[Cite as *State v. Westbrook*, 2010-Ohio-2692.]

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

STATE OF OHIO,	:	Case No. 09CA3277
	:	
Plaintiff-Appellee,	:	
	:	DECISION AND
v.	:	JUDGMENT ENTRY
	:	
JOEY S. WESTBROOK,	:	
	:	**Released 6/9/10**
Defendant-Appellant.	:	

APPEARANCES:

Joseph D. Reed, Columbus, Ohio, for appellant.

Mark E. Kuhn, SCIOTO COUNTY PROSECUTOR, and Pat Apel, SCIOTO COUNTY ASSISTANT PROSECUTOR, Portsmouth, Ohio, for appellee.

Per Curiam

{¶1} While executing a search warrant for the apartment of Betty Jo Duff ("Duff"), the Portsmouth Police Department ("PPD") discovered crack cocaine and oxycodone in a bedroom that Joey S. Westbrook ("Westbrook") shared with Duff's daughter, Stephanie Young ("Young"). Prior to executing the warrant, the PPD initiated a traffic stop of Westbrook's vehicle. Young, who was a passenger, turned over a baggie of crack cocaine and oxycodone that she claimed Westbrook gave her and told her to hide.

{¶2} After being convicted of various drug offenses, Westbrook contends that the trial court erred in denying his motion to suppress the evidence seized from the apartment under the search warrant. He argues that the investigator's affidavit in

support of the warrant was primarily based on hearsay from a confidential informant ("CI") and Duff. We agree that reliance on the CI's hearsay statements is problematic, but Duff confirmed some of this information. And Duff's statements taken alone provided probable cause to issue the warrant, notwithstanding any claims that she was allegedly a drug user. Duff's information was reliable because she was an identified citizen informant and the police corroborated at least some of her statements. Because even marginal cases should be resolved in favor of upholding a warrant, we conclude the issuing judge had a substantial basis to find that probable cause existed to search the apartment.

{¶3} In his second assignment of error, Westbrook argues that he received ineffective assistance of counsel. He complains about counsel's failure to: 1.) request an in camera inspection of prior statements by witnesses; 2.) properly conduct voir dire and cross-examination; 3.) request a separation of witnesses; and 4.) make a motion for acquittal. However, some of these claims require a review of evidence outside the record and are beyond the scope of a direct appeal. Other claims relating to voir dire and cross-examination are largely a matter of trial strategy, which we decline to second guess. Finally, Westbrook fails to identify any prejudice resulting from the purported deficiencies in counsel's performance.

{¶4} In his third assignment of error, Westbrook contends that the trial court improperly subjected him to multiple sentences for the same crime. He argues that because police found the oxycodone and crack cocaine together, his trafficking convictions should merge and his possession convictions should merge for purposes of sentencing. However, trafficking in cocaine and aggravated trafficking in oxycodone are

separate offenses; likewise, possession of cocaine and aggravated possession of oxycodone are separate offenses. Each crime requires proof of a different fact, i.e. trafficking in or possession of the particular controlled substance, to establish a violation of the Revised Code. Therefore, Westbrook's trafficking convictions are not allied offenses of similar import and neither are his possession convictions.

{¶5} Westbrook also claims that: 1.) his crack cocaine-related convictions for trafficking, in violation of R.C. 2925.03(A)(2), and possession, in violation of R.C. 2925.11(A) should merge, and 2.) his oxycodone-related convictions for trafficking, in violation of R.C. 2925.03(A)(2), and possession, in violation of R.C. 2925.11(A) should merge for purposes of sentencing. These offenses are allied offenses of similar import. Moreover, the State failed to present any evidence that Westbrook possessed a distinct amount of each drug with an animus separate from trafficking in the drug. Thus, the trial court erred in imposing separate sentences based on Westbrook possessing and trafficking each drug.

{¶6} Finally, Westbrook contends that the verdict forms for the possession of and trafficking in crack cocaine charges are insufficient to convict him of second degree felonies. The verdict forms erroneously state a weight range for crack cocaine that includes the ranges for both second and third degree felonies, i.e. "Five to twenty-five grams." Thus, the jury did not make a specific finding regarding an aggravating element necessary to convict Westbrook of second degree felonies, i.e. that he possessed and trafficked in at least ten grams of crack cocaine. Therefore, Westbrook could only be convicted of and sentenced for third degree felonies because they are the least degree of the offenses covered by the language of the verdict forms. Thus, we vacate his

second degree felony crack-cocaine convictions and remand with instructions to the trial court to enter third degree felony convictions before the State elects which allied offense to pursue in sentencing.

I. Facts

{¶7} A Scioto County grand jury indicted Westbrook on the following counts: 1.) Trafficking in drugs, i.e. crack cocaine, in violation of R.C. 2925.03(A)(2) and R.C. 2925.03(C)(4)(e); 2.) Trafficking in drugs, i.e. oxycodone, in violation of R.C. 2925.03(A)(2)[1] and R.C. 2925.03(C)(1)(c); 3.) Possession of drugs, i.e. crack cocaine, in violation of R.C. 2925.11(A)[2] and R.C. 2925.11(C)(4)(d); 4.) Possession of drugs, i.e. oxycodone, in violation of R.C. 2925.11(A) and R.C. 2925.11(C)(1)(b); 5.) Conspiracy to traffic in drugs, in violation of R.C. 2923.01 and R.C. 2925.03(A)[3]; 6.) Possession of criminal tools, in violation of R.C. 2923.24(A) and R.C. 2923.24(C); and 7.) Tampering with evidence, in violation of R.C. 2921.12(A)(1). The indictment also included a forfeiture specification for $305 that officers seized.

