicial or constitutional error," *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶ 90. Crim.R. 43(A)(1) contemplates such non-prejudicial absences: "In all prosecutions, the defendant's voluntary absence after the trial has been commenced in the defendant's presence shall not prevent continuing the trial to and including the verdict." Accordingly, "the right to be present at trial may be waived by the defendant's own act." *State v. Meade*, 80 Ohio St.3d 419, 421 (1997).

{¶55} Whether a defendant was voluntarily absent for the purposes of Crim.R. 43(A) is a question of fact for the trial court to decide. *State v. Perez*, 9th Dist. Medina No. 3045-M, 2000 WL 1420341, * 2 (Sept. 27, 2000). "An appellate court's review of the trial court's

findings of fact looks only for clear error[.]" *State v. Hunter*, 151 Ohio App.3d 276, 2002-Ohio-7326, ¶ 24 (9th Dist.). Accordingly, we will not disturb the trial court's fact findings so long as "they are supported by some competent, credible evidence." *Id*. When applying this deferential standard of review to Crim.R. 43(A)(1) scenarios, "[u]nrebutted evidence that the defendant was aware of his obligation to attend the court proceeding and did not appear is sufficient to support a finding that the absence is voluntary." *State v. Dennis*, 10th Dist. Franklin No. 04AP-595, 2005-Ohio-1530, ¶ 12; *see also State v. Carr*, 104 Ohio App.3d 699, 703 (2d Dist.1995) ("If counsel had no explanation for the defendant's absence, the trial court may nevertheless find the absence to be voluntary because the presumption that the defendant knows of his obligation to attend has gone unrebutted.").

{¶56} Here, the trial court ended the first day of trial by explicitly instructing Jackson, "[s]ee you back here tomorrow at 8:30." Despite this admonishment, Jackson did not appear in the courtroom at 8:30 a.m. as required for the second day of trial. When trial resumed, Jackson's trial counsel did not offer any explanation for Jackson's absence. Jackson appeared later that day and at that point, offered the explanation that he had experienced car trouble, and he stated that he had made three phone calls to his attorney with no answer. However, we must examine the trial court's action in light of the information available to it at the time the decision was made. The information available to the court at the time the trial resumed on the second day was that Jackson had been made aware of the time trial would resume, he was not present, and his attorney did not know of his whereabouts or the reasons for his absence. This was sufficient evidence for the trial court to conclude that Jackson was voluntarily absent and we see no reason to second guess that finding on appeal.[4] *See State v. Chancey*, 8th Dist. Cuyahoga Nos. 75633,

[4] Jackson explained to the trial court that "[i]t's inexcusable to be late."

76277, 2000 WL 193235, * 5 (Feb. 17, 2000) (finding voluntary absence "since defendant-appellant knew he had to be in court and failed to appear in a timely manner as previously ordered"); *State v. McIntyre*, 9th Dist. Summit No. 15348, 1992 WL 125251, * 3 (May 27, 1992) (finding no error in proceeding without defendant's presence where "no evidence was presented to show that [the defendant]'s absence was involuntary").

{¶57} Accordingly, we overrule Jackson's sixth assignment of error.

ASSIGNMENT OF ERROR V

> DEFENDANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE WHEN THE COURT WOULD NOT EITHER RE-OPEN THE EVIDENCE TO RECALL OF WITNESSES OR HAVE WITNESSES RECALLED WHO TESTIFIED DURING DEFENDANT'S ABSENCE.

{¶58} In his fifth assignment of error, Jackson argues that the trial court precluded him from presenting a defense since it would not allow the recall of Trooper Beyer and Trooper Trader on the second day of trial. We disagree.

{¶59} "Due process requires only 'that criminal defendants be afforded a meaningful opportunity to present a complete defense.' " *Hale*, 2008-Ohio-3426, at ¶ 46, quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984). But, this opportunity is not "unfettered," *Taylor v. Illinois*, 484 U.S. 400, 410 (1988), and the trial court has discretion in determining the "mode and order of interrogating witnesses and presenting evidence," Evid.R. 611(A). Accordingly, we review a trial court's decision regarding the recalling of a witness merely for an abuse of discretion. *State v. Anderson*, 191 Ohio App.3d 110, 2010-Ohio-6234, ¶ 9 (1st Dist.). A trial court abuses its discretion only when its decision is "unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 218 (1983). When applying the abuse of discretion

standard, a reviewing court is precluded from simply substituting its own judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993).

