[Cite as *State v. Fields*, 2020-Ohio-3995.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- GERALD D. FIELDS Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P. J. Hon. John W. Wise, J. Hon. Craig R. Baldwin, J. Case No. CT2019-0073 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. CR2019-0123
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	July 27, 2020

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
D. MICHAEL HADDOX PROSECUTING ATTORNEY TAYLOR P. BENNINGTON ASSISTANT PROSECUTOR 27 North Fifth Street, P.O. Box 189 Zanesville, Ohio 43702-0189	JAMES A. ANZELMO 446 Howland Drive Gahanna, Ohio 43230

Wise, J.

{¶1} Defendant-Appellant Gerald Fields appeals his conviction and sentence entered in the Muskingum County Court of Common Pleas on two counts of drug possession, two counts of trafficking in drugs and one count of the illegal manufacture of drugs, following a jury trial.

{¶2} Plaintiff-Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶3} The relevant facts and procedural history are as follows:

{¶4} On February 8, 2019, officers with the CODE task force conducted surveillance of 1308 Jackson Street after receiving citizen complaints of heavy foot traffic and drug activity that was occurring at the residence. During their surveillance, the officers were able to observe traffic in and out of the residence as well. 1308 Jackson Street is the residence of Gerald Fields, "Appellant."

{¶5} After making these observations, the officers contacted Eric Gaumer, who is with the Adult Parole Authority. Mr. Gaumer has supervision over Appellant from a prior conviction of trafficking in drugs. Gaumer asked the Muskingum County Sheriff's Office and the Central Ohio Drug Enforcement Task Force if they would accompany him on his visit, and they agreed.

{¶6} Once Mr. Gaumer arrived and knocked on the door, it took an unusually long time for Appellant to answer it. Gaumer made contact with Appellant. Also in the house at this time was Appellant's girlfriend Misty Roe and Appellant's sister Tara Harris.

{¶7} Officers began to walk through the house and found digital scales and the twisted-off end of a baggie containing a white rock-like substance in the sheets of his bed.

On the scale, they could see white powder residue. On a table, they found marijuana and some white powder mixed into it. Under the bed, officers located a box of 150 sandwich baggies. Next to the bed were bottles of prescription medications in Appellant's name, men's watches, and a man's ring. At the end of the bed, $7,700 in cash was located in a pillow case. In a dresser drawer they found marijuana in a large bag and in individual baggies prepared for sale. Also located was a pay/owe ledger. Baking soda residue was found along the bed. More marijuana was located on a shelf. Inside hot chocolate containers, numerous baggies with corners twisted off were located. Burnt marijuana was found inside a cashew container and more marijuana was found in a tea canister. A smoking pipe was also located. The white powder was tested and found to be cocaine; the suspected marijuana was confirmed to be marijuana.

{¶8} Appellant was subsequently arrested.

{¶9} On February 20, 2019, Appellant was indicted on:

Count 1: Possession of Drugs (Cocaine), a felony of the fifth degree, in violation of R.C. §2925.11(A).

Count 2: Possession of Drugs (Marijuana), a minor misdemeanor, in violation of R.C. §2925.11(A).

Count 3: Trafficking in Drugs (Cocaine), with a forfeiture specification, a felony of the fifth degree, in violation of R.C. §2925.03(A)(2).

Count 4: Trafficking in Drugs (Marijuana), with a forfeiture specification, a felony of the fifth degree, in violation of R.C. §2925.03(A)(2).

Count 5: Illegal Manufacture of Drugs (Cocaine), a felony of the second degree, in violation of R.C. §2925.04(A).

Count 6: Possession of Drug Paraphernalia, a misdemeanor of the fourth degree, in violation of R.C. §2925.14(C)(1).

{¶10} On March 1, 2019, Appellant entered a plea of not guilty to the charges.

{¶11} On June 4, 2019, a jury trial commenced in this matter. The State nolled Count 6 and proceeded on Counts 1 through 5.

{¶12} Approximately two hours into deliberations, the jury submitted a question inquiring as to what would happen if they could not come to a consensus on three of the counts, stating "this may be a while". (T. at 455). The trial court instructed the jury "You must continue your discussion and deliberations in an attempt to reach a verdict." *Id.* Neither party objected to the trial court's instruction.

{¶13} The following day, the jury found Appellant guilty as charged on all five (5) counts.

{¶14} On August 12, 2019, a sentencing hearing was held. For purposes of sentencing, the trial court found that Counts 1 and 3 should merge and Counts 2 and 4 should merge. The State of Ohio elected to proceed under counts 3 and 4.

