[Cite as *State v. Davenport*, 2023-Ohio-2953.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Nos. 112004 and 112005
v.	:	
ASSANTE DAVENPORT,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: August 24, 2023

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case Nos. CR-21-663420-A and CR-21-655773-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Mallory Buelow, Assistant Prosecuting Attorney, *for appellee*.

Allison S. Breneman, *for appellant*.

EMANUELLA D. GROVES, J.:

{¶ 1} Defendant-appellant, Assante Davenport ("Davenport"), appeals his conviction and sentence for felonious assault and other charges. For the reasons that follow, we affirm.

Facts and Procedural History

{¶ 2} Davenport faced charges in two different cases. In Cuyahoga C.P. No. CR-21-663420-A ("Case No. 663420"), Davenport was indicted on September 28, 2021, for 11 counts including two counts of having weapons while under disability, felonies of the third degree (Counts 1 and 2); tampering with evidence, a felony of the third degree (Count 3); failure to comply, a felony of the third degree (Count 4); assault on a peace officer, a felony of the fourth degree (Count 5); improper handling of a firearm in a motor vehicle, a felony of the fourth degree (Count 6); carrying a concealed weapon, a felony of the fourth degree (Count 7); three counts of drug possession, felonies of the fifth degree (Counts 8, 9, and 10); and resisting arrest, a misdemeanor of the first degree (Count 11). The indictment listed the date of offense as September 12, 2021; however, at trial the state amended the date on Count 4 to September 5, 2021. One-year and three-year firearm specifications were attached to Counts 3 and 5. One-year firearm specifications were also attached to Counts 4, 8, and 9; and gun forfeiture specifications were attached to Counts 1, 2, 3, 4, 6, 7, 8, and 9.

{¶ 3} In Cuyahoga C.P. No. CR-21-655773-A ("Case No. 655773"), Davenport was indicted on January 13, 2021, on three counts for events that occurred on August 25, 2020; including, felonious assault, a felony of the second degree (Count 1); discharge of a firearm on or near prohibited premises, a felony of the third degree (Count 2); and having weapons while under disability, a felony of the third degree

(Count 3). One-year and three-year firearm specifications were attached to Counts 1 and 2.

{¶ 4} After several pretrials, the cases were set for trial on September 6, 2022. Prior to the beginning of trial, the state placed its plea offer on the record. Davenport, through his attorney, declined the offer. The trial court then addressed Davenport directly and reviewed the plea offer and the potential penalties should he be found guilty as charged. Davenport rejected the plea offer.

{¶ 5} The defense elected to try the weapons while under disability charges to the jury; however, the defense wanted to limit the information presented to the jury. After a discussion on the record, the trial court determined that the jury was entitled to the same information that the trial court would review in deciding the verdict if the charges were tried to the bench. The parties stipulated to the identity and the authenticity of the journal entries of Davenport's convictions.

{¶ 6} The court then addressed the order of presentation. The state elected to start with Case No. 663420. The trial court then asked whether the cases would be tried before the same jury. The state indicated that it "could" proceed in that manner, at which point, the defense objected. The trial court noted that the defense did not file a motion to sever the cases and overruled the objection. The defense started to argue further; but the trial court asked the parties to be seated and brought in the jury. The defense raised the issue of joinder again during voir dire. The trial court found that the issue had been decided and overruled the objection. The trial commenced with witnesses from Case No. 663420. To accommodate the victim in

Case No. 655773, the state introduced the testimony of that victim out of order. The defense objected to the joinder of cases again at that time as well as the decision to call the witness out of order. The trial court overruled the objections.

Evidence in Case No. 663420

{¶ 7} On September 5, 2021, then sergeant, and acting lieutenant, Al Johnson[1] ("Sgt. Johnson") with the Cleveland police department's gang and narcotics unit was conducting a routine patrol in the area of West 88th Street and Detroit Road in Cleveland. His unit often patrolled areas based on requests from citizens, councilpersons, and other community stakeholders. He was in that location due to reports of high crime and a violent accident that had occurred in the area recently. At the time, he noticed a vehicle that stood out to him because the passenger-bumper area and side panel were completely gone. Sgt. Johnson radioed other units that he was about to stop the vehicle.

