COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 82674

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	AND
vs.	:	
	:	OPINION
WILLIE THOMAS	:	
	:	
Defendant-Appellant	:	
	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	April 15, 2004
	:	
CHARACTER OF PROCEEDINGS	:	Criminal appeal from Common Pleas Court Case No. CR-429294
	:	
JUDGMENT	:	CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED FOR RESENTENCING.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellee

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SEAN C. GALLAGHER, J.

{¶1} Appellant Willie Thomas ("Thomas") appeals his conviction and sentence entered by the Cuyahoga County Court of Common Pleas after a jury found him guilty of robbery, a felony of the second degree, in violation of R.C. 2911.02. For the reasons discussed below, we affirm the conviction, but vacate the sentence and remand for resentencing.

{¶2} The following facts were adduced at Thomas's jury trial. On July 20, 2002, Officer Matthew Craska of the Cleveland Police Department was working as an off-duty, part-time security guard at a Save A Lot grocery store in Cleveland. That afternoon, the store's front-end manager, Zeda Luna, saw a man walk through a checkout line and out the door with two bags of groceries he had not paid for. Officer Craska was alerted to the situation, looked towards the door, and saw Thomas exiting with two plastic bags that appeared full.

{¶3} Officer Craska followed Thomas as he walked out of the store, across the street, and into a laundromat. Along the way, Officer Craska saw Thomas drop the bags on the sidewalk before crossing the street.

{¶4} Once inside the laundromat, Officer Craska saw Thomas pick up the phone. Officer Craska instructed Thomas to hang up the phone and step outside. Once outside, Officer Craska asked for identification which Thomas provided. Officer Craska then told Thomas to return to the store with him, but Thomas refused at first. Eventually, Officer Craska convinced Thomas to walk back to the store with him.

{¶5} When the two arrived back at the front door of the store, Thomas tried to run, whereupon Officer Craska tackled Thomas to the ground. Officer Craska testified he used non-deadly force on Thomas, including wrestling, takedown techniques, strikes, and punches. Officer Craska further testified at one point Thomas threw his head back and cut Craska on the side of his mouth. Officer Craska stated the cut was bleeding and it stung. Officer Craska also testified he sustained a scrape on his elbow and knee, and a small tear to the knee of his pants.

{¶6} When a zone car driven by Officer Hageman arrived, Thomas was handcuffed and placed in the car. Thomas did not have any receipt on him for the merchandise. The bags discarded by Thomas contained several packages of chicken and beef worth approximately $25. Officer Hageman observed the cut on Officer Craska's lip that was bleeding.

{¶7} Zeda Luna testified she went outside after Officer Craska, saw Thomas drop the bags, and watched Thomas struggling with Officer Craska. She further testified Thomas "cocked his head back, and his arms, and that's when he struck [Officer Craska]." Luna observed a scrape on Officer Craska's arm and a cut by his mouth.

{¶8} Ronzel White, a store manager, testified he observed Officer Craska walking Thomas back to the store, saw Thomas trying to get loose, and watched Thomas swing his head and arms back and hit Officer Craska in the mouth. White also observed Officer Craska's lip was busted and bleeding.

{¶9} There was also testimony that the store has cameras that would have videotaped the alleged shoplifting; however, a tape was never produced.

{¶10} Thomas was convicted of robbery in violation of R.C. 2911.02. The parties stipulated to the notice of prior conviction and repeat violent offender specifications. The trial court sentenced Thomas to a prison term of seven years.

{¶11} Thomas has appealed his conviction and sentence raising six assignments of error. His first two assignments of error provide:

{¶12} "I. The evidence was insufficient to support a conviction for the offense of robbery, as alleged."

{¶13} "II. The conviction for the offense of robbery was against the manifest weight of the evidence."

{¶14} The sufficiency of the evidence produced by the state and weight of the evidence adduced at trial are legally distinct issues. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. When reviewing the sufficiency of the evidence, an appellate court's function is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. Id.

