[Cite as *State v. Boyd*, 2016-Ohio-8560.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 15 BE 0032
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
THOMAS JESSIE BOYD, JR.	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Belmont County, Ohio Case No. 13-CR-091
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellee:	Atty. Daniel P. Fry Belmont County Prosecutor 147-A West Main Street St. Clairsville, Ohio 43950 No Brief Filed
For Defendant-Appellant:	Atty. John M. Jurco P.O. Box 783 St. Clairsville, Ohio 43950
JUDGES:	
Hon. Cheryl L. Waite Hon. Gene Donofrio Hon. Mary DeGenaro	
	Dated: December 30, 2016

[Cite as *State v. Boyd*, 2016-Ohio-8560.]
WAITE, J.

{¶1} Appellant Thomas Jessie Boyd, Jr. appeals both his convictions and sentencing of April 29, 2015 in the Belmont County Common Pleas Court. Appellant contends that his trial counsel was ineffective for using a peremptory challenge instead of a challenge for cause regarding a juror and for failing to object to comments made by the prosecutor during closing arguments. Appellant also claims that the prosecutor's comments amounted to plain error. Appellant next argues the trial court erred in denying his motion for directed verdict and his motion to dismiss. Finally, Appellant contends that the trial court erroneously ordered his sentence to run consecutively to a sentence he was ordered to serve in West Virginia. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} The Belmont County Drug Task Force arrested a man who agreed to become a confidential informant. The informant provided Officer Jerry Delman with Appellant's name and photograph and claimed that he had previously purchased heroin from him. Officer Delman and the informant arranged a controlled buy.

{¶3} On January 23, 2013, the informant called Appellant and arranged a heroin buy. He agreed to pick up Appellant at Wheeling Downs Casino in West Virginia ("Wheeling Downs") and bring him to the Bridgeport Autozone store where the transaction would occur. Before the informant left to pick up Appellant, Officer Delman searched him and his car and placed a small fob as a recording device

inside the car. The informant then drove to Wheeling Downs and picked up Appellant.

{¶4} According to the informant's testimony, when they arrived at the Autozone, he entered the store, leaving Appellant in the car. Officer Delman was waiting inside. While inside, Appellant approached Officer Delman who handed him $1,625. The informant took the money to the car where he and Appellant counted it. The informant then carried four bricks and several bundles of heroin inside and handed them to Officer Delman. The informant left the store and drove Appellant back to Wheeling Downs with a second officer, Officer West, following.

{¶5} Officer Delman testified that he could not immediately arrest Appellant, because it would have exposed his informant. A second control buy was discussed; however, Appellant learned that the informant had been working with the police. Consequently, the informant was moved to another location.

{¶6} On March 1, 2013, Officer Delman, along with the Ohio Valley Drug Task Force, arrested Appellant at Wheeling Downs. At the time of his arrest, Appellant had two bricks of heroin on his person. He was eventually convicted of possession by a West Virginia court and sentenced to one to fifteen years of incarceration. In Belmont County, Appellant was indicted by a Grand Jury on one count of trafficking in drugs, a felony of the second degree, in violation of R.C. 2925.03 (A)(1), (C)(6)(e). In July of 2013, Appellant failed to attend a status conference and the trial court issued a bench warrant. In March of 2014, Appellant was found and arrested in Pittsburgh. Following jury trial, Appellant was convicted of

the sole charge that he faced. The trial court sentenced him to six years of incarceration, with credit for 165 days served. The sentence was ordered to run consecutively to the sentence he received in West Virginia. The trial court also imposed three years of postrelease control. This timely appeal followed. We note that the state failed to file a response brief.

ASSIGNMENT OF ERROR NO. 1

Trial counsel provided ineffective assistance of counsel because:

(A) He used peremptory strikes rather than motions to strike for cause on two jurors who did not appreciate the appellant's Fifth Amendment right to remain silent.

(B) He did not object to the prosecution's credibility comments about a State witness in closing argument.

ASSIGNMENT OF ERROR NO. 2

The prosecution's closing- [sic] argument comments vouching the credibility of the State's witness, Richard William Lund, were plain error.

{¶7} As Appellant's first two assignments of error share certain law and facts, they will be addressed together.