{¶15} The trial court then sentenced Appellant to twelve (12) months in prison on Count 3, twelve (12) months in prison on Count 4, and eight (8) years in prison on Count 5. The periods of incarceration imposed were ordered to be served consecutively for an aggregate prison sentence of ten (10) years. The trial court additionally terminated Appellant's post-release control and imposed the remainder of time left to be served.

{¶16} Appellant now appeals, raising the following assignments of error for review.

ASSIGNMENTS OF ERROR

{¶17} "I. FIELDS' TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BY NOT OBJECTING WHEN THE TRIAL COURT PROVIDED AN IMPROPER INSTRUCTION ON CONTINUED DELIBERATIONS AFTER THE JURY INDICATED THAT IT COULD NOT REACH A UNANIMOUS VERDICT.

{¶18} "II. THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTION TO PRESENT WITNESS TESTIMONY ON THE DETAILS OF THE INVESTIGATION OF FIELDS' PRIOR DRUG OFFENSE, IN VIOLATION OF HIS DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION SIXTEEN, ARTICLE ONE OF THE OHIO CONSTITUTION.

{¶19} "III. THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY TO CONSIDER TWO COUNTS OF TRAFFICKING IN COCAINE, EVEN THOUGH FIELDS WAS INDICTED ON ONE COUNT OF TRAFFICKING IN MARIJUANA AND ONE COUNT OF TRAFFICKING IN COCAINE.

{¶20} "IV. THE JURY VERDICTS AGAINST FIELDS ARE BASED ON INSUFFICIENT EVIDENCE, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 10 & 16, ARTICLE I OF THE OHIO CONSTITUTION.

{¶21} "V. THE JURY VERDICTS AGAINST FIELDS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED

STATES CONSTITUTION AND SECTIONS 10 & 16, ARTICLE I OF THE OHIO CONSTITUTION.

{¶22} "VI. THE TRIAL COURT UNLAWFULLY ORDERED FIELDS TO SERVE CONSECUTIVE SENTENCES, IN VIOLATION OF HIS RIGHTS TO DUE PROCESS, GUARANTEED BY SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION."

I.

{¶23} In his first assignment of error, Appellant argues he was denied the effective assistance of counsel. We disagree.

{¶24} 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).

{¶25} "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.

{¶26} 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. A court may dispose of a case by considering the second prong first, if that would facilitate disposal of the case. *State v. Bradley,* 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989), citing *Strickland,* 466 U.S. at 697. We note that a properly licensed attorney is presumed competent. *See Vaughn v. Maxwell,* 2 Ohio St.2d 299, 209 N.E.2d 164 (1965); *State v. Calhoun,* 86 Ohio St.3d 279, 714 N.E.2d 905 (1999).

{¶27} Further, reviewing courts must refrain from second-guessing strategic decisions and presume that counsel's performance falls within the wide range of reasonable legal assistance. *State v. Merry*, 5th Dist. Stark No. 2011CA00203, 2012-Ohio-2910, ¶ 42, citing *State v. Carter,* 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995). Debatable trial tactics do not establish ineffective assistance of counsel. *State v. Wilson*, 2018-Ohio-396, 106 N.E.3d 806, ¶ 36 (5th Dist.), citing *State v. Hoffner*, 102 Ohio St.3d 358, 365, 2004-Ohio-3430, 811 N.E.2d 48 (2004), ¶ 45.

{¶28} Appellant herein argues that defense trial counsel provided ineffective assistance in failing to object to the instruction provided to the jury to continue deliberations in an attempt to reach a verdict. Appellant argues that the trial court should have read the jury the *Howard*[1] charge.

{¶29} In *State v. Howard*, 42 Ohio St.3d 18 (1989), the Ohio Supreme Court approved a supplemental charge to be given to juries deadlocked on the question of

[1] *See State v. Howard*, 42 Ohio St.3d 18, 24, 537 N.E.2d 188 (1989).

conviction or acquittal. *Id.* at paragraph two of the syllabus. The charge must be balanced and neutral, and comport with the following goals: (1) encourage a unanimous verdict only when one can conscientiously be reached, leaving open the possibility of a hung jury and resulting mistrial; and (2) call for all jurors to reevaluate their opinions, not just the jurors in the minority. *Id.* at 25.

