[Cite as *State v. Steele*, 2005-Ohio-2185.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84385

STATE OF OHIO	:	JOURNAL ENTRY
	:	AND
Plaintiff-appellee	:	OPINION
	:	
-vs-	:	
	:	
IRA STEELE	:	
	:	
Defendant-appellant	:	

DATE OF ANNOUNCEMENT OF DECISION:	MAY 5, 2005
CHARACTER OF PROCEEDING:	Criminal appeal from the Court of Common Pleas Case No. CR-445211
JUDGMENT:	Affirmed in part, Vacated In Part and Remanded for Re-Sentencing
DATE OF JOURNALIZATION:	

APPEARANCES:

For Plaintiff-Appellee:	WILLIAM D. MASON, ESQ. BY: JOHN SMERILLO, ESQ. ASST. COUNTY PROSECUTOR 8th Floor, Justice Center 1200 Ontario Street Cleveland, Ohio 44113
For Defendant-Appellant:	ROBERT L. TOBIK, ESQ. PUBLIC DEFENDER BY: JOHN T. MARTIN, ESQ.

ASST. PUBLIC DEFENDER
1200 West Third Street
100 Lakeside Place
Cleveland, Ohio 44113

ANN DYKE, P.J.:

{¶1} Defendant Ira Steele appeals from his conviction for drug possession. For the reasons set forth below, we affirm defendant's conviction, vacate his sentence, and remand the matter for resentencing.

{¶2} On December 5, 2003, defendant was indicted for one count of possession of less than one gram of crack cocaine. He pled not guilty and the matter proceeded to a jury trial on February 19, 2004.

{¶3} For its case, the state presented the testimony of Cleveland Police Sgt. Ronald Dillions and Cleveland Police Scientific Examiner Cynthia Lewis.

{¶4} Sgt. Dillions testified that he has been with the department for twenty-three years, worked in the Strike Force Unit for eleven years, and has investigated numerous cases involving crack cocaine. On October 15, 2003, he was working an off-duty security assignment in the theater district, near East 12th Street. A car parked behind his vehicle and a man stepped out and walked northbound. Defendant was walking southbound. From approximately 15-20 feet away, Dillions observed the first man give defendant something, and saw defendant give the first man money. Dillions approached defendant and demanded to know what defendant had received from the first man. Defendant denied getting anything, and Dillions placed him against the wall and patted him down. Defendant had what appeared to be a makeshift crack pipe in his right pocket. A portion of it appeared to be burned.

{¶5} Sgt. Dillions next flagged down Cleveland Police Officer Rodriguez who placed defendant into a zone car. Dillions then walked around the block to East 13th Street

and Chester to look for the first man. Dillions spotted the man, patted him down and uncovered a cell phone, pager, and approximately $300.

{¶6} Dillions returned to the location on East 12th Street where he observed defendant and the man make an exchange and found a cellophane container with what appeared to be a rock of cocaine.

{¶7} On cross-examination, Dillions admitted that he did not observe defendant to be in the possession of the cellophane container and did not see what defendant had obtained in exchange for money.

{¶8} Cynthia Lewis testified that the makeshift crack pipe confiscated in this matter tested positive for cocaine, and that the item in the cellophane container tested positive for crack cocaine and weighed .19 grams. She admitted, however, that she did not further determine whether the residue in the pipe had come from powder cocaine or crack cocaine.

{¶9} Defendant was subsequently convicted of the charge. The trial court determined that, based on a consideration of the relevant statutory factors, imprisonment was appropriate and sentenced him to six months imprisonment. He now appeals and assigns four errors for our review.

{¶10} Defendant's first assignment of error states:

{¶11} "Defendant was denied federal and state due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution when he was convicted on evidence that was insufficient as a matter of law to sustain the conviction for the offense for which he was indicted by the grand jury."

