[Cite as *State v. Anderson*, 2018-Ohio-2013.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 17CA6
vs.	:	
ARNOLD ANDERSON,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Brian A. Smith, Akron, Ohio, for appellant.

Brigham Anderson, Lawrence County Prosecuting Attorney, and C. Michael Gleichauf, Lawrence County Assistant Prosecuting Attorney, Ironton, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:5-9-18
ABELE, J.

{¶ 1} This is an appeal from a Lawrence County Common Pleas Court judgment of conviction and sentence. A jury found Arnold Anderson, defendant below and appellant herein, guilty of three counts of fourth-degree-felony aggravated trafficking in drugs, in violation of R.C. 2925.03(A)(1). Appellant assigns the following errors for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE FAILURE OF APPELLANT'S TRIAL COUNSEL TO OBJECT TO TESTIMONY FROM DETECTIVE CHAD GUE THAT TWO CHARGES WOULD 'MERGE' CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL."

SECOND ASSIGNMENT OF ERROR:

"THE FAILURE OF APPELLANT'S TRIAL COUNSEL TO PROVIDE ADDITIONAL INFORMATION OR TO FURTHER CROSS-EXAMINE AMANDA CLARK ABOUT HER PRIOR CRIMINAL HISTORY CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL."

THIRD ASSIGNMENT OF ERROR:

"APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

FOURTH ASSIGNMENT OF ERROR:

"APPELLANT'S SENTENCE WAS CONTRARY TO LAW."

{¶ 2} In June 2016, the Ironton Police Department engaged Amanda Clark as a confidential informant. Clark indicated that she could purchase drugs from appellant and Ironton Police Detective Chad Gue and Sergeant Jamie Pruitt monitored three controlled transactions between Clark and appellant. After each transaction, Clark immediately returned to the officers and showed them the drugs appellant had given her in exchange for money. Subsequently, a Lawrence County grand jury returned an indictment that charged appellant with trafficking in drugs.[1] Appellant entered not guilty pleas.

{¶ 3} At trial, Detective Gue testified that he monitored three controlled buys that used Clark as a confidential informant. The detective indicated that he knew Clark "had a problem

[1] The indictment charged appellant with third-degree-felony trafficking offenses. The state's bill of particulars, however, alleged that the offenses are fourth-degree-felony offenses. Moreover, the trial court's April 2017 sentencing entry indicates that the jury found appellant guilty of fourth-degree-felonies. Although it does not appear that the state sought to amend the indictment, none of the parties raise any issue regarding the discrepancy between the indictment and appellant's judgment of conviction and sentence. Furthermore, appellant did not object to the variance. Crim.R. 7(D) permits a trial court to amend an indictment "at any time before, during, or after a trial * * * in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged." In light of the foregoing, we do not find it necessary to dwell on this issue.

with drugs," but Clark advised Gue "that she wanted to clean up her life" and "wanted to turn some things around."

{¶ 4} Detective Gue stated that before each buy, officers searched Clark to ensure that she did not have any drugs in her possession. The officers also outfitted Clark with a recording device and gave her marked money to use for the transaction.

{¶ 5} Detective Gue related that the first controlled buy occurred at Clark's residence. Gue remained in his vehicle during the transaction, while Sergeant Pruitt waited inside the residence. When appellant's vehicle arrived, Clark exited and approached appellant's vehicle. The detective testified that he witnessed "a transaction" between appellant and Clark, after which Clark immediately returned to the residence and surrendered the recording device and the evidence to Sergeant Pruitt. Detective Gue related that he then picked up Clark and Sergeant Pruitt, and drove to the police department where the officers conducted another search of Clark and debriefed her. Clark had returned with two, fifteen milligram oxycodone tablets.

{¶ 6} Detective Gue explained that during Clark's debriefing, she explained what transpired during her interaction with appellant. The detective then watched the video obtained from the recording device to ensure it matched Clark's explanation. Detective Gue stated that Clark's description was consistent with what he viewed on the video. During the detective's testimony, the state introduced the video recording of the transaction, as well as still shots. Detective Gue testified that one of the photos depicted appellant removing a cap from a pill bottle.

{¶ 7} Detective Gue related that, for the next two transactions, the parties followed the same procedure. During the second transaction, Clark purchased "a tenth of methamphetamine"

and also obtained a suboxone strip. The detective explained that Clark "already told [Gue] she was attempting to recover from her addiction and stated that she had been using suboxone I guess her choice [sic] and that [appellant] had gave [sic] her that because, in her words, I guess he knows I like suboxone." Detective Gue stated that Clark purchased methamphetamine during the third transaction.

{¶ 8} On cross-examination, defense counsel asked the detective whether the officers recovered from appellant any of the marked money used during the controlled buy. Detective Gue stated that they had not. Defense counsel additionally questioned whether the detective knew why the state did not charge appellant with an offense related to the suboxone strip, and Detective Gue replied that he did not know why the state did not charge appellant with a suboxone-related offense.

{¶ 9} On re-direct, the prosecutor asked the detective whether suboxone and methamphetamine offenses arising from the same transaction would merge. The detective stated that they "[c]ertainly could."

{¶ 10} In response to defense counsel's suggestions that the video and photographic evidence lacked clarity, the detective stated that he believes that the video and audio evidence shows that Clark gave appellant money for drugs. He testified that the video and photographic evidence from the first transaction document a pill bottle in appellant's hand and Clark's receipt of pills from appellant.

