[Cite as *State v. Fuller*, 2015-Ohio-5602.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	
	)	
PLAINTIFF-APPELLEE	)	
	)	CASE NO. 13 JE 19
v.	)	
	)	OPINION
TIMOTHEUS M. FULLER	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Court of Common Pleas of Jefferson County, Ohio Case No. 13 CR 44
JUDGMENT:	Affirmed in part; reversed in part. Remanded for rehearing on consecutive sentences only.
APPEARANCES: For Plaintiff-Appellee	Attorney Jane Hanlin Jefferson County Prosecutor Attorney Frank Bruzzese Assistant Prosecuting Attorney 16001 State Route 7 Steubenville, Ohio 43952
For Defendant-Appellant	Attorney Lydia Spragin 333 South 4th Street Steubenville, Ohio 43952-2930

JUDGES:

Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Carol Ann Robb

Dated: December 31, 2015

[Cite as *State v. Fuller*, 2015-Ohio-5602.]
DeGENARO, J.

{¶1} Defendant-Appellant, Timotheus Fuller, appeals the judgment of the Jefferson County Court of Common Pleas convicting him of drug trafficking and possession of cocaine. Fuller challenges his conviction and sentence, claiming ineffective assistance of counsel, and that the trial court erred by: permitting the State to amend the indictment; failing to excuse a juror for cause; and failing to sua sponte assess his competency. Most of Fuller's arguments are meritless; however, the trial court erred by failing to comply with R.C. 2929.14(C)(4) when imposing consecutive sentences. Accordingly, the judgment of the trial court is affirmed in part and reversed in part. Fuller's convictions are affirmed, but his sentence is reversed in part, and the case remanded for rehearing on consecutive sentences only.

Facts and Procedure

{¶2} On March 7, 2013, a confidential informant (CI) contacted the Jefferson County Drug Task Force (DTF) and offered to purchase drugs from Timotheus Fuller. The CI had previously made drug buys from Fuller within the past month and positively identified Fuller from a photograph. Thereafter, the CI called Fuller to initiate the drug deal, which DTF recorded.

{¶3} After the agreement had been made by phone, the CI was outfitted with a body wire and given $250 in "buy money." The CI was transported to 559 Linden Avenue, where he was kept under visual surveillance by the DTF as the drug transaction took place on the front porch. Afterwards, the CI delivered the drugs to Agent Jack Shea who had witnessed the event. He could not see Fuller's face; however, he saw the screen door open, and saw the exchange of drugs and money with the CI.

{¶4} On March 8th, a second buy was arranged in the same manner between Fuller and the CI while under DTF surveillance. Detective Thomas Ellis of the DTF was not able to personally see Fuller's face as he sold the drugs, but testified that he knew it was Fuller based on the telephone records; the CI's phone number on Fuller's call log; the "buy money" being found on Fuller; the mail at the house; the clothing at the house; the drugs found at the house; and the tools of the

drug trade where Fuller was the only person present and the only person who lived there.

{¶5} On the same day hours later, DTF obtained and executed a search warrant at Fuller's house at 559 Linden Avenue where they found drugs on him and in the residence, together with the tools of the "drug dealer's trade." During the execution of the search warrant, a cell phone was found and confirmed to be the phone which Fuller used to make the drug deals as the phone number matched the number that had been called by the CI. Further, $20.00 of prerecorded "buy money" from the March 8th sale was found on Fuller.

{¶6} Fuller was the only person present in the house when the search warrant was executed and there was no evidence that indicated that anyone else lived at the house: the mail was all addressed to Fuller; only male clothing was found in the house; the clothing was the same size; and no children's clothing or toys were found. Additionally, the vehicle parked outside of the residence was registered to Fuller.

{¶7} On May 1, 2013, Fuller was indicted on two counts of trafficking in cocaine, fifth degree felonies, and one count of possession of drugs with a forfeiture specification, a second degree felony. The case proceeded to jury trial. Prior to voir dire, the State made a motion to amend count three of the indictment to reflect the amount of cocaine as "in excess of 20 grams", as opposed to 26 grams as previously written. The State made this motion to "conform to the statute" and confirm that the charge was a felony of the second degree. Counsel for Fuller stated "I have no objection to it."