{¶ 8} Sgt. Johnson audibly signaled the car, a Lincoln four-door sedan, to stop. The driver stopped the vehicle, and Sgt. Johnson pulled to the side of the vehicle and exited his car. He could see the driver clearly and described him as a black male with long blond braids or dreads. As he approached, Sgt. Johnson observed the driver place the car back in drive. Before Sgt. Johnson could react, the driver raced off, hitting Sgt. Johnson's vehicle and a nearby parked car. Sgt. Johnson did not pursue the vehicle. Detective Lombardi ("Det. Lombardi") arrived

[1] He was promoted to the rank of commander by the time of trial.

in time to see the car flee, and described the car as a dark blue Lincoln. An accident report was created as a result of the incident.

{¶ 9} On September 12, 2021, Detective Thomas Kloock ("Det. Kloock") was patrolling in the area of West 88th and Detroit Road. He noticed a dark-colored Lincoln MKZ sedan that was backed into a parking spot with heavily tinted windows. The vehicle matched the description of the vehicle Sgt. Johnson and Sgt. Lombardi had encountered a week earlier. Both Sgt. Johnson and Det. Lombardi confirmed that it was the same vehicle.

{¶ 10} Several officers in the gang unit converged on the area to effectuate a stop. When officers approached the car on foot, three people exited the car and ran. Once the driver exited the car, Sgt. Johnson confirmed that the driver was the same person he had encountered on September 5, 2021. The officers focused on the driver, who was identified in court as Davenport. Det. Lombardi immediately noticed that Davenport had a firearm tucked in his waistband. It was an unusual color, sand with a camouflage paint scheme. Det. Lombardi, Detective Meehan ("Det. Meehan"), and another officer chased Davenport on foot. Det. Kloock and his partner, Det. Donnellan followed along in a cruiser.

{¶ 11} As they ran, Det. Lombardi observed Davenport stumble and fall. At that point, he observed Davenport had loosened his grip on the firearm, and dropped it. Davenport then got up and kept running. Det. Lombardi stopped to ensure that the firearm was secured while the other officers continued to chase

Davenport. The firearm that Davenport dropped was collected and submitted into evidence for testing. The firearm was operable.

{¶ 12} Det. Meehan, who did not testify at trial, apprehended Davenport after he tried to jump a fence. Det. Lombardi saw Det. Meehan later and observed that his finger appeared "crooked." During a search incident to arrest, an officer felt what he suspected was drugs in Davenport's buttocks region. Davenport removed a packet of suspected drugs from his pants. The evidence was submitted to the lab for testing. The packet contained 0.39 grams of a mixture of drugs, including heroin, fentanyl, and cocaine.

{¶ 13} After the close of testimony, the state produced a report on the failure-to-comply charge to the defense. The defense had asked several witnesses during cross-examination about the existence of such a report. The witnesses had varying responses on whether such a report existed. Nevertheless, it was clear that the report was not produced during discovery. As a remedy, the trial court offered to recall the witnesses so the defense could question them on the report. After discussion, the defense elected not to bring back any of the witnesses.

Evidence in Case No. 655773

{¶ 14} On August 25, 2020, a year before the events in Case No. 663420, Jasmine Harris ("Harris") and her friend, Deangelo Bender ("Bender"), were hanging out in the area of West 80th Street and Detroit Road. They had been at a barbecue earlier that day and Harris went up to the corner store to pick up a few

items. Bender had exited Harris' car to run an errand and met Harris back at the corner store.

{¶ 15} Before Harris left the store parking lot, a car owned by Breana Baker ("Baker") drove up and parked on the street next to the store. Baker exited the passenger side and entered the store. The driver, who Harris and Bender both later identified as Davenport, stayed in the vehicle. As Harris and Bender drove out of the store parking lot, Davenport exited the car and watched them. Harris was not aware of Davenport; however, Bender noticed him. After they turned the corner, passing Baker's car, Harris started to back into a parking spot. Bender suddenly told her to "pull off, pull off." Harris did not initially understand why Bender wanted her to drive away. As she began to drive, Harris looked in the mirror and saw Davenport running after them while shooting. Harris drove frantically from the scene, hunched down in her seat, and went down side streets to avoid the bullets. She eventually made it to the freeway and headed to the east side. Harris did not know Davenport by name, but she had seen him before and knew that he was Baker's boyfriend. Bender was also familiar with Davenport and identified him as the person shooting at them that day.

{¶ 16} Harris did not immediately call the police because she did not know what to do. Harris discussed it with Bender. Although he did not want to be involved with the police, he did not discourage Harris from calling them. Bender, however, asked that she not discuss him. Nevertheless, Bender did appear for trial. Bender

testified that Davenport was after him, not Harris. Bender did not explain why. He just noted that he and Davenport had several run-ins over the years.