{¶ 11} The detective further stated that the audio recording from the second transaction captured Clark stating that she needs "a tenth of ice" and asking "how much you gonna charge me?" Detective Gue explained that "ice" means crystal methamphetamine. On

cross-examination, however, Detective Gue agreed that the video does not actually depict the transfer of drugs in exchange for money. Sergeant Pruitt offered similar testimony.

{¶ 12} Clark testified that she decided to become a confidential informant after her mother's death and after Clark had overdosed on drugs. She admitted that her criminal history includes drug possession, theft, and driving under suspension, and explained that her theft offense resulted because she was trying to feed her drug addiction. Clark additionally explained that she and appellant's girlfriend, Tiffany, became romantically involved.

{¶ 13} Clark indicated that she started buying controlled substances from appellant around January 2016 and had made somewhere between ten and twenty purchases from him. She testified that after she became a confidential informant, she participated in three controlled buys from appellant. On June 16, she purchased two fifteen milligram oxycodone pills in exchange for $40. Clark related that before the buy, the officers patted her down. She explained that she had to empty her pockets, and lift up her bra and shake it. Clark testified that she did not have contraband on her at that time and she did not tamper with the recording device. Clark stated that after the buy, she immediately turned over the oxycodone and the recording device to the detective.

{¶ 14} Clark stated that on June 22, she purchased crystal methamphetamine. Clark related that although she did not recall all of the details of this transaction, she ordinarily would call or text appellant to ask if he had what she wanted to buy and then make arrangements to complete the transaction. Clark explained that she does not recall how much money she paid appellant for the crystal methamphetamine, but does remember that during one of the controlled buys she still owed him $5. Clark further believed that during this second buy, appellant gave her

suboxone, even though she did not pay for it.

{¶ 15} Clark also recalled making a third buy from appellant, but again could not recall details.

{¶ 16} On cross-examination, defense counsel probed Clark's motivation for acting as a confidential informant. Clark agreed that she was paid $60 for each of the last two buys. She also explained that when she became an informant, she had fines that she was paying for driving under suspension, but was unaware of any other pending charges. Clark indicated that she had been in trouble before, but did not have anything pending when she decided to become an informant.

{¶ 17} Defense counsel asked Clark whether she had any convictions that involve dishonesty besides the theft conviction. Clark indicated that she believes she has two theft charges that were "amended down to unauthorized use of properties." She additionally mentioned a third offense that occurred in Kentucky five or six years ago and that she believes it involved receiving stolen property.

{¶ 18} Defense counsel next questioned Clark regarding her relationship with Tiffany. Counsel pointed out that Tiffany and Clark began a relationship after appellant and Tiffany's relationship soured, and Clark then became an informant. Counsel additionally noted that after appellant's arrest, Clark continued to live in the house that appellant and Tiffany owned. Appellant's counsel thus implied that Clark acted as an informant to retaliate against appellant.

{¶ 19} Clark, however, denied all of defense counsel's insinuations and denied that she became an informant simply because she needed money. Instead, she explained that she wanted to straighten out her life. Clark further stated that she and Tiffany no longer involved in a

relationship and that she did not engage in controlled buys as a form of retaliation.

{¶ 20} After hearing the evidence, the jury found appellant guilty. This appeal followed.

I

INEFFECTIVE ASSISTANCE OF COUNSEL

{¶ 21} Appellant's first and second assignments of error involve the same legal issue—whether trial counsel failed to provide effective assistance of counsel. For ease of discussion, we combine our review of the assignments of error.

A

INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD

{¶ 22} The Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution provide that defendants in all criminal proceedings shall have the assistance of counsel for their defense. The United States Supreme Court has generally interpreted this provision to mean a criminal defendant is entitled to the "reasonably effective assistance" of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *accord Hinton v. Alabama*, —— U.S.——, 134 S.Ct. 1081, 1087–1088, 188 L.Ed.2d 1 (2014) (explaining that the Sixth Amendment right to counsel means "that defendants are entitled to be represented by an attorney who meets at least a minimal standard of competence").

{¶ 23} To establish constitutionally ineffective assistance of counsel, a defendant must show (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced the defense and deprived the defendant of a fair trial. *E.g., Strickland*, 466 U.S. at 687, 104 S.Ct. 2052; *State v. Obermiller*, 147 Ohio St.3d 175, 63 N.E.3d 93, 2016-Ohio-1594, ¶ 83; *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 85. "Failure to

establish either element is fatal to the claim." *State v. Jones*, 4th Dist. Scioto No. 06CA3116, 2008-Ohio-968, ¶ 14. Therefore, if one element is dispositive, a court need not analyze both. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000) (stating that a defendant's failure to satisfy one of the elements "negates a court's need to consider the other").