{¶15} While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion. Id. at 390. When a defendant asserts that his conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility

of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact 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; *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

{¶16} R.C. 2911.02, the robbery statute, provides in relevant part:

> **"(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:**
>
> **"*****
>
> **"(2) Inflict, attempt to inflict, or threaten to inflict physical harm on another.**
>
> **"(3) Use or threaten the immediate use of force against another."**

{¶17} The offense of robbery is differentiated from theft by the element of force or harm. *State v. Hughes*, Cuyahoga App. No. 81768, 2003-Ohio-2307. In similar cases where a defendant has struggled with a security guard while resisting apprehension after a shoplifting incident, this court has consistently applied the "single continuous transaction" rule. See, e.g., *Hughes*, supra (defendant struck store employee attempting to apprehend him after he left the store without paying for several items); *State v. Dunning* (Mar. 23, 2000), Cuyahoga App. No. 75869 (defendant used force against security guard several blocks from store where theft occurred). We have determined such conduct, as part of a single continuous transaction committed by the defendant, constitutes

sufficient evidence to establish the force or harm element of robbery in this context. Id.

{¶18} In arguing that the evidence was insufficient to sustain a conviction of robbery, Thomas relies heavily on the fact that he had abandoned the groceries. Based on his claimed abandonment of the bags, Thomas argues that his use of force in this case was for the purpose of making an escape rather than for the purpose of depriving the store of merchandise. Thomas also argues the evidence failed to show he was "fleeing immediately after" as required for the offense since he had abandoned the groceries and walked away.

{¶19} While it may be true Thomas abandoned his criminal purpose as he was being chased across the street by Officer Craska, the theft offense had already occurred.[1] The testimony presented at trial reflected that after Thomas was observed leaving the store without paying for the groceries, Officer Craska followed him across the street, returned to the store with Thomas, and was head-butted by Thomas. This evidence sufficiently established that Thomas, while fleeing from a theft or attempted theft, and as part of a continuous transaction, inflicted harm upon Officer Craska.

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[1] Once criminal intent has been formed and "such intent is coupled with an overt act toward the commission of the contemplated offense, the abandonment of the criminal purpose will not act as a defense." *State v. Cooper* (1977), 52 Ohio St.2d 163, vacated in part on other grounds (1978), 438 U.S. 911.

{¶20} Insofar as Thomas questions whether his actions constitute "fleeing," the mere fact that Thomas was walking does not mean that his actions did not constitute "fleeing." The term "flee" encompasses an "endeavor to avoid or escape from." *State v. Henderson* (July 24, 1988), Hamilton App. Nos. C-960734, and C-961072, citing *Marion v. Gilmore* (May 24, 1978), Marion App. No. 9-77-22. Moreover, "fleeing" contemplates not only an offender actually running from the scene, but also an offender's attempt to avoid or escape from an antagonist. *Henderson*, supra.

{¶21} Given the evidence, and viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, we conclude any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. Thus, Thomas's robbery conviction is sustained by sufficient evidence.

{¶22} Additionally, this court cannot say that the trial court's decision is against the manifest weight of the evidence. After reviewing the record, weighing the evidence and all reasonable inferences, and considering the credibility of the witnesses, we are not persuaded that the jury clearly lost its way and created such a manifest miscarriage of justice such that Thomas's conviction must be reversed and a new trial ordered.

{¶23} Because Thomas's conviction is supported by sufficient evidence and is not contrary to the manifest weight of evidence adduced at trial, Thomas's first and second assignments of error are overruled.

{¶24} Thomas's third assignment of error states:

{¶25} "The prosecution violated Mr. Thomas' constitutional rights under Article I, Section 10 of the Ohio Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution when it engaged in improper closing argument."

