ORIGINAL

NO. 11-0599

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 94718

STATE OF OHIO,

Plaintiff-Appellant

-vs-

DONALD EAFFORD,

Defendant-Appellee

MERIT BRIEF OF APPELLANT

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SEP 19 2011
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TABLE OF CONTENTS

I. STATEMENT OF THE CASE AND FACTS 1

II. LAW AND ARGUMENT 3

A. PROPOSITION OF LAW: Where a verdict form states a charge of possession of drugs but omits the drug at issue, the court is to look to the entirety of the record, to include the indictment, the evidence at trial, the argument of counsel, and the jury instructions to determine the level of offense. (State v. Pelfrey, 112 Ohio St.3d 422, 2007-Ohio-256, limited and explained.) 3

B. This Court's Precedent in Pelfrey Does Not Mandate a Misdemeanor Conviction Where the Indictment Alleges the Possession of Cocaine, A Felony Offense 3

C. R.C. 2945.75 Requires the Indictment and Record be Examined to Determine the Level of Offense 7

D. Intent of R.C. 2945.75 is To Prohibit An Increase in Punishment after Trial, An Intent followed in this Case 9

III. CONCLUSION 10

IV. CERTIFICATE OF SERVICE 11

TABLE OF AUTHORITIES

Cases

People v. Goodwin (1988), 202 Cal. App. 3d 940, 249 Cal. Rptr. 430 (2d Dist.) 9

State v. Eafford, Cuyahoga App. No. 94718, 2011-Ohio-927, at ¶ 3-8 ..... ii, 3, 8

State v. Pace, Franklin App. No. 10AP-547, 2011-Ohio-320 ..... 3, 4, 5, 6

State v. Pelfrey, 112 Ohio St.3d 422, 2007-Ohio-256 ..... i, 3, 4, 6, 8

U.S. v. Barrett (1989), 870 F.2d 953 (3d Cir.) 9

Statutes

2925.11 ..... ii, 1, 5

2925.11(A) 1, 5

2945.75 ..... i, ii, 3, 7, 9

Other Authorities

West's Ann. Cal. Pen. Code, § 1157 7

APPENDIX:

Date Stamped Notice of Appeal, *State of Ohio v. Donald Eafford*, Cuyahoga County App. No. 94718 1-2
Journal Entry and Opinion, *State of Ohio v. Eafford*, Cuyahoga County App. No. 94718, Journalized and Released March 3, 2011 3-22
R.C. § 2925.11 23-30
R.C. § 2945.75 31
West's Ann. Cal. Penal Code § 1157 32

I. STATEMENT OF THE CASE AND FACTS

On August 6, 2009, the Cuyahoga County Grand Jury returned a three-count indictment against Appellee Donald Eafford charging him with Permitting Drug Abuse in violation of R.C. 2925.13(B), a felony of the fifth degree in Count One; Possession of Drugs in violation of 2921.11(A), a felony of the fifth degree in Count Two; and Possessing Criminal Tools in violation of 2923.24(A), a felony of the fifth degree in Count Three. The case proceeded to trial on these charges and on January 26, 2010, the jury found Appellant guilty as charged of Counts One and Two, Permitting Drug Abuse and Possession of Drugs.

The indictment for the count of Possession of Drugs reads in pertinent part:

Count Two	**Drug Possession** §2925.11(A)
Defendants	Donald Eafford
Date of Offense	On or about May 8, 2009

The grand jurors, on their oaths, further find that the Defendant(s) unlawfully

did knowingly obtain, possess, or use a controlled substance and the drug involved was cocaine or a compound, mixture, preparation, or substance containing cocaine in an amount of less than 5 grams.

The offense is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

The trial court instructed the jury at to Count Two in part as:

> Before you can find the defendant guilty, you must find beyond a reasonable doubt that on or about the 8th day of May, 2009, and in Cuyahoga County, Ohio, the defendant did knowingly obtain, possess or use a controlled substance, and the drug involved was cocaine or a compound, mixture, preparation or substance containing cocaine in an amount less than five grams.

(Tr. 227.)

The verdict form upon the drug possession count read that Eafford was found guilty of drug possession in violation of Section 2925.11(A) of the Ohio Revised Code as, "charged in the indictment."

Eafford was sentenced by the trial court to eight months of incarceration on Count One, permitting drug abuse and eight months on Count Two, possession of drugs, to be served concurrent to each other[1]. At the hearing, the court sentenced after the trial court determined the level of offense to be a felony of the fifth degree and conferred with the State and defense counsel, stating:

THE COURT:	In 527280, Counts 1 and 2 are felonies of the fifth degrees as I understand the statute. Is that correct?
PROSECUTOR:	Yes, Your Honor.
THE COURT:	Is that correct, counsel?
COUNSEL:	It is correct, Your Honor.

(Tr. 258.)

The Eighth District summarized the charges and the evidence presented at trial as follows:

> {¶ 3} The state charged Eafford with permitting drug abuse, possession of drugs, and possession of criminal tools, in a three-count indictment filed on August 6, 2009. Eafford pleaded not guilty, and his jury trial commenced in January 2010.
>
> ***
>
> {¶ 7} One of the officers described the Rexford Avenue property as a "smoke house," which is a place where individuals meet to engage in drug activity. When the SWAT team entered the house, they found several individuals in the immediate vicinity of drugs. At the kitchen table, a person was smoking what appeared to be crack cocaine; he attempted to flee but was apprehended. Several others were found with various drug paraphernalia and crack cocaine, which was in plain view.
>
> {¶ 8} During the execution of the search warrant, Eafford and a woman were asleep in an upstairs bedroom. The officers found a crack pipe with cocaine residue in the medicine cabinet in the bathroom. In addition, Detective Mitchell

[1] The State notes that the journal entry of conviction states that Count Two is an "F4". The State believes this to be a typographical error as the trial court determined that the level of offense was a felony of the fifth degree at sentencing. See, Tr.

> testified that he found a Dominion East Ohio gas bill in Eafford's name for gas service to that address.

State v. Eafford, Cuyahoga App. No. 94718, 2011-Ohio-927, at ¶ 3, 7-8.

On appeal, Eafford raised several assignments of error. All but one of these assignments was overruled by the appellate court. In his fifth assignment of error, Eafford complained that the verdict forms for possession of drugs did not state the level of offense. The appellate court agreed and determined that the verdict form did not indicate the level of offense for the charge of drug possession. *Eafford*, 2011-Ohio-927, at ¶ 40. It found that the jury form on its face convicted Eafford of a third degree misdemeanor and remanded the matter for resentencing. Id., at ¶ 46 – 47.

