[Cite as *State v. Robinson*, 2019-Ohio-2155.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
MEIGS COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 18CA10 & 18CA17
vs.	:	
ANDREW ROBINSON,	:	DECISION & JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Brian A. Smith, Akron, Ohio, for appellant[1].

James K. Stanley, Meigs County Prosecuting Attorney, Pomeroy, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:5-8-19
ABELE, J.

{¶ 1} This is an appeal from a Meigs County Common Pleas Court judgment of conviction and sentence. The jury found Andrew Robinson, defendant below and appellant herein, guilty of (1) vandalism in violation of R.C. 2909.05(B)(1)(b), a fifth-degree felony, and (2) failure to appear in violation of R.C. 2937.99, a fourth-degree felony. The trial court sentenced appellant to serve 30 months in prison.

{¶ 2} Appellant assigns four errors for review:

[1]Different counsel represented appellant at trial.

FIRST ASSIGNMENT OF ERROR:

"WHETHER THE TRIAL COURT'S DECISION TO PROCEED TO JURY TRIAL ONE DAY AFTER APPELLANT'S ARRAIGNMENT ON THE CHARGE OF VANDALISM IN CASE NUMBER 17-CR-166, WHERE APPELLANT'S COUNSEL INDICATED THAT SHE WAS NOT PREPARED FOR TRIAL AND WAS NOT AWARE OF WHEN APPELLANT WAS GOING TO BE RE-INDICTED, WAS AN ABUSE OF DISCRETION."

SECOND ASSIGNMENT OF ERROR:

"WHETHER THE TRIAL COURT ERRED IN ENTERING A JUDGMENT OF CONVICTION AND SENTENCING AGAINST APPELLANT FOR, WITH RESPECT TO THE CHARGE OF VANDALISM, ON A FIFTH-DEGREE FELONY, AND, WITH RESPECT TO THE CHARGE OF FAILURE TO APPEAR, ON A FOURTH-DEGREE FELONY, WHERE THE RECORD SHOWS THAT THE VERDICT FORMS SUPPLIED BY THE TRIAL COURT AND USED BY THE JURY DID NOT COMPLY WITH R.C. 2945.75(A)(2), IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS."

THIRD ASSIGNMENT OF ERROR:

"WHETHER THE TRIAL COURT'S SENTENCE OF APPELLANT TO THE MAXIMUM SENTENCE ON BOTH CHARGES, WITH THE SENTENCES TO RUN CONSECUTIVELY TO ONE ANOTHER, WAS CONTRARY TO LAW, WHERE THE TRIAL COURT DID NOT MAKE THE REQUIRED FINDINGS UNDER R.C. 2929.14(C)(4)."

FOURTH ASSIGNMENT OF ERROR:

"WHETHER THE TRIAL COURT'S SENTENCE OF APPELLANT TO THE MAXIMUM SENTENCE ON BOTH CHARGES, WITH THE SENTENCES TO RUN CONSECUTIVELY TO ONE ANOTHER, WAS CONTRARY TO LAW, WHERE THE RECORD SHOWED ONLY ONE PREVIOUS FELONY CONVICTION AND WHERE NONE OF THE SERIOUSNESS FACTORS FOR FELONY SENTENCING UNDER R.C. 2929.12 WERE PRESENT."

{¶ 3} On March 16, 2017, a Meigs County Grand Jury returned an indictment that charged appellant with one count of vandalism in violation of R.C. 2909.05(B)(2) (Case No.

17-CR-031). The charge arose from a February 27, 2017 incident at the Middleport Jail in which appellant allegedly broke the jail holding cell's lock mechanism. The trial court conducted appellant's arraignment on June 29, 2017 and scheduled an initial pre-trial hearing on July 19, 2017, a final pre-trial hearing on August 10, 2017, and a jury trial on September 14, 2017. At the arraignment, the trial court also released appellant on a recognizance bond. When appellant failed to appear for both the initial and final pre-trial hearings, the court issued an arrest warrant and vacated the jury trial date. After appellant's August 12, 2017, arrest, he appeared in court on August 15, 2017, and the court scheduled a final pre-trial on August 30, 2017 and a jury trial on September 14, 2017.