{¶8} Westbrook pleaded not guilty to the charges, and the matter proceeded to a jury trial. After the jury was impaneled, Westbrook fled the courthouse, and the State elected to continue with the trial in his absence. Although several witnesses testified at length during the trial, only an abbreviated summary of the events is necessary at this point.

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[1] Although neither party raises the issue, the language used in this count of the indictment mirrors that of R.C. 2925.03(A)(2), but the indictment and the trial court's judgment entry of conviction and sentence mistakenly cite to R.C. 2925.03(A)(1) instead.

[2] The indictment and judgment entry of conviction and sentence use language from this code section without specifically citing to it.

[3] Although neither party raises the issue, the indictment and the trial court's judgment entry of conviction and sentence refer to a conspiracy to traffic in crack cocaine and oxycodone, but both documents mistakenly cite to R.C. 2925.03(C)(3)(c), which deals with marihuana, in addition to R.C. 2923.01 and R.C. 2925.03(A).

{¶9} Steven Timberlake ("Timberlake"), a narcotics investigator with the Portsmouth Police Department, received a phone call from a CI who claimed that a black male known as "Joe" was staying at Duff's apartment on Rhodes Avenue in New Boston, Ohio while selling cocaine and oxycodone. The CI also told him that Duff had "started to use drugs again" and was "strung out."

{¶10} Later that day, Duff contacted Timberlake. She told him that a drug dealer named Joe Westbrook was inside her apartment at 3613 Rhodes Avenue, New Boston, Ohio with a bag of 80mg oxycodone tablets and an unknown amount of cocaine. Duff feared for her own safety and that of her daughter. Duff told Timberlake that she believed Westbrook had a firearm. She also told Timberlake that Westbrook had a white Ford Mustang convertible with an Illinois license plate in the driveway and that she thought it was a rental car. Officers from the PPD verified that a white Ford Mustang convertible was parked in the rear of Duff's residence. It had an Illinois license plate, and the officers confirmed it was a rental car.

{¶11} Based on this information, Timberlake swore out an affidavit that he used to obtain a search warrant. After the PPD learned that Westbrook and Young had left Duff's apartment in the white convertible, they initiated a traffic stop of the vehicle. Once Westbrook and Young were in custody, the PPD executed the search warrant.

{¶12} While being questioned by the PPD, Young removed a baggie containing crack cocaine and oxycodone tablets from her pants and gave it to the officers. She told the PPD that prior to the traffic stop, Westbrook learned the police were following them. He threw her the baggie and said, "Here, stuff this" – meaning that he wanted Young to put the baggie in her vaginal tract. According to Young, she made a drug sale

on Westbrook's behalf earlier that day.

{¶13} In Duff's apartment, police found baggies of oxycodone and crack cocaine inside a sock in a baby crib in the bedroom Westbrook and Young shared. Duff entered the apartment during the search, removed a set of digital scales from her purse, and gave them to police. She claimed they belonged to Westbrook.

{¶14} The jury found Westbrook guilty on all seven counts and found that the money police seized after the traffic stop was subject to forfeiture. Several weeks later, law enforcement captured Westbrook in West Virginia, and the trial court sentenced him to: 1.) Eight years in prison for trafficking in drugs, i.e. crack cocaine; 2.) Five years in prison for trafficking in drugs, i.e. oxycodone; 3.) Eight years in prison for possession of drugs, i.e. crack cocaine; 4.) Five years in prison for possession of drugs, i.e. oxycodone; 5.) Five years in prison for conspiracy to traffic in drugs; 6.) One year in prison for possession of criminal tools; and 7.) Five years in prison for tampering with evidence. The court ordered Westbrook to serve the sentences for Counts 1, 2, 3, 4, 6, and 7 consecutively to each other and concurrently to the sentence for Count 5, for a total aggregate prison sentence of 32 years. Then, Westbrook filed this appeal.

II. Assignments of Error

{¶15} Westbrook assigns the following errors for our review:

I. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT WHEN IT FAILED TO SUPPRESS THE EVIDENCE OBTAINED PURSUANT TO THE SEARCH WARRANT EXECUTED AT HIS RESIDENCE.

II. DEFENDANT-APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND ARTICLE ONE SECTION TEN OF THE CONSTITUTION OF THE STATE OF OHIO.

III. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT WHEN IT SENTENCED HIM TO CONSECUTIVE TERMS OF IMPRISONMENT FOR COUNTS ONE, TWO, THREE, AND FOUR OF THE INDICTMENT.

III. Motion to Suppress

A. Standard of Review

{¶16} Our review of a trial court's decision on a motion to suppress presents a mixed question of law and fact. *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, at ¶100, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, at ¶8. When considering a motion to suppress, the trial court acts as the trier of fact and is in the best position to resolve factual questions and evaluate witness credibility. Id. Accordingly, we defer to the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Landrum* (2000), 137 Ohio App.3d 718, 722, 739 N.E.2d 1159. Accepting those facts as true, we must independently determine whether the trial court reached the correct legal conclusion in analyzing the facts of the case. *Roberts* at ¶100, citing *Burnside* at ¶8.

