[Cite as *State v. Dunn*, 2023-Ohio-2828.]

IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY

STATE OF OHIO, Plaintiff-Appellee, - vs - NIQUAN M. DUNN, Defendant-Appellant.	**CASE NO. 2022-G-0041** Criminal Appeal from the Court of Common Pleas Trial Court No. 2022 C 000012

O P I N I O N

Decided: August 14, 2023
Judgment: Affirmed in part, reversed in part, and remanded

James R. Flaiz, Geauga County Prosecutor, and *Christian A. Bondra*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Suite 3A, Chardon, OH 44024 (For Plaintiff-Appellee).

Wesley C. Buchanan and *Anna K. Ley*, 50 South Main Street, Suite 625, Akron, OH 44308 (For Defendant-Appellant).

JOHN J. EKLUND, P.J.

{¶1} Appellant, Niquan Dunn, appeals his convictions of Aggravated Trafficking in Drugs, a fourth degree felony in violation of R.C. 2925.03(A)(1)(C)(1)(a); Aggravated Trafficking in Drugs, a third degree felony in violation of R.C. 2925.03(A)(2)(C)(1)(b) with a criminal forfeiture specification; Aggravated Possession of Drugs, a fifth degree felony in violation of R.C. 2925.11(A)(C)(1)(a); Trafficking in Cocaine, a fourth degree felony in violation of R.C. 2925.03(A)(2)(C)(4)(b); and Possession of Cocaine, a fifth degree felony in violation of R.C. 2925.11(A)(C)(4)(a).

{¶2} Appellant has raised four assignments of error, asserting: (1) there was insufficient evidence to convict him of violating R.C. 2925.03(A)(2)(C)(1)(b); (2) his convictions were against the manifest weight of the evidence because the state's evidence against him was "primarily" "circumstantial" and because the state did not prove he "possessed" the drugs; (3) the trial court abused its discretion in granting the state's motion in limine, which prevented Appellant from introducing evidence of another person's criminal history; and (4) he should have been sentenced to community control, or, in the alternative, concurrent sentences.

{¶3} After review of the record and the applicable caselaw, the judgment of the Geauga County Court of Common Pleas is affirmed in part, reversed in part, and remanded. There was insufficient evidence that Appellant violated R.C. 2925.03(A)(2)(C)(1)(b), trafficking in the vicinity of child, because the state did not prove beyond a reasonable doubt that Appellant prepared to distribute a controlled substance for sale within 100 feet of a juvenile. Appellant's convictions were not against the manifest weight of the evidence because it showed he sold drugs to Justin Gould, and drugs and a digital scale were found in his residence with his belongings. The trial court did not abuse its discretion in granting the state's motion in limine because Evid.R. 404(B)(1) precludes admitting evidence of any other crime to prove a person's character in order to show that on a particular occasion the person acted in accordance with that character. Lastly, the trial court could not consider sentencing Appellant to community control because a pre-sentence investigation had not been provided; and the trial court overcame the presumption of concurrent sentences when it made all findings required to impose consecutive sentences and the record supports those findings.

Substantive Facts and Procedural History

{¶4} The trial court transcript reflects the following facts:

{¶5} On December 17, 2021, Detective Steven Deardowski received complaints of drug activity at a residence in Chardon, Ohio. After obtaining, and then executing, a search warrant, the police officers found methamphetamine in Justin Gould's residence. Detective Deardowski asked Mr. Gould if he would be interested in "sharing information" regarding who sold him the methamphetamine. Mr. Gould became an informant in exchange for the detectives' agreeing to not charge him with a crime. Mr. Gould agreed to a "controlled buy," in which he would purchase the drug from a buyer with police secretly observing in the area. Mr. Gould then arranged to meet with a man he called "Q" at Mr. Gould's residence to purchase the drug. Mr. Gould described "Q" to Detective Deardowski as "a black male and he lived in the area, and he would be walking." Mr. Gould later identified "Q" as Appellant. Detective Deardowski observed a man matching "Q's" description enter Mr. Gould's residence. Detective Deardowski later identified the man he saw walking as Appellant. Detective Deardowski then saw Appellant leave Mr. Gould's residence. Mr. Gould confirmed to Detective Deardowski that he had purchased methamphetamine from Appellant during the "controlled buy" and handed it over to the police.

