

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)	Sup. Ct. No. 15-0385
)	
Plaintiff-Appellant,)	Ct. App. No. WD-13-086
)	
-vs-)	On Appeal from the Wood County
)	Court of Appeals, Sixth Appellate
RAFAEL GONZALES,)	District
)	
Defendant-Appellee.)	
)	
)	

PLAINTIFF-APPELLANT/CROSS-APPELLEE, STATE OF OHIO'S
MEMORANDUM IN OPPOSITION OF JURISDICTION
OF DEFENDANT-APPELEE'S CROSS-APPEAL

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
EXPLANATION OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST	1
STATEMENT OF THE CASE.....	4
STATEMENT OF THE FACTS.....	5
LAW AND ARGUMENT.....	8
COUNTER-PROPOSITION OF LAW NO. 1: The trial court did not abuse its discretion when it allowed the State to amend the bill of particulars at trial.....	8
A. Open file discovery was provided; Appellant, therefore, was on notice of the charges against him; thus, a bill of particulars was not required.....	8
B. A bill of particulars is amendable at any time, including at trial.....	8
C. Appellee/Cross-Appellant participated in a continuing course of conduct.....	9
COUNTER-PROPOSITION OF LAW NO. 2: This Court has held that a lay witness may identify a controlled substance.....	11
A. No scientific testimony is required to identify a controlled substance.....	11
B. A controlled substance may be identified by drug addicts or dealers, law enforcement officers, and other lay individuals.....	11
COUNTER-PROPOSITION OF LAW NO. 3: The trial court did not abuse its discretion when it denied Appellant’s request for an additional jury instruction concerning the definition of cocaine...	13
CONCLUSION.....	15
CERTIFICATION.....	16

TABLE OF AUTHORITIES

Cases

<i>Blakemore v. Blakemore</i> , 5 Ohio St.3d 217, 5 Ohio B. 481, 450 N.E.2d 1140 (1983).....	3
<i>Cleveland v. Buckley</i> , 67 Ohio App. 3d 799, 588 N.E.2d 912 (8 th Dist. 1990).....	13
<i>Crouch v. State</i> , 37 Ohio App. 366, 174 N.E.799 (6 th Dist. 1930).....	10
<i>Murphy v. Carrollton Mfg. Co.</i> , 61 Ohio St.3d 585, 575 N.E.2d 828 (1991).....	2, 14
<i>North Carolina v. Llamas-Hernandez</i> , 363 N.C. 8, 673 S.E.2d 658 (2009)	12-13
<i>Parma Heights v. Jaros</i> , 69 Ohio App.3d 623, 591 N.E.2d 726 (8 th Dist. 1990).....	14
<i>Schlachet v. Cleveland Clinic Found.</i> , 104 Ohio App. 3d 160, 661 N.E.2d 259 (8 th Dist.1995).....	2
<i>State v. Brown</i> , 99 Ohio App. 3d 604, 651 N.E.2d 470, (10 th Dist. 1994)	9
<i>State v. Brumback</i> , 109 Ohio App.3d 65, 671 N.E.2d 1064 (9 th Dist.1996).....	1
<i>State v. Evans</i> , 2 nd Dist. Montgomery No. 20794, 2006-Ohio-1425....	8
<i>State v. Fields</i> , 13 Ohio App.3d 433, 13 OBR 521, 469 N.E.2d 939 (8 th Dist. 1984).....	14
<i>State v. Foti</i> , 11 th Dist. No. 2001-L-020, 2003-Ohio-796.....	11
<i>State v. Gonzales</i> , 6 th Dist. Wood No. WD-13-086, 2015-Ohio-461...	<i>passim</i>
<i>State v. Guster</i> , 66 Ohio St.2d 266, 421 N.E.2d 157 (1981).....	2, 14
<i>State v. Hackworth</i> , 80 Ohio App.3d 362, 609 N.E.2d 228 (6 th Dist. 1992).....	10, 11
<i>State v. Hymore</i> , 9 Ohio St. 2d 122, 224 N.E.2d 126 (1967).....	13
<i>State v. Jacobs</i> , 3 rd Dist. Hancock No. 5-99-17, 1999-Ohio-899.....	14