{¶ 4} On September 22, 2017, the trial court re-scheduled the final pre-trial hearing to be held on October 11, 2017 and a jury trial on October 19, 2017. On October 11, 2017, the court issued an entry to indicate that the parties were in the process of negotiating a settlement and that the trial date remained the same. On October 19, 2017, the court continued the jury trial to November 16, 2017. On October 23, 2017, the state filed a nolle prosequi and indicated that the matter would be presented to "the November Grand Jury under a new subsection of Section 2909.05 of the Ohio Revised Code."

{¶ 5} On September 7, 2017, a Meigs County Grand Jury returned an indictment that charged appellant with one count of failure to appear in violation of R.C. 2937.99, a fourth-degree felony, (Case No. 17-CR-133). The indictment alleged that appellant failed to appear for the final pre-trial hearing in Case No. 17CR031, as required after his August 10,

2017 release. The trial court conducted appellant's arraignment on September 22, 2017, and, on October 11, 2017, issued an entry to indicate that the parties continued to negotiate and that the trial date remained the same. On October 19, 2017, the court continued the jury trial to November 15, 2017.

{¶ 6} On November 6, 2017, the state re-indicted appellant on the vandalism charge in violation of R.C. 2909.05(B)(1)(b) (Case No. 17-CR-166). The indictment alleged that appellant knowingly caused physical harm to property owned or possessed by another, regardless of the property's value or the amount of damage, and the property was necessary for the owner or possessor to engage in the owner's or possessor's profession, business trade, or occupation. The second vandalism indictment stemmed from the same act as the first vandalism indictment.

{¶ 7} Subsequently, the trial court scheduled appellant's arraignment on the new vandalism charge on November 27, 2017, an initial pre-trial hearing on December 13, 2017, a final pre-trial hearing on January 17, 2018 and a jury trial on February 1, 2018. However, the court rescheduled the arraignment and ordered that appellant's arraignment be held on November 15, 2017. Additionally, during appellant's November 15, 2017 arraignment, the court advised the parties that the case must proceed to jury trial the following day, November 16, 2017.

{¶ 8} At trial, Court Bailiff John Jagers testified that (1) he is familiar with the vandalism charge (Case No. 17CR31); (2) he was present at appellant's June 29, 2017 arraignment on the initial vandalism charge and appellant's release on his own recognizance; (3) appellant received a copy of the arraignment entry, (4) the entry provided that, as a condition of

appellant's recognizance, he must appear and answer a charge of vandalism; and (5) he gave appellant a card that included notice of the next date that appellant had to appear in court (for the July 19, 2017 initial pre-trial). Jagers further testified that appellant failed to appear at both his July 19, 2017 first pre-trial and his August 10, 2017 final pre-trial.

{¶ 9} Middleport Police Patrolman Michael Oliver testified that, on February 27, 2017, the police dispatcher contacted him and asked for assistance with an unruly inmate. Oliver stated that appellant, while in the holding cell, told Oliver that he was not provided the opportunity to make a telephone call. Oliver, however, checked the phone logs and concluded that appellant did, in fact, make a phone call during his booking process at the jail and Oliver relayed this information to appellant. Upon hearing this information, appellant became upset, threw food from his tray, struck the toilet with the tray, attempted to strike the video camera with the tray, and, when unsuccessful, slid the tray under the door and kicked the cell door. Oliver then observed appellant kick the door and dislodge the door handle and lock mechanism. At that time, Oliver called a supervisor and they removed appellant from the holding cell. Oliver also testified that, because the lock mechanism had to be replaced, the holding cell could not be used for approximately two weeks. During the trial, the defense cross-examined the state's witnesses, but did not introduce evidence or call witnesses.