{¶6} Detective Deardowski notified Detective Altemus, another detective observing the "controlled buy," that the purchase had been completed. Detective Altemus then followed the individual who had left Mr. Gould's residence and saw him walk to 430 Karen Drive. Detective Altemus identified that individual as Appellant. The police department then contacted the garbage company who collected garbage at 430 Karen

Drive and asked them to conduct a "trash pull," so that the detectives could search for evidentiary material related to drug activity. As a result of the trash pull, Detective Altemus found mail belonging to Appellant, four narcotics tear-off plastic bags and fourteen very small plastic bags (which the detectives refer to as "felony baggies.") The plastic bags all tested presumptively positive for cocaine.

{¶7} The detectives conducted a second trash pull at 430 Karen Drive in January 2022. As a result of the second trash pull, the detectives found a mirror with white reside on it and a "narcotics tear-off baggie." Detective Altemus described, without objection, a "tear-off baggie" as one used by sellers for ease of production, but he explained that only the seller would have such plastic bags and not the buyer. Both objects tested presumptively positive for cocaine.

{¶8} The court granted the Chardon Police Department a narcotics related search warrant for 430 Karen Drive. When the detectives arrived at the residence, Shirley Gossett and Joseph Gossett, Appellant's relatives, answered the door and allowed the detectives to enter. In the living room, the detectives saw two middle-aged females, and a four-month old baby. The detectives asked who lived at the residence and they were told that Shirley Gossett, Joseph Gossett, the two females, the baby, and Appellant all resided there. The detectives did not find any drugs or drug related materials on the first floor. The detectives proceeded to the basement where they encountered Appellant sleeping on the floor. Detective Altemus found "a plastic storage container with three drawers. And in those three drawers were mail belonging to Niquan, his wallet and clothes belonging to Niquan. And we also found, there was an orange bag in the top drawer. And in there, we found at the time, well, when we weighed it, it was 3.5 grams of

crack cocaine, and .8 grams * * * of methamphetamine." The detectives also found a digital scale with white residue on it in the top drawer. The storage container was located 15-20 feet away from where Appellant was sleeping. The detectives arrested Appellant and asked him if he had sold drugs, to which he replied no.

{¶9} The Geauga County grand jury indicted Appellant on 6 counts: (1) Aggravated Trafficking in Drugs; (2) Aggravated Trafficking in Drugs; (3) Aggravated Possession of Drugs; (4) Trafficking in Cocaine; (5) Possession of Cocaine; and (6) Possession of Criminal Tools.

{¶10} The court held a jury trial on July 19, 2022.

{¶11} At trial, the state made an oral motion in limine to prevent the defense from introducing evidence of Joseph Gossett's prior criminal convictions. The state argued that the convictions were inadmissible character testimony, that his last conviction was 20 years before the instant trial, and that Mr. Gossett was not testifying. The defense opposed the motion, arguing that "this is relevant to presenting an alternative theory of, you know, of a theory of defense, an alternative source of these drugs that the Jury should be able to consider, given that this individual was residing in the home." The court granted the state's motion.

{¶12} The state offered three witnesses: Detective Deardowski, Justin Gould, and Detective Altemus. After the state rested its case, the defense made a Crim.R. 29 motion for acquittal on all counts. The court overruled the motion on counts 1-5, but granted the motion on count 6. The defense rested its case. The jury found Appellant guilty on all 5 counts.

{¶13} On September 14, 2022, the court held a sentencing hearing. The court noted that it had ordered Appellant to undergo a pre-sentence investigation ("PSI") but that it had not been completed and that he did not provide sufficient information to prepare a PSI. The court specifically noted that there was "very little information" on the questionnaire, that he had answered "N/A" to most questions, on the last page Appellant "indicated" he was not guilty, and that a self-report survey was "marginally completed." The court allowed defense counsel an opportunity to argue for a continuance, but counsel stated that Appellant answered the PSI "to the best of his ability." The court proceeded sentencing without a PSI.