The State filed a motion to certify conflict of this determination with the Eighth District Court of Appeals, citing the Tenth District Court of Appeals holding in *State v. Pace*, Franklin App. No. 10AP-547, 2011-Ohio-320, which motion was denied. This Court accepted jurisdiction of this matter upon the State's appeal and sole proposition of law.

II. LAW AND ARGUMENT

A. PROPOSITION OF LAW: Where a verdict form states a charge of possession of drugs but omits the drug at issue, the court is to look to the entirety of the record, to include the indictment, the evidence at trial, the argument of counsel, and the jury instructions to determine the level of offense. (State v. Pelfrey, 112 Ohio St.3d 422, 2007-Ohio-256, limited and explained.)

B. This Court's Precedent in Pelfrey Does Not Mandate a Misdemeanor Conviction Where the Indictment Alleges the Possession of Cocaine, A Felony Offense

In *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, this Court stated in the syllabus that:

> Pursuant to the clear language of R.C. 2945.75, a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense.

In determining the applicability of *Pelfrey* to the verdict form in this case for drug possession, the Eighth District Court of Appeals found that it could only be construed to authorize a conviction for a misdemeanor. However, in *State v. Pace,* Franklin App. No. 10AP-547, 2011-Ohio-320, the Tenth District Court of Appeals found *Pelfrey* to be limited to only those circumstances where a verdict form omitted an aggravating factor. Other Ohio courts have similarly looked beyond the language of the verdict form to determine the language of the offense charged as well.

In this case, the Eighth District determined that the verdict on Count 2 was a misdemeanor where the verdict form did not indicate the level of offense. However, in *Pace*, supra, the court held that the verdict form that omitted the name of the drug possessed was to be considered a felony where:

1) The verdict referenced the indictment (2011-Ohio-320, at ¶15);

2) The court instructed the jury that they were considering a charge of possession of cocaine (Id.);

3) That the argument by counsel for the State and defense argued that the indictment concerned cocaine, not marijuana (Id., at ¶ 16);

4) There was no discrepancy between the indictment and the evidence (Id., at ¶ 19); and

5) Finding that *State v. Pelfrey,* 112 Ohio St.3d 422, 2007-Ohio-256, applied to elements that elevated an offense, not the elements of the offense themselves. (Id., at ¶ 20-21.)

In contrast, the Eighth District Court found that Appellant was guilty of a misdemeanor possession of drugs despite facts in the record that indicated otherwise. The Eighth District determined that a guilty verdict upon a drug possession charge that omitted the type of drug at issue is only sufficient to state guilt of the least offense listed within the statute, a third degree

misdemeanor. The court stated, "In the instant case, the verdict form does not include a statement indicating either the degree of the offense charged or that an aggravating circumstance existed to justify a conviction on the greater offense, specifically that the drug involved was cocaine or a compound, mixture, preparation, or substance containing cocaine in an amount less than five grams. The verdict form simply states that Eafford was guilty of drug possession in violation of Section 2925.11(A) of the Ohio Revised Code as "charged in the indictment." This is insufficient." *Eafford*, 2011-Ohio-84718, at ¶ 40.

In contract, in *Pace*, supra, the verdict form read simply, "We the jury find the defendant, Johnny Pace, GUILTY OF POSSESSION OF DRUGS as he stands charged in Count One of the indictment." *Pace*, 2011-Ohio-320, at ¶ 14. There is no factual distinction to be made between the cases. In *Eafford*, the trial court properly instructed the jury in this case as in *Pace*, supra. The indictment, evidence, and argument at trial indicated the drug at issue. Now, in Cuyahoga County, a verdict form that omits the drug charged is in all cases a misdemeanor. In Franklin County, the opposite is true – the court will look to the entirety of the circumstances surrounding the verdict to determine the meaning of the verdict.

The rule of law followed in Franklin County is not limited to that court. In Portsmouth v. Wrage, Scioto App. No. 08CA3237, 2008-Ohio-3390, at ¶ 44, the court determined that where the verdict form read, "'We the Jury in this case, find the Defendant, Eric A. Wrage, guilty of the offense charged in the complaint,'" the defendant was guilty of the charged offense, Aggravated Menacing. Although the defendant in Wrage asked that the court consider him guilty of the lesser offense of Menacing, which was codified separately from Aggravated Menacing, the court declined to do so. Id., at ¶ 47. However, the court expressly looked to the complaint to determine what offense, and therefore, what level of offense the verdict form found that

defendant guilty of. Id., at ¶ 46. The *Pace* court acknowledged the court's instructions, argument by counsel, and the indictment itself to find that the level of offense of the verdict; in this case, the Eighth District did not take that approach or look to the indictment, the court's instructions, argument of counsel. Id determined that only the verdict form could be used to determine the offense and its level that Eafford was found guilty, applying *Pelfrey* broadly, not limiting it to only those cases in which an aggravating, or enhancing, fact or circumstance was omitted from the verdict form.

In Pelfrey, this court determined that a verdict form indicating the defendant was guilty of tampering with records, not tampering with *government* records, under R.C. 2945.72 stated only a finding of guilt upon the lesser offense of tampering with records. 2007-Ohio-256, at ¶ 14. This Court stated and held, "The express requirement of the statute cannot be fulfilled by demonstrating 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 or the incorporation of the indictment into the verdict form, or by showing that the defendant failed to raise the issue of the inadequacy of the verdict form. We hold that pursuant to the clear language of R.C. 2945.75, a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense." Id.

However, in this case, as in *Pace* and *Wrage*, it is necessary to look to the charging instrument to determine what offense was charged. And, as noted by the court in Pace and Wrage, this Court's holding in Pelfrey is limited to those circumstances in which an aggravating element of the offense is omitted from the jury from. In those cases, the

appellate courts looked to the indictment to determine the offense charged and its level of offense. The State does not contest that the verdict form in this case could be interpreted to be a felony offense higher than that found by the trial court, a fifth degree felony, where the weight of the cocaine was not specified in the verdict form, however, the State does believe that it is proper to examine the indictment to determine exactly what offense was charged. In this case, Eafford was charged with possession of drugs, cocaine. He was found guilty of possession of drugs as charged in the indictment. It is necessary and proper to find that the verdict form found him guilty of the lowest form of the offense of possession of cocaine – a fifth degree felony.

C. R.C. 2945.75 Requires the Indictment and Record be Examined to Determine the Level of Offense.

In determining the level of offense that a defendant is found guilty, R.C. 2945.75 reads:

> (A) When the presence of one or more additional elements makes an offense one of more serious degree:
>
> (1) The affidavit, complaint, indictment, or information either shall state the degree of the offense which the accused is alleged to have committed, or shall allege such additional element or elements. Otherwise, such affidavit, complaint, indictment, or information is effective to charge only the least degree of the offense.
>
> (2) 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**.

