[Cite as *State v. Graham*, 2009-Ohio-2814.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-07-095
	:	O P I N I O N
- vs -		6/15/2009
	:	
ANTHONY GRAHAM,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 07CR24552

Rachel A. Hutzel, Warren County Prosecuting Attorney, Andrew Sievers, John Arnold, Keith Anderson, 500 Justice Drive, Lebanon, OH 45036, for plaintiff-appellee

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YOUNG, J.

{¶1} Defendant-appellant, Anthony Graham, appeals his convictions in the Warren County Court of Common Pleas of one count of trafficking in marijuana and one count of possession of marijuana. We affirm the decision of the trial court.

{¶2} On October 9, 2007, Deputy Brian Lewis was patrolling northbound traffic on I-71 in Turtle Creek Township. In addition to being a deputy with the Warren County

Sheriff's Office, Lewis is also a trained canine handler, and at the time of Graham's trial, was assigned to the Warren County Drug Task Force. In the late afternoon of the ninth, Lewis noticed a dark-colored minivan traveling in the left-hand lane, followed by a semi-truck. Lewis clocked the van going 64 m.p.h. in a section with a maximum speed of 65 m.p.h. As the van and truck passed Lewis, the van slowed suddenly so that the semi-truck had to apply its breaks to avoid a rear-end collision with the van. Lewis checked the van's speed, which had decreased to 59 m.p.h.

{¶3} After pulling onto the highway to follow, Lewis continued to watch the van, which had moved to the right lane. Lewis saw the minivan drift over the center line so that both the front and rear tires were across and into the left lane, only to drift back into the right lane. Lewis also observed the van's speed fluctuate from the mid-50s up to the mid-60s and back again. At that point, Lewis pulled the van over.

{¶4} Lewis informed Graham, the driver, that he pulled the van over because Graham committed a lane violation. At that time, Lewis requested Graham's identification. The van also contained a passenger, Winston Thomas, who told Lewis that he had rented the van. Lewis requested Thomas' identification and the rental paperwork. While Lewis was waiting for Graham and Thomas to turn over their identifications and rental paperwork, he visually scanned the van and noticed an air freshener in the back of the van, as well as various garbage bags and clothes.

{¶5} Lewis then verified that the van was rented, and discovered that Thomas had picked it up from Logan International Airport in Boston, Massachusetts at approximately 8:00 p.m. the previous night and that Graham signed the paperwork as an additional driver. Lewis asked Thomas to step out of the van, and began a

conversation with him in front of his police cruiser. Thomas told Lewis that he and Graham had driven from Boston in order to visit friends in Cincinnati. However, Thomas would not give Lewis a specific address or location where he visited his friends, instead telling Lewis that he and Graham slept in the van and were headed up to Cleveland.

{¶6} After hearing Thomas' version, Lewis went back to the van and asked Graham to explain why the two had come from Boston the night before. Graham also told Lewis that the two had been to Cincinnati but said that they were visiting family, but could not give a specific location or address that they had visited. Graham also told Lewis that they had gotten lost and had, at one point, ended up in Indianapolis.

{¶7} Lewis called for backup assistance and ran Thomas and Graham's information through police dispatch to confirm their identifications and that neither had any outstanding warrants. By the time the information was verified, a backup unit arrived on the scene and Lewis felt the situation was secure enough to perform a canine sniff to detect drugs. During the search, Thomas and Graham were seated in the backup unit's cruiser. Before placing them in the cruiser, the backup officer patted Thomas and Graham down and found a McDonald's bag with over $2,000 cash in the back of Thomas' waistband. At that point, Lewis walked his canine partner around the van, and the dog alerted at the back of the van as well as the driver-side door.

{¶8} Lewis opened the back door of the van, removed a blanket from the back seat area and found four individual bails wrapped in moving blankets and tape. After Lewis removed the moving blanket and cut through the tape and cellophane, he saw that the bundle was filled with a green, leafy substance he recognized as marijuana. The police then took the van to a secure garage and thoroughly searched the van,

finding two more bundles of marijuana in the front of the van, with one found directly behind the driver's seat.