Peremptory Challenge

{¶8} During *voir dire,* Appellant asserts that two jurors expressed problems with a scenario where a defendant would make a decision not to testify. Appellant correctly states that a jury is not permitted to consider or speculate as to why a

defendant exercises his right to not testify. While these jurors were ultimately excused, Appellant argues that they should have been removed using a challenge for cause, not a peremptory challenge. As defense counsel had the jurors excused through peremptory challenges, Appellant concludes that his counsel was ineffective.

{¶9} The test for an ineffective assistance of counsel claim is two-part: whether trial counsel's performance was deficient and, if so, whether the deficiency resulted in prejudice. *State v. White*, 7th Dist. No. 13 JE 33, 2014-Ohio-4153, ¶ 18, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶ 107. In order to demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Lyons*, 7th Dist. No. 14 BE 28, 2015-Ohio-3325, ¶ 11, citing *Strickland* at 694. In Ohio, attorneys are given wide latitude and we will not second-guess any tactical decisions.

{¶10} According to the Ohio Supreme Court, "good cause exists for the removal of a prospective juror when 'he discloses by his answers that he cannot be a fair and impartial juror or will not follow the law as given to him by the court.' " *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 94, reconsideration denied, 139 Ohio St.3d 1420, 2014-Ohio-2487, 10 N.E.3d 739, ¶ 94 (2014), and cert. denied, 135 S.Ct. 1400, 191 L.Ed.2d 372 (2015).

{¶11} At *voir dire,* the first juror at issue stated:

> I prefer to see someone's eyes and facial expression, body movements, you know, like the accused, when they are asked a specific question, you know, to use that in my judgment as to whether or not they are telling the truth or not, you know; but I can still rely upon it, the information I get from the prosecution and the defense, you know, but I prefer to see someone's eyes when they are talking to me.

(4/14/15 Trial Tr. Vol. I, pp. 59-60.)

{¶12} As to the second juror, the following colloquy between the juror and defense counsel occurred.

> [The Juror]: I can accept if he doesn't want to testify. I wonder why.
>
> [Counsel]: You say you would wonder why. Why would you wonder why if doesn't have to.
>
> [The Juror]: Why would he not tell his side of the story? I mean, I can accept that he wouldn't want to.
>
> [Counsel]: Would you still, though, have questions in your mind why he is not taking the stand as to is he trying to hide something or is he guilty of something?
>
> [The Juror]: Yes, there would probably be questions there, but I guess that's your job to answer those questions.

[Counsel]: Okay. But, again, you understand the defendant does not have to take the witness stand.

[The Juror]: I understand that, yes.

(4/14/15 Trial Tr. Vol. I, pp. 60-61.)

{¶13} Both jurors were dismissed pursuant to a peremptory challenge. Trial counsel's decision to strike a juror using a peremptory challenge instead of a motion for cause can be a tactical decision that falls "within the range of professionally reasonable judgments." *State v. Jones,* 91 Ohio St.3d 335, 354, 744 N.E.2d 1163 (2001), citing *Strickland* at 699. Appellant is unable to meet the first *Strickland* prong. Moreover, Appellant has not argued or shown prejudice and it is apparent from this record Appellant suffered no prejudice. Thus, he also fails to satisfy the second *Strickland* prong.

Prosecutor's Comments

{¶14} Appellant contends that the prosecutor improperly vouched for the informant's credibility. Appellant concedes that his trial counsel failed to object to the comments at issue and argues that his counsel was also ineffective for this reason. Further, as witness credibility is an issue exclusively reserved for the jury, Appellant argues that the prosecutor's comments amount to plain error.