{¶12} A claim of insufficient evidence invokes due process of the law and raises the question of whether the evidence is legally sufficient to support the jury verdict as a matter of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541. Our inquiry is whether, after viewing the evidence in a light most favorable to the state, any rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶13} In this matter, defendant was charged with possession of crack cocaine in violation of R.C. 2925.11. This statute defines the offense as follows: "no person shall knowingly obtain, possess, or use a controlled substance."

{¶14} In *State v. Biggs,* Franklin App No. 01AP-1185, 2002-Ohio-4999, the Court held that where a defendant is observed to engage in activity which appears to be drug related, and drugs are then found in that area a short time later, the evidence is sufficient to withstand a challenge to the sufficiency of evidence of possession. Accord *State v. Wilson* (March 28, 1991), Cuyahoga App. No. 582529. In this matter, Sgt. Dillions testified that he observed defendant receive an item from the first man and give the first man money. A rock of crack cocaine was recovered in this area minutes later, and defendant was in possession of a crack pipe. After viewing the evidence in a light most favorable to the state, we conclude that a rational trier of fact could have concluded beyond a reasonable doubt that defendant was in possession of the crack cocaine.

{¶15} This assignment of error is without merit.

{¶16} Defendant's second assignment of error states:

{¶17} "The conviction was against the manifest weight of the evidence."

{¶18} The proper test to be used when addressing the issue of manifest weight of the evidence is set forth as follows:

{¶19} "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether, in resolving conflicts in the evidence, the [fact finder] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. * * *" *State v. Moore,* Cuyahoga App. No. 81876, 2003-Ohio-3526, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717; see, also, *Tibbs v. Florida* (1982), 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652.

{¶20} The weight of the evidence and credibility of the witnesses are primarily for the trier of fact. *State v. Moore,* supra, citing *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212. The power to reverse a judgment of conviction as against the manifest weight must be exercised with caution and in only the rare case in which the evidence weighs heavily against the conviction. *State v. Martin,* supra.

{¶21} In determining whether a judgment of conviction is against the manifest weight of the evidence, this court in *State v. Wilson* (June 9, 1994), Cuyahoga App. Nos. 64442 and 64443, adopted the guidelines set forth in *State v. Mattison* (1985), 23 Ohio App.3d 10, 490 N.E.2d 926. These factors, which are not exhaustive, include:

{¶22} "1) Knowledge that even a reviewing court is not required to accept the incredible as true;

{¶23} "2) Whether evidence is uncontradicted;

{¶24} "3) Whether a witness was impeached;

{¶25} "4) Attention to what was not proved;

{¶26} "5) The certainty of the evidence;

{¶27} "6) The reliability of the evidence;

{¶28} "7) The extent to which a witness may have a personal interest to advance or defend their testimony; and

{¶29} "8) The extent to which the evidence is vague, uncertain, conflicting or fragmentary." Id.

{¶30} In this matter, Sgt. Dillion's testimony demonstrated that crack cocaine was recovered from the area where Dillions had observed defendant make a transaction involving money. The testimony was certain, credible, and consistent with the evidence recovered from defendant's pocket. Although the case presented circumstantial evidence of possession, we do not believe that the jury lost its way and created such a manifest miscarriage of justice in convicting defendant of possession.

{¶31} This assignment of error is overruled.

{¶32} Defendant's third assignment of error states:

{¶33} "The prosecution violated Mr. Steele's constitutional rights under Article I, Section 10 of the Ohio Constitution, the Fifth Amendment to the United States Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution when it engaged in improper closing argument which exceeded the evidence and which also included improper attacks on defense counsel."