{¶60} Jackson's trial counsel proffered that both Trooper Trader and Trooper Beyer needed to be recalled "to address the Fourth Amendment issues." However, on appeal, Jackson does not argue that the witnesses should have been recalled on that basis; rather, he suggests that the recall was appropriate to delve into purported inconsistencies between their testimonies and the testimony of Detective Taliano. But, trial counsel's proffer did not indicate the import of these purported inconsistencies, nor does Jackson elucidate it on appeal. Absent a proffer on this point and an argument on how these inconsistencies would affect the trial outcome, we are unable to find that the trial court abused its discretion in denying Jackson's request to recall Trooper Beyer and Trooper Trader. *See* Evid.R. 103(A)(2) (stating that evidentiary violation does not constitute error unless it affects a "substantial right of the party" and "the substance of the evidence was made known to the court by offer"); App.R. 16(A)(7) (requiring briefs to have "[a]n argument containing the contentions of the appellant with respect to each assignment of error * * * with citations to the authorities * * * on which appellant relies."); *State v. Williams*, 51 Ohio St.2d 112 (1977), paragraph one of the syllabus ("An appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention when such error could have been avoided or corrected by the trial court."), *vacated in part on other grounds sub nom. Williams v. Ohio*, 438 U.S. 911 (1978) (vacating imposition of death penalty).

{¶61} Accordingly, we overrule Jackson's fifth assignment of error.

ASSIGNMENT OF ERROR VII

DEFENDANT WAS DENIED A FAIR TRIAL WHEN THE JURORS WERE INFORMED THAT DEFENDANT WAS UNDER RESTRAINT.

{¶62} In his seventh assignment of error, Jackson contends that the trial court erred when jurors heard that he was wearing a tracking device during the trial. We disagree.

{¶63} The invited error doctrine precludes a party from "tak[ing] advantage of an error which he himself invited or induced the trial court to make." *Lester v. Leuck*, 142 Ohio St. 91 (1943), paragraph one of the syllabus. Here, the jurors learned of Jackson's tracking device in the following exchange between the trial court and Jackson:

The Court: Hold on a second. Do you have a cell phone on?

The Defendant: No, ankle bracelet.

The Court: Oh. Make sure anybody here that has a cell phone, make sure it's powered off.

The Defendant: It is powered off.

The Court: It powered off?

The Defendant: No, it's going to keep beeping because of the battery life.

The jurors only learned of the ankle bracelet because Jackson himself told them. While he was required to answer the court's inquiry, he could have asked to approach the bench so that the court could be informed of the existence of the device outside of the hearing of the jury. Consequently, we reject Jackson's argument on the basis of the invited error doctrine.[5]

[5] Our resolution of the seventh assignment of error does not indicate that it is per se reversible error to offer evidence regarding a criminal defendant's wearing of a tracking device or restraints. *E.g., State v. Kidder*, 32 Ohio St.3d 279, 285-286 (1987) (finding that juror's observation of the defendant in shackles did not create reversible error). Rather, we merely rely on the fact that Jackson himself was the person who brought his restraint to the attention of the jurors.

{¶64} Accordingly, we overrule Jackson's seventh assignment of error.

ASSIGNMENT OF ERROR IV

DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

{¶65} In his fourth assignment of error, Jackson claims that he was denied the effective assistance of counsel during his trial. He identifies the following deficiencies of his trial counsel as rising to the level of ineffective assistance of counsel: (1) failing to request a continuance when Jackson failed to appear on time for the second day of trial; (2) not objecting to testimony about his invocation of silence during the investigation; (3) failing to fully cross-examine Trooper Beyer; and (4) not objecting to testimony by Trooper Beyer and Trooper Trader using the terms "reasonable articulable suspicion" and "probable cause." We disagree.

{¶66} We may only reverse a conviction on the basis of ineffective assistance of counsel where we find (1) trial counsel's performance was deficient; and (2) "but for [trial] counsel's deficient performance the result of the trial would have been different." *State v. Velez*, 9th Dist. Lorain No. 13CA010518, 2015-Ohio-642, ¶ 18, citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Trial counsel's performance is deficient only where it falls "below an objective standard of reasonable representation." *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph two of the syllabus. In assessing the deficiency of the performance, though, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland* at 689, quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955). Along these lines, we have previously recognized that "trial counsel's failure to make objections is within the realm of trial tactics and does not establish ineffective assistance of counsel." *State v. Smith*, 9th Dist. Wayne No. 12CA0060, 2013-Ohio-3868, ¶ 24; *see also State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶ 115 ("Trial counsel's strategic choices must be accorded

deference and cannot be examined through the distorting effect of hindsight"). If we find that trial counsel's performance overcomes the strong presumption of reasonable professional assistance, we may only find prejudice where "there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *Bradley* at paragraph three of the syllabus.