{¶ 10} At the conclusion of the trial, the jury returned guilty verdicts on both counts. The trial court sentenced appellant to serve 12 months in prison on the vandalism offense, 18 months on the failure to appear offense, and ordered the sentences be served consecutively for a total of 30 months in prison. Appellant filed a motion for delayed appeal and this court

granted appellant's request. The appeal is now properly before us.

I.

{¶ 11} In his first assignment of error, appellant asserts that the trial court abused its discretion when it denied his request for a continuance and ordered the parties to proceed to a jury trial one day following appellant's arraignment.

{¶ 12} Generally, the grant or denial of a continuance is a matter entrusted to a trial court's sound discretion. *State v. Unger*, 67 Ohio St.2d 65, 423 N.E.2d 1078 (1981), syllabus. An appellate court will not reverse a trial court's denial of a continuance absent an abuse of discretion. *Id.* at 67. An abuse of discretion implies that a court's attitude is unreasonable, arbitrary or unconscionable. *State v. McCreery*, 4th Dist. Lawrence No. 15CA10, 2015-Ohio-5453, ¶ 7, citing *State v. Herring*, 94 Ohio St.3d 246, 255, 762 N.E.2d 940 (2002).

{¶ 13} Appellant cites *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964) for the proposition that, although a continuance is traditionally within a trial judge's discretion, "a myopic insistence upon expeditiousness even in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." While we may generally agree with appellant that this abstract proposition of law may indeed be true, the unique facts present in the case sub judice require a closer examination. As the state points out, in Case No. 17CR166 appellant was re-indicted for the same act of vandalism for which he was indicted in Case No. 17CR031. Moreover, since June 29, 2017, the same attorney represented appellant on this vandalism charge and, since August 25, 2017, counsel has had full discovery. Additionally, the facts and circumstances that surround this particular charge

are not overly complex or complicated and would not preclude a full and complete understanding of those facts. The court filings reveal that the original vandalism charge was dismissed on October 23, 2017, re-filed on November 6, 2017, and on November 15, 2017 appellant was arraigned on the newly re-indicted vandalism count. The state also points out that speedy trial concerns pressed the trial court to accelerate the trial schedule. Moreover, our review of the transcript indicates that appellant's trial counsel did not explicitly or formally request to continue the trial. While counsel did express concern about adequate trial preparation, counsel did not explicitly request a continuance, either orally or in written form. Counsel did, however, have the option to seek a continuance and to waive speedy trial time. Appellant also contends that, although counsel did not file for a written continuance, the language used during the hearing arguably constitutes a request for a continuance. Appellant, however, cites no authority for this proposition. Therefore, because appellant did not actually request a continuance, we need not examine whether the trial court abused its discretion or violated appellant's right to due process. With respect to due process concerns, after our review of the proceeding we also conclude that no prejudice resulted from the accelerated trial date and trial counsel's preparedness. At trial, the state presented two witnesses - one for the vandalism charge and one for the failure to appear charge. Defense counsel cross-examined each witness at length and attempted to establish that (1) appellant did not have sufficient knowledge of the pertinent dates with respect to the failure to appear charge, and (2) the state did not sufficiently prove a loss with respect to the vandalism charge. The record reveals that trial counsel had been aware of all of the underlying facts for a long period of time and that trial counsel appropriately and zealously defended appellant. *See*

State v. Cossack, 7th Dist. Mahoning No. 03MA110, 2005-Ohio-2784, ¶ 29. Thus, we conclude that appellant did not suffer prejudice from the trial court's decision concerning the jury trial schedule.

{¶ 14} Accordingly, based upon the foregoing reasons we overrule appellant's first assignment of error.

II.

{¶ 15} In his second assignment of error, appellant asserts that the verdict forms did not comply with R.C. 2945.75(A)(2) and violated appellant's right to due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution.