{¶30} A trial court is not required to give a verbatim *Howard* charge, as long as the given charge did not coerce the jurors into reaching a verdict. *In re Ohio Criminal Sentencing Statutes Cases,* 109 Ohio St.3d 313, 2006-Ohio-2109, 847 N.E.2d 1174 (2006).

{¶31} "Where it appears to a trial court that a jury is incapable of reaching a consensus, the court, in its discretion, may make a last-ditch effort to prod the jury into reaching a unanimous verdict so long as its instructions are balanced, neutral, and not coercive." *State v. King*, 8th Dist. Cuyahoga No. 99319, 2013-Ohio-4791, 2013 WL 5886605, ¶ 24, citing *Howard* at 24, 537 N.E.2d 188. "[T]he determination of whether a jury is irreconcilably deadlocked is within the discretion of the trial court." *Id.* at ¶ 25, citing *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, ¶ 127. Moreover, "there is no bright-line test to determine what constitutes an irreconcilably deadlocked jury." *King* at ¶ 26. "There is no formula or required period of time a trial court must wait before issuing a *Howard* instruction." (Citations omitted.) *Id. See also State v. May*, 2015-Ohio-4275, 49 N.E.3d 736, ¶ 55 (8th Dist.) (where this court found that the trial court did not abuse its discretion or did not commit plain error "in giving a supplemental *Howard* instruction at 4:30 p.m. rather than the following morning"). *See also Jones v. Cleveland Clinic Found.*, 8th Dist. No. 107030, 2019-Ohio-347, 119 N.E.3d 490, ¶¶ 37-38

{¶32} In the instant case, the jury had only been deliberating for two hours when they sent their question to the trial court. Further, the jury did not inform the trial court that they were deadlocked, only that their deliberations may take a while. The instruction provided to the jury did not stress or coerce them into reaching a verdict, it stated only that they must continue their "discussion and deliberations in an attempt to reach a verdict." We do not find the trial court abused its discretion in giving the instruction it did and not giving a *Howard* charge at that time.

{¶33} Having found no error in the trial court's instructions, we find no ineffective assistance of Appellant's trial counsel for failure to object to same.

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

II.

{¶35} In his second assignment of error, Appellant argues the trial court erred in allowing testimony regarding a prior drug offense. We disagree.

{¶36} Appellant complains that under Evid.R. 404(B), testimony concerning his prior conviction was improperly used to show a propensity or inclination to commit the crime of trafficking in drugs in the instant case.

{¶37} Extrinsic acts may not generally be used to prove the inference that the accused acted in conformity with his other acts or that he has the propensity to act in that manner. *State v. Smith* (1990), 49 Ohio St.3d 137, 140, 551 N.E.2d 190, 193–194. Evid.R. 404(B) permits "other acts" evidence for other purposes, such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶38} The Ohio Supreme Court has discussed Evid.R. 404, stating:

> Evid.R. 404 codifies the common law with respect to evidence of other acts of wrongdoing. The rule contemplates acts that may or may not be similar to the crime at issue. If the other act is offered for some relevant purpose other than to show character and propensity to commit crime, such as one of the purposes in the listing, the other act may be admissible. Another consideration permitting the admission of certain other-acts evidence is whether the other acts "form part of the immediate background of the alleged act which forms the foundation of the crime charged in the indictment" and are "inextricably related" to the crime. (Citations omitted.) *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 13.

{¶39} In determining whether to admit other-acts evidence, courts are to employ a three-step analysis. The first step is to consider whether the other acts evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Evid.R. 401. The next step is to consider whether evidence of the other crimes, wrongs, or acts is presented to prove the character of the accused in order to show activity in conformity therewith or whether the other acts evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B). The third step is to consider whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. *See* Evid.R 403. *State v. Hare*, 2018-Ohio-765, 108 N.E.3d 172, ¶ 42 (2d Dist.), quoting *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 20.

{¶40} "[A] trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence." *Rigby v. Lake Cty*., 58 Ohio St. 3d 269, 271, 559 N.E.2d 1056 (1991). "A trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable, or arbitrary." *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34.

{¶41} Upon review, we find no abuse of discretion here.

{¶42} At trial, Appellant testified that he did not know how to make cocaine and that he had never seen a collection of baggies before, (T. at 356). In response, the State then showed Appellant photographs from his 2009 conviction where officers located numerous baggies, crack cocaine and powder cocaine, baking soda, and a pan on the stove which was used to manufacture cocaine. Appellant denied ever seeing any of the items in the photographs. The State then called Detective Moore who was the evidence technician in 2009. At that time he assisted the drug unit and SRT team with the photographing and collection of evidence. The detective identified the photographs and the items in the photographs from Appellant's prior case, recalling that the evidence found at that time included baggies with crack cocaine, baggies with powder cocaine, and baggies with residue with the corners torn out of them. One of the photographs specifically showed a pile of baggies with the corners twisted and torn out and packaged for sale.