{¶67} As to failure to request a continuance on the second day of trial, we conclude that trial counsel's performance did not fall below reasonable standards of professional assistance. In our resolution of the sixth assignment of error, we determined that the trial court properly found that Jackson was voluntarily absent and could proceed without his presence at the start of the second day of trial. Consequently, a motion for continuance at the start of the second day would have been futile and Jackson's trial counsel was not required to engage in such a pointless exercise. *See State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, ¶ 132 ("[The defendant]'s counsel did not perform deficiently by declining to raise claims with no chance of success."); *State v. Cottrell*, 4th Dist. Ross Nos. 11CA3241, 11CA3242, 2012-Ohio-4583, ¶ 20 ("The law does not require counsel to take a futile act, so trial court's failure to [do the futile act] was not deficient.").

{¶68} We similarly conclude that the failure to object to the evidence regarding Jackson's silence did not constitute deficient performance. In our resolution of the second assignment of error, we determined no error in the trial court's admission of the evidence since the State did not elicit the testimony about Jackson's silence as substantive evidence of guilt. Since there was no error in the admission of the evidence, we are unable to conclude that trial counsel's failure to object to the evidence constituted deficient performance. *See, e.g.*, *State v. Greer*, 9th Dist. Summit No. 26470, 2013-Ohio-4267, ¶ 49 ("[T]he State's exhibits were

properly admitted; therefore, we cannot conclude that counsel's performance was deficient [for failing to object to the admission of evidence]."). Further, even if trial counsel should have objected to the testimony, we conclude that the failure to do so did not affect the outcome of the trial since there was other overwhelming evidence to prove the counts alleged in the indictment. *See Conway* at ¶ 105 (finding no ineffective assistance of counsel where even if trial counsel objected and evidence was excluded, other evidence established facts giving rise to the defendant's conviction).

{¶69} In regard to trial counsel's purported failure to fully cross-examine Trooper Beyer, Jackson argues that his trial counsel should have more extensively cross-examined the trooper regarding the legality of the stop and inconsistencies between his testimony and that of Detective Taliano. The record reflects that trial counsel extensively cross-examined Trooper Beyer about the basis for the investigatory stop and his actions during the stop. Moreover, it is unclear whether testimony on these points was even appropriate for trial since it relates to the constitutionality of the stop, which is a preliminary issue that the trial court had already decided during the pretrial suppression proceedings. *See* Evid.R. 104(A) ("Preliminary questions concerning * * * the admissibility of evidence shall be determined by the court[.]"); Crim.R. 12(C)(3) ("The following must be raised before trial: * * * [m]otions to suppress evidence[.]"); *State v. Dvorak*, 65 Ohio App.3d 44, 46 (9th Dist.1989) ("[T]he defendant may not contest the evidence through cross-examination, because to allow such a contest would permit the defendant to challenge the evidence at trial rather than pretrial as mandated.").

{¶70} Additionally, Jackson has failed to show how any inconsistencies between Trooper Beyer's testimony and Detective Taliano's testimony about the traffic stop would have exculpated him when the State offered the video and audio recording of the traffic stop and other

significant evidence proving his guilt. It is also difficult to conclude that trial counsel was deficient in this regard when Detective Taliano testified after Trooper Beyer. Trial counsel is not expected to have the necessary prophetic foresight to determine that later witnesses will somehow contradict previous witnesses and act accordingly. Finally, trial counsel extensively referred to the inconsistences between Trooper Beyer's testimony and the other offered testimony, including that of Detective Taliano, during his closing argument. This tends to negate Jackson's argument on appeal that only cross-examination could properly demonstrate these inconsistencies for the jury. *See State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, ¶ 221 ("Trial counsel used closing arguments, rather than cross-examination, to point out inconsistencies in the [S]tate's evidence. Counsel made a tactical decision and was not ineffective.").

{¶71} As to the fourth suggested deficiency, we similarly conclude that Jackson's argument does not demonstrate ineffective assistance of counsel. Trooper Beyer's use of "reasonable articulable suspicion" and Trooper Trader's use of "probable cause" are not inherently prejudicial and Jackson has offered no authority for us to reach such a conclusion. *See* App.R. 16(A)(7) (requiring briefs to have "[a]n argument containing the contentions of the appellant with respect to each assignment of error * * * with citations to the authorities * * * on which appellant relies.").

{¶72} In sum, we are unable to find that Jackson's trial counsel was ineffective. Accordingly, we overrule Jackson's fourth assignment of error.

ASSIGNMENT OF ERROR VIII

> DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE [SIC] WAS SENTENCED FOR A FELONY VERSION OF POSSESSION OF CRIMINAL TOOLS AND THE VERDICT DID NOT SUPPORT A FELONY VERSION.