{¶14} For sentencing, the court merged count 3 with count 2, and count 5 with count 4. The court sentenced Appellant to 12 months imprisonment on count 1, 24 months on count 2, and 12 months on count 4. The court ordered count 2 to be served consecutive to count 1, and that count 4 would be served concurrent to count 2, for a total of 36 months.

Law and Analysis

{¶15} Appellant raises four assignments of error:

{¶16} First assignment of error: "There was insufficient evidence as a matter of law to convict Niquan."

{¶17} "'Sufficiency' is a term of art meaning that legal standard which is applied to determine whether the case may go to the [factfinder] or whether the evidence is legally sufficient to support the [factfinder's] verdict as a matter of law." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997), citing Black's Law Dictionary (6 Ed.1990) 1433. The appellate court's standard of review for sufficiency of evidence is to determine,

after viewing the evidence in a light most favorable to the prosecution, whether a rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶18} When evaluating the sufficiency of the evidence, we do not consider its credibility or effect in inducing belief. *Thompkins* at 387. Rather, we decide whether, if believed, the evidence can sustain the verdict as a matter of law. *Id.* 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.

{¶19} Appellant asserts that the court had insufficient evidence to convict him of Aggravated Trafficking in Drugs, a third-degree felony, in violation of R.C. 2925.03(A)(2)(C)(1)(b).

{¶20} R.C. 2925.03(A)(2)(C)(1)(b) provides: "No person shall knowingly * * * [p]repare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance or a controlled substance analog, when the offender knows or has reasonable cause to believe that the controlled substance or a controlled substance analog is intended for sale or resale by the offender or another person * * * in the vicinity of a juvenile."

{¶21} The state's evidence that Appellant prepared to distribute a controlled substance for sale was: the narcotics plastic bags and felony plastic bags found in the trash pull at Appellant's residence; the cocaine, methamphetamine, and digital scale found with Appellant's belongings at his residence, and the controlled buy in which Appellant sold methamphetamine to Justin Gould. After viewing the evidence in a light

most favorable to the prosecution, a rational trier of fact could find that Appellant prepared to distribute a controlled substance for sale proven beyond a reasonable doubt.

{¶22} The question remains whether Appellant committed the crime in the vicinity of a juvenile.

{¶23} R.C. 2925.01(BB) provides: "An offense is 'committed in the vicinity of a juvenile' if the offender commits the offense within one hundred feet of a juvenile or within the view of a juvenile, regardless of whether the offender knows the age of the juvenile, whether the offender knows the offense is being committed within one hundred feet of or within view of the juvenile, or whether the juvenile actually views the commission of the offense." A juvenile is "a person under eighteen years of age." R.C. 2925.01(N).

{¶24} In his brief, Appellant cites to *State v. Smith*, 3rd Dist. Union No. 14-01-28, 2002-Ohio-5051 for the proposition that a juvenile being present during the execution of a search warrant is insufficient alone to find that the offense was committed in the vicinity of a juvenile. *State v. Smith* is distinguishable from the instant case because in that case, there was no evidence presented that the juvenile resided in the residence.

{¶25} The state offers *State v. Reuschling*, 11th Dist. Ashtabula No. 2007-A-0006, 2007-Ohio-6726 as support for its contention that a juvenile being in the residence where the crime had been committed is sufficient evidence to find the crime was committed in the vicinity of a juvenile. In *Reuschling*, the defendant and a friend were *found* committing the crime while the friend's child was upstairs in a bedroom asleep. The juvenile did not live in the residence. The defendant argued that the state did not prove he committed the crime within 100 feet of a juvenile. This court held that it was sufficient to find the crime was committed in the vicinity of a juvenile when that juvenile is in the residence

while the crime was being committed. *Id.* at ¶ 81. *Reuschling* is distinguishable from the instant case because there the defendant was committing the crime when the police entered the residence and the child was in it. Here, the state never offered any evidence that the crime was committed while the baby was physically at the residence. The state only proved that the baby generally lived there.