{¶43} Here, the rebuttal testimony was admitted not to show other bad acts by Appellant, but rather to impeach Appellant's testimony by demonstrating that Appellant had knowledge regarding the manufacturing process of cocaine and the tools used in

said process. As such, we find the trial court did not err in allowing said testimony and evidence.

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

III.

{¶45} In his third assignment of error, Appellant argues the trial court's jury instructions were erroneous. We disagree.

{¶46} Here, during the reading of the instructions to the jury, the trial court erroneously initially instructed the jury to consider two counts of trafficking in cocaine rather than one count of trafficking in cocaine and one count of trafficking in marijuana.

> In Count 4, the defendant is charged with trafficking in drugs, cocaine, Ohio Revised Code section 2925.03(A)(2), with a forfeiture specification.
>
> Before you can find the defendant guilty, you must find beyond a reasonable doubt that on or about the 8th day of February, 2019, in Muskingum County, Ohio, Gerald D. Fields knowingly prepared for shipment, shipped, transported, delivered, prepared for distribution, or distributed a controlled substance, to-wit: marijuana, in an amount less than 200 grams, when the said Gerald D. Fields knew or had reasonable cause to believe that the controlled substance, to-wit, marijuana, or a controlled substance analogue, was intended for sale or resale by the said Gerald D. Fields, or another person ...
>
> If you find that the State proved beyond a reasonable doubt all of the essential elements of the offense of trafficking in drugs, marijuana, in an amount less than 200 grams, your verdict must be guilty ... (T. at 440-41).

{¶47} The trial court again properly instructed the jury that Count 4 charged Appellant with trafficking in marijuana when it reviewed the verdict form with the jury. (T. at 451).

{¶48} Upon review, because we find that the jury was properly informed of the charges, in both the instructions and the verdict form, the error in the trial court's erroneous instruction to the jury to consider two counts of trafficking in cocaine was harmless.

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

IV., V.

{¶50} In his fourth and fifth assignments of error, Appellant argues his convictions were against the manifest weight and sufficiency of the evidence. We disagree.

{¶51} The standard of review for a challenge to the sufficiency of the evidence is set forth in *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), in which the Ohio Supreme Court held, "an appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The 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."

{¶52} 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

lots its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). 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.*

{¶53} It is well-established, though, that the weight of the evidence and the credibility of the witnesses are determined by the trier of fact. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216. The jury was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. *Id.*

{¶54} Appellant herein argues that the state failed to produce any witnesses to verify that they bought drugs from Fields or that they saw Fields possess or manufacture drugs." (Appellant's brief at 10).

{¶55} In the present case, Appellant was convicted of two counts of Possession of Drugs (Cocaine and Marijuana), in violation of R.C. §2925.11(A), two counts of Trafficking in Drugs (Cocaine and Marijuana), in violation of R.C. §2925.03(A)(2) and one count of the Illegal Manufacture of Drugs (Cocaine), in violation of R.C. §2925.04(A), which provide, in relevant part:

{¶56} R.C. §2925.11

(A) No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog.

{¶57} R.C. §2925.03

(A) No person shall knowingly do any of the following:

****

(2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance or a controlled substance analog, when the offender knows or has reasonable cause to believe that the controlled substance or a controlled substance analog is intended for sale or resale by the offender or another person.

{¶58} R.C. §2925.04

(A) No person shall knowingly cultivate marihuana or knowingly manufacture or otherwise engage in any part of the production of a controlled substance.

{¶59} At trial, the State introduced evidence to establish all of the elements of the possession, trafficking and manufacturing statutes recited above.

{¶60} At trial, the State introduced unrefuted evidence from the police officers that they received complaints regarding high numbers of people coming and going and drug trafficking from Appellant's residence. Detectives with the CODE task force investigated and observed the foot traffic at the house. Det. Wilhite testified this type of foot traffic is consistent with trafficking in drugs.

{¶61} Upon entering Appellant's home, the officers saw drugs and drug paraphernalia in plain sight. The State presented photographs of marijuana mixed with cocaine, digital scales with cocaine residue on them, a bag containing cocaine located on the side of the bed, baking soda on the carpet beside the bed, sandwich baggies with the corners torn off found in the bedroom, Appellant's prescription bottles and men's watches on the night stand next to the bed, cocaine and baggies in a hot cocoa container, and marijuana roaches in a cashew container in the kitchen.