{¶ 16} Initially, we point out that appellant contends that the verdict form for the fifth-degree felony vandalism charge did not comply with R.C. 2945.75(A)(2). Appellant, however, did not set forth any facts or argument to support that assertion within the body of his assignment of error. Moreover, in appellant's reply brief he candidly concedes that "the charge of vandalism, as a fifth-degree felony, constitutes the 'least degree of the offense charged.' R.C. 2945.75(A)(2); R.C. 2909.05." Thus, we need only address the application of R.C. 2945.75 to the failure to appear charge.

R.C. 2945.75 provides in relevant part:

> (A) When the presence of one or more additional elements makes an offense one of more serious degree:
>
> * * *
>
> (2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a

guilty verdict constitutes a finding of guilty of the least degree of the offense charged.

The failure to appear offense is defined in R.C. 2937.29 and R.C. 2937.99. R.C. 2937.29 provides, in relevant part, that "the accused may be released on his own recognizance. A failure to appear by such recognizance shall constitute an offense subject to the penalty provided in section 2937.99 of the Revised Code." R.C. 2937.99 provides:

> (A) No person shall fail to appear as required, after having been released pursuant to section 2937.29 of the Revised Code. Whoever violates this section is guilty of failure to appear and shall be punished as set forth in division (B) or (C) of this section.
>
> (B) *If the release was in connection with a felony charge or pending appeal after conviction of a felony, failure to appear is a felony of the fourth degree.*
>
> (C)*If the release was in conjunction with a misdemeanor charge or for appearance as a witness, failure to appear is a misdemeanor of the first degree.* (Emphasis added.)

{¶ 17} In the case sub judice, the indictment charged appellant with a fourth-degree felony and alleged a violation of R.C. 2937.99(A). The indictment, however, did not specify either paragraph (B) or (C). The verdict form reads: "Indictment for Failure to Appear count one O.R.C. 2937.99(A). We, the jury in this case, duly empaneled, sworn and affirmed, find the defendant, Andrew H. Robinson, (guilty/not guilty) of failure to appear on or about the 10th day of August, 2017."

{¶ 18} The state first asserts that appellant did not object to the jury verdict form at trial, although it appears that appellant did raise this issue during the sentencing hearing. However, as this court has previously acknowledged, "the Supreme Court of Ohio has recognized error, even in the absence of an objection at trial, when a verdict form fails to

comply with R.C. 2945.72(A)(2)." *Portsmouth v. Wrage*, 4th Dist. Scioto No. 08CA3237, 2009-Ohio-3390, ¶ 42, citing *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735.

{¶ 19} Next, we must address appellant's argument that the verdict form does not comply with *State v. Pelfrey*, *supra*. It appears that our analysis in the case at bar requires the application of conflicting authority from the Supreme Court of Ohio regarding R.C. 2945.75(A)(2).

{¶ 20} In 2007, the *Pelfrey* court considered R.C. 2945.75 and held, pursuant to the statute's clear language, that to justify a conviction for a greater degree of a criminal offense, a verdict form signed by a jury must include either the degree of the offense or a statement that the jury found an aggravating element. *Pelfrey*, syllabus. The court thus held that, under R.C. 2945.75(A)(2), an insufficient verdict form must result in a guilty finding on the least degree of the offense charged. *Pelfrey* at ¶ 12. The court explained that "[t]he express requirement of the statute cannot be fulfilled by demonstrating additional circumstances, such as that the verdict incorporates the language of the indictment, or by presenting evidence to show the presence of the aggravated element at trial or the incorporation of the indictment into the verdict form, or by showing that the defendant failed to raise the issue of the inadequacy of the verdict form." *Pelfrey* at ¶ 14.

{¶ 21} In 2008, the court examined *Pelfrey*'s application to the R.C. 2921.04 offense of intimidation of a victim or witness when it accepted the certified question: "Is the holding in *State v. Pelfrey*, 112 Ohio St.3d 422, 860 N.E.2d 735, applicable to charging statutes that contain separate sub-parts with distinct offense levels?" *State v. Sessler*, 116 Ohio St.3d

1505, 2008-Ohio-381, 880 N.E.2d 481. The court answered the question in the affirmative and affirmed the judgment on authority of *Pelfrey,* without opinion. *See State v. Sessler*, 119 Ohio St.3d 9, 2008-Ohio-3180, 891 N.E.2d 18, ¶ 1.

