[Cite as *State v. Adams*, 2015-Ohio-1160.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2014-CA-13
	:	
v.	:	T.C. NO. 13CR371, 13CR518,
	:	13CR609, 13CR733A
LUKE ADAMS	:	
	:	(Criminal Appeal from
Defendant-Appellant	:	Common Pleas Court)
	:	

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O P I N I O N

Rendered on the __27th____ day of ____March_____, 2015.

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FROELICH, P.J.

{¶ 1} Luke Adams pled guilty in the Clark County Court of Common Pleas to three counts of burglary and one count of heroin possession in four separate cases. The trial court sentenced him to sentences of seven years (Case No. 13-CR-371), three years (Case No. 13-CR-518), seven years (Case No. 13-CR-609), and three years (Case No.

13-CR-733), to be served consecutively for an aggregate sentence of 20 years.

{¶ 2} In his sole assignment of error, Adams contends the trial court erred in imposing consecutive sentences totaling 20 years in prison. For the following reasons, the trial court's judgment will be reversed, and the matter will be remanded for resentencing.

I. Factual and Procedural History

{¶ 3} On May 16, 2013 at 1:38 p.m., Adams broke a window and entered a residence. The two adult occupants were awakened by a noise, saw Adams in the kitchen, and Adams ran. He was arrested approximately 20 minutes later. (Case No. 13-CR-371). When arrested, Adams's vehicle contained 5.47 grams of heroin and oxycodone in less than the bulk amount (Case No. 13-CR-518). He was released on bond.

{¶ 4} On August 21, 2013, after his release on bond, Adams committed a burglary between 8:30 a.m. and 9:00 a.m. by cutting a residence's upstairs screen window (Case No. 13-CR-609). A disability prevented the occupant from going to check the noises, and when a relative arrived, the police were called. Adams was arrested later that day in possession of the resident's wallet. Adams was again released on bond.

{¶ 5} On September 9, 2013, Adams allegedly was involved in two separate burglaries, which resulted in two additional burglary charges. (Case No. 13-CR-662.) The details of those burglaries are not in the record.

{¶ 6} On October 9, Adams and a co-defendant entered a residence and removed several items, including weapons. (Case No. 13-CR-733A). No one was home at the time. Adams and his co-defendant were apprehended that day with several of the stolen

items. Adams was charged with burglary and receiving stolen property.

{¶ 7} Adams allegedly was involved with one additional incident of burglary, for which he was charged with two additional counts of burglary. (Case No. 13-CR-812.) The circumstances of this burglary also are not in the record, but the record suggests that this burglary occurred prior to October 9, 2013. (Adams received jail time credit for the period from October 9 until his conveyance to the penitentiary.)

{¶ 8} In total, Adams was charged with eight counts of burglary (involving six different residences), one count of possession of heroin, one count of aggravated drug possession, and one count of receiving stolen property. All of the offenses appear to have occurred between May 16, 2013 and October 9, 2013.

{¶ 9} Pursuant to a plea agreement, Adams pled guilty to three counts of burglary and one count of heroin possession. In exchange for the plea, all other charges were dismissed. *See* Case Nos. 13-CR-662, 13-CR-812, 13-CR-518 (count 2), and 13-CR-733A (counts 1 & 3). No agreement was made with regard to sentencing; Adams understood that he faced a potential aggregate 22-year prison sentence, consisting of eight years each on the two burglaries that were felonies of the second degree and three years each on the other burglary (third-degree felony) and the heroin possession charge. After accepting Adams's plea, the trial court ordered a presentence investigation.

{¶ 10} Adams returned to court for sentencing approximately one month later. After reviewing the presentence investigation report and hearing from counsel and Adams, the trial court imposed a sentence of seven years in Case No. 13-CR-371 (burglary, F-2), three years in Case No. 13-CR-518 (heroin, F-3), seven years in Case No. 13-CR-609 (burglary, F-2), and three years in Case No. 13-CR-733 (burglary, F-3); the

trial court ordered that the sentences be served consecutively, for an aggregate sentence of 20 years in prison. The court also imposed fines, a driver's license suspension, and restitution totaling $480.