B. Probable Cause

{¶17} The Fourth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Article I, Section 14 of the Ohio Constitution contains a nearly identical provision.

{¶18} "A neutral and detached magistrate may issue a search warrant only upon the finding of probable cause." *State v. Gilbert*, Scioto App. No. 06CA3055, 2007-Ohio-2717, at ¶13, citing *United States v. Leon* (1984), 468 U.S. 897, 914-915, 104 S.Ct. 3405, 82 L.Ed.2d 677 and Crim.R. 41(C). A warrant shall issue "only on an affidavit or affidavits sworn to before a judge of a court of record and establishing the grounds for issuing the warrant." Crim.R. 41(C). An affidavit in support of a search warrant must "particularly describe the place to be searched, name or describe the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located." Id.

{¶19} When evaluating an affidavit for the sufficiency of probable cause, the issuing magistrate must apply a "totality-of-the-circumstances" test. *State v. George* (1989), 45 Ohio St.3d 325, 544 N.E.2d 640, at paragraph one of the syllabus, following *Illinois v. Gates* (1983), 462 U.S. 213, 238-239, 103 S.Ct. 2317, 76 L.Ed.2d 527. The magistrate must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Id., quoting *Gates* at 238.

{¶20} Neither the trial court nor an appellate court should substitute its judgment for that of the magistrate. Id. at paragraph two of the syllabus, following *Gates*. Rather, the reviewing court should simply "ensure that the magistrate had a substantial basis for concluding that probable cause existed." Id. The reviewing court "should accord great deference to the magistrate's determination of probable cause, and doubtful or marginal

cases in this area should be resolved in favor of upholding the warrant." Id.

{¶21} Westbrook filed two motions to suppress – the first to suppress evidence seized from Duff's apartment and the second to suppress evidence obtained from the traffic stop. On appeal, Westbrook only challenges the trial court's denial of the motion to suppress evidence seized from Duff's apartment.

{¶22} Here, Timberlake's affidavit was primarily based on hearsay from the CI and Duff. Westbrook contends that the affidavit did not support a finding of probable cause because (1) it did not supply enough facts for the issuing judge to assess the CI's credibility, the CI's basis of knowledge, or the freshness of the CI's information; (2) the CI indicated that Duff was a drug user and "strung out," so Duff's statements were not credible; and (3) the affidavit "contained no reference to the drugs actually being in the place to be searched."

{¶23} Timberlake's affidavit in support of the search warrant states:

* * *

> On January 17th, 2008 officers of the Portsmouth Police Department received information from a confidential informant who stated that a black male subject known as "Joe" was staying at Betty Jo Duff's apartment on Rhodes Ave. and he is selling cocaine and oxycodone. The CI also stated that Betty Jo has started to use drugs again and is strung out.
>
> On January 17[th], 2008, Officers of the Portsmouth Police Department Narcotics Unit received information from Betty Jo Duff that a drug dealer by the name of Joe Westbrook is inside her residence at 3613 Rhodes Ave. New Boston, Ohio with a bag of 80mg oxycodone tablets and an unknown amount of cocaine. Betty Jo further stated that Westbrook is her daughter Stephanie's boyfriend and she is in fear of her and her daughter's safety. She also stated that she believes Westbrook has a firearm in his possession. She also stated that Westbrook has a white Ford Mustang convertible in the driveway with an Illinois license plate and she believes it is a rental car. Betty Jo called to request officers help her to remove this subject and the drugs from her residence.

> On January 17th, 2008, officers of the Portsmouth Police Department checked the area around 3613 Rhodes Ave[.] and verified that there is a white Ford Mustang convertible parked in the rear of that residence with an Illinois License plate X122082 and confirmed it to be a rental car.
>
> * * *

{¶24} In applying the *Gates* "totality-of-the-circumstances" test, the official issuing a warrant must still consider the veracity and basis of knowledge of informants who supply the underlying information for the affidavit. *State v. Goddard* (Oct. 2, 1998), Washington App. No. 97CA23, 1998 WL 716662, at *4, citing *Gates* and *George*. "However, an affidavit lacking in these areas is not automatically insufficient to procure the issuance of a search warrant." Id., citing *Gates* at 230. These areas should instead be viewed as "closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place." Id., quoting *Gates* at 230. Therefore, a deficiency in one area may be overcome by "other indicia of reliability." Id., citing *Gates* at 233.

{¶25} Identified citizen informants are considered "highly reliable and, therefore, a strong showing as to the other indicia of reliability may be unnecessary * * *." *State v. Wagner* (Feb. 29, 2000), Pickaway App. No. 99CA23, 2000 WL 245499, at *3, quoting *Maumee v. Weisner*, 87 Ohio St.3d 295, 300, 1999-Ohio-68, 720 N.E.2d 507, citing *Gates* at 233-234. "[U]nless special circumstances exist which would indicate that an ordinary citizen has a motive to falsify his report of criminal activity, such information is presumed to be truthful and reliable." *State v. Sebastian*, Highland App. No. 08CA19, 2009-Ohio-3117, at ¶22, quoting *State v. Willis* (Aug. 11, 1989), Wood App. No. WD-88-

38, 1989 WL 90636, at *3. "[E]ven if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles his tip to greater weight than might otherwise be the case." Id., quoting *State v. Farndon* (1984), 22 Ohio App.3d 31, 35-36, 488 N.E.2d 894, in turn, quoting *Gates* at 234.