{¶ 22} In 2012, the court revisited this issue in *State v. Eafford*, 132 Ohio St.3d 159, 2012-Ohio-2224, 970 N.E.2d 891. In *Eafford*, the indictment charged the defendant with the possession of cocaine. At the conclusion of the trial, the jury found Eafford guilty "as charged in Count Two of the indictment." The verdict form referenced "possession of drugs" and R.C. 2925.11(A), but did not include any factors to elevate the level of the offense. The Eighth District, based on *Pelfrey*, concluded that the conviction should be reduced to the lowest degree of the offense charged, vacated the sentence and remanded the case for resentencing. The supreme court noted, however, that the indictment, the evidence presented at trial and the jury instructions all referred to "cocaine," and concluded that, even if the trial court had complied with R.C. 2945.75(A)(2), the outcome of the trial would not have been different. Thus, the court determined that the failure to include either the degree of the offense or an explicit verdict form finding that the drug involved was cocaine did not constitute plain error. *Eafford* at ¶ 18.

{¶ 23} As the Fifth District noted in *State v. Sanders*, 2016-Ohio-7204, 76 N.E.3d 468 (5th Dist.), "[t]he puzzling effect of this line of cases arises in part because the *Eafford* majority does not mention *Pelfrey* and its decision is inconsistent with *Pelfrey*. *Pelfre*y held that the requirement of R.C. 2945.75(A)(2) "cannot be fulfilled by demonstrating additional circumstances, such as that the verdict incorporates the language of the indictment, or by presenting evidence to show the presence of the aggravated element at trial or the

incorporation of the indictment into the verdict form, or by showing that the defendant failed to raise the issue of the inadequacy of the verdict form." *Pelfrey* at ¶ 14. However, *Eafford* held that the additional circumstances that *Pelfrey* specifically prohibited can be used to prevent a conviction from being reduced to the lowest degree of the offense charged even when the verdict form does not include either the degree of the offense or a finding concerning the aggravating element. *Eafford*, *supra*, ¶ 17-18.

{¶ 24} Finally, in 2013 the supreme court again addressed the issue and held that "its holding in *Pelfrey* makes clear that in cases involving offenses for which the addition of an element or elements can elevate the offense to a more serious degree, *the verdict form itself* is the only relevant thing to consider in determining whether the dictates of R.C. 2945.75 have been followed." (Emphasis added.) *State v. McDonald*, 137 Ohio St.3d 517, 522, 2013-Ohio-5042, 1 N.E.3d 374, 379, ¶ 17. Once again, however, *McDonald* does not reference *Eafford*. As the Fifth District observed in *Sanders*, the outcome in *McDonald* appears to be at odds with *Eafford,* in which the court considered the indictment, evidence, and jury instructions, as well as the verdict. Moreover, the Fifth District pointed to a Third District case, *State v. Duncan*, 3d Dist. Logan No. 8-12-15, 2014-Ohio-2720, ¶ 10, that held that nothing outside the verdict form should be considered to determine whether the verdict form is sufficient to support a conviction for anything greater than an offense of the least degree. The supreme court declined the appeal. *See State v. Duncan*, 141 Ohio St.3d 1473, 2015-Ohio-554, 25 N.E.3d 1080. The *Sanders* court then referred to *Eafford* as an anomaly, and held that it must strictly interpret R.C. 2945.75(A)(2) pursuant to R.C. 2901.04(A), which requires that statutory penalties be strictly construed against the state and liberally

construed in favor of the accused. Consequently, *Sanders* followed *Pelfrey*, *Sessler*, and *McDonald* and concluded that "the verdict form itself is the only relevant thing to consider in determining whether the dictates of R.C. 2945.75 have been followed." *Pelfrey, supra*, at ¶ 14; *McDonald, supra,* at ¶ 17.

