[Cite as *State v. Calhoun*, 2012-Ohio-1128.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-A-0057**
- vs -	:	
MICHAEL CALHOUN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2006 CR 042.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Joseph A. Humpolick, Ashtabula County Public Defender, Inc., 4817 State Road, Suite 202, Ashtabula, OH 44004-6927 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} Appellant, Michael Calhoun, appeals from a judgment of the Ashtabula County Court of Common Pleas, sentencing him for trafficking in drugs within the vicinity of a school and possession of drugs.

{¶2} Appellant was indicted on three counts: count one, trafficking in drugs (a Schedule I controlled substance) within the vicinity of a school, a felony of the third degree, in violation of R.C. 2925.03(A)(2) and (C)(1)(b); count two, trafficking in drugs (a

Schedule I controlled substance) within the vicinity of a school, a felony of the fourth degree, in violation of R.C. 2925.03(A)(2) and (C)(3)(b); and count three, possession of drugs, a felony of the fifth degree, in violation of R.C. 2925.11(A) and (C)(1). The basis of the trafficking charges involved methylenedioxymethamphetamine ("MDMA") pills in count one, and marijuana in count two. The basis of the possession charge in count three involved MDMA pills.

{¶3} Appellant filed a motion to suppress evidence and statements. The state filed opposition in response. Following a hearing, the trial court overruled appellant's motion to suppress evidence but granted his motion to suppress statements.

{¶4} The matter proceeded to a two-day jury trial.

{¶5} Preliminarily, we note that appellant challenges issues involving both the suppression hearing and jury trial. At the suppression hearing, the only witness to testify was Patrolman Thomas Perry with the Ashtabula City Police Department. In all major respects, Patrolman Perry's testimony at the suppression hearing was consistent with his trial testimony.

{¶6} Patrolman Perry was on duty in the area of West 36th and Station Avenue, a high crime and high drug trafficking area. While on patrol, he observed a group of four people standing around a tan pick-up truck which was later identified as belonging to appellant. The group was approximately 300 feet from the border of Thurgood Marshall Public School. One member of the group, Cheyrone Kelly, was a known drug dealer. As Patrolman Perry drove past the group, everyone near the truck turned their heads away from him to avoid eye contact. As his suspicions grew, Patrolman Perry circled the block and approached the truck.

{¶7} After exiting his cruiser, Patrolman Perry observed a black film container on the ground at the rear of the truck, a couple feet away from where appellant was standing. Patrolman Perry picked up the container, opened it, and found two blue pills with a star stamped on them which appeared to be MDMA, also known as ecstasy, a Schedule I controlled substance. He peered into the opened passenger side window of the truck and observed two marijuana roaches, burnt ends of marijuana cigarettes, in the ashtray. At that time, Patrolman Perry ordered everyone in the group to place their hands on the truck for his safety. Appellant was located on the driver's side rear wheel area, two others were directly across from appellant on the other side of the truck, and one individual was at the front of the truck. Patrolman Perry checked the immediate area around the truck and then entered the vehicle to retrieve the roaches. While inside, he located two small bags of suspected marijuana in the glove box, packaged in a manner that they were intended for sale. Patrolman Perry then observed appellant crouched near the driver's side rear wheel area.

{¶8} After exiting the truck, Patrolman Perry saw that appellant's hands were fidgeting or moving into the rear wheel well area, and he observed a portion of a plastic bag sticking out of the wheel well. Patrolman Perry did not observe anything in the driver's side rear wheel area before everyone placed their hands on the truck. He removed the bag and found one large bag containing three small bags of what appeared to be more marijuana as well as seven blue pills that were suspected to be MDMA, packaged in a manner that they were intended for sale. Patrolman Perry testified that appellant was the only one on the driver's side of the truck and the only one close enough to have placed that plastic bag in the rear wheel well area. At that

time, appellant was arrested. During a pat down search incident to his arrest, Patrolman Perry found a marijuana cigarette in appellant's front shirt pocket.

{¶9} Patrolman Perry did not see appellant or anyone else in the group buying or selling drugs on the evening at issue. Because the black film container found on the ground was within two feet of everyone, not just appellant, no charges were brought against appellant regarding the contents in the film container. No fingerprint testing was done on any of the baggies because based on Patrolman Perry's experience, fingerprinting baggies has been unsuccessful due to creases and wrinkles.