1

Deficient Performance

{¶ 24} The deficient performance part of an ineffectiveness claim "is necessarily linked to the practice and expectations of the legal community: 'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Padilla v. Kentucky*, 559 U.S. 356, 366, 130 S.Ct. 1473, 176 L .Ed.2d 284 (2010), quoting *Strickland*, 466 U.S. at 688; *accord Hinton*, 134 S.Ct. at 1088. "Prevailing professional norms dictate that with regard to decisions pertaining to legal proceedings, 'a lawyer must have "full authority to manage the conduct of the trial."'" *Obermiller* at ¶ 85, quoting *State v. Pasqualone*, 121 Ohio St.3d 186, 2009–Ohio–315, 903 N.E.2d 270, ¶ 24, quoting *Taylor v. Illinois*, 484 U.S. 400, 418, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). Furthermore, "'[i]n any case presenting an ineffectiveness claim, "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.'" *Hinton*, 134 S.Ct. at 1088, quoting *Strickland*, 466 U.S. at 688. Accordingly, "[i]n order to show deficient performance, the defendant must prove that counsel's performance fell below an objective level of reasonable representation." *State v. Conway*, 109 Ohio St.3d 412, 2006–Ohio–2815, 848 N.E.2d 810, ¶ 95 (citations omitted); *accord Hinton*, 134 S.Ct. at 1088, citing *Padilla*, 559 U.S. at 366; *State v. Wesson*, 137 Ohio St.3d 309, 2013–Ohio–4575, 999 N.E.2d 557, ¶ 81.

{¶ 25} Moreover, when considering whether trial counsel's representation amounts to deficient performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Thus, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* Additionally, "[a] properly licensed attorney is presumed to execute his duties in an ethical and competent manner." *State v. Taylor*, 4th Dist. Washington No. 07CA11, 2008–Ohio–482, ¶ 10, citing *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel's errors were "so serious" that counsel failed to function "as the 'counsel' guaranteed * * * by the Sixth Amendment." *Strickland*, 466 U.S. at 687; *e.g., Obermiller* at ¶ 84; *State v. Gondor*, 112 Ohio St.3d 377, 2006–Ohio–6679, 860 N.E.2d 77, ¶ 62; *State v. Hamblin*, 37 Ohio St.3d 153, 156, 524 N.E.2d 476 (1988).

2

Prejudice

{¶ 26} To establish prejudice, a defendant must demonstrate that a reasonable probability exists that "'but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the outcome.'" *Hinton*, 134 S.Ct. at 1089, quoting *Strickland*, 466 U.S. at 694; *e.g., State v. Short*, 129 Ohio St.3d 360, 2011–Ohio–3641, 952 N.E.2d 1121, ¶ 113; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus; *accord State v. Spaulding*, 151 Ohio St.3d 378, 2016-Ohio-8126, 89 N.E.3d 554, 2016 WL 7386160, ¶91 (indicating that prejudice component requires a "but for" analysis). "'[T]he question is whether there is a reasonable probability that,

absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" *Hinton,* 134 S.Ct. at 1089, quoting *Strickland,* 466 U.S. at 695. Furthermore, courts may not simply assume the existence of prejudice, but must require the defendant to affirmatively establish prejudice. *State v. Clark,* 4th Dist. Pike No. 02CA684, 2003–Ohio–1707, ¶22; *State v. Tucker,* 4th Dist. Ross No. 01CA2592 (Apr. 2, 2002). As we have repeatedly recognized, speculation is insufficient to demonstrate the prejudice component of an ineffective assistance of counsel claim. *E.g., State v. Tabor*, 4th Dist. Jackson No. 16CA9, 2017-Ohio-8656, 2017 WL 5641282, ¶34; *State v. Jenkins,* 4th Dist. Ross No. 13CA3413, 2014–Ohio–3123, ¶ 22; *State v. Simmons,* 4th Dist. Highland No. 13CA4, 2013–Ohio–2890, ¶ 25; *State v. Halley,* 4th Dist. Gallia No. 10CA13, 2012–Ohio–1625, ¶ 25; *State v. Leonard,* 4th Dist. Athens No. 08CA24, 2009–Ohio–6191, ¶ 68; *accord State v. Powell,* 132 Ohio St.3d 233, 2012–Ohio–2577, 971 N.E.2d 865, ¶ 86 (stating that an argument that is purely speculative cannot serve as the basis for an ineffectiveness claim).

B

DETECTIVE GUE'S TESTIMONY

{¶ 27} Appellant first contends that trial counsel performed ineffectively by failing to object to Detective Gue's testimony that, if the state had charged appellant with suboxone and methamphetamine related drug charges, the two drug charges could merge. Appellant contends that trial counsel should have recognized that the detective's testimony regarding merger constituted an improper legal conclusion and that trial counsel's failure to object to this allegedly improper testimony constituted deficient performance. Appellant additionally claims that trial counsel's failure to object affected the outcome of the trial. While his argument is somewhat

difficult to discern, appellant appears to assert that if trial counsel had objected, defense counsel could have offered the jury an alternate explanation why the state did not choose to pursue a methamphetamine and a suboxone charge. Appellant argues that the state "may have wished to minimize scrutiny as to why" Clark "obtained the suboxone." Appellant contends that trial counsel's failure to object to the testimony allowed appellee to offer an explanation why it chose to bring one charge instead of two, and impacted defense counsel's ability to challenge Clark's credibility. Appellant posits that trial counsel's failure to offer an alternate explanation for the state's decision not to pursue two charges rendered Clark's "credibility higher" and made the state's "case appear stronger by failing to cast additional doubt on its key witness." Appellant claims that trial counsel's failure to object thus affected the jury's decision to find him guilty.