<i>State v. Joseph</i> , 73 Ohio St. 3d 450, 653 N.E.2d 285 (1995).....	13
<i>State v. Koval</i> , 12 th Dist. Warren No. CA2005-06-083, 2006-Ohio-5377	11
<i>State v. Lillo</i> , 6 th Dist. Huron No. H-10-001, 2010-Ohio-6221.....	3, 14
<i>State v. McKee</i> , 91 Ohio St. 3d 292, 744 N.E.2d 737 (2001).....	2, 12-13
<i>State v. Mundy</i> , 99 Ohio App.3d 275, 650 N.E.2d 502 (2 nd Dist.1994)	1
<i>State v. Nelson</i> , 36 Ohio St.2d 79, 65 O.O.2d 222, 303 N.E.2d 865 (1973)	14
<i>State v. Nickel</i> , 6 th Dist. Ottawa No. OT-09-001, 2009-Ohio-5996.....	8
<i>State v. Pitts</i> , 9 th Dist. Summit No. 20976, 2002-Ohio-6291.....	15
<i>State v. Renfoe</i> , 6 th Dist. Lucas No. L-12-1146, 2013-Ohio-5179.....	8
<i>State v. Sanders</i> , 92 Ohio St. 3d 245, 750 N.E. 90 (2001).....	13
<i>State v. Schnoering</i> , 9 th Dist. App. Lorain No. 95CA006044, 1995 Ohio App. LEXIS 5075 (Nov. 15, 1995).....	10
<i>State v. Scott</i> , 41 Ohio App.3d 313, 535 N.E.2d 379 (8 th Dist. 1987)...	14
<i>State v. Singleton</i> , 11 th Dist. Lake No. 2002-L-077, 2004-Ohio-1517..	11
<i>State v. Smith</i> , 2 nd Dist. Greene No. 2010-Ohio-2568.....	4
<i>State v. Sneed</i> , 63 Ohio St.3d 3, 584 N.E.2d 1160 (1992).....	3, 14
<i>State v. Stephenson</i> , 4 th Dist. Adams No. 12CA936, 2013-Ohio-771....	14
<i>State v. Thompkins</i> , 8 th Dist. Cuyahoga No. 92575, 2010-Ohio-151....	12
<i>State v. Warden</i> , 6 th Dist. Wood No. WD-03-065, 2004-Ohio-6306....	10
<i>State v. White</i> , 2013-Ohio-51, 988 N.E.2d 595, (6 th Dist.).....	2
<i>State v. Wolons</i> , 44 Ohio St.3d 64, 541 N.E.2d 443 (1989).....	14
<i>Wilson v. Dixon</i> , 8 th Dist. Cuyahoga App. No. 56788, 1990 WL 37398 (Mar. 29, 1990).....	14

Statutes

R.C. 2901.12(H).....	9-10
R.C. 2925.01(X).....	13, 15
R.C. 2925.11.....	3, 4, 7, 13, 15
R.C. 2941.30.....	1

Rules

Crim.R. 7.....	1, 8-9
----------------	--------

EXPLANATION OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION AND WHY LEAVE TO APPEAL SHOULD NOT BE GRANTED

Appellee/Cross-Appellant seeks review of three issues arising out of major drug offender conviction. These issues, however, were properly disposed of at both the trial and appellate level. And there is no public or great general interest arising out of this cross-appeal, nor is there any substantial constitutional question. Rather, this cross-appeal involves three fairly well-settled issues of law. Indeed, the precedent of this Court, as well as others, need not be revisited on those issues. The fact that the case at bar concerns a certified conflict on a separate issue, does not change the fact that the other aspects of the Sixth District's decision are firmly ensconced in precedent from this Court and other courts stretching back for several decades.

The first issue is whether the State can change what is contained in the bill of particulars at trial under Crim.R. 7. The answer to that question is yes. The Sixth District reinforced that in their decision.

Crim.R. 7 vests the trial court with discretion when considering the state's motion to amend its bill of particulars. Thus, we review the trial court's decision for an abuse of discretion. *State v. Brumback*, 109 Ohio App.3d 65, 81, 671 N.E.2d 1064 (9th Dist.1996), citing *State v. Mundy*, 99 Ohio App.3d 275, 313, 650 N.E.2d 502 (2nd Dist.1994). “[F]or the amendment to constitute reversible error, the defendant must demonstrate that the amendment hampered [his] defense or otherwise prejudiced [him].” *Id.*; see also R.C. 2941.30 (indicating that “no appeal based upon such action of the court shall be sustained, nor reversal had, unless from consideration of the whole proceedings, the reviewing court finds that the accused was prejudiced in his defense or that a failure of justice resulted”).