{¶ 17} Harris went to the police department two days after the shooting to file a police report. Detective Vasile Nan ("Det. Nan") was one of the detectives assigned to investigate. Coincidentally, Det. Nan did a traffic stop of Harris' car on August 28, 2020. Bender was a passenger in the car. During a conversation with Bender, Det. Nan learned more about the August 25, 2020 shooting. Bender also testified about this conversation. Det. Nan arrested Bender during the traffic stop because Bender had a firearm. Bender admitted that he was carrying a gun because he was looking for Davenport to retaliate for the shooting. Bender testified that Harris did not know his intentions.

{¶ 18} Det. Nan did not have the shooter's name. He found Baker, Davenport's girlfriend, on Instagram and from there identified Davenport. He then located surveillance video of the shooting. The video showed the relative position of Harris' and Baker's cars; Davenport exiting Baker's car with what appeared to be a gun in his hand; Davenport chasing Harris' car while raising the gun; and several people outside of the store running away from the area.

{¶ 19} Det. Nan also investigated the crime scene for evidence. He found a shell casing, which was placed into evidence. After Davenport was apprehended, that shell casing was compared to the gun taken from Davenport at his arrest. The two did not match.

{¶ 20} The state rested and the defense chose not to present any witnesses. At the close of testimony, the defense made a motion for acquittal under Crim.R. 29, and renewed its objection to the joinder of the indictments. Both motions were overruled. The state also moved to dismiss the specifications associated with Count 4 (failure to comply) and the entirety of Count 11 (resisting arrest).

{¶ 21} The jury deliberated and found as follows: in Case No. 663420: guilty on Counts 1 and 2, having weapons while under disability; guilty on Count 3, tampering with evidence and guilty to both firearm specifications; guilty on Count 4, failure to comply; guilty on Count 6, improper handling of a firearm in a motor vehicle; guilty on Counts 8, 9, and 10, drug possession and guilty on the one-year firearm specifications associated with Counts 8 and 9. The jury found Davenport not guilty of Count 5, assault on a peace officer.

{¶ 22} In Case No. 655773, the jury found Davenport: guilty of Count 1, felonious assault, and guilty of both firearm specifications; guilty of Count 2, discharge of firearm near prohibited premises, and guilty to both firearm specifications; and guilty on Count 3, having a weapon while under disability.

{¶ 23} On a subsequent date, the trial court sentenced Davenport. In Case No. 663420, the court found that Counts 1 and 2 merged. The court then sentenced Davenport to 36 months on Count 1; three-years on the firearm specification consecutive to and prior to 36 months on the underlying charge on Count 3; 36 months on Count 4; 18 months on Count 5; and 18 months on Count 7. The trial court also determined that Counts 8, 9, and 10 merged, and sentenced Davenport to

one year on the firearm specification consecutive to and prior to 12 months on Count 8.

{¶ 24} In Case No. 655773, the sentence was: three years on the firearm specification consecutive to, and prior to eight years, on the underlying offense of Count 1; three years on the firearm specification consecutive to and prior to 36 months on the underlying offense of Count 2 and 36 months on Count 3. The trial court ordered all charges to be served consecutively to each other and to the term in the other case for an aggregate term of 37 years.[2]

{¶ 25} Davenport appeals and assigns the following errors for our review.

Assignment of Error No. 1

> The jury found, against the manifest weight of the evidence that the appellant committed the acts alleged in the indictment.

Assignment of Error No. 2

> The evidence was not legally sufficient to sustain a guilty verdict.

Assignment of Error No. 3

> Trial court erred by not granting the motion to sever.

Assignment of Error No. 4

> The trial court erred by imposing consecutive sentences.

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[2] Although the trial court stated on the record that the term was 34 years, its journal entry correctly reflects that the term is 37 years.

Law and Analysis

{¶ 26} For ease of analysis we will address Davenport's assignments of error out of order. Accordingly, we will begin with Davenport's third assignment of error, in which he argues that the trial court erred when it denied his motion to sever the cases.