{¶ 11} In support of consecutive sentences, the trial court stated:

> I do find that under [R.C.] 2929.14(C)(4) that consecutive sentences are necessary to protect the public from future crime and to punish the defendant.
>
> That consecutive sentences are not disproportionate to the seriousness of the defendant's conduct and to the danger he poses to the public.
>
> And that the defendant committed one or more of the multiple offenses while the defendant was awaiting trial and out on bond.

{¶ 12} Adams appeals from the trial court's judgment.

II. Imposition of Consecutive Sentences

{¶ 13} In his sole assignment of error, Adams claims that "the trial court erred in imposing a twenty year sentence upon appellant after his plea, which included consecutive sentences, and was only two years short of the maximum penalties he faced." He advances three arguments in support his claim. First, Adams contends the trial court "did not make the mandated findings under R.C. 2929.14(C)(4) to impose consecutive sentences." Second, he claims that the imposition of a 20-year sentence, as opposed to the 22-year possible maximum sentence, did "not save the trial court from its obligation to make findings as to why a maximum sentence is required." Third, he maintains that his 20-year prison sentence "shocks the conscience" and, therefore,

constitutes cruel and unusual punishment under the Eighth Amendment. Each of Adams's arguments challenges the aggregate 20-year sentence imposed by the trial court; he does not challenge the individual sentence imposed for each offense.

{¶ 14} After determining the sentence for a particular crime, a sentencing judge has discretion to order an offender to serve individual counts of a sentence consecutively. R.C. 2929.14(C)(4) provides:

> 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 [1] that the consecutive service is necessary to protect the public from future crime or to punish the offender and [2] 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 [3] 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.

{¶ 15} Adams asserts that the trial court "recited some statutory language and simply stated that [he] was awaiting trial when committing some of the acts, in support of the sentence." He maintains that "[t]his is inadequate under the statute." In particular, he contends that not all of his offenses were committed while "awaiting trial" and that the trial court's "conclusory" statements regarding consecutive sentences are inadequate. Adams further argues that the trial court did not justify the imposition of consecutive sentences totaling 20 years in prison.

{¶ 16} "On appeals involving the imposition of consecutive sentences, R.C. 2953.08(G)(2)(a) directs the appellate court 'to review the record, including the findings underlying the sentence' and to modify or vacate the sentence 'if it clearly and convincingly finds * * * [t]hat the record does not support the sentencing court's findings under division * * * (C)(4) of section 2929.14 * * * of the Revised Code.'" *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 28.

{¶ 17} There are two ways that a defendant can challenge consecutive sentences on appeal. First, the defendant can argue that consecutive sentences are *contrary to law* because the court failed to make the necessary findings required by R.C. 2929.14(C)(4). *See* R.C. 2953.08(G)(2)(b); *Bonnell* at ¶ 29 ("When imposing consecutive sentences, a trial court must state the required findings as part of the sentencing hearing."). Second, the defendant can argue that the record does not support the findings made under R.C. 2929.14(C)(4). *See* R.C. 2953.08(G)(2)(a); *State v. Moore*, 2014-Ohio-5135, 24 N.E.3d 1197 (8th Dist.) (record did not support the

imposition of consecutive sentences). Adams raises both types of arguments.

{¶ 18} Contrary to Adams's argument, the trial court made all of the findings required by R.C. 2929.14(C)(4), using the statutory language. In our view, an explanation of the rationale (both case-specific and statutory) for a sentence can only increase the public understanding of a particular sanction and thus the perceived legitimacy of the criminal justice system. *See, e.g.,* O'Hear, *Explaining Sentences*, 36 Fla.St.U.L.Rev. 459 (2009); Lamparello, *Social Psychology, Legitimacy, and the Ethical Foundations of Judgment: Importing the Procedural Justice Model to Federal Sentencing Jurisprudence*, 38 Colum.Hum.Rts.L.Rev. 115 (2006). Nonetheless, the trial court was not required to provide reasons to support its findings. *Bonnell* at ¶ 37; *State v. Hayes*, 2d Dist. Clark No. 2014-CA-27, 2014-Ohio-5362, ¶ 10.

