[Cite as *State v. Edwards*, 2015-Ohio-2140.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case Nos. 14CA3424 & 14CA3425
vs.	:	
RICHARD EDWARDS,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT:[1]	Timothy Young, Ohio Public Defender, and Peter Galyardt, Ohio Assistant Public Defender, 250 East Broad Street, Columbus, Ohio 43215
COUNSEL FOR APPELLEE:	Matthew S. Schmidt, Ross County Prosecuting Attorney, and Jeffrey C. Marks, Ross County Assistant Prosecuting Attorney, 72 North Paint Street, Chillicothe, Ohio 45601

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:5-11-15
ABELE, J.

{¶ 1} This is a consolidated appeal from two Ross County Common Pleas Court judgments of conviction and sentence. In the first case, a jury found Richard Edwards, defendant below and appellant herein, guilty of (1) two counts of aggravated possession of drugs in violation of R.C. 2925.11; and (2) tampering with evidence in violation of R.C. 2921.12. In the second case, a jury found appellant guilty of (1) illegal possession of chemicals for the

[1]Different counsel represented appellant during the trial court proceedings.

manufacture of drugs in violation of R.C. 2925.041, (2) illegal manufacture of drugs in violation of R.C. 2925.04, and (3) aggravated possession of drugs in violation of R.C. 2925.11. Appellant assigns the following errors for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED IN DENYING RICHARD EDWARDS'S CRIM.R. 29 MOTION FOR ACQUITTAL, AND VIOLATED HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN, IN THE ABSENCE 0F SUFFICIENT EVIDENCE, IT CONVICTED HIM OF TAMPERING WITH EVIDENCE."
>
> SECOND ASSIGNMENT OF ERROR:
>
> "A TRIAL COURT COMMITS REVERSIBLE ERROR WHEN IT IMPOSES CONSECUTIVE PRISON TERMS WITHOUT SATISFYING THE STATUTORY MANDATES THAT AUTHORIZE CONSECUTIVE SENTENCES."

{¶ 2} In the early evening hours of February 26, 2012, Ross County Sheriff's Department Detective Allen Lewis received a complaint about a "meth cook" at a home that was later determined to be under appellant's control. Lewis and another deputy arrived at the scene and detected an odor of chemicals consistent with the manufacture of methamphetamine. After Lewis knocked on the door and announced himself, the door opened. Lewis testified that the smell of the chemicals, that he was trained to detect, was stronger in the home.

{¶ 3} After the officers moved a number of people outside for their safety, appellant identified himself as the occupant of the residence. When Detective Lewis took appellant aside to question him, appellant reached into his pocket, retrieved an aluminum foil "bindle" and threw it away. When the detective began to retrieve the "bindle," appellant admitted that it contained "meth." Appellant further explained that his grandmother had just passed away and that he "was

getting high."

{¶ 4} On June 1, 2012, the Ross County Grand Jury returned an indictment in Case No. 12CR140 that charged appellant with tampering with evidence and two counts of aggravated possession of drugs. On August 3, 2012, the Ross County Grand Jury returned an indictment in Case No. 12CR374 that charged appellant with the illegal possession of materials for the manufacture of drugs, the illegal manufacture of drugs, and aggravated possession of drugs. Appellant pled not guilty to all charges.

{¶ 5} These matters came on for trial in October 2013. At the conclusion of the prosecution's case, the defense moved for a Crim.R. 29(A) motion for judgment for acquittal on all counts.[2] The trial court denied the motion. Subsequently, the jury found appellant guilty of all of the offenses (in both cases).

{¶ 6} At the October 8, 2013 sentencing hearing, the trial court sentenced appellant in Case No. 12CR140 to, inter alia, serve two years in prison for tampering with evidence and ten months on each count of aggravated possession of drugs. The court further ordered that those prison terms be served consecutively to one another.