Joinder of Indictments

{¶ 27} Preliminarily, the law favors joinder of multiple offenses in a single trial if the offenses charged "are of the same or similar character." *State v. Torres*, 66 Ohio St. 2d 340, 343, 421 N.E. 2d 1288 (1981); Crim.R. 13; Crim.R. 8(A). Joinder is favored because it offers the benefits of "conserving time and expense, diminishing the inconvenience of witnesses and minimizing the possibility of incongruous results in successive trials before different juries." *Id.* Crim.R. 13 allows two different indictments to be tried together "if the offenses * * * could have been joined in a single indictment or information." Crim.R. 8(A) allows offenses to be joined in a single indictment where they "are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan or are part of a course of criminal conduct."

{¶ 28} Here, the trial court reasoned that the cases should be joined because they constituted a continuing course of criminal conduct. The Supreme Court has noted that a continuing course of criminal conduct is found when the evidence interlocks and the events occur in close proximity in location and time; or when the

offenses are part of a common scheme or plan and similarly, occur over a short period of time. *See State v. Hamblin*, 37 Ohio St.3d 153, 158, 524 N.E.2d 476 (1988); *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, ¶ 62. In the instant case, the crimes occurred a year apart and did not involve the same parties or witnesses. Additionally, the failure to comply charge that began the events in Case No. 663420, is not analogous to the felonious assault in Case No. 655773.

{¶ 29} However, Davenport does not challenge the joinder under Crim.R. 8(A) or 13. Davenport argues that he was prejudiced by the joinder under Crim.R. 14. Crim.R. 14 provides, in relevant part:

> If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires.

{¶ 30} When challenging joinder under Crim.R. 14, the appellant "has the burden of affirmatively showing that his rights were prejudiced." *Torres*, 66 Ohio St.2d at 343, 421 N.E.2d 1288. Appellant also bears the burden of providing sufficient information to the trial court "that it can weigh the considerations favoring joinder against the defendant's right to a fair trial." *Id.* We review the trial court's decision not to sever the indictments for an abuse of discretion. *Id.* An abuse of discretion is more than an error of law or judgment; "it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5

Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983); *State v. Hill*, Slip Opinion No. 2022-Ohio-4544, ¶ 9.

{¶ 31} The defense objected to the joinder of these cases four times: 1) at the beginning of trial; 2) during voir dire; 3) when the state sought to present a witness out of order; and 4) at the end of the case. In the first two instances, the defense objected on the basis that the cases had never been scheduled for a joint trial. When the state sought to take a witness out of order, the defense argued that it would be "highly prejudicial." Finally, the defense objected at the close of evidence. The defense argued that the offenses were not directly connected and should not have been tried together.

{¶ 32} However, a claim of prejudicial joinder may be rebutted by showing either 1) the evidence in the joined cases could be introduced in separate trial as "other acts" evidence under Evid.R. 404(B); or (2) by showing that the evidence as to each crime is simple and direct. *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 96.

{¶ 33} Here the evidence in each case was simple and direct. The evidence in Case No. 655773 the shooting, was comprised of the testimony of Bender and Harris supported by the video of the shooting captured by nearby cameras. Harris and Bender testified that Davenport shot at them and the video evidence corroborated their testimony. The charges in Case No. 663420 were supported by testimony, body-cam footage, and the gun and drugs recovered at the scene. Additionally, in the body-cam footage, Davenport admitted that the gun was in his

possession and the footage showed the drugs were found on his person. Given that the evidence was simple and direct, Davenport has failed to establish that he was prejudiced by the joinder. Since there was no prejudice, the trial court did not abuse its discretion.

{¶ 34} Accordingly, the third assignment of error is overruled.

Sufficiency of the Evidence

{¶ 35} In the second assignment of error, Davenport challenges whether certain convictions were supported by the sufficiency of the evidence. In Case No. 663420, Davenport challenges his convictions for tampering with evidence, failure to comply, and improper handling of a firearm in a motor vehicle. In Case No. 655773, Davenport challenges his convictions for felonious assault and discharge of a firearm on or near prohibited premises.

{¶ 36} A challenge to the sufficiency of the evidence requires a court to determine whether the state met its burden of production at trial and to consider not the credibility of the evidence but whether, if believed, the evidence presented would sustain a conviction. *State v. Macklin*, 8th Dist. Cuyahoga No. 111117, 2022-Ohio-4400, ¶ 57. "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." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 37} To examine whether the state met its burden of production, we must first look at the elements of the offenses. In order to prove tampering with evidence,

R.C. 2921.12(A)(1), the state needed to establish that Davenport did, knowing that an official proceeding or investigation was in progress, or was about to be or likely to be instituted, alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation. Davenport argues that there was insufficient evidence to establish that he knowingly concealed the gun when Det. Lombardi testified that he saw Davenport fall and drop the gun. However, the evidence also established that Davenport ran, with the gun, when the police approached the vehicle. If believed, the evidence established that Davenport removed evidence knowing that an investigation was in progress or was likely to begin with purpose to impair its value or availability as evidence under the statute. If believed, this evidence was sufficient to support the tampering with evidence conviction.

