[Cite as *State v. Wilson*, 2020-Ohio-1217.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellee	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	Case No. CT 2019-0039
WILLIAM R. WILSON	:	CT 2019-0040
	:	
Defendant-Appellant	:	OPINION

CHARACTER OF PROCEEDING: Criminal appeal from the Muskingum Court of Common Pleas, Case No. CR2019-0739 and CR2019-0044

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: March 25, 2020

APPEARANCES:

For Plaintiff-Appellee

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Gwin, P.J.

{¶1} Defendant-appellant William R. Wilson ["Wilson"] appeals his conviction and sentence after a jury trial in the Muskingum County Court of Common Pleas.

Facts and Procedural History

{¶2} In the early morning hours of December 8, 2018, Deputy Wade Kanavel was on patrol in Zanesville, Ohio, when he observed a vehicle ahead of him pull into a driveway. The vehicle stopped halfway down the driveway. No one exited the vehicle. After passing this location, Kanavel turned his cruiser around and drove by the driveway a second time. He observed the vehicle still running in the drive, no one was leaving the vehicle, and the lights were off in the house. Kanavel then noticed the vehicle backing out of the driveway. Deputy Kanavel ran the vehicle information and was advised that the Frazeyburg Police Department had been notified that the vehicle owner reported that the individual whom he let use the vehicle refused to return the vehicle to the owner. T., Feb 26, 2019 at 165.Therefore, the Frazeyburg Police were requested to stop the vehicle.

{¶3} Deputy Kanaval followed the car. When he observed the vehicle make a right turn without using a turn signal, Deputy Kanaval attempt to make a traffic stop. After activating his cruiser's overhead lights, Deputy Kanaval notice the vehicle accelerate. A chase ensued. The vehicle was traveling up to 70 miles per hour, was driving in the middle of the road, and running through stop signs. The car passed through a residential area, eventually stopping in the yard in front of a house. Three male occupants exited the car and began to run. A fourth person, a female, remained in the vehicle. The driver was fleeing into the woods with another occupant of the vehicle.

{¶4} Deputy Kanavel was able to catch up with the driver and place him under arrest. Deputy Kanavel identified the driver of the car as Wilson. Upon a search of Wilson's person, a baggie with a white crystal-like substance was located. This substance was sent for testing and found to be 1.38 grams of methamphetamine.

{¶5} Stacy Nutter is the mother of Wilson's girlfriend, and she testified for the defense. Nutter was out with her dog during the early morning hours of December 8, 2018. Ms. Nutter testified she saw a vehicle stop nearby, and she saw the driver exit the vehicle. Ms. Nutter did not recognize the driver. Ms. Nutter further testified she saw Wilson in the backseat of the vehicle, and she saw Wilson climb into the front driver's seat and exit the vehicle.

{¶6} On December 13, 2018, Wilson was indicted on one count of Failure to Comply (risk of harm), a felony of the third degree, in violation of R.C. 2921.331(B) and one count of Obstructing Official Business, a misdemeanor of the second degree, in violation of R.C. 2921.31(A). (Case No. CR2018-0739).

{¶7} On January 23, 2019, after lab results confirmed the substance removed from Wilson's pocket to be methamphetamine, Wilson was indicted on one count of Possession of Drugs (Methamphetamine), a felony of the fifth degree, in violation of R.C. 2925.11(A). (Case No. CR2019-0044).

{¶8} On February 1, 2019, the state filed a motion to consolidate the two cases for purposes of trial, noting that Wilson was in agreement with the motion. On February 5, 2019, the trial court granted the motion.

{¶9} On February 26, 2019, a jury trial began on the two felony counts. Wilson was found guilty by the jury of Failure to Comply (risk of harm) and Possession of Drugs (methamphetamine)[1].

{¶10} On April 15, 2019, the trial court sentenced Wilson to 36 months in prison on the Failure to Comply charge and 12 months on the Possession of Drugs charge, to be served consecutively for an aggregate prison sentence of 48 months.

Assignments of Error

{¶11} Wilson raises six Assignments of Error,

{¶12} "I. THE TRIAL COURT ERRED BY NOT HOLDING SEPARATE TRIALS ON WILSON'S CHARGES OF POSSESSION OF DRUGS AND FAILURE TO COMPLY, IN VIOLATION OF HIS RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION."

{¶13} "II. WILSON'S CONVICTIONS ARE BASED ON INSUFFICIENT EVIDENCE, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 10 & 16, ARTICLE I OF THE OHIO CONSTITUTION.

{¶14} "III. WILSON'S CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS IO & 16, ARTICLE I OF THE OHIO CONSTITUTION.

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[1] The state had dismissed the misdemeanor count of Obstructing Official Business prior to trial. T. at 143.

{¶15} "IV. THE TRIAL COURT UNLAWFULLY ORDERED WILSON TO SERVE CONSECUTIVE SENTENCES, IN VIOLATION OF HIS RIGHTS TO DUE PROCESS, GUARANTEED BY SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

{¶16} "V. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING WILSON'S MOTION TO WAIVE COURT COSTS, IN VIOLATION OF HIS RIGHTS UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

{¶17} "VI. WILSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION."

I.

{¶18} In his First Assignment of Error, Wilson argues it was error for the trial court to grant the state's motion to consolidate his cases for trial.

{¶19} In the motion to consolidate filed by the state on February 1, 2019, the state represented to the trial court that, "The State and defense have discussed these issues and are in agreement that the cases should be consolidated under the original case number." Nothing in the record before this Court suggests that Wilson's trial counsel did not join in the motion to consolidate the case.