{¶73} In his eighth assignment of error, Jackson contends that the verdict form for his possession of criminal tools conviction was defective under R.C. 2945.75(A)(2) and should only give rise to a misdemeanor conviction. We disagree.

{¶74} Jackson did not object to the verdict form at trial. As a result, he has forfeited all but plain error on this point. *State v. Eafford*, 132 Ohio St.3d 159, 2012-Ohio-2224, ¶ 11.

{¶75} Although Jackson has only preserved plain error under Crim.R. 52(B), he does not argue the existence of plain error on appeal. Indeed, his appellate brief does not mention plain error. Due to this complete failure, we decline to sua sponte fashion such an argument and then address it. *See* App.R. 16(A)(7) (requiring briefs to have "[a]n argument containing the contentions of the appellant with respect to each assignment of error * * * with citations to the authorities * * * on which appellant relies."); *State v. Cross*, 9th Dist. Summit No. 25487, 2011-Ohio-3250, ¶ 41 ("While a defendant who forfeits such an argument may still argue plain error on appeal, this court will not sua sponte undertake a plain-error analysis if a defendant fails to do so."), citing *State v. Hairston*, 9th Dist. Lorain No. 05CA008768, 2006-Ohio-4925, ¶ 11 ("Accordingly, as Appellant failed to develop his plain error argument, we do not reach the merits and decline to address this argument.").

{¶76} Accordingly, we overrule Jackson's eighth assignment of error.

ASSIGNMENT OF ERROR IX

THE COURT ERRED IN ORDERING DEFENDANT TO REPAY ATTORNEY FEES.

{¶77} In his ninth assignment of error, Jackson argues that the trial court erred in ordering that he repay the fees of his court-appointed attorney without first determining whether he had the ability to pay. The State concedes this point.

{¶78} R.C. 2941.51(D) allows a trial court to order that a criminal defendant repay his court-appointed counsel's fees. *State v. Eader*, 9th Dist. Summit No. 26762, 2013-Ohio-3709, ¶ 23. It relevantly provides as follows:

> The fees and expenses approved by the court under this section shall not be taxed as part of the costs and shall be paid by the county. However, if the person represented has, or reasonably may be expected to have, the means to meet some part of the cost of the services rendered to the person, the person shall pay the county an amount that the person reasonably can be expected to pay.

R.C. 2941.51(D). By the plain terms of the statute, a trial court may only order repayment of the court-appointed counsel fees "after finding that the defendant is financially capable of doing so." *State v. El-Jones*, 9th Dist. Summit No. 26136, 2012-Ohio-4134, ¶ 37. Before making such a finding, the trial court must "afford an opportunity [to the defendant] to demonstrate inability to pay." *State v. Boone*, 9th Dist. Summit No. 26104, 2013-Ohio-2664, ¶ 33. When the trial court fails to properly inquire into the defendant's ability to pay, "[t]he appropriate remedy * * * 'is a remand for a determination of [the defendant]'s financial ability to pay for his court-appointed counsel.' " *Eader* at ¶ 37, quoting *State v. Warner*, 9th Dist. Lorain No. 96CA006534, 2001 WL 1155698, * 4 (Sept. 21, 2001).

{¶79} The judgment entry ordering Jackson to repay his court-appointed counsel fees includes no finding regarding his ability to pay. Additionally, while the trial court did inform Jackson of the repayment order at the sentencing hearing, it did not inquire into the defendant's

ability to pay. This constituted error. *See State v. Lewis*, 9th Dist. Summit No. 27222, 2014-Ohio-4559, ¶ 32 (remanding matter to determine the defendant's ability to pay his court-appointed counsel's fees).

{¶80} Accordingly, we sustain Jackson's ninth assignment of error. The trial court's order that Jackson repay his court-appointed attorney fees is reversed. On remand, the trial court is instructed to determine Jackson's ability to pay before deciding whether to order him to repay his attorney fees.

III.

{¶81} Having overruled all of Jackson's assignments of error relating to his conviction and prison term, but having also sustained the ninth assignment of error relating to the attorney fees order, we affirm Jackson's conviction and prison term, reverse the court's order that Jackson repay his court-appointed counsel's fees, and remand this matter to the trial court for further proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

JULIE A. SCHAFER
FOR THE COURT

HENSAL, P. J.
MOORE, J.
CONCUR.

APPEARANCES:

PAUL MANCINO, JR., Attorney at Law, for Appellant.

DENNIS P. WILL, Prosecuting Attorney, and MARY SLANCZKA, Assistant Prosecuting Attorney, for Appellee.