(Emphasis added.)

This section clearly indicates that when the verdict form does not include the degree of the offense charged, the court should look to the offense charged to determine the level of offense. The Eighth District currently ignores the charging document, looks exclusively at the verdict form. In this case, the sentencing court complied with R.C. 2945.75 by looking to the

indictment in this case. Although the verdict form for Count Two didn't explicitly include the degree of the offense; it did not indicate the drug or weight of the drug at issue.

Without looking to the indictment, there is no way to know what offense was charged in this case. It *is* necessary to look to the indictment that Eafford was charged in the indictment with, possession of cocaine in an amount of less than five grams. R.C. 2925.11(C)(4)(a). There was no enhancement or aggravating offense that needed to be found by the jury and included in the jury form to make this offense a felony of the fifth degree as it was charged as a felon. Accordingly, Eafford was properly sentenced.

The appellate court recognized that the indictment included the degree of the offense, but held that it must ignore the indictment in its analysis. *Eafford*, 2011-Ohio-{¶ 41}. *Pelfrey*, in essence found, that when the jury form and charging documents are conflicting, the defendant can only be guilty of the least degree of the offense. *Pelfrey* should not be found to require courts to ignore the charging document. Here, the jury form and charging document were not conflicting. In fact, to convict him of a misdemeanor would conflict with the charging document, not to mention the entire trial. The indictment, evidence, and jury instruction referred exclusively to cocaine, no other drug.

The State further notes that this Court was not unanimous in *Pelfrey*. The dissenting opinion found that the statute complied with R.C. 2945.75 where it used the language as charged in the indictment. 2007-Ohio-256, at ¶ 24. In addition to that finding, the dissent further noted that the defendant in Pelfrey should have been found to have waived any argument as to the verdict form where he did not object to it. Id., at ¶ 25. Further, the dissenting opinion noted that the error would not have been found to be plain error as the outcome of the trial would not have been different. Id., at ¶ 33.

When determining how to apply R.C. 2945.75, it is important to consider the purpose of the statute. R.C. 2945.75 was not created to apply in cases like this. When the indictment, evidence and jury instructions are all consistent, there is no reason to interpret R.C. 2945.75 to mean courts can only look at the verdict form, especially as the statute itself allows the court to look to the offense charged to determine the level of offense.

D. Intent of R.C. 2945.75 is To Prohibit An Increase in Punishment after Trial, An Intent followed in this Case

Ohio is not the only state to have a statute that requires a jury verdict form to contain any facts that would enhance the level of the offense. In California, Pen. Code, § 1157, similarly requires an express finding on the degree of the crime. Courts there have held that the purpose of this statute is to protect the defendant from the risk that the degree of the crime could be increased after the judgment. *People v. Goodwin* (1988), 202 Cal. App. 3d 940, 249 Cal. Rptr. 430 (2d Dist.). There is no risk of this in Eafford's case, as the trial court found that he was guilty of the lowest degree of the offense charged possession of cocaine. Further, the evidence and jury instructions consistently indicated he should be sentenced for possession of cocaine.

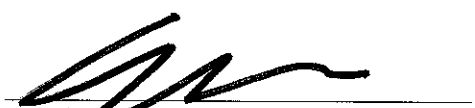
In the federal courts, the same purpose can be seen. The Third Circuit has held that, when a jury is instructed on a lesser-included offense and it returns a general verdict of guilty, the verdict is fatally ambiguous and the case will be remanded for a new trial. *U.S. v. Barrett* (1989), 870 F.2d 953 (3d Cir.). This statute is designed to protect defendants against ambiguous verdicts. If the verdict is ambiguous, courts can arbitrarily impose defendants to higher sentences than he/she was convicted of. There is no danger of ambiguity happening in cases like Eafford's, where every step of the proceedings consistently indicated the degree offense.

III. CONCLUSION

In this matter, the appellate court did not look to the indictment itself to determine the level of the offense for which Eafford was found guilty; R.C. 2945.75(A)(2) itself authorizes the court to consider the "offense charged." That State asks that this Court adopt its proposition of law and limit and modify the holding of *Pelfrey* and allow courts to look to not only the charging instrument to determine the offense and level of offense for which the verdict from finds, but also look to the entire record of the case.

Respectfully submitted,

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR



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IV. CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Appellant has been mailed this the 19th day of 2011 to:

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CR527280

NO. 11-0569

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 94718

STATE OF OHIO,
Plaintiff-Appellant

-vs-

DONALD EAFFORD
Defendant-Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

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FILED
APR 14 2011
CLERK OF COURT
SUPREME COURT OF OHIO

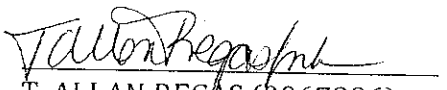
NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

Appellant, State of Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in *State v. Eafford, Cuyahoga App. No. 94718, 2011-Ohio-927* on March 3, 2011.

This appeal raises a substantial constitutional question, involves a felony, or a question of public or great general interest and invokes this Court's discretionary authority pursuant to Art. IV, § 2(B)(2)(e) and S.Ct. R. II Section 1 (A)(2) and (3).

Respectfully submitted,

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

BY: 

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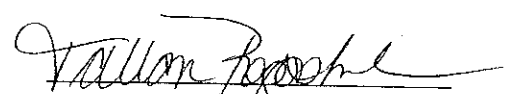
SERVICE

A copy of the foregoing Notice of Appeal has been mailed this 13th day of April, 2011, to David M. King, 310 Lakeside Avenue, 2nd Floor, Cleveland, Ohio 44113 and to the Office of the Ohio Public Defender, 250 East Broad Street, 14th Floor, Columbus, Ohio 43215.



Assistant Prosecuting Attorney

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94718

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DONALD EAFFORD

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-527280

BEFORE: Blackmon, P.J., Boyle, J., and Cooney, J.