State v. Gonzales, 6th Dist. Wood No. WD-13-086, 2015-Ohio-461, ¶ 47.

This case, therefore, is based on established precedent, and does not involve any unsettled constitutional issues or any other issues of public interest justifying further review by this Court.

The second issue asks that this Court to reverse its holding in *State v. McKee*, 91 Ohio St. 3d 292, 744 N.E.2d 737 (2001) at paragraph one of the syllabus, that allows lay witnesses to testify to the existence of a controlled substance at trial and instead adopt a holding from the North Carolina Supreme Court that says an expert is needed to do that. The Sixth District disagreed with the Appellee/Cross-Appellant's and chose not to disregard this Court's precedent.

“A court of appeals is bound by and must follow decisions of the Ohio Supreme Court, which are regarded as law unless and until reversed or overruled.” *State v. White*, 2013-Ohio-51, 988 N.E.2d 595, ¶ 201 (6th Dist.), citing *Schlachet v. Cleveland Clinic Found.*, 104 Ohio App. 3d 160, 168, 661 N.E.2d 259 (8th Dist.1995). In light of the clear instruction from the Supreme Court of Ohio allowing lay witness identification of controlled substances, we decline to adopt appellant's view, first espoused by the North Carolina Supreme Court in *Llamas-Hernandez*, that expert testimony was required to identify the cocaine in this case.

State v. Gonzales, 6th Dist. Wood No. WD-13-086, 2015-Ohio-461, ¶ 22.

Again, the Sixth District's decision was based on established precedent, and does not involve any unsettled constitutional issues or any other issues of public interest justifying further review by this Court.

The third issue, which sounds in error correction—if error is even present in this case, is whether the trial court abused its discretion when it denied Appellee/Cross-Appellant's request to include an additional definition of cocaine in the jury instructions. The Sixth District found that the trial court's action was proper.

Generally, requested jury instructions should be given if they are a correct statement of law as applied to the facts of the case. *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 575 N.E.2d 828 (1991). “[A] court's instructions to the jury should be addressed to the actual issues in the case as posited by the evidence and the pleadings.” *State v. Guster*, 66 Ohio St.2d 266, 271, 421 N.E.2d 157 (1981). Prejudicial error is found in a criminal case where a court refuses to give an instruction that is pertinent to the case,

states the law correctly, and is not covered by the general charge. *State v. Sneed*, 63 Ohio St.3d 3, 9, 584 N.E.2d 1160 (1992). A determination as to jury instructions is a matter left to the sound discretion of the trial court. *Id.* Thus, we review a trial court's decision regarding jury instructions for an abuse of discretion. *State v. Lillo*, 6th Dist. Huron No. H-10-001, 2010-Ohio-6221, ¶ 15. Abuse of discretion connotes that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140 (1983).

State v. Gonzales, 6th Dist. Wood No. WD-13-086, 2015-Ohio-461, ¶ 22.

The Court then stated “that the requested instruction would have been superfluous” and found that “the relevant statute is R.C. 2925.11(C)(4), the substance of which was already covered in the general charge to the jury.” *Id.*, ¶ 36. As a result, this proposition does not involve any unsettled constitutional issues or any other issues of public interest justifying further review by this Court.

As stated before, Appellee/Cross-Appellant's jurisdictional memorandum fails to present any unsettled constitutional issues or any other issues of public interest justifying further review by this Court. Appellant/Cross-Appellee, therefore, respectfully submits that jurisdiction for the cross-appeal should be declined.

STATEMENT OF THE CASE

On August, 1, 2012, Rafael Gonzales was indicted on one count of Possession of Drugs, in violation of R.C. 2925.11(A) and (C)(4)(f), a felony of the first degree, including a Major Drug Offender specification. Later, a jury trial was held on November 5-6, 2013. The jury found Appellee/Cross-Appellant guilty as charged, and also found that the amount of the “drug involved” exceeded 100 grams, making Appellee/Cross-Appellant a Major Drug Offender. The trial court sentenced Appellee/Cross-Appellant to a mandatory-maximum 11-year prison sentence as statutorily required for a Major Drug Offender.