{¶10} Kenneth Ross, a forensic scientist with BCI, testified that the substances suspected of being marijuana all tested positive. He also stated that six of the seven blue pills found in the plastic bag located in the wheel well tested positive for MDMA.

{¶11} At the close of the state's case-in-chief, appellant's counsel moved for judgment of acquittal, which was overruled by the trial court. The defense did not call any witnesses.

{¶12} Following the trial, the jury returned a guilty verdict on all counts. The trial court deferred sentencing because although appellant appeared for the first day of trial, he did not appear for the second day. Defense counsel's attempts to contact his client were unsuccessful. The trial court did not accept defense counsel's request for a 24 to 48 hour continuance and proceeded with the second and final day of the jury trial. A capias was issued for appellant's arrest.

{¶13} Prior to sentencing, appellant made oral motions for mistrial, to treat count one as a felony of the fourth degree, and to designate counts one and three as allied offenses. The trial court overruled appellant's oral motions for mistrial and to treat count

one as a felony of the fourth degree instead of a felony of the third degree. However, the trial court granted appellant's oral motion to treat counts one and three as allied offenses.

{¶14} Appellant was sentenced to three years in prison on count one and 18 months on count two, to be served concurrently with each other and consecutively to a sentence he was serving in another case. Appellant was ordered to pay a $5,000 mandatory fine and costs. The trial court also suspended appellant's right to drive a motor vehicle for six months. Appellant filed a timely appeal and asserts the following assignments of error:

{¶15} "[1.] The trial court below abused its discretion when it proceeded to try appellant before a jury in his absence without recessing for at least twenty-four hours at defense counsel's request so he could have an opportunity to find his client.

{¶16} "[2.] Appellant's convictions of trafficking in a Schedule I controlled substance in the vicinity of a school in violation of Ohio Revised Code 2925.03, and possession of a Schedule I controlled substance in violation of Ohio Revised Code 2925.11 are neither supported by sufficient evidence nor by the manifest weight of the evidence.

{¶17} "[3.] Appellant's conviction of trafficking in marijuana in the vicinity of a school in violation of Ohio Revised Code 2925.03 was neither supported by sufficient evidence nor by the manifest weight of the evidence.

{¶18} "[4.] Seven blue pills of whom six were MDMA or ecstasy and four baggies of marijuana that were found in a larger plastic bag that was retrieved by Ashtabula Police Officer Thomas Perry were neither relevant to any of the issues before the trial

court; and even if they were their probative value was substantially outweighed by the dangers of unfair prejudice, confusion of the issues and of its potential to mislead the jurors who heard this case.

{¶19} "[5.] A black film cannister (sic) and the two blue pills that it contained that was found in the vicinity of appellant's truck were not relevant to any of the issues before the trial court; and even if they were, their probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues and of its potential to mislead the jurors who heard this case.

{¶20} "[6.] Two roaches that were found in appellant's truck and a roach that was found in his shirt pocket were not relevant to any of the issues before the trial court; and even if they were their probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues and its potential to mislead the jurors who heard this case.

{¶21} "[7.] Two baggies of marijuana that were found in the glove compartment of appellant's truck were not relevant to any of the issues before the trial court; and even if they were their probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues and its potential to mislead the jurors who heard this case.

{¶22} "[8.] Appellant's constitutional rights against unreasonable search and seizure were violated when Ashtabula Police Officer Thomas Perry searched the interior of his truck and obtained two roaches and two baggies of marijuana.

{¶23} "[9.] Appellant's constitutional rights against unreasonable search and seizure were violated when Ashtabula Police Officer Thomas Perry removed a large

plastic bag from the driver's side rear wheel well that contained seven pills of whom six were MDMA or ecstasy and four baggies of marijuana.

{¶24} "[10.] Appellant's constitutional rights to a fair trial were violated by the impact of numerous cumulative errors."

{¶25} In his first assignment of error, appellant argues that the trial court abused its discretion when it denied defense counsel's motion for a continuance when appellant failed to appear for the second day of trial. Appellant alleges that the trial court erred by failing to recess for at least 24 hours, at his counsel's request, so that he could have been located. He maintains that nobody at the time knew whether the reason for his absence was legitimate or not. Appellant stresses that a 24 hour continuance would not have been an inconvenience to anyone and would not have seriously interfered with the trial court's interests in moving along its docket.