{¶9} Soon thereafter, Detective Dan Schweitzer of the Warren County Drug Task Force and Special Agent Raymond Dratt of the Drug Enforcement Agency ("DEA") separately interviewed Thomas and Graham. Graham told Schweitzer and Dratt that he and Thomas drove from Boston to Cincinnati, slept in the van at a rest stop, and had eventually stopped at a Dunkin' Donuts in the Kenwood Mall area.

{¶10} Graham said that while at Dunkin' Donuts, Thomas went outside and approached three unknown males and had a conversation with them. The men drove off in the van and brought it back a few hours later. Graham told Schweitzer and Dratt that Thomas said the men were family members. When the van reappeared, Graham said that he and Thomas immediately started northbound towards Boston. When Schweitzer asked Graham his involvement, Graham responded that he did not know about the drugs and that he was just the driver.

{¶11} Graham and Thomas were indicted and moved the court to suppress the marijuana and evidence seized from the van. After a hearing on the matter, the court denied the motion to suppress and the case went to trial. Before the trial started, Thomas fled the jurisdiction. Graham appeared at trial and was found guilty of single counts of possession and trafficking in marijuana. The trial court sentenced Graham to eight years in prison. Graham now appeals the court's decision to deny his motion to suppress, as well as his convictions and prison sentence, raising 11 assignments of error.

{¶12} Assignment of Error No. 1:

{¶13} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY OVERRULING HIS MOTION TO SUPPRESS AND PERMITTING THE ADMISSION OF EVIDENCE AT TRIAL WHICH WAS OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART.I, SECTION 14 OF THE OHIO CONSTITUTION."

{¶14} In his first assignment of error, Graham argues that the trial court erred by denying his motion to suppress because the traffic stop was unlawful and its duration was unreasonable. This argument lacks merit.

{¶15} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Cochran*, Preble App. No. CA2006-10-023, 2007-Ohio-3353. Acting as the trier of fact, the trial court is in the best position to resolve factual questions and evaluate witness credibility. Id. Therefore, when reviewing the denial of a motion to suppress, a reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Oatis*, Butler App. No. CA2005-03-074, 2005-Ohio-6038. "An appellate court, however, independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, whether as a matter of law, the facts satisfy the appropriate legal standard." *Cochran* at ¶12.

{¶16} The Fourth Amendment to the United States Constitution protects individuals from unreasonable governmental searches and seizures. *United States v. Hensley* (1985), 469 U.S. 221, 105 S.Ct. 675. "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen* (1984), 466 U.S. 109, 113, 104 S.Ct. 1652.

{¶17} Specific to the legality of the initial traffic stop, "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 * * *." *Dayton v. Erickson*, 76 Ohio St.3d 3, 1996-Ohio-431, syllabus. "Evidence of a defendant's marked lane violation establishes reasonable suspicion or probable cause for a traffic stop." *State v. McEldowney*, Clark App. No. 06-CA-138, 2007-Ohio-6690, ¶38.

{¶18} R.C. 4511.33(A)(1) requires that a vehicle "shall be driven, as nearly as practicable, entirely within a single lane or line of traffic and shall not be moved from such lane or line until the driver has first ascertained that such movement can be made with safety." In the trial court's entry denying Graham's motion to suppress, the court found that Deputy Lewis observed Graham's van slow down quickly, which almost caused a rear-end collision with a semi-truck traveling behind it. Lewis began following Graham and observed the van drifting over the marked center-line and then back into the original travel lane. Based on Lewis' testimony, the court had competent and credible evidence that after nearly causing an accident with the semi-truck, Graham's van drifted over the marked lane lines, and then drifted back into the original travel lane.

{¶19} Because Graham's unsafe driving constituted a violation of R.C. 4511.33, Lewis had the requisite suspicion or probable cause to initiate the traffic stop. See *State v. Gibson-Sweeney*, Lake App. No. 2005-L-086, 2006-Ohio-1691 (finding traffic stop lawful where officer initiated it after appellee's vehicle drifted over marked lanes by a distance of about two or three inches before crossing back into the original travel lane). Having found that the initial traffic stop was lawful, we will next analyze whether the stop

became unconstitutional based on its duration.