{¶26} In *State v. Flores*, 6th Dist. Wood App. Nos. WD-04-012 and WD-04-050, 2005-Ohio-3355, the Sixth District held that evidence of juveniles residing in the same house as the defendant was sufficient to prove that the offense had been committed in the vicinity of the child. However, this case is also distinguishable because there was additional evidence in *Flores* offered to support the conviction: some of the children's items were found near drug paraphernalia. In this case, the drugs and digital scale were found separately stored away in the container where Appellant stored all of his personal belongings; there was no evidence that the drugs or associated articles ever were near the baby or any of the baby's belongings.

{¶27} Evidence that a juvenile resides in a residence where a crime is committed is insufficient, under the definition of "vicinity of a juvenile," to prove that the crime was committed while the juvenile was present. A violation of R.C. 2925.01(BB) requires that the prohibited acts occurred within 100 feet of a juvenile. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could not have found beyond a reasonable doubt that Appellant had prepared to distribute a controlled substance for sale within 100 feet of a juvenile.

{¶28} Count 2 had been enhanced from a fourth-degree felony to a third degree felony under R.C. 2925.03(C)(1)(b) because the jury necessarily found that the crime was

committed in the vicinity of a juvenile. Upon reversal, we hereby modify Appellant's sentence to withdraw the enhancement. Appellant's conviction of trafficking in drugs, in violation of R.C. 2925.03(A)(2), is now a fourth-degree felony. R.C. 2923.03(C)(1)(a). We reverse the conviction on the enhancement and remand to the trial court to resentence Appellant on merged counts 2 and 3 with count 2 now being a fourth-degree felony.

{¶29} Appellant's first assignment of error is with merit.

{¶30} Second assignment of error: "Niquan's convictions were against the manifest weight of the evidence."

{¶31} When evaluating the weight of the evidence, we review whether the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other indicated clearly that the party having the burden of proof was entitled to a verdict in its favor, if, on weighing the evidence in their minds, the greater amount of credible evidence sustained the issue which is to be established before them. "Weight is not a question of mathematics but depends on its effect in inducing belief." *Thompkins* at 387. Whereas sufficiency relates to the evidence's adequacy, weight of the evidence relates the evidence's persuasiveness. *Id*. The reviewing court "weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [factfinder] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs

heavily against the conviction." *State v. Martin*, 20 Ohio App. 3d 172, 175, 485 N.E.2d 717 (1st Dist. 1983).

{¶32} The trier of fact is the sole judge of the weight of the evidence and the credibility of the witnesses. *State v. Landingham*, 11th Dist. Lake No. 2020-L-103, 2021-Ohio-4258, ¶ 22, quoting *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964). The trier of fact may believe or disbelieve any witness in whole or in part, considering the demeanor of the witness and the manner in which a witness testifies, the interest, if any, of the outcome of the case and the connection with the prosecution or the defendant. *Id.,* quoting *Antil* at 67. This court, engaging in the limited weighing of the evidence introduced at trial, is deferential to the weight and factual findings made by the factfinder. *State v. Brown*, 11th Dist. Trumbull No. 2002-T-0077, 2003-Ohio-7183, ¶ 52, citing *Thompkins* at 390 and *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph two of the syllabus.

{¶33} A finding that a judgment is supported by the manifest weight of the evidence necessarily means the judgment is supported by sufficient evidence. *State v. Arcaro*, 11th Dist. Ashtabula No. 2012-A-0028, 2013-Ohio-1842, ¶ 32.

{¶34} Appellant contends that his five convictions are against the manifest weight of the evidence because there was only circumstantial evidence that Appellant committed the crimes. Specifically, Appellant asserts that five other people resided in the home and had access to the drugs and digital scale. Thus, Appellant argues that it was never proven that it was him who possessed the drugs, digital scale, and plastic bags.