{¶26} The decision whether to grant or deny a motion to continue is within the broad, sound discretion of the trial court. *State v. Griesmar*, 11th Dist. No. 2009-L-061, 2010-Ohio-824, at ¶17, quoting *State v. Mays*, 11th Dist. No. 2001-T-0071, 2003-Ohio-63, at ¶14. The denial of a continuance will not be reversed by an appellate court on appeal unless there has been an abuse of discretion. *Id*. An abuse of discretion is the trial court's ""failure to exercise sound, reasonable, and legal decision-making."" *State v. Sawyer*, 11th Dist. No. 2011-P-0003, 2011-Ohio-6098, at ¶72, quoting *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶27} "Whether the trial court abused its discretion by denying a motion to continue depends upon the reasons for the requested continuance at the time the

request was made." *Griesmar*, *supra*, at ¶18, citing *State v. Ngiraingas*, 11th Dist. No. 2004-A-0034, 2005-Ohio-7058, at ¶32 citing *State v. Powell*, 49 Ohio St.3d 255, 259 (1990). "'On appeal, "the reviewing court must weigh potential prejudice against "a court's right to control its own docket and the public's interest in the prompt and efficient dispatch of justice. "Relevant factors include "the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or (***) dilatory, purposeful, or contrived; (and) whether the defendant contributed to the circumstance which gives rise to the request(.)"'" *Id*.

{¶28} Crim.R. 43 provides in part:

{¶29} "(A) Defendant's presence.

{¶30} "(1) Except as provided in Rule 10 of these rules and division (A)(2) of this rule, the defendant must be physically present at every stage of the criminal proceeding and trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence, except as otherwise provided by these rules. 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. ***"

{¶31} A defendant's right to be present at trial is not absolute. *State v. Jones*, 11th Dist. No. 2008-L-028, 2008-Ohio-6559, at ¶29, citing *State v. White*, 82 Ohio St.3d 16, 26 (1998). However, pursuant to Crim.R. 43(A)(1), "the court may not proceed with the trial after it has commenced in the absence of the defendant unless that absence is voluntary, that is, a product of the defendant's own free choice and unrestrained will.

Voluntariness is an issue of fact. Therefore, the trial court must determine that the defendant is voluntarily absent before it can proceed with the trial." *State v. Carr*, 104 Ohio App.3d 699, 703 (1995).

{¶32} The second day of the jury trial was scheduled to begin at 9:00 a.m. At 10:30 a.m., the trial court stated that it received no explanation from appellant or anyone on his behalf as to why he was absent. Defense counsel said that he, as well as another individual from his office, called appellant and left him voicemail messages. Defense counsel also stated that he spoke with an acquaintance of appellant's in the hallway of the courthouse and that she too did not know his whereabouts. Thereafter, defense counsel moved for a continuance, which was denied.

{¶33} The trial court indicated that appellant was present at all stages of the proceedings, including the hearing on his motion to suppress, voir dire, the commencement of the trial, and the entire presentation of the state's case-in-chief against him. Without any explanation for his failure to appear for the second day of trial, the trial court determined that it was appellant's voluntary decision not to appear. Thus, the trial court decided to proceed to a verdict without appellant present.

{¶34} Pursuant to Crim.R. 43(A)(1) and *Carr*, *supra*, the trial court determined that appellant was voluntarily absent before it proceeded with the trial and, based on the information available, the decision is supported. The record establishes that appellant appeared for the first day of trial. Appellant had knowledge of the date and time scheduled for the second day of trial. However, appellant made no attempt to contact either his counsel or the trial court to explain his absence on the second day and all attempts to reach appellant were unsuccessful. Moreover, we note that although

appellant alleges here that nobody at the time knew whether the reason for his absence was legitimate or not, he later admitted during his sentencing hearing that he knew he was not going to win so he fled to Arkansas. In retrospect, it is clear appellant was voluntarily absent and therefore, he cannot establish prejudice. Based upon the circumstances, the trial court did not abuse its discretion in concluding appellant was voluntarily absent and, therefore, denying defense counsel's motion for a continuance.