{¶20} Graham next argues that even if the stop was lawful at its inception, it became a violation of his constitutional rights based on the unreasonable duration between the time Lewis pulled him over and when the canine sniff occurred. "To justify a particular intrusion, the officer must demonstrate 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" *State v. Batchili*, 113 Ohio St.3d 403, 2007-Ohio-2204, ¶11, citing *Terry v. Ohio* (1968), 392 U.S. 1, 21, 88 S.Ct. 1868. The court in *Batchili* clarified the reasonable and articulable suspicion analysis by stating that a court must consider the "collection of factors * * * which cumulatively provide[ ] a sufficient reason for additional detention for the purposes of a canine walk around." *Batchili* at ¶19.

{¶21} Here, the trial court found that Lewis had several reasons for his articulable suspicion. Lewis testified that after he made the traffic stop, Graham and Thomas told him that they rented the van in order to drive from Boston to Cincinnati. Graham and Thomas also told Lewis that they slept in the van the previous night but then offered Lewis conflicting stories when prompted to explain their reasoning for traveling so far in one day only to turn around and go back home. Lewis further testified that Graham and Thomas were "nervous" during his questioning, and that at some point, he noticed an air freshener hanging in the back of the van. While Lewis asked Graham and Thomas questions and observed their demeanor, he awaited a response from dispatch for his warrant check on Graham and Thomas, and after the check was completed, Lewis commenced the canine walk around the van.

{¶22} Based on this collection of factors, Lewis provided sufficient reason for

detaining Graham past the time necessary to issue a citation so that he could perform the canine walk-around. While Graham asserts that the 24-minute detention before Lewis deployed his canine was unreasonable, this court has previously held that detentions of approximately 24 minutes and 23 minutes were not unreasonable given the circumstances. See *State v. Howard*, Preble App. Nos. CA2006-02-002, CA2006-02-003, 2006-Ohio-5656; and *State v. Bolden*, Preble App. No. CA2003-03-007, 2004-Ohio-184. Here, Lewis diligently questioned Graham and Thomas, requested a warrant/records check, and worked to complete his traffic stop, and did not unreasonably detain Graham beyond the time necessary to conduct the investigation.

{¶23} Accordingly, the trial court properly denied Graham's motion to suppress and his first assignment of error is overruled.

{¶24} Assignment of Error No. 2:

{¶25} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY PERMITTING A DEA AGENT TO GIVE THE JURY HIS OPINION THAT DEFENDANT-APPELLANT WAS A DRUG COURIER, IN VIOLATION OF THE STATE EVIDENCE RULES AND GRAHAM'S FEDERAL DUE PROCESS GUARANTEES."

{¶26} In his second assignment of error, Graham asserts that the trial court abused its discretion by allowing a lay witness to offer opinion testimony. This arguments lack merit.

{¶27} A court's ruling on evidentiary issues will not be reversed unless the court has clearly abused its discretion "and the defendant has been materially prejudiced thereby." *State v. McCroskey*, Stark App. No. 2007CA00089, 2008-Ohio-2534, ¶36.

More than mere error of judgment, an abuse of discretion requires that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶28} Graham claims that the trial court abused its discretion by allowing DEA Special Agent Dratt to testify about drug couriers. Graham asserts that Dratt offered his opinion on whether or not Graham was a drug courier through the following trial testimony: "Based on my training and experience, the situation that I first observed was these guys are couriers." The state then went on to ask Dratt to define what being a courier meant to the DEA.

{¶29} After Graham objected to Dratt's courier-related testimony, the court replied: "[Dratt] can certainly testify as to what a courier, in his profession, would be described as." Dratt then went on to explain what being a drug courier entailed, what the DEA considered warning signs for couriering, and typical compensation rates for couriers.

{¶30} Because Dratt was not presented as an expert witness, Evid. R. 701 applies, and states, "if the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

{¶31} Dratt answered the state's courier-related questions based on his education, training, and experience as a DEA agent. He also used his own personal, firsthand knowledge gained by interviewing Graham and Thomas after the traffic stop so that his testimony was rationally based on his own perception. This testimony was also

helpful to the jury because it explained DEA jargon used during Dratt's testimony that the average citizen may not be familiar with, and further allowed the jury to determine whether Graham possessed or trafficked the marijuana as charged in the indictment.