{¶ 28} First, we observe that tactical decisions, such as whether and when to object, ordinarily do not give rise to a claim for ineffective assistance. *State v. Johnson*, 112 Ohio St.3d 210, 2006–Ohio–6404, 858 N.E.2d 1144, ¶ 139–140; *accord State v. Fears*, 86 Ohio St.3d 329, 347, 715 N.E.2d 136 (1999), quoting *State v. Holloway*, 38 Ohio St.3d 239, 244, 527 N.E.2d 831 (1988) ("'[t]he failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel.'"); *State v. Hale*, 119 Ohio St.3d 118, 2008–Ohio–3426, 892 N.E.2d 864, ¶233. As the court explained in *Johnson* at ¶ 139–140:

> [F]ailure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel. To prevail on such a claim, a defendant must first show that there was a substantial violation of any of defense counsel's essential duties to his client and, second, that he was materially prejudiced by counsel's ineffectiveness. *State v. Holloway* (1988), 38 Ohio St.3d 239, 244, 527 N.E.2d 831. * * *
>
> [E]xperienced trial counsel learn that objections to each potentially objectionable event could actually act to their party's detriment. * * * In light of this, any single failure to object usually cannot be said to have been error unless

> the evidence sought is so prejudicial * * * that failure to object essentially defaults the case to the state. Otherwise, defense counsel must so consistently fail to use objections, despite numerous and clear reasons for doing so, that counsel's failure cannot reasonably have been said to have been part of a trial strategy or tactical choice. *Lundgren v. Mitchell* (C.A.6, 2006), 440 F.3d 754, 774. Accord *State v. Campbell*, 69 Ohio St.3d 38, 52–53, 1994–Ohio–492, 630 N.E.2d 339.

{¶ 29} After our review in the case at bar, we do not believe that trial counsel's failure to object to Detective Gue's merger testimony created such prejudice that the failure to object essentially defaulted to case to the state. If trial counsel had objected, and if the trial court had sustained the objection, then the court would have instructed the jury to disregard Detective Gue's testimony concerning merger. We fail to see how the absence of Detective Gue's testimony that a methamphetamine and a suboxone offense could merge affected the outcome of appellant's trial and essentially defaulted the case to the state. Appellant postulates that if defense counsel had objected, defense counsel could have highlighted Clark's drug use to appellant's advantage, which, he claims, would have led to an acquittal. However, this is only speculation. Appellant cannot know how the jury would have used any additional emphasis upon Clark's drug use. Obviously, Clark's drug use is not a secret. The jury was well-aware of her drug use. Thus, even though defense counsel may not have highlighted every possible facet of Clark's drug use, the jury nevertheless heard more than ample evidence regarding her drug use. We do not believe that defense counsel's decision not to object to the detective's merger testimony placed the proverbial nail in appellant's coffin.

{¶ 30} We further note that trial counsel opened the door to testimony regarding the state's decision not to pursue both methamphetamine- and suboxone-related charges. During defense counsel's cross-examination of Detective Gue, defense counsel asked the detective if he

knew why the state chose not to pursue a suboxone-related charge. The detective responded that he did not know. On re-direct, the state asked the detective whether he knew if the two charges would have merged, if the state had chosen to charge both. Thus, defense counsel opened the door to allow the state to offer a reason why it chose not to pursue two charges. We therefore do not believe that trial counsel performed ineffectively by failing to object to Detective Gue's testimony regarding merger. *See State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319, ¶ 149, quoting *State v. Nix*, 1st Dist. Hamilton No. C–030696, 2004-Ohio-5502, ¶ 60 ("'it clearly cannot be said that defense counsel is constitutionally ineffective whenever he or she inadvertently opens the door to otherwise inadmissible testimony'").

C

CLARK'S CRIMINAL HISTORY

{¶ 31} In his second assignment of error, appellant asserts that trial counsel performed ineffectively by failing to more thoroughly cross-examine Clark about her criminal history. Appellant alleges that trial counsel should have delved into the details of Clark's criminal history, such as "the offense of which she was convicted, the degree, the punishment, and the date of the charge and/or conviction."

{¶ 32} Appellant also asserts that trial counsel performed ineffectively by failing to obtain, before trial, details of Clark's criminal history. Appellant argues that if the state had disclosed Clark's criminal history earlier, then defense counsel would have had more time to investigate Clark's criminal history. Instead, "the jury only heard vague testimony from a witness who testified that she was unsure of her own criminal history." Appellant claims that "the additional time spent on Clark's impeachment would have undermined her credibility in a

manner that would have been fatal to the State's case against [appellant]." We do not agree.

{¶ 33} In general, "'[t]he scope of cross-examination falls within the ambit of trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel.'" *State v. Spaulding*, 151 Ohio St.3d 378, 2016-Ohio-8126, 89 N.E.3d 554, ¶90, quoting *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶101. The Ohio Supreme Court recently stated that a defendant alleging that trial counsel performed deficiently during cross-examination "must identify the questions he believes his counsel should have asked and must provide some sense of the information that might have been elicited. Otherwise, we will presume that the choice to forgo cross-examination 'constituted a legitimate tactical decision.'" *State v. Beasley*, --- Ohio St.3d ---, 2018-Ohio-493, --- N.E.3d. ---, 2018 WL 915251, ¶155, citing and quoting *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, 873 N.E.2d 1263, ¶ 220, and citing *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, ¶ 90 (holding that counsel made a legitimate tactical decision to forgo additional cross-examination where the defendant "fail[ed] to explain how further cross-examination of [the witness] would have made a difference in his case").