{¶35} We first address Appellant's contention that circumstantial evidence is insufficient for which to convict a defendant. Ohio courts have "long held that

circumstantial evidence is sufficient to sustain a conviction if that evidence would convince the average mind of the defendant's guilt beyond a reasonable doubt," as circumstantial evidence is accorded equal weight and given the same deference as direct evidence. *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 75.

{¶36} We next address whether each of Appellant's convictions were against the manifest weight of the evidence.

{¶37} A jury found Appellant guilty on 5 counts, all of which were for either possession of drugs or trafficking in drugs (methamphetamine and cocaine).

{¶38} R.C. 2925.03(A)(1), trafficking in drugs, which relates to count 1, provides: No person shall knowingly * * * [s]ell or offer to sell a controlled substance."

{¶39} The state's evidence to prove this count was the informant, Justin Gould. Mr. Gould had called Appellant to arrange a controlled buy (a telephone conversation which detectives monitored). Mr. Gould described Appellant, and detectives identified him as entering and leaving Mr. Gould's residence. After Appellant left the residence, Mr. Gould provided the detectives with the drugs he had bought from Appellant.

{¶40} Weighing the evidence and all reasonable inferences, the jury did not clearly lose its way in finding that Appellant was guilty of violating R.C. 2925.03(A)(1).

{¶41} R.C. 2925.03(A)(2), trafficking in drugs, which relates to counts 2 and 4, provides: "No person shall knowingly * * * [p]repare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance or a controlled substance analog, when the offender knows or has reasonable cause to believe that the controlled

substance or a controlled substance analog is intended for sale or resale by the offender or another person."

{¶42} It was not against the manifest weight of the evidence for the jury to find that Appellant had committed trafficking in violation of R.C. 2925.03(A)(2). Justin Gould testified that Appellant had sold him methamphetamine, and the detectives conducted a controlled buy, which proved that Appellant sold the drugs. During the detective's search of Appellant's residence, they found methamphetamine, cocaine, and a digital scale, which had cocaine residue on it. It was not against the manifest weight of the evidence for a jury to find that cocaine had been weighed and prepared for sale on the digital scale. Each of these items were found with or near Appellant's personal belongings, which connects him to the crime. The detectives also found several narcotics and felony plastic bags during the trash pull. Detective Altemus testified that the narcotic tear-off plastic bags found would only be found possessed by a seller, not by a buyer of drugs.

{¶43} Thus, the jury did not clearly lose its way in finding that Appellant committed trafficking in violation of R.C. 2925.03(A)(2).

{¶44} R.C. 2925.11(A), possession of drugs, which relates to counts 3 and 5, provides: "No person shall knowingly obtain, possess, or use a controlled substance."

{¶45} R.C. 2925.01 defines possession as "* * * 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."

{¶46} In this case, the state's evidence demonstrated more than "mere access" to the substance through occupation of the premises. The detectives found Appellant 15-

20 feet away from the storage container. The three drawers contained Appellant's wallet, mail, and clothes, along with the drugs and the digital scale. Appellant implies that any of the other 5 persons residing in the home could have possessed the drugs, but only Appellant's belongings were found with the drugs.

{¶47} Weighing the evidence and all reasonable inferences, the jury did not clearly lose its way in finding that Appellant was guilty of committing R.C. 2925.11(A).

{¶48} Appellant's second assignment of error is without merit.

{¶49} Third assignment of error: "The trial court abused its discretion in granting the government's motion in limine."

{¶50} We will not disturb a trial court's ruling on a motion in limine absent an abuse of discretion. *Brannon v. Austinburg Rehab. & Nursing Ctr*., 190 Ohio App.3d 662, 2010-Ohio-5396, 943 N.E.2d 1062, ¶ 18 (11th Dist.). An abuse of discretion is a term of art reflecting a court's exercise of judgment that fails to comport with the record or logic. *Walters v. Goddard*, 11th Dist. Trumbull, 2018-Ohio-5184, 127 N.E.3d 322, ¶ 11. An abuse of discretion is the trial court's "failure to exercise sound, reasonable, and legal decision-making." *State v. Beechler*, 2d Dist. Clark No. 09-CA-54, 2010-Ohio-1900, 2010 WL 1731784, ¶ 62, quoting *Black's Law Dictionary* 11 (8th Ed.Rev.2004).