{¶32} We also note that Ohio courts rely on such testimony when dealing with drug-related cases. Through an officer or agent's testimony, juries, trial judges, and reviewing courts are able to consider the evidence from well-trained and reliable sources familiar with drugs and drug-related activity. See *State v. Alexander*, 151 Ohio App.3d 590, 2003-Ohio-760, ¶46 (noting that "in a specialized area like drug interdiction, the court should consider the evidence from the perspective of one who is trained in the field of law enforcement"); *State v. Kelch*, Brown App. No. CA2002-02-003, 2002-Ohio-6875 (finding that appellant's conviction was not against the manifest weight where a DEA agent testified to the process of making methamphetamines and that appellant was found with the chemicals necessary for manufacturing drugs); and *State v. Gragg*, Fayette App. No. CA2006-09-038, 2007-Ohio-4731 (finding no abuse of discretion where trial court admitted testimony from a police lieutenant regarding methamphetamine manufacturing).

{¶33} Therefore, the trial court's decision to allow Agent Dratt to testify about drug couriers was not an abuse of discretion, and his second assignment of error is overruled.

{¶34} Assignment of Error No. 3:

{¶35} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY DENYING HIM HIS RIGHT TO PRESENT A DEFENSE IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTHEENTH AMENDMENTS TO THE

UNITED STATES CONSTITUTION."

{¶36} In his third assignment of error, Graham asserts that the trial court erred by not permitting him to question Detective Schweitzer about a supposed exculpatory statement made by Thomas. We find no merit in this argument.

{¶37} The state raised a hearsay objection after the following exchange occurred between Detective Schweitzer and Graham's counsel.

{¶38} Q: "Were you present when Mr. Thomas said [Graham] didn't have anything to do with this and didn't know what was going on?

{¶39} A: "No."

{¶40} Graham essentially argues that he was denied his right to present the exculpatory statement because the court ruled that it was hearsay. However, there is no need to perform a hearsay analysis because before the court sustained the state's objection, Schweitzer answered that he had not been present. Because Schweitzer was not present when the statement was supposedly made, he could not testify on the matter. Neither arguments made at trial nor Graham's assertions to this court demonstrate that the trial court should have permitted Graham to continue to question witnesses about Thomas' supposed statement.

{¶41} Graham failed to offer any proof that Thomas made the exculpatory statement or that Schweitzer was there to hear it. Instead, Graham's counsel later cross-examined Agent Dratt and asked him "were you present and did you hear any conversation or any statement made by Mr. Thomas about his involvement, or Mr. Graham's involvement in this transaction? * * * I'm not asking you what he said. Do you remember him saying anything about Mr. Graham's involvement or his involvement

in this?" Dratt answered, "I do not, sir."

{¶42} Soon after that exchange, Graham's counsel renewed his argument regarding the exculpatory statement and why it should be admitted. However, instead of establishing the veracity of the statement or that Thomas actually made it, counsel told the trial court, "I believe certainly Detective Schweitzer could have testified as to what Thomas said." However, Schweitzer testified specifically that he was not present when the statement was supposedly made and Dratt testified that he did not remember Thomas saying anything about Graham's involvement. Therefore, the trial court did not abuse its discretion by not permitting testimony regarding the supposed statement.

{¶43} Because the trial court did not deny Graham a right to present the exculpatory statement, his third assignment of error is overruled.

{¶44} Assignment of Error No. 4:

{¶45} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY PERMITTING THE PROSECUTION TO ENGAGE IN MISCONDUCT DURING CLOSING ARGUMENT, THEREBY VIOLATING HIS DUE PROCESS RIGHTS."

{¶46} In his fourth assignment of error, Graham claims that the prosecutor engaged in misconduct by making improper comments during closing arguments. This argument lacks merit.