RELEASED AND JOURNALIZED: March 3, 2011

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FILED AND JOURNALIZED
PER APP.R. 22(C)

MAR 03 2011

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

PATRICIA ANN BLACKMON, P.J.:

Appellant Donald Eafford appeals his convictions and sentence and assigns the following errors for our review:

> **"I. Defendant's convictions for permitting drug abuse and possession of drugs were against the manifest weight of the evidence."**
>
> **"II. The trial court erred in allowing jurors to submit questions of the witnesses at trial in violation of the United States Constitution Amendments V, VI, and XIV, Ohio Constitution Art. I, Section 10 & 16, and Crim.R. 24."**
>
> **"III. The accused's convictions for drug possession and permitting drug abuse were not supported by sufficient evidence as required by due process in violation of U.S. Constitution Amendment XIV and Crim.R. 29."**
>
> **"IV. The court erred in sentencing Mr. Eafford in count one on a charge for which the jury had not convicted him in violation of R.C. 2945.75."**
>
> **"V. The court erred in sentencing Mr. Eafford in count two on a charge for which the jury had not convicted him in violation of R.C. 2945.75."**
>
> **"VI. The court erred when it allowed the state to enter inadmissible opinion testimony based on inadmissible hearsay."**
>
> **"VII. Defendant Donald Eafford was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 10 of the Ohio Constitution."**

Having reviewed the record and pertinent law, we affirm Eafford's conviction and sentence on the fifth-degree felony, permitting drug abuse. We

modify his conviction on the possession of drugs from a third-degree felony to a third-degree misdemeanor. We reach this conclusion because Eafford only could be convicted and sentenced for possession of drugs, a third-degree misdemeanor. Consequently, we remand to the trial court for resentencing on Count 2.

The Facts

The state charged Eafford with permitting drug abuse, possession of drugs, and possession of criminal tools, in a three-count indictment filed on August 6, 2009. Eafford pleaded not guilty, and his jury trial commenced in January 2010.

The state's evidence consisted of several witnesses, and the main witness was Detective Roland Mitchell, a veteran police officer who had made numerous drug arrests. Detective Mitchell used information from a confidential informant ("CRI") to obtain a search warrant for property located at 12216 Rexford Avenue, where Eafford was located and arrested. Eafford was also identified as the leaseholder of the Rexford Avenue property.

Detective Mitchell described in detail how a drug dealer with the first name "Donald" at the Rexford Avenue property came to his attention from his CRI. The CRI had worked for Detective Mitchell in the past and given him reliable information that resulted in numerous prosecutions of drug-related crimes. The CRI told Detective Mitchell of the drug activity at the Rexford Avenue property, and on an unknown date prior to the execution of the search

warrant, the CRI made a drug purchase at that address under the surveillance and operation of Detective Mitchell and other officers. Detective Mitchell observed the CRI enter the property and obtain the drugs.

On May 8, 2009, Detective Mitchell, other officers, and the SWAT team executed the search warrant at the Rexford Avenue property. Detective Mitchell testified that while they were waiting on the SWAT team, they observed significant vehicular and foot traffic going into and out of the Rexford Avenue property. Detective Mitchell estimated four or five individuals entered and exited the property after staying for a short period.

One of the officers described the Rexford Avenue property as a "smoke house," which is a place where individuals meet to engage in drug activity. When the SWAT team entered the house, they found several individuals in the immediate vicinity of drugs. At the kitchen table, a person was smoking what appeared to be crack cocaine; he attempted to flee but was apprehended. Several others were found with various drug paraphernalia and crack cocaine, which was in plain view.

During the execution of the search warrant, Eafford and a woman were asleep in an upstairs bedroom. The officers found a crack pipe with cocaine residue in the medicine cabinet in the bathroom. In addition, Detective Mitchell testified that he found a Dominion East Ohio gas bill in Eafford's name for gas service to that address.

At the close of the state's case, Eafford moved for a judgment of acquittal under Crim.R. 29. The trial judgment granted the motion for acquittal for the criminal tools count but denied the motion as to the remaining counts.

The case was presented to the jury, and the jury found Eafford guilty of permitting drug abuse and drug possession. The trial court sentenced Eafford to concurrent eight-month prison terms for each count. In addition, the trial court sentenced Eafford to serve six months for an unrelated case where Eafford pleaded guilty to passing a bad check and forgery. The trial court ordered Eafford to serve this sentence consecutively.

In this appeal, we will address the assigned errors out of sequence. Consequently, we will begin with Eafford's third assigned error.

Sufficiency of Evidence

In his third assigned error, Eafford challenges whether the state proved that he obtained, possessed, or used a controlled substance and that he knowingly permitted his property to be used for drug activity by others; consequently, the trial court should have granted his Crim.R. 29 motion for acquittal.

Crim.R. 29 mandates that the trial court issue a judgment of acquittal where the state's evidence is insufficient to sustain a conviction for the offense. Crim.R. 29(A) and sufficiency of evidence review require the same analysis. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386.

In analyzing the sufficiency issue, the reviewing court must view the evidence "in the light most favorable to the prosecution" and ask whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560; *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus; *State v. Carter* (1995), 72 Ohio St.3d 545, 651 N.E.2d 965.

In this case, the state's evidence showed that a drug dealer, first name "Donald," was selling drugs at 12216 Rexford Avenue. A CRI purchased drugs at 12216 Rexford Avenue, and on May 8, 2009, the police executed a search warrant for that address. On the date of the execution of the warrant, the police found many individuals in the house using drugs and possessing drugs on their person.

Donald Eafford was found asleep in the bedroom and a gas bill was found in his name as the leaseholder. Drugs were found in the medicine cabinet not far from where Donald was sleeping.

On the day of the CRI purchase, several people were observed entering and leaving the premises. On the day of the execution of the warrant, as the SWAT team was about to enter the property, a woman exited the property; she was stopped and found to have crack cocaine on her person. She was arrested. When the SWAT team entered the property, they observed two men sitting at

a kitchen table preparing to smoke crack cocaine. One of the men fled out the back door, but was apprehended. The other man at the kitchen table was found in possession of a crack pipe containing cocaine residue.

A woman was asleep in bed with Eafford, and the officers found a crack pipe containing cocaine residue on the night stand next to the woman and found a second crack pipe with cocaine residue in the bathroom medicine cabinet.

Consequently, viewing the evidence in the light most favorable to the state, specifically the testimony regarding the high volume of vehicular and foot traffic at the residence, the contraband and drug paraphernalia found in plain view, the observation of the two individuals preparing to smoke crack cocaine, and the evidence of drugs in the medicine cabinet and on the night stand, any rational trier of fact could have found that Eafford, the leaseholder, knew or had reason to know of any activity taking place in his residence and that he knowingly possessed drugs.

Thus, we conclude the state proved all of the essential elements of the instant charges beyond a reasonable doubt. As such, the trial court properly denied Eafford's motion for acquittal. Accordingly, we overrule the third assigned error.

Manifest Weight of the Evidence

In the first assigned error, Eafford argues his convictions are against the manifest weight of the evidence.

In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

> **"The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. Id. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive — the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. Id. at 387, 678 N.E.2d 541. 'When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony.' Id. at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."**

In this assigned error, Eafford maintains that the officers were not credible and their testimonies were inconsistent. However, a defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958. The determination of weight and credibility of the evidence is for the trier of fact. *State v. Chandler*, 10th Dist. No. 05AP-415, 2006-Ohio-2070, citing *State v.*

DeHass (1967), 10 Ohio St.2d 230, 227 N.E.2d 212. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimonies are credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503.

