[Cite as *State v. Jewett*, 2017-Ohio-2891.]

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

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| STATE OF OHIO, | : | Case No. 15CA3714 |
| Plaintiff-Appellee, | : | |
| v. | : | DECISION AND JUDGMENT ENTRY |
| TYRONNE J. JEWETT, | : | |
| Defendant-Appellant. | : | **RELEASED: 04/24/2017** |

APPEARANCES:

Steven H. Eckstein, Washington Court House, Ohio, for appellant.

Mark E. Kuhn, Scioto County Prosecuting Attorney, and Jay Willis, Scioto County Assistant Prosecuting Attorney, Portsmouth, Ohio, for appellee.

Harsha, J.

**{¶1}** A jury convicted Tyronne Jewett of 33 criminal offenses, including 22 counts of trafficking in heroin or cocaine. The court sentenced him to an aggregate 40-year prison term, with 16 years of mandatory prison time.

**{¶2}** First, Jewett asserts that the trial court erred by not granting his motion to amend the cocaine trafficking charges that were greater than felonies of the fifth degree. The jury convicted Jewett of four cocaine trafficking charges with penalties enhanced beyond a fifth-degree felony based on the weight of the cocaine. Jewett claims that the state failed to introduce evidence that the weight of the cocaine for these offenses was pure cocaine. The Supreme Court of Ohio recently reconsidered and vacated an earlier decision that the state must prove the weight of the actual cocaine, not the total weight of cocaine plus any filler, in prosecutions for possession of cocaine where the defendant is charged with a penalty enhancement. The applicable offense level for cocaine trafficking and possession is consequently determined by the total weight of the drug involved,

including any fillers that are part of the usable drug. The trial court thus did not abuse its discretion by denying Jewett's motion to amend the cocaine trafficking charges.

**{¶3}** Next, Jewett contends that there was insufficient evidence to support 14 of his convictions on heroin and cocaine trafficking counts because they were based upon the exclusive testimony of lay witnesses and not upon expert testimony. We reject Jewett's contentions for several reasons. First, he cites no authority supporting his proposition. Second, Jewett's motion for acquittal was not premised on this argument. For the most part, he did not object to the lay witnesses' testimony concerning the identity and weight of the drugs involved in the trafficking charges and thus forfeited all but plain error. Third, he does not claim plain error and does not specify an assignment of error relating to the trial court's admission of this evidence. Fourth, upon presentation of a foundation for their experience and knowledge, lay witness drug users can establish their competence to express an opinion on the identity of a controlled substance. Fifth, in offenses where the state has not recovered and tested the drug, the offender may be convicted of the offense and the penalty enhancement based on the testimony of lay witnesses, even in the absence of expert testimony, as long as a proper foundation exists for their opinion on the weight of the drugs.

**{¶4}** Jewett also claims that his convictions for these same 14 trafficking convictions were against the manifest weight of the evidence because the jury could not rely on the testimony of drug addicts and co-defendants whose testimony was obtained through plea deals. We find this claim is meritless because the weight and credibility of evidence was to be determined by the jury. Here the jury did not clearly lose its way or create a manifest miscarriage of justice so as to warrant reversal.

**{¶5}** Next Jewett argues that his trial counsel provided ineffective assistance of counsel because: (1) he failed to move to dismiss the charges because of a statutory speedy-trial violation; and (2) he failed to ask necessary questions of a witness with whom he had a conflict of interest. We reject Jewett's first claim because there was no statutory speedy-trial violation. The triple-count provision did not apply because he was not held in jail solely on the charges in this case, but also on charges from Gallia County. And the standard 270-day time period did not expire before his trial. We reject Jewett's second claim because when the court learned of a possibility of conflict, it conducted a hearing where the parties orally waived any conflict. Moreover, there is no evidence that an actual conflict of interest adversely affected his lawyer's performance. Jewett's counsel previously represented one of the state's witnesses, but he cross-examined that witness about whether she was convicted of misdemeanor theft. Although he remarked to the trial court that he wanted to "skate kind of * * * soft on this," he ultimately did get the witness to concede that she had been convicted of a misdemeanor theft within the last ten years. Because the extent and scope of cross-examination fall within the ambit of trial strategy, debatable trial tactics do not establish ineffective assistance of counsel.