{¶26} Timberlake's affidavit does not provide the CI's basis of knowledge or indicate the last time the CI knew Westbrook had sold drugs. The only basis for finding the CI credible is the fact that Duff verified some of the CI's information. However, even if we accept Westbrook's argument that the issuing judge could not rely on the CI's statements to support a probable cause finding, the judge could rely on Duff's statements.

{¶27} As an identified citizen informant, Duff's information would ordinarily be presumed truthful and reliable. Westbrook's only argument for discrediting Duff depends on the CI's statement that she was "strung out." However, the affidavit does not provide the CI's basis of knowledge for this statement. Furthermore, the level of detail Duff gave as to Westbrook's alleged wrongdoing and the PPD's verification of the information Duff provided on the type of car Westbrook drove bolster her credibility. The affidavit reveals no motivation for Duff to falsify her report of criminal activity, so the issuing judge had no basis to reject the presumption that Duff was truthful and reliable. In addition, Timberlake's affidavit clearly places drugs in the place to be searched, i.e. Duff's apartment. It states that Duff told Timberlake that Westbrook was "*inside her residence* * * * *with* a bag of 80mg oxycodone tablets and an unknown amount of cocaine." (Emphasis added). Because even doubtful or marginal cases should be

resolved in favor of upholding the warrant, we find that the issuing judge had a substantial basis to conclude that probable cause existed to search Duff's apartment. Therefore, we overrule Westbrook's first assignment of error.

IV. Ineffective Assistance of Counsel

{¶28} In his second assignment of error, Westbrook argues that his trial counsel rendered ineffective assistance of counsel. In order to prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced his defense so as to deprive him of a fair trial. *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, at ¶205, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. To establish deficient performance, an appellant must show that trial counsel's performance fell below an objective level of reasonable representation. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, at ¶95. To establish prejudice, an appellant must show a reasonable probability exists that, but for the alleged errors, the result of the proceeding would have been different. Id. The appellant has the burden of proof on the issue of counsel's ineffectiveness because a properly licensed attorney is presumed competent. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, at ¶62.

{¶29} First, Westbrook complains that when the State concluded direct examination of each witness, defense counsel failed to ask the court to review their statements under Crim.R. 16(B)(1)(g). Our review of the record revealed the existence of only one witness statement, a videotaped statement by Young. The trial court apparently did review this videotape because the court allowed Westbrook's counsel to

use the statement to impeach Young. Even if we assume other witness statements existed and counsel should have requested a Crim.R. 16(B)(1)(g) review of them, Westbrook "fails to show prejudice because he does not explain whether any of the witness statements would have been discoverable or proven useful for impeachment during the trial." *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, at ¶142. Moreover, in order to do so he would have to rely on evidence outside of the record in this appeal. That review is beyond the scope of a direct appeal.

{¶30} Second, Westbrook argues that during voir dire, trial counsel (1) should not have rehabilitated a potential juror who expressed a hatred of drugs; (2) failed to question a potential juror with concerns about judging a drug case in sufficient depth; and (3) failed to question some potential jurors at all. However, "voir dire is largely a matter of strategy and tactics * * *." *State v. Keith*, 79 Ohio St.3d 514, 521, 1997-Ohio-367, 684 N.E.2d 47, certiorari denied (1998), 523 U.S. 1063, 118 S.Ct. 1393, 140 L.Ed.2d 652. "Debatable trial tactics generally do not constitute a deprivation of effective counsel." *State v. Phillips* (1995), 74 Ohio St.3d 72, 85, 1995-Ohio-171, 656 N.E.2d 643, citing *State v. Clayton* (1980), 62 Ohio St.2d 45, 49, 402 N.E.2d 1189. "The conduct of voir dire by defense counsel does not have to take a particular form, nor do specific questions have to be asked." *State v. Evans* (1992), 63 Ohio St.3d 231, 247, 586 N.E.2d 1042, certiorari denied (1992) 506 U.S. 886, 113 S.Ct. 246, 121 L.Ed.2d 179. Additionally, we give deference to decisions by trial counsel during voir dire because trial counsel sees and hears jurors and is in the best position to determine whether voir dire questions are needed. *State v. Sanders*, 92 Ohio St.3d 245, 274, 2001-Ohio-189, 750 N.E.2d 90, citing *State v. Bradley* (1989), 42 Ohio St.3d 136, 143,

538 N.E.2d at 373.

{¶31} Even assuming trial counsel performed deficiently during voir dire, Westbrook fails to establish how counsel's performance prejudiced his defense. The prosecutor and the court rehabilitated the potential juror who expressed a hatred of drugs before defense counsel questioned her, and defense counsel exercised a peremptory challenge on the juror. As for the juror with concerns about judging a drug case and the unquestioned jurors, Westbrook merely speculates regarding what additional questioning of these potential jurors may have revealed. Proof of ineffective assistance of counsel requires more than vague speculation. *State v. Otte*, 74 Ohio St.3d 555, 566, 1996-Ohio-108, 660 N.E.2d 711. Therefore, we reject this argument.