Accordingly, an appellate court may not substitute its view for that of the jury, but our role "in resolving conflicts in the evidence" is to determine whether the jury lost its way thereby creating a manifest miscarriage of justice that requires a new trial. *Thompkins* at 387.

Here, we are not disposed to reach such a conclusion. One of the officers testified that this was a smokehouse. Several individuals were found in the house smoking crack cocaine. One was found with drugs in her possession. Donald Eafford was identified as the leaseholder through a gas bill. He was found asleep at the house with a woman, and a crack pipe was found on the nightstand. A second crack pipe with cocaine residue was found in the medicine cabinet in the bathroom.

Consequently, we cannot conclude that after reviewing the entire record that any of the evidence weighs heavily against the jury's finding of guilt. Accordingly, we overrule his first assigned error.

Questioning by Jurors

In the second assigned error, Eafford argues the trial court erred in allowing jurors to submit questions of witnesses.

In *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, the Ohio Supreme Court put to rest the inquiry of allowing jurors to question witnesses. *State v. Gaston*, 6th Dist. No. L-06-1183, 2008-Ohio-1856. Like other evidentiary matters, the decision to allow jurors to question witnesses is a matter within the discretion of the trial court and should not be disturbed on appeal absent an abuse of that discretion. Id., citing *Fisher*, supra. The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

However, to minimize any danger of prejudice, courts that allow juror questions should "(1) require jurors to submit their questions to the court in writing, (2) ensure that jurors do not display or discuss a question with other jurors until the court reads the question to the witness, (3) provide counsel an opportunity to object to each question at sidebar or outside the presence of the jury, (4) instruct jurors that they should not draw adverse inferences from the court's refusal to allow certain questions, and (5) allow counsel to ask follow-up questions of the witnesses." *State v. Nicholson*, 5th Dist. No. 2009-CA-0069, 2010-Ohio-763, ¶35, citing *Fisher* at ¶29.

In this case, prior to opening statements, the trial court instructed the jurors in detail on how they would be permitted to ask questions of the witnesses. After the questions were submitted in accordance with the trial court's prior instructions, the attorneys were permitted to object to the questions. Notably, Eafford's attorney objected to several questions, which the trial court sustained.

Our review of the record indicates that the trial court followed all of the recommended procedures of the Ohio Supreme Court in permitting the jurors' questions of the witnesses. In addition, Eafford offers no evidence to support his contention that he was prejudiced. Thus, we find that the record fails to establish that the trial court abused its discretion in allowing the jury to question witnesses. Accordingly, we overrule the second assigned error.

Verdict Form One

In the fourth assigned error, Eafford argues the trial court sentenced him on charges for which he was not convicted.

Pursuant to R.C. 2945.75(A)(2):

> **"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."**

Pursuant to the clear language of R.C. 2945.75, a verdict form signed by a jury must include either the degree of the offense of which the defendant is

convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense. *State v. Bryant*, 7th Dist. No. 10-MA-11, 2010-Ohio-4401, citing *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735, syllabus.

In the instant case, Eafford contends the trial court should have sentenced him to a first degree misdemeanor because the verdict form failed to comply with R.C. 2945.75. We disagree.

Regarding Count 1 of the indictment, the jury form, containing two pages, states in pertinent part as follows:

> "**We, the jury in this case, being duly impaneled and sworn, do find the Defendant Donald Eafford guilty of permitting drug abuse, in violation of Section 2925.13(B) of the Ohio Revised Code, as charged in the indictment.**" Verdict Form, Page 1.
>
> "**We, the jury in this case, find the Defendant Donald Eafford guilty of permitting drug abuse, and we do further find that the felony drug abuse in question, specifically trafficking in drugs, was a violation of Section 2925.02 or 2925.03 of the Ohio Revised Code.**" Verdict Form, Page 2.

Here, the verdict form complies with R.C. 2945.75 even though page one only states that Eafford was found guilty as charged in the indictment. Page two of the verdict form contains a statement that an aggravating element has been found to justify convicting Eafford of the greater degree of the offense. Page two specifically states that the jury further found that the felony drug abuse in question was trafficking in drugs. Consequently, because the verdict form

contained the aggravated element as required by R.C. 2945.75, the form was in proper order, and the trial court imposed the appropriate sentence. Accordingly, we overrule the fourth assigned error.

Verdict Form Two

In the fifth assigned error, Eafford argues he was improperly sentenced on Count 2 of the indictment. We agree.

Regarding Count 2 of the indictment, the verdict form, containing a single page, states in pertinent part as follows:

> **"We, the Jury in this case, being duly impaneled and sworn, do find the defendant, Donald Eafford, guilty of Possession of Drugs in violation of §2925.11(A) of the Ohio Revised Code, as charged in Count Two of the indictment."**

In the instant case, the verdict form does not include a statement indicating either the degree of the offense charged or that an aggravating circumstance existed to justify a conviction on the greater offense, specifically that the drug involved was cocaine or a compound, mixture, preparation, or substance containing cocaine in an amount less than five grams. The verdict form simply states that Eafford was guilty of drug possession in violation of Section 2925.11(A) of the Ohio Revised Code as "charged in the indictment." This is insufficient.

The "as charged in the indictment" language in the verdict form in the case at bar does not cure the defect, even though the degrees of the offense were

included in the indictment. *State v. Moore*, 188 Ohio App.3d 726, 2010-Ohio-1848, 936 N.E.2d 981. As such, Eafford was improperly sentenced.

The state contends that we should follow our reasoning in *State v. Parks*, Cuyahoga App. No. 90368, 2008-Ohio-4245. In *Parks*, we held where there exists additional documentation in the record to prove that the jury only contemplated specific charges of trafficking in crack cocaine, the *Pelfrey* mandate does not apply. Specifically, in *Parks*, the jury verdict included an enhancement finding by the jury that was attached to the verdict form. However, we find *Parks* distinguishable from the case at bar.

In *Parks*, the defendant argued his conviction should have been a minor misdemeanor rather than a fifth degree felony for the possession of crack cocaine, because the verdict form only stated that the jury found him "guilty of possession of drugs in violation of R.C. 2925.11, as charged in count two of the indictment," without mentioning the drug he possessed.

However, in *Parks*, we found that although the first page of the verdict form failed to indicate the specific type of drug or felony level, the second page indicated that the drug was crack cocaine. Because the verdict form did not indicate the felony level, the defendant was convicted of the lowest level of possession of crack cocaine, which is a felony of the fifth degree. We were unpersuaded by the defendant's argument that he should have been convicted of a misdemeanor. Page two of the verdict form in *Parks* contained a "further

finding" by the jury regarding the type and amount of drugs the defendant possessed. As such, the conviction was, by operation of statute, a fifth degree felony.