{¶ 25} As the state acknowledges, the Fifth District examined R.C. 2945.75 with respect to a failure to appear charge in *State v. Nichols*, 5th Dist. Richland No. 2009-CA-0111, 2010-Ohio-3104. In *Nichols*, the court held that the verdict form stated that the jury found appellant guilty of "failure to appear on a PR Bond as charged in the indictment, a violation of R.C. 2937.99(A)." *Id.* at ¶ 31. The *Nichols* court noted that, because the verdict form did not contain the degree of the offense or the additional finding that the underlying offense was a felony, "pursuant to *Pelfrey*, appellant could only be convicted of the lowest degree of the offense, a first-degree misdemeanor. Accordingly, the trial court erred in sentencing appellant as if the failure to appear conviction was a felony of the fourth degree." *Id.* Here, however, the state argues that (1) *Nichols* is distinguishable because in *Nichols* the state conceded that the verdict form was not sufficient under *Pelfrey* to convict appellant of a felony of the fourth degree, and (2) the court decided *Nichols* after *Pelfrey*, but before *Eafford.*

{¶ 26} In the case sub judice, the state points out that (1) R.C. 2937.99(B) provides that "if the release was in connection with a felony charge or pending appeal after conviction of a felony, failure to appear is a felony of the fourth degree;" and (2) R.C. 2937.99 (C) provides that "if the release was in connection with a misdemeanor charge or for appearance as a witness, failure to appear is a misdemeanor of the first degree." Thus, a violation of R.C.

2937.99(A), when charged with a felony, is a felony of the fourth degree, and when charged with a misdemeanor, is a misdemeanor. Thus, the state contends that no aggravating circumstance or additional element can elevate the offense of failing to appear on a misdemeanor charge from a misdemeanor to a felony. In other words, if a person fails to appear on a misdemeanor charge, no additional element can make a failure to appear charge a felony. Conversely, if a person fails to appear on a felony charge, the absence of any additional element cannot reduce the level of the offense to a misdemeanor. Thus, the state argues, a felony failure to appear charge is not an elevated form of a misdemeanor failure to appear charge due to any aggravating circumstance and, because a misdemeanor failure to appear charge is not a lesser form of a felony failure to appear charge, a verdict form is not required to include or specify the degree of offense for which a defendant is found guilty or that an additional element or elements are present to elevate the offense to a felony. In sum, we agree that the pronouncement in *Pelfrey* does not apply to the facts in the case sub judice.

{¶ 27} The state further argues that, although *Eafford* may arguably be an anomaly among the Supreme Court of Ohio cases that have analyzed R.C. 2945.75(A), including *Pelfrey*, *Sessler*, and *McDonald*, it is nevertheless good law and is applicable. The state contends that the cases coexist because in *Eafford* the charge (possession of cocaine) did not involve any additional elements that elevated the level of the offense. See, also, *State v. Melton*, 2013-Ohio-257, 984 N.E.2d 112, ¶ 31 (8th Dist.).

{¶ 28} In *State v. Jones*, 4th Dist. Adams No. 13CA960, 2013-Ohio-5889, this court considered a case that involved the illegal conveyance of drugs into a detention facility in

violation of R.C. 2921.36(A)(2), a third degree felony. J*ones* argued that because the jury's verdict form did not state the degree of the offense or the aggravating element, as R.C. 2945.75(A)(2) requires, she could only be convicted of the least degree of the offense charged, a second-degree misdemeanor. This court, however, disagreed and observed that R.C. 2945.75(A)(2) only applies when the presence of one or more additional elements makes an offense one of a more serious degree. In *Jones*, the jury found Jones guilty of violating R.C. 2921.36(A)(2). Under R.C. 2921.36(G)(2), a violation of subsection (A)(2) can only result in a third-degree felony conviction. Thus, because no aggravating elements were necessary to enhance the penalty, we concluded that R.C. 2945.75(A)(2) did not apply and the verdict form was sufficient for a third-degree felony. *Jones* at ¶ 1-2.