{¶35} Appellant's first assignment of error is without merit.

{¶36} In his second assignment of error, appellant contends that his convictions for trafficking in a Schedule I controlled substance, MDMA pills, within the vicinity of a school in violation of R.C. 2925.03, and possession of a Schedule I controlled substance, MDMA pills, in violation of R.C. 2925.11, are neither supported by sufficient evidence nor by the manifest weight of the evidence.

{¶37} In his third assignment of error, appellant alleges that his conviction on count two, trafficking in marijuana within the vicinity of a school in violation of R.C. 2925.03, was neither supported by sufficient evidence nor by the manifest weight of the evidence.

{¶38} Because appellant's second and third assignments of error are interrelated, we will address them together.

{¶39} With regard to a Crim.R. 29 motion, in *State v. Bridgeman*, 55 Ohio St.2d 261 (1978), the Supreme Court of Ohio established the test for determining whether a motion for acquittal is properly denied. The Supreme Court stated that "[P]ursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material

element of a crime has been proved beyond a reasonable doubt." *Id.* at syllabus. "Thus, when an appellant makes a Crim.R. 29 motion, he or she is challenging the sufficiency of the evidence introduced by the state." *State v. Patrick*, 11th Dist. Nos. 2003-T-0166 and 2003-T-0167, 2004-Ohio-6688, at ¶18.

{¶40} As this court stated in *State v. Schlee*, 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, *13-14 (Dec. 23, 1994):

{¶41} "'Sufficiency' challenges whether the prosecution has presented evidence on each element of the offense to allow the matter to go to the jury, while 'manifest weight' contests the believability of the evidence presented.

{¶42} "'"(***) The test (for sufficiency of the evidence) is whether after viewing the probative evidence and the inference[s] drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all of the elements of the offense beyond a reasonable doubt. *The claim of insufficient evidence invokes an inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence*. ***"'

{¶43} "In other words, the standard to be applied on a question concerning sufficiency is: when viewing the evidence 'in a light most favorable to the prosecution,' *** '(a) reviewing court (should) not reverse a jury verdict where there is substantial evidence upon which the jury could reasonably conclude that all of the elements of an offense have been proven beyond a reasonable doubt.' ***" (Emphasis sic.) (Citations omitted.)

{¶44} "*** [A] reviewing court must look to the evidence presented *** to assess whether the state offered evidence on each statutory element of the offense, so that a

rational trier of fact may infer that the offense was committed beyond a reasonable doubt." *State v. March*, 11th Dist. No. 98-L-065, 1999 Ohio App. LEXIS 3333, *8 (July 16, 1999). The evidence is to be viewed in a light most favorable to the prosecution when conducting this inquiry. *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. Further, the verdict will not be disturbed on appeal unless the reviewing court finds that reasonable minds could not have arrived at the conclusion reached by the trier of fact. *State v. Dennis*, 79 Ohio St.3d 421, 430(1997).

{¶45} Appellant is challenging his convictions for trafficking in drugs within the vicinity of a school in violation of R.C. 2925.03(A)(2) and (C)(1)(b) and (3)(b), which state:

{¶46} "(A) No person shall knowingly do any of the following:

{¶47} "***

{¶48} "(2) 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.

{¶49} "***

{¶50} "(C) Whoever violates division (A) of this section is guilty of one of the following:

{¶51} "(1) If the drug involved in the violation is any compound, mixture, preparation, or substance included in schedule I *** whoever violates division (A) of this section is guilty *** as follows:

{¶52} "***

{¶53} "(b) *** [I]f the offense was committed in the vicinity of a school *** a felony of the third degree ***.

{¶54} "***

{¶55} "(3) If the drug involved in the violation is marijuana *** whoever violates division (A) of this section is guilty *** as follows:

{¶56} "***

{¶57} "(b) *** [I]f the offense was committed in the vicinity of a school *** a felony of the fourth degree ***."

{¶58} Although appellant does not specifically challenge the "within the vicinity of a school" portion of his R.C. 2925.03 convictions, we note that his conduct occurred around 300 feet of the border of Thurgood Marshall Public School.