{¶8} The jury found Fuller guilty on all counts and he was sentenced to eleven months on each trafficking count and a mandatory 8 years on the possession charge. The trial court imposed consecutive sentences for one trafficking count and the possession count, with the second trafficking count to be served concurrently.

Ineffective Assistance of Counsel

{¶9} As Fuller's first three of ten assignments of error address ineffective assistance of counsel, they will be discussed together for clarity of analysis. He asserts:

> MR. FULLER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION WHEN COUNSEL NEITHER URGED THE COURT TO ORDER A COMPETENCY EVALUATION PRIOR TO OR DURING TRIAL NOR RAISED THE ISSUE OF WHETHER HE WAS IN THE FIRST INSTANCE COMPETENT TO STAND TRIAL AND/OR ASSIST IN HIS DEFENSE WHEN COUNSEL KNEW THAT MR. FULLER HAD BEEN DISCHARGED FROM THE UNITED STATES MILITARY ON "A MENTAL HEALTH DISCHARGE" IN 2002, PRESENTLY RECEIVED $1,100 A MONTH IN VETERAN'S BENEFITS BASED UPON HIS DISABILITY DISCHARGE FROM THE UNITED STATES MILITARY, COUPLED WITH HIS THE FACT THAT HE ATTAINED ONLY A HIGH SCHOOL EDUCATION AND HIS DISRUPTIVE BEHAVIOR AND OUTBURSTS DURING THE COURSE OF THE TRIAL TO THERE [sic] SEVERAL JUDICIAL REPRIMANDS BOTH IN AND OUT OF THE PRESENCE OF THE JURY.
>
> MR. FULLER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL DID NOT PRESENT ANY WITNESSES ON BEHALF OF MR. FULLER EITHER AT TRIAL OR IN MITIGATION OF THE SENTENCING TO SPEAK TO THE MENTAL HEALTH OF MR. FULLER PRIOR TO AND DURING THE TRIAL PHASE OR AT THE SENTENCING PHASE.

MR. FULLER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO OBJECT TO PROSECUTORIAL BOLSTERING OF THE CREDIBILITY OF OFFICER JASON HANLIN DURING THE VOIR DIRE.

{¶10} To prove an allegation of ineffective assistance of counsel, the defendant must satisfy a two-prong test; that counsel's performance has fallen below an objective standard of reasonable representation, and that he was prejudiced by counsel's performance. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley,* 42 Ohio St.3d 136, 538 N.E .2d 373 (1989), at paragraph two of the syllabus. To demonstrate prejudice, the defendant must prove that, but for counsel's errors, the result of the trial would have been different. *Id.* at paragraph three of the syllabus. In Ohio, a properly licensed attorney is presumed to be competent and the burden is on the defendant to prove otherwise. *State v. Hamblin*, 37 Ohio St.3d 153, 155, 524 N.E.2d 476 (1988). Fuller alleges that counsel was ineffective for three different reasons. Each will be discussed in turn.

Failure to Request Competency Evaluation

{¶11} Fuller argues that his trial attorney should have requested a competency evaluation. The test for competence to stand trial is whether "the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense." R.C. 2945.37(G). Competency will be discussed further below. However, in regards to Fuller's ineffective assistance of counsel argument, he cites to outbursts made by him during the trial, but fails to explain how these outbursts demonstrate that he was unable to understand the proceedings or assist in his defense. Nothing suggests that Fuller lacked the ability to do either.

{¶12} Fuller continues that his trial counsel should have requested a competency evaluation because he received a mental health discharge from the military. However 'mental illness' "does not necessarily equate with the definition of legal incompetency." *State v. Berry*, 72 Ohio St.3d 354, 1995-Ohio-310, 650 N.E.2d

433, syllabus. "A defendant may be emotionally disturbed or even psychotic and still be capable of understanding the charges against him and of assisting his counsel." *State v. Bock*, 28 Ohio St.3d 108, 110, 502 N.E.2d 1016 (1986).