{¶26} The prosecution is normally entitled to a certain degree of latitude in its concluding remarks. *State v. Woodards* (1966), 6 Ohio St.2d 14. A prosecutor is at liberty to prosecute with earnestness and vigor, striking hard blows, but may not strike foul ones. *Berger v. United States* (1935), 295 U.S. 78. It is a prosecutor's duty in closing arguments to avoid efforts to obtain a conviction by going beyond the evidence which is before the jury. *State v. Potter* (Mar. 20, 2003), Cuyahoga App. 81037. The test regarding prosecutorial misconduct in closing arguments is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant. Id.

{¶27} In this assignment of error, Thomas cites several comments made by the prosecutor during closing argument that he argues were prosecutorial misconduct unfairly prejudicing his right to a fair trial.

{¶28} Thomas first argues the prosecutor improperly cited the definition of flight in Webster's Dictionary. The actual comment by the prosecutor was as follows:

> **"*** In part of her closing yesterday afternoon, defense counsel indicated that the defendant didn't run, didn't sprint away from the scene. Well, ladies and gentlemen, the word 'flee,' as defined in Webster's New World Dictionary, first definition, 'To go swiftly or escape.' Second definition, 'To vanish, to run away or try to escape from.'"**

{¶29} The prosecutor's statement was in response to the defense's position that Thomas was not "fleeing" as required by the robbery statute. Defense counsel, in her closing argument, had stated:

> "**Now, fleeing. The prosecutor would have you believe that fleeing just means moving along. He's walking. Is that fleeing, because he's walking? In my mind, fleeing, at minimum, is a brisk trot or something. But he's walking. The officer is even walking. Nobody is running."**

{¶30} We find the prosecutor's use of the definition of the word "flee" was not improper. The word is not defined by the statute and the prosecutor informed the jurors of its regular meaning in direct response to defense counsel's own personal definition of the term.

{¶31} A term which is not defined by a statute is accorded its common, ordinary meaning. *Cleveland v. GSX Chemical Services of Ohio, Inc*. (May 7, 1992), Cuyahoga App. No. 60512. Furthermore, R.C. 1.42 states that "words and phrases shall be read in context and construed according to the rules of grammar and common usage." Since the definition provided by the prosecutor was a common definition of the word "flee," we find the prosecutor did not commit misconduct in using the definition in his closing argument.

{¶32} Thomas next claims the prosecutor improperly cited a statutory definition of "resisting arrest." During defense counsel's closing argument, she commented that "[b]ut for [Thomas's] resisting arrest, he wouldn't be sitting here." The prosecutor commented in his closing argument that one of the elements of robbery was "inflicted physical harm, or [attempt] to inflict physical harm." The prosecutor then misstated that "causing physical harm to a police officer isn't one of the elements of resisting arrest. You have to do that by

force or recklessly." In concluding this point, the prosecutor stated defense counsel had in essence admitted that her client caused physical harm to the police officer.

{¶33} We find that these comments were improper. Thomas had not been charged with resisting arrest, and therefore it was not appropriate law to apply to the case. Moreover, the prosecutor improperly applied elements of resisting arrest to the offense of robbery and his comments included misstatements of law. The prosecutor also improperly suggested defense counsel had admitted her client caused physical harm. Nevertheless, the court reminded the jury that closing arguments are not evidence and instructed the jury on the law for the offense of robbery and its required elements. We determine the prosecutor's comments did not unfairly prejudice Thomas's right to a fair trial. *State v. Potter,* supra.

{¶34} Lastly, Thomas claims the prosecutor made an improper insinuation that defense counsel knew her client was guilty. Specifically, Thomas refers to the following comment by the prosecutor:

> **"And more importantly, defense counsel, in her closing argument, she didn't tell you that this tape would exonerate her client. She just said, 'Well, there is no tape. There is no tape, and because of that, you should find my client not guilty.' That's essentially what she told you. So she doesn't even tell you that it's going to exonerate her client."**

{¶35} We note initially that the defendant failed to object to this alleged improper comment about which he now complains. Therefore, he has waived all but plain error. *State v. Slagle* (1992), 65 Ohio St.3d 597. "Plain error does not exist unless it can be said that, but for the error, the outcome of the trial would clearly have been otherwise." *State v. Moreland* (1990), 50 Ohio St.3d 58. We cannot say that the prosecutor's comment

amounts to plain error in the context of the entire trial. While the tape with its content was not in evidence before the jury, there was testimony at trial that Thomas was seen walking through a checkout line and exiting the store with two bags of groceries he had not paid for. It cannot be said that, but for the comment, the outcome of the trial would clearly have been otherwise.