{¶ 19} However, upon review of the record, we clearly and convincingly find that the record does not support the conclusion that consecutive sentences (1) are necessary to protect the public or punish Adams and (2) are not disproportionate to the seriousness of Adams's conduct and to the danger he poses to the public.

{¶ 20} Adams was born in June of 1991; he was 21 years old at the time of the first burglary and the drug offenses, and 22 years old at the time of the other offenses. His juvenile court adjudications consist of (1) complicity to unauthorized use of property (age 15), where he was placed on probation with random drug tests and counseling; (2) breaking and entering (age 15), a fifth-degree felony, where he received DYS suspended and was placed on probation; (3) disorderly conduct (age 16), where he was placed on probation, given 30 days detention, and placed on house arrest for two weeks; (4) failure to control (age 17); (5) two separate speeding cases (age 17); and (6) possession of

drugs (age 17), a minor misdemeanor. Several other juvenile cases were filed, but dismissed.

{¶ 21} His adult record consists of unauthorized use of property in December of 2012, for which he received 10 days in jail, and criminal damaging in May of 2013, for which he was sentenced to 30 days in jail.

{¶ 22} Adams reported that he completed the 12th grade, was never married, and has no children. His drug abuse began with alcohol as a teenager and progressed to marijuana, cocaine, oxycodone and heroin for the last year. He has never had any formal substance-related treatment, although he was attending Narcotics Anonymous (NA) and Alcohol Anonymous (AA) while incarcerated on these charges.

{¶ 23} Adams's explanation for his offenses, as relayed in the presentence investigation report, was that he was kicked out of his parents' house when they found out he was doing drugs and lost his job; he would either scrap junk or borrow from friends to survive, but mostly to get heroin. He said that he wanted to stop using heroin and get sober, but did not get treatment. He took "full responsibility" for the offenses, is "ashamed of" himself and apologized "to the victims, their families and the community" for his actions. Total restitution in the four cases was $480.

{¶ 24} At sentencing, counsel made a statement about the effects of heroin on his client and mentioned that his client had written letters to the victims "trying to mend the damage done." Adams apologized and explained his addiction and that his acts were "childish" and "very dangerous." He stated he'd been attending NA and hearing stories from other people and that if imprisoned he "will still attend the meetings and * * * still gonna go to church and get a college education that's going to help me when I get out."

He again apologized to the victims and the court.

{¶ 25} The State then was asked to make a statement.[1] The prosecutor did not "dispute that [Adams] is addicted to heroin," but thought "it's important to point out that he chose heroin. It didn't just fall into his lap one day. He's the one that chose to use those drugs." The prosecutor noted Adams's problems with alcohol as a juvenile and his juvenile probation record.

{¶ 26} In describing the May 16 offenses and the heroin involved, the prosecutor told the trial court that "under the law in the State of Ohio a unit dose of heroin is 0.1 grams. That means he had approximately 54 doses of heroin on him." Based on "phone records," the prosecutor said the "State has no doubt that he was also engaged in the selling of heroin. A true addict would not be able to hold onto 5.47 grams of heroin and not use it."

{¶ 27} The prosecutor went on to describe Adams's subsequent burglary offenses. He explained the effect on the sense of security of the victims and that the children have trouble sleeping; as it relates to the adult resident of one of the homes, the prosecutor said he did not testify at grand jury because he began to "have a seizure due to the stress that it was causing him." The prosecutor requested consecutive sentences "to protect the public from [Adams's] future behavior * * * because it's very likely that upon his

[1] The order of the presentencing statements (i.e., Adams and counsel went first and the State was the last to speak to the court) is unusual. Given the history of the right of allocution and its probable evolvement from final statements before pronouncement of a death sentence, Bennett, *Last Words: A Survey and Analysis of Federal Judges' Views on Allocution in Sentencing*, 65 Ala.L.Rev. 735 (2014), it seems reasonable that a convicted defendant should have the last word. However, Adams did not object, seek to rebut anything the prosecutor said, or raise the issue on appeal. While the right to allocution itself is constitutional, *Green v. United States*, 365 U.S. 301, 81 S.Ct. 653, 5 L.Ed.2d 670 (1961), neither the Constitution nor Crim.R. 32(A)(4) mandates a particular sequence and there does not appear to be any inherent prejudice.

release from prison he's going to reoffend unless he is sentenced to prison for a long enough time by this court to ensure he does not do so."