{¶ 38} In order to prove failure to comply, R.C. 2921.331(B), the state needed to establish that Davenport operated a motor vehicle so as to willfully elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop. Furthermore, the state needed to establish that the operation of the motor vehicle caused a substantial risk of serious physical harm to persons or property. The testimony established that Sgt. Johnson signaled Davenport to stop his vehicle. Davenport stopped briefly, and then recklessly fled the scene, hitting both Sgt. Johnson's car and a parked car, after Sgt. Johnson exited his vehicle and approached Davenport's car, placing the officer at risk as well.

Accordingly, sufficient evidence was presented, that if believed, supported Davenport's conviction for failure to comply.

{¶ 39} In order to prove improper handling of a firearm in a motor vehicle under R.C. 2923.16, the state needed to establish that Davenport did knowingly transport or have a loaded firearm in a motor vehicle in such a manner that the firearm is accessible to the operator without leaving the vehicle. Davenport argues that because he told the police that one of the passengers threw the gun in his lap, he could not be found guilty of this charge. In other words, he did not know the gun was in the car until the passenger tossed it in his lap. A person has a firearm under R.C. 2923.16 when they have actual or constructive possession of the gun. *State v. Philpott*, 8th Dist. Cuyahoga Nos. 109173, 109174, and 109175, 2020-Ohio-5267, ¶ 45, citing *State v. Gardner*, 2017-Ohio-7241, 96 N.E.3d 925, ¶ 33 (8th Dist.). The testimony established that when Davenport exited his vehicle the gun was in his waistband. Davenport's subsequent statement does not vitiate his actual possession of the gun, nor does it negate his knowledge of the gun in the car. Based on the facts, a jury could find that Davenport had possession of the gun and was able to access it from inside the vehicle. Accordingly, sufficient evidence was presented that if believed, supported Davenport's conviction for improper handling.

{¶ 40} In Case No. 655773, Davenport first challenges the sufficiency of the evidence undergirding his felonious assault conviction under R.C. 2903.11(A)(2). In order to prove felonious assault, the state needed to establish that Davenport did knowingly cause or attempt to cause physical harm to Harris by means of a deadly

weapon or dangerous ordinance, to wit: firearm and or handgun. Davenport argues that there was no physical evidence of a shooting, and both Bender and Harris had motive to lie. Whether or not Bender or Harris were credible witnesses is not a concern for a sufficiency analysis. Sufficiency simply examines whether the evidence, if believed, is sufficient to support the conviction. Harris and Bender testified that Davenport shot at their car as they drove down the street. The video evidence supports this testimony. Davenport appears to have a gun, and one can infer from the people running that a shooting occurred when the video shows Davenport with his arm raised and pointed in the direction of Harris' car as Harris fled the area. Accordingly, there was sufficient evidence, if believed, to support the conviction for felonious assault.

{¶ 41} In order to prove discharge of a firearm on or near prohibited premises, R.C. 2923.162(A)(3), the state needed to establish that Davenport discharged a firearm upon or over a public road or highway and the violation created a substantial risk of physical harm to any person or caused serious physical harm to property. Davenport makes the same argument for this charge as for the charge of felonious assault, i.e., that there was no physical evidence that a gun was fired, and Bender and Harris were not credible. For the same reasons, we disagree. The testimony of Bender and Harris established that Davenport chased Harris' car down the middle of the street while firing a gun at them. The video evidence corroborated this testimony. There was sufficient evidence if believed, to support the conviction for discharge of a firearm on or near prohibited premises.

{¶ 42} Accordingly, the second assignment of error is overruled.

Weight of the Evidence

{¶ 43} In the first assignment of error, Davenport argues that his convictions were against the manifest weight of the evidence. Specifically, Davenport argues that the jury was confused by the presentation of evidence. He alleges that the combination of the two dates in Case No. 664320, coupled with the addition of the events in Case No. 665773 confused the jury and caused them to lose their way. He suggested that this was shown when the jury asked whether a person could be convicted of felonious assault if they did not fire the gun but merely brandished or pointed it at someone.