{¶ 7} In Case No. 12CR374, the trial court determined that counts one and two are allied offenses of similar import, as are counts two and three. The prosecution then elected to sentence appellant on Count II (illegal manufacture of drugs), for which the trial court ordered appellant to serve seven years in prison. The court further ordered that the sentence must be served consecutively to the sentences imposed in Case No. 12CR140, for a total prison sentence

[2] Defense counsel made the motion, but offered no argument in support except for the statement "I don't think the State has proven beyond a reasonable doubt."

of nine years.

{¶ 8} No appeal was taken from these judgments. However, on February 20, 2014 this Court granted appellant's motion to file a delayed appeal in each case and also ordered the appeals consolidated for purposes of briefing and disposition. The matters are now properly before us for review.

I

{¶ 9} In his first assignment of error, appellant asserts that the trial court erred by overruling his Crim.R. 29(A) motion for judgment acquittal regarding the tampering with evidence charge.

{¶ 10} Our analysis begins with a recitation of the proper standard of review. This standard is the same standard as is applicable to any argument that challenges the sufficiency of evidence. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, at ¶37; *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997); *State v. Carter*, 72 Ohio St.3d 545, 553, 651 N.E.2d 965 (1995). In reviewing for the sufficiency of the evidence, our inquiry must focus on the adequacy of the evidence and whether the evidence, considered in a light most favorable to the prosecution, could reasonably support a finding of guilt beyond a reasonable doubt. *Thompkins*, supra, at 386; *State v, Pickens*, ___ Ohio St.3d ___, 2014-Ohio-5445, ___ N.E.3d ___, at ¶180; *State v. Jenks*, 61 Ohio St.3d 259, 273, 574 N.E.2d 492 (1991).

{¶ 11} Appellant argues that his actions, while walking with Deputy Lewis, were tantamount to "divulg[ing] evidence," thus making the deputy's job "easier." In particular, appellant claims that he "pulled" the bindle from his pocket, then "dropped it on the ground for the officer to pick up." However, a reasonable juror need not have accepted this characterization

of the evidence.

{¶ 12} Deputy Lewis testified that appellant "cast [the bindle] off to the side." Admittedly, the phrase "cast off" is somewhat vague, but the trial transcript reveals that the deputy also demonstrated the action for the jury. Although we cannot glean from the transcript precisely what gesture the deputy made, this is why we must defer to the jury, the trier of fact, who actually observed the gesture and drew its own conclusion. See generally *Myers v. Garson*, 66 Ohio St.3d 610, 615, 614 N.E.2d 742 (1993); *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

{¶ 13} We also point out that later in his testimony, Deputy Lewis identified an exhibit as "the tin foil bindle that he [appellant] had thrown off to the side." (Emphasis added.) To throw an object generally means to "propel something through the air" or to "hurl with great force." *The American Heritage Dictionary* 1267 (1985). This characterization runs counter to appellant's claim that he simply "dropped" the evidence to the ground in order to divulge it to the deputy.

{¶ 14} R.C. 2925.11(A)(1) provides that no person, knowing that an official investigation is in progress, shall "[a]lter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its . . . availability as evidence in such proceeding or investigation[.] (Emphasis added.) Throwing away evidence is sufficient for a trier of fact to conclude that a defendant attempted to conceal, and thus tamper with, that evidence. See e.g. *State v. Williams*, 6th Dist. Lucas Nos. L–13–1053, L–13–1054, 2014-Ohio-2834, at ¶51; State v. English, 10th Dist. Franklin No. 13AP–88. 2014-Ohio-89, at ¶¶21-22.

{¶ 15} Therefore, after our review of the record, we believe that sufficient evidence exists for the trier of fact to conclude that appellant, during the investigation, threw away the

evidence in an attempt to conceal it from discovery. Thus, the trier of fact could reasonably conclude that appellant tampered with evidence and the trial court properly denied the Crim.R. 29(A) motion for judgment of acquittal.