Appellee/Cross-Appellant appealed. The Sixth District affirmed Appellee/Cross-Appellant’s conviction, but found that the sentencing enhancement, which concerned Appellee/Cross-Appellant possessing more than 100 grams of “cocaine or a compound, mixture, preparation, or substance containing cocaine” was not shown at trial. Specifically, the Sixth District held that the State did not prove the weight of the pure cocaine in the “drug involved”. *State v. Gonzales*, 6th Dist. Wood No. WD-13-086, 2015-Ohio-461, ¶ 47. They then remanded the case to adjust Appellee/Cross-Appellant’s sentence from that for a Major Drug Offender to a felony of the fifth degree. The Sixth District, however, recognized that in reaching its result, it was in direct conflict with *State v. Smith*, 2nd Dist. Greene No. 2010-Ohio-2568, ¶14-15. As a result, the Sixth District certified a conflict to this Court. *Id.*, ¶ 58.

STATEMENT OF FACTS

DEA agents set up a “reverse buy” with Appellee/Cross-Appellant and a confidential informant (“CI”). A recorded phone call was then made to set up a meeting to facilitate Appellee/Cross-Appellant’s purchase. Appellee/Cross-Appellant then met with the CI in a store parking lot to inspect the two kilos that he wanted to buy. They talked about how much it would cost. Appellee/Cross-Appellant said he was planning to sell ten kilos that day, so he wanted to buy them from the CI at \$30,000 per kilo. They opened the trunk of the CI’s car and opened one of the kilos, so Appellee/Cross-Appellant could test its quality. After Appellee/Cross-Appellant tested the kilo, he set up a time to buy the drugs from the CI. At that point, Appellee/Cross-Appellant tried to negotiate a lower price. Appellee/Cross-Appellant called his buyer to inform him of the negotiated price per kilo. Appellee/Cross-Appellant also told the CI that, next time, the CI needed to make bigger cuts in the packaging: “make a big cross so you can see it all.” Appellee/Cross-Appellant showed the CI the customary way of splitting open the package. The CI had only cut a small opening in the packaging. He then put tape over the opening to keep the drugs from falling out. Appellee/Cross-Appellant also told the CI that if he had gotten there earlier, the two of them could have made more sales on top of the four kilos that Appellee/Cross-Appellant had agreed to buy.

After Appellee/Cross-Appellant tested the drugs and negotiated his price, he and the CI decided to meet at a local Super 8 hotel. The CI then immediately called Mark Apple (a DEA task-force agent), while he was driving to the hotel. Shortly after the CI arrived at the hotel, Appellee/Cross-Appellant called CI to say that he was on his way. Later, the CI called Appellee/Cross-Appellant and told him to come to Room 105.

A video camera set up by the DEA recorded the following events: Appellee/Cross-Appellant entered the Super 8 hotel room and asked if the drugs were there. Appellee/Cross-Appellant then went straight into the bathroom to look for them. Appellee/Cross-Appellant got upset and began swearing because the CI did not have the drugs with him at that point in time. The CI testified that Appellee/Cross-Appellant became agitated and was upset that the CI wanted to see the money before the CI sold the drugs to Appellee/Cross-Appellant.

Appellee/Cross-Appellant then left the hotel room and later returned with \$58,000. The CI then called an officer, who was posing as a truck driver and who possessed the drugs, to bring in the two kilos to the hotel room because Appellee/Cross-Appellant only had enough money for two kilos. While they were waiting, Appellee/Cross-Appellant said that if everything was good with the two kilos that he was buying, he would buy ten more kilos. The CI then told Appellee/Cross-Appellant that he did not know how to work the money-counting machine, so Appellee/Cross-Appellant helped the CI count the \$58,000. The undercover officer then entered the hotel room with Exhibit 13 (the "drug involved"), which was inside a compartment in Exhibit 3 (a mock kilo) and Exhibit 4 (another mock kilo with a hidden tracking device inside). Appellee/Cross-Appellant quickly took the two bricks from the truck driver/agent and then walked away.

Appellee/Cross-Appellant was immediately arrested. The "drug involved" that Appellee/Cross-Appellant purchased was then scientifically tested and confirmed to be "a compound, mixture, preparation, or substance containing cocaine." Later, the analyst who had originally tested the "drug involved" left BCI for another job and was no longer at BCI when subpoenas were served. He was, thus, unavailable to testify at trial. In response to this, the State

had the “drug involved” retested and provided the new lab results to Appellee/Cross-Appellant. The test results remained the same.