Nonetheless, the state alleges, in the instant case, the jury was provided written instructions, which listed the type and amount of drugs involved, the trial court instructed the jury accordingly, and Eafford was aware that he was charged with possession of crack cocaine. However, the trial court's instructions do not cure the verdict form's defect. *State v. Sessler*, 119 Ohio St.3d 9, 2008-Ohio-3180, 891 N.E.2d 318. See, also, *Moore*, supra. As this case stands, without a statement of the degree of the offense for which he was convicted, or a statement of the aggravating element demonstrating that defendant was convicted of a greater degree of the offense, he stands convicted of only a misdemeanor.

Further, while the state presented evidence that the drug involved was crack cocaine in an amount less than five grams, the jury made no specific finding in that regard. As such, the possession of drugs verdict supports a conviction for a third degree misdemeanor. See *State v. Ligon*, 179 Ohio App.3d 544, 2008-Ohio-6085, 902 N.E.2d 1011.

Although *Ligon* dicta states that a defect could be cured if the trial court's verdict entry mentions the degree of the offense, we point out that in this case, the record indicates that the degree of the offense is also absent from the trial court's verdict entry. Accordingly, we sustain the fifth assigned error, vacate

Eafford's sentence as to Count 2, and remand this matter for resentencing on Count 2.

Admission of Evidence

In the sixth assigned error, Eafford argues the trial court erred in allowing the opinion testimony of Detective Mitchell that there was drug activity at Eafford's residence.

The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Greer*, Cuyahoga App. No. 92910, 2010-Ohio-1418, citing *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of the syllabus. Accordingly, we review a challenge to the admission of evidence under an abuse of discretion standard. Id.

A lay witness's opinion testimony is limited to those opinions or inferences that are (1) rationally based on the perception of the witness, and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. *State v. Skidmore*, 7th Dist. No. 08 MA 165, 2010-Ohio-2846; Evid.R. 701.

The distinction between lay and expert witness opinion testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning that only specialists in the field can master. *State v. Bleigh*, 5th Dist. No. 09-CAA-03-0031, 2010-Ohio-1182, citing *State v. McKee*, 91 Ohio St.3d 292, 2001-Ohio-41, 744 N.E.2d 737.

In the instant case, Detective Mitchell's testimony that drug activity was taking place at Eafford's home fits squarely within the framework of Evid.R. 701. Detective Mitchell testified that there were citizens' complaints about the subject property, that a CRI, with whom he had a longstanding working relationship, agreed to participate in a controlled drug buy, and that the transaction was actually completed at Eafford's address.

In addition, Detective Mitchell testified that on the basis of the completed transaction, police obtained a search warrant for Eafford's residence. Further, Detective Mitchell testified that he observed significant foot and vehicular traffic at Eafford's residence, while he was waiting for the SWAT team to arrive. Finally, Detective Mitchell testified about the contraband and drug paraphernalia that was seized upon the execution of the search warrant.

We find no error in the admission of Detective Mitchell's testimony. His opinion was clearly based on his perception, and it was helpful to the jury as it established that drug activity was taking place at Eafford's residence. Opinion testimony is not excludable "solely because it embraces an ultimate issue to be decided by the trier of fact." *State v. Hall*, 2d Dist. No. 19671, 2004-Ohio-663; Evid.R. 704. Accordingly, we overrule the sixth assigned error.

Ineffective Assistance of Counsel

In the seventh assigned error, Eafford argues he was denied the effective assistance of counsel.

We review a claim of ineffective assistance of counsel under the two-part test set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Under *Strickland*, a reviewing court will not deem counsel's performance ineffective unless a defendant can show his lawyer's performance fell below an objective standard of reasonable representation and that prejudice arose from the deficient performance. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph one of the syllabus.

To show prejudice, a defendant must prove that, but for his lawyer's errors, a reasonable probability exists that the result of the proceedings would have been different. Id. at paragraph two of the syllabus. Judicial scrutiny of a lawyer's performance must be highly deferential. *State v. Moon*, Cuyahoga App. No. 93673, 2010-Ohio-4483, citing *State v. Sallie*, 81 Ohio St.3d 673, 1998-Ohio-343, 693 N.E.2d 267.

In the instant case, Eafford argues he was denied the effective assistance of counsel because trial counsel failed to object to questions of the jurors, to the testimony of Detective Mitchell, and to the verdict forms. However, trial counsel's failure to make objections, alone, does not establish ineffective assistance of counsel, because this decision is generally viewed as trial strategy. *State v. Turks*, 3d Dist. Nos. 1-10-02 and 1-10-26, 2010-Ohio-5944, citing *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶103.

Accordingly, we overrule Eafford's seventh assigned error.

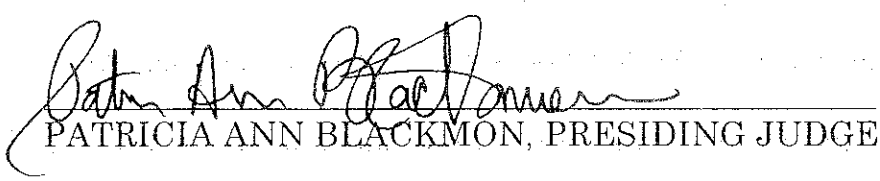
Judgment affirmed in part, reversed in part, and remanded for resentencing on Count 2.

It is ordered that appellee and appellant share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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



PATRICIA ANN BLACKMON, PRESIDING JUDGE

MARY J. BOYLE, J., and
COLLEEN CONWAY COONEY, J., CONCUR

Baldwin's Ohio Revised Code Annotated Currentness
Title XXIX. Crimes--Procedure (Refs & Annos)
Chapter 2925. Drug Offenses (Refs & Annos)
Drug Offenses
2925.11 Drug possession offenses

(A) No person shall knowingly obtain, possess, or use a controlled substance.

(B) This section does not apply to any of the following:

(1) Manufacturers, licensed health professionals authorized to prescribe drugs, pharmacists, owners of pharmacies, and other persons whose conduct was in accordance with Chapters 3719., 4715., 4723., 4729., 4730., 4731., and 4741. of the Revised Code;

(2) If the offense involves an anabolic steroid, any person who is conducting or participating in a research project involving the use of an anabolic steroid if the project has been approved by the United States food and drug administration;

(3) Any person who sells, offers for sale, prescribes, dispenses, or administers for livestock or other nonhuman species an anabolic steroid that is expressly intended for administration through implants to livestock or other nonhuman species and approved for that purpose under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040 (1938), 21 U.S.C.A. 301, as amended, and is sold, offered for sale, prescribed, dispensed, or administered for that purpose in accordance with that act;

(4) Any person who obtained the controlled substance pursuant to a lawful prescription issued by a licensed health professional authorized to prescribe drugs.