{¶34} In analyzing claims of prosecutorial misconduct, the test is "whether remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused." *State v. Jones,* 90 Ohio St.3d 403, 420, 2000 Ohio 187, 739 N.E.2d 300, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883. "The touchstone of analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" Id., quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 947, 71 L.Ed. 2d 78. Where it is clear beyond a reasonable doubt that a jury would have found the defendant guilty even absent the alleged misconduct, the defendant has not been prejudiced, and his conviction will not be reversed. See *State v. Loza* (1994), 71 Ohio St.3d 61, 78, 1994- Ohio-409, 641 N.E.2d 1082. In reviewing allegations of prosecutorial misconduct, we review the alleged wrongful conduct in the context of the entire trial. *Darden v. Wainwright* (1986), 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144.

{¶35} Generally, prosecutors are entitled to considerable latitude in closing argument. *State v. Ballew,* 76 Ohio St.3d 244, 255, 1996-Ohio-81, 667 N.E.2d 369; *State v. Stevens,* Montgomery App. No. 19572, 2003-Ohio-6249. In closing argument, a prosecutor may comment freely on "what the evidence has shown and what reasonable inferences may be drawn therefrom." *State v. Lott* (1990), 51 Ohio St.3d 160, 165, 555 N.E.2d 293, quoting *State v. Stephens* (1970), 24 Ohio St.2d 76, 82, 263 N.E.2d 773. "Moreover, because isolated instances of prosecutorial misconduct are harmless, the closing argument must be viewed in its entirety to determine whether the defendant has been prejudiced." *State v.Ballew,* supra; *State v. Lorraine* (1993), 66 Ohio St.3d 414, 420, 613 N.E.2d 212.

{¶36} Within this assignment of error, defendant complains that: (1) the prosecuting attorney commented that defendant was "drug dependent," and no such evidence was presented; (2)commented that the case was not significant, thus unfairly commented on the possible sentence; (3) commented that the matter could lead to "larger transgressions," thus suggesting that society would suffer if there was no conviction; and (4) unfairly remarked that defendant's trial counsel was "spinning the facts."

{¶37} With regard to the first matter, in *State v. Wogenstahl,* 75 Ohio St.3d at 357, 662 N.E.2d at 322-323, citing *State v. Combs* (1991), 62 Ohio St.3d 278, 283, 581 N.E.2d 1071, 1077, noted that such argument improperly "invites the jury to speculate on facts not in evidence." Accordingly, this isolated remark was improper but viewed in its proper context, was not prejudicial.

{¶38} The second matter was, in our estimation, simply a comment on the brief duration of the trial and relative seriousness of the charge and was therefore permissible.

{¶39} With regard to the third matter, this remark was not such that it was calculated to incite the passions and prejudices of the jurors, and was not impermissible. Cf. See *United States v. Solivan,* 937 F.2d 1146, 1151 (6th Cir. 1991).

{¶40} Finally, with regard to the fourth matter, we conclude that these remarks were fairly invited by the defense strategy of repeatedly calling the crack pipe a "stem" and minimizing the significance of the fact that defendant had this item in his possession. Under these circumstances, the prosecutor's cross-examination about and argument were responses fairly invited by the defense strategy and defense counsel's closing argument. Cf. *State v. Mason,* 82 Ohio St.3d 144, 162-163, 1998-Ohio-370, 694 N.E.2d 932.

{¶41} This assignment of error is without merit.

{¶42} Defendant's fourth assignment of error states:

{¶43} "The trial court erred when it failed to advise Mr. Steele about the imposition of a term of post-release control and then imposed such a term via its journal entry."

{¶44} In this assignment of error, defendant complains that the trial court did not advise defendant during sentencing that he would be subject to post-release control. Defendant therefore argues that post-release control did not become a valid part of his sentence, and this portion of the sentence must be vacated. The state concedes that defendant was not advised of this aspect of the sentence but it maintains that the matter should simply be remanded for resentencing.