**{¶6}** Finally, Jewett asserts that the trial court erred and denied him a fair trial when it gave curative and final instructions that incorrectly stated Ohio law. For the reasons previously discussed in resolving Jewett's first claim, the trial court's curative instruction correctly stated that the state did not need to establish the purity of the controlled substance for the trafficking charges with elevated penalties. Jewett did not object to the curative and final instructions that the state could use lay witnesses to prove the identity and weight of drugs if a foundation for the testimony was first established, so

he forfeited all but plain error. And the trial court did not commit error, much less plain error, by instructing the jury of the propriety of lay witness testimony concerning the identity and weight of drugs for the charged offenses.

**{¶7}** Having overruled Jewett's assignments of error, we affirm his convictions.

## I. FACTS

**{¶8}** The Scioto County Grand Jury returned a 46-count indictment against Tyronne Jewett and 23 other defendants. The indictment charged Jewett with 41 counts and various specifications. All of the defendants, including Jewett, were charged with engaging in a pattern of corrupt activities, conspiracy to engage in corrupt activities, and conspiracy to traffic in drugs (heroin and cocaine). The indictment also charged Jewett with multiple trafficking in heroin and cocaine offenses. After the trial court appointed counsel for Jewett, he entered a plea of not guilty to the charges.

**{¶9}** The remaining facts are based upon the evidence produced at a jury trial. The Southern Ohio Drug Task Force received information that Jewett (also known as "Blue" or "Ty"), who came from Dayton, was dealing heroin and cocaine in the Portsmouth area from 2014 until early 2015. Jewett purchased heroin and cocaine from Taevon Turnage in Dayton through Steven North, who acted as a middleman. Jewett sold the heroin and cocaine from several different residences in Scioto County. He then had the proceeds of the drug sales delivered or wired to Dayton in return for more drugs. Jewett instructed several individuals to wire the money to North. And several people drove Jewett or others on his behalf to obtain the drugs from Dayton.

**{¶10}** In January 2015 the police arranged six different controlled purchases of heroin and cocaine from Jewett by a confidential informant. The drugs seized from those

transactions went to the Bureau of Criminal Investigation ("BCI") where the lab found varying amounts of heroin and cocaine. BCI forensic scientist Megan Koentop testified that the laboratory did not quantitate submitted substances, i.e., BCI did not determine what percentage of the substance tested is actually heroin or cocaine—it did not test for the purity of the drug.

**{¶11}** Many of Jewett's co-defendants, who were almost all drug addicts, testified that they purchased heroin and cocaine from him, drove to Dayton to get the drugs for him and to give money to North, and permitted Jewett to use their houses in Scioto County to deal drugs. They provided testimony, mostly without objection, about the types and amounts of drugs purchased from Jewett and transported by or on behalf of him.

**{¶12}** After the task force had evidence of the six controlled purchases of heroin and cocaine, the police stopped an SUV driven by Jewett's accomplice, Christopher Wolfe, based on Wolfe's driving while under suspension. Jewett was in the front passenger seat. They discovered that Jewett had an arrest warrant on an unrelated Gallia County indictment and found a loaded semiautomatic handgun underneath Jewett's seat, multiple cellphones in his possession, including the one on which he made the drug transactions, digital scales and hypodermic needles in his coat, and $1,563 on his person. They arrested him and took him to jail.

**{¶13}** Portsmouth Police Detective Lee Bower testified that based on his experience, he was able to look at various quantities of drugs and estimate how much they weighed. Jewett did not object to the trial court qualifying him as an expert on giving estimates of weights of drugs based on appearance. By contrast BCI forensic scientist

Koentep testified that the BCI weighs the submitted substances because they cannot be sure of the weight if they just looked at it.

**{¶14}** The jury returned verdicts finding Jewett guilty of 33 of the charged criminal offenses, including the charges of engaging in a pattern of corrupt activities, conspiracy to engage in corrupt activities, and conspiracy to traffic in drugs, as well as 22 counts of trafficking in heroin or cocaine, and various specifications. The jury found him not guilty of the remaining counts. The trial court sentenced Jewett to an aggregate prison term of 40 years, with 16 years being mandatory.

## II. ASSIGNMENTS OF ERROR

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

I. THE TRIAL COURT ERRED IN NOT GRANTING DEFENDANT-APPELLANT'S MOTION TO AMEND THE INDICTMENT MADE AT THE CLOSE OF THE STATE'S CASE.