{¶ 44} Additionally, Davenport argues that Bender provided self-serving testimony because he wanted to retaliate against Davenport. Therefore, testifying provided Bender with the "ultimate retaliation" and ensured Davenport would go to jail. From the foregoing, Davenport alleges that his convictions were not supported by the weight of the evidence.

{¶ 45} Unlike sufficiency, "'weight of the evidence involves the inclination of the greater amount of credible evidence.'" *State v. Harris*, 8th Dist. Cuyahoga No. 109060, 2021-Ohio-856, ¶ 32, citing *State v. Thompkins,* 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). Weight of the evidence relates to the evidence's effect of inducing belief. *Id.*, quoting *State v. Wilso*n, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, citing *Thompkins* at 386-387. The reviewing court must consider all of the evidence in the record, the reasonable inferences to be made from

it, and the credibility of the witnesses to determine ""whether in resolving conflicts in the evidence, the factfinder clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed, and a new trial ordered."" *Harris* at *id.*, quoting *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 485 N.E.2d 717 (1st Dist.1983).

{¶ 46} Davenport argues that the evidence was confusing and the jury clearly lost its way. However, the jury elected to find Davenport not guilty of the assault on a peace officer charge. There was no testimony by the officer allegedly assaulted, and although one of the detectives testified that he observed an injury, no testimony was presented to establish how the officer was injured. The jury noticed this lack of evidence and appropriately found Davenport not guilty of the charge. The jury did not exhibit confused behavior.

{¶ 47} Additionally, as noted, the evidence in this case was simple and direct. There is no evidence in the record that the jury was confused by the presentation of evidence or the dates the events occurred. The mere possibility that the jury was confused about dates does not negate the fact that the evidence was simple and direct about what occurred. Any confusion about when events happened does not take away from the fact that the events did, in fact, happen. Furthermore, there was video evidence in support of both crimes in the form of surveillance videos and body-cam footage. Bender's and Harris' testimony was corroborated by video. Body-cam footage captured the gun and drugs collected during Davenport's arrest for the

failure to comply charge. Finally, Sgt. Johnson's testimony and direct observations established the evidence in the failure to comply case.

{¶ 48} Davenport's convictions were supported by the greater weight of the evidence. There is no support for the argument that the jury lost its way on its path to a verdict.

{¶ 49} Accordingly, the first assignment of error is overruled.

Imposition of Consecutive Sentences

{¶ 50} Finally, in the fourth assignment of error, Davenport argues that the trial court erred by imposing consecutive sentences. Specifically, Davenport argues that the imposition of consecutive sentences totaling 37 years is vastly disproportionate to Davenport's conduct since "[t]here was no harm to any individual on the charges Mr. Davenport was found guilty of."

{¶ 51} Our review of felony sentences is governed by R.C. 2953.08(G)(2). *State v. Watkins*, 8th Dist. Cuyahoga No. 110355, 2022-Ohio-1231, ¶ 21, citing, *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 16. Pursuant to R.C. 2953.08(G)(2), we may increase, reduce, modify, or vacate and remand a felony sentence if this court clearly and convincingly finds either that the record does not support the sentencing court's findings as prescribed under specific statutes or the sentence is "otherwise contrary to law." *State v. Artis*, 8th Dist. Cuyahoga No. 111298, 2022-Ohio-3819, ¶ 11.

{¶ 52} While there is a presumption for concurrent sentencing when a person is convicted of multiple sentences, R.C. 2929.41(A), the law allows a court to impose

consecutive sentences when certain conditions are met. A trial court may impose consecutive sentences under R.C. 2929.14(C)(4) if it finds that "consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." In addition to these findings, the court most also find any one of the following:

> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶ 53} In making this determination, the trial court "must consider the number of sentences it will impose consecutively along with the defendant's aggregate sentence that will result." *State v. Gwynne*, Slip Opinion No. 2022-Ohio-4607, ¶ 12. A reviewing court conducts a de novo review of the imposition of consecutive sentences and may reverse or modify the sentence, including the number of consecutive sentences, if the court "clearly and convincingly finds that the record does not support the trial court's findings." *Id.*

{¶ 54} When reviewing the sentence, the appellate court must first determine whether the trial court made the required findings under R.C. 2929.14(C). If the court failed to make the required findings, then the appellate court must find the order of consecutive sentences was contrary to law and either modify or vacate the sentence and remand. *Id.* at ¶ 25. If the court did make the required findings, before an appellate court modifies or vacates the sentence, it must clearly and convincingly find that the record does not support those findings. *Id.* at ¶ 27.