{¶ 29} Similarly, in the case sub judice we believe that, because R.C. 2937.99(A) does not include aggravating circumstances or additional elements that could elevate a misdemeanor failure to appear offense to a felony failure to appear offense, and because the misdemeanor and felony charges are distinct and separate charges, we find no merit to appellant's argument.

{¶ 30} Accordingly, based on the foregoing reasons, we overrule appellant's second assignment of error.

III.

In his third assignment of error, appellant asserts that the trial court erred by (1) imposing the maximum sentence on both charges, and (2) ordering the sentences to be served consecutively to one another.

{¶ 31} Generally, appellate courts review felony sentences under the standard set forth in

R.C. 2953.08(G)(2). *Blanton* at ¶ 97; *Bever* at ¶ 13. That statute directs an appellate court to "review the record, including the findings underlying the sentence," and to modify or vacate the sentence "if it clearly and convincingly finds * * * (a) [t]hat the record does not support the sentencing court's findings under division * * * (C)(4) of section 2929.14 * * * of the Revised Code * * * [or] (b) [t]hat the sentence is otherwise contrary to law." R.C. 2953.08(G)(2). This means that the appellate court must clearly and convincing find that the record does not support the trial court's findings, which is an extremely deferential standard of review. *Blanton* at ¶ 99; *State v. Bass*, 4th Dist. Washington No. 16CA32, 2017-Ohio-7059, ¶ 7.

{¶ 32} In the case sub judice, the trial court (1) sentenced appellant to serve the maximum 12 months in prison on the vandalism charge, (2) sentenced appellant to serve the maximum 18 months on the failure to appear charge, and (3) ordered the sentences to be served consecutively to one another, for a total of 30 months in prison. In imposing consecutive sentences, the transcript reveals that the trial court stated: "Court is going to state that pursuant to R.C. 2929.14(C)(4), two or more offenses are part of the course of conduct [inaudible] harm cause [sic] is so great or unusual that a single prison term will not [inaudible] reflect the seriousness of the conduct, or a criminal history demonstrates a consecutive * * * sentences [sic] are necessary to protect * * * the public."

{¶ 33} Under R.C. 2929.14(C)(4), a trial court must engage in a three-step analysis and make certain findings before it may impose consecutive sentences. *State v. Blanton*, 4th Dist. Adams No. 16CA1031, 2018-Ohio-1275, ¶ 96*; State v. Bever*, 4th Dist. Washington No. 13CA21, 2014-Ohio-600, ¶ 16; *State v. Clay*, 4th Dist. Lawrence No. 11CA23,

2013-Ohio-4649, ¶ 64. In particular, a trial court must find that (1) consecutive sentences are necessary to protect the public from future crime or to punish the offender; (2) the consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public; and (3) the harm caused by two or more multiple offenses is so great or unusual that no single prison term for any of the offenses committed adequately reflects the seriousness of the offender's conduct. R.C. 2929.14(C)(4). A trial court is required to make the findings mandated by R.C. 2929.14(C)(4), but is not required to recite "a word-for-word recitation of the language of the statute * * *." *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus. *Id.* at ¶ 29. "[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.* A failure to make the R.C. 2929.14(C)(4) findings renders a consecutive sentence contrary to law. *Id.* at ¶ 37; *Blanton* at ¶ 96; *Bever* at ¶ 17. Also, the findings must be separate and distinct, in addition to any findings that relate to the purposes and goals of criminal sentencing. *Blanton, supra; Bever* at ¶ 17.

{¶ 34} Appellant asserts that no mention occurred at sentencing of consecutive sentences being "disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." R.C. 2929.14(C)(4)*; Blanton*, at ¶ 96. The state responds that two portions of the transcript are denoted as "inaudible," and, because it is unclear for how long the trial court spoke while the recording was inaudible, it is unclear exactly what the trial court may have stated during that time. Regardless, the state argues that a trial court

is not required to recite word-for-word the R.C. 2929.14(C)(4) language. After our review, however, we agree with appellant that the record in the case sub judice is devoid of evidence of this required finding.