{¶13} The State argues: "The Defendant made a strategic choice ---- he could have pleaded Not Guilty by Reason of Insanity and/or he could have challenged his mental competency. Rather than raise a defense which would have confined him to a mental facility, he chose to go with the some-other-guy-did-it defense."

{¶14} Fuller's statement at sentencing demonstrates he understood the defense strategy:

> Judge Henderson, I just want – I want to ask you after you – after you recommend what you are going to recommend for me, I'm going to ask could I receive an appeal bond because I thought, **I mean, he did the best he could representing me but I believe that it was lack of evidence** and I believe that I could have been represented better and fair. I believe I could have had a fair – a fair trial – I think the fair – I think it wasn't fair. It wasn't – it wasn't – it was unjust. It was unjust and that's all I'm going to say. I'm going to leave this court in your hands and that's all I'm going to say. (emphasis added)

{¶15} "Judicial scrutiny of counsel's performance is to be highly deferential, and reviewing courts must refrain from second-guessing the strategic decisions of trial counsel." *State v. Carter*, 72 Ohio St.3d 545, 558, 1995-Ohio-104, 651 N.E.2d 965. The defense was proceeding under the trial strategy that the State would fail to produce enough evidence to prove Fuller was the individual who possessed and trafficked in cocaine. The strategy was not successful. Failing to raise competency does not make Fuller's counsel ineffective. As Fuller fails to direct this court's attention to how he was unable to understand the proceedings or assist in his defense, and that it was trial strategy to proceed as he did, Fuller's first assignment of error is meritless.

Failure to Present Witnesses

{¶16} Fuller argues that his trial counsel was ineffective for failing to request or demonstrate the need for an expert witness or to call any witnesses at trial or at sentencing on his behalf. The record demonstrates that counsel was proceeding on the trial theory that Fuller was not the man that sold and possessed cocaine at the date, time and location as charged in the indictment. "Counsel's decisions on which witnesses to call fall within the realm of trial strategy and will not usually constitute ineffective assistance of counsel." *State v. Christman*, 7th Dist. No. 786, 1999 WL 343411, *21 (May 28, 1999) citing *State v. Clayton*, 62 Ohio St.2d 45, 49, 402 N.E.2d 1189 (1980). As counsel's decision to not call any witnesses is presumed to be a part of sound trial strategy, Fuller's second assignment of error is meritless.

Failure to Object to Improper Bolstering

{¶17} During voir dire the State made the following statement:

> Okay. Now, I have here seated with me Jason Hanlin. He's actually one of the leading officers on the Jefferson County Drug Task Force. He's a Steubenville police officer and also assigned to the task force.

{¶18} Fuller argues that his counsel was ineffective for failing to object to the characterization of Hanlin as a "leading" officer, contending this was impermissible bolstering. Fuller incorrectly argues that his right to test the witness's credibility was impaired "when the jury was lead to believe without the benefit of cross-examination that Mr. Hanlin had a status which he may not have had." Prosecutors are entitled to considerable latitude in opening arguments. *State v. Whitfield*, 2d Dist. No. 22432, 2009-Ohio-293, ¶ 12. "Leading" is defined as "most important"[1] or "having great importance, influence or success."[2] There is nothing impermissible about referring to Hanlin in this manner. Fuller did not object at trial and he had ample opportunity to cross-examine Hanlin.

---

[1] Oxford Dictionaries
[2] Merriam-Webster

{¶19} As the statement in question was not improper, counsel was not ineffective for failing to object to it. As such, Fuller's third assignment of error is meritless.