{¶32} Third, Westbrook complains that after he fled the courthouse, trial counsel failed to "voir dire" the jury regarding his absence. However, voir dire is a process in which *prospective* jurors are questioned as to their qualifications to serve on a jury. R.C. 2945.27; Crim.R. 24(B). Before Westbrook absconded, voir dire had ended and the jury was impaneled, so counsel could no longer question jurors in that context. Furthermore, Westbrook again only speculates regarding what additional questioning of the jurors may have revealed. In any event, before opening statements, the trial court directed:

> I am instructing you as a jury that you're not to hold this against him. He is still entitled to Constitutional Rights; he's presumed innocent until he's proven guilty beyond a reasonable doubt. You're to give the same attention to the evidence as if he were sitting here in the courtroom. And again, you're instructed not to hold this against him. I want this tried on the evidence and the evidence only. Okay?

We presume the jury followed the trial court's instructions. *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637, at ¶93. Therefore, even if counsel had

performed deficiently by failing to question the jurors regarding Westbrook's absence, Westbrook failed to demonstrate any prejudice to his defense.

{¶33} Fourth, Westbrook contends that defense counsel rendered ineffective assistance of counsel by failing to request a separation of witnesses. However, he does not argue, let alone point to any evidence, that the State's witnesses altered their testimony due to their ability to hear prior witnesses. Therefore, even assuming trial counsel performed deficiently by failing to request a separation of witnesses before any witness testified, Westbrook again fails to prove prejudice to his defense.

{¶34} Fifth, Westbrook argues that defense counsel "failed to challenge any of the State's evidence." Specifically, he complains that counsel failed to "effectively cross examine [sic] the officers on the discovery of the digital scale and the drugs found at the scene of the apartment search." However, the Supreme Court of Ohio has found that "[t]he extent and scope of cross-examination clearly fall within the ambit of trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel." *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, at ¶146. And again, Westbrook only speculates as to what additional questioning of the officers would have revealed. Therefore, we reject this argument.

{¶35} Sixth, Westbrook complains that trial counsel failed to make a Crim.R. 29 motion for acquittal. However, under App.R. 16(A)(7), an appellant's brief must contain reasons in support of the appellant's contentions, "with citations to the authorities, statutes, and parts of the record on which appellant relies." Westbrook makes no effort to explain what material elements of any of his seven convictions were not supported by sufficient evidence. He uses conclusory analysis and cites to no caselaw. Because

Westbrook completely failed in his burden to prove counsel's ineffectiveness, we reject this argument.

{¶36} Finally, Westbrook makes a broad generalization that trial counsel simply "has problems understanding the law" as evidenced by one statement counsel made during a hearsay objection and a closing statement Westbrook characterizes as a "rambling, disjointed, nonsensical statement which in no way helped his client." Even if these examples were sufficient to overcome the presumption of counsel's competence, Westbrook again fails to demonstrate prejudice to his defense from counsel's remarks. Accordingly, we overrule Westbrook's second assignment of error.

V. Sentencing

A. Allied Offenses of Similar Import

{¶37} In his third assignment of error, Westbrook contends that the trial court erred when it sentenced him to separate prison terms for trafficking in crack cocaine, trafficking in oxycodone, possession of crack cocaine, and possession of oxycodone because the crimes are allied offenses of similar import under R.C. 2941.25 and should have merged.

{¶38} R.C. 2941.25, Ohio's multi-count statute, provides:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶39} The Supreme Court of Ohio has explained that R.C. 2941.25 requires a

two-step analysis:

> In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must proceed to the second step. In the second step, the defendant's *conduct* is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.

State v. Cabrales, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, at ¶14, quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816.

{¶40} The Supreme Court of Ohio recently determined that "[u]pon finding reversible error in the imposition of multiple punishments for allied offenses, a court of appeals must reverse the judgment of conviction and remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against the defendant." *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, at paragraph two of the syllabus. "Because R.C. 2941.25(A) protects a defendant only from being punished for allied offenses, the determination of the defendant's guilt for committing allied offenses remains intact, both before and after the merger of allied offenses for sentencing." Id. at paragraph three of the syllabus.

1. Possession Convictions

{¶41} The trial court sentenced Westbrook for possession of oxycodone, in violation of R.C. 2925.11(A) and R.C. 2925.11(C)(1)(b), and possession of crack cocaine, in violation of R.C. 2925.11(A) and R.C. 2925.11(C)(4)(d). Westbrook contends that possession of two different drugs can never constitute separate offenses when police locate the drugs at the same time and in the same location. This

contention is wrong.

{¶42} The Supreme Court of Ohio has held that the simultaneous possession of different types of controlled substances can constitute multiple offenses under R.C. 2925.11. *State Delfino* (1986), 22 Ohio St.3d 270, 490 N.E.2d 884, at syllabus. R.C. 2925.11(A) states: "No person shall knowingly obtain, possess, or use a controlled substance." A controlled substance is defined as any substance listed in Schedules I through V under R.C. 3719.41 and as amended by R.C. 3719.43 and R.C. 3719.44. See R.C. 2925.01(A) and R.C. 3719.01(C). Depending on the type of controlled substance involved, R.C. 2925.11(C) provides the title of and penalty for the offense.