{¶59} R.C. 2925.01(P) states: "[a]n offense is 'committed in the vicinity of a school' if the offender commits the offense on school premises, in a school building, or within one thousand feet of the boundaries of any school premises, regardless of whether the offender knows the offense is being committed on school premises, in a school building, or within one thousand feet of the boundaries of any school premises."

{¶60} Thus, pursuant to R.C. 2925.01(P), because appellant's conduct occurred within 1,000 feet of Thurgood Marshall Public School, his offenses were "committed in the vicinity of a school."

{¶61} Appellant is also challenging his conviction for possession of drugs in violation of R.C. 2925.11(A), which states: "[n]o person shall knowingly obtain, possess, or use a controlled substance."

{¶62} R.C. 2901.22(B) provides: "[a] person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶63} The state presented sufficient evidence to sustain appellant's convictions for trafficking in drugs within the vicinity of a school and possession of drugs. Based on all of the testimony, previously discussed in detail, the jury could reasonably conclude that the elements of trafficking in drugs within the vicinity of a school and possession of drugs were proven.

{¶64} With respect to counts one and two, the evidence demonstrates that appellant transported MDMA pills, which were found in the wheel well of appellant's truck, and marijuana, which was found in the wheel well and inside the glove box in his truck, within the vicinity of a school. During the direct testimony of Patrolman Perry, the jury heard and observed, through the admission of State's Exhibits 2, 3, and 4, how the MDMA pills and marijuana found in the wheel well and the marijuana inside the glove box were packaged in a manner that the jury could conclude were intended for sale by appellant. With respect to count three, the evidence establishes that appellant knowingly obtained or possessed MDMA pills, which were located within the wheel well area.

{¶65} Pursuant to *Schlee*, *supra*, there is sufficient evidence upon which the jury could reasonably find beyond a reasonable doubt that the elements of trafficking in drugs within the vicinity of a school and possession of drugs have been proven.

{¶66} With respect to manifest weight, in *Schlee*, *supra*, at *14-15, this court stated:

{¶67} "'[M]anifest weight' requires a review of the weight of the evidence presented, not whether the state has offered sufficient evidence on each element of the offense.

{¶68} "'In determining whether the verdict was against the manifest weight of the evidence, "(***) the court reviewing the entire record, *weighs the evidence* and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. (***)"' (Citations omitted.) ***" (Emphasis sic.)

{¶69} A judgment of a trial court should be reversed as being against the manifest weight of the evidence "only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997).

{¶70} With regard to the manifest weight of the evidence, we note that the jury is in the best position to assess the credibility of witnesses. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus.

{¶71} In our case, appellant did not testify nor did he present any witnesses to testify on his behalf. Thus, the jury apparently placed great weight on the state's witnesses. For the reasons stated in our discussion regarding the motion for acquittal, we cannot say that the jury clearly lost its way in finding appellant guilty of trafficking in

drugs within the vicinity of a school and possession of drugs. *Schlee*, *supra*, at *14-15; *Thompkins*, *supra*, at 387.

{¶72} Appellant's second and third assignments of error are without merit.

{¶73} In his fourth assignment of error, appellant argues that seven blue pills, six of which were MDMA, and four baggies of marijuana, retrieved by Patrolman Perry, were not relevant to any of the issues before the trial court. He contends that even if the evidence were relevant, its probative value was substantially outweighed by the dangers of unfair prejudice, confusion of the issues, and of its potential to mislead the jurors who heard this case.

{¶74} In his fifth assignment of error, appellant contends that the black film container and the two blue pills located inside, which were found in the vicinity of appellant's truck, were not relevant to any of the issues before the trial court. He contends that even if the evidence were relevant, its probative value was substantially outweighed by the dangers of unfair prejudice, confusion of the issues, and of its potential to mislead the jurors who heard this case.

{¶75} In his sixth assignment of error, appellant alleges that the two marijuana roaches found in his truck and a roach found in his shirt pocket were not relevant to any of the issues before the trial court. He contends that even if the evidence were relevant, its probative value was substantially outweighed by the dangers of unfair prejudice, confusion of the issues, and of its potential to mislead the jurors who heard this case.

{¶76} In his seventh assignment of error, appellant argues that the two baggies of marijuana that were found in the glove box of his truck were not relevant to any of the issues before the trial court. He contends that even if the evidence were relevant, its

probative value was substantially outweighed by the dangers of unfair prejudice, confusion of the issues, and of its potential to mislead the jurors who heard this case.