{¶51} A motion in limine is a "written motion which is usually made before or after the beginning of a jury trial for a protective order against prejudicial questions and statements * * * to avoid injection into trial of matters which are irrelevant, inadmissible and prejudicial." *State v. Grubb*, 28 Ohio St.3d 199, 200-01, 503 N.E.2d 142 (1986). The power to grant a motion in limine is not conferred by rule or statute but instead lies within the inherent power and discretion of a trial court to control its proceedings. *Id*. at 201.

{¶52} A motion in limine "may be used as a means of raising objection to an area of inquiry to prevent prejudicial questions or statements until the admissibility of the questionable evidence can be determined during the course of the trial." *State v. Maurer*, 15 Ohio St.3d 239, 259, 473 N.E.2d 768 (1984), fn. 14, quoting Palmer, *Ohio Rules of Evidence*, Rules Manual 446 (1984). A motion in limine cannot be used to determine the admissibility of evidence. *Riverside Methodist Hosp. Assn. of Ohio v. Guthrie*, 3 Ohio App.3d 308, 310, 444 N.E.2d 1358 (10th Dist.1982). Rather, it is "only a preliminary interlocutory order precluding questions being asked in a certain area until the court can determine from the total circumstances of the case whether the evidence would be admissible." *Grubb* at 201, quoting Palmer at 446. Thus, a motion in limine, if granted, is a tentative, interlocutory, precautionary ruling by the trial court reflecting its anticipatory treatment of the evidentiary issue. *Id*. at 201-02.

{¶53} Under this assignment, Appellant argues that the trial court erred in granting the state's motion in limine to prevent the defense from introducing evidence of Joseph Gossett's prior convictions.

{¶54} At trial, the state argued that the convictions were inadmissible character evidence, that his last conviction was 20 years before the instant trial, and that Mr. Gossett was not testifying. The defense argued that the prior convictions were not to attack Mr. Gossett's credibility, but to establish a defense that someone else could have possessed the drugs.

{¶55} Evid.R. 404(B)(1) provides: "Evidence of any other crime, wrong or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."

{¶56} Evid.R. 404(B)(2) allows the admission of evidence precluded under section (B)(1) "* * * for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident" if the party offering the evidence provides "reasonable notice of any such evidence the proponent intends to introduce at trial so that an opposing party may have a fair opportunity to meet it." The notice shall articulate "* * * the permitted purpose for which the proponent intends to offer the evidence, and the reasoning that supports the purpose; and do so in writing in advance of trial, or in any form during trial if the court, for good cause, excuses lack of pretrial notice." Evid.R. 404(B)(2)(b)(c).

{¶57} At trial, defense counsel argued that Mr. Gossett's drug possession conviction from 20 years prior was admissible as a defense to prove that someone else could have possessed the drugs in the residence. In other words, this is evidence of Mr. Gossett's criminal history to prove that on this occasion he acted in conformity with that character. This is precluded by Evid.R. 404(B)(1). The only exception defense counsel appears to assert under Evid.R. 404(B)(2) is that Mr. Gossett had "opportunity" and access to the drugs and digital scale. However, defense counsel did not offer any evidence to the court supporting why this contention was more or less likely true in this instance. The court did not abuse its discretion in granting the state's motion and finding that Mr. Gossett's criminal conviction was 20 years old and inadmissible character evidence in this case. Appellant also failed to provide reasonable notice to the court before trial that he intended to introduce Mr. Gossett's criminal history.

{¶58} The trial court did not abuse its discretion in granting the state' motion in limine.

{¶59} Appellant asserts in his brief that the court's granting the state's motion in limine violated his confrontation clause rights because he was not allowed to "impeach a witnesses' credibility." The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him[.]"