II. THE TRIAL COURT ERRED IN NOT GRANTING DEFENDANT-APPELLANT'S MOTION FOR ACQUITAL. [SIC.]

III. DEFENDANT-APPELLANT'S CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

IV. TRIAL COUNSEL PROVIDED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE IN VIOLATION OF DEFENDANT-APPELLANT'S RIGHTS UNDER THE SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

V. THE TRIAL COURT ERRED AND DENIED DEFENDANT-APPELLANT A FAIR TRIAL AND DUE PROCESS OF LAW WHEN IT GAVE CURATIVE INSTRUCTIONS THAT INCORRECTLY STATED OHIO LAW AND WERE SIMPLIFIED FROM THOSE GIVEN IN ITS FINAL CHARGE TO THE JURY AND FINAL JURY INSTRUCTIONS THAT WERE INCORRECT STATEMENTS OF OHIO LAW.

## III. LAW AND ANALYSIS

### A. Motion to Amend the Indictment

**{¶16}** In his first assignment of error Jewett asserts that the trial court erred by not granting his motion to amend the indictment. Crim.R. 7(D) permits the trial court to correct errors in the indictment before, during, or after the trial as long as it does not change the name or identity of the crime charged. We review the trial court's ruling on the motion to amend the indictment under the abuse-of-discretion standard. *See State v. Bennett*, 5th Dist. Delaware No. 05CA11069, 2006-Ohio-5530, ¶ 95 ("If the amendment does not change the name or identity of the crime charged, an abuse of discretion standard is applied to review the trial court's decision"); *State v. Gibson*, 8th Dist. Cuyahoga No. 103958, 2016-Ohio-7778, ¶ 28 ("We review motions to amend indictments for an abuse of discretion"). " 'A trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable, or arbitrary.' " *State v. Keenan*, 143 Ohio St.3d 397, 2015-Ohio-2484, 38 N.E.3d 870, ¶ 7, quoting *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34.

**{¶17}** At the close of the state's case Jewett's trial counsel moved for a judgment of acquittal, which he subsequently modified to a motion to amend the indictment for the cocaine trafficking counts that were enhanced beyond fifth-degree felonies based on the weight of the cocaine involved. The requested amendment would not have changed the name or identity of the trafficking in cocaine offenses charged. Ultimately, the jury convicted him of four of these trafficking in cocaine charges—Counts 4, 13, 15, and 30—with three of them being first-degree felonies and one of them being a fourth-degree felony.

**{¶18}** The state failed to present evidence that the weight of the cocaine for these offenses was based on pure cocaine instead of cocaine plus a filler. BCI forensic

scientist Koentop testified that the laboratory does not quantitate controlled substances it tests, i.e., it does not determine what percentage of the substance is actually cocaine.

**{¶19}** Previously, in *State v. Remy*, 4th Dist. Ross No. 03CA2731, 2004-Ohio-3630, we held in a cocaine-possession case where the penalty was enhanced by the weight of the drug, "[t]he State need not conduct qualitative analysis to determine the purity of the cocaine" because " 'the content or purity of cocaine is immaterial so long as there is *any amount* of cocaine in the compound or substance.' " (Emphasis sic.) *Id.* at ¶ 50, quoting *State v. Brown*, 107 Ohio App.3d 194, 202, 668 N.E2d 514 (3d Dist.1995).

**{¶20}** The Supreme Court of Ohio recently addressed this issue by initially holding that the offense level for cocaine possession was determined by the weight of the actual cocaine, not by the total weight of cocaine plus any filler. *State v. Gonzales*, __ Ohio St.3d __, 2016-Ohio-8319, __ N.E.3d __ ("*Gonzales* I"), affirming *State v. Gonzales*, 6th Dist. Wood No. WD-13-086, 2015-Ohio-461. On appeal Jewett relies on the appellate court decision in *Gonzales*, 2015-Ohio-461. In affirming that decision the Supreme Court reasoned that this result was dictated by the unambiguous language of R.C. 2925.11(C)(4)(b) through (f), which require that a person possess a certain amount "of cocaine," not a compound or mixture that contains cocaine plus filler material, to be guilty of a higher-degree felony than a fifth-degree felony offense, which has no weight requirement. *Id.* at ¶ 17-20.