(C) Whoever violates division (A) of this section is guilty of one of the following:

(1) If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule I or II, with the exception of marihuana, cocaine, L.S.D., heroin, and hashish, whoever violates division (A) of this section is guilty of aggravated possession of drugs. The penalty for the offense shall be determined as fol- lows:

(a) Except as otherwise provided in division (C)(1)(b), (c), (d), or (e) of this section, aggravated possession of drugs is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

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(b) If the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, aggravated possession of drugs is a felony of the third degree, and there is a presumption for a prison term for the offense.

(c) If the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, aggravated possession of drugs is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(d) If the amount of the drug involved equals or exceeds fifty times the bulk amount but is less than one hundred times the bulk amount, aggravated possession of drugs is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(e) If the amount of the drug involved equals or exceeds one hundred times the bulk amount, aggravated possession of drugs is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(2) If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule III, IV, or V, whoever violates division (A) of this section is guilty of possession of drugs. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(2)(b), (c), or (d) of this section, possession of drugs is a misdemeanor of the first degree or, if the offender previously has been convicted of a drug abuse offense, a felony of the fifth degree.

(b) If the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, possession of drugs is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) If the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, possession of drugs is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of the drug involved equals or exceeds fifty times the bulk amount, possession of drugs is a felony of the second degree, and the court shall impose upon the offender as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(3) If the drug involved in the violation is marihuana or a compound, mixture, preparation, or substance containing marihuana other than hashish, whoever violates division (A) of this section is guilty of possession of mari-

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huana. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(3)(b), (c), (d), (e), or (f) of this section, possession of marihuana is a minor misdemeanor.

(b) If the amount of the drug involved equals or exceeds one hundred grams but is less than two hundred grams, possession of marihuana is a misdemeanor of the fourth degree.

(c) If the amount of the drug involved equals or exceeds two hundred grams but is less than one thousand grams, possession of marihuana is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(d) If the amount of the drug involved equals or exceeds one thousand grams but is less than five thousand grams, possession of marihuana is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(e) If the amount of the drug involved equals or exceeds five thousand grams but is less than twenty thousand grams, possession of marihuana is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense.

(f) If the amount of the drug involved equals or exceeds twenty thousand grams, possession of marihuana is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree.

(4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of possession of cocaine. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(4)(b), (c), (d), (e), or (f) of this section, possession of cocaine is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds five grams but is less than twenty-five grams of cocaine that is not crack cocaine or equals or exceeds one gram but is less than five grams of crack cocaine, possession of cocaine is a felony of the fourth degree, and there is a presumption for a prison term for the offense.

(c) If the amount of the drug involved equals or exceeds twenty-five grams but is less than one hundred grams of cocaine that is not crack cocaine or equals or exceeds five grams but is less than ten grams of crack cocaine, possession of cocaine is a felony of the third degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree.

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(d) If the amount of the drug involved equals or exceeds one hundred grams but is less than five hundred grams of cocaine that is not crack cocaine or equals or exceeds ten grams but is less than twenty-five grams of crack cocaine, possession of cocaine is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of the drug involved equals or exceeds five hundred grams but is less than one thousand grams of cocaine that is not crack cocaine or equals or exceeds twenty-five grams but is less than one hundred grams of crack cocaine, possession of cocaine is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds one thousand grams of cocaine that is not crack cocaine or equals or exceeds one hundred grams of crack cocaine, possession of cocaine is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(5) If the drug involved in the violation is L.S.D., whoever violates division (A) of this section is guilty of possession of L.S.D. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(5)(b), (c), (d), (e), or (f) of this section, possession of L.S.D. is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) If the amount of L.S.D. involved equals or exceeds ten unit doses but is less than fifty unit doses of L.S.D. in a solid form or equals or exceeds one gram but is less than five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) If the amount of L.S.D. involved equals or exceeds fifty unit doses, but is less than two hundred fifty unit doses of L.S.D. in a solid form or equals or exceeds five grams but is less than twenty-five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of L.S.D. involved equals or exceeds two hundred fifty unit doses but is less than one thousand unit doses of L.S.D. in a solid form or equals or exceeds twenty-five grams but is less than one hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of L.S.D. involved equals or exceeds one thousand unit doses but is less than five thousand unit doses of L.S.D. in a solid form or equals or exceeds one hundred grams but is less than five hundred grams

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of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of L.S.D. involved equals or exceeds five thousand unit doses of L.S.D. in a solid form or equals or exceeds five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(6) If the drug involved in the violation is heroin or a compound, mixture, preparation, or substance containing heroin, whoever violates division (A) of this section is guilty of possession of heroin. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(6)(b), (c), (d), (e), or (f) of this section, possession of heroin is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds ten unit doses but is less than fifty unit doses or equals or exceeds one gram but is less than five grams, possession of heroin is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) If the amount of the drug involved equals or exceeds fifty unit doses but is less than one hundred unit doses or equals or exceeds five grams but is less than ten grams, possession of heroin is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of the drug involved equals or exceeds one hundred unit doses but is less than five hundred unit doses or equals or exceeds ten grams but is less than fifty grams, possession of heroin is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of the drug involved equals or exceeds five hundred unit doses but is less than two thousand five hundred unit doses or equals or exceeds fifty grams but is less than two hundred fifty grams, possession of heroin is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds two thousand five hundred unit doses or equals or exceeds two hundred fifty grams, possession of heroin is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a

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felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(7) If the drug involved in the violation is hashish or a compound, mixture, preparation, or substance containing hashish, whoever violates division (A) of this section is guilty of possession of hashish. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(7)(b), (c), (d), (e), or (f) of this section, possession of hashish is a minor misdemeanor.

(b) If the amount of the drug involved equals or exceeds five grams but is less than ten grams of hashish in a solid form or equals or exceeds one gram but is less than two grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a misdemeanor of the fourth degree.

(c) If the amount of the drug involved equals or exceeds ten grams but is less than fifty grams of hashish in a solid form or equals or exceeds two grams but is less than ten grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(d) If the amount of the drug involved equals or exceeds fifty grams but is less than two hundred fifty grams of hashish in a solid form or equals or exceeds ten grams but is less than fifty grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(e) If the amount of the drug involved equals or exceeds two hundred fifty grams but is less than one thousand grams of hashish in a solid form or equals or exceeds fifty grams but is less than two hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense.