{¶20} In *State v. Ford,* the appellant argued on appeal that the trial judge erred by excusing a certain juror from his trial. 158 Ohio St.3d 139, 2019-Ohio-4539, ¶ 269. In rejecting the appellant's arguments, the Ohio State Supreme Court held,

> Furthermore, Ford requested that juror No. 19 be removed from the panel. The doctrine of invited error specifies that a litigant may not "take advantage of an error which he himself invited or induced." *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co., Lincoln-Mercury Div.*, 28 Ohio St.3d 20, 502 N.E.2d 590 (1986), paragraph one of the syllabus. "This court has found invited error when a party has asked the court to take some action later claimed to be erroneous, or affirmatively consented to a procedure the trial judge proposed." *State v. Campbell*, 90 Ohio St.3d 320, 324, 738 N.E.2d 1178 (2000). Here, defense counsel requested that juror No. 19 be removed from the panel, and Ford is not entitled to complain of an error that counsel requested. Accordingly, we reject this claim.

158 Ohio St.3d 139, 2019-Ohio-4539, ¶ 270. *Accord, State v. Rohrbaugh,* 126 Ohio St.3d 421, 2010-Ohio-3286, 934 N.E.2d 920, ¶10. "The doctrine of invited error precludes a defendant from making an affirmative and apparent strategic decision at trial and then complaining on appeal that the result of that decision constitutes reversible error. *State v. Doss*, 8th Dist. Cuyahoga No. 84433, 2005-Ohio-775, ¶7, *quoting United States v. Jernigan*, 341 F.3d 1273, 1290 (11th Cir.2003). 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)." *State v. Thompson,* 11th Dist. Portage No. 2018-P-0099, 2020-Ohio-67, ¶39.

{¶21} Wilson's trial counsel made a tactical decision to join in the motion to consolidate the cases for trial.

{¶22} Therefore, he is not entitled to complain of error that he requested.

II. & III.

{¶23} In his Second Assignment of Error, Wilson argues that there was insufficient evidence to prove beyond a reasonable doubt that 1). He was the driver of the car that Deputy Kanaval stopped and /or to prove that he caused a risk of harm to person or property if he had driven the car, and 2). To prove that he possessed the drugs. In his Third Assignment of Error, Wilson contends that the jury's findings are against the manifest weight of the evidence.

STANDARD OF APPELLATE REVIEW.

Sufficiency of the Evidence.

{¶24} The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...." This right, in conjunction with the Due Process Clause, requires that each of the material elements of a crime be proved to a jury beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. __, 133 S.Ct. 2151, 2156, 186 L.Ed.2d 314 (2013); *Hurst v. Florida*, 136 S.Ct. 616, 621, 193 L.Ed.2d 504 (2016). The test for the sufficiency of the evidence involves a question of law for resolution by the appellate court. *State v. Walker,* 150 Ohio St.3d 409, 2016-Ohio-8295, 82 N.E.3d 1124, ¶30. "This naturally entails a review of the elements of the charged offense and a review of the state's evidence." *State v. Richardson,* 150 Ohio St.3d 554, 2016-Ohio-8448, 84 N.E.3d 993, ¶13.

{¶25} When reviewing the sufficiency of the evidence, an appellate court does not ask whether the evidence should be believed. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *Walker,* at ¶30. "The relevant inquiry is whether, after viewing the evidence in the 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." *Jenks* at paragraph two of the syllabus. *State v. Poutney,* 153 Ohio St.3d 474, 2018-Ohio-22, 97 N.E.3d 478, ¶19. Thus, "on review for evidentiary sufficiency we do not second-guess the jury's credibility determinations; rather, we ask whether, '*if believed*, [the evidence] would convince the average mind of the defendant's guilt beyond a reasonable doubt.'" *State v. Murphy*, 91 Ohio St.3d 516, 543, 747 N.E.2d 765 (2001), *quoting Jenks* at paragraph two of the syllabus (emphasis added); *Walker* at ¶31. We will not "disturb a verdict on appeal on sufficiency grounds unless 'reasonable minds could not reach the conclusion reached by the trier-of-fact.'" *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 94, *quoting State v. Dennis*, 79 Ohio St.3d 421, 430, 683 N.E.2d 1096 (1997); *State v. Montgomery*, 148 Ohio St.3d 347, 2016-Ohio-5487, 71 N.E.3d 180, ¶74.

ISSUES FOR APPEAL.

1. Whether, after viewing the evidence in the light most favorable to the prosecution, the evidence, if believed, would convince the average mind of Wilson's guilt on each element of the crime of failure to comply (risk of harm) beyond a reasonable doubt.

a). Evidence that Wilson was driving the car at the time Deputy Kanaval attempted to make the traffic stop.

{¶26} Wilson was convicted of a violation of R.C. 2921.331, Failure to comply with order or signal of police officer. The statute provides in relevant part,

> (B) No person shall operate a motor vehicle so as willfully to 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.

{¶27} A violation of R.C. 2921.331(B) is a felony of the third degree if the jury finds by proof beyond a reasonable doubt,

> (i) The operation of the motor vehicle by the offender was a proximate cause of serious physical harm to persons or property.
>
> (ii) The operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property.

R.C. 2921.331(C)(5)(a).

{¶28} "Substantial risk" means a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist. R.C. 2901.01(A)(8). Under R.C. 2901.01(A)(6), "serious physical harm to property" means any physical harm to property that does either of the following:

> (a) Results in substantial loss to the value of the property or requires a substantial amount of time, effort, or money to repair or replace;
>
> (b) Temporarily prevents the use or enjoyment of the property or substantially interferes with its use or enjoyment for an extended period of time.

{¶29} Under R.C. 2901.01(A)(5), "serious physical harm to persons" means:

> (a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;
>
> (b) Any physical harm that carries a substantial risk of death;

(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain

{¶30} Deputy Kanaval testified during Wilson's jury trial as follows,

Q: Is it possible that you're mistaken as to Mr. Wilson driving that car?

A: No.

T., Feb. 26, 2019 at 159. Deputy Kanaval further testified,

Q: Did somebody climb through the center of that car, then come out through the driver's side door?

A: They did not.

T., Feb. 26, 2019 at 159.

{¶31} Kanavel further testified:

Q: When you're in a circumstance like this and there are four people in a car that has been in a chase and they all run in different directions, who's the person you're most interested in catching after something like this?

A: Oh, without a doubt the driver.