{¶43} In this case, the relevant subsections are R.C. 2925.11(C)(1)(b) and R.C. 2925.11(C)(4)(d). Under R.C. 2925.11(C)(1), a person in possession of a Schedule I or II controlled substance, "with the exception of marihuana, *cocaine*, L.S.D., heroin, and hashish," is guilty of "aggravated possession of drugs." (Emphasis added). Oxycodone is a Schedule II controlled substance. R.C. 3719.41, Schedule II(A)(1)(n). Westbrook committed a third degree felony under R.C. 2925.11(C)(1)(b) because the amount of oxycodone the PPD found equaled or exceeded the bulk amount but was less than five times the bulk amount. Under R.C. 2925.11(C)(4), a person in possession of "cocaine or a compound, mixture, preparation, or substance containing cocaine," is guilty of the separate offense of "possession of cocaine." Westbrook committed a second degree felony under R.C. 2925.11(C)(4)(d) because the PPD found crack cocaine in an amount equal to or in excess of ten grams but less than twenty-five grams. R.C. 2925.11(C)(1)(b) and R.C. 2925.11(C)(4)(d) each require proof of a different fact, i.e. the possession of the particular controlled substance, to establish a violation of R.C.

2925.11. See *State v. Barr*, 178 Ohio App.3d 318, 2008-Ohio-4754, 897 N.E.2d 1161, at ¶12. Therefore, they are not allied offenses of similar import.[4] The legislature clearly intended that possession of different drug groups constitutes different offenses. *Delfino* at 274.

2. Trafficking Convictions

{¶44} The trial court also sentenced Westbrook for trafficking in oxycodone, in violation of R.C. 2925.03(A)(2) and R.C. 2925.03(C)(1)(c), and trafficking in crack cocaine, in violation of R.C. 2925.03(A)(2) and R.C. 2925.03(C)(4)(e). Westbrook contends that trafficking in two different drugs can never constitute separate offenses when police locate the drugs at the same time and in the same location. Again, we disagree.

{¶45} R.C. 2925.03(A)(2) states: "No person shall knowingly * * * [p]repare 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." Again, a controlled substance is defined as any substance listed in Schedules I through V under R.C. 3719.41 and as amended by R.C. 3719.43 and R.C. 3719.44. See R.C. 2925.01(A) and R.C. 3719.01(C). Depending on the type of controlled substance involved, R.C. 2925.03(C) provides the title of and penalty for the offense.

{¶46} In this case, the relevant subsections are R.C. 2925.03(C)(1)(c) and R.C. 2925.03(C)(4)(e). Under R.C. 2925.03(C)(1), a person trafficking a Schedule I or II controlled substance, "with the exception of marihuana, *cocaine*, L.S.D., heroin, and

[4] As we conclude in Section V.B., Westbrook's conviction for possession of crack-cocaine should have been a third-degree felony under R.C. 2925.11(C)(4)(c), not a second-degree felony under R.C. 2925.11(C)(4)(d). However, that error does not impact our conclusion here.

hashish," is guilty of "aggravated trafficking in drugs." (Emphasis added). Oxycodone is a Schedule II controlled substance. R.C. 3719.41, Schedule II(A)(1)(n). Westbrook committed a third degree felony under R.C. 2925.03(C)(1)(c) because the amount of oxycodone the PPD found equaled or exceeded the bulk amount but was less than five times the bulk amount. Under R.C. 2925.03(C)(4), a person trafficking in cocaine or a "compound, mixture, preparation, or substance containing cocaine," e.g. crack cocaine, is guilty of the separate offense of "trafficking in cocaine." Westbrook committed a second degree felony under R.C. 2925.03(C)(4)(e) because the amount of crack cocaine the PPD found equaled or exceeded ten grams but was less than twenty-five grams. R.C. 2925.03(C)(1)(c) and R.C. 2925.03(C)(4)(e) each require proof of a different fact, i.e. trafficking in the particular controlled substance, to establish a violation of R.C. 2925.03. See *Barr* at ¶12. Therefore, they are not allied offenses of similar import based upon the rationale found in *Delfino*, supra.

3. Possession and Trafficking Convictions

{¶47} Westbrook also argues that trafficking, in violation of R.C. 2925.03(A)(2), and possession, in violation of R.C. 2925.11(A), are allied offenses of similar import. Therefore, he argues that (1) his oxycodone-related trafficking and possession convictions merge, and (2) his crack cocaine-related trafficking and possession convictions merge for purposes of sentencing. In *Cabrales*, supra, the Supreme Court of Ohio compared the elements of these crimes and held that they are allied offenses of similar import. The court explained:

> To be guilty of possession under R.C. 2925.11(A), the offender must "knowingly obtain, possess, or use a controlled substance." To be guilty of trafficking under R.C. 2925.03(A)(2), the offender must knowingly prepare for shipment, ship, transport, deliver, prepare for distribution, or

> distribute a controlled substance, knowing, or having reason to know, that the substance is intended for sale. In order to ship a controlled substance, deliver it, distribute it, or prepare it for shipping, etc., the offender must "hav[e] control over" it. R.C. 2925.01(K) (defining "possession"). Thus, trafficking in a controlled substance under R.C. 2925.03(A)(2) and possession of that same controlled substance under R.C. 2925.11(A) are allied offenses of similar import because commission of the first offense *necessarily* results in commission of the second.

Cabrales at ¶30. We follow *Cabrales* and hold that R.C. 2925.03(A)(2) and R.C. 2925.11(A) establish allied offenses of similar import.

{¶48} Next, we must examine Westbrook's conduct to determine whether "the crimes were committed separately or [whether] there was a separate animus for each crime[.]" *Cabrales* at ¶14. The Supreme Court of Ohio "has generally not found the presence or absence of any specific factors to be dispositive on the issue of whether crimes were committed separately or with a separate animus. * * * Instead, [its] approach has been to analyze the particular facts of each case before [it] to determine whether the acts or animus were separate." *State v. Jones*, 78 Ohio St.3d 12, 14, 1997-Ohio-38, 676 N.E.2d 80 (citations omitted).