{¶15} When reviewing a claim of prosecutorial misconduct in closing arguments, we must first determine whether the remarks were proper. *State v. Peeples*, 7th Dist. No. 07 MA 212, 2009-Ohio-1198, ¶ 74, citing *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). If the remarks appear improper, we must

then determine whether they prejudicially affected the defendant's substantial rights. *Id.*

{¶16} As previously stated, a *Strickland* analysis is used to review an ineffective assistance of counsel claim. Appellant claims that his trial counsel failed to object to the following comment by the prosecutor in his closing argument:

> I will, however, dispute what the defense says when it comes to [the informant] and his drug addiction or any other individuals with a drug addiction. He called them liars and drug addicts. It's not really the case and that's not been proven here today in court despite the efforts of the defense. Merely because the person has become an addict doesn't necessarily make the person a liar and there's been nothing that this jury can rely upon to shake the veracity of [the informant]. I think he was very honest, he was brutally honest. He told you about his addiction, he told you why he did what he did and he also told you, as well as Officer Delman, of his successes as far as being a confidential informant in Pittsburgh.
>
> We also heard, though, maybe even more importantly, we also heard about his life's successes, the fact that, I think he had mentioned he knew to the day, 585, I think is what he said, days that he had been clean, he knew the last time he stuck something in his arm, he knew the last time he put an Adderall in his mouth.

(Trial Tr. Vol. III, pp. 492-493.)

{¶17} As Appellant concedes, his counsel did not object to the statement and he is limited to a plain error review. To determine whether plain error exists, a three-part test is employed. *State v. Parker*, 7th Dist. No. 13 MA 161, 2015-Ohio-4101, ¶ 12, citing *State v. Billman*, 7th Dist. Nos. 12 MO 3, 12 MO 5, 2013-Ohio-5774, ¶ 25; *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). "First, there must be an error, *i.e.* a deviation from a legal rule. Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. Third, the error must have affected 'substantial rights.' " *Parker* at ¶ 12, citing *Billman, supra.*

{¶18} Appellant contends that the prosecutor improperly vouched for the informant's credibility. Appellant urges that the comments were prejudicial because the informant was the state's key witness, so his credibility was a significant issue. Similar comments by a prosecutor are not improper under Ohio law when made in response to defense counsel's attacks on a witness' credibility and refer to facts in evidence that tend to make the witness more credible. *State v. Jackson,* 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 20, citing *State v. Green*, 90 Ohio St.3d 352, 738 N.E.2d 1208 (2000). See also *State v. Woods,* 7th Dist. No. 13 MA 81, 2015-Ohio-3950 (while a prosecutor may not state his own personal beliefs regarding a witness' credibility, he may state his opinion if it is based on the evidence presented at trial); *Peoples, supra,* ¶ 77 ("[i]mproper vouching does not occur unless the prosecutor implies knowledge of facts outside the record or places the prosecutor's personal credibility at issue.")

{¶19} The record demonstrates here that the prosecutor's comments were in response to defense counsel's attacks on the informant's credibility. During the informant's cross-examination, defense counsel asked him "[y]ou are a cheater, aren't you?" (4/14/15 Trial Tr. Vol. III, p. 431.) Defense counsel called him a cheater three times during cross-examination and repeatedly referred to him as an addict. Additionally, defense counsel questioned the informant's honesty and credibility in both his opening and closing statements. The record clearly reflects that the prosecutor's comments, here, were in response to the defense counsel's statements, which called the informant's credibility into question.

{¶20} Importantly, the prosecutor's comments also refer to facts in evidence that tended to make the informant more credible. The prosecutor stated in closing that "there's been nothing that this jury can rely upon to shake the veracity of [the informant]." (4/14/15 Trial Tr. Vol. III, p. 493.) For instance, the prosecutor reminded the jury that the informant "told you about his addiction, he told you why he did what he did and he also told you, as well as Officer Delman, of his successes as far as being a confidential informant in Pittsburgh." *Id.* The prosecutor said, "[w]e also heard, though, maybe even more importantly, we also heard about his life's successes, the fact that, I think he had mentioned he knew to the day, 585, I think is what he said, days that he had been clean." *Id.* Both of these statements are supported by facts found in the record and tended to make the informant more credible.

{¶21} As the prosecutor's comments were in response to defense counsel's attacks on the witness and are supported by facts within the record, the prosecutor did not improperly vouch for the witness' credibility and they do not amount to plain error. As the comments were appropriate, Appellant's trial counsel was not ineffective for failing to object. Accordingly, Appellant's first and second assignments of error are without merit and are overruled.

ASSIGNMENT OF ERROR NO. 3

> The trial court erred in overruling the appellant-defendant, Thomas Jessie Boyd, Jr.'s motion to dismiss.