{¶ 55} In the instant case, the trial court made the findings required by R.C. 2929.14(C)(4). With respect to R.C. 2929.14(C)(4)(a), (b), and (c), the court limited its finding to section (c) noting that Davenport's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶ 56} Davenport challenges the trial courts finding that the sentences are not disproportionate to the seriousness of his conduct and the danger he poses to the public. When a defendant alleges disproportionality in felony sentencing, he has the "burden of producing evidence to 'indicate that his sentence is directly disproportionate to sentences given to other offenders with similar records who have committed these offenses * * *.'" *State v. Smith,* 8th Dist. Cuyahoga No. 95243, 2011-Ohio-3051, ¶ 66, quoting *State v. Breeden*, 8th Dist. Cuyahoga No. 84663, 2005-Ohio-510, ¶ 81. In order to support this argument, the defendant "must raise this issue before the trial court and present some evidence, however minimal, in

order to provide a starting point for analysis and to preserve the issue for appeal." *State v. Theodorou*, 8th Dist. Cuyahoga No. 105630, 2017-Ohio-9171, ¶ 16.

{¶ 57} Davenport has not preserved this issue for review. He did not raise this issue during the sentencing hearing nor provide any information that would help the trial court determine whether the sentence was disproportionate when compared to the sentence of similarly situated offenders.

{¶ 58} Accordingly, Davenport's fourth assignment of error is overruled.

{¶ 59} Judgment affirmed.

It is ordered that appellee recover from appellant 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 common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

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EMANUELLA D. GROVES, JUDGE

MICHELLE J. SHEEHAN, P.J., CONCURS;
SEAN C. GALLAGHER, J., CONCURS (WITH SEPARATE OPINION)

SEAN C. GALLAGHER, J., CONCURRING:

{¶ 60} I concur with the majority decision. I write to further address the fourth assignment of error, which challenges the trial court's imposition of consecutive sentences.

{¶ 61} In this case there is no dispute that the trial court made the necessary consecutive-sentence findings under R.C. 2929.14(C)(4). Davenport argues that "the trial court failed to consider that a 34-year [or 37-year] prison sentence was vastly disproportionate to the conduct by Mr. Davenport."

{¶ 62} In *Gwynne*, Slip Opinion No. 2022-Ohio-4607, the Supreme Court of Ohio held that "R.C. 2929.14(C)(4) requires trial courts to consider the overall number of consecutive sentences and the aggregate sentence to be imposed when making the necessity and proportionality findings required for the imposition of consecutive sentences." *Id.* at ¶ 31. In reviewing a consecutive-sentence challenge, the appellate court applies R.C. 2953.08(G)(2)'s clear-and-convincing standard, with the ultimate inquiry being "whether it clearly and convincingly finds — in other words, has a firm conviction or belief — that the evidence in the record does not support the consecutive-sentence findings that the trial court made." *Id.* at ¶ 27.

{¶ 63} It is important to reiterate that R.C. 2953.08(G)(2) is written in the negative and requires the court of appeals to clearly and convincingly find that the record does not support the trial court's findings under R.C. 2929.14(C)(4). *State v. Venes*, 2013-Ohio-1891, 992 N.E.2d 453, ¶ 21 (8th Dist.). Support for the findings

may appear anywhere in the record. *Id.* Even under the *Gwynne* standard, although we are not required to give deference to the trial court's consecutive-sentence findings, we must have "a firm conviction or belief, after reviewing the entire record, that the evidence does not support the specific findings made by the trial court to impose consecutive sentences, which includes the number of consecutive terms and the aggregate sentence that results." *Gwynne* at ¶ 29. As is the case herein, an appellate court may be asked to review only one of the trial court's findings. *Id.* at ¶ 26.

{¶ 64} Davenport makes several conclusory assertions in suggesting a 34-year prison term is not justified, and he broadly asserts that the record does not support the aggregate sentence that was imposed in this case. Davenport claims that there was no harm to any individual, but he disregards any psychological harm caused. For example, the victim's terror in fleeing the scene in her car in the one case certainly came out in her testimony. Further, the fact that nobody was physically injured does not take away from the seriousness of Davenport's conduct in these cases and the danger he poses to the public, which is supported by the evidence reviewed in the majority opinion. Insofar as Davenport claims his sentence is disproportionate to sentences given to other offenders, as the majority finds, Davenport did not present any evidence to support this argument or preserve this issue for review.