{¶36} Thomas's third assignment of error is overruled.

{¶37} Thomas's fourth assignment of error states:

{¶38} "The trial court erred by imposing consecutive sentences when it failed to make findings required by R.C. 2929.14(E)(4) with reasons in support thereof."

{¶39} R.C. 2929.14(E)(4) provides that a trial court may impose consecutive sentences only when it concludes that the sentence 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) the court finds one of the following: (a) the crimes were committed while awaiting trial or sentencing, under sanction, or under post-release control; (b) the harm caused by multiple offenses was so great or unusual that a single prison term would not adequately reflect the seriousness of his offense; or (c) the offender's criminal history demonstrates that consecutive sentences are necessary to protect the public from future crime. *State v. Stadmire*, Cuyahoga App. No. 81188, 2003-Ohio-873.

{¶40} In addition, R.C. 2929.19(B)(2) provides that "a court shall impose a sentence and shall make a finding that gives its reasons for selecting the sentence imposed in any of the following circumstances: *** (c) If it imposes consecutive sentences

under section 2929.14 of the Revised Code, its reasons for imposing the consecutive sentences."

{¶41} Thus, a trial court is required to make at least three findings under R.C. 2929.14(E)(4) prior to sentencing an offender to consecutive sentences and must give its reasons for imposing consecutive sentences pursuant to R.C. 2929.19(B)(2)(c). *Stadmire*, supra; see, also, *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165. A trial court's failure to sufficiently state its reasons on the record constitutes reversible error. Id.

{¶42} In this case the trial court set forth the required findings on the record. The court stated:

> **"THE COURT: *** All right. The Court's going to consider all the purposes in 2929, purposes of sentencing, and the relevant factors therein.**
>
> **"First, we want to punish the offender here for the crime he committed, and to protect the public from future crimes of the defendant.**
>
> **"In the past he's had what we call glorified shopliftings, and then he fought with the store owners. Here he's fighting with the policeman in uniform, threatening the policeman, being combative, and trying to hurt the policeman, and causing some physical harm to him.**
>
> **"***
>
> **"Now, the Court also has to consider whether recidivism is likely. Well, of course it is. To conclude anything else, it would be foolish. Same type of conduct over and over. ***
>
> **"So it would be silly to think recidivism isn't likely, and it would be endangering the public. So prison is necessary here, and prison is the answer and it's required anyhow by our findings here, certainly consistent with the sentencing purposes here.**

> **"And the only sentence that I could think of that would give you adequate punishment, give you a message, and keep you off the street, because I don't think you could be rehabilitated, frankly. I think you're a career criminal, is seven years LCI, with credit for time served. Anything else would not adequately protect the public."**

{¶43} The court proceeded to sentence Thomas in a separate case and instructed that the sentences in the two cases would run consecutively.

{¶44} Our review of the record reflects the trial court made the three required findings. First, the court found recidivism was likely and the sentence was necessary to protect the public. Second, the court reviewed Thomas's conduct and the danger he posed and found the sentence provided an adequate punishment. Third, the court commented on Thomas's criminal history and lack of rehabilitation and determined the sentence was necessary to protect the public.