{¶ 34} In the case sub judice, even if we agreed that trial counsel should have cross-examined Clark more thoroughly regarding her criminal history, we cannot conclude that the jury would have reached a different result. Appellant has not suggested what further probing of Clark's criminal past would have revealed. The jury was well-aware that Clark had not been a law-abiding citizen. Trial counsel cross-examined Clark regarding her criminal history, her drug use, and her motivation to become a confidential informant. Clark admitted that she had prior criminal charges involving dishonesty, that she abused drugs, that she overdosed, and that

following her overdose she became a confidential informant. Trial counsel also elicited Clark's testimony that she had been involved in a romantic relationship with appellant's girlfriend, Tiffany, and that after appellant's arrest, Clark and Tiffany lived together in the home appellant and Tiffany jointly shared. Thus, trial counsel suggested that Clark implicated appellant solely due to a romantic tiff. Consequently, trial counsel gave the jury sufficient reasons to doubt Clark's testimony and to conclude that she lied and set up appellant. The jury, however, obviously did not believe the defense's theory of the case. We do not believe that additional or more specific details regarding Clark's criminal history would have led the jury to wholly discredit Clark's testimony such that the outcome of appellant's trial would have been different. Appellant can only speculate that additional evidence regarding Clark's criminal past would have led the jury to acquit appellant. Speculation is insufficient to establish the prejudice component of an ineffective-assistance-of-counsel claim. *E.g. Tabor*, *supra*.

{¶ 35} Accordingly, based upon the foregoing reasons, we overrule appellant's first and second assignments of error.

II

MANIFEST WEIGHT

{¶ 36} In his third assignment of error, appellant asserts that his convictions are against the manifest weight of the evidence. He asserts that the jury lost its way by believing Clark's testimony. Appellant claims that Clark was not a credible witness for the following reasons: (1) Clark had a lengthy criminal history; (2) Clark had a financial incentive to work as a confidential informant; (3) Clark had an incentive to mitigate punishment for her own drug offenses; (4) Clark was romantically involved with appellant's girlfriend, Tiffany; (5) Clark lived

in Tiffany's and appellant's house after appellant's arrest; and (6) Clark did not recall all of the details of each alleged drug transaction.

{¶ 37} Appellant additionally argues that (1) the evidence shows that the officers did not thoroughly search Clark before each controlled buy so as to ensure that she did not bring drugs to the transaction and attempt to frame appellant, and (2) neither the video nor the still photographs actually captured an exchange of money or drugs between appellant and Clark.

{¶ 38} When an appellate court considers a claim that a conviction is against the manifest weight of the evidence, the court must dutifully examine the entire record, weigh the evidence and all reasonable inferences, and consider the witness credibility. *State v. Dean,* 146 Ohio St.3d 106, 2015–Ohio–4347, 54 N.E.3d 80, ¶151, citing *State v. Thompkins,* 78 Ohio St.3d 380, 387, 678 N.E.2d (1997). A reviewing court must bear in mind, however, that credibility generally is an issue for the trier of fact to resolve. *State v. Issa,* 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001); *State v. Murphy,* 4th Dist. Ross No. 07CA2953, 2008–Ohio–1744, ¶31. "'Because the trier of fact sees and hears the witnesses and is particularly competent to decide "whether, and to what extent, to credit the testimony of particular witnesses," we must afford substantial deference to its determinations of credibility.'" *Barberton v. Jenney,* 126 Ohio St.3d 5, 2010–Ohio–2420, 929 N.E.2d 1047, ¶20, quoting *State v. Konya,* 2nd Dist. Montgomery No. 21434, 2006–Ohio–6312, ¶6, quoting *State v. Lawson,* 2nd Dist. Montgomery No. 16288 (Aug. 22, 1997). As the court explained in *Eastley* :

> "'[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment must be made in favor of the judgment and the finding of facts. * * *
>
> If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and

judgment, most favorable to sustaining the verdict and judgment.'"

Id. at ¶21, 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 60, at 191–192 (1978). Thus, an appellate court will leave the issues of weight and credibility of the evidence to the fact-finder, as long as a rational basis exists in the record for its decision. *State v. Picklesimer,* 4th Dist. Pickaway No. 11CA9, 2012–Ohio–1282, ¶24; *accord State v. Howard,* 4th Dist. Ross No. 07CA2948, 2007–Ohio–6331, ¶6 ("We will not intercede as long as the trier of fact has some factual and rational basis for its determination of credibility and weight.").

{¶ 39} Once the reviewing court finishes its examination, the court may reverse the judgment of conviction only if it appears that the fact-finder, when resolving the conflicts in evidence, "'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *Thompkins,* 78 Ohio St.3d at 387, quoting *State v. Martin,* 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). If the prosecution presented substantial credible evidence upon which the trier of fact reasonably could conclude, beyond a reasonable doubt, that the essential elements of the offense had been established, the judgment of conviction is not against the manifest weight of the evidence. *E.g., State v. Eley,* 56 Ohio St.2d 169, 383 N.E.2d 132 (1978), syllabus, superseded by state constitutional amendment on other grounds in *State v. Smith,* 80 Ohio St.3d 89, 684 N.E.2d 668 (1997). *Accord Eastley* at ¶12, quoting *Thompkins,* 78 Ohio St.3d at 387, quoting Black's Law Dictionary 1594 (6th ed.1990) (explaining that a judgment is not against the manifest weight of the evidence when "'"the greater amount of credible evidence"'" supports it). A reviewing court should find a conviction against the manifest weight of the evidence only in the "'exceptional

case in which the evidence weighs heavily against the conviction.'" *Thompkins,* 78 Ohio St.3d at 387, quoting *Martin,* 20 Ohio App.3d at 175. *Accord State v. Lindsey,* 87 Ohio St.3d 479, 483, 721 N.E.2d 995 (2000).