{¶60} This argument fails for, at least, four reasons. First, Mr. Gossett did not testify at trial. Second, Mr. Gossett did not provide deposition testimony, or any other testimony against Appellant. Third, Appellant had no right to impeach Mr. Gossett through cross-examining the detectives. Fourth, the Confrontation Clause only applies to testimonial statements. *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

{¶61} Appellant's third assignment of error is without merit.

{¶62} Fourth assignment of error: "Niquan should have been sentenced to community control."

{¶63} Appellant first asserts that the court erred by sentencing him without a pre-sentence investigation, and that if one had been provided, he could have been sentenced to community control.

{¶64} "Crim.R. 32.2 requires a pre-sentence investigation only before granting probation or community control sanctions." *State v. Wise*, 5th Dist. Coshocton No. 2021CA0001, 2021-Ohio-3190, ¶ 36, citing *State v. Cyrus*, 63 Ohio St.3d 164, 166, 586 N.E.2d 94 (1992). Where probation or community control sanctions are not imposed, the rule does not apply, and a pre-sentence investigation is not required. *Id*.

{¶65} Appellant was not sentenced to probation or community control. A pre-sentence investigation was not required. *Id.*

{¶66} Appellant next contends that the court failed to overcome the presumption of community control for fourth and fifth degree felonies. As noted in ¶ 64 of this opinion, a court may not consider community control without a pre-sentence investigation. *Id*. Thus, the sentencing court here was not permitted to consider community control.

{¶67} Appellant also argues that consecutive sentences were not clearly and convincingly supported by the record.

{¶68} Under R.C. 2953.08(G)(2), an appellate court may increase, reduce, or otherwise modify consecutive sentences imposed under R.C. 292914(C)(4) if it clearly and convincingly finds that: (a) the record does not support the sentencing court's findings; or (b) the sentence is otherwise contrary to law.

{¶69} 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.

{¶70} In making its findings for consecutive sentences, the sentencing court is required to engage in the analysis for consecutive sentencing and specify the statutory criteria warranting its decision. *State v. Bonnell*, 140 Ohio St. 3d 209, 2014-Ohio-3177, 16 N.E.3d 659, at ¶ 26. While the sentencing court is not required to state exact reasons supporting its findings, the record must contain a clear basis upon which a reviewing court can determine that the sentencing court's findings for imposing consecutive sentences are supported by the record. *Id*. at ¶ 27-28.

{¶71} The sentencing court made the following findings:

> I do find that the consecutive sentence as to Counts One and Two, I find that is necessary to protect the public from future crime or to punish the offender. I find that consecutive sentences are not disproportionate to the seriousness of Mr. Dunn's conduct and the danger that Mr. Dunn poses to the public. I also find that at least two of the multiple offenses were committed as part of one or more courses of conduct, and that the harm caused by these multiple offenses was so great that no single prison term for any of these offenses committed as part of this course of conduct adequately reflects the seriousness of Mr. Dunn's conduct. I also do find that Mr. Dunn has a criminal history, and that consecutive sentences are necessary to protect the public from future crime.

{¶72} We cannot clearly and convincingly find that the record does not support the sentencing court's findings. From the record, we can discern that Appellant did "have a record, and there are a number of offenses in multiple states" and that he "continued to commit crimes after these." The need to punish the offender, the seriousness of the crimes, the danger he poses to the public are clear by the crimes themselves: 5 counts

of fourth and fifth degree felonies for possessing and trafficking methamphetamine and cocaine. It is important to repeat that the record shows that this is not the first or second instance that Appellant has been convicted of serious drug-related crimes, and that he continues to commit these crimes. In this instance, there were multiple offenses committed as part of a course of conduct because there were multiple counts of possession of drugs and trafficking in drugs.

{¶73} Pursuant to R.C. 2929.14(C)(4), the court made all statutory findings to impose consecutive sentences and this court cannot clearly and convincingly find that the record does not support those findings.