{¶ 65} It also is important to recognize that in this matter, a sizeable portion of Davenport's sentence is mandated by required consecutive terms for his

repeatedly possessing firearms while under disability in these crimes.[3] While the defendant has an absolute right to maintain his innocence and require the state to prove each and every element on all crimes charged, by rejecting any plea offer and with the resulting findings of guilt on all charges, the trial court judge was required to impose mandatory, consecutive prison terms for the two firearm specifications in each case. In the end, Davenport's rejection of any plea offer left the judge with no options on the specification time. Davenport's counsel even acknowledged at the sentencing hearing that a lengthy sentence could be imposed and that the matter involved two cases with multiple gun specifications that would not merge.

{¶ 66} Ultimately, because Davenport raises a generic "too much time" claim that fails to articulate in detail how the record is deficient, his claim must fail. Upon review, I do not clearly and convincingly find that the record does not support the sentencing court's consecutive-sentence findings.[4]

{¶ 67} For these reasons, I would overrule the fourth assignment of error. I also concur with the majority's decision to overrule the other assignments of error and to affirm the judgment of the trial court.

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[3] Davenport rejected a plea deal that would have limited the required imposition of those consecutive specification terms the trial court was required to impose.

[4] Even if an appellate judge may not have imposed the same lengthy sentence as the trial judge did here on Davenport, that is not grounds for reversal. Perhaps if the legislature would consider implementing a grid or matrix system for sentencing, this review might fall under a different standard. But even with those approaches, Davenport's conduct likely would still result in substantial prison time under nearly any system or approach.

{¶ 68} Finally, I believe it is important to note an observation concerning Marsy's Law. While not directly at issue here, appellate courts should nevertheless be mindful of victims' rights under Marsy's Law. In this matter, several victims testified as witnesses at trial and, upon request, one of those victims appeared at sentencing.[5] However, there is nothing in the record to demonstrate whether or not the prosecutor complied with applicable notice requirements under Marsy's Law with regard to the appellate proceedings.[6] It does not appear that the statutes require repeated notices, but pursuant to the Ohio Constitution Article I, Section 10(A), victims have a right "upon request, to reasonable and timely notice of *all* public proceedings involving the criminal offense or delinquent act against the victim, and to be present at all such proceedings;" and "to be heard in any public proceeding involving release, plea, sentencing, disposition, or parole, or in any public proceeding in which a right of the victim is implicated[.]" (Emphasis added.) Ohio Constitution Article I, Section 10(A)(2) and (3).

{¶ 69} The victim or the victim's representative may assert these rights or any other right afforded to the victim by law "in any proceeding involving the criminal offense." Ohio Constitution Article I, Section 10(B). Pursuant to

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[5] The court was informed by the prosecutor that one of the victims wished to be present for sentencing and of the need to comply with Marsy's Law. The trial court set a sentencing date when the victim could be present. The felonious-assault victim was present at the sentencing, though she elected not to make a statement.

[6] I note this because while it seems the victims were notified of their Marsy's Law rights for trial court proceedings, it is unclear if they were notified of the appellate process or the prosecutor relied on the original notice for all subsequent proceedings.

R.C. 2930.15, if the victim or victim's representative requests notice of the filing of an appeal, and if the defendant or alleged juvenile offender files an appeal, the prosecutor "shall notify the victim and victim's representative, if applicable, of the appeal" and must provide certain information to the victim and/or victim's representative regarding the appeal.

{¶ 70} Because of the constitutional implications, both trial and appellate courts should have greater measures in place to establish in the record that the prosecutor has satisfied applicable notice requirements under Marsy's Law.[7]

[7] At present, our praecipe advises prosecutors to notify victims of the Marsy's Law requirements. Yet, we have no way of knowing if the prosecutor is relying on past notifications from trial court proceedings or is formally notifying victims of the existence of an appeal. While we have no interest in whether the victim seeks to participate, waives that participation or ignores the notice entirely, we have a vested interest in knowing that at least the notification was made in advance of any action taken on our part. Our failure to do this will not bode well for public confidence in our system of justice. A victim who finds out for the first time, after the fact, that a defendant's conviction or sentence has been vacated, modified, remanded, or reversed will wonder how they left a sentencing hearing one day with a sense of finality, only to discover months, or even a year later, that the landscape has suddenly changed with no prior notice to them.