{¶ 28} All of Adams's felonies (convicted and dismissed) occurred within a period of five months. Although Adams pled guilty to two burglaries in which homeowners were present, none of the offenses was violent, and all of the burglaries involved theft offenses. The record reflects that Adams has a history of drug use, which has not been addressed. The prosecutor's statement that, although addicted, Adams "chose heroin," while perhaps cognitively correct, fails to recognize the complexity of addiction. The prosecutor's subsequent contradictory statement that a "true addict would not be able to hold onto 5.47 grams of heroin and not use it" is unsubstantiated; the reference to "phone records" and Adams's engaging in the selling of heroin is inflammatory and has no basis in the record or the presentence investigation report; and the statement that "under the law in the State of Ohio a unit dose of heroin is 0.1 grams" is, at best, misleading.[2]

{¶ 29} Without minimizing the emotional distress the burglary offenses undoubtedly caused the victims, Adams's offenses do not reflect such seriousness and a danger to the public that 20 years in prison is necessary to protect the public from him. Indeed, such a sentence may demean the perceived seriousness of other crimes and the

[2] This may come from the sentencing statute for heroin possession which imposes ranges which superficially seem to equate 0.1g with one "unit dose," i.e., R.C. 2925.03(C) imposes the same penalty range for 100-500 unit doses of heroin as it does for 10-50 grams of heroin. However, R.C. 2925.01(E) defines "unit dose" as any amount that is "separately identifiable and in a form that indicates that it is the amount of unit by which the controlled substance is separately administered to or taken by an individual." Therefore, a unit dose of heroin could be less than a tenth of a gram or considerably more, depending on its form of delivery. Regardless, the reports in this case simply reflect that "a plastic bag containing heroin" was located under the driver's seat of Adams's vehicle.

harm to other victims; for example, the sentence for murder is 15 to life and rape has a maximum sentence of 11 years.

{¶ 30} "Formalism" has been described as scrupulous or excessive adherence to outward form at the expense of inner reality or content. We are concerned that our sentencing jurisprudence has become a rubber stamp for rhetorical formalism. It appears that consecutive sentences will be upheld on appellate review as long as the aggregate sentence is within the arithmetic long-addition established by the statutes and the trial judge and the entry state that this calculation is (1) necessary to protect the public from future crime or to punish the offender, (2) not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and (3) one or more of the offenses was committed while awaiting trial or sentencing. Here, the minimally-required statutory phrases were uttered, and a 22-year-old non-psychopathic addict, with only a previous juvenile suspended DYS commitment and no adult felony record, will spend the next twenty years in prison at the expense of the taxpayers, not to mention the damage to him and to the community where he will be released.

{¶ 31} In summary, although the court made findings necessary to order Adams to serve his sentences consecutively, we clearly and convincingly find that the record does not support the trial court's finding that consecutive sentences totaling 20 years in prison are necessary to protect the public or punish Adams *and* are not disproportionate to the seriousness of Adams's conduct *and* to the danger he poses to the public. Moreover, the record does not demonstrate that 20 years in prison was the minimum sanction to accomplish the purposes of sentencing without imposing an unnecessary burden on the State.

{¶ 32} In light of this holding, we need not reach Adams's Eighth Amendment argument.

{¶ 33} Adams's assignment of error is sustained.

III. Conclusion

{¶ 34} The trial court's judgment will be reversed, and the matter will be remanded for resentencing.

. . . . . .

DONOVAN, J., concurs.