{¶45} Pursuant to R.C. 2967.28(B) and (C), a trial court must inform the defendant at sentencing or at the time of a plea hearing that post-release control is part of the defendant's sentence. *Woods v. Telb,* 89 Ohio St.3d 504, 2000-Ohio-171, 733 N.E.2d 1103, paragraph two of the syllabus. Further, pursuant to R.C. 2929.19(B)(3)(d), a trial court must inform the defendant at sentencing or at the time of a plea hearing "that he may be subject to a definite period of post-release control [and] the possibility of sanctions, including prison, available for violation of such controls." *State v. Morrissey* (Dec. 18, 2000), Cuyahoga App. No. 77179. That is, the trial court is required to inform a defendant of the salient features of post-release control as set forth in R.C. 2929.19(B). See *State v. Davis*, Cuyahoga App. No. 83033, 2004-Ohio-1908, that post-release control is to be part of his sentence, Id., and that there is the possibility of sanctions, including prison, for a

violation of such controls. See, also, *State v. Shepard,* Cuyahoga App. No. 82158, 2003-Ohio-4938 (describing proper notification).

{¶46} In *Ohio v. Jordan,* 104 Ohio St.3d 21, 2004-Ohio-6085, the Supreme Court considered the proper remedy for a trial court's failure to notify and stated as follows:

{¶47} "Because a trial court has a statutory duty to provide notice of postrelease control at the sentencing hearing, any sentence imposed without such notification is contrary to law. As a general rule, if an appellate court determines that a sentence is clearly and convincingly contrary to law, it may remand for resentencing. See R.C. 2953.08(G)(2). Furthermore, where a sentence is void because it does not contain a statutorily mandated term, the proper remedy is, likewise, to resentence the defendant. See *State v. Beasley* (1984), 14 Ohio St.3d 74, 14 OBR 511, 471 N.E.2d 774.

{¶48} "R.C. 2953.08(G)(2) provides that if an appellate court clearly and convincingly finds that a sentence is contrary to law, it may "increase, reduce, or otherwise modify a sentence *** or may vacate the sentence and remand the matter to the sentencing court for resentencing.

{¶49} "* * *

{¶50} "'* * * Jeopardy did not attach to the void sentence, and, therefore, the court's imposition of the correct sentence did not constitute double jeopardy.' * * * [Quoting *State v. Beasley,* supra].

{¶51} "Accordingly, when a trial court fails to notify an offender about postrelease control at the sentencing hearing but incorporates that notice into its journal entry imposing sentence, it fails to comply with the mandatory provisions of R.C. 2929.19(B)(3)(c) and (d),

and, therefore, the sentence must be vacated and the matter remanded to the trial court for resentencing."

{¶52} In accordance with the foregoing, the proper remedy in this instance is to vacate defendant's sentence and remand the matter for resentencing.

{¶53} The fourth assignment of error is sustained in part, and overruled in part.

{¶54} Defendant's conviction is affirmed, the sentence is vacated, and the matter is remanded for resentencing.

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

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

FRANK D. CELEBREZZE, JR., J., CONCURS.

DIANE KARPINSKI, J., DISSENTS (SEE ATTACHED DISSENTING OPINION)

ANN DYKE
PRESIDING JUDGE

N.B. This entry is an announcement of the court's decision. See App.R.22(B), 22(D) and 26(A); Loc.App.R.22. This decision will be journalized and will become the judgment and order of the court pursuant to App. R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also S.Ct.Prac.R. II, Section 2(A)(1).

[Cite as *State v. Steele*, 2005-Ohio-2185.]

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84385

STATE OF OHIO	:	
	:	
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Plaintiff-appellee	:	
	:	DISSENTING
v.	:	
	:	OPINION
IRA STEELE	:	
	:	
	:	
Defendant-appellant	:	

DATE: MAY 5, 2005

KARPINSKI, J., DISSENTING:

{¶55} I respectfully dissent from the majority on assignment of error number one because I do not believe that the evidence presented at trial was sufficient for a conviction.

{¶56} The majority relies on *State v. Biggs*, Franklin App. No. 01AP-1185, 2002-Ohio-4999. The facts in *Biggs*, however, are nothing like the facts in the case at bar. In *Biggs*, defendant was seen, first, attempting, to conceal a plastic baggie up her shirtsleeve and then, second, shoving that same baggie under her leg after the officer placed her on the ground. The baggie was found moments later.