{¶47} When reviewing statements during closing arguments for prosecutorial misconduct, a prosecutor is granted a certain degree of latitude. *State v. Smith* (1984), 14 Ohio St.3d 13. Prosecutorial misconduct will only be found when remarks made during closing were improper and those improper remarks prejudicially affected

substantial rights of the defendant. *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207. In order to determine whether the remarks were prejudicial, the prosecutor's closing argument is reviewed in its entirety. *State v. Treesh*, 90 Ohio St.3d 460, 2001-Ohio-4.

{¶48} The Ohio Supreme Court has held that prosecutorial misconduct is not grounds for reversal unless the defendant has been denied a fair trial because of the prosecutor's prejudicial remarks. *State v. Murphy*, Butler App. No. CA2007-03-073, 2008-Ohio-3382. "We will not deem a trial unfair if, in the context of the entire trial, it appears beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments." *State v. Smith*, Butler CA2007-05-133, 2008-Ohio-2499, at ¶9.

{¶49} Initially, we note that Graham failed to raise any objections at trial to the state's closing argument. Therefore, this argument has been forfeited unless we find plain error. See Crim.R. 52(B). Plain error exists where there is an obvious deviation from a legal rule which affected the defendant's substantial rights, or influenced the outcome of the proceedings. *State v. Barnes*, 94 Ohio St.3d 21, 2002-Ohio-68. The defendant must show a violation of his substantial rights and even then, notice of plain error is taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Landrum* (1990), 53 Ohio St.3d 107.

{¶50} Here, Graham argues that the prosecution made improper comments about the reason for traveling from Boston to Cincinnati, and the financial circumstances of drug couriering. However, after viewing the closing argument in its entirety, these comments were not improper.

{¶51} Graham first asserts that the prosecution improperly questioned Graham's veracity through the following statement: "Well, ladies and gentlemen, he's going to be asked: Why were you coming down here? He's got to have a good explanation. And the chef explanation[1], I guess, was the best we could come up with. It's the first time he's told that to anybody, and it suggests that it's a recent fabrication."

{¶52} Graham asserts that the state's statement was prosecutorial misconduct because "the comment that this is the first time that Graham told anybody about that [sic] the reason for [sic] trip was to pick-up a chef constitutes an improper comment on Graham's pre-trial silence." However, the record is full of references to Graham's explanations regarding his travel plans. Instead of remaining silent, Graham told investigating officers on multiple occasions that he was helping Thomas drive down to meet some family members. Graham told this story to Officer Lewis, and repeated it when DEA agents interviewed Graham after his arrest. At no time, however, did Graham remain silent or suggest that he accompanied Thomas on the trip in order to bring back a chef to work in Thomas' restaurant.

{¶53} When viewed in context with the rest of the closing argument, the section Graham cites as improper was merely another example of the inconsistencies in Graham's story and how it continued to change from the day of his arrest to his jury trial. Therefore, the state's comments were not improper and did not prejudicially affect Graham's substantial rights.

{¶54} Graham also argues that the prosecutor improperly referenced facts that

1. During trial, Graham testified in his own defense and said that his reason for coming to Cincinnati was to help drive because Thomas wanted to pick up one of his family members to work in a restaurant he owned and operated. The prosecution pointed out on cross-examination that Graham's testimony at trial

had been stricken from the record after defense counsel's objection was sustained. During the trial, the following exchange occurred between the state and Agent Dratt:

{¶55} Q: "How would [couriers] typically be compensated in a marijuana case?

{¶56} A: "Based on my training and experience, the usual compensation is approximately $100 a pound. That's what they're paid for their efforts. In this particular case, 313 pounds of marijuana, if they are paid $100 per pound, it's approximately $31,300 that, ultimately, Mr. Graham and Mr. Thomas were probably going to split."

{¶57} At that point, defense counsel objected because the total payment and if Graham would share in the amount with Thomas were "total speculation." After the court sustained the objection, the state asked Dratt if couriers are typically paid up front or after delivery. Graham again objected, stating that "this is all speculation and there's no evidence against my client." The court overruled the objection and permitted Dratt to answer the question and to provide information on how couriers are usually paid. It is, therefore, clear that the trial court sustained Graham's objection specific to Dratt's speculation that Thomas and Graham were going to split the courier fee, not that Dratt's information and knowledge regarding the typical courier fee and payment process were based on speculation.