At that point, Appellee/Cross-Appellant knew that the “drug involved” had been tested by BCI **twice**. From those lab tests, Appellee/Cross-Appellant knew that the “drug involved” was “a compound, mixture, preparation, or substance containing cocaine” and that its total weight exceeded 100 grams. Yet, in an abundance of caution, the trial court excluded the second BCI lab report and its author from testifying at trial pursuant to Crim.R. 16(K) because the prosecution had not provided the second lab report more than 21 days before trial. With the exclusion of the expert witness and the second BCI report, the State used federal, state, and local law enforcement agents, as well as the CI (who was a previous drug user and dealer) to confirm that the “drug involved” in the offense contained cocaine.

At the conclusion of the trial, the jury found Appellee/Cross-Appellant guilty of Possession of Drugs, in violation of 2925.11(A) and (C)(4)(f), a felony of the first degree. The jury also found that the amount of the “drug involved” that contained “cocaine or a compound, mixture, preparation, or substance containing cocaine” exceeded 100 grams. The trial court, therefore, found Appellee/Cross-Appellant to be a Major Drug Offender under R.C. 2925.11(C)(4)(f) and sentenced him to a mandatory maximum 11-year prison sentence.

LAW AND ARGUMENT

COUNTER-PROPOSITION OF LAW NO. 1: The trial court did not abuse its discretion when it allowed the State to amend the bill of particulars at trial.

The State will preface this response by first stating that a bill of particulars is not necessary in this case because open file discovery was provided. Appellee/Cross-Appellant, in his first proposition of law, asserts that the bill of particulars was incorrectly amended. He also ignores that his actions in the Meijer Parking lot in Northwood, Ohio, were a part of a continuing course of conduct. The events that led up to the sale of the controlled substance containing cocaine are part of a course of conduct and may be used as evidence against Appellee/Cross-Appellant. This issue is not error for three reasons, as will be explained below. Finally, Appellee/Cross-Appellant suggests that *State v. Nickel*, 6th Dist. Ottawa No. OT-09-001, 2009-Ohio-5996, which concerns issues related to faulty indictments, controls. It doesn't.

A. Open file discovery was provided; Appellant, therefore, was on notice of the charges against him; thus, a bill of particulars was not required.

In this case, Appellee/Cross-Appellant was provided with open file discovery, and courts have held that when the State provides open file discovery, as it did in this case, a bill of particulars is not required. *See, e.g., State v. Renfoe*, 6th Dist. Lucas No. L-12-1146, 2013-Ohio-5179, ¶ 25, citing *State v. Evans*, 2nd Dist. Montgomery No. 20794, 2006-Ohio-1425, ¶ 24. Courts have also held that the State's failure to produce the requested bill of particulars amounts to harmless error. *See, e.g., State v. Renfoe*, 6th Dist. Lucas No. L-12-1146, 2013-Ohio-5179, ¶ 25. Here, a bill of particulars—while unnecessary—was produced. With that being said, the following two ideas are also true.

B. A bill of particulars is amendable at any time, including at trial.

Ohio Criminal Rule 7(E) contains the controlling language for a bill of particulars:

Bill of particulars: When the defendant makes a written request within twenty-one days after arraignment but not later than seven days before trial, or upon court order, the prosecuting attorney shall furnish the defendant with a bill of particulars setting up specifically the nature of the offense charge and of the conduct of the defendant alleged to constitute the offense. A bill of particulars may be amended at any time subject to such conditions as justice requires.

Crim. R. 7(D), similarly, allows for the amendment of a charging instrument “before, during, or after a trial” provided that “no change is made in the name or identity of the crime charged.” *See State v. Brown*, 99 Ohio App. 3d 604, 610, 651 N.E.2d 470, (10th Dist. 1994). The Sixth District found that to be applicable in this case. *State v. Gonzales*, 6th Dist. Wood No. WD-13-086, 2015-Ohio-461, ¶ 55-56.

C. Appellee/Cross-Appellant participated in a continuing course of conduct.

Appellee/Cross-Appellant first argues that there is no substantial nexus between the Meijer parking lot in Northwood, Ohio, and the Super 8 Hotel in Millbury, Ohio. The State and the trial court contend that the taste test and reverse buy were part of the same continuing course of criminal conduct that the Appellee/Cross-Appellant was involved in purchasing a controlled substance containing cocaine.