{¶ 16} Accordingly, for all these reasons, we hereby overrule appellant's first assignment of error.

II

{¶ 17} In his second assignment of error, appellant asserts that the trial court erred by sentencing him to consecutive prison terms. We agree, albeit reluctantly.

{¶ 18} In the ever-evolving parallel universe that is Ohio felony sentencing law, our recent pronouncement provides that R.C. 2953.08(G)(2) provides two grounds for an appellate court to overturn the imposition of consecutive sentences: (1) the appellate court, upon its review, clearly and convincingly finds that "the record does not support the sentencing court's findings" under R.C. 2929.14(C)(4); or (2) the sentence is otherwise clearly and convincingly contrary to law. *State v. Walters*, 4th Dist. Washington Nos. 13CA33 & 13CA36, 2014-Ohio-4966, at ¶7; *State v. Bever*, 4th Dist. Washington No. 13CA21, 2014–Ohio–600, ¶14.

R.C. 2929.14(C) requires, inter alia, as follows:

"(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."

The October 8, 2013 sentencing transcript reveals the following colloquy between the trial court and the assistant prosecutor:

"[THE STATE]: Your Honor, the Court may have already addressed this and I might have just missed it when I was writing stuff down, but I don't know if there was the appropriate language put down as far as the consecutive sentencing [is concerned] . . .

THE COURT: The court makes the finding that it's necessary to protect the public and in order to place this in incarceration for the number of years because it's necessary to protect the public. It's been clearly shown through the facts of this case, that this Defendant was making large amounts of methamphetimine, more than he could ever have used himself."

{¶ 19} Appellant argues that the trial court made only one of the three findings required to impose consecutive sentences. Thus, appellant reasons, the trial court's ruling is contrary to law. Again, we reluctantly agree. The R.C. 2929.14(C)(4) findings were omitted when the court first imposed the sentence and the assistant prosecutor raised the issue only as an afterthought. Even then, the only finding is that the consecutive sentences are necessary to protect the public. The trial court did not find (1) that consecutive sentences are not disproportionate to the seriousness of appellant's conduct, or (2) any of the three factors in R.C. 2929.14(C)(4)(a), (b) or (c).

{¶ 20} We further point out that none of the findings were carried over into the final sentencing entry for Case No. 12CR140. The prosecution claims that in the final sentencing entry for Case No. 12CR374, the trial court found "consecutive service [sic] is necessary to

protect the public from future crime, to punish the Defendant and that consecutive sentences are not disproportionate to the seriousness of the Defender's [sic] conduct and to the danger the Defendant poses to the public." Nevertheless, it is not clear to us that the court satisfied all of the R.C. 2929.14(C)(4) requirements in the sentencing entry for the second case. However, even if it had, the Ohio Supreme Court has held that these findings must be made at the sentencing hearing, and then be incorporated into the final judgment entry. See *State v. Bonnell*, 140 Ohio St.3d 209, 2014- Ohio-3177, 16 N.E.3d 659, at the syllabus. In the case sub judice, our review of the transcript reveals that the trial court did not make all of the required findings during the sentencing hearing. Therefore, we hereby sustain appellant's second assignment of error.

{¶ 21} Having sustained appellant's second assignment of error, we hereby affirm, in part, and reverse, in part, the trial court's judgment. Thus, the judgment of conviction stands, but appellant's sentences are hereby vacated and this matter is remanded for re-sentencing consistent with this opinion.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the trial court's judgment be affirmed, in part, and reversed, in part, and the case remanded for re-sentencing consistent with this opinion. Appellant shall recover of appellee costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

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

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

Harsha, J. & McFarland, A.J.: Concur in Judgment & Opinion
For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

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

Topics & Issues:

Criminal Law: Trial court did not err in overruling appellant's Crim.R. 29(A) motion for judgment of acquittal; trial court failed to make requisite findings under R.C. 2929.14(C)(4) for imposing consecutive sentences.