{¶77} Because appellant's fourth, fifth, sixth, and seventh assignments of error are interrelated, we will address them in a consolidated fashion.

{¶78} Appellant challenges the trial court's decision regarding the admissibility of certain evidence. An appellate court reviews the trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Davis v. Killing*, 171 Ohio App.3d 400, 2007-Ohio-2303, at ¶11, citing *Calderon v. Sharkey*, 70 Ohio St.2d 218, 219 (1982) .

{¶79} Evid.R. 401 states: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

{¶80} Evid.R. 402 provides: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio. Evidence which is not relevant is not admissible."

{¶81} Evid.R. 403(A) states: "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

{¶82} "'[E]xclusion on the basis of unfair prejudice involves more than a balance of mere prejudice. If unfair prejudice simply meant prejudice, anything adverse to a litigant's case would be excludable under Rule 403. Emphasis must be placed on the

word “unfair.” Unfair prejudice is that quality of evidence which might result in an improper basis for a jury decision. Consequently, if the evidence arouses the jury’s emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish, the evidence may be unfairly prejudicial.’” *Davis*, *supra*, at ¶16, quoting *Hampton v. Saint Michael Hospital*, 8th Dist. No. 81009, 2003-Ohio-1828, at ¶55.

{¶83} Evid.R. 404(B) provides: “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

{¶84} Evidence of a separate instance of criminal conduct is admissible where the non-charged crime is so connected with the charged crime that the facts of each are logically intertwined. *State v. Long*, 64 Ohio App.3d 615, 617 (1989). Evidence of other drugs, even though not part of the charges against a defendant, may be admissible to show contemporaneous acts to establish a defendant’s identity as the person in possession and knowledge of the presence of drugs with which he was charged. *State v. Rocker*, 10th Dist. No. 97APA10-1341, 1998 Ohio App. LEXIS 4145, *19 (Sept. 1, 1998). “Scheme, plan or system” evidence is relevant and admissible if the “other acts” testimony concerns events which are inextricably related to the charged criminal act. *State v. Miley*, 5th Dist. Nos. 2005-CA-67 and 2006-CA-14, 2006-Ohio-4670, at ¶67.

{¶85} In our case, appellant maintains that the trial court improperly allowed the state to admit the following evidence over defense counsel’s objection: seven blue pills, six of which were MDMA, found in the wheel well of appellant’s truck; four baggies of

marijuana located in the wheel well; two blue pills inside a black film container found in the vicinity of appellant's truck; two marijuana roaches located inside appellant's vehicle; one marijuana cigarette found in appellant's front shirt pocket; and two baggies of marijuana found in the glove box. Appellant stresses that he was neither seen handling the foregoing evidence nor doing anything illegal in Patrolman Perry's presence that would lead anybody to believe that he wanted to sell the drugs. He alleges that the admission of this evidence did nothing more than "poison the well," mislead the jury, and confuse the issues, thereby leading to his prejudice.

{¶86} The seven blue pills, six of which were MDMA, found in the wheel well of appellant's truck, the four baggies of marijuana located in the wheel well, and the two baggies of marijuana found in the glove box, were relevant and admissible pursuant to Evid.R. 401 and 402 as that evidence formed the basis of the charges brought against appellant. Specifically, with respect to counts one and two, the seven blue pills, six of which were MDMA, and the four baggies of marijuana found in the wheel well of appellant's truck, and the two baggies of marijuana found in the glove box, were all transported within the vicinity of a school and packaged in a manner that the jury could conclude were intended for sale by appellant. Also, with respect to count three, the evidence establishes that appellant knowingly obtained or possessed the MDMA pills found within the wheel well area of his truck.

{¶87} Appellant's counsel made an oral motion in limine to exclude the two marijuana roaches located in the ashtray of appellant's truck and the one marijuana cigarette found in his front shirt pocket. The trial court overruled that motion. Although not part of the charges brought against appellant, the two marijuana roaches in the

ashtray and the one marijuana cigarette found in his front shirt pocket were relevant and admissible to show contemporaneous acts to establish appellant's identity as the person in possession and knowledge of the presence of the drugs with which he was charged. Evid.R. 404(B); *Rocker*, *supra*, at *19.