{¶ 35} Appellant also contends that the two offenses are not part of a "course of conduct" because they occurred approximately five months apart, in two different locations and had no apparent relationship to one another. Typically, a finding of the course of conduct factor is reserved for multiple instances or related acts. *See, e.g., State v. Cardwell*, 10th Dist. Franklin No. 15AP-1076, 2016-Ohio-5591 (multiple residential burglaries); *State v. Barajas-Anguiano*, 11th Dist. No. 2017-G-0112, 2018-Ohio-3440 (multiple acts of endangering children/gross sexual imposition/voyeurism); *State v. Wimbley*, 8th Dist. 106171, 2018-Ohio-1749 (three aggravated robberies, seven robberies, five kidnaping). In the case at bar, however, it appears that the two offenses are unrelated, other than the fact that the failure to appear charge was added when appellant failed to appear for a pre-trial hearing for the vandalism charge. Also, the offenses occurred approximately five months apart and in different locations. Therefore, the facts present in the case sub judice do not appear to resemble the type of facts that involves a course of conduct.

{¶ 36} As for the sentencing entries, appellant also asserts that they do not explicitly mention any of the required factors to impose consecutive sentences. Instead, the entries contain a cursory statement that "[t]he Court makes the appropriate findings to impose said consecutive sentence as required by Section 2929.14(C)(4) of the Ohio Revised Code." While it is true that a trial court is not required to recite the R.C. 2929.14(C)(4) language verbatim, the sentencing entry in Case No. 17CR166 (vandalism) provides: "Said sentence is ORDERED

to run consecutive to Meigs County Common Pleas Court case number 17 CR 133. The Court makes the appropriate findings to impose said consecutive sentence as required by section 2929.14(C)(4) of the Revised Code." The sentencing entry in Case No. 17CR 133 (failure to appear) provides: "Said sentence is ORDERED to run consecutive to Meigs County Common Pleas Court case number 17 CR 166. The Court makes the appropriate findings to impose said consecutive sentence as required by Section 2929.14(C)(4) of the Ohio Revised Code." However, the sentencing entries do not mention any of the findings required to impose consecutive sentences as provided in R.C. 2929.14(C)(4). Moreover, as we explain above, a trial court is also required to find that: (1) consecutive sentences are necessary to protect the public from future crime or to punish the offender, and (2) consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. R.C. 2929.14(C)(4). Here, the trial court's pronouncements do not speak to those findings, and the record does not appear to support a course of conduct finding. Therefore, we conclude that the trial court did not adequately provide the necessary support for the course of conduct finding and the sentence is contrary to law. The trial court failed to comply with R.C. 2929.14(C) and *Bonnell*. *Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659 at ¶ 37.

{¶ 37} Consequently, in light of the foregoing, we sustain appellant's assignment of error. The failure to make the consecutive sentence findings at the sentencing hearing and in the sentencing entry requires that the sentences be vacated and the matter remanded for a new sentencing hearing.

IV.

{¶ 38} In appellant's final assignment of error, he asserts that the record does not support the trial court's sentence. Because we have sustained appellant's third assignment of error and vacated and remanded this matter for a new sentencing hearing, this assignment of error has been rendered moot. See App.R. 12.

{¶ 39} Accordingly, based upon the foregoing reasons, we overrule appellant's first and second assignments of error, sustain his third assignment of error, vacate his sentences and remand this matter for a new sentencing hearing.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND CAUSE REMANDED FOR RESENTENCING CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed in part, reversed in part, and this cause remanded for resentencing consistent with this opinion. Appellee shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Meigs County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of the proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to the expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Smith, P.J. & McFarland, J.: Concur in Judgment & Opinion

or the Court

BY: _____

Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.