[Cite as *State v. Salyer,* 2015-Ohio-2431.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CHAMPAIGN COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 2013-CA-60
	:	
v.	:	Trial Court Case No. 2013-CR-162
	:	
TIMOTHY SALYER	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 19th day of June, 2015.

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HALL, J.

{¶ 1} Timothy Salyer appeals from his convictions for illegal manufacture of drugs (methamphetamine) and endangering children. Finding no error, we affirm.

I. Facts

{¶ 2} Salyer was living in Indiana when he started having personal difficulties. He came to Ohio in the fall of 2012 to stay with his cousin Anthony Cole, his wife Lisa Cole, and their three children, 13- and 10-year-old daughters and a 9-year-old son, who lived in a house on a residential street in Urbana. Not long after Salyer moved in, he began to cook methamphetamine with his cousin. Salyer had the knowledge and the skill to make it. They cooked meth in a tent on the property, near railroad tracks that run behind the property, and even in the house. Salyer and Anthony stashed and buried on the property the toxic by-products created in the production. Salyer lived with for the Coles for only a couple months and he moved out around Thanksgiving of 2012.

{¶ 3} In February 2013, police began investigating methamphetamine production on the Coles' property. In June, Lisa Cole, Anthony Cole, and Salyer were indicted. Lisa was charged with one count of illegal assembly or possession of chemicals for the manufacture of drugs and with three counts of endangering children. She pleaded guilty to two counts of endangering children and the other two charges were dismissed. The trial court sentenced her to a total of 3 years in prison. Anthony and Salyer were each charged with three counts of illegal manufacture of drugs, each of which had a juvenile specification attached, in violation of R.C. 2925.04(A) and (C)(3)(b); one count of illegal assembly or possession of chemicals for the manufacture of drugs, in violation of R.C. 2925.041(A); one count of possessing criminal tools, in violation of R.C. 2923.23(A); and one count of endangering children, in violation of R.C. 2919.22(B)(6). Anthony Cole

pleaded guilty to the one count of illegal assembly or possession of chemicals for the manufacture of drugs and the other charges were dismissed. The trial court sentenced him to 5 years in prison.

{¶ 4} Salyer did not plead guilty but was tried to a jury. The State presented the testimony of numerous law enforcement officers, who testified about how methamphetamine is made and the items that were found on the Coles' property, including the by-products of the manufacturing process, found buried on the property. The State also presented the testimony of Anthony Cole, his son, and one of his daughters, each of whom testified about seeing Salyer making meth. The defense called several witnesses too, including Salyer himself. The jury found Salyer guilty on all six counts, including the juvenile specifications attached to the illegal-manufacture counts. For sentencing purposes, the trial court merged the illegal-assembly count and the possessing-criminal-tools count into the illegal-manufacture counts. The court sentenced Salyer to 7 years in prison for each illegal-manufacture offense and to 3 years for the endangering-children offense. The court ordered Salyer to serve two of illegal-manufacture sentences and the endangering-children sentence consecutively, for a total sentence of 17 years in prison.

{¶ 5} Salyer appealed.

II. Analysis

{¶ 6} Salyer assigns three errors to the trial court. The first assignment of error alleges that the trial court erred by not also merging the endangering-children count into the illegal-manufacture counts. The second assignment of error alleges that the trial court

erred by ordering Salyer to serve two illegal-manufacture sentences and the endangering-children sentence consecutively. And the third assignment of error alleges that there is insufficient evidence to support any of the illegal-manufacture convictions.

A. Merger

{¶ 7} R.C. 2941.25 provides that a court must merge certain offenses:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

The test established by the Ohio Supreme Court in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, for determining whether offenses merge under R.C. 2941.25(A) has two steps. First, the court must determine "whether it is possible to commit one offense *and* commit the other with the same conduct." (Emphasis sic.) *Johnson* at ¶ 48. If the offenses *can* be committed by the same conduct, "then the court must determine whether the offenses *were* committed by the same conduct, i.e., 'a single act, committed with a single state of mind.' " (Emphasis added.) *Id.* at ¶ 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 50 (Lanzinger, J., dissenting). "If the answer to both questions is yes, then the offenses are allied offenses

of similar import and will be merged." *Id.* at ¶ 50. But "if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." (Emphasis sic.) *Id.* at ¶ 51.

{¶ 8} Salyer was convicted of illegal manufacture of drugs under R.C. 2925.04(A), which pertinently provides that "[n]o person shall * * * knowingly manufacture or otherwise engage in any part of the production of a controlled substance." And he was convicted of child endangering under R.C. 2919.22(B)(6), which provides:

> (B) No person shall do any of the following to a child under eighteen years of age * * *:
>
> (6) Allow the child to be on the same parcel of real property and within one hundred feet of * * * any act in violation of section 2925.04 or 2925.041 of the Revised Code when the person knows that the act is occurring, whether or not any person is prosecuted for or convicted of the violation of section 2925.04 or 2925.041 of the Revised Code that is the basis of the violation of this division.

The trial court here determined that it is possible to commit these two offenses by the same conduct. But the court determined that Salyer committed them separately, saying that he committed the endangering-children offense by disposing of the waste products on the property. Salyer contends that the two offenses are based on the same allegation and conduct: that a child was present while he manufactured methamphetamine. His only animus, says Salyer, was the manufacture of meth in the presence of a juvenile. The trial

court is correct that "manufacture" of drugs includes the disposal of waste products. *See State v. Lanik*, 9th Dist. Summit Nos. 26192, 26224, 2013-Ohio-361, ¶ 34 ("The disposal of the remnants of the manufacturing of methamphetamine is an activity 'incident to production' so as to be included in the definition of 'manufacture.' "). In this case, we agree with the trial court that the burying of waste products on the property where the children lived continuously exposed them to dangerous chemicals well after the cooking operation was complete. Nevertheless, we disagree with the trial court that it is possible to commit the two offenses by the same conduct. This means that, contrary to his contention, Salyer could not have committed the two offenses with the same conduct.

{¶ 9} At least two Ohio appellate courts have held, in cases factually similar to this one, that these two offenses do not merge, though for differing reasons. The Twelfth District held in *State v. Highfield*, 12th Dist. Brown No. CA2013-05-007, 2014-Ohio-165, that illegal manufacture of drugs and endangering children under R.C. 2919.22(B)(6) did not merge because the defendant "committed these offenses with a separate animus[,] for not only did he knowingly manufacture methamphetamine, but also recklessly allowed a child to be within 100 feet of him during that time." *Highfield* at ¶ 13. The Fourth District in *State v. Greer*, 4th Dist. Jackson No. 13CA2, 2014-Ohio-2174, did not even reach the *Johnson* test. The court held that R.C. 2919.22(B)(6) "clearly indicates the legislature's intent to allow multiple punishments for violations of that statute and the offense of illegal manufacturing of drugs when the drug is methamphetamine and the offense within 100 feet of a child." *Greer* at ¶ 11. *See generally State v. Miranda,* 178 Ohio St.3d 184, 2014-Ohio-451, 5 N.E.3d 603, ¶ 10 (saying that it is not necessary to use the *Johnson* test " 'when the legislature's intent is clear from the language of the statute,' " quoting *Brown,*

119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, at ¶ 37).

{¶ 10} A third reason that these two offenses do not merge is that they cannot be committed by the same conduct. By manufacturing drugs, a person does not "allow" a child "to be on the same parcel of real property and within one hundred feet." And by so allowing a child, a person does not "manufacture or otherwise engage in any part of the production" of drugs. The conduct by which a person commits illegal manufacture of drugs is an act concerning drugs—their manufacture and production. The conduct by which a person commits endangering children under R.C. 2919.22(B)(6) concerns a child—allowing the child to be near the manufacture or production of drugs. Whether this conduct is an act—granting the child permission to be there—or an omission—doing nothing to stop the child—the conduct is directed to the child. *See Black's Law Dictionary*, allow (10th Ed.2014) (The first definition of "allow" is "[t]o put no obstacle in the way of; to suffer to exist or occur; to tolerate." The ninth definition is "[t]o grant permission; to permit."). Moreover, we note that Sayler's indictment for meth manufacture had specifications that they were committed in the vicinity of a juvenile. Under R.C. 2925.04(C)(3)(a), meth manufacture is ordinarily a second degree felony. But under 2925.04(C)(3)(b), such manufacture is a felony of the first degree if committed in the presence of a juvenile. Accordingly, the juvenile specification is in the nature of a penalty enhancement. In a similar vein we have held that that a "weapons under disability offense and the firearm specification for the possession of heroin offense are not allied offenses of similar import as defined in R.C. 2941.25, because the firearm specification is a penalty enhancement, not a separate criminal offense." *State v. Hayes*, 2d Dist. Clark No. 2014

CA 27, 2014-Ohio-5362, ¶ 26.

{¶ 11} Finally, Salyer committed the offense of illegal manufacture of drugs when he did those acts involved in the "manufacture"[1] and production of methamphetamine. By allowing one of the Coles' children to be on the same property and within 100 feet of him (or, for that matter, Anthony Cole) while he did those acts, Salyer committed the offense of endangering children. The two offenses do not merge.

{¶ 12} The first assignment of error is overruled.

B. Consecutive Sentences

{¶ 13} The second assignment of error alleges that the trial court erred by ordering Salyer to serve consecutive sentences.

{¶ 14} "When imposing consecutive sentences, a trial court must state the required findings as part of the sentencing hearing * * *." *State v. Bonnell,* 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 29, citing Crim.R. 32(A)(4). "On appeals involving the imposition of consecutive sentences, R.C. 2953.08(G)(2)(a) directs the 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 * * * [t]hat the record does not support the sentencing court's findings under division * * * (C)(4) of section 2929.14 * * * of the Revised Code.' " *Id.* at ¶ 28, