[Cite as *State v. Coleman*, 2019-Ohio-4415.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

OMAR K. COLEMAN

Defendant-Appellant

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. John W. Wise, J.
Hon. Earle E. Wise, Jr., J.

Case No. 19-COA-002

O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 17-CRI-187
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 2, 2019

APPEARANCES:

For Plaintiff-Appellee

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Wise, John, J.

{¶1} Appellant Omar K. Coleman appeals his conviction and sentence on six felony counts following a jury trial in the Ashland County Court of Common Pleas.

{¶2} Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶3} On January 12, 2018, Appellant Omar Coleman was indicted on the following charges:

Count One: Engaging in a Pattern of Corrupt Activity, a first-degree felony and violation of R.C. §2923.32(A)(1);

Count Two: Complicity to Aggravated Trafficking in Drugs, a third-degree felony, in violation of R.C. §2923.03(A)(2) and §2925.03(A)(2), with a firearm specification;

Count Three: Complicity to Aggravated Trafficking in Drugs, a third-degree felony, in violation of R.C. §2923.03(A)(2) and §2925.11(A);

Count Four: Having Weapons While Under Disability, a third-degree felony, in violation of R.C. §2923.13(A)(2);

Count Five: Complicity to Aggravated Trafficking in Drugs, a first-degree felony, in violation of R.C. §2923.03(A)(2) and §2925.03(A)(2); and

Count Six: Money Laundering, a third-degree felony, in violation of R.C. §1315.55(A)(1).

{¶4} On October 23, 2018, the case proceeded to jury trial. At trial, the jury heard the following testimony:

{¶5} Narcotics Detective Brian Evans of the Ashland Police Department received information in November, 2017, that Robert Virgili was selling methamphetamines in Ashland County. (T. at 667). He further received information that Virgili supplied methamphetamines to Nick Lindecamp and Omar Coleman, the Appellant in this matter, out of a big, white SUV. (T. at 667).

{¶6} On December 21, 2017, Cody Roberts was arrested in Shelby, Ohio, for attempting to steal a firearm. (T. at 670). Cody Roberts wished to give information on Virgili. (T. at 670). Cody Roberts told Ashland detectives that Virgili supplied methamphetamines out of a big white SUV to other dealers, namely a Zach Ellis, Appellant Omar Coleman, Leonard Gerich, and Cody Howell. (T. at 670). Cody Roberts also stated that Virgili used 510 Carroll Street as a "trap house" and sold methamphetamines out of that location. (T. at 670-671). Det. Evans surveilled Virgili's house on Grove Street and witnessed known drug users enter the house. (T. at 672). Det. Evans learned Virgili bought methamphetamines in Akron or Wooster. (T. at 682). Det. Evans was also aware that Virgili did not go to Akron alone, and that Appellant often accompanied Virgili to Akron. (T. at 683). Based on his investigation, Detective Evans obtained a search warrant and placed a GPS tracking device on Virgili's SUV on December 27, 2017. (T. at 673).

{¶7} That night, Det. Evans observed the GPS tracker on Virgili's SUV. (T. at 681). First, Det. Evans witnessed the tracker travel around Ashland before stopping in the area of Appellant's residence. (T. at 681). The GPS next showed the vehicle headed north on State Route 42, stopping briefly at a gas station, and then traveling east on State Route 224 to Akron. (T. at 682). The GPS tracker stayed in Akron for roughly two hours

before returning to Ashland on Interstate 71 and getting off at State Route 250. (T. at 684). The vehicle made no stops on the return trip. (T. at 685).

{¶8} Det. Evans, who was sitting in a Denny's parking lot on State Route 250 near the exit ramp from Interstate 71, observed Virgili's white SUV driving down State Route 250 and began following. (T. at 687). He followed the vehicle through the outskirts of Ashland before asking Officer Timothy Atchison of the Ashland Police Department to stop the vehicle. (T. at 691).

{¶9} Officer Atchison testified that he observed the white SUV traveling in Ashland City. (T. at 322). Officer Atchison personally observed the vehicle, checked to verify the GPS monitored vehicle matched the vehicle before him, and initiated a traffic stop for a busted taillight. (T. at 323, 329).

{¶10} Virgili was the driver. (T. at 324). Appellant sat in the passenger seat. (T. at 325). Officer Atchison called for assistance, and Lieutenant Jerry Bloodhart, Sergeant John Simmons, and Det. Evans responded to the scene. (T. at 325, 394). Virgili stated that he and Appellant had been in Medina County and also ate at a Denny's restaurant. (T. at 329). Officer Atchison knew this to be untrue because Det. Evans was waiting at the Denny's Restaurant. (T. at 329, 333). Based upon this, Officer Atchison removed Virgili from the SUV and placed Virgili in his cruiser. (T. at 329). Sergeant Simmons placed Appellant in his cruiser. (T. at 329).

{¶11} Virgili was placed under arrest for Falsification. (T. at 332). Virgili was Mirandized. (T. at 699). After the arrest, Virgili told Officer Atchison "this is what you're looking for" and handed Officer Atchison a baggy of methamphetamines. (T. at 334). This

baggy was later confirmed to hold 9.65 grams of methamphetamines by the Bureau of Criminal Investigations. (T. at 659).

{¶12} Det. Evans spoke with Appellant. (T. at 696). Appellant claimed he and Virgili visited Virgili's son in Ravenna before returning to Ashland and eating at a Denny's. (T. at 696). Appellant claimed he did not have anything on his person he was not supposed to have. (T. at 696).

{¶13} Sgt. Simmons also spoke with Appellant. (T. at 364). Appellant told Sgt. Simmons that he and Virgili drove to Rittman before eating at a Denny's. (T. at 365). Det. Evans asked Appellant for consent to search his person, but Appellant declined. (T. at 365-366). Sgt. Simmons later arrested Appellant for Falsification. (T. at 369). Appellant was Mirandized. (T. at 700). During a search incident to arrest, Sgt. Simmons recovered a loaded Rohm Model R-14 handgun with serial number L668854 from Appellant's waistband. Appellant told Sgt. Simmons that the handgun was real, and that he carried it on previous occasions in the same manner. (T. at 373).

{¶14} Lieutenant Gary Alting of the Ashland Police Department testified that the firearm was functional after a test fire. (T. at 410).

{¶15} Appellant told Sgt. Simmons that he had recently been released from parole following a robbery conviction. (T. at 374). It was later confirmed that Appellant had a prior conviction for Aggravated Robbery. (T. at 712).

{¶16} Lt. Bloodhart assisted with the search incident to arrest. (T. at 396). He found a cut blue straw in Appellant's right jean pocket. (T. at 396). Lt. Bloodhart testified that in his experience cut straws are used to ingest narcotics. (T. at 397). Lt. Bloodhart

also found .22 caliber bullets in a Ziploc baggy in a different pocket on Appellant. (T. at 398).

{¶17} Virgili wished to cooperate with Det. Evans at the scene. (T. at 704). Virgili told Det. Evans that he and Appellant went to Akron to purchase Methamphetamine. Virgili also explained that he had been selling methamphetamines since September and bought his methamphetamines in either Wooster or Akron. (T. at 706). Virgili said he distributed the methamphetamines from 510 Carroll Street. (T. at 706, 718). Virgili then drew out his distribution chain with Virgili distributing methamphetamines to Appellant, Howell, Cody Roberts, and Ashlea Roberts. (T. at 709). Virgili told Det. Evans that he brought an ounce of methamphetamines to Ashland every other day. (T. at 710). He also stated that Appellant went with him to Akron every time. (T. at 711).

{¶18} Det. Evans testified that 510 Carroll Street is 537 feet from St. Edwards School. (T. at 719). St. Edwards School is an accredited school located on Cottage Street in Ashland. (T. at 652). Cottage Street runs parallel to Carroll Street. (T. at 652). Det. Evans used a laser measuring device to measure the distance from the St. Edwards playground to a sign in a parking lot across the street (360 feet). (T. at 720). Det. Evans then used the same device to measure the distance from that sign to the awning over the front door of 510 Carroll Street (177 feet), totaling 537 feet. (T. at 720). Det. Evans testified that he was qualified to use the laser device through a school in the Highway Patrol. (T. at 720). He also testified that he tested his laser device before measuring the distances. (T. at 721). Det. Evans also stated that his visual distance estimation from St. Edwards School to 510 Carroll Street was two football fields or 600 feet. (T. at 726).

{¶19} Cody Roberts stated Appellant and Virgili would bring drugs to him at 510 Carroll St. "every other day." (T. at 428). Cody Roberts bought methamphetamines from Virgili (T. at 427). He also stated that Appellant lived at 510 Carroll Street at this time. (T. at 430). Cody Roberts also testified that Appellant and Virgili would leave the house together and return with methamphetamines. (T. at 431). Cody Roberts also stated Appellant and Virgili acknowledged they would go on drug runs together. (T. at 432). Appellant personally handed Cody Roberts methamphetamines on Virgili's behalf. (T. at 439). Cody Roberts also saw Appellant with the same firearm from the arrest on December 27th. (T. at 443-444).

{¶20} Howell stated that he would go with Virgili and Appellant to get drugs in Mansfield or Shelby. (T. at 462). Howell also testified that he would message Appellant to meet up and get high. (T. at 469).

{¶21} Marina Pajewski, who was not charged, testified that she bought methamphetamines from Virgili. (T. at 489). Pajewski testified that she would sometimes text Appellant or Virgili to purchase methamphetamines and Virgili or Appellant would send somebody to her house to deliver the drugs. (T. at 491). She stated that Appellant delivered the drugs to her house and that she gave him the money on those occasions (T. at 494, 497). She also stated she saw Appellant possess the firearm from the arrest on December 27th when he delivered methamphetamines to her house. (T. at 494).

{¶22} Ashlea Roberts testified that Appellant fronted her methamphetamines on December 10th. (T. at 511-512). Roberts testified that 510 Carroll Street was a place where drugs were sold. (T. at 524). Virgili told Roberts that he and Appellant would go to Akron for methamphetamines.

{¶23} Virgili also testified and stated that Appellant asked him in September 2017 to "invest money" in an “8 ball” of methamphetamines. (T. at 540). Virgili stated Appellant doubled his investment. (T. at 541). Virgili claimed they did this so he and Appellant could make money. (T. at 593). To that end, Appellant assisted Virgili in weighing and packaging methamphetamines for sale at 510 Carroll Street. (T. at 595). Virgili also stated that he and Appellant brought between twenty-five and thirty ounces, roughly nine-hundred grams of methamphetamines, to 510 Carroll Street between September and December. (T. at 568, 569). He stated that he and Appellant split the profits from selling meth "50-50." (T. at 545). Virgili also testified that he and Appellant were returning from picking up methamphetamines in Akron when they were arrested on December 27, 2017. (T. at 597). Virgili stated that he knew Appellant carried a firearm that evening. (T. at 597).

{¶24} Following deliberations, the jury found Appellant guilty on all counts. (Judgment Entry, October 26, 2018).

{¶25} At sentencing on December 11, 2018, the trial court sentenced Appellant to seven (7) years incarceration on Count One, thirty (30) months incarceration on Count Two, one (1) year incarceration on the specification to Count Two, thirty (30) months incarceration on Count Three, thirty (30) months incarceration on Count Four, seven (7) years incarceration on Count Five, and thirty (30) months incarceration on Count Six. (Judgment Entry – Sentencing, December 11, 2018, p. 4-7). Counts One, Five, and the specification to Count Two were ordered to be served consecutively to one another and concurrently to the sentences imposed for Counts Two, Three, Four, and Six, for an aggregate prison term of fifteen (15) years. *Id.* at 4-7. Appellant was also given an

aggregate fine of $15,000.00. *Id.* at. 7. The court also ordered Appellant to pay $3,026.40 to the Ashland Police Department for the costs of investigation. *Id.* at 9.

{¶26} Appellant now appeals, assigning the following errors for review:

ASSIGNMENTS OF ERROR

{¶27} "I. THE TRIAL COURT'S DECISION TO ADMIT EVIDENCE OF THE LASER DEVICE, USED BY DETECTIVE EVANS TO MEASURE THE DISTANCE BETWEEN 510 CARROLL STREET AND ST. EDWARDS SCHOOL, WAS AN ABUSE OF DISCRETION.

{¶28} "II. APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶29} "III. APPELLANT'S SENTENCE WAS CONTRARY TO LAW DUE TO COUNTS ONE AND FIVE OF THE INDICTMENT BEING ALLIED OFFENSES OF SIMILAR IMPORT, BUT NOT BEING MERGED FOR PURPOSES OF SENTENCING, IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSES OF THE OHIO CONSTITUTION AND THE UNITED STATES CONSTITUTION.

{¶30} "IV. THE FAILURE OF APPELLANT'S TRIAL COUNSEL TO RAISE THE ISSUE OF MERGER OF COUNTS ONE AND FIVE AS ALLIED OFFENSES OF SIMILAR IMPORT AT SENTENCING CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

{¶31} "V. THE TRIAL COURT'S IMPOSITION OF CONSECUTIVE SENTENCES WAS NOT SUPPORTED BY THE RECORD.

{¶32} "VI. THE TRIAL COURT'S IMPOSITION OF RESTITUTION IN THE AMOUNT OF $3,026.40 WAS NOT SUPPORTED BY THE RECORD."

I.

{¶33} In his first assignment of error, Appellant argues the trial court erred in admitting the laser distance evidence from Det. Evans. We disagree.

{¶34} The trial court has broad discretion concerning the admissibility of evidence. Beard v. Meridia Huron Hosp., 106 Ohio St.3d 237, 2005–Ohio–4787, 834 N.E.2d 323, ¶ 20. "A decision to admit or exclude evidence will be upheld absent an abuse of discretion." *Id.* Even in the event of an abuse of discretion, a judgment will not be disturbed unless the abuse affected the substantial rights of the adverse party or is inconsistent with substantial justice. *Id.* An abuse of discretion suggests the trial court's decision is unreasonable, arbitrary, or unconscionable. Blakemore v. Blakemore, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). A reviewing court may not simply substitute its judgment for that of the trial court. *Id.*

{¶35} Evid.R. 201(B) governs the trial court's ability to take judicial notice of adjudicative facts: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The scientific reliability of a speed-measuring device can be established by "(1) a reported municipal court decision, (2) a reported or unreported case from the appellate court, or (3) the previous consideration of expert testimony about a specific device where the trial court notes it on the record." *State v. Yaun,* 3rd Dist. Logan No. 8–07–22, 2008–Ohio–1902, ¶ 12.

{¶36} Here, the trial court failed to state on the record that it was taking judicial notice of the laser for purposes of measuring distance or cite to a previous case in which

it had taken judicial notice of the laser device. This Court cannot find a case from this appellate district concerning the scientific reliability of a laser device for purposes of measuring distance.

{¶37} Upon review, we find the trial court erred in taking judicial notice of the laser device used by Det. Evans. Det. Evans testimony was insufficient to establish the scientific reliability and accuracy of the laser in this matter because no testimony was presented as the make/model of the laser device, nor was there any testimony or evidence establishing the accuracy of such device for the purpose of measuring distance rather than speed.

{¶38} However, even though we find that the testimony based on the distance as measured by the laser device was not admissible, any error in its admission was harmless as the jury also heard evidence from Det. Evans that he visually observed the distance to be approximately two football fields or 600 feet, well within the 1,000 foot prohibition.

{¶39} Based on the foregoing, we find Appellant's first assignment of error not well-taken and overrule same.

{¶40} Appellant's first assignment of error is overruled.

II.

{¶41} In his second assignment of error, Appellant argues that his convictions were against the manifest weight of the evidence. We disagree.

{¶42} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as the "thirteenth juror," and after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly

lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered." *State v. Thompkins*, *supra*, 78 Ohio St.3d at 387. Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶43} Appellant argues that most of the evidence presented by the state came in the form of testimony from his co-defendants who had negotiated plea deals in exchange for said testimony and therefore said testimony was not credible and/or unreliable.

{¶44} As an appellate court, we are not fact finders; we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent and credible evidence, upon which the fact finder could base his or her judgment. *Cross Truck v. Jeffries*, 5th Dist. Stark No. CA–5758, 1982 WL 2911(Feb. 10, 1982). Accordingly, judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction*, 54 Ohio St.2d 279, 376 N.E.2d 578(1978). The Ohio Supreme Court has emphasized: " '[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts. * * *.' " *Eastley v. Volkman*, 132 Ohio St.3d 328, 334, 972 N.E. 2d 517, 2012–Ohio–2179, *quoting Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 603, at 191–192 (1978). Furthermore, it is well established that the trial court is in the best position to determine the credibility of witnesses. *See, e.g., In re Brown*, 9th

Dist. No. 21004, 2002–Ohio–3405, ¶ 9, *citing State v. DeHass*, 10 Ohio St. 2d 230, 227 N.E.2d 212 (1967).

{¶45} Ultimately, "the reviewing court must determine whether the appellant or the appellee provided the more believable evidence, but must not completely substitute its judgment for that of the original trier of fact 'unless it is patently apparent that the fact finder lost its way.' " *State v. Pallai*, 7th Dist. Mahoning No. 07 MA 198, 2008–Ohio–6635, ¶ 31, *quoting State v. Woullard*, 158 Ohio App.3d 31, 2004–Ohio–3395, 813 N.E.2d 964 (2nd Dist. 2004), ¶ 81. In other words, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. Mahoning No. 99 CA 149, 2002–Ohio–1152, at ¶ 13, citing *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist. 1999).

{¶46} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212(1967), paragraph one of the syllabus; *State v. Hunter*, 131 Ohio St.3d 67, 2011–Ohio–6524, 960 N.E.2d 955, ¶ 118. *Accord, Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Marshall v. Lonberger*, 459 U.S. 422, 434, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983).

{¶47} Upon review of the record and the witness testimony as set forth above, including that of the investigating officers, we find that this is not an "exceptional case in which the evidence weighs heavily against the conviction." *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541, *quoting Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717. The jury

neither lost its way nor created a miscarriage of justice in convicting Appellant of the charges in the indictment.

{¶48} Based upon the foregoing and the entire record in this matter, we find Appellant's convictions were not against the manifest weight of the evidence.

{¶49} Appellant's second assignment of error is overruled.

III.

{¶50} In his third assignment of error, Appellant argues that his sentence is contrary to law. We disagree.

{¶51} More specifically, Appellant argues that Counts One and Five were allied offenses of similar import and should have merged for purposes of sentencing.

{¶52} Pursuant to R.C. 2923.32(A)(1), Ohio's Racketeer Influenced and Corrupt Organizations ("RICO") statute, "[n]o person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity." As defined in R.C. 2923.31(I), corrupt activity includes "engaging in, attempting to engage in, conspiring to engage in, or soliciting, coercing, or intimidating another person to engage in" conduct including the predicate offenses of possession, manufacturing, and trafficking of drugs. *See also State v. Johnson,* 10th Dist., 2015-Ohio-3248, 40 N.E.3d 628, ¶ 61-62.

{¶53} In *State v. Miranda*, 138 Ohio St.3d 184, 2014-Ohio-451, 5 N.E.3d 603, ¶ 20 (2014), the Ohio Supreme Court reviewed R.C. 2923.32(A)(1), Ohio's RICO statute. In said case, Miranda claimed that he was punished twice for the same offense when the trial court sentenced him for both the RICO violation and for the predicate offense of trafficking in drugs. Upon review, the Court found that a RICO offense is dependent upon

a defendant committing two or more predicate offenses listed in R.C. 2923.31(I). The *Miranda* court went on to find:

> However, a RICO offense also requires a defendant to be "employed by, or associated with" an "enterprise" and to "conduct or participate in" an "enterprise through a pattern of corrupt activity." R.C. 2923.32(A)(1). "Such pattern must include both a relationship and continuous activity, as well as proof of the existence of an enterprise. Thus, the conduct required to commit a RICO violation is independent of the conduct required to commit [the underlying predicate offenses]." (Emphasis added.) *State v. Dudas,* 11th Dist. Lake Nos. 2008–L–109 and 2008–L–110, 2009-Ohio-1001, 2009 WL 580791, ¶ 46. *See also* **607 *State v. Moulton*, 8th Dist. Cuyahoga No. 93726, 2010-Ohio-4484, 2010 WL 3706620, ¶ 36; *State v. Caudill,* 3d Dist. Hancock No. 05–97–35, 1998 WL 833729, *9 (Dec. 2, 1998). The intent of RICO is " 'to criminalize the pattern of criminal activity, not the underlying predicate acts.' " *State v. Thomas*, 3d Dist. Allen Nos. 1–11–25 and 1–11–26, 2012-Ohio-5577, 2012 WL 6017971, ¶ 61, quoting *State v. Dodson,* 12th Dist. Butler No. 2009–07–1147, 2011-Ohio-6222, 2011 WL 6017950, ¶ 68. *See also Dudas* at ¶ 47.

{¶54} As such, a RICO offense does not merge with its predicate offenses for purposes of sentencing.

{¶55} We therefore find the trial court did not err in sentencing Appellant for both the RICO offense and the predicate offense.

{¶56} Appellant's third assignment of error is overruled.

IV.

{¶57} In his fourth assignment of error, Appellant claims he was denied the effective assistance of counsel. We disagree.

{¶58} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that trial counsel acted incompetently. *See, Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984). In assessing such claims, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id*. at 689, citing Michel v. Louisiana, 350 U.S. 91, 101, 76 S.Ct. 158 (1955).

{¶59} "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland,* 466 U.S. at 689. The question is whether counsel acted "outside the wide range of professionally competent assistance." *Id.* at 690.

{¶60} Even if a defendant shows that counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this "actual prejudice" prong, the 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." *Strickland,* 466 U.S. at 694.

{¶61} Appellant argues his counsel was ineffective in failing to raise the issue of merger for Counts One and Five, as argued in Appellant's Assignment of Error IV.

{¶62} Having found above that the offenses are not allied and not subject to merger, it cannot be said that trial counsel acted unreasonably in not raising the issue prior to sentencing, or that Appellant was prejudiced as a result of counsel's failure to raise the issue.

{¶63} Appellant's fourth assignment of error is overruled.

V.

{¶64} In his fifth assignment of error, Appellant challenges the trial court's order of consecutive sentences.

{¶65} R.C. §2929.14(C)(4) concerns the imposition of consecutive sentences. In Ohio, there is a statutory presumption in favor of concurrent sentences for most felony offenses. R.C. 2929.41(A). The trial court may overcome this presumption by making the statutory, enumerated findings set forth in R.C. 2929.14(C) (4). *State v. Bonnell,* 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 23. This statute requires the trial court to undertake a three-part analysis. *State v. Alexander,* 1st Dist. Hamilton Nos. C–110828 and C-110829, 2012-Ohio-3349, 2012 WL 3055158, ¶ 15.

{¶66} Revised Code §2929.14(C)(4) controls the trial court's discretion to impose consecutive sentences:

> (4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that 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.

{¶67} Thus, in order for a trial court to impose consecutive sentences the court must find that consecutive sentences are necessary to protect the public from future crime or to punish the offender. The court must also find that consecutive sentences are not disproportionate to the offender's conduct and to the danger the offender poses to the public. Finally, the court must make at least one of three additional findings, which include that (a) the offender committed one or more of the offenses while awaiting trial or sentencing, while under a sanction imposed under R.C. 2929.16, 2929.17, or 2929.18, or while 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 offenses 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 would adequately reflect the seriousness of the offender's conduct; or (c) the offender's criminal history demonstrates that consecutive sentences *1088 are necessary to protect the public from future crime by the offender. *See, State v. White*, 5th Dist. Perry No. 12-CA-00018, 2013-Ohio-2058, 2013 WL 2152488, ¶ 36.

{¶68} In *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.2d 659, syllabus, the Supreme Court of Ohio stated that:

> In order to impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. §2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry, but it has no obligation to state reasons to support its findings.

{¶69} Furthermore, the sentencing court is not required to recite "a word-for-word recitation of the language of the statute." *Bonnell*, ¶ 29. "[A]s long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld." *Id.* A failure to make the findings required by R.C. 2929.14(C)(4) renders a consecutive sentence contrary to law. *Bonnell,* ¶ 34. The findings required by R.C. 2929.14(C)(4) must be made at the sentencing hearing and included in the sentencing entry. *Id.* at the syllabus. However, a trial court's inadvertent failure to incorporate the statutory findings in the sentencing entry after properly making those findings at the sentencing hearing does not render the sentence contrary to law; rather, such a clerical

mistake may be corrected by the court through a *nunc pro tunc* entry to reflect what actually occurred in open court. *Bonnell,* ¶ 30.

{¶70} During sentencing the trial court expressly considered the terms of R.C. 2929.14(C)(4) and determined that consecutive sentences were warranted as punishment and were not disproportionate to the offender's conduct. (Sent. T. at 10-11). The trial court also found "that at least two of the multiple offenses was committed as part of one or more courses of conduct" and "the harm caused by the multiple offenses is so great that no single prison term adequately reflects the seriousness of the offender's conduct." (Sent. T. at 11).

{¶71} Further, in this case, the record supports a conclusion that the trial court made all of the findings required by R.C. §2929.14(C)(4) at the time it imposed consecutive sentences. Appellant had a prior conviction for aggravated robbery and told Sgt. Simmons he had already been to prison twice. (T. at 712, 376; Sent. T. at 11). Appellant was arrested on the current charges right after he was released from parole on his prior conviction. Further, Appellant herein was involved in a course of conduct which involved trafficking drugs over a four-month period of time. (T. at 710).

{¶72} The transcript of the sentencing hearing and judgment entry clearly indicate the trial court engaged in the appropriate analysis and made the required findings under R.C. §2929.14(C)(4). Rather than establishing error, the record supports the trial court's findings for imposing consecutive sentences.

{¶73} Appellant's fifth assignment of error is overruled.

VI.

{¶74} In his sixth assignment of error, Appellant argues the amount of restitution imposed by the trial court is not supported by the record. We disagree.

{¶75} Here, the trial court imposed restitution in the amount of $3,206.40 to the Ashland Police Department for the costs of the criminal investigation, pursuant to R.C. §2923.32, which provides, in pertinent part:

> **R.C. §2923.32 Engaging in a pattern of corrupt activity; fines; penalties; forfeiture; records and reports; third-party claims to property subject to forfeiture**
>
> (2) Notwithstanding the financial sanctions authorized by section 2929.18 of the Revised Code, the court may do all of the following with respect to any person who derives pecuniary value or causes property damage, personal injury other than pain and suffering, or other loss through or by the violation of this section:
>
> ***
>
> (c) In addition to the fine described in division (B)(2)(a) of this section and the financial sanctions authorized by section 2929.18 of the Revised Code, order the person to pay to the state, municipal, or county law enforcement agencies that handled the investigation and prosecution the costs of investigation and prosecution that are reasonably incurred.

{¶76} In this case, the state submitted an invoice to the trial court detailing the costs associated with and incurred by the Ashland Police Department. The sentencing entry issued by the court specifically ordered Appellant to pay the $3,026.40 as restitution

to the Ashland Police Department. The court also made a finding that "[t]he Court specifically finds that the Defendant has the future ability to be employed and to pay financial sanctions in this case." (Sentencing Judgment Entry at 11).

{¶77} While Appellant argues that no finding was made as to his proportional share of the investigation with regard to his co-defendants, we find that Appellant has failed to provide any relevant legal authority supportive of such argument.

{¶78} Upon review we find the restitution amount is supported by the record and is authorized by statute. Under the circumstances of this case, we find no error.

{¶79} Appellant's sixth assignment of error is overruled.

{¶80} For the foregoing reasons, the judgment of the Court of Common Pleas, Ashland County, Ohio, is affirmed.

By: Wise, John, J.

Gwin, P. J., and

Wise, Earle, J., concur.

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JWW/d 1017