{¶49} The police seized oxycodone and crack cocaine from two different locations in two separate seizures. However, when the State indicted Westbrook, it aggregated the amounts of each drug into one count of trafficking and one count of possession. The State's brief cites *State v. Dunham*, Scioto App. No. 04CA2931, 2005-Ohio-3642 for the proposition that "[t]he State is compelled to * * * aggregate the same type of drugs in[to] the same count of the indictment….", i.e., the entire amount of crack cocaine must be lumped into a single count. We do not share that interpretation of *Dunham*.

{¶50} Nonetheless, because the State did not indict Westbrook separately for

each incident where police seized the two drugs, we do not need to determine whether Westbrook was involved in four crimes, i.e. two trafficking and two possessions, for each drug. Rather, we look to see if the trafficking and possession of each drug were committed separately or with a separate animus. In other words, we treat the drugs as if they are a single stash, rather than two separate stashes of each drug. Although the State urges us to consider the two seizures as separate incidents, the indictments preclude that analysis.

{¶51} As the Supreme Court of Ohio explained in *State v. Logan* (1979), 60 Ohio St.2d 126, 131, 397 N.E.2d 1345:

> * * * R.C. 2941.25(B), by its use of the term "animus," requires us to examine the defendant's mental state in determining whether two or more offenses may be chiseled from the same criminal conduct. In this sense, we believe that the General Assembly intended the term "animus" to mean purpose or, more properly, immediate motive.
>
> Like all mental states, animus is often difficult to prove directly, but must be inferred from the surrounding circumstances. See, generally, *State v. Robinson* (1975), 48 Ohio App.2d 197, 205, 356 N.E.2d 725, affirmed (1976) 47 Ohio St.2d 103, 114, 351 N.E.2d 88; *State v. Gantt* (1975), 26 N.C.App. 554, 557, 217 S.E.2d 3, 5; and *State v. Evans* (1976), 219 Kan. 515, 519-20, 548 P.2d 772, 777.

{¶52} Here, the trial court found that Westbrook had a separate animus for his trafficking and possession crimes. Westbrook clearly trafficked in and possessed crack cocaine and oxycodone with the purpose of selling the drugs for money. The trial court found that he also possessed the drugs in order to use them as gifts for Young and Duff and as currency to pay Duff rent, i.e. for barter transactions.

{¶53} But to be convicted of trafficking under R.C. 2925.03(A)(2), the defendant must "[p]repare 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." (Empahsis added). Under R.C. 3719.01(AA), the term "sale" includes "delivery, *barter*, exchange, transfer, or *gift*, or offer thereof * * *[.]" (Emphasis added); See R.C. 2925.01(A). So even if Westbrook possessed the drugs with the purpose of selling some for cash, using some as gifts, and using some in barter transactions, these purposes would not constitute an animus separate from his trafficking crimes because preparing a controlled substance for distribution when one knows it is intended for any of these purposes constitutes trafficking under R.C. 2925.03(A)(2).

{¶54} However, the State argues that the evidence also shows that Westbrook possessed the drugs with the purpose of using them personally. At trial, Young testified that the night before Westbrook's arrest, she told him to remove the drugs from Duff's apartment because she did not want them around her mother or her son. Young testified that when she found out Westbrook still had drugs in the apartment, he said, "Oh, this is just a little bit for us to get by[.]" Personal use is not included in the definition of the term "sale" under R.C. 3719.01(AA). However, even if we presume that Westbrook's statement implies that he possessed a portion of the stash for personal use, the State failed to present any evidence as to how much of each drug Westbrook would utilize in this manner. Thus the State failed to show that Westbrook possessed an amount of each drug for personal use that was sufficient to support a third degree felony conviction for possession of oxycodone or a second degree felony conviction for possession of crack cocaine. Therefore, the trial court erred in sentencing Westbrook for (1) possessing and trafficking oxycodone, and (2) possessing and trafficking crack cocaine.

{¶55} Accordingly, we vacate Westbrook's sentences for possessing and trafficking oxycodone. We also vacate Westbrook's sentences for possessing and trafficking crack cocaine. We remand for a new sentencing hearing at which the State must elect to pursue punishment for each drug under either R.C. 2925.03(A)(2) or R.C. 2925.11(A). However, as we will explain in Section V.B., Westbrook's crack cocaine-related sentence must be in the third degree felony range.

B. Verdict Forms

{¶56} After reviewing the record, we discovered errors in the verdict forms and instructed the parties to file an additional brief on the issue of whether these errors rose to the level of plain error. We will consider Westbrook's arguments as part of his third assignment of error. Westbrook contends that the verdict forms on which his convictions for trafficking in and possession of crack cocaine were based are defective. Westbrook failed to object to the verdict forms. However, "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). "A silent defendant has the burden to satisfy the plain-error rule[,] and a reviewing court may consult the whole record when considering the effect of any error on substantial rights." *State v. Davis*, Highland App. No. 06CA21, 2007-Ohio-3944, at ¶22, citing *United States v. Vonn* (2002), 535 U.S. 55, 59, 122 S.Ct. 1043, 152 L.Ed.2d 90.