{¶62} The jury also heard testimony from Detective Wilhite who explained that baking soda is used as a cutting agent in the manufacturing of cocaine. He also testified that sandwich baggies are used in the packaging of drugs and that same were found under Appellant's bed. He further testified that $7,700.00 was found in a pillow case on Appellant's bed and three (3) bags containing marijuana were found in his dresser. The baggies were balled up in the corner and tied in a knot, which he explained is indicative of drug trafficking. (T. at 216).

{¶63} Additionally, the jury was shown Appellant's pay/owe ledger, which Det. Wilhite explained is associated with drug trafficking and is used to keep track of who owes money when the drug dealer fronts the drugs to someone for a period of time. (T. at 217, 257).

{¶64} Det. Wilhite testified that Appellant admitted that he smoked marijuana and that he also snorted powder cocaine. (T. at 383-384). Appellant also admitted to them that the crack cocaine they located belonged to him. *Id*.

{¶65} While the defense presented testimony and evidence that the marijuana, marijuana pipe, and the money belonged to Appellant Misty Roe and the cocaine and scales belonged to Tara Harris, the jury as the trier of fact was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the trier of fact may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Craig,* 10th Dist. Franklin No. 99AP–739, 1999 WL 29752 (Mar 23, 2000) *citing State v. Nivens*, 10th Dist. Franklin No. 95APA09–1236, 1996 WL 284714 (May 28, 1996). Indeed, the trier of fact need not

believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver*, 10th Dist. Franklin No. 02AP–604, 2003–Ohio–958, ¶ 21, *citing State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964); *State v. Burke*, 10th Dist. Franklin No. 02AP–1238, 2003–Ohio–2889, *citing State v. Caldwell*, 79 Ohio App.3d 667, 607 N.E.2d 1096 (4th Dist. 1992). Although some of the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks*, 61 Ohio St.3d 259, 272, 574 N.E.2d 492 (1991), paragraph one of the syllabus, *superseded by State constitutional amendment on other grounds as stated in State v. Smith*, 80 Ohio St.3d 89, 102 at n.4, 684 N.E.2d 668 (1997).

{¶66} Based on the foregoing, we find that this is not an " 'exceptional case in which the evidence weighs heavily against the conviction.' " *State v. Thompkins*, 78 Ohio St.3d 380, 386–387, 678 N.E.2d 541 (1997), *quoting Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717. Based upon the foregoing and the entire record in this matter we find Appellant's convictions are not against the sufficiency or the manifest weight of the evidence. To the contrary, the jury appears to have fairly and impartially decided the matters before them. The jury heard the witnesses, evaluated the evidence, and was convinced of Appellant's guilt. The jury neither lost their way nor created a miscarriage of justice in convicting Appellant of the offenses.

{¶67} Finally, upon careful consideration of the record in its entirety, we find that there is substantial evidence presented which if believed, proves all the elements of the crimes for which Appellant was convicted.

{¶68} Appellant's fourth and fifth assignments of error are overruled.

VI.

{¶69} In his sixth assignment of error, Appellant argues the trial court erred in imposing consecutive sentences. We disagree.

{¶70} We review felony sentences using the standard of review set forth in R.C. 2953.08. *State v. Marcum*, 146 Ohio St.3d 516, 2016–Ohio–1002, 59 N.E.3d 1231, ¶ 22*; State v. Howell,* 5th Dist. Stark No. 2015CA00004, 2015-Ohio-4049, ¶ 31

{¶71} In *State v. Gwynne,* a plurality of the Supreme Court of Ohio held that an appellate court may only review individual felony sentences under R.C. §2929.11 and R.C. §2929.12, while R.C. §2953.08(G)(2) is the exclusive means of appellate review of consecutive felony sentences. 158 Ohio St.3d 279, 2019-Ohio-4761, ¶16-18; *State v. Anthony,* 11th Dist. Lake No. 2019-L-045, 2019-Ohio-5410, ¶60.

{¶72} R.C. §2953.08(G)(2) provides we may either increase, reduce, modify, or vacate a sentence and remand for resentencing where we clearly and convincingly find that either the record does not support the sentencing court's findings under R.C. §2929.13(B) or (D), §2929.14(B)(2)(e) or (C)(4), or §2929.20(I), or the sentence is otherwise contrary to law. *See, also, State v. Bonnell*, 140 Ohio St.3d 209, 2014–Ohio–3177, 16 N.E.2d 659, ¶ 28; *State v. Gwynne,* ¶16.