{¶58} When we consider the statements in the context of the information provided during the trial, and summarized in the state's closing, the statements were not improper and did not prejudicially affect Graham's substantial rights. Having found that the state's closing argument did not constitute prosecutorial misconduct and that no plain error occurred, Graham's fourth assignment of error is overruled.

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was the first time he had offered the explanation and that he told a different story when previously questioned by multiple law officials.

{¶59} For ease of discussion, we will address Graham's next two assignments of error together.

{¶60} Assignment of Error No. 5:

{¶61} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY FINDING HIM GUILTY OF POSSESSION OF MARIJUANA AND TRAFFICKING IN MARIJUANA WHEN THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE REQUIRED CULPABLE MENTAL STATE OF KNOWINGLY, THEREBY DEPRIVING DEFENDANT-APPELLANT OF HIS RIGHT TO DUE PROCESS."

{¶62} Assignment of Error No. 6:

{¶63} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY FINDING HIM GUILITY OF POSSESSION OF MARIJUANA AND TRAFFICKING IN MARIJUANA WHEN SUCH VERDICTS WERE CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED AT TRIAL."

{¶64} In his fifth and sixth assignments of error, Graham argues that his convictions were against the sufficiency and manifest weight of the evidence. These arguments lack merit.

{¶65} When reviewing the sufficiency of the evidence underlying a criminal conviction, an appellate court examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Wilson,* Warren App. No. CA2006-01-007, 2007-Ohio-2298. When addressing sufficiency, "the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the

crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶66} "In determining whether a conviction is against the manifest weight of the evidence, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the tier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Cummings*, Butler App. No. 2006-09-224, 2007-Ohio-4970, ¶12.

{¶67} "Because sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency. Thus, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." *Wilson* at ¶35, citing *State v. Lombardi*, Summit App. No. 22435, 2005-Ohio-4942, fn. 4.

{¶68} Graham was convicted of violating R.C. 2925.11(A), which states that "no person shall knowingly obtain, possess, or use a controlled substance." Graham was also convicted of trafficking in marijuana in violation of R.C. 2925.03(A)(2), which states that no person shall "prepare for shipment, ship, transport, deliver, 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."

{¶69} The jury heard the following evidence: Graham was stopped while driving on I-71, a major interstate often used as a drug courier route in a van that contained 313 pounds of marijuana. The marijuana was packed in six double-wrapped bundles, each

weighing over 20,000 grams, and one of the bundles was located within an arm's distance behind Graham's driver-side seat. The marijuana was valued at over $400,000. The jury also heard testimony from Officer Lewis and the DEA agents regarding Graham's changing story and explanation for the one-day trip to Cincinnati.

{¶70} Based on this evidence, we cannot say that Graham's convictions were against the manifest weight of the evidence. Instead, after reviewing the entire record and weighing the evidence and all reasonable inferences, as well as the credibility of the witnesses, the jury neither clearly lost its way nor created such a manifest miscarriage of justice that the convictions must be reversed and a new trial ordered. Having found that Graham's convictions were not against the manifest weight of the evidence, it follows that the evidence was sufficient to support the convictions, and his fifth and sixth assignments of error are overruled.

{¶71} Assignment of Error No. 7:

{¶72} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY GIVING A JURY INSTRUCTION ON COMPLICITY."

{¶73} In his seventh assignment of error, Graham argues that the trial court erred by giving the jury an instruction on complicity when he was charged as a principal offender, and the evidence offered at trial did not reasonably prove that he was an aider and abettor. This argument has no merit.

{¶74} The indictment that charged Graham with one count of trafficking and one count of possession stated the offenses in terms of the principal offense instead of complicity. However, "because the clear and unambiguous langue of R.C. 2923.03(F) states that a charge of complicity may be stated in the indictment in terms of complicity

or in terms of the principal offense, it is inconsequential that a defendant is indicted and prosecuted for the principal offense rather under the complicity statute." *State v. Benson*, Butler App. No. CA2004-10-254, 2005-Ohio-6549, ¶29.