{¶88} However, the two blue pills inside the black film container found in the vicinity of appellant's truck, which did not test positive for MDMA, were irrelevant and inadmissible, and defense counsel's objection to the admissibility of those pills should have been sustained. They did not form the basis of any charges and, unlike the roaches and marijuana cigarette, were not possessed by appellant and therefore, were not admissible to show identity or knowledge. Nevertheless, the trial court's error was harmless and did not amount to an abuse of discretion because appellant was not materially prejudiced by the admission. *State v. Hanusosky*, 11th Dist. No. 2008-L-065, 2009-Ohio-3409, at ¶16.

{¶89} The other evidence against appellant was so strong that there is no reasonable possibility that this admission contributed to his conviction. *State v. Portis*, 10th Dist. No. 01AP-1458, 2002-Ohio-4501, at ¶35. Specifically, some of the marijuana packaged for sale was found in the glove box of his truck. Also, the other marijuana packaged for sale and the MDMA pills packaged for sale were found in the wheel well on the side of the truck where appellant and appellant alone was located; where appellant and appellant alone was found crouched with his hands in the wheel well; and the bag containing the marijuana and MDMA pills was not there when Patrolman Perry told appellant to place his hands on the side of the truck.

{¶90} Appellant's fourth, fifth, sixth, and seventh assignments of error are without merit.

{¶91} In his eighth assignment of error, appellant argues that his constitutional rights against unreasonable search and seizure were violated when Patrolman Perry searched the interior of his truck and obtained two roaches and two baggies of marijuana.

{¶92} In his ninth assignment of error, appellant alleges that his constitutional rights against unreasonable search and seizure were violated when Patrolman Perry removed a large plastic bag from the driver's side rear wheel well that contained the MDMA pills, and four baggies of marijuana.

{¶93} Because appellant's eighth and ninth assignments of error are interrelated, we will address them together.

{¶94} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8. The appellate court must accept the trial court's factual findings, provided they are supported by competent, credible evidence. *Id*., citing *State v. Fanning*, 1 Ohio St.3d 19 (1982). Thereafter, the appellate court must independently determine whether those factual findings meet the requisite legal standard. *Id*., citing *State v. McNamara*, 124 Ohio App.3d 706 (1997).

{¶95} Under the Fourth Amendment, searches and seizures conducted without a warrant based on probable cause are unreasonable unless the search falls within an exception to this requirement. *Katz v. United States*, 389 U.S. 347, 357 (1967). There are three general categories in which encounters between citizens and police officers

are classified. The first is a consensual encounter; the second is a brief investigatory stop pursuant to *Terry v. Ohio*, 392 U.S. 1 (1967); and the third is formal arrest. *State v. Long*, 127 Ohio App.3d 328, 333 (1998). Each category requires a heightened level of evidence to be valid under the Fourth Amendment.

{¶96} "It is well-settled that '(a)n encounter may be consensual when a police officer approaches and questions individuals in or near a parked car.'" *State v. Ball*, 11th Dist. No. 2009-T-0013, 2010-Ohio-714, at ¶12, quoting *State v. Staten*, 4th Dist. No. 03CA1, 2003-Ohio-4592, at ¶18. (Citations omitted.) "Further, '(w)hen a police officer merely approaches a person seated in [or near] a parked car, no "seizure" of the person occurs so as to require reasonable suspicion supported by specific and articulable facts.'" *Ball*, *supra*, at ¶14, quoting *State v. Woodgeard*, 1st Dist. No. 01CA50, 2002-Ohio-3936, at ¶34. (Citation omitted.) "A consensual encounter is not a seizure, therefore no Fourth Amendment rights are invoked." *Ball*, *supra*, at ¶14, quoting *Florida v. Bostick*, 501 U.S. 429, 434 (1991).

{¶97} In our case, the record establishes that Patrolman Perry's initial contact with appellant and the group he was with was a consensual encounter. Appellant and the group were standing outside in a public area. Through the opened passenger side window of appellant's truck, Patrolman Perry observed two marijuana roaches in the ashtray.