{¶22} Appellant contends that the trial court erroneously denied his motion to dismiss based on several arguments regarding the term "unit doses." R.C. 2925.03(C)(6)(d) provides that:

> Except as otherwise provided in this division, 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, trafficking in heroin is a felony of the third degree, and there is a presumption for a prison term for the offense.

{¶23} R.C. 2925.03(C)(6)(e) provides that:

> Except as otherwise provided in this division, 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, trafficking in 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.

{¶24} Appellant first argues that what constitutes a unit dose is not readily apparent from the language of R.C. 2925.01(E). Hence, he argues the statute is unconstitutionally vague. Appellant focuses his argument on the phrase "separately administered to or taken by an individual." Appellant interprets this phrase to mean that the definition of a unit dose depends on the individual user, as some users only take one stamp bag while others take several. In support of his argument, Appellant cites to *State v. Stone,* 12th Dist. No. CA83-11-089, 1989 WL 3347 (June 11, 1984) and contends that *Stone* established that LSD users typically take one tablet, so one tablet constitutes a unit dose. Appellant contrasts this with his own case to argue that a heroin user often takes more than one stamp bag, thus one stamp bag is not a "unit dose" of heroin.

{¶25} Appellant appears confused about the relevance of *Stone*. The issue in *Stone* was not whether a unit dose depends on how much a user typically ingests. Instead, the issue was whether fragments or crumbles of an LSD tablet could be pieced together to constitute a unit dose. *Stone* at *2. Regardless, more recent caselaw from the Eighth and Ninth Districts have held that the amount a user consumes is irrelevant to the unit dose determination. See also *State v. Walker,* 8th Dist. No. 68927, 1996 WL 100963 (March 7, 1996) (thirty rocks of crack cocaine amount to thirty unit doses as each rock has the ability to be smoked separately regardless of how many rocks a user consumes); *State v. Woods,* 8th Dist. No.

60585, 1992 WL 146833, *4 (June 25, 1992) ("the amount an individual actually uses to produce the desired effect is totally irrelevant to the unit dose determination."); *State v. McCoy,* 63 Ohio App.3d 644, 579 N.E.2d 756 (9th Dist.1989) ("[b]ecause some users may choose to smoke more than one rock or piece of cocaine does not mean that one rock or piece is not sufficient to constitute a unit dose.").

{¶26} Additionally, the Eighth District has held that as there is no guesswork required to determine what constitutes one unit dose of heroin, R.C. 2925.01(E) is not unconstitutionally vague. *State v. Payne,* 8th Dist. No. 86280, 2006-Ohio-3005, ¶ 10. The Court reasoned that the prohibited quantity is specifically stated within the statute. *Id.* at ¶ 11. The Court also noted that the appellant failed to make any argument demonstrating arbitrary enforcement or heavier punishment as a member of a particular class. Other than his mere assertion, Appellant in this matter similarly fails to raise this argument.

{¶27} Appellant also claims that R.C. 2925.03 is unconstitutional, as it gives the state great discretion to either charge a defendant with a second-degree felony (if the amount of drugs involved is more than one hundred but less than five hundred unit doses) or a third-degree felony (if the total amount of drugs involved is more than five but less than ten grams). In this case, Appellant claims that he could have been charged with either a second-degree felony (because there were 247 unit doses involved) or a third-degree felony (as the total weight of drugs amounted to 7.2 grams).

{¶28} A similar argument was advanced in *State v. Stoffer,* 8th Dist. No. 26269, 2015-Ohio-352. In *Stoffer,* the Court held that "the existence of prosecutorial discretion concerning which offense to charge when two statutes prohibit the same conduct is not unconstitutional unless [the] defendant demonstrates such discretion is exercised to impermissibly discriminate against a particular class of persons to which he belongs." *Id.* at ¶ 19. Here, Appellant, again other than by his mere assertion, makes no argument that he belongs to a class that has been impermissibly discriminated against in regard to the statute.