{¶45} While the trial court's findings did not mimic the exact language of R.C. 2929.14(E)(4), the statute does not require the trial court to recite its exact words to impose consecutive sentences. *State v. Ebbing*, Clermont App. No. CA2003-05-041, 2003-Ohio-5877. Moreover, we have previously recognized that R.C. 2929.14(E)(4) is satisfied when we can glean from the tenor of the trial court's comments, its findings, and the evidence that imposition of consecutive sentences is justified. See *State v. Kessler*, Cuyahoga App. No. 82956, 2003-Ohio-6052; *State v. Robinson*, Cuyahoga App. No. 81610, 2003-Ohio-1353.

{¶46} We also find that the trial court sufficiently set forth the reasons for imposing consecutive sentences pursuant to R.C.

2929.19(B)(2)(c). There is no predetermined format a trial court must follow in setting forth the reasons for its findings pursuant to R.C. 2929.19(B)(2)(c). As we stated in *State v. Webb*, Cuyahoga App. No. 80206, 2003-Ohio-1718: "Although the court did not specifically state the findings first and then relate its reasons to the findings, there is no obligation to do so in the sentencing statutes. The sentencing statutes do not put an obligation upon the lower court to provide the statutory findings and its reasons in such close proximity on the record in order for the reasons to be of effect." Rather, the ability to clearly align the findings and reasons for consecutive sentences must be apparent from the record as a whole.

{¶47} In this case, the trial court detailed its reasons for imposing consecutive sentences throughout its findings. The trial court referred to Thomas's past "glorified shopliftings" in which he fought with store owners. The court also reasoned that in the present case Thomas had fought with a policeman in uniform, was combative, and caused physical harm. The court found recidivism was likely and expressed the view that Thomas was a career criminal. The court also expressed the belief that Thomas could not be rehabilitated. These reasons were all related to the findings on the record.

{¶48} Upon our review of the record, we find the trial court complied with the sentencing statutes and did not err in imposing a sentence that ran consecutive with a sentence imposed in a separate case. Thomas's fourth assignment of error is overruled.

{¶49} Thomas's fifth assignment of error states:

{¶50} "The trial court failed to adequately ensure that its total sentence was proportionate to sentences being given to similarly situated offenders who have committed similar offenses."

{¶51} R.C. 2929.11(B) reads as follows: "(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." R.C. 2929.11(A) provides that the "overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender."

{¶52} We have previously recognized that R.C. 2929.11 does not require a trial court to make findings on the record, but rather, it sets forth objectives for sentencing courts to achieve. *State v. Georgakopoulos*, Cuyahoga App. No. 81934, 2003-Ohio-4341. As we stated in *Georgakopoulos*, "trial courts are given broad but guarded discretion in applying these objectives to their respective evaluations of individual conduct at sentencing." Id.

{¶53} Our review of the record does not demonstrate that the trial court failed to consider the objectives set forth in R.C. 2929.11. Thomas was convicted of a robbery in which he fought with and caused physical injury to an officer in uniform. The court reviewed Thomas's criminal history and found that recidivism was likely. The court also stated that it did not believe Thomas could be rehabilitated and recognized the overriding purposes of felony sentencing, "to punish the offender here for the crime

he committed, and to protect the public from future crimes of the defendant." Upon these considerations, the court imposed a seven-year sentence of imprisonment, to run consecutive to a nine-month sentence imposed in another case.

{¶54} Nevertheless, Thomas argues that the trial court did not compare the sentence imposed with other sentences imposed for similar crimes committed by similar offenders. We have previously recognized that consistency in sentencing does not require uniform results. *State v. Turner*, Cuyahoga App. No. 81449, 2003-Ohio-4933. As we stated in *Turner*, "[t]here is no grid under Ohio law under which identical sentences must be imposed for various classifications of offenders. Instead, Ohio law offers a range of sentences so that divergent factors may be considered. *** 'The task of the appellate court is to examine the available data not to determine if the trial court has imposed a sentence that is in lockstep with others, but whether the sentence is so unusual as to be outside the mainstream of local judicial practice.'" Id. quoting *State v. Ryan*, Hamilton App. No. C-020283, 2003-Ohio-1188.