{¶98} "For a search or seizure to be reasonable under the Fourth Amendment, it must be based upon probable cause and executed pursuant to a warrant." *State v. Moore*, 90 Ohio St.3d 47, 49 (2000), citing *Katz*, *supra*, at 357. However, there are several exceptions to the warrant requirement. *State v. O'Hora*, 11th Dist. No. 2000-L-

134, 2002 Ohio App. LEXIS 1608, *5 (Apr. 5, 2002). The two relevant exceptions here are the "plain view" doctrine and the automobile exception.

{¶99} There are three general requirements that must be met for the "plain view" doctrine. *State v. Halczyszak*, 25 Ohio St.3d 301, 303 (1986), citing *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). "First, the initial intrusion that brought the police into a position to view the object must have been legitimate. Second, the police must have inadvertently discovered the object. Third, the incriminating nature of the object must have been immediately apparent." *Id*.

{¶100} We conclude that Patrolman Perry's discovery and removal of the two marijuana roaches located in the ashtray of appellant's truck was reasonable under the "plain view" doctrine, as Patrolman Perry saw them during a brief consensual encounter. Thus, the first prong of the "plain view" test was satisfied.

{¶101} Because there is no evidence that Patrolman Perry was looking for marijuana when he approached the vehicle, but rather discovered the two marijuana roaches in the opened ashtray after he looked into the opened window the second prong of the test is met.

{¶102} Finally, the two marijuana roaches located in the ashtray of appellant's truck were immediately incriminating.

{¶103} Pursuant to *Halczyszak* and *Coolidge*, the initial intrusion that brought Patrolman Perry into a position to view the marijuana roaches in the opened ashtray was legitimate; he inadvertently discovered the marijuana roaches; and the incriminating nature of the marijuana roaches was immediately apparent to him. Thus,

the actions of Patrolman Perry in discovering and removing the two marijuana roaches fell within the "plain view" doctrine exception to the warrant requirement.

{¶104} Next, we conclude that Patrolman Perry's subsequent search of appellant's truck was permitted under the automobile exception to the warrant requirement.

{¶105} "The well-established automobile exception allows police to conduct a warrantless search of a vehicle if there is probable cause to believe that the vehicle contains contraband or other evidence that is subject to seizure, and exigent circumstances necessitate a search or seizure." *State v. Mills*, 62 Ohio St.3d 357, 367 (1992), citing *Chambers v. Maroney*, 399 U.S. 42, 51(1970). Accordingly, an officer may search a properly stopped vehicle if he has probable cause that it contains contraband. *Moore*, *supra*, at 51. "The scope of the search is defined by the object of the search and the places in which there is probable cause to believe that the contraband may be found." *O'Hora*, *supra*, at *7, citing *United States v. Ross*, 456 U.S. 798, syllabus (1982).

{¶106} Due to the legitimate discovery of the two marijuana roaches in the opened ashtray, Patrolman Perry had probable cause to subsequently search appellant's truck, including the glove box. Regarding the MDMA pills and marijuana found in the wheel well, we too find that Patrolman Perry had probable cause to seize and search the bag. Probable cause was present as he had already found the roaches in the ashtray and marijuana in the glove box when he saw appellant attempting to conceal what he could reasonably conclude was other incriminating items.

{¶107} Appellant's eighth and ninth assignments of error are without merit.

{¶108} In his tenth assignment of error, appellant contends that his constitutional right to a fair trial was violated by the impact of numerous cumulative errors.

{¶109} The "cumulative error" doctrine, first adopted in Ohio by *State v. DeMarco* (1987), 31 Ohio St.3d 191, provides: "Although violations of the Rules of Evidence during trial, singularly, may not rise to the level of prejudicial error, a conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial." *Id.* at paragraph two of the syllabus. "'However, in order even to consider whether "cumulative" error is present, we would first have to find that multiple errors were committed in this case.'" *State v. Moore*, 11th Dist. No. 2009-A-0024, 2010-Ohio-2407, at ¶65, quoting *State v. Goff* (1998), 82 Ohio St.3d 123, 140.

{¶110} In our case, pursuant to *Moore* and *Goff*, because multiple errors were not committed in this matter, the "cumulative error" doctrine does not apply.

{¶111} Appellant's tenth assignment of error is without merit.

{¶112} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Ashtabula County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.