(f) If the amount of the drug involved equals or exceeds one thousand grams of hashish in a solid form or equals or exceeds two hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree.

(D) Arrest or conviction for a minor misdemeanor violation of this section does not constitute a criminal record and need not be reported by the person so arrested or convicted in response to any inquiries about the person's criminal record, including any inquiries contained in any application for employment, license, or other right or privilege, or made in connection with the person's appearance as a witness.

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(E) In addition to any prison term or jail term authorized or required by division (C) of this section and sections 2929.13, 2929.14, 2929.22, 2929.24, and 2929.25 of the Revised Code and in addition to any other sanction that is imposed for the offense under this section, sections 2929.11 to 2929.18, or sections 2929.21 to 2929.28 of the Revised Code, the court that sentences an offender who is convicted of or pleads guilty to a violation of division (A) of this section shall do all of the following that are applicable regarding the offender:

(1)(a) If the violation is a felony of the first, second, or third degree, the court shall impose upon the offender the mandatory fine specified for the offense under division (B)(1) of section 2929.18 of the Revised Code unless, as specified in that division, the court determines that the offender is indigent.

(b) Notwithstanding any contrary provision of section 3719.21 of the Revised Code, the clerk of the court shall pay a mandatory fine or other fine imposed for a violation of this section pursuant to division (A) of section 2929.18 of the Revised Code in accordance with and subject to the requirements of division (F) of section 2925.03 of the Revised Code. The agency that receives the fine shall use the fine as specified in division (F) of section 2925.03 of the Revised Code.

(c) If a person is charged with a violation of this section that is a felony of the first, second, or third degree, posts bail, and forfeits the bail, the clerk shall pay the forfeited bail pursuant to division (E)(1)(b) of this section as if it were a mandatory fine imposed under division (E)(1)(a) of this section.

(2) The court shall suspend for not less than six months or more than five years the offender's driver's or commercial driver's license or permit.

(3) If the offender is a professionally licensed person, in addition to any other sanction imposed for a violation of this section, the court immediately shall comply with section 2925.38 of the Revised Code.

(F) It is an affirmative defense, as provided in section 2901.05 of the Revised Code, to a charge of a fourth degree felony violation under this section that the controlled substance that gave rise to the charge is in an amount, is in a form, is prepared, compounded, or mixed with substances that are not controlled substances in a manner, or is possessed under any other circumstances, that indicate that the substance was possessed solely for personal use. Notwithstanding any contrary provision of this section, if, in accordance with section 2901.05 of the Revised Code, an accused who is charged with a fourth degree felony violation of division (C)(2), (4), (5), or (6) of this section sustains the burden of going forward with evidence of and establishes by a preponderance of the evidence the affirmative defense described in this division, the accused may be prosecuted for and may plead guilty to or be convicted of a misdemeanor violation of division (C)(2) of this section or a fifth degree felony violation of division (C)(4), (5), or (6) of this section respectively.

(G) When a person is charged with possessing a bulk amount or multiple of a bulk amount, division (E) of section 2925.03 of the Revised Code applies regarding the determination of the amount of the controlled substance involved at the time of the offense.

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CREDIT(S)

(2008 H 195, eff. 9-30-08; 2006 S 154, eff. 5-17-06; 2002 H 490, eff. 1-1-04; 2002 S 123, eff. 1-1-04; 2000 H 241, eff. 5-17-00; 1999 S 107, eff. 3-23-00; 1998 S 66, eff. 7-22-98; 1997 S 2, eff. 6-20-97; 1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1-96; 1995 H 249, eff. 7-17-95; 1994 H 391, eff. 7-21-94; 1993 H 377, eff. 9-30-93; 1991 H 298, H 62; 1990 S 258; 1980 S 184, § 5)

Current through 2011 Files 1 to 27, 29 to 34, 36 to 39, 41 and 44 of the 129th GA (2011-2012), apv. by 7/15/2011, and filed with the Secretary of State by 7/18/11.

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Baldwin's Ohio Revised Code Annotated Currentness
Title XXIX. Crimes--Procedure (Refs & Annos)
Chapter 2945. Trial (Refs & Annos)
Degree of Offense
2945.75 Degree of offense; charge and verdict; prior convictions

(A) When the presence of one or more additional elements makes an offense one of more serious degree:

(1) The affidavit, complaint, indictment, or information either shall state the degree of the offense which the accused is alleged to have committed, or shall allege such additional element or elements. Otherwise, such affidavit, complaint, indictment, or information is effective to charge only the least degree of the offense.

(2) 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.

(B)(1) Whenever in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction.

(2) Whenever in any case it is necessary to prove a prior conviction of an offense for which the registrar of motor vehicles maintains a record, a certified copy of the record that shows the name, date of birth, and social security number of the accused is prima-facie evidence of the identity of the accused and prima-facie evidence of all prior convictions shown on the record. The accused may offer evidence to rebut the prima-facie evidence of the accused's identity and the evidence of prior convictions. Proof of a prior conviction of an offense for which the registrar maintains a record may also be proved as provided in division (B)(1) of this section.

(3) If the defendant claims a constitutional defect in any prior conviction, the defendant has the burden of proving the defect by a preponderance of the evidence.

CREDIT(S)

(2008 S 17, eff. 9-30-08; 2006 H 461, eff. 4-4-07; 1972 H 511, eff. 1-1-74)

Current through 2011 Files 1 to 27, 29 to 34, 36 to 39, 41 and 44 of the 129th GA (2011-2012), apv. by 7/15/2011, and filed with the Secretary of State by 7/18/11.

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Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Penal Code (Refs & Annos)
Part 2. Of Criminal Procedure (Refs & Annos)
Title 7. Of Proceedings After the Commencement of the Trial and Before Judgment
Chapter 4. The Verdict or Finding (Refs & Annos)
→ **§ 1157. Finding of degree of crime or attempt; failure to determine; conviction of lowest de- gree**

Whenever a defendant is convicted of a crime or attempt to commit a crime which is distinguished into degrees, the jury, or the court if a jury trial is waived, must find the degree of the crime or attempted crime of which he is guilty. Upon the failure of the jury or the court to so determine, the degree of the crime or attempted crime of which the defendant is guilty, shall be deemed to be of the lesser degree.

CREDIT(S)

(Enacted 1872. Amended by Stats.1949, c. 800, p. 1537, § 1; Stats.1951, c. 1674, p. 3849, § 109; Stats.1978, c. 1166, p. 3771, § 4.)

Current with urgency legislation through Ch. 285 of 2011 Reg.Sess. and Ch. 8 of 2011-2012 1st Ex.Sess.

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