Q: Okay. And so, is that why you focused on Mr. Wilson?

A: Yes.

Q: Is there any possibility that some random person jumped out of the car and was actually the driver and then Mr. Wilson was —

A: No.

Q: -- was —

A: There's no chance of that at all.

T., Feb. 26, 2019 at 172-173.

{¶32} Kanavel testified he was 100% certain Wilson was the driver of the vehicle. T., Feb. 26, 2019 at 193.

{¶33} Viewing the evidence in the case at bar in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that Wilson was the driver of the car. We hold, therefore, that the state met its burden of production regarding the element of the identity of the driver of the car and, accordingly, there was sufficient evidence to submit the charge to the jury and to support Wilson's conviction.

b). Evidence that the operation of the car caused a substantial risk of serious physical harm to persons or property.

{¶34} Deputy Kanavel testified the car that Wilson was driving reached speeds of 50 mph, an unsafe speed for the area, drove in the middle of the roadway, then accelerated to 70 mph, continued through the residential area, ran a stop sign going 70 mph, attempted to turn left onto another road but nearly lost control of the vehicle due to his speed, then continued driving through residential areas at a high rate of speed. T.,

Feb. 26, 2019 at 168-169. Deputy Kanavel testified the vehicle then drove up the left side of the roadway, through a yard at a residence, which was very muddy, and skidded to a stop in the mud just before it reached a wood line. T., Feb. 26, 2019 at 170.

{¶35} These facts constitute sufficient evidence that Wilson created a substantial risk of physical harm to persons or property, those persons being himself, Deputy Kanavel, and other motorists on the road. Additionally, he created a substantial risk of harm to property, that being the deputy's cruiser, his own vehicle, and the real property where he wrecked his vehicle. *See, State v. Hopkins,* 5th Dist. Richland No. 09-CA-66, 2010-Ohio-2441, ¶21. Further, as we observed in *Hopkins*,

> Even if we were only to consider the "substantial risk" that Appellant posed to himself, Ohio courts have held that a substantial risk to one's self is sufficient for a conviction under R.C. 2921.331(B) as a felony of the third degree. *See State v. Hall*, 8th Dist. No. 92625, 2009–Ohio–5695 (finding that sufficient evidence of substantial risk of physical harm existed where offender ran three to four stoplights, "nearly" collided with a parked car, and where offender jumped from the vehicle while it was still moving, almost running over himself); see also, *State v. Moore* (January 28, 1993), 8th Dist No. 61673, (finding that offender put himself and passenger in danger of serious physical harm by refusing to submit to officer's order); *State v. Payne*, 3rd Dist. No. 5–04–21, 2004–Ohio–6487 (determining that offender who ignored ten stop signs and exceeded speeds of one hundred miles per hour and wrecked his car, causing his vehicle significant damage, had placed himself and others at substantial risk of serious harm).

State v. Hopkins, 5th Dist. Richland No. 09-CA-66, 2010-Ohio-2441, ¶22. *Accord, State v. Bailey,* 5th Dist. Tuscarawas No. 2016 AP 0032, 2017-Ohio-771, ¶ 25.

{¶36} Viewing the evidence in the case at bar in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that Wilson's operation of the car created a substantial risk of serious physical harm to persons or property. We hold, therefore, that the state met its burden of production regarding each element of the crime of Failure to comply with the order or signal of police officer creating a substantial risk of serious physical harm to persons or property and, accordingly, there was sufficient evidence to submit the charge to the jury and to support Wilson's conviction.

2. Whether, after viewing the evidence in the light most favorable to the prosecution, the evidence, if believed, would convince the average mind of Wilson's guilt on each element of the crime of possession of drugs beyond a reasonable doubt.

{¶37} Wilson was convicted of Possession of Methamphetamine, a Schedule II controlled substance in violation of R.C. 2925.11(A),

{¶38} R.C. 2925.11 Drug Possession Offense

> (A) No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog.

{¶39} R.C. 2925.01(K) defines possession as follows: " 'Possess' or 'possession' means having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found." R.C. 2901.21 provides the requirements for criminal liability and provides that possession is a "voluntary act if the possessor

knowingly procured or received the thing possessed, or was aware of the possessor's control of the thing possessed for sufficient time to have ended possession." R.C. 2901.21(D) (1).

{¶40} Pursuant to R.C. 2901.22(B), "[a] person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature." Further, "[a] person has knowledge of circumstances when he is aware that such circumstances probably exist." Id. "Whether a person acts knowingly can only be determined, absent a defendant's admission, from all the surrounding facts and circumstances, including the doing of the act itself." *State v. Huff,* 145 Ohio App.3d 555, 563, 763 N.E.2d 695(1st Dist. 2001). (Footnote omitted.) Thus, "[t]he test for whether a defendant acted knowingly is a subjective one, but it is decided on objective criteria." *State v. McDaniel*, 2nd Dist. Montgomery No. 16221, 1998 WL 214606 (May 1, 1998), *citing State v. Elliott*, 104 Ohio App.3d 812, 663 N.E.2d 412(10th Dist. 1995). *See also, State v. Jones*, 56 Ohio St.2d 35, 38, 318 N.E.2d 637 ("The determination of whether appellant had the required culpable mental state must be made with a view to the totality of circumstances surrounding the beating of Otto Baum. As this court stated in paragraph four of the syllabus in *State v. Huffman* (1936), 131 Ohio St. 27, 1 N.E.2d 313: "The intent of an accused person dwells in his mind. Not being ascertainable by the exercise of any or all of the senses, it can never be proved by the direct testimony of a third person, and it need not be. It must be gathered from the surrounding facts and circumstances under proper instructions from the court.").