{¶29} Appellant's argument relies in part on the witness evidence presented at trial. He claims that the witnesses against him were not credible. However, a motion to dismiss is filed prior to trial and is not the proper mechanism to challenge the sufficiency of the evidence adduced at trial. *State v. Stanley,* 7th Dist. No. 03 CO 41, 2004-Ohio-3040, ¶ 19. Rather, a pretrial motion to dismiss "tests the sufficiency of the indictment, without regard to the quantity or quality of evidence that may be produced by either the state or the defendant." *State v. Lawson,* 7th Dist. No. 12 MA 194, 2014-Ohio-879, ¶ 26, citing *State v. Patterson,* 63 Ohio App.3d 91, 95, 577 N.E.2d 1165 (2d Dist.1989).

{¶30} Regardless, Appellant's argument flies in the face of the facts in this record. Although there was some confusion at the hearing on his motion to dismiss, Appellant was charged with the sale of 247 stamp bags (unit doses). He could properly be charged with a second-degree felony pursuant to R.C. 2925.03(C)(6)(e). Appellant argues that he should have been charged with a third-degree felony

because the total weight of the stamp bags was 7.2 grams. The facts, however, reveal that the total weight of the 247 stamp bags was 59.097 grams, which is a second-degree felony.

{¶31} Michelle Taylor, an Ohio Bureau of Criminal Investigations ("BCI") specialist, testified that she received 247 stamp bags for testing. (4/14/15 Trial Tr. Vol. II, p. 204.) She testified that it is BCI protocol to use the "hypergeometric sampling" method, which involves testing a sample percentage of the whole, in this case 27 stamp bags. *Id.* at 204. Taylor testified that she weighed the 27 bags, which amounted to 7.2 grams, and divided that amount by 27 to obtain the approximate weight of each stamp bag. *Id.* She then multiplied that weight by 247 to obtain the approximate weight of the entire population: all 247 bags. This totaled 59.097 grams. *Id.* Consequently, Appellant could not have been charged with a third-degree felony. Pursuant to R.C. 2925.03(C)(6)(d), this amount can only be charged as a second-degree felony.

{¶32} Finally, Appellant argues that Taylor never characterized the stamp bags as unit doses in her testimony. Again, this argument relies on evidence presented at trial and is irrelevant to his pretrial motion to dismiss. Nevertheless, pursuant to R.C. 2925.01(E), " 'Unit dose' means an amount or unit of a compound, mixture, or preparation containing a controlled substance that is separately identifiable and in a form that indicates that it is the amount or unit by which the controlled substance is separately administered to or taken by an individual." The Fifth District previously addressed a similar argument and held that a jury could have

reasonably concluded that each piece of cocaine amounted to a separate unit dose even though the state did not present an expert witness to provide such testimony. *State v. Holden,* 5th Dist. No. CA9558, 1994 WL 369972, *2 (July 11, 1994). It would not, then, be fatal to the state's case if Taylor had never used the term "unit dose." This record reflects that Taylor referred to the stamp bags as "units" on at least two occasions within her testimony. (4/14/15 Trial Tr., pp. 234, 237.)

{¶33} Based on the language of R.C. 2925.01(E) and the above-cited cases, Appellant's third assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 4

> The trial court erred in denying the appellant-defendant, Thomas Jessie Boyd, Jr.'s motion for directed verdict because of insufficiency of evidence to convict him and because the conviction was against the manifest weight of the evidence.

{¶34} In relevant part, Crim.R. 29(A) states:

> The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses.

{¶35} Sufficiency of the evidence involves a legal question that addresses adequacy. *State v. Pepin–McCaffrey*, 186 Ohio App.3d 548, 2010-Ohio-617, 929 N.E.2d 476 ¶ 49 (7th Dist.), citing *Thompkins*, *supra*, at 386, 678 N.E.2d 541.

"Sufficiency is a term of art meaning that legal standard which is applied to determine whether a case may go to the jury or whether evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Draper*, 7th Dist. No. 07 JE 45, 2009-Ohio-1023, ¶ 14, citing *State v. Robinson*, 162 Ohio St. 486, 124 N.E.2d 148 (1955). An appellate court does not determine "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Rucci*, 7th Dist. No. 13 MA 34, 2015-Ohio-1882, ¶ 14, citing *State v. Merritt*, 7th Dist. No. 09-JE-26, 2011-Ohio-1468, ¶ 34. In other words, did the state present evidence of every element of the charged crime that, if believed, supports conviction.