HALL, J., dissenting:

{¶ 35} I could be persuaded that sentencing a heroin-addicted offender who has no previous adult record to twenty years in prison for a five-month string of residential burglaries into six households and for felony-three possession of heroin constitutes an absence of the exercise of discretion, let alone an abuse thereof. However, the appropriate standard of review—whether the record clearly and convincingly does not support the court's findings—in my view has not been met. Therefore, I reluctantly would affirm the judgment of the trial court.

{¶ 36} As the lead opinion recognizes, Adams does not challenge the individual sentences imposed for the four offenses to which he entered pleas (F2 burglary, seven years, F3 heroin possession, three years, F2 burglary, seven years, and F3 burglary, three years). Only the trial court's consecutive-sentence determination is at issue. That squarely brings into play R.C. 2953.08(G)(2)(a) and the "extremely deferential" standard of review recognized by *State v. Venes*, 2013-Ohio-1891, 992 N.E.2d 453 (8th Dist.). There the appellate court indicated:

> It is important to understand that the "clear and convincing" standard applied in R.C. 2953.08(G)(2) is not discretionary. In fact, R.C. 2953.08(G)(2) makes it clear that "(t)he appellate court's standard for review is not whether the sentencing court abused its discretion." As a practical consideration, *this means that appellate courts are prohibited from substituting their judgment for that of the trial judge.*
>
> It is also important to understand that the clear and convincing standard used by R.C. 2953.08(G)(2) is written in the negative. *It does not say that the trial judge must have clear and convincing evidence to support its findings.* Instead, it is the court of appeals that must clearly and convincingly find that the record does not support the court's findings. In other words, *the restriction is on the appellate court, not the trial judge. This is an extremely deferential standard of review.*

Id. at ¶ 20-21 (emphasis added).

{¶ 37} Our court (*State v. Rodeffer,* 2013-Ohio-5759, 5 N.E.3d 1069, ¶ 31 (2d Dist.)), the Twelfth District (*State v. Lee*, 12th Dist. Butler No. 2012-09-182, 2013-Ohio-3404, ¶ 9), the Fifth District (*State v. Gooding*, 5th Dist. Holmes No. 13CA006, 2013-Ohio-5148, ¶ 7), the Eleventh District (*State v. Lane*, 11th Dist. Geauga No. 2013-G-3144, 2014-Ohio-2010, ¶ 123), and the Fourth District (*State v. Losey*, 4th Dist. Washington No. 14CA11, 2015-Ohio-285, ¶ 6-7) have cited and quoted *Venes* for the proposition that the review standard is "extremely deferential." Most of these cases also quoted the language from *Venes* recognizing that a trial court does not need clear and convincing evidence to support its findings. Accordingly, as long as a trial court makes the

appropriate statutory findings, the consecutive nature of its sentencing should stand unless the record overwhelmingly suggests to the contrary. In my view, a record that is silent except for the offenses and dates committed, perhaps after pleas without a presentence investigation and with only minimal information concerning the offenses, is sufficient if the trial court made the statutory findings. Under such circumstances, we should not substitute our conclusions for those of the trial court.

{¶ 38} Here the trial court manifestly *did* make all of the findings required by R.C. 2929.14(C)(4). As relevant here, the statute authorizes consecutive sentences if a trial court finds (1) consecutive sentences are necessary to protect the public from future crime or to punish the offender, (2) consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and (3) the offender committed one or more of the multiple offenses while awaiting trial or sentencing. The trial court made each of the foregoing findings, and it was not required to provide reasons to support them. *State v. Hayes*, 2d Dist. Clark No. 2014-CA-27, 2014-Ohio-5362, ¶ 10.