{¶55} On balance, we find that the record adequately demonstrates that the trial court considered the objectives of R.C. 2929.11(B) when sentencing Thomas. Although the sentence may appear harsh, we do not find that the sentence was so unusual as to be considered outside the mainstream of local judicial practice. See *State v. Hughes*, Cuyahoga App. No. 81768, 2003-Ohio-2307 (imposing six-year sentence); *State v.*

McDonald (Dec. 6, 2001), Cuyahoga App. No. 78939 (imposing six-year sentence).[2] Thomas's fifth assignment of error is overruled.

{¶56} Thomas's sixth assignment of error states:

{¶57} "Under the sixth amendment [sic] to the United States Constitution to be present and represented by counsel at all critical stages of proceedings, and in violation of his right under the Fourteenth Amendment to the United States Constitution to Due Process of Law when it included the possibility that Mr. Thomas would serve a term of post-release control via a journal entry, after not having mentioned it at sentencing."

{¶58} Thomas correctly argues that the trial court failed to notify him at the sentencing hearing, as required by R.C. 2929.19, that he would be subject to post-release control. Thomas suggests that the post-release control term should be vacated as part of his sentence and relies on *State v. Morrisey* (Dec. 18, 2000), Cuyahoga App. No. 77179, for this argument.

{¶59} The state concedes that the trial court failed to inform appellant that post-release control was part of his sentence. Nonetheless, it relies on this court's decision in *State v. Johnson*, Cuyahoga App. No. 80459, 2002-Ohio-4581, for the proposition that the case should be remanded for resentencing.

{¶60} While we recognize there is a split of authority on this issue, we find that the appropriate action is to remand the case for resentencing. R.C. 2967.28(B)(3) mandates a post-release control period of three years for those convicted of second-degree felonies.

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[2] Since this case is nevertheless being remanded for resentencing as discussed below, this sentence may be revisited by the trial court.

Because of the mandatory language of R.C. 2929.19, this court has held that the trial court has a mandatory duty at the sentencing hearing to notify the defendant that he or she is subject to post-release control. *State v. Shepard*, Cuyahoga App. No. 82158, 2003-Ohio-4938; *State v. Huber*, Cuyahoga App. No. 80616, 2002-Ohio-5839.

{¶61} Due to the mandatory nature of post-release control in this case, its omission by the trial court makes the sentence statutorily incorrect. We therefore must vacate the sentence and remand the matter for resentencing in compliance with R.C. 2929.19(B)(3). Thomas's sixth assignment of error is sustained.

{¶62} Conviction affirmed, sentence vacated, remanded for resentencing.

JAMES J. SWEENEY, P.J., CONCURS.

TIMOTHY E. MCMONAGLE, J., CONCURS IN PART AND DISSENTS IN PART. (SEE ATTACHED CONCURRING AND DISSENTING OPINION.)

{¶63} TIMOTHY E. MCMONAGLE, J., concurring in part and dissenting in part.

{¶64} I concur with the majority's resolution of appellant's first, second and third assignments of error and, therefore, concur in affirming appellant's conviction. However, I disagree with the majority in their resolution of appellant's remaining assignments of error, which upholds the trial court's decision to impose consecutive sentences but, nonetheless, vacates that sentence and

remands for resentencing in order for the trial court to inform appellant that post-release control would be part of his sentence.

Consecutive Sentences

Findings and Rationale

{¶65} The majority correctly states that imposing consecutive prison terms for multiple convictions is appropriate upon making certain findings as enumerated in R.C. 2929.14. When the trial court does so, however, it must state these findings, and its reasons for those findings, on the record. See R.C. 2929.19(B)(2)(c). The Ohio Supreme Court recently addressed this issue in *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165. Finding consecutive sentences permissible under the law, the *Comer* court opined that "a trial court must clearly align each rationale with the specific finding to support its decision to impose consecutive sentences." Id. at ¶21.