{¶41} Possession may be actual or constructive. *State v. Butler*, 42 Ohio St.3d 174, 176, 538 N.E.2d 98(1989). To establish constructive possession, the evidence must

prove that the defendant was able to exercise dominion and control over the contraband. *State v. Wolery*, 46 Ohio St.2d 316, 332, 348 N.E.2d 351(1976). Dominion and control may be proven by circumstantial evidence alone. *State v. Trembly*, 137 Ohio App.3d 134, 738 N.E.2d 93 (8th Dist. 2000). Circumstantial evidence that the defendant was located in very close proximity to the contraband may show constructive possession. *State v. Butler, supra; State v. Morales*, 5th Dist. Licking No.2004 CA 68, 2005-Ohio-4714, ¶ 50. Ownership of the contraband need not be established in order to find constructive possession. *State v. Smith*, 9th Dist. Summit No. 20885, 2002-Ohio-3034, ¶13. Furthermore, possession may be individual or joint. *Wolery*, 46 Ohio St.2d at 332, 348 N.E.2d 351. Multiple individuals may constructively possess a particular item simultaneously. *State v. Pitts*, 4th Dist. Scioto No. 99 CA 2675, 2000-Ohio-1986. The Supreme Court has held that knowledge of illegal goods on one's property is sufficient to show constructive possession. *State v. Hankerson*, 70 Ohio St.2d 87, 91, 434 N.E.2d 1362, 1365(1982), *certiorari denied* (1982), 459 U.S. 870, 103 S.Ct. 155, 74 L.Ed.2d 130.

{¶42} If the state relies on circumstantial evidence to prove an essential element of an offense, it is not necessary for "'such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction.' " *State v. Jenks*, 61 Ohio St.3d 259, 272, 574 N.E.2d 492 (1991), paragraph one of the syllabus, *superseded by State constitutional amendment on other grounds as stated in State v. Smith, 80 Ohio St.3d 89, 102 at n. 4, 684 N.E.2d 668 (1997).*

{¶43} "'Circumstantial evidence and direct evidence inherently possess the same probative value [.]' " *Jenks*, 61 Ohio St.3d at paragraph one of the syllabus. Furthermore, " '[s]ince circumstantial evidence and direct evidence are indistinguishable so far as the

jury's fact-finding function is concerned, all that is required of the jury is that it weigh all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt.' " *Jenks*, 61 Ohio St.3d at 272, 574 N.E.2d 492. While inferences cannot be based on inferences, a number of conclusions can result from the same set of facts. *State v. Lott*, 51 Ohio St.3d 160, 168, 555 N.E.2d 293(1990), *citing Hurt v. Charles J. Rogers Transp. Co.,* 164 Ohio St. 329, 331, 130 N.E.2d 820(1955). Moreover, a series of facts and circumstances can be employed by a jury as the basis for its ultimate conclusions in a case. *Lott,* 51 Ohio St.3d at 168, 555 N.E.2d 293*, citing Hurt,* 164 Ohio St. at 331, 130 N.E.2d 820.

{¶44} In *Ulster County Court v. Allen*, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777(1979), the United States Supreme Court upheld a statute which provided that the presence in an automobile, other than a public one, of a firearm "is presumptive evidence of its possession by all persons occupying such automobile at the time except (a) where the firearm is found upon the person of an occupant, (b) where the automobile is being operated for hire by a licensed operator or (c) if the weapon is a handgun and one of the occupants, not present under duress, has a license to have a handgun." Id. at 442 U.S. 142-143, 99 S.Ct. 2217. The Court noted that the presumption was not a mandatory; rather it was a permissive inference available only in certain circumstances. Further, the jury could ignore the presumption even if there was no affirmative proof offered in rebuttal by the accused. Id. at 160-162, 99 S.Ct. at 2226-2227. Finally, the trial judge in *Allen* explained, "that possession could be actual or constructive, but that constructive possession could not exist without the intent and ability to exercise control or dominion over the weapons." Id. at 161, 99 S.Ct. at 2226.

{¶45} In the case at bar, Wilson was wearing the jacket at the time he was apprehended. Wilson attempted to flee the police both in the car and by running after it was stopped. The drugs were found in the pocket of the jacket Wilson was wearing.

{¶46} Viewing the evidence in the case at bar in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that Wilson had committed the crime of Possession of Drugs in violation of R.C. 2925.11(A). We hold, therefore, that the state met its burden of production regarding each element of the crime of Possession of Drugs in violation of R.C. 2925.11(A) and, accordingly, there was sufficient evidence to submit the charge to the jury and to support Wilson's conviction.

Manifest weight of the evidence.

{¶47} As to the weight of the evidence, the issue is whether the jury created a manifest miscarriage of justice in resolving conflicting evidence, even though the evidence of guilt was legally sufficient. *State v. Thompkins*, 78 Ohio St.3d 380, 386–387, 678 N.E.2d 541 (1997), *superseded by constitutional amendment on other grounds as stated by State v. Smith,* 80 Ohio St.3d 89, 684 N.E.2d 668, 1997–Ohio–355; *State v. Issa*, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001).

> "[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts.
>
> * * *

> "If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment."

Seasons Coal Co., Inc. v. Cleveland, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, *quoting* 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978).

{¶48} The reviewing court must bear in mind; however, that credibility generally is an issue for the trier of fact to resolve. *State v. Issa*, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001); *State v. Murphy*, 4th Dist. Ross No. 07CA2953, 2008–Ohio–1744, ¶ 31. Because the trier of fact sees and hears the witnesses and is particularly competent to decide whether, and to what extent, to credit the testimony of particular witnesses, the appellate court must afford substantial deference to its determinations of credibility. *Barberton v. Jenney*, 126 Ohio St.3d 5, 2010–Ohio–2420, 929 N.E.2d 1047, ¶ 20. In other words, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. Mahoning No. 99 CA 149, 2002–Ohio–1152, at ¶ 13, citing *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125(7th Dist. 1999). Thus, an appellate court will leave the issues of weight and credibility of the evidence to the fact finder, as long as a rational basis exists in the record for its decision. *State v. Picklesimer,* 4th Dist. Pickaway No. 11CA9, 2012–Ohio–1282, ¶ 24.

{¶49} Once the reviewing court finishes its examination, an appellate court may not merely substitute its view for that of the jury, but must find that " 'the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be

reversed and a new trial ordered.'" *State v. Thompkins, supra*, 78 Ohio St.3d at 387, *quoting State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720–721(1st Dist. 1983). Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." Id.

ISSUE FOR APPEAL.

Whether the trial court clearly lost their way and created such a manifest miscarriage of justice that the convictions must be reversed and a new trial ordered.

{¶50} Stacy Nutter testified that it was not Wilson that she saw exiting from the driver seat and running toward the woods.

{¶51} The jury as the trier of fact was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the trier of fact may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Craig,* 10th Dist. Franklin No. 99AP–739, 1999 WL 29752 (Mar 23, 2000) *citing State v. Nivens*, 10th Dist. Franklin No. 95APA09–1236, 1996 WL 284714 (May 28, 1996). Indeed, the trier of fact need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver*, 10th Dist. Franklin No. 02AP–604, 2003–Ohio–958, ¶ 21, *citing State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964); *State v. Burke*, 10th Dist. Franklin No. 02AP–1238, 2003–Ohio–2889, *citing State v. Caldwell*, 79 Ohio App.3d 667, 607 N.E.2d 1096 (4th Dist. 1992). Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks*, 61 Ohio St.3d 259, 272, 574 N.E.2d 492 (1991), paragraph one of the syllabus, *superseded by State constitutional*

amendment on other grounds as stated in State v. Smith, 80 Ohio St.3d 89, 102 at n.4, 684 N.E.2d 668 (1997).

{¶52} In the case at bar, the jury heard, the witnesses viewed the evidence, and heard both Deputy Kanaval and Stacy Nutter testify and be subjected to cross-examination. Thus, a rational basis exists in the record for the jury's decision.

{¶53} We find that this is not an "'exceptional case in which the evidence weighs heavily against the conviction.'" *State v. Thompkins*, 78 Ohio St.3d 380, 386–387, 678 N.E.2d 541 (1997), *quoting Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717. Based upon the foregoing and the entire record in this matter we find Wilson's convictions are not against the sufficiency or the manifest weight of the evidence. To the contrary, the jury appears to have fairly and impartially decided the matters before them. The jury heard the witnesses, evaluated the evidence, and was convinced of Wilson's guilt. The jury neither lost his way nor created a miscarriage of justice in convicting Wilson.

{¶54} Finally, upon careful consideration of the record in its entirety, we find that there is substantial evidence presented which if believed, proves all the elements of the crimes for which Wilson was convicted.

{¶55} Wilson's Second and Third Assignments of Error are overruled.

IV.

{¶56} In his Fourth Assignment of Error, Wilson contends this Court should vacate the trial court's decision to impose consecutive sentences on Wilson because the trial court imposed them in contravention of the sentencing statutes.

{¶57} We review felony sentences using the standard of review set forth in R.C. 2953.08. *State v. Marcum*, 146 Ohio St.3d 516, 2016–Ohio–1002, 59 N.E.3d 1231, ¶ 22*;* *State v. Howell,* 5th Dist. Stark No. 2015CA00004, 2015-Ohio-4049, ¶ 31.

{¶58} In *State v. Gwynne,* a plurality of the Supreme Court of Ohio held that an appellate court may only review individual felony sentences under R.C. 2929.11 and R.C. 2929.12, while R.C. 2953.08(G)(2) is the exclusive means of appellate review of consecutive felony sentences. ___ Ohio St.3d ___, 2019-Ohio-4761, ¶16-18; *State v. Anthony,* 11th Dist. Lake No. 2019-L-045, 2019-Ohio-5410, ¶60.

{¶59} R.C. 2953.08(G)(2) provides we may either increase, reduce, modify, or vacate a sentence and remand for resentencing where we clearly and convincingly find that either the record does not support the sentencing court's findings under R.C. 2929.13(B) or (D), 2929.14(B)(2)(e) or (C)(4), or 2929.20(I), or the sentence is otherwise contrary to law. *See, also, State v. Bonnell*, 140 Ohio St.3d 209, 2014–Ohio–3177, 16 N.E.2d 659, ¶ 28; *State v. Gwynne,* ¶16.

{¶60} Clear and convincing evidence is that evidence "which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford,* 161 Ohio St. 469, 120 N.E.2d 118(1954), paragraph three of the syllabus. *See* also, In *re Adoption of Holcomb*, 18 Ohio St.3d 361 (1985). "Where the degree of proof required to sustain an issue must be clear and convincing, a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof." *Cross,* 161 Ohio St. at 477 120 N.E.2d 118.

{¶61} In the case at bar, Wilson does not contest the length of his individual sentences for Failure to Comply and Possession of Drugs; rather his arguments center upon the trial court's decision to make the sentence for Failure to Comply consecutive to the prison sentence for the Possession of Drug Count. As the Ohio Supreme Court noted in *Gwynne*,

> Because R.C. 2953.08(G)(2)(a) specifically mentions a sentencing judge's findings made under R.C. 2929.14(C)(4) as falling within a court of appeals' review, the General Assembly plainly intended R.C. 2953.08(G)(2)(a) to be the exclusive means of appellate review of consecutive sentences. *See State v. Vanzandt*, 142 Ohio St.3d 223, 2015-Ohio-236, 28 N.E.3d 1267, ¶ 7 ("We primarily seek to determine legislative intent from the plain language of a statute").
>
> While R.C. 2953.08(G)(2)(a) clearly applies to consecutive-sentencing review, R.C. 2929.11 and 2929.12 both clearly apply only to *individual* sentences.

2019-Ohio-4761, ¶¶16-17(emphasis in original).

{¶62} "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[.]" *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, ¶37. Otherwise, the imposition of consecutive sentences is contrary to law. *See* id. The trial court is not required "to give a talismanic incantation of the words of the statute, provided that the necessary findings can be found in the record and are incorporated into the sentencing entry." Id.

ISSUE FOR APPEAL.

A. Whether the trial court properly imposed consecutive sentences in Cassano's case.

R.C. 2929.14 (C)(4) Consecutive Sentences.

{¶63} R.C. 2929.14(C)(4) concerns the imposition of consecutive sentences. In Ohio, there is a statutory presumption in favor of concurrent sentences for most felony offenses. R.C. 2929.41(A). The trial court may overcome this presumption by making the statutory, enumerated findings set forth in R.C. 2929.14(C) (4). *State v. Bonnell,* 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶23. This statute requires the trial court to undertake a three-part analysis. *State v. Alexander,* 1st Dist. Hamilton Nos. C–110828 and C–110829, 2012-Ohio-3349, 2012 WL 3055158, ¶ 15.

{¶64} R.C. 2929.14(C)(4) provides,

> 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.

{¶65} Thus, in order for a trial court to impose consecutive sentences the court must find that consecutive sentences are necessary to protect the public from future crime or to punish the offender. The court must also find that consecutive sentences are not disproportionate to the offender's conduct and to the danger the offender poses to the public. Finally, the court must make at least one of three additional findings, which include that (a) the offender committed one or more of the offenses while awaiting trial or sentencing, while under a sanction imposed under R.C. 2929.16, 2929.17, or 2929.18, or while 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 offenses 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 would adequately reflect the seriousness of the offender's conduct; or (c) the offender's criminal history demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender. *See, State v. White*, 5th Dist. Perry No. 12-CA-00018, 2013-Ohio-2058, ¶36.

{¶66} In this case, the record does support a conclusion that the trial court made all of the findings required by R.C. 2929.14(C)(4) at the time it imposed consecutive sentences.

R.C. 2929.14(C)(4): [T]he 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.

{¶67} In the case at bar, the trial court made this finding on the record and in its sentencing entry. Sent. T., Apr 15, 2019 at 9; *Sentencing Entry*, filed Apr 17, 2019 [Docket Entry No. 23].

R.C. 2929.14(C)(4)(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.

{¶68} The trial court found that Wilson had at the time of sentencings Wilson had "currently pending from Licking County a failure to comply with an order or signal of a police officer and falsification. " Sent. T., Apr. 15, 2019 at 7. Wilson acknowledged the pending charges. Id.

R.C. 2929.14(C)(4)(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.

{¶69} The Court made no findings concerning this factor in Wilson's case.

R.C. 2929.14(C)(4)(c): The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶70} In the case at bar, the trial court made this finding on the record and in its sentencing entry. Sent. T., Apr. 15, 2019 at 9; *Sentencing Entry*, filed Apr 15, 2019 [Docket Entry No. 23].

B. Whether the trial court's decision to impose consecutive sentences in Wilson's case is supported by the record.

{¶71} According to the Ohio Supreme Court, "the record must contain a basis upon which a reviewing court can determine that the trial court made the findings required by R.C. 2929.14(C)(4) before it imposed consecutive sentences." *Bonnell*, ¶28. "[A]s long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld." Id. at ¶29.

{¶72} The plurality of the Ohio Supreme Court in *Gwynne* held that appellate courts may not review consecutive sentences for compliance with R.C. 2929.11 and R.C. 2929.12. *See* 2019-Ohio- 4761, ¶18.

{¶73} The trial court reviewed the Pre-sentence Investigation report and noted that the present case is Wilson's ninth felony case; and further that Wilson had a felony case pending in Licking County. Sent. T., Apr. 15, 2019 7-9.

{¶74} Upon review, we find that the trial court's sentencing on the charge complies with applicable rules and sentencing statutes. The sentence was within the statutory sentencing range. Further, the record contains evidence supporting the trial court's findings under R.C. 2929.14(C)(4).

{¶75} Wilson's Fourth Assignment of Error is overruled.

V.

{¶76} In his Fifth Assignment of Error, Wilson argues that because he is indigent, the trial court abused its discretion in denying his request to waive the imposition of court costs. He further contends, "In fact, it will be burdensome for Wilson to have to pay court costs, while in prison, because he may also be charged for food and hygienic products, under R.C. 5120.56. This is problematic because the Eighth Amendment to the United States Constitution requires "humane conditions of confinement," including "adequate food, clothing, shelter and medical care." *Farmer v. Brennan*, 511U .S. 825, 832 (1994). The Eighth Amendment right is infringed upon here to the extent that the burdensome court costs will interfere with Smith's ability to pay for food, clothing, hygienic products, or medical care." Appellant's Brief at 12.

{¶77} Subsequent to the trial court's announcement of sentence in this case, the following exchange occurred,

> [Defense Counsel]: Your Honor, the appeals attorneys like to argue that those of us at trial are ineffective if we don't ask that the court costs be waived. So because Mr. Wilson is indigent, I'd like to request the court costs be waive.
>
> THE COURT: Thank you. Court costs being waived will be denied.

STANDARD OF APPELLATE REVIEW.

{¶78} A trial court has discretion to waive the payment of court costs if the defendant is indigent. *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 14. Therefore, we review the trial court's decision concern waiving the court costs for an abuse of discretion.

{¶79} An abuse of discretion can be found where the reasons given by the court for its action are clearly untenable, legally incorrect, or amount to a denial of justice, or where the judgment reaches an end or purpose not justified by reason and the evidence. *Tennant v. Gallick,* 9th Dist. Summit No. 26827, 2014-Ohio-477, ¶35; In *re Guardianship of S .H.*, 9th Dist. Medina No. 13CA0066–M, 2013–Ohio–4380, ¶ 9; *State v. Firouzmandi,* 5th Dist. Licking No.2006–CA–41, 2006–Ohio–5823, ¶54.

ISSUE FOR APPEAL.

{¶80} *Whether the trial court abused its discretion by overruling Wilson's motion to waive court costs.*

{¶81} In *State v. Davis*, the Ohio Supreme Court noted,

> R.C. 2947.23(A)(1)(a) requires a trial court to impose the costs of prosecution against all convicted criminal defendants. *White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, at ¶ 14. While the imposition of those costs is mandatory, the court may waive the payment of all costs when the defendant is determined to be indigent. Id.; see also R.C. 2743.70, 2949.091, and 2949.092.

Oh. Sup. Ct. No. 2018-0312, 2020-Ohio-309(Feb 4, 2020), ¶13. The Court further held,

> Furthermore, a determination of indigency alone does not rise to the level of creating a reasonable probability that the trial court would have waived costs had defense counsel moved the court to do so, contrary to the Eighth District's holding in *Gibson,* 2017-Ohio-102, 2017 WL 123309, and in *Springer,* 2017-Ohio-8861, 2017 WL 6055504. *See State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, ¶ 233; State *v. Smith*, 12th Dist. Warren No. CA2010-06-057, 2011-Ohio-1188, 2011 WL 882182, ¶ 63-64, *rev'd in part on other grounds,* 131 Ohio St.3d 297, 2012-Ohio-781, 964 N.E.2d 423 (an indigent defendant fails to show that there is a reasonable probability that the trial court would have waived costs when the trial court made a finding that the defendant had the ability to work and therefore had the ability to pay the costs in the future). *The court of appeals, instead, must look at all the circumstances that the defendant sets forth in attempting to demonstrate prejudice and determine whether there is a reasonable probability that the trial court would have granted a motion to waive costs had one been made.*

Oh. Sup. Ct. No. 2018-0312, 2020-Ohio-309(Feb 4, 2020), ¶15 (emphasis added).

{¶82} The Supreme Court of Ohio has held that R.C. 2947.23 requires a court to assess costs against all convicted defendants, including indigent defendants. *State v. White,* 103 Ohio St.3d 580, 2004-Ohio-5989, ¶8; *State v. Hayes*, 11th Dist. Ashtabula No. 2004-A-0024, 2005-Ohio-2881, ¶8. Therefore, 'a defendant's financial status is irrelevant to the imposition of court costs. *State v. Clevenger*, 114 Ohio St.3d 258, 2007-Ohio-4006, ¶3.

{¶83} In the case at bar, the trial court review a Pre-sentence Investigation Report. Wilson is 51 years old and received a 48-month sentence. No evidence is contained in the record that Wilson will be unable to obtain employment and pay the costs after his release.

{¶84} The Supreme Court has cautioned that Eighth Amendment conditions-of-confinement violations are found only in cases where the conditions "involve the wanton and unnecessary infliction of pain" or are "grossly disproportionate to the severity of the crime warranting imprisonment." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). That is, to be considered "sufficiently serious" for purposes of the objective prong, the inmate must have been denied "'the minimal civilized measure of life's necessities.' " *Farmer,* 511 U.S. at 834 (quoting Rhodes, 452 U.S.at 347); *see also Spencer v. Bouchard*, 449 F.3d 721, 728 (6th Cir 2006), *abrogated on other grounds by Jones v. Bock*, 549 U.S. 199 (2007). When determining whether the conditions of confinement rise to an Eighth Amendment violation, the court must consider the "circumstances, nature, and duration of [the] deprivation." *Spencer,* 449 F.3d at 728.

{¶85} The Supreme Court of Ohio has previously held that "costs are not punishment, but are more akin to a civil judgment for money." *State v. Clinton*, 153 Ohio St.3d 422, 2017-Ohio-9423, ¶240, *quoting State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, ¶15.

{¶86} Wilson's Eight Amendment claims are purely speculative. At the time of sentencing, he had not been imprisoned and therefore, could not demonstrate that as a result of his imprisonment he had been subjected to inhumane conditions of confinement.

{¶87} Wilson's Fifth Assignment of Error is overruled.

VI.

{¶88} In his Sixth Assignment of Error, Wilson argues the trial court erroneously allowed one trial for Wilson's offenses. Wilson's trial counsel failed to object despite this error.

STANDARD OF APPELLATE REVIEW.

{¶89} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180(1993); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373(1989).

{¶90} In order to warrant a finding that trial counsel was ineffective, the petitioner must meet both the deficient performance and prejudice prongs of *Strickland* and *Bradley. Knowles v. Mirzayance*, 556 U.S. 111, 129 S.Ct. 1411, 1419, 173 L.Ed.2d 251(2009).

{¶91} Recently, the United States Supreme Court discussed the prejudice prong of the *Strickland* test,

> With respect to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., at 694, 104 S.Ct. 2052. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id., at 693, 104 S.Ct.

2052. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id., at 687, 104 S.Ct. 2052.

"Surmounting Strickland's high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. ——, ——, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689–690, 104 S.Ct. 2052. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id., at 689, 104 S.Ct. 2052; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

Harrington v. Richter, __U.S.__, 131 S.Ct. 770, 777-778, 178 L.Ed.2d 624(2011).

{¶92} Trial counsel's failure to file a motion does not per se constitute ineffective assistance of counsel. *State v. Madrigal,* 87 Ohio St.3d 378, 389, 2000–Ohio–0448. Counsel can only be found ineffective for failing to file a motion if, based on the record, the motion would have been granted. *State v. Lavelle,* 5th Dist. No. 07 CA 130, 2008–Ohio–3119, at ¶ 47; *State v. Cheatam,* 5th Dist. No. 06–CA–88, 2007–Ohio–3009, at ¶ 86. The defendant must further show that there is a reasonable probability that the outcome would have been different if the motion had been granted or the defense pursued. *See Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S.Ct. 2574, 2583, 91 L.Ed.2d 305 (1986); *see, also, State v. Santana*, 90 Ohio St.3d 513, 739 N.E.2d 798 (2001), *citing State v. Lott*, 51 Ohio St.3d 160, 555 N.E.2d 293 (1990).

ISSUE FOR APPEAL.

Whether a motion for bifurcation of the counts would have been granted and whether Wilson would have been found not guilty if it had.

{¶93} Joinder is appropriate where the evidence is interlocking and the jury is capable of segregating the proof required for each offense. *State v. Czajka*, 101 Ohio App.3d 564, 577-578, 656 N.E.2d 9 (8th Dist. 1995). Nonetheless, if it appears that a criminal defendant would be prejudiced by such joinder, then the trial court is required to order separate trials. Crim.R. 14.

{¶94} When a defendant claims that he or she was prejudiced by the joinder of multiple offenses, the court must determine (1) whether evidence of the other crimes would be admissible even if the counts were severed; and (2) if not, whether the evidence of each crime is simple and distinct. *State v. Schaim*, 65 Ohio St.3d 51, 59, 600 N.E.2d 661(1992), *citing State v. Hamblin*, 37 Ohio St.3d 153, 158-159, 524 N.E.2d 476(1988)

and *Drew v. United States*, 331 F.2d 85(D.C.Cir. 1964). "If the evidence of other crimes would be admissible at separate trials, any 'prejudice that might result from the jury's hearing the evidence of the other crime in a joint trial would be no different from that possible in separate trials,' and a court need not inquire further." *Schaim, supra, quoting Drew v. United States*, 331 F.2d at 90.

{¶95} In discussing the dangers associated with admitting other acts evidence in a case where the offenses included several counts of rape and gross sexual imposition, the *Schaim* court stated:

> The admissibility of other acts evidence is carefully limited because of the substantial danger that the jury will convict the defendant solely because it assumes that the defendant has a propensity to commit criminal acts, or deserves punishment regardless of whether he or she committed the crime charged in the indictment. * * * This danger is particularly high when the other acts are very similar to the charged offense, or of an inflammatory nature, as is certainly true in this case. The legislature has recognized the problems raised by the admission of other acts evidence in prosecutions for sexual offenses, and has carefully limited the circumstances in which evidence of the defendant's other sexual activity is admissible. The forcible rape statute and the gross sexual imposition statute both contain subsections that address the admissibility of evidence of other sexual activity by either the victim or the defendant. * * *

{¶96} 65 Ohio St.3d at 59-60, 600 N.E.2d 661.

{¶97} The legislature has recognized the problems raised by the admission of other acts evidence in prosecutions for sexual offenses, and has carefully limited the circumstances in which evidence of the defendant's other sexual activity is admissible. The rape statute and the gross sexual imposition statute both contain subsections that address the admissibility of evidence of other sexual activity by either the victim or the defendant. *Schaim, supra*. (Footnotes omitted). Because of the severe social stigma attached to crimes of sexual assault and child molestation, evidence of these past acts poses a higher risk, on the whole, of influencing the jury to punish the defendant for the similar act rather than the charged act. Accordingly, the state may not "parade past the jury a litany of potentially prejudicial similar acts that have been established or connected to the defendant only by unsubstantiated innuendo." *Huddleston v. United States*, 485 U.S. 681, 689, 108 S.Ct. 1496, 99 L.Ed.2d 771(1988).

{¶98} Evidence of other acts is admissible if (1) there is substantial proof that the alleged other acts were committed by the defendant, and (2) the evidence tends to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *State v. Carter*, 26 Ohio St.2d 79, 83, 269 N.E.2d 115, 117(1971); *State v. Lowe*, 69 Ohio St.3d 527, 530, 1994-Ohio-345, 634 N.E.2d 616, 619. (Citing *State v. Broom*, 40 Ohio St.3d 277, 282-283, 533 N.E.2d 682, 690-691(1988); Evid.R. 404(B); R.C. 2945.59.

{¶99} Further, the prior act must not be too remote and must be closely related in nature, time, and place to the offense charged. *Schaim*, 65 Ohio St.3d at 60, 600 N.E.2d at 669. A prior act which is "* * * too distant in time or too removed in method or type has no permissible probative value." *State v. Snowden*, 49 Ohio App.2d 7, 10, 359 N.E.2d

87, 91(1st Dist. 1976); *State v. Burson*, 38 Ohio St.2d 157, 159, 67 O.O.2d 174, 175, 311 N.E.2d 526, 529(1974).

{¶100} In the case at bar, evidence of Wilson's fleeing from the police is inexorably intertwined with the evidence of the drug possession. When the police apprehended Wilson and searched him incident to arrest for failure to comply, the drugs were found inside his coat pocket. "Flight from justice * * * may be indicative of a consciousness of guilt." *State v. Taylor,* 78 Ohio St.3d 15, 27, 1997-Ohio-243, 676 N.E.2d 82, quoting, *State v. Eaton*, 19 Ohio St.2d 145, 48 O.O.2d 188, 249 N.E.2d 897(1969), paragraph six of the syllabus.

{¶101} Assuming, arguendo, that the evidence did not fit the "other acts" exception, it nevertheless fits the second prong of the *Schaim* test which requires the evidence of the crime under each indictment to be simple and distinct. 65 Ohio St.3d at 59. In *State v. Decker*, 88 Ohio App.3d 544, 624 N.E.2d 350(1st Dist. 1993), the court found that the evidence was simple and distinct. The evidence achieved these characteristics in part because the crimes involved contained different victims and different witnesses, and therefore, the jury was able to segregate the facts that constituted each crime. *Decker*, 88 Ohio App.3d at 549.

{¶102} In the case at bar, of Wilson's fleeing from the police was simple and direct. Evidence of Wilson's possession of drugs was simply and direct. Both crime contained similar evidence and witnesses. The trial court charged the jury that each count of the indictment was a separate and distinct crime and that the jury's verdict on one count must not influence the other count. The jury was instructed that they might find Wilson guilty or not guilty of any one or all of the counts. T. at 269-270.

{¶103} Accordingly, because Wilson was not able to demonstrate that he was prejudiced by the joinder of the cases, he cannot meet the first element of the *Schaim* test. Therefore, we do not need to address the remaining elements of the test.

{¶104} Given the facts *sub judice,* we find that counsel was not ineffective in failing to file a motion to sever the cases or by agreeing to consolidate the cases for trial.

{¶105} Wilson's Sixth Assignment of Error is overruled.

{¶106} The judgment of the Muskingum County Court of Common Pleas is affirmed.

By Gwin, P.J.,

Wise, John, J.,

Baldwin, J., concur