**{¶21}** In *State v. Sanchez*, __ Ohio St.3d __, 2016-Ohio-8470, __ N.E.3d __, affirming *State v. Sanchez*, 2016-Ohio-542, 59 N.E.3d 719 (6th Dist.) the Supreme Court of Ohio expanded its initial holding in *Gonzales I* to trafficking in cocaine by virtue of the fact that the penalty enhancement provisions for trafficking offenses are identical to the

ones for cocaine possession. *See* R.C. 2925.03(C)(4)(c)-(g). *See also State v. Valdez*, 3d Dist. Marion No. 9-16-01, 2017-Ohio-241, ¶ 148 ("Although *Gonzales* involved the interpretation of R.C. 2925.11 (drug possession) and not R.C. 2925.03 (drug trafficking), the relevant penalty enhancement language of R.C. 2925.11(C)(4)(e) is identical to that of the relevant penalty enhancement language in R.C. 2925.03(C)(4)(f)").

**{¶22}** Therefore, under *Sanchez* and the Supreme Court's initial decision in *Gonzales I*, "to substantiate an enhanced penalty for convictions for possession and trafficking in cocaine pursuant to R.C. 2925.11(C)(4) and R.C. 2925.03(C)(4), the State must prove the weight of the actual cocaine, excluding any filler or cutting agents, involved in the offenses." *See State v. Hamilton*, 1st Dist. Hamilton No. 15CA010830, 2017-Ohio-230, ¶ 16.[1]

**{¶23}** Nevertheless, in March 2017, the Supreme Court of Ohio, composed of a new panel of Justices, reconsidered and vacated its initial decision in *Gonzales I*, __ Ohio St.3d __, 2016-Ohio-8319, __ N.E.3d __. *See State v. Gonzales*, __ Ohio St.3d __, 2017-Ohio-777, __ N.E.3d ___ ("*Gonzales II*"). The Supreme Court held that "the applicable offense level for cocaine possession under R.C. 2925.11(C)(4) is determined by the total weight of the drug involved, including any fillers that are part of the usable drug." *Id.* at ¶ 18. Therefore, Jewett's reliance on the appellate court decision in *Gonzales*, 2015-Ohio-461, is misplaced because that decision has now been reversed by the Supreme Court.

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[1] The same purity requirement has never been applied to trafficking and possession offenses involving other drugs like heroin. *See Gonzales*, __ Ohio St.3d __, 2016-Ohio-8319, __ N.E.3d __, ¶ 15, citing *Gonzales*, 2015-Ohio-461, ¶ 42 ("The appellate court compared this language to the provisions for marihuana and heroin in R.C. 2925.11 and found that these subsections did not modify 'drug involved' with 'of marihuana' or 'of heroin' ").

**{¶24}** By that holding the Supreme Court also implicitly overruled its decision in *Sanchez*, which had relied solely on its initial decision in *Gonzales I* to expand it to cocaine trafficking cases because of the identical penalty enhancement provisions. Consequently, the trial court did not abuse its discretion by denying Jewett's motion to amend the counts charging him with enhanced felonies for trafficking in cocaine. We overrule his first assignment of error.

B. Motion for Judgment of Acquittal

**{¶25}** In his second assignment of error Jewett contends that the trial court erred by denying his motion for judgment of acquittal. Under Crim.R. 29(A), "[t]he court on motion of a defendant * * *, after the evidence on either side is closed, shall order the entry of acquittal * * *, if the evidence is insufficient to sustain a conviction of such offense or offenses." "A motion for acquittal under Crim.R. 29(A) is governed by the same standard as the one for determining whether a verdict is supported by sufficient evidence." *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 37; *State v. Reyes-Rosales*, 4th Dist. Adams No. 15CA1010, 2016-Ohio-3338, ¶ 14.

**{¶26}** "When a court reviews the record for sufficiency, '[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' " *State v. Maxwell*, 139 Ohio St.3d 12, 9 N.E.3d 930, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 146, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

**{¶27}** "A sufficiency assignment of error challenges the legal adequacy of the state's prima facie case, not its rational persuasiveness." *State v. Koon*, 4th Dist. Hocking No. 15CA17, 2016-Ohio-416, ¶ 17. "That limited review does not intrude on the jury's role 'to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.' " *Musacchio v. United States*, ___U.S. ___, 136 S.Ct. 709, 715, 193 L.Ed.2d 639 (2016), quoting *Jackson* at 319.

**{¶28}** Jewett asserts that there was insufficient evidence to support 14 of his convictions for trafficking in heroin (12) and cocaine (2) counts greater than a fifth-degree felony because they were based upon the exclusive testimony of lay witnesses rather than expert testimony.

**{¶29}** Jewett's motion for judgment of acquittal at the close of the state's evidence, which he renewed at the conclusion of all the evidence, was not premised on this ground. Instead, he based his motion at trial on the appellate court decision in *Gonzales*, 2015-Ohio-461, and modified it to a motion to amend the indictment to attack the cocaine trafficking counts that were greater than fifth-degree felonies. As previously decided, that motion was meritless. He also claimed that there was insufficient evidence of gun specifications accompanying some of his charges.

**{¶30}** We reject Jewett's contention for several reasons.

**{¶31}** First, he cites no authority supporting his proposition that trafficking convictions cannot be based on the testimony of lay witnesses for the identity and weight of the drugs. *See State v. Kelly*, 2016-Ohio-8582, __ N.E.3d __, ¶ 79 (4th Dist.), citing App.R. 16(A)(7) ("court can summarily reject argument in assignment of error that is not supported by any legal authority").

**{¶32}** Second, for the most part, he did not object to the lay witnesses' testimony concerning the identity and weight of the heroin and cocaine involved in the contested trafficking charges; thus he forfeited all but plain error. *See State v. Blair*, 2016-Ohio-2872, 63 N.E.3d 798, ¶ 86 (4th Dist.).

**{¶33}** Third, he does not claim plain error, and he does not assign as error the trial court's admission of lay testimony on the identity and weight of heroin and cocaine in the contested trafficking offenses. *See State v. Gavin*, 4th Dist. Scioto No. 13CA3592, 2015-Ohio-2996, ¶ 25, citing *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 17-20 (appellate court need not consider plain error where appellant fails to timely raise plain-error claim); *Wright v. Ohio Dept. of Jobs and Family Servs.*, 9th Dist. Lorain No. 12CA010264, 2013-Ohio-2260, ¶ 22 (where a claim is forfeited on appeal and the appellant does not raise plain error, the appellate court will not create an argument on his behalf); *see also State v. Owens*, 2016-Ohio-176, 57 N.E.3d 345, ¶ 59 (4th Dist.), quoting *State v. Nguyen*, 4th Dist. Athens No. 14CA42, 2015-Ohio-4414, ¶ 41 (" 'we need not address this contention because we review assignments of error and not mere arguments' ").

**{¶34}** Fourth, notwithstanding Jewett's claims to the contrary, courts "have allowed lay witnesses to testify about the identity of a drug." *State v. Johnson*, 4th Dist. Gallia No. 13CA16, 2014-Ohio-4032, ¶ 38. "The 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 (2002), syllabus.

**{¶35}** Finally, in offenses where the state fails to recover and weigh the drugs, the offender may be convicted of the offense and the penalty enhancement associated with the weight of the drug involved based on the testimony of lay witnesses, even in the absence of expert testimony, as long as a proper foundation is made. *See Garr v. Warden, Madison Corr. Inst.*, 126 Ohio St.3d 334, 2010-Ohio-2449, 933 N.E.2d 1063, ¶ 28 (conviction for trafficking in cocaine with a major-drug-offender specification can be supported by lay testimony where no drug is recovered and no testing is performed). Notably, Jewett argues only that his 14 trafficking convictions are not supported by sufficient evidence because of his general proposition that "they are based upon the exclusive testimony of lay witnesses and not upon expert analysis." He does not contend that an improper foundation was laid for these unspecified witnesses' lay testimony.

**{¶36}** Therefore, Jewett forfeited his claim on appeal and has not established any error, much less plain error, by the trial court in denying his motion for judgment of acquittal. We overrule his second assignment of error.

C. Manifest Weight of the Evidence

**{¶38}** In his third assignment of error Jewett claims that 14 trafficking convictions were against the manifest weight of the evidence. In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6254, 960 N.E.2d 955, ¶ 119.

"Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence." *Thompkins* at 387.

**{¶39}** Jewett argues that these 14 trafficking convictions were against the manifest weight of the evidence because the jury could not rely on the testimony of drug addicts and co-defendants whose testimony was obtained through plea deals. We reject Jewett's argument because the weight and credibility of evidence are to be determined by the trier of fact. *See Kirkland*, 140 Ohio St.3d 73, 15 N.E.3d 818, 2014-Ohio-1966, at ¶ 132. " 'A jury, sitting as the trier of fact, is free to believe all, part or none of the testimony of any witness who appears before it.' " *State v. Reyes-Rosales*, 4th Dist. Adams No. 15CA1010, 2016-Ohio-3338, ¶ 17, quoting *State v. West*, 4th Dist. Scioto No. 12CA3507, 2014-Ohio-1941, ¶ 23. We defer to the trier of fact on these evidentiary weight and credibility issues because it is in the best position to gauge the witnesses' demeanor, gestures, and voice inflections, and to use these observations to weigh their credibility. *Id*; *State v. Koon*, 4th Dist. Hocking No. 15CA17, 2016-Ohio-416, at ¶ 18.

**{¶40}** Thus regardless of their status as co-defendants and drug addicts, the jury could properly credit the testimony of the state's witnesses concerning the identity and weight of the drugs in these offenses. *See, e.g., State v. Haugh*. 6th Dist. Lucas No. L-15-115, 2016-Ohio-8008, ¶ 48 (rejecting manifest-weight argument because the jury was free to assess the credibility of co-defendants and inmates who had a motive to fabricate their testimony); *State v. Bussle*, 11th Dist. Portage No. 2009-P-0061, 2010-Ohio-4943, ¶ 69 (rejecting manifest-weight argument that witnesses' drug addictions rendered their testimony so untrustworthy that convictions constituted a miscarriage of justice). And in

the absence of any objection, the jury was also free to credit Detective Bower's expert testimony concerning the weights of drugs.[2] The jury did not clearly lose its way and create such a manifest miscarriage of justice that these convictions must be reversed. We overrule Jewett's third assignment of error.

D. Ineffective Assistance of Counsel

**{¶41}** In his fourth assignment of error Jewett argues that his trial counsel provided ineffective assistance. To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 113; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Failure to establish either part of the test is fatal to an ineffective-assistance claim. *Strickland* at 697.

1. Failure to Move to Dismiss for Speedy-Trial Violation

**{¶42}** In this assignment of error Jewett first asserts that his trial counsel provided ineffective assistance because he failed to file a motion to dismiss the indictment based on a violation of his statutory speedy-trial rights. The Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution guarantee a criminal defendant the rights to a speedy trial. This guarantee is implemented in R.C. 2945.71, which provides specific statutory time limits within which a person must be brought to trial. *See State v. Hucks*, 4th Dist. Ross No. 15CA3488, 2016-Ohio-323, ¶ 19.

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[2] Jewett does not contest the trial court's admission of this expert testimony in this appeal.

**{¶43}** The state charged Jewett with multiple felony offenses. Under R.C. 2945.71(C)(2), a person charged with a felony offense must be brought to trial within 270 days after the person's arrest. *See, e.g., State v. Spencer*, 4th Dist. Scioto No. 15CA378, 2017-Ohio-456, ¶ 20. From the date of Jewett's arrest on January 25, 2015, until his trial began on August 31, 2015, 217 days passed for purposes of the speedy-trial statute. *See State v. Davis*, 4th Dist. Scioto No. 12CA3506, 2013-Ohio-5311, ¶ 21, citing R.C. 1.14 and Crim.R. 45(A) ("When computing how much time has run against [the state] under R.C. 2945.71, we begin with the day after the date [the defendant] was arrested").

**{¶44}** Jewett argues that because he was being held in jail solely on the charges in this criminal case, the triple-count provision applies. *See* R.C. 2945.71(E) (if an accused remains in jail in lieu of bail solely on the pending charges, each day is counted as three days for speedy-trial purposes). But the uncontroverted evidence at trial established that Jewett was also being held for charges on an indictment from Gallia County. Therefore, the triple-count provision of R.C. 2945.71(E) did not apply to him, and he was brought to trial within the applicable 270-day period. *See State v. Sydnor*, 4th Dist. Scioto No. 10CA3359, 2011-Ohio-3922, ¶ 19 ("when a defendant awaits trial on separate unrelated cases, the triple-count provision does not apply"). Because no speedy-trial violation occurred, Jewett cannot establish ineffective assistance of his trial counsel for failing to raise this meritless issue. *See State v. Bailey*, 4th Dist. Ross No. 14CA3461, 2015-Ohio-5483, ¶ 42 (trial counsel did not render ineffective assistance by failing to pursue a motion to dismiss based on an alleged violation of the defendant's speedy-trial rights, which would not have been successful). We reject Jewett's first ineffective-assistance claim.

2. Conflict of Interest

**{¶45}** Next Jewett claims that his trial counsel provided ineffective assistance because a conflict of interest prevented him from properly cross-examining one of the state's witnesses. Lee Ann Bradford, a co-defendant who pleaded guilty to conspiracy to trafficking in drugs, testified that she was a longtime heroin addict who had purchased heroin on a daily basis from Jewett in Scioto County for a three-month period beginning in the summer of 2014. She further testified that she knew that it was heroin that she bought from Jewett based on how it tasted and how she reacted when she shot it up. According to Bradford, she paid Jewett $20-$40 a day and owed him $150 for one gram of heroin that she did not pay for.

**{¶46}** Prior to trial the state became aware that Jewett's trial counsel had represented Bradford in a prior misdemeanor theft case and filed a motion for judicial determination of a potential conflict of interest the week before trial commenced. The trial court held a hearing on the matter where Jewett and Bradford expressly represented to the court that they would waive any conflict of interest. The trial court requested that the parties waive any potential conflict in writing. The state submitted Bradford's waiver in writing, but Jewett's counsel later filed a motion to withdraw as counsel because of his representation that Jewett would not consent to waive the conflict in writing. Ultimately, Jewett's counsel proceeded to represent him at trial and during his cross-examination of Bradford, he elicited her admission that she had been convicted of misdemeanor theft within the last ten years.

**{¶47}** During the cross-examination a bench conference included the following exchange:

MR. MAY: I just wanted to (inaudible). I don't want to say anymore.

THE COURT: It's just -- talking about a shoplifting charge?

MR. MAY: Yeah, it's a –

MS. HUTCHINSON: It's a misdemeanor theft.

MR. MAY: This is the one –

THE COURT: We'll just say it was a misdemeanor theft. You don't have to go to any facts. Just ask was it misdemeanor theft or felony theft.

MR. MAY: (Inaudible). I want to skate kind of –

THE COURT: Okay. That's all -- that's all you need to ask.

MR. MAY: -- soft on this.

MS. HUTCHINSON: I mean, she's admitted it, so I don't think that's –

**{¶48}** Jewett's trial counsel then proceeded to elicit Bradford's admission that she had been convicted of misdemeanor theft in the last ten years.

**{¶49}** The Sixth Amendment right to effective assistance of counsel includes the right to counsel free from conflicts of interest. *State v. Gillard*, 64 Ohio St.3d 304, 312, 595 N.E.2d 878 (1992). "A court that is determining whether defense counsel rendered ineffective assistance based upon conflicting interests will presume prejudice 'if the defendant demonstrates that counsel "actively represented conflicting interests" and "that an actual conflict of interest adversely affected his lawyer's performance." ' " *State v Pickett*, 4th Dist. Athens No. 15CA13, 2016-Ohio-4593, ¶ 49, quoting *Strickland*, 466 U.S. at 692, 104 S.Ct. 2052, 80 L.Ed.2d 674, quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348 and 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

**{¶50}** We reject Jewett's contention because the parties promptly brought the possibility of conflict to the trial court's attention; the court conducted a hearing where

Jewett and Bradford both represented to the court that they waived any conflict; and there is no evidence that any actual conflict of interest adversely affected Jewett's trial counsel's performance in cross-examining Bradford. Although he remarked to the trial court that he wanted to "skate kind of * * soft on this," he ultimately elicited the testimony he needed to impeach Bradford's credibility—her concession on cross-examination that she had been convicted of misdemeanor theft in the past ten years, i.e. a crime that involved dishonesty. Evid.R. 609(A)(3). Jewett does not identify how he was prejudiced by his counsel's cross-examination of Bradford. "[D]ecisions regarding cross-examination are within trial counsel's discretion and generally do not form the basis for a claim of ineffective assistance of counsel." *State v. Allah*, 4th Dist. Gallia No. 14CA12, 2015-Ohio-5060, ¶ 23; *State v. Madden*, 4th Dist. Adams No. 09CA883, 2010-Ohio-176, ¶ 25 ("The extent and scope of cross-examination clearly fall within the ambit of trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel").

**{¶51}** Jewett has established neither deficient performance by his trial counsel nor prejudice. We overrule his fourth assignment of error.

E. Jury Instructions

**{¶52}** In his fifth assignment of error Jewett contends that the trial court erred when it gave curative and final instructions that incorrectly stated Ohio law. A jury instruction must present a correct, pertinent statement of the law that is appropriate to the facts. *State v. Barry*, 145 Ohio St.3d 354,

**{¶53}** 2015-Ohio-5449, 49 N.E.3d 1248, ¶ 25. " 'Our review concerning whether jury instructions correctly state the law is de novo.' " *Kelly*, 2016-Ohio-8582, __ N.E.3d __, ¶ 86, quoting *State v. Kulchar*, 4th Dist. Athens No. 10CA6, 2015-Ohio-3703, ¶ 15.

**{¶54}** At the state's request during Jewett's cross-examination of BCI forensic scientist Koentep, the trial court instructed the jury that "drugs can be identified by expert witnesses and also by lay witnesses who are knowledgeable of the drugs" and that "it is not necessary to quantitate exactly how much is in it."

**{¶55}** And in its final jury instructions the trial court gave the following instruction on the identity and weight of the drugs for charged offenses:

> The burden is upon the State to show beyond a reasonable doubt the identity of the drugs and the weight of the drugs when the weight of the drugs is over one gram. The State does not have to prove the weight of the drug if they are not over one gram. The State may do that in several ways. First, the State may prove the identity and weight of the drugs by laboratory testing. In this case, the State has introduced lab reports to identify the drugs in question and to determine the weight.
>
> Second, the State may use lay witnesses to prove the identity and weight of the drugs. You have hea[r]d several lay witnesses, in this case drug addicts, testify to the identity of certain drugs, that is, that certain substances were heroin, cocaine or marijuana and to give an opinion as to the weight of certain drugs. You are instructed that the experience and knowledge of a drug user lay witness can establish his or her competence to express an opinion on the identity and weight of a controlled substance if a foundation for this testimony is first established. The State is entitled to establish both the identity and the weight of a drug through circumstantial evidence as long as a lay witness has firsthand knowledge and a reasonable basis, grounded either in experience or specialized knowledge, for arriving at the opinion expressed.

**{¶56}** The trial court's curative instruction that the state did not need to establish the purity of the controlled substance was correct for the cocaine and heroin trafficking charges with elevated felonies for the same reasons we previously discussed in resolving Jewett's first assignment of error. *See Gonzales II*, __ Ohio St.3d __, 2017-Ohio-777, __ N.E.3d __.

**{¶57}** Additionally, Jewett did not object to the court's curative and final instructions that the state could generally use lay witnesses to prove the identity and

weight of drugs if a foundation for the testimony is first established. Instead, his trial counsel conceded that lay witnesses can express an opinion on the identity of the controlled substance. He thus forfeited all but plain error. *See State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112, ¶ 203. And he does not argue plain error on appeal. *Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 17-20 (court need not consider plain error where appellant fails to timely raise plain-error claim).

**{¶58}** Furthermore, as we decided in our disposition of Jewett's second assignment of error, the trial court did not commit error, much less plain error, by instructing the jury on the general propriety of lay witness testimony concerning the identity and weight of the drugs where a proper foundation for the testimony exists. *McKee*, 91 Ohio St.3d 292, 744 N.E.2d 737, at syllabus; *Garr*, 126 Ohio St.3d 334, 2010-Ohio-2449, 933 N.E.2d 1063, at ¶ 28. We overrule his fifth assignment of error.

## IV. CONCLUSION

**{¶59}** Jewett has not established any reversible error. Having overruled Jewett's assignments of error, we affirm his convictions.

JUDGMENT AFFIRMED.

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

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

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

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

Abele, J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: ____________________________
William H. Harsha, Judge

**NOTICE TO COUNSEL**

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