{¶66} Here, the trial court addressed the need to protect the public from future crime and the likelihood of recidivism given appellant's past criminal history, which is quite extensive. These findings and their rationale, however, do not obviate the mandate that the trial court make an additional finding that consecutive sentences are "not disproportionate" to the seriousness of appellant's conduct and then state the rationale behind that finding.

{¶67} Although the record contains references to appellant's conduct as it relates to the conviction for robbery, the record does not reflect any discussion of appellant's conduct as it relates to the separate case whose sentence was to run consecutive to the instant case. Apparently, this separate case, number CR-432932, contained charges against appellant for forgery and theft for which appellant was convicted and sentenced to concurrent nine-month terms of imprisonment to run consecutive to the seven-year term of imprisonment in the instant case. The record in case number CR-432932 is not before us, however. Without knowing what the particular conduct involved, there is nothing in the record before this court from which I can discern that this conduct warranted the imposition of consecutive sentences even if the trial court had undertaken a perfunctory analysis before imposing sentence. See *State v. Glass*, Cuyahoga App. No. 81275, 2003-Ohio-1505, at ¶26; see, also, *State v. Hicks*, Cuyahoga App. No. 82574, 2003-Ohio-6902, ¶15.

{¶68} Although I disagree with the majority's discussion included under appellant's fourth assignment of error, I find it unnecessary to address this assigned error in light of the majority's decision to vacate appellant's sentence and remand for resentencing. I render the aforementioned opinion in response to the majority's decision to address it in the event the trial court,

finds it unnecessary to address this aspect of appellant's sentence on remand.

Consistency in Sentencing

{¶69} "The requirement of consistency addresses the concept of proportionality by directing the court to consider sentences imposed upon different offenders in the same case or on offenders in other similar cases. The consistency concept gives legal relevance to the sentences of other judges. It adopts the premise that an overwhelming majority of judges sentence similarly, that a relatively small minority sentence outside of the mainstream, and that sentences outside of the mainstream of judicial practice are inappropriate." Griffin & Katz, Sentencing Consistency: Basic Principles Instead of Numerical Grids: The Ohio Plan (2002), 53 Case W.Res.L.Rev. 1, 12-13.

{¶70} As this court has previously determined, because the mandate of consistency in sentencing is directed to the trial court, it is the trial court's responsibility to insure consistency among the sentences it imposes. See *State v. Lyons*, Cuyahoga App. No. 80220, 2002-Ohio-3424, at ¶30; see, also, *State v. Stern* (2000), 137 Ohio App.3d 110. As we stated in *Lyons*, "with the resources available to it, a trial court will, and indeed it must, make these sentencing decisions in compliance with this statute." *Lyons*, supra, at ¶33.

{¶71} The majority in this case concludes that as long as the trial court's comments at the sentencing hearing reflect that the court considered "this aspect of the statutory purpose in fashioning the appropriate sentence," the mandate for consistency has been satisfied. I disagree.

{¶72} This mandate is set forth in R.C. 2929.11(B), which provides, in relevant part:

{¶73} "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." (Emphasis added.)

{¶74} Written in the conjunctive, the sentence imposed by the trial court must not only be reasonably calculated to achieve the overriding purposes of felony sentencing, inter alia, but it must *also* be "consistent with sentences imposed for similar crimes committed by similar offenders." The majority relies on the trial court's comments regarding appellant's extensive criminal history in its effort to justify statutory compliance. A trial court is not relieved of its obligation to abide by the directives imposed by statute merely because an offender has an illustrious criminal history. When analyzed in this manner, the majority absolves the trial court of failing to take into account whether that same sentence was consistent with sentences imposed on similarly situated offenders. Merely because the trial court may have complied with part of R.C. 2929.11(B) does not obviate any requirement to comply with the balance of this statutory provision.