Competency

{¶20} Fuller's fourth and fifth assignments of error address competency. They will be discussed together for clarity of analysis. In his fourth and fifth of ten assignments of error, Fuller asserts:

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO ORDER AN EXAMINATION TO DETERMINE WHETHER MR. FULLER HAD THE CAPACITY TO PROCEED TO TRIAL IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.
>
> THE TRIAL COURT COMMITTED PLAIN ERROR IN FAILING TO SUA SPONTE MAKE A PROPER DETERMINATION OF COMPETENCY OR TO ORDER A COMPETENCY EXAMINATION OF MR. FULLER IN LIGHT OF HIS STATEMENTS AND CONDUCT PRIOR TO AND DURING THE COURSE OF TRIAL, INCLUDING BUT NOT LIMITED TO SEVERAL NON-SENSICAL ANSWERS TO INQUIRIES BY THE COURT, CONTINUED OUTBURSTS, ERRATIC AND DISRUPTIVE BEHAVIOR, AND HIS OBVIOUS INABILITY TO UNDERSTAND THE NATURE OF THE PROCEEDINGS.

{¶21} R.C. 2945.37(B)[3] provides:

> In a criminal action in a court of common pleas, a county court, or a municipal court, the court, prosecutor, or defense may raise the issue of the defendant's competence to stand trial. If the issue is raised before the trial has commenced, the court shall hold a hearing on the issue as provided in this section. **If the issue is raised after the trial has**

[3] Version effective October 6, 2009 to September 28, 2013, and controls this appeal.

commenced, the court shall hold a hearing on the issue only for good cause shown or on the court's own motion. (emphasis added)

{¶22} A defendant is presumed to be competent and he bears the burden of rebutting this presumption and establishing incompetence by a preponderance of the evidence. *Youngstown v. Ortiz*, 153 Ohio App.3d 271, 2003-Ohio-2238, 793 N.E.2d 498 (7th Dist.), ¶ 54. The right to a hearing "rises to the level of a constitutional guarantee where the record contains 'sufficient indicia of incompetence,' such that an inquiry * * * is necessary to ensure the defendant's right to a fair trial." *State v. Berry,* 72 Ohio St.3d 354, 359, 1995-Ohio-310, 650 N.E.2d 433. "The decision as to whether to hold a competency hearing once trial has commenced is in the court's discretion." *State v. Rahman*, 23 Ohio St.3d 146, 156, 492 N.E.2d 401 (1986). "Abuse of discretion means an error in judgment involving a decision that is unreasonable based upon the record; that the appellate court merely may have reached a different result is not enough." *State v. Dixon,* 7th Dist. No. 10 MA 185, 2013–Ohio–2951, ¶ 21.

{¶23} Fuller concedes that neither he, nor the State, raised the issue of his competency prior to trial. As such the trial court is only required to sua sponte hold a hearing on the issue for "good cause shown." R.C. 2945.37(B). In support of establishing good cause, Fuller points to the following: (1) he did not "meaningfully participate" in the trial; (2) he had outbursts that "were reprimanded by both the court and his trial counsel;" (3) his trial counsel knew or should have known about his military discharge due to mental health reasons; (4) his limited education; (5) his "sometimes incomprehensive responses to direct court questions and at one point clapping his hands;" and (6) his irrational behavior and confused demeanor.

{¶24} Fuller relies on an older case, *State v. Rubenstein,* 40 Ohio App.3d 57, 531 N.E.2d 732 (8th Dist.1987), as support for his argument. In *Rubenstein* the Eighth District held that a "trial court, in making a determination of whether to hold a sua sponte hearing concerning the accused's competence to stand trial, should consider the following: (1) doubts expressed by counsel as to the defendant's

competence; (2) evidence of irrational behavior; (3) the defendant's demeanor at trial; and (4) prior medical opinion relating to competence to stand trial." *Id*. at paragraph two of the syllabus. However, in *Rubenstein* the Eighth District ultimately held that the developments at trial were not good cause to require the trial court to sua sponte conduct a competency hearing:

> In this case, the only evidence in the record bearing on appellant's competence to stand trial was contained in the psychiatric examiner's report which, although acknowledging that appellant could have some limitations on his ability to work with counsel, concluded that such limitations were not overwhelming. The record is devoid of any instances of irrational behavior on appellant's part which might suggest a change in appellant's mental condition. There is also nothing in the record to suggest that appellant's demeanor at trial was such as to create sufficient doubt by the trial court as to appellant's competence to stand trial. It is also significant that there was no suggestion by appellant's trial counsel that appellant was not competent or was unable to work with counsel and that a competency hearing should be held. Under these circumstances, appellant has not satisfied the "good cause" standard of R.C. 2945.37(A) in order to require the court to conduct an additional competency hearing after the trial commenced.