The types of evidence that show a continuing course of criminal conduct, as it relates to venue, are discussed in R.C. 2901.12(H), which states:

any of the following is prima-facie evidence of a course of criminal conduct:

- (1) The offenses involved the same victim, or victims of the same type or from the same group.
- (2) The offenses were committed by the offender in the offender’s same employment, or capacity, or relationship to another.
- (3) The offenses were committed as part of the same transaction or chain of events, or in furtherance of the same purpose or objective.

- (4) The offenses were committed in furtherance of the same conspiracy.
- (5) The offenses involved the same or a similar modus operandi.
- (6) The offenses were committed along the offender's line of travel in this state, regardless of the offender's point of origin or destination.

“This court has already concluded that evidence that a defendant is in the business of selling drugs is prima facie evidence that the sales are part of a course of criminal conduct.” *State v. Warden*, 6th Dist. Wood No. WD-03-065, 2004-Ohio-6306, citing *State v. Hackworth*, 80 Ohio App.3d 362, 367, 609 N.E.2d 228 (6th Dist. 1992). See *State v. Schnoering*, 9th Dist. App. Lorain No. 95CA006044, 1995 Ohio App. LEXIS 5075 (Nov. 15, 1995).

The above law and excerpts from the trial transcript put the issue of continuing course of criminal conduct into perspective; even though, venue is not an issue here. The same approach applies. Crime moves. And the law moves with it. See *Crouch v. State*, 37 Ohio App. 366, 369, 174 N.E.799 (6th Dist. 1930).

Agent Apple testified about the importance of the first step of the transaction, the taste test in the Meijer parking lot: “We wanted to show him an actual kilogram of cocaine so he could take a look at it, so [Appellee/Cross-Appellant] could take a look at it, and open it if he wanted to so he would have a good idea of what he was looking at.” Trial Transcript November 6, 2013, at 64. It is a part of the ongoing transaction. *Id.* The agents allowed the Appellee/Cross-Appellant to try the drug, feel comfortable with the confidential informant (for everyone's safety), and to establish a rapport. Apple indicated that it was important for Appellee/Cross-Appellant because he wanted to “see the quality of the cocaine” *Id.* at 65. The logic of R.C. 2901.12(H)(3) can be applied to the case here. Appellee/Cross-Appellant had one objective. Appellee/Cross-Appellant and the CI made one drug transaction. Tasting it was a necessary step to buying it.

Compare State v. Hackworth, 80 Ohio App. 3d 362, 609 N.E.2d 228, (6th Dist. 1992) (“We believe that the dichotomy asserted by appellant, between ‘mere preparation’ and the full completion of an element of the crime, is an artful distinction not present in either statutory law or case law.”) Time and geography should not preclude inclusion of step one of a two-step transaction.

COUNTER-PROPOSITION OF LAW NO. 2: This Court has held that a lay witness may identify a controlled substance.

A. No scientific testimony is required to identify a controlled substance.

Appellee/Cross-Appellant’s second argument is that scientific testimony is required in this case to identify the controlled substance. Ohio Law, however, does not require scientific testimony to identify a controlled substance. Here, the State used multiple DEA agents and an experienced drug user and dealer to identify the drug that Appellee/Cross-Appellant possessed.

Law enforcement officers, drug addicts, and other lay individuals can identify a controlled substance. “A layperson can provide opinion testimony regarding the identity of controlled substances provided the opinion is based upon a sufficient foundation of experience and knowledge of the substance at issue.” *State v. Koval*, 12th Dist. Warren No. CA2005-06-083, 2006-Ohio-5377 at ¶ 61, citing *State v. Foti*, 11th Dist. No. 2001-L-020, 2003-Ohio-796, ¶ 51. And though the State often has a crime lab test substances that it believes to be a controlled substance, it is not needed. “The state is not required to present expert scientific testimony to establish that a substance is in fact a controlled substance.” *State v. Singleton*, 11th Dist. Lake No. 2002-L-077, 2004-Ohio-1517, ¶ 22. The same holds true here, as the Sixth District found. *State v. Gonzales*, 6th Dist. Wood No. WD-13-086, 2015-Ohio-461, ¶ 31-32.

B. A controlled substance may be identified by drug addicts or dealers, law enforcement officers, and other lay individuals.