{¶75} Graham next argues that the evidence did not support the jury instruction on complicity. "If the evidence presented at trial could reasonably be found to have proven the defendant's guilt as an aider and abettor, a jury instruction on complicity is proper." Id. The jury heard testimony that Graham agreed to help Thomas drive from Boston to Cincinnati and back, that he signed the rental car paperwork as an additional driver, and that Graham was driving the van that contained the marijuana within an arm's length from the driver's seat. Therefore, we find that the evidence presented at trial was reasonably sufficient to prove Graham's guilt as an aider and abettor so that the jury instruction on complicity was proper, and his seventh assignment of error is overruled.

{¶76} Assignment of Error No. 8:

{¶77} "THE MANDATORY PRISON SENTENCE IMPOSED UPON DEFENDANT-APPELLANT WAS UNCONSTITUTIONAL AS IT REMOVED ALL DISCRETION FROM THE PROVINCE OF THE JUDICIARY."

{¶78} In his eighth assignment of error, Graham argues that the legislation requiring Graham's mandatory prison sentence is unconstitutional because it is a violation of the separation of powers doctrine. As courts have previously held, this argument lacks merit.

{¶79} Instead of presenting a specific issue for review, Graham asserts that the mandatory sentencing legislation is unconstitutional and "hopes that this Court will see

that this case exemplifies the irrationality and unreasonableness of mandatory prison sentences." However, we do not.

{¶80} Instead, Ohio courts have continually held that mandatory sentencing legislation does not violate the separation of powers doctrine and we will not stray from that controlling precedent. See *State v. Thompkins,* 75 Ohio St.3d 558, 1996-Ohio-264; *State v. Waldo*, Clermont App. No. CA2008-02-015, 2008-Ohio-4167; and *State v. Rosado*, Cuyahoga App. No. 88504, 2007-Ohio-2782.

{¶81} Therefore, Graham's eighth assignment of error is overruled.

{¶82} Assignment of Error No. 9:

{¶83} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY ADMITTING THE LABORATORY REPORT WITHOUT THE STATE PRESENTING THE TESTIMONY OF THE LAB TECHNICIAN WHO PERFORMED THE ANALYSIS IN VIOLATION OF DEFENDANT-APPELLANT'S RIGHT TO CONFRONTATION CONTAINED IN THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION."

{¶84} In his ninth assignment of error, Graham asserts that the trial court should have excluded a lab report from being offered into evidence because the technician who performed the analysis and prepared the report did not testify and was not therefore subject to cross-examination. This argument lacks merit.

{¶85} During the trial, the state asked Deputy Lewis to identify a crime lab result sheet, which indicated that the drug recovered from Graham's van was marijuana and that each package weighed over 20,000 grams. The state moved to admit the lab report, among other exhibits, into evidence and Graham posed no objection. While

Graham now claims that it was error to admit the report into evidence without first allowing him to cross-examine the lab technician, we find that Graham waived his right to cross-examine the analyst.

{¶86} Recently, the Ohio Supreme Court issued a case with direct bearing on this issue. In *State v. Pasqualone*, 121 Ohio St.3d 176, 2009-Ohio-315, the court analyzed whether an attorney can waive his client's right to cross-examine a lab analyst at trial. In answering in the affirmative, the court held, "we hold that an accused's attorney is capable of waiving his client's right to confrontation by not demanding that a laboratory analyst testify pursuant to the opportunity afforded by R.C. 2925.51, because whether to cross-examine a particular witness is properly viewed as a decision relating to trial tactics or strategy. We also hold that the procedures of R.C. 2925.51 adequately protect an accused's right to confrontation, so that an accused who fails to demand the testimony of the analyst pursuant to R.C. 2925.51(C) validly waives his opportunity to cross-examine the analyst." Id. at ¶44.

{¶87} Therefore, based on this precedent, we find that by not objecting to the admittance of the lab report or not demanding that the lab analyst appear at trial, Graham waived that right and cannot now argue that the trial court erred in accepting the lab report as evidence. Therefore, Graham's ninth assignment of error is overruled.