{¶ 39} Pursuant to R.C. 2953.08(G)(2), I do not clearly and convincingly find that the record fails to support the trial court's consecutive-sentence findings. Although Adams complains that his sentence was just two years less than the twenty-two-year statutory maximum the trial court could have imposed, he overlooks the fact that his plea agreement itself resulted in the dismissal of additional burglary charges, a drug charge, and a receiving-stolen-property charge. In fashioning an appropriate sentence, the trial court could consider these dismissed charges. *State v. Clemons*, 2d Dist. Montgomery No. 26038, 2014-Ohio-4248, ¶ 8 (recognizing that a trial court at sentencing may consider

a defendant's uncharged yet undisputed conduct as well as facts related to charges dismissed under a plea agreement). Moreover, there are some facts of Adams' case that provide support for the trial court's consecutive-sentence findings. The prosecutor addressed those facts in some detail below, pointing out Adams' juvenile record, his prior substance-abuse counseling, his commission of multiple burglaries (including offenses committed while children and a disabled adult were home and while he was out of jail on bond awaiting trial), and the impact the crimes had on Adams' victims. (Sentencing Tr. at 13-17).

{¶ 40} Pursuant to R.C. 2953.08(G)(2), I also do not find that Adams' aggregate twenty-year sentence is contrary to law. "[A] sentence is not contrary to law when the trial court imposes a sentence within the statutory range, after expressly stating that it had considered the purposes and principles of sentencing set forth in R.C. 2929.11, as well as the factors in R.C. 2929.12." (Citation omitted.) *Rodeffer* at ¶ 32. These requirements were met here. Each of Adams' sentences was within the authorized statutory range, and the trial court considered the statutory principles and purposes of sentencing as well as the statutory seriousness and recidivism factors.

{¶ 41} Adams additionally claims the trial court failed to satisfy "its obligation to make findings as to why a maximum sentence is required." (Appellant's brief at 6). However, the case law on this issue is that no "findings" were required for the trial court to impose statutory-maximum sentences for two of his offenses. *See, e.g., State v. Miller*, 7th Dist. Mahoning No. 13 MA 186, 2014-Ohio-4009, ¶ 8, fn.1 (recognizing that "there are no maximum sentence findings required under current R.C. 2929.14(C) or elsewhere"); *State v. McAfee*, 1st Dist. Hamilton No. C-130567, 2014-Ohio-1639, ¶ 18 ("The court was

not required to make findings or to give reasons for imposing the maximum term of confinement."). Adams identifies no such findings that the trial court was required to make, and there were none.

{¶ 42} Finally, Adams contends his aggregate twenty-year prison sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment. He argues that the sentence shocks the conscience in its disproportionality to the crimes at issue. Although I would question the wisdom of Adams' sentence, I would not find that it is cruel and unusual. This court should give substantial deference to the General Assembly, which established the range of punishment for Adams' crimes and authorized consecutive sentences under certain circumstances. *State v. Mayberry*, 2014-Ohio-4706, 22 N.E.3d 222, ¶ 38 (2d Dist.). As a general rule, then, a sentence that complies with valid sentencing statutes cannot constitute cruel and unusual punishment. *Id*. I find that to be the case here, where Adams does not even challenge the validity of R.C. 2929.14(C)(4).

{¶ 43} I note too that Adams claims his aggregate twenty-year sentence is disproportionate to sentences imposed in other jurisdictions and in this appellate district. (Appellant's brief at 7). He has failed, however, to identify any other cases from this appellate district or elsewhere for us to conduct a proportionality review. Even more importantly, "the 'proportionality review should focus on individual sentences rather than on the cumulative impact of multiple sentences imposed consecutively. Where none of the individual sentences imposed on an offender are grossly disproportionate to their respective offenses, an aggregate prison term resulting from consecutive imposition of those sentences does not constitute cruel and unusual punishment.'" *State v. Temple*, 2d Dist. Clark No. 2012-CA-65, 2013-Ohio-3843, ¶ 17, quoting *State v. Hairston*, 118 Ohio

St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073, ¶ 20. Here Adams does not argue that any of his four sentences, individually, is grossly disproportionate. Instead, his Eighth Amendment argument improperly challenges his aggregate twenty-year sentence as cruel and unusual punishment. (Appellant's brief at 7). For this additional reason, I find his argument unpersuasive.

{¶ 44} Based on the reasoning set forth above, I would overrule Adams' assignment of error and affirm the judgment of the Clark County Common Pleas Court.

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