A controlled substance may be identified in many ways without the need for scientific testing. This Court has held that “[t]he experience and knowledge of a drug user lay witness can establish his or her competence to express an opinion on the identity of a controlled substance if a foundation for this testimony is first established.” *State v. McKee*, 91 Ohio St. 3d 292, 744 N.E.2d 737 (2001) at paragraph one of the syllabus. Here, the confidential informant was a previous cocaine user and dealer. Trial Transcript November 5, 2013, 141. And he identified the substance at issue here as containing cocaine. *Id.* at 155, 157. Specifically, he saw and smelled Exhibit 13, identifying it as containing cocaine. *Id.* at 158.

A controlled substance can also be identified by agents specifically trained in drug enforcement, as a result of their experience. “A rational trier of fact could find that the officer sufficiently describe as crack cocaine . . . the officer’s long experience in drug interdiction led him to believe that the object had a color similar to that of crack cocaine.” *State v. Thompkins*, 8th Dist. Cuyahoga No. 92575, 2010-Ohio-151, ¶ 6. Mark Denomy, a fifteen year DEA taskforce veteran, Kip Lewton, a seventeen year DEA taskforce veteran, and Mark Apple, a sixteen year DEA taskforce veteran all identified the substance that Appellee/Cross-Appellant possessed as containing cocaine. Trial Transcript November 5, 2013, 188, and Trial Transcript November 6, 2013, 27, 51-52. In *Thompkins*, the officer merely identified crack cocaine by sight, yet the appellate court found that he sufficiently identified the substance. *Thompkins*, at ¶ 6. Here, the agents in this case identified the substance containing cocaine that Appellee/Cross-Appellant possessed by sight and smell. And a rational trier of fact could conclude that they sufficiently identified the presence of cocaine in that substance.

In that vein, Appellee/Cross-Appellant advocates that this Court should adopt the viewpoint of the North Carolina Supreme Court in *North Carolina v. Llamas-Hernandez*, 363

N.C. 8, 673 S.E.2d 658 (2009) that holds opposite of the clear law in Ohio. *Llamas-Hernandez* has not been followed in any other state for a reason. The State would, therefore, advocate that this Court continue to follow its precedent found in the holding of *State v. McKee*, 91 Ohio St.3d 292, 744 N.E.2d 737 (2001), at paragraph one of the syllabus.

COUNTER-PROPOSITION OF LAW NO. 3: The trial court did not abuse its discretion when it denied Appellant's request for an additional jury instruction concerning the definition of cocaine.

The crux of Appellee/Cross-Appellant's third proposition is that the court erred when it did not include the definition of cocaine from R.C. 2925.01(X) in the jury instructions. This argument fails for a number of reasons. To start, the trial court felt that the definitions in R.C. 2925.11(C)(4) sufficiently covered the definition of cocaine needed by the jury in this case. Trial Transcript from November 6, 2013 at pages 96-97. This was a direct reaction to Appellee/Cross-Appellant raising R.C. 2925.01(X) as it related to the weight of the cocaine and its purity, not its component ingredients. Trial Transcript from November 6, 2013 at pages 82-86. Additionally, courts have utilized a quite broad abuse of discretion standard in determining whether not giving a definition in jury instructions was reversible error.

Courts have broad discretion when it comes to what constitutes evidence and jury instructions. *State v. Sanders*, 92 Ohio St. 3d 245, 259, 750 N.E. 90 (2001); *See State v. Hymore*, 9 Ohio St. 2d 122, 128, 224 N.E.2d 126 (1967); *State v. Joseph*, 73 Ohio St. 3d 450, 460, 653 N.E.2d 285 (1995). The trial court judge must also select and modify jury instructions to fit the particular facts of each case. *Cleveland v. Buckley*, 67 Ohio App. 3d 799, 809, 588 N.E.2d 912 (8th Dist. 1990). Here, the court was trying to tailor and select the best jury instructions for a fair jury deliberation, and it decided to exclude the definition of cocaine found in RC 2925.01(X).

The standard that the Sixth District has consistently employed is as follows:

Generally, requested jury instructions should be given if they are a correct statement of the law as applied to the facts in a given case. *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 575 N.E.2d 828. A court's instructions to a jury "should be addressed to the actual issues in the case as posited by the evidence and the pleadings." *State v. Guster* (1981), 66 Ohio St.2d 266, 271, 421 N.E.2d 157. Prejudicial error is found where, in a criminal case, a court refuses to give an instruction that is pertinent to the case, states the law correctly, and is not covered by the general charge. *State v. Sneed* (1992), 63 Ohio St.3d 3, 9, 584 N.E.2d 1160. We review the trial court's decision to refuse the requested jury instructions for an abuse of discretion. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443.