Id. at *62.

{¶25} In response, the State directs this court's attention to the more recent *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215. Skatzes alleged that the trial court erred by not conducting a sua sponte competency evaluation. In support of establishing good cause he cited the following factors: (1) he did not understand that he was waiving constitutional rights by taking the witness stand, (2) he did not understand the consequences of answering questions with speculative responses, (3) his use of colloquial phrases, such as "I reckon,"

subjected him to ridicule by the prosecutor, (4) he lost a significant amount of weight pending trial, (5) his mental state was deteriorating—inmates testified that his nickname was "Crazy George" and (6) he had been suffering from stress and confusion at the time of the [jail] takeover.

{¶26} The Ohio Supreme Court found no error in the trial court's actions:

> The record in this case does not reflect "sufficient indicia of incompetence" to have required the trial court to conduct a competency hearing. See *State v. Smith* (2000), 89 Ohio St.3d 323, 329, 731 N.E.2d 645. None of the points raised by Skatzes suggest that he did not understand the nature and objective of the proceedings against him or that he was unable to assist in his defense. Skatzes's decision to testify on his own behalf does not provide indicia of incompetence; he attempted to rebut the abundant testimony elicited against him. Nor do we find indicia of incompetence because Skatzes decided to exercise his constitutional rights. Neither his behavior at trial nor his testimony provides "good cause" or "sufficient indicia of incompetence." Deference on such issues should be granted to those "who see and hear what goes on in the courtroom." *State v. Cowans* (1999), 87 Ohio St.3d 68, 84, 717 N.E.2d 298.
>
> Skatzes's alleged paranoia, stress, and confusion during the takeover do not indicate incompetence. Such reactions are understandable in the context of conditions during the takeover and do not appear to have impaired his ability to assist in his defense. See *State v. Hessler* (2000), 90 Ohio St.3d 108, 125, 734 N.E.2d 1237. Moreover, at no time did defense counsel suggest that Skatzes lacked competence. See *State v. Were* (2002), 94 Ohio St.3d 173, 176, 761 N.E.2d 591 (counsel continually raised the issue of defendant's competency). Lead counsel represented Skatzes from his appointment in August 1994 through the

> January 1996 sentencing and thus had ample time to become familiar with Skatzes. If lead counsel had reason to question Skatzes's competence, he surely would have raised the issue. See *State v. Spivey* (1998), 81 Ohio St.3d 405, 411, 692 N.E.2d 151.

State v. Skatzes, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶ 157-158.

{¶27} In the present case there was not reversible error, nor plain error, in the trial court failing to sua sponte order a competency evaluation or hearing. Fuller's trial counsel had interaction with Fuller and did not question his competence. Additionally, none of the factors raised by Fuller suggest that he did not understand the nature and objective of the proceedings against him or that he was unable to assist in his defense. Though he did have outbursts, he also answered questions appropriately and with an understanding of the proceedings. Individuals with varying degrees of experience and education come before Ohio trial courts on a regular basis, but this does not implicate their competency to stand trial. Also, just because Fuller received a mental health discharge from the military does not equally mean he was incompetent. There are a multitude of reasons one can receive a mental health discharge. As such, Fuller's fourth and fifth assignments of error are meritless.

Sentencing

{¶28} In his sixth, seventh, and tenth of ten assignments of error, which we will address out of order for clarity of analyses, Fuller asserts:

> THE TRIAL COURT ERRED IN DETERMINING DEFENDANT'S PRIOR RECORD LEVEL FOR SENTENCING PURPOSES AS THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE OF DEFENDANT'S PRIOR CONVICTIONS TO SUPPORT THE PRIOR RECORD LEVEL FOUND IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

ALTHOUGH TRIAL COUNSEL DID MAKE A RULE 29 MOTION TO DISMISS, HE DID NOT ADDRESS THE ISSUE OF WHETHER THE ABSENT CONFIDENTIAL INFORMANT WAS A MATERIAL WITNESS WHOSE TESTIMONY WAS SO INTRINSIC TO THE TRIAL THAT HIS ABSENCE INFRINGED UPON MR. FULLER'S RIGHT TO CONFRONT THE WITNESS AGAINST HIM AS THE CONFIDENTIAL INFORMANT DID NOT TESTIFY AND NO ELSE (SIC) ONE CAN ACTUALLY IDENTIFY MR. FULLER.