{¶36} Appellant solely contests the quantity of heroin and does not address any other element. Appellant argues that the state presented insufficient evidence to support his convictions because Taylor, the chemist, failed to test all 247 stamp bags to determine if they contained heroin, and because the state failed to prove that each stamp bag was a unit dose. We have already determined that Appellant's arguments regarding "unit dose" fail. As to BCI's failure to test all 247 stamp bags, Appellant attempts to distinguish his case from *State v. Gartell,* 3d Dist. No. 9-14-02, 2014-Ohio-5203, 24 N.E.3d 680. Appellant argues that unlike the BCI chemist in *Gartell,* Taylor failed to testify that the stamp bags in this case contained heroin with a reasonable degree of scientific certainty.

{¶37} As previously discussed, Taylor testified that she tested 27 of the 247 stamp bags in accordance with the hypergeometric sampling plan. Several Ohio

Districts have accepted the hypergeometric sampling plan "when the seized samples are sufficiently homogenous so that one may infer beyond a reasonable doubt that the untested samples contain the same substance as those that are conclusively tested." *State v. Carroll,* 4th Dist. No. 15CA3485, 2016-Ohio-374, 47 N.E.3d 198, ¶ 33. See also *State v. Jackson,* 9th Dist. Nos. 27132, 27200, 271133, 27158, 2015-Ohio-5246 (appeal allowed on other grounds); *Gartell, supra*; *State v. Edwards,* 10th Dist. No. 12AP-992, 2013-Ohio-4342; *State v. Howard,* 8th Dist. No. 99535, 2013-Ohio-5125; *State v. Coppernoll,* 6th Dist. No. WM-07-010, 2008-Ohio-1293. While the term "hypergeometric sampling" is not explicitly used, we have authorized the use of random sample testing methods in *State v. Rose,* 144 Ohio App.3d 58, 65, 759 N.E.2d 460 (7th Dist.2001). Hence, the state was not required to show that all 247 stamp bags were tested.

{¶38} As to the stamp bags that were tested, Appellant attempts to argue that Taylor failed to testify that the stamp bags all contained heroin within a reasonable degree of scientific certainty, as per *Gartell.* This assertion is contrary to the record. On direct, the state asked Taylor, "[b]ased on your experience in utilizing the testing mechanisms for what you utilize, based on your educational experience, is the opinions that you have rendered here today, are they to a *reasonable degree of scientific certainty*?" (sic) (Emphasis added.) *Id.* Taylor responded, "[y]es, they are." *Id.* The state further inquired, "[n]ow, as important, this hypergeometric sampling that you used, is that sampling based on a *reasonable degree of scientific certainty*?" (Emphasis added.) *Id.* Taylor responded, "[y]es." *Id.* This record shows Taylor

stated her opinion that the stamp bags in this case all contained heroin within a reasonable degree of scientific certainty.

{¶39} We note that a comparison of the chemist's testimony in *Gartell* mirrors Taylor's testimony. Both chemists conducted a visual examination of all packets and completed both presumptive and confirmatory testing. Next, the chemists explained the process and results of the hypergeometric sampling testing. Finally, both chemists testified that, based on a reasonable degree of certainty, the tested packets contained heroin. Accordingly, sufficient evidence was presented to demonstrate the quantity of heroin at issue in this case. Consequently, Appellant's fourth assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 5

> The trial court erred in sentencing the appellant, Thomas Jessie Boyd, Jr. to 6 years and running that sentence consecutively to his West Virginia sentence.

{¶40} Appellant contends that the trial court erred in ordering his sentence to run consecutively to his West Virginia felony sentence, but fails to explain why. Instead, he contests his sentence, generally.

{¶41} An appellate court is permitted to review a felony sentence to determine if it is contrary to law. *State v. Marcum,* 146 Ohio St.3d. 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 23. Further, "an appellate court may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence." *Id*.

{¶42} Pursuant to R.C. 2929.41(B)(2):

> If a court of this state imposes a prison term upon the offender for the commission of a felony and a court of another state or the United States also has imposed a prison term upon the offender for the commission of a felony, the court of this state may order that the offender serve the prison term it imposes consecutively to any prison term imposed upon the offender by the court of another state or the United States.