{¶ 40} We further observe that generally, a lack of direct evidence does not necessarily render a conviction against the manifest weight of the evidence. Instead, "a defendant may be convicted solely on the basis of circumstantial evidence." *State v. Nicely,* 39 Ohio St.3d 147, 151, 529 N.E.2d 1236 (1988). "Circumstantial evidence and direct evidence inherently possess the same probating value." *Jenks,* paragraph one of the syllabus. "Circumstantial evidence is defined as '[t]estimony not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions are drawn, showing indirectly the facts sought to be proved. * * * '" *Nicely,* 39 Ohio St.3d at 150, quoting Black's Law Dictionary (5 Ed.1979) 221. Thus, a lack of direct evidence is not dispositive of a manifest-weight challenge. *State v. Bradford,* 8th Dist. Cuyahoga No. 105217, 2017-Ohio-8481, 2017 WL 5192401, ¶13.

{¶ 41} Additionally, this court and others generally have rejected manifest-weight challenges based upon a confidential informant's alleged lack of credibility. *State v. Stevens,* 4th Dist. Highland No. 09CA3, 2009-Ohio-6143, 2009 WL 4021149, ¶ 25; *accord State v. Bachman,* 6th Dist. Fulton No. F-17-006, 2018-Ohio-1242, 2018 WL 1567641; *State v. Bradley,* 2015-Ohio-5421, 55 N.E.3d 580 (8th Dist.), ¶¶ 26-28; *State v. Fisher,* 3rd Dist. Hardin No. 6-13-03, 2014-Ohio-436, 2014 WL 538642, ¶¶ 10-11; *State v. Altman,* 7th Dist. Columbiana No. 12 CO 42, 2013-Ohio-5883, 2013 WL 6921497, ¶¶ 33-37; *State v. Price,* 3rd Dist. Logan No. 8-13-03, 2013-Ohio-3984, 2013 WL 5230326, ¶ 24; *State v. Smith,* 193 Ohio App.3d 201, 2011-Ohio-997, 951 N.E.2d 469 (3rd Dist.), ¶ 20; *State v. Moore,* 5th Dist. Stark No.

2008-CA-00228, 2009-Ohio-4958, 2009 WL 3003996, ¶ 23. In *Bachman*, for instance, the court concluded that the defendant's trafficking charge was not against manifest weight of the evidence, even though the defendant asserted that the confidential informant's testimony lacked credibility due to the informant's "drug addiction and previous bad acts." *Id.* at ¶18. The court pointed out that the defendant's "trial counsel thoroughly explored the various credibility issues relating to" the confidential informant. The court noted that the jury was aware of the informant's credibility issues and was entitled to weigh it accordingly. The court did not believe "that the jury's credibility determination was against the manifest weight of the evidence." *Id.*, citing *State v. Neal*, 5th Dist. Stark No. 1998CA00288, 1999 Ohio App. LEXIS 2863, *5-6 (June 21, 1999) (rejecting defendant's manifest weight argument challenging the credibility of identification testimony based upon the witness's credibility upon a determination that defense counsel thoroughly cross-examined the witness and explored the credibility issue at trial.

{¶ 42} The *Bachman* court also observed that the officers who monitored the informant's controlled buy with the defendant substantiated the informant's testimony. The court noted that "the officers testified at length as to the procedures they employed to ensure that [the informant] was not in possession of any drugs prior to the transaction, which included searching [the informant] and his vehicle." *Id.* at ¶19. Furthermore, after the informant's contact with the defendant, the officers rendezvoused with the informant. The informant advised the officers that the defendant had sold him marijuana and gave the officers the marijuana. The court thus concluded that the defendant's drug-trafficking conviction was not against the manifest weight of the evidence.

{¶ 43} Similarly, in the case at bar, appellant's trial counsel thoroughly cross-examined

Clark and made the jury well-aware of her checkered past. Even though appellant believes trial counsel could have delved further into Clark's criminal history to attempt to completely discredit her, the jury had more than ample knowledge that Clark was not an innocent bystander without motivation to lie. However, the jury obviously credited Clark's testimony that implicated appellant as the individual who sold her oxycodone and methamphetamine, and rejected appellant's defense that Clark could not be believed and simply wanted to implicate appellant as retaliation for a romantic tiff. We also point out that Clark admitted to her past misdeeds and claimed that she is attempting to turn her life around. Thus, we do not believe that the jury clearly lost its way by crediting Clark's testimony and rejecting appellant's defense.

{¶ 44} Furthermore, the law enforcement officers who monitored the controlled buys testified as to the procedures they followed for each of the three buys. They indicated that although they did not strip search Clark, their search was sufficiently thorough to discover any drugs that Clark may have attempted to smuggle into the controlled buy in an effort to frame appellant. The officers found no drugs on Clark before the controlled buys. The officers also explained that they maintained audio and visual contact with Clark throughout the transaction, and neither testified that they observed Clark make any sounds or maneuvers to cause them to believe that she attempted to smuggle drugs into the controlled buy. After the controlled buy, Clark immediately reconnected with the officers and handed over the recording device, as well as the drugs. We therefore reject appellant's argument that the officers failed to ensure that Clark did not have any drugs in her possession before the controlled buys. *See State v. Stevens*, 4th Dist. Highland No. 09CA3, 2009-Ohio-6143, 2009 WL 4021149, ¶ 19 and ¶21-24, and *State v. Mason*, 5th Dist. Stark No. 2003CA00438, 2004-Ohio-4896, 2004 WL 2070367, ¶¶ 20-21 (both

rejecting similar arguments regarding inadequacy of search before controlled buy); *State v. Beavers*, 2nd Dist. Clark No. 96 CA 104, 1998 WL 12685, *3 (explaining that "[a]lthough police did not strip search [informant], the record demonstrates a search of both [informant] and his car sufficient to render highly improbable his concealment of cocaine").

{¶ 45} While we recognize that none of the video or audio evidence crystallizes the moment appellant handed drugs to Clark in exchange for money, the evidence did record Clark and appellant engaged in suspicious conversations that trained law enforcement officers testified constituted drug transactions. We further note that direct evidence of a hand-to-hand drug transaction is not necessarily required to sustain a drug-trafficking conviction. *See State v. Chafin*, 4th Dist. Scioto No. 16CA3769, 2017-Ohio-7622, 2017 WL 4075209, ¶¶ 36-38 (rejecting similar argument that drug-trafficking conviction against manifest weight of the evidence when video failed to document hand-to-hand drug transaction); *see generally State v. McLemore*, 9th Dist. Lorain No. 99CA007356, 2000 WL 422368, *2 (determining that defendant's conviction not against the manifest weight of the evidence even though officers who observed controlled buy did not see what transpired between appellant and informant, and even though defendant asserted that informant lack credibility because she cooperated with the police in exchange for the dismissal of criminal charges against her). Consequently, even if none of the video or documentary evidence clearly shows that appellant exchanged drugs for money, Clark's testimony, along with the officers' corroborating observations, provides ample proof to show, beyond a reasonable doubt, that appellant committed aggravated drug trafficking.

{¶ 46} Therefore, in view of the foregoing, we do not believe that the evidence weighs heavily against appellant's convictions. Instead, we believe that the state presented substantial

credible evidence upon which the trier of fact reasonably could have concluded, beyond a reasonable doubt, that the essential elements of the offense had been established.

{¶ 47} Accordingly, based upon the foregoing reasons, we overrule appellant's third assignment of error.

III

{¶ 48} In his fourth assignment of error, appellant asserts that his sentence is contrary to law. In particular, appellant contends that the trial court did not correctly consider and apply the R.C. 2929.13(B)(1)(a) factors when it imposed sentence.

{¶ 49} R.C. 2953.08(G)(2) defines appellate review of felony sentences and provides in relevant part:

> The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court. The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:
>
> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law.

{¶ 50} The statute thus indicates that "appellate courts may not apply the abuse-of-discretion standard" when reviewing felony sentences. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 10. Instead, "an appellate court may vacate or modify a felony sentence on appeal only if it determines, by clear and convincing evidence, that the record does not support the trial court's findings under relevant statutes or that the sentence is

otherwise contrary to law." *Id.* at ¶ 1.

> Clear and convincing evidence is that measure or degree of proof which is more than a mere "preponderance of the evidence," but not to the extent of such certainty as is required "beyond a reasonable doubt" in criminal cases, and which will produce 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.

Id. at ¶ 22. Thus, our standard of review "'is * * * extremely deferential.'" *State v. Butcher*, 4th Dist. Athens Nos. 15CA33 and 15CA34, 2017-Ohio-1544, 2017, 2017 WL 1507209 WL 1507209, ¶84, quoting *State v. Venes*, 8th Dist. Cuyahoga No. 98682, 2013-Ohio-1891, 992 N.E.2d 453, ¶ 20–21; *see Marcum* at ¶23.

{¶ 51} Additionally, although R.C. 2953.08(G) does not mention R.C. 2929.11 or 2929.12, the Ohio Supreme Court has determined that the same standard of review applies to findings made under those statutes. *Marcum* at ¶23 (stating that "it is fully consistent for appellate courts to review those sentences that are imposed solely after consideration of the factors in R.C. 2929.11 and 2929.12 under a standard that is equally deferential to the sentencing court," meaning that "an appellate court may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence").

{¶ 52} Furthermore, a "trial court has full discretion to impose any sentence within the authorized statutory range, and the court is not required to make any findings or give its reasons for imposing maximum or more than minimum sentences." *State v. Johnson*, 2d Dist. Clark No.

2013-CA-85, 2014-Ohio-2308, ¶ 8, 2014 WL 2475589, citing *State v. King*, 2013-Ohio-2021, 992 N.E.2d 491, ¶ 45 (2nd Dist.); *accord State v. Robinson*, 4th Dist. Lawrence No. 13CA18, 2015-Ohio-2635, 2015 WL 3991050, ¶38 (stating that trial courts are "not required to make findings or give reasons for imposing more than the minimum sentence"). Thus, courts have "refused to find that a sentence is contrary to law when the sentence is in the permissible range and the court's journal entry states that it 'considered all required factors of the law' and 'finds that prison is consistent with the purposes of R.C. 2929.11.'" *State v. Williams*, 8th Dist. Cuyahoga No. 100042, 2014-Ohio-1618, 2014 WL 1513846, ¶17, quoting *State v. May*, 8th Dist. Cuyahoga No. 99064, 2013-Ohio-2697, 2013 WL 3328823, ¶16; *accord State v. Haddad*, 2017-Ohio-1290, 88 N.E.3d 556 (10th Dist.), ¶19; *State v. Neal*, 4th Dist. Lawrence Nos. 14CA31 and 14CA32, 2015-Ohio-5452, 2015 WL 9462118, ¶61.