MR. FULLER ARGUES THAT THE TRIAL COURT ERRED WHEN IT SENTENCED HIM TO CONSECUTIVE PRISON TERMS AND/OR THAT THE TRIAL COURT FAILED TO COMPLY WITH THE SENTENCING PROVISIONS OF R. C. 2929.14(C)(4) AS RENUMBERED AND REVIVED BY H.B. 86 AND THUS, HIS CONSECUTIVE SENTENCES ARE CONTRARY TO LAW.

{¶29} This court is currently split as to the standard of review to apply in felony sentencing cases. *See State v. Hill,* 7th Dist. No. 13 MA 1, 2014–Ohio–919 (Vukovich, J., Donofrio, J., majority with DeGenaro, J., concurring in judgment only with concurring in judgment only opinion); *State v. Wellington,* 7th Dist. No. 14 MA 115, 2015–Ohio–1359 (Robb, J., DeGenaro, J., majority with Donofrio, J. concurring in judgment only with concurring in judgment only opinion).

{¶30} One approach is to apply the test set forth in the plurality opinion in *State v. Kalish,* 120 Ohio St.3d 23, 2008–Ohio–4912, 896 N.E.2d 124, ¶ 26. *Hill* at ¶ 7–20. Under the *Kalish* test, we must first examine the sentence to determine if it is "clearly and convincingly contrary to law." *Kalish* at ¶ 26 (O'Connor, J., plurality opinion). Next, if the sentence is clearly and convincingly not contrary to law, the appellate court reviews the sentence to determine if the trial court abused its discretion in selecting a sentence within the permissible statutory range. *Id.* at ¶ 17 (O'Connor, J., plurality opinion).

{¶31} The other approach is to strictly follow R.C. 2953.08(G), which provides that appellate courts are only to review felony sentences to determine if they are clearly and convincingly contrary to law. R.C. 2953.08(G) does not contain an abuse of discretion component. *Wellington* at ¶ 9–14.

{¶32} The issue of which felony sentencing standard of review is applicable is currently before the Ohio Supreme Court. *State v. Marcum,* 141 Ohio St.3d 1453, 2015–Ohio–239, 23 N.E.3d 1195. The certified question the Court has accepted is, "[D]oes the test outlined by the [c]ourt in *State v. Kalish* apply in reviewing felony sentences after the passage of R.C. 2953.08(G)?" *Id.* Regardless of what standard is employed, the result in this case is the same; the sentence is affirmed.

{¶33} The General Assembly enacted Am.Sub.H.B. No. 86, effective September 30, 2011. *State v. Bonnell*, 140 Ohio St.3d 209, 2014–Ohio–3177, 16 N.E.2d 659, ¶20. In H.B. 86, the General Assembly revived R.C. 2929.14(E)(4) and renumbered it as R.C. 2929.14(C)(4), which states in pertinent part:

> If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the

> courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶34} "In order to impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry, but it has no obligation to state reasons to support its findings." *State v. Bonnell,* 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus. "Although the trial court is not required to recite the statute verbatim, there must be an indication that the court in fact found that (1) consecutive sentences are necessary to protect the public from future crime or to punish the offender, (2) that consecutive sentences are not disproportionate to the seriousness of the defendant's conduct and to the danger he poses to the public, and (3) one of the findings described in subsections (a), (b) or (c). R.C. 2929.14(C)(4)." *State v. Bellard,* 7th Dist. No. 12MA97, 2013-Ohio-2956, ¶ 17.