{¶43} According to R.C. 2929.14(C)(4), a trial court may impose consecutive sentences if the court makes three statutory findings:

> [T]hat the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single

> prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶44} A trial court judge must make the requisite findings at the sentencing hearing and must incorporate the findings into the sentencing entry. *State v. Williams*, 7th Dist. No. 13 MA 125, 2015-Ohio-4100, 43 N.E.3d 797, ¶ 33-34, citing *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37. The court need not state reasons in support and is not required to use any "magic" or "talismanic" words, so long as it is apparent that the court conducted the proper analysis. *State v. Verity*, 7th Dist. No. 12 MA 139, 2013-Ohio-1158, ¶ 28-29.

{¶45} Appellant has presented no argument or caselaw to suggest that the trial court improperly imposed a consecutive sentence. Appellant concedes R.C. 2929.41(B)(2) allows a trial court to impose a prison term consecutive to that imposed by another state. This record demonstrates that the trial court made the requisite R.C. 2929.14(C) findings. The trial court found both at the sentencing hearing and within its sentencing entry that a shorter sentence would not adequately punish Appellant or protect the public from future crimes. The court found that a consecutive sentence would not be disproportionate to the seriousness of Appellant's conduct. The trial court found that the harm caused was so great that a single term

would demean the seriousness of the offense. In support of its finding, the court noted that Appellant: openly participated in a series of high volume drug trafficking offenses, has a criminal record, committed a criminal offense while on bond, absconded to Pennsylvania while on bond in Ohio and in West Virginia, and has shown a lack of remorse. Accordingly, the record demonstrates that the trial court made the requisite findings at the sentencing hearing and within its sentencing entry and the trial court's imposition of a consecutive sentence was proper.

{¶46} Appellant also argues that his sentence, generally, is contrary to law. Appellant highlights the fact that he was convicted of a nonviolent drug offense. He argues that an analysis of the recidivism and seriousness factors weigh in favor of lesser sentence. Finally, he explains that he did not flee to Pittsburgh to avoid prosecution. He claims that his son was due to be born and the West Virginia court had threatened to place him in custody despite the fact that he had paid bond.

{¶47} As stated previously, an appellate court is permitted to review a felony sentence to determine if it is contrary to law. "In determining the appropriate sentence, the trial court is directed to consider the purposes and principles of sentencing as espoused in R.C. 2929.11, the seriousness and recidivism factors enumerated in R.C. 2929.12, and the permissible statutory ranges as set forth in R.C. 2929.14." *State v. Bell*, 7th Dist. No. 14 MA 0017, 2016-Ohio-1440, ¶ 16.

{¶48} Based on this record, we find that the trial court complied with all relevant statutory requirements. At the sentencing hearing and within its sentencing entry, the trial court provided a detailed analysis of both the R.C. 2929.11 factors and

R.C. 2929.12 factors. Appellant's six-year sentence is within the permissible statutory range, which allows a maximum sentence of eight years.

{¶49} There is nothing within this record to allow us to find the sentence is not supported by clear and convincing evidence. In determining Appellant's sentence, the trial court highlighted the fact that Appellant fled to Pittsburgh when released on bond in both his Ohio and West Virginia cases and did not return until he was involuntarily apprehended eight months later. The court also emphasized that Appellant's lengthy criminal history showed a "worsening course," as evidenced by the five bricks of heroin involved in this matter and the fact that Appellant had several blocks of heroin on his person when he was arrested. Appellant's fifth assignment of error is without merit and is overruled.

Conclusion

{¶50} Appellant contends that his trial counsel was ineffective for using a peremptory challenge instead of a challenge for cause and for failing to object to comments made by the prosecutor during closing arguments. However, Appellant is unable to meet either *Strickland* prong in his claims. Appellant also contends that the prosecutor's comments amounted to plain error. The comments were entirely appropriate. Appellant argues the trial court erred in denying his motion for directed verdict and his motion to dismiss. Based on Ohio caselaw, the trial court's decision was proper and sufficient evidence supports Appellant's conviction. Finally, Appellant contends that the trial court erroneously ordered his sentence to run consecutive to a West Virginia sentence. The record demonstrates that Appellant's

sentence is not contrary to law. Accordingly, all of Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Donofrio, P.J., concurs.

DeGenaro, J., concurs.