{¶57} For a reviewing court to find plain error: (1) there must be an error, i.e., "a deviation from a legal rule"; (2) the error must be plain, i.e., "an 'obvious' defect in the trial proceedings"; and (3) the error must have affected "substantial rights," i.e., it "must have affected the outcome of the trial." *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-

Ohio-68, 759 N.E.2d 1240. Furthermore, the Supreme Court of Ohio has stated that "[n]otice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, at paragraph three of the syllabus.

{¶58} R.C. 2945.75(A)(2) provides:

> When the presence of one or more additional elements makes an offense one of more serious degree: * * * A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.

See, also, *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735, at syllabus. Similarly, when a verdict form includes some aggravating elements, but not others, a defendant may only be convicted of the least degree of the offense including those elements in the verdict form. See *State v. Ligon*, 170 Ohio App.3d 544, 2008-Ohio-6085, 902 N.E.2d 1011, at ¶20.

{¶59} Here, the first verdict form at issue reads: "We the jury, being duly impaneled, hereby find the defendant **guilty** of **Count 1, Trafficking in Drugs in an amount of:** * * * **Five to twenty-five grams**[.]" The second verdict form reads: "We the jury, being duly impaneled, hereby find the defendant **guilty** of **Count 3, Possession of Drugs/Crack Cocaine in an amount of:** * * * **Five to twenty-five grams**[.]"

{¶60} However, possessing and trafficking crack cocaine are second degree felonies only when the amount of the drug equals or exceeds ten grams, not five grams. R.C. 2925.03(C)(4)(e); R.C. 2925.11(C)(4)(d). If the amount equals or exceeds five grams but is less than ten grams, trafficking in and possession of crack cocaine are

third degree felonies. R.C. 2925.03(C)(4)(d); R.C. 2925.11(C)(4)(c). Thus the weight range the jury selected on the verdict forms includes the ranges for both second and third degree felonies.

{¶61} The indictment and jury instructions only included weight ranges for second degree felony convictions,[5] and the State presented evidence that at least ten grams of crack cocaine were involved in this case. However, the jury never specifically found that Westbrook trafficked in and possessed at least ten grams of crack cocaine. Therefore, the jury did not make findings regarding an aggravating element necessary to convict Westbrook of second degree felonies. See, e.g., *Pelfrey* at ¶14 (finding that the Court would not excuse failure to comply with R.C. 2945.75(A)(2) based on additional circumstances, "such as that the verdict incorporates the language of the indictment, or by presenting evidence to show the presence of the aggravated element at trial * * *.")

{¶62} However, the jury clearly found that Westbrook trafficked in and possessed at least five grams of crack cocaine. Thus, the jury made findings regarding an aggravating element necessary to convict Westbrook under R.C. 2925.03(C)(4)(d) and R.C. 2925.11(C)(4)(c). Therefore, Westbrook could only be convicted and sentenced for third degree felonies, i.e. the least degree of the offenses covered by the verdict forms.

{¶63} The trial court sentenced Westbrook to eight years in prison for both crack cocaine-related convictions. However, for a third degree felony, a court may only

[5] We note that the indictment and jury instructions imprecisely stated the second degree felony weight range as "more than ten grams and less than twenty five grams." A finding that the defendant possessed or trafficked in an amount that "equals" ten grams will also sustain a second degree felony conviction. R.C. 2925.03(C)(4)(e); R.C. 2925.11(C)(4)(d).

sentence a defendant to a prison term of one to five years. R.C. 2929.14(A)(3). Therefore, the obvious error in the weight ranges provided on the verdict forms affected Westbrook's substantial rights and constitutes plain error. Thus we vacate Westbrook's second degree felony crack-cocaine convictions and remand with instructions to the trial court to enter third degree felony convictions before the State elects which allied offense to pursue in sentencing.

VI. Conclusion

{¶64} In summary, we overrule Westbrook's first and second assignments of error. We overrule his third assignment of error to the extent he argues the trafficking convictions should merge and the possession convictions should merge for sentencing. However, we sustain Westbrook's third assignment of error to the extent he contends that (1) his convictions for trafficking in and possession of crack cocaine merge for sentencing, (2) his convictions for trafficking in and possession of oxycodone merge for sentencing, and (3) the trial court improperly convicted him of second degree felonies on the crack cocaine-related charges. We remand the case to the trial court for further proceedings consistent with this opinion.

JUDGMENT AFFIRMED IN PART,
REVERSED IN PART,
AND CAUSE REMANDED.

Harsha J., Dissenting in part and Concurring in part:

{¶65} Based upon the unique facts of this case, I would follow the Supreme Court of Ohio's admonishment in *State v. Barnes*, 94 Ohio St.3d 21, 2002-Ohio-68, and refrain from applying the plain error doctrine to the verdict forms. Thus, I would allow Westbrook's second degree crack-cocaine convictions to stand. I do agree however, with the rest of the opinion.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED IN PART AND REVERSED IN PART and that the CAUSE IS REMANDED. Appellant and Appellee shall split the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

McFarland, P.J. & Kline, J.: Concur in Judgment and Opinion.
Harsha, J.: Dissents in part and Concurs in part with attached Opinion.

For the Court

BY: _____
Matthew W. McFarland, Presiding Judge

BY: _____
William H. Harsha, Judge

BY: _____
Roger L. Kline, Judge

NOTICE TO COUNSEL

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