{¶74} Appellant's last argument under this assignment of error is that the sentencing court failed to ascertain whether the total aggregate sentence (36 months imprisonment) is proportional to his crimes.

{¶75} In *State v. Gwynne*, Slip Opinion No. 2022-Ohio-4607, the Ohio Supreme Court noted that a trial court's consecutive sentence findings "are not simply threshold findings that, once made, permit any amount of consecutively stacked individual sentences" or "consecutive sentence stacking." *Id*. at ¶ 1, 13. "Rather, these findings must be made in consideration of the aggregate term to be imposed." *Id*. at ¶ 1. That is to say, when a trial court "makes the statutory findings under R.C. 2929.14(C)(4) for consecutive sentences, it must consider the number of sentences that it will impose consecutively along with the defendant's aggregate sentence that will result." *Id*. at ¶ 12. A trial court cannot make this "necessity finding" without considering the overall prison term that it will be imposing, "not whether any hypothetical consecutive sentence might be necessary or proportionate". *Id*. at ¶ 15, 17. This is why, when imposing consecutive

sentences, a trial court must consider "each sentence on individual counts that it intends to impose consecutively on the defendant and the aggregate prison term that will result." *Id*. at ¶ 14.

{¶76} However, there is no Ohio law, statutory or otherwise, that requires a sentencing court to state on the record that it "considered" the aggregate sentence. There is nothing we can discern from this record demonstrating that a 36-month prison sentence is disproportional to Appellant's crimes, or that the sentencing court did not consider the aggregate sentence.

{¶77} Appellant's fourth assignment of error is without merit.

{¶78} The judgment of the Geauga County Court of Common Pleas is affirmed in part, reversed in part, and remanded for resentencing. On remand, the court shall withdraw the enhancement on count 2, and modify count 2 to a fourth-degree felony. Appellant shall be resentenced on the merged counts 2 and 3 only.

MATT LYNCH, J., concurs,

MARY JANE TRAPP, J., concurs in part and dissents in part with a Dissenting Opinion.

MARY JANE TRAPP, J., concurs in part and dissents in part with a Dissenting Opinion.

{¶79} I concur with the majority's disposition of all the assignments of error save the first because I find, as the jury did, that Mr. Dunn engaged in trafficking in the vicinity of a child as alleged in the second count of the indictment. Thus, I would affirm the judgment of the trial court.

{¶80} As the majority correctly observes, the state offered evidence that Mr. Dunn prepared to distribute a controlled substance for sale in a residence where a child was also living, i.e., the specific types of plastic bags used to portion out narcotics for sale, together with cocaine, methamphetamine, and a digital scale found with Mr. Dunn's belongings at his residence. When combined with evidence of the controlled buy in which Mr. Dunn sold methamphetamine to an informant, the majority correctly concludes that a rational trier of fact could find beyond a reasonable doubt that Mr. Dunn prepared to distribute a controlled substance for sale. I would add to that conclusion "in a residence in the vicinity of a juvenile."

{¶81} The danger to the child remained the same even if Mr. Dunn was not caught in the act of preparing the drugs for distribution within the house where the child was living. If there was sufficient evidence to support a conviction for preparing to distribute a controlled substance for sale, the evidence that a child lived in the house where the preparation occurred is sufficient to support the determination this act was done in the vicinity of the child. Our precedent in State v. Reuschling, 11th Dist. Ashtabula No. 2007-A-0006, 2007-Ohio-6726, supports this conclusion.

{¶82} As Justice Pfeifer observed, "[t]he distance requirement for an act to be committed within 'the vicinity of a juvenile' is only 100 feet or 'within view of the juvenile.' Drug trafficking is a dangerous activity. Beyond the psychic danger of seeing drugs being sold, there is a very real physical danger surrounding a drug transaction, even for nonparticipants. Thus, a child, whether in view or not, could become a part of the collateral damage of a failed transaction. The threat to a child is real and imminent." State v. Lozier, 101 Ohio St.3d 161, 2004-Ohio-732, 803 N.E.2d 770, ¶ 42.