{¶35} Here, the judgment entry stated:

> The Court further finds that a prison sentence is consistent with the purposes and principles of sentencing under R.C. §2929.11 because a prison sentence is commensurate with the seriousness of the offender's conduct and its impact on the victim, because it is reasonably necessary to deter the defendant in order to protect the public from future crime, and because it would not place an unnecessary burden on governmental resources.
>
> The court finds under ORC §2929.12(B) that the defendant possessed only less than one (1) gram under a felony of the first degree and, therefore, is the worst form of the offense; and under ORC §2929.12(C)

> that no physical harm to persons or property was expected or caused; therefore, the more serious factors outweigh the less serious factors.
>
> The court finds under ORC §2929.12(D) that the defendant has a history of criminal convictions and has numerous traffic violations; and the court finds under ORC§2929.12(E) that no factors apply to the defendant; therefore, the recidivism likely factors outweigh the not likely factors.
>
> The court finds under ORC §2929.13(B)(1) that the defendant previously served two prior prison terms; therefore, after weighing the seriousness and recidivism factors, finds that a prison term is consistent with the purposes of §2929.11 and that the defendant is not amenable to available community sanctions.

{¶36} The sentencing entry further indicated that Counts One and Three were to be served consecutively, and concurrent to Count Two.

{¶37} The sentencing transcript demonstrates that the trial court listened to the statements of both parties, R.C. 2929.19(B)(1), considered the principles and purposes of felony sentencing, the seriousness and recidivism factors under R.C. 2929.12), the factors in R.C. 2929.13(B)(1), and the presumption in favor of a prison term for a felony of the second degree, R.C. 2929.13(D)(1). Finally, the prison terms imposed for all three charges are within the authorized range of available punishments for the respective felonies. Thus, the trial court complied with these sentencing statutes.

{¶38} However, the trial court did not comply with R.C.2929.14(C)(4) with respect to the imposition of consecutive sentences. A review of the sentencing transcript and journal entry demonstrates that the trial court did not comply with the statute as required by *Bonnell.* At the sentencing hearing the trial court stated:

> I'm going to make that term consecutive to the possession and I'm

> making the possession consecutive because I am considering your criminal history and considering your criminal history, I believe it shows that consecutive terms are necessary and I'm also going to consider the fact that the trafficking took place on March 7th and the possession took place on March the 8th. So, they did not take place on the same day. It was two separate days. Therefore, I am going to make those – Counts One and Three are consecutive.

{¶39} It would strain the analysis of *Bonnell* and its interpretation of R.C. 2929.14(C)(4) to conclude that the trial court fully complied with the first and third statutory findings identified in *Bellard;* further there was no finding of disproportionality. The sentencing entry failed to make any of the statutory findings whatsoever, merely stating that two of the convictions would be served consecutively to each other. As this fails to comply with the holding in *Bonnell* and R.C. 2929.14(C)(4), Fuller's tenth assignment of error is meritorious in part.

{¶40} Fuller additionally argues that the trial court erred in considering his prior record for sentencing purposes as the State failed to present sufficient evidence of his prior convictions. R.C. 2929.12 mandates that the trial court consider whether he is likely to commit future crimes. R.C. 2929.12(D). The State used a CCH (Computerized Criminal History) when discussing Fuller's past. Fuller did not object and has waived all but plain error. Further, Fuller used information contained on the CCH, for example, the fact that he completed his prison term and successfully completed his parole, in mitigation at sentencing.

{¶41} Fuller argues that R.C. 2945.75(B)(1) mandates that the State provide certified copies of judgment entries when it is "necessary to prove a prior conviction." This section is applicable when needing to prove prior convictions to enhance or prove an element of an offense, such as OVI or Domestic Violence. Fuller stipulated to the convictions as outlined by the State at sentencing and even attempted to use the successful completion of a prior sentence to his benefit in mitigation. Accordingly, Fuller's sixth assignment of error is meritless.

{¶42} Fuller also argues that his right to confront witnesses was violated because the confidential informant was a material witness whose testimony was essential. The Sixth Amendment to the United States Constitution provides, "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." Likewise, Section 10, Article I of the Ohio Constitution provides, "[i]n any trial, in any court, the party accused shall be allowed * * * to meet the witnesses face to face." The Supreme Court of the United States has held that evidence that is "testimonial hearsay" offends a defendant's Sixth Amendment right to confrontation and is not admissible. *Crawford v. Washington,* 541 U.S. 36, 51, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). However, Fuller does not direct our attention to any "testimonial hearsay" to consider.