State v. Lillo, 6th Dist. Huron No. H-10-001, 2010-Ohio-6221, ¶ 15.

Other courts follow a similar standard, for example, the Eighth District utilizes the following rule:

As a general rule, jury instructions are reviewed in their entirety to determine if they contain prejudicial error. *State v. Fields* (1984), 13 Ohio App.3d 433, 13 OBR 521, 469 N.E.2d 939, paragraph one of the syllabus. The court retains discretion to use its own language to communicate legal principles. *State v. Scott* (1987), 41 Ohio App.3d 313, 535 N.E.2d 379, paragraph one of the syllabus; *State v. Nelson* (1973), 36 Ohio St.2d 79, 65 O.O.2d 222, 303 N.E.2d 865, paragraph one of the syllabus. The language of the court's instruction cannot be directed by a general rule, but must be decided upon the particular facts of the case by the exercise of sound discretion. See *State v. Guster* (1981), 66 Ohio St.2d 266, 271, 20 O.O.3d 249, 252, 421 N.E.2d 157, 160. Thus, this court will not reverse unless an instruction is so prejudicial that it may induce an erroneous verdict. See *Wilson v. Dixon* (Mar. 29, 1990), Cuyahoga App. No. 56788, unreported, at 4, 1990 WL 37398.

Parma Heights v. Jaros, 69 Ohio App.3d 623, 630, 591 N.E.2d 726 (8th Dist. 1990).

That standard, furthermore, has been followed by a number of courts including the Third and Fourth Districts. *State v. Jacobs*, 3rd Dist. Hancock No. 5-99-17, 1999-Ohio-899; *State v. Stephenson*, 4th Dist. Adams No. 12CA936, 2013-Ohio-771, ¶ 22. And faced with this exact

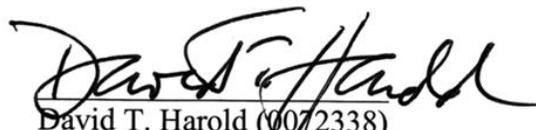
statute—though defense counsel in the case about to be cited did not object to the definition of cocaine at trial—the Ninth District held that it was not error to exclude the definition of cocaine found in R.C. 2925.01(X) from the jury instructions because the testimony at trial by the State’s witnesses rendered the definition duplicative and unneeded. *State v. Pitts*, 9th Dist. Summit No. 20976, 2002-Ohio-6291, ¶ 51-65. In this case, the Sixth District referred to the definition as “superfluous”. *State v. Gonzales*, 6th Dist. Wood No. WD-13-086, 2015-Ohio-461, ¶ 36.

As stated above, no less than six knowledgeable individuals testified that the substance at issue here contained cocaine. And Appellee/Cross-Appellant only quibbles about the weight and purity, not component chemical ingredients that comprised the substance containing cocaine. The rationale of both the trial and appellate court, therefore, is sound since the issue was better covered by R.C. 2925.11(C)(4) rather than R.C. 2925.01(X). This Court should hold likewise. Despite the Appellee/Cross-Appellant’s wish, the trial court did not abuse its discretion by keeping Appellee/Cross-Appellant’s chosen definition of cocaine out of the instructions to the jury. That decision was for the court to make, and it did not abuse its discretion in making the decision that it did.

CONCLUSION

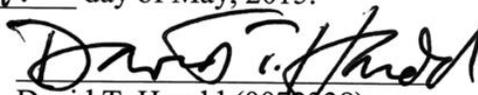
This cross-appeal presents no circumstances justifying the modification of or departure from this Court’s prior precedents. There is no substantial constitutional question or matter of general or great public interest, and this Court should decline to exercise its discretionary jurisdiction to review Appellee/Cross-Appellant’s cross-appeal in this case.

Respectfully submitted,


David T. Harold (0072338)
Assistant Prosecuting Attorney

CERTIFICATION

The undersigned counsel certifies that a true and accurate copy of this memorandum in opposition of jurisdiction was served via regular U.S. Mail to counsel for Defendant-Appellee/Cross-Appellant, Attorney Andrew R. Mayle, Mayle, Ray & Mayle LLC, 210 South Front Street, Fremont, Ohio 43420, on this 11th day of May, 2015.



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