{¶88} Assignment of Error No. 10:

{¶89} "DEFENDANT-APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL SECURED TO HIM BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES."

{¶90} In his tenth assignment of error, Graham asserts that his trial counsel was

ineffective. There is no merit to this argument.

{¶91} Warning against the temptation to view counsel's actions in hindsight, the United States Supreme Court stated that judicial scrutiny of an ineffective assistance claim must be "highly deferential * * *. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland v. Washington* (1984), 466 U.S. 668, 689, 104 S.Ct. 2052, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 58.

{¶92} Also within *Strickland*, the Supreme Court established a two-part test which requires an appellant to establish that first, "his trial counsel's performance was deficient; and second, that the deficient performance prejudiced the defense to the point of depriving the appellant of a fair trial." *State v. Myers*, Fayette App. No. CA2005-12-035, 2007-Ohio-915, ¶33, citing *Strickland*.

{¶93} Regarding the first prong, an appellant must show that his counsel's representation "fell below an objective standard of reasonableness." *Strickland* at 688. The second prong requires the appellant to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

{¶94} Graham first claims that his trial counsel was ineffective because counsel failed to adequately proffer what Thomas' exculpatory statement would have been. However, during the trial, counsel asked Detective Schweitzer if he was present when Thomas said that Graham "didn't have anything to do with this and didn't know what was

going on," and Schweitzer answered the question. Therefore, counsel was not deficient in not further proffering what Thomas' statement would have been because this court was able to rule on the admissibility of the statement based on the question and answer offered at trial.

{¶95} Graham next asserts that counsel's failure to object to portions of the prosecution's closing argument amounts to ineffective assistance of counsel. However, as we have already determined under Graham's fourth assignment of error, the prosecutor's statements were not improperly made and did not amount to prosecutorial misconduct. Therefore, Graham's counsel was not deficient in failing to object to statements made during closing and his assistance was not ineffective.

{¶96} Graham also argues that counsel was ineffective by waiving sufficiency of evidence arguments and by waiving Graham's right to cross-examine the technician who created the lab report detailing the amount of marijuana seized from the van. As we have determined under Graham's fifth assignment of error, the evidence was sufficient to support Graham's convictions, and counsel's failure to move the court on the sufficiency issue did not amount to deficient performance.

{¶97} We also note that the court in *Pasqualone* noted, "the decision whether to cross-examine a particular witness is a tactical decision ultimately controlled by a defendant's trial counsel." 2009-Ohio-315 at ¶31. During the trial, the jury heard evidence that officers seized over 300 pounds of marijuana from the van Graham was driving. The lab report confirmed Lewis' on-site determination that the substance was marijuana and that each bundle weighed over 20,000 grams. It is understandable that Graham's counsel would not want to question the lab technician regarding the large

quantity of marijuana found in the van after the jury had already heard Lewis' damaging testimony.

{¶98} Because counsel's decision to not cross-examine the lab technician was part of his trial strategy, Graham has failed to establish that counsel's decision to not cross-examine the lab technician was deficient or prejudicial. See *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶101 (finding that "debatable trial tactics do not establish ineffective assistance of counsel"). Having found that Graham's trial counsel was not ineffective, his tenth assignment of error is overruled.

{¶99} Assignment of Error No. 11:

{¶100} "THE CUMULATIVE EFFECT OF THE TRIAL COURT'S ERRORS LED TO A WRONGFUL VERDICT IN VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHTS OF DUE PROCESS."

{¶101} In his final assignment of error, Graham argues that his convictions should be reversed because the cumulative effect of the trial court's errors denied him his constitutional right to a fair trial. This argument lacks merit.

{¶102} According to the cumulative error doctrine, "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." *State v. Garner*, 74 Ohio St.3d 49, 64, 1995-Ohio-168.

{¶103} This doctrine is not applicable to the case at bar because we have not found that the trial court erred or that there were multiple instances of harmless error. Therefore, Graham's eleventh assignment of error is overruled.

{¶104} Judgment affirmed.

BRESSLER, P.J., and POWELL, J., concur.