{¶57} In the case at bar, the majority believes that the officer "testified that he observed defendant receive an item from

the first man and give the first man money." I disagree with this interpretation of the testimony. Specifically, the officer stated:

> ***I didn't see exactly what they passed. I saw money exchange hands but I didn't see what the first gentleman gave this gentleman.
>
> Q. Whose hands did the money go from and to?
>
> A. The money went from his hands to the first gentleman that parked behind me.
>
> Q. Did you see anything come from the other, like the person in the car?
>
> A. I couldn't. They were like 15, 20 feet away. I couldn't say what was passed. You can't tell. I've seen enough drug transactions or transactions I couldn't say exactly what the first gentleman had in his hand but I did see the money.

Tr. at 146-147. The officer never explicitly said that he saw defendant receive anything from the other gentleman who passed him on the street.

{¶58} The officer further testified:

> Q. Now during that whole exchange you never saw any actual piece of crack cocaine exchanged between the two of them, did you?
>
> A. No.
>
> Q. In fact, from where you were sitting, you never saw any crack cocaine while sitting in your truck over to where these two were, did you?
>
> A. No.
>
> Q. You never say my client drop a piece of crack cocaine to the ground, did you?
>
> A. No.

Q. You never saw him with a piece of crack cocaine in his hand, did you?

A. No.

Q. You never saw the other gentleman with a piece of crack cocaine handing it to my client, did you?

A. No.

Tr. at 162-163. The state never presented any direct evidence that defendant possessed crack cocaine.

{¶59} The majority, however, finds persuasive that "a rock of crack cocaine was recovered in this area minutes later, and defendant was in possession of a crack pipe." The officer and defendant both left the primary scene for a period of eight or nine minutes[1], according to the officer, to look for another individual and returned to the place of the exchange of money whereupon the officer searched the ground for "something" with a flashlight because it "was starting to get dark." Only then did the officer find a cellophane packet on the ground in the vicinity of where defendant had been. The area where the cellophane packet was found was the sidewalk on 12th Street between Euclid and Chester Avenues, which contained "apartments and businesses." The area was in downtown Cleveland and was "part of the theater district." The

[1]The officer stopped defendant, searched him, walked to Euclid Avenue, flagged down another car, in which defendant was deposited, and then drove around looking for the second male. The officer went to 14th and 15th and Euclid and then drove back to 13th and Chester, where the other male was located, searched, and placed in the police car.

officer testified further that in that location you see "a lot of the residents from the apartment buildings coming and going."

{¶60} Because he had left the block, the officer could not continue to survey the scene. Moreover, there were a "moderate" number of "people on the sidewalk passing back and forth." Because of the lapse of time while the officers left the scene and because of the public nature of the area with people walking back forth, the bag that was found cannot be attributed to defendant beyond a reasonable doubt. Again, the comparison to *Biggs* fails because here the police did not recover the cellophane packet immediately after observing the exchange between defendant and the other gentleman.

{¶61} Further, in *Biggs*, the defendant **confessed** to having purchased and smoked crack cocaine just prior to her arrest. In the case at bar, however, the verbal exchange between the officer and defendant was the complete opposite from the verbal exchange in *Biggs*. Here, the officer testified:

> A. I approached this gentleman here and I said, "What did you get from him?
>
> He said, "Nothing."
>
> I said, "What are you doing here?"
>
> He said, "I'm doing nothing" so I put him against the wall and patted him down.

Tr. at 148. This exchange contains no confession as that given in *Biggs*.