{¶75} Notwithstanding this statutory mandate, I recognize that trial courts are limited in their ability to address the consistency mandate and appellate courts are hampered in their review of this issue by the lack of a reliable body of data upon which they can rely. Despite the directive set forth in R.C. 2929.11(B) for trial courts to impose felony sentences that are "consistent with sentences imposed for similar crimes by similar offenders," the legislature has yet to identify the means by which the courts could comply with this unfunded mandate. Neither individual practitioners, government attorneys, trial courts nor

appellate courts have the resources available to assemble reliable information about sentencing practices throughout the state. See *State v. Haamid*, Cuyahoga App. Nos. 80161, and 80248, 2002-Ohio-3243 (Karpinski, J., concurring). Identification of the data and factors that should be compared in deciding whether a criminal offense is "similar" in itself would be a massive undertaking, yet critical to begin to build a database. "Until that data is available and accessible, appellate courts will be able to address the principle of consistency only to a very limited degree." Id., at ¶34.

{¶76} Although in the past I have found that the failure of a trial court to engage in any consistency analysis required a remand for resentencing, I have since been persuaded by recent arguments to find otherwise when a criminal defendant has failed to present any argument, however minimal, regarding sentences imposed for similar offenders. See *State v. Armstrong*, Cuyahoga App. No. 81928, 2003-Ohio-5932 (McMonagle, J., concurring). "Although a defendant cannot be expected to produce his or her own database to demonstrate the alleged inconsistency, the issue must at least be raised in the trial court and some evidence, however minimal, must be presented to the trial court to provide a starting point for analysis and to preserve the issue for appeal." Id. at ¶29; cf. *State v. Douse*, Cuyahoga App. No. 82008, 2003-Ohio-5238 (McMonagle, J., concurring in part and dissenting in part); *State v. Crayton*, Cuyahoga App. No. 81257, 2003-Ohio-4663 (McMonagle, J., concurring in part and dissenting in part).

{¶77} As in *Armstrong*, appellant did not submit any evidence of sentences imposed upon similar offenders. Reiterating, I am mindful of the burden placed not only upon trial courts but upon counsel in arguing and defending arguments regarding

consistency. Nonetheless, until some framework is in place from which an appellate court can meaningfully review these sentences in compliance with the sentencing statute's mandates, it is not unreasonable for a criminal defendant to at least submit some evidence, however minimal, for the trial court to consider – at least until such a time that a better system is in place that tracks consistency in sentencing.

{¶78} Consequently, as pertains to appellant's fifth assignment of error, it is my opinion that the majority reached the right conclusion for the wrong reason and I, therefore, concur in judgment only.

Post-Release Control

{¶79} This court has addressed this issue several times recently. This author, along with several other members of this court, has concluded that if a criminal defendant is not informed at the sentencing hearing that post-release control is part of his or her sentence, then post-release control is not properly part of any sentence imposed, despite a sentencing journal entry to the contrary. See, generally, *State v. Johnson*, Cuyahoga App. No. 81814, 2003-Ohio-4180. As stated in *Johnson*, supra, this issue is presently before our supreme court. See *State v. Jordan*, 98 Ohio St.3d 1460, 2003-Ohio-644. Although ordinarily I would adhere to the position stated in *Johnson*, the circumstances of this case do not demonstrate any error prejudicial to appellant.

{¶80} Because the sentence in this case is being vacated and remanded for resentencing, any error associated with appellant's

sentence is now moot as the trial court, on remand, will have the opportunity to resentence appellant in compliance with R.C. Chapter 2929 and, furthermore, advise appellant appropriately as to whether post-release control is part of his sentence.

This cause is remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, ordered that said appellant and appellee share 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 Cuyahoga County Court of Common Pleas to carry this judgment into execution. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 82674

STATE OF OHIO,	:	
	:	C O N C U R R I N G
Plaintiff-Appellee	:	
	:	and
v.	:	
	:	D I S S E N T I N G
WILLIE THOMAS,	:	
	:	O P I N I O N
Defendant-Appellant	:	

DATE: April 15, 2004