{¶43} Fuller argues that the State was mandated to use the CI as a witness, but provides no legal support to back this proposition. The State presented the testimony of five officers that were involved with the controlled buys and/or executed the search warrant. It was the jury's province to assess the credibility of the witnesses and determine whom to believe. *State v. DeHass,* 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. Accordingly, Fuller's seventh assignment of error is meritless.

Indictment

{¶44} Fuller's eighth of ten assignments of error asserts:

> THE TRIAL COURT ERRED IN GRANTING AN AMENDMENT TO THE INDICTMENT RETURNED BY THE JEFFERSON COUNTY GRAND JURY BY ORDERING INTERLINEATION OF AN ESSENTIAL ELEMENT OF THE OFFENSE CHARGED WITHOUT FURTHER DELIBERATION OF THE GRAND JURY, IN VIOLATION OF THE OHIO CONSTITUTION ARTICLE I, SECTION 10.

{¶45} Article I, Section 10 of the Ohio Constitution provides that "no person shall be held to answer for a capital, or otherwise infamous, crime, unless on

presentment or indictment of a grand jury." "The court may at any time before, during, or after a trial amend the indictment, information, complaint or bill of particulars, 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." Crim.R. 7(D) "Crim.R. 7(D) does not permit the amendment of an indictment when the amendment changes the penalty or degree of the charged offense; amending the indictment to change the penalty or degree changes the identity of the offense." *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, 903 N.E.2d 609, syllabus.

{¶46} The trial court did not err in permitting the indictment to be amended. The degree of the offense was not changed: the possession of cocaine count was indicted as a second degree felony and remained a second degree felony after the amendment. As such, the penalty did not change either. The only change made was to the amount of cocaine possessed; it was changed to "in excess of 20 grams" as opposed to 26 grams. The amendment benefitted Fuller, was done by the agreement, and Fuller's counsel stated that he had no objection. As such, there was no error in the amendment of the indictment and Fuller's eighth assignment of error is meritless.

Voir Dire

{¶47} In his ninth of ten assignments of error, Fuller asserts:

> THE TRIAL COURT ERRED IN NOT SUSTAINING COUNSEL FOR THE DEFENSE'S FOR CAUSE CHALLENGE AS TO MR. CONSTANTINE STATING "AS TO MR. CONSTANTINE, I THINK HE INDICATED THAT HE COULD FOLLOW THE INSTRUCTIONS AND THEREFORE I'M NOT GOING TO EXCUSE HIM FOR CAUSE BUT MR. KITTLE WILL BE EXCUSED FOR CAUSE.

{¶48} Fuller argues that the trial court erred in not excusing Mr. Constantine for cause. "A party cannot complain of prejudicial error in the overruling of a

challenge for cause if it does not force him to exhaust his peremptory challenges." *State v. Eaton*, 19 Ohio St.2d 145, 14, 249 N.E.2d 897 (1969). The record shows that Fuller used only one of his four peremptory challenges and had the opportunity to excuse Constantine with a peremptory challenge which he did not do. Further, Fuller did not object at the time the court overruled the challenge for cause, nor did he object when the jury selection was complete. As such, Fuller has waived this argument and his ninth assignment of error is meritless.

{¶49} In sum, Fuller's argument claiming ineffective assistance of counsel is meritless. Likewise, his claims that the trial court erred by: permitting the State to amend the indictment, failing to excuse a juror for cause and failing to sua sponte assess his competency are meritless. However, Fuller's claim that his sentence is erroneous is meritorious in part. Accordingly, the judgment of the trial court is affirmed in part and reversed in part. Fuller's convictions are affirmed, but his sentence is reversed in part, and the case remanded for rehearing on consecutive sentences only.

Donofrio, P. J., concurs

Robb, J., concurs

APPROVED:

Mary DeGenaro, Judge