{¶62} The majority also observes that defendant was in possession of a crack pipe. There was no evidence, however, of crack cocaine in the pipe found on defendant. The true bill of indictment states clearly that defendant is charged with having possession of "crack cocaine." The scientific technician testified, however, that the evidence taken from defendant's drug paraphernalia was cocaine, not crack cocaine. The cross-examination of the scientific examiner clarified the difference:

> Q. What were the results of these tests?
>
> A. The results of both of those tests were positive for cocaine.
>
> Q. Now when you say it's positive for cocaine, I asked you if that was crack cocaine and you said that's what I would call it. What is the distinction?
>
> A. Crack cocaine chemically is cocaine in the base form as opposed to the powder cocaine which is cocaine in the soft form. I described it as crack cocaine because it also can be used as a descriptive term and it's in the form that I would describe as being crack cocaine.
>
> Q. Now in other words, crack cocaine is an object or chemical entity which is something that is different then [sic] cocaine, not crack cocaine, but just cocaine. There is a distinction between the two, correct?
>
> A. There is a distinction between the cocaine. It's all cocaine, but crack cocaine is cocaine in the base form and powder cocaine is cocaine in the soft form.
>
> Q. In your work as a lab technician when you test these objects, part of your work is to make distinctions between what is crack cocaine and what is just cocaine; is that correct?
>
> A. That can be done.
>
> Q. All right. You did that in this case, didn't you?

A. *No. I just tested to see if it was cocaine.*

***

Q. All right. So based on the description of the material you're making a distinction between crack cocaine and cocaine, correct?

A. Yes. Crack cocaine looks different then [sic] powder form.

Q. Because in fact they are two different entities, would you agree with that?

A. Yes, they're both cocaine but like I said one is the base form and the other is the soft form.

Q. You also tested this metal pipe there, is that correct?

A. That's correct.

Q. You did that by rinsing out some of the inside of that and testing what you had rinsed out of that, is that correct?

A. Yes.

Q. Can you describe to us how you did that?

A. I performed the same two tests. I just performed the test on the rinsed portion using a chemical solvent, and I performed the Scott's Test and the instrumental tests.

Q. What were the results of those tests?

A. *The results were positive for cocaine.*

Q. All right. Now so in other words, you're saying that the material you tested that was, that came outside, came from inside of that stem, that tested positive to be the chemical cocaine; correct?

A. Yes.

Q. However, that's material that was inside that pipe that did not turn out to be crack cocaine, would you agree with that?

A. *I didn't perform any test to make that distinction.*

Q. So in other words, what you're saying is you did not discover any crack cocaine within that pipe, correct?

A. *I did not perform any test to make that distinction.*

Q. *Well, in other words, without performing tests to make that distinction you can't sit here and say you found crack cocaine within that pipe, correct*?

A. *Right.*

Tr. at 178-181. Emphasis added.

{¶63} "The constitutional right to be tried for the same offense for which one is indicted is one of our most fundamental constitutional rights of due process. The failure to include an essential element in an indictment does adversely affect said substantial right." *State v. Pittman*, Cuyahoga App. No. 68163, 1995 Ohio App. LEXIS 5115. "When the prosecuting attorney files a bill of particulars, the state is confined to the items therein set down. 14 R.C.L. 191. This rule applies to each count of the indictment." *State v. Vitale*, 96 Ohio App.3d 695; 645 N.E.2d 1277; 1994 Ohio App. LEXIS 3322.

{¶64} Defendant was indicted for possession of **crack cocaine**, not cocaine. The scientific examiner testified to the presence only of cocaine and agreed that she could not say she found evidence of crack cocaine within his pipe. In fact, she testified that she did not perform any type of test to determine whether or

not there was evidence of crack cocaine in the paraphernalia removed from defendant, although such tests exist.

{¶65} The majority acknowledges that the evidence here is circumstantial. Possession of crack cocaine cannot be proved beyond a reasonable doubt, however, from evidence of a pipe in which no crack cocaine has been found. Nor can possession be attributed to someone simply because he was standing earlier on a public sidewalk where a bag of crack was later found.

{¶66} I would, therefore, reverse the conviction.