{¶ 53} Consequently, in the case sub judice we may not disturb the trial court's decision to impose concurrent sixteen-month prison terms unless the record clearly and convincingly shows that the sentence is contrary to law. *State v. Noble*, 4th Dist. Athens No. 15CA20, 2017-Ohio-1440, 2017 WL 1400008, ¶¶ 45–46; *accord State v. Farless*, 6th Dist. Lucas Nos. L–15–1060 and L151061, 2016-Ohio-1571, 2016 WL 1547098, ¶ 4; *see Marcum* at ¶23 (stating that "an appellate court may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence").

{¶ 54} In the case sub judice, we first readily reject appellant's assertion that the trial court's sentence is contrary to R.C. 2929.13(B)(1)(a). Here, appellant was convicted of three fourth-degree-felony aggravated-drug-trafficking offenses. R.C. 2925.03(C)(1)(a) specifies that

R.C. 2929.13(C) applies when a trial court determines whether to impose a prison term on a fourth-degree-felony aggravated-drug-trafficking offender. We therefore disagree with appellant that R.C. 2929.13(B) governed the trial court's sentencing decision. Moreover, we find nothing in the record to otherwise indicate that the trial court's sentence is contrary to law. R.C. 2929.13(C) states:

> Except as provided in division (D), (E), (F), or (G) of this section, in determining whether to impose a prison term as a sanction for * * * a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and that is specified as being subject to this division for purposes of sentencing, the sentencing court shall comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code and with section 2929.12 of the Revised Code.

Thus, under R.C. 2929.13(C), a court that is determining whether to impose a prison term upon a felony-drug offender "must simply comply with the purposes and principles of sentencing under R.C. 2929.11 and R.C. 2929.12. There are no further limitations on the trial court's decision to impose a prison term on an offender, such as appellant, who has been convicted of a felony drug offense." *State v. Oldiges*, 12th Dist. Clermont No. CA2011-10-073, 2012-Ohio-3535, 2012 WL 3158716, ¶14.

{¶ 55} In the case sub judice, the trial court's sentencing entry states that the court considered R.C. 2929.11, 2929.12, and 2929.13.[2] Neither the court's sentencing entry nor the

[2] R.C. 2929.11 states:

> (A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

(C) A court that imposes a sentence upon an offender for a felony shall not base the sentence upon the race, ethnic background, gender, or religion of the offender.

R.C. 2929.12 reads:

(A) Unless otherwise required by section 2929.13 or 2929.14 of the Revised Code, a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct, the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism, and the factors set forth in division (F) of this section pertaining to the offender's service in the armed forces of the United States and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

(B) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is more serious than conduct normally constituting the offense:

(1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.

(2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.

(3) The offender held a public office or position of trust in the community, and the offense related to that office or position.

(4) The offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to justice.

(5) The offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others.

(6) The offender's relationship with the victim facilitated the offense.

(7) The offender committed the offense for hire or as a part of an organized criminal activity.

(8) In committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion.

(9) If the offense is a violation of section 2919.25 or a violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code involving a person who was a family or household member at the time of the violation, the offender committed the offense in the vicinity of one or more children who are not victims of the offense, and the offender or the victim of the offense is a parent, guardian, custodian, or person in loco parentis of one or more of those children.

(C) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is less serious than conduct normally constituting the offense:

(1) The victim induced or facilitated the offense.

(2) In committing the offense, the offender acted under strong provocation.

(3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.

(4) There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.

(D) The sentencing court shall consider all of the following that apply regarding the

sentencing hearing transcript indicates that the court considered improper factors, or failed to comply with the sentencing statutes when it imposed appellant's sentence. Additionally, a sixteen-month prison term falls within the authorized range for a fourth-degree felony. See R.C. 2929.14(A)(4) ("For a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months."). Consequently, we do not find clear and convincing evidence that the record fails to support the

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offender, and any other relevant factors, as factors indicating that the offender is likely to commit future crimes:

(1) At the time of committing the offense, the offender was under release from confinement before trial or sentencing; was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code; was under post-release control pursuant to section 2967.28 or any other provision of the Revised Code for an earlier offense or had been unfavorably terminated from post-release control for a prior offense pursuant to division (B) of section 2967.16 or section 2929.141 of the Revised Code; was under transitional control in connection with a prior offense; or had absconded from the offender's approved community placement resulting in the offender's removal from the transitional control program under section 2967.26 of the Revised Code.

(2) The offender previously was adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has a history of criminal convictions.

(3) The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has not responded favorably to sanctions previously imposed for criminal convictions.

(4) The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse.

(5) The offender shows no genuine remorse for the offense.

(E) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is not likely to commit future crimes:

(1) Prior to committing the offense, the offender had not been adjudicated a delinquent child.

(2) Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense.

(3) Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.

(4) The offense was committed under circumstances not likely to recur.

(5) The offender shows genuine remorse for the offense.

(F) The sentencing court shall consider the offender's military service record and whether the offender has an emotional, mental, or physical condition that is traceable to the offender's service in the armed forces of the United States and that was a contributing factor in the offender's commission of the offense or offenses.

trial court's findings or that the court's sentence is contrary to law.

{¶ 56} Accordingly, based upon the foregoing reasons, we overrule appellant's fourth assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

[Cite as *State v. Anderson*, 2018-Ohio-2013.]

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the 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 Lawrence County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

Harsha, J. & McFarland, 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.