{¶73} Clear and convincing evidence is that evidence "which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford,* 161 Ohio St. 469, 120 N.E.2d 118(1954), paragraph three of the syllabus. *See* also, *In re Adoption of Holcomb*, 18 Ohio St.3d 361 (1985). "Where the degree of proof required to sustain an issue must be clear and convincing, a reviewing court will examine the record to determine whether the trier of facts had sufficient

evidence before it to satisfy the requisite degree of proof." *Cross,* 161 Ohio St. at 477 120 N.E.2d 118.

{¶74} In the case at bar, Appellant does not contest that the trial court made the proper findings under R.C. §2929.14(C)(4), only that the record does not support said findings.

{¶75} As the Ohio Supreme Court noted in *Gwynne*,

> Because R.C. 2953.08(G)(2)(a) specifically mentions a sentencing judge's findings made under R.C. 2929.14(C)(4) as falling within a court of appeals' review, the General Assembly plainly intended R.C. 2953.08(G)(2)(a) to be the exclusive means of appellate review of consecutive sentences. *See State v. Vanzandt*, 142 Ohio St.3d 223, 2015-Ohio-236, 28 N.E.3d 1267, ¶ 7 ("We primarily seek to determine legislative intent from the plain language of a statute").
>
> While R.C. §2953.08(G)(2)(a) clearly applies to consecutive-sentencing review, R.C. §2929.11 and §2929.12 both clearly apply only to *individual* sentences. 2019-Ohio-4761, ¶¶16-17 (emphasis in original).

{¶76} "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[.]" *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, ¶37. Otherwise, the imposition of consecutive sentences is contrary to law. *See Id*. The trial court is not required "to give a talismanic incantation of the words of the statute, provided that the necessary findings can be found in the record and are incorporated into the sentencing entry." *Id*.

{¶77} Appellant agrees that the trial judge in his case made the requisite findings to impose consecutive sentences under R.C. §2929.14(C)(4). (Appellant's Brief at 13).

{¶78} According to the Ohio Supreme Court, "the record must contain a basis upon which a reviewing court can determine that the trial court made the findings required by R.C. 2929.14(C)(4) before it imposed consecutive sentences." *Bonnell*, ¶28. "[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*. at ¶29.

{¶79} The plurality of the Ohio Supreme Court in *Gwynne* held that appellate courts may not review consecutive sentences for compliance with R.C. §2929.11 and R.C. §2929.12. *See* 2019-Ohio- 4761, ¶18.

{¶80} In the case at bar, the trial court had the benefit of a Pre-Sentence Investigation Report. That report detailed Appellant's significant criminal history which included a 2009 case in Muskingum County for trafficking in crack cocaine and permitting drug use, for which Appellant was sentenced to nine (9) years in prison. Appellant was still on post-release control for those convictions. Appellant also had a 2005 conviction in Guernsey County for trafficking in drugs (crack cocaine), possession of drugs (crack cocaine) for which he was sentenced to ten (10) months in prison. Appellant had three other separate convictions in Guernsey County in 2003: for trafficking in drugs (crack cocaine); and, for trafficking in drugs (cocaine), both of which he was sentenced to six (6) months in prison, and possession of drugs (crack cocaine) on which he was sentenced to one (1) year in prison. Appellant also had older convictions in Muskingum County in 2001, 1999, 1989 and 1981, for receiving stolen property, theft by deception and drug

abuse, as well as misdemeanor convictions for petty theft, disorderly conduct, passing bad checks, falsification, domestic violence, criminal trespass and drug abuse.

{¶81} The trial court found that, in addition to Appellant being on post-release control when these crimes occurred, Appellant had previously been on community control on more than one occasion and that his control had been revoked.

{¶82} Upon review, as set forth above, we find the record supports the trial court findings as required in order to impose consecutive sentences. We find that the trial court's sentencing on the charges complies with applicable rules and sentencing statutes. The sentence was within the statutory sentencing range. Further, the record contains evidence supporting the trial court's findings under R.C. §2929.14(C)(4). Therefore, we have no basis for concluding that it is contrary to law.

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

{¶84} Accordingly, the judgment of the Court of Common Pleas, Muskingum County, Ohio, affirmed.

By: Wise, J.

Hoffman, J., and

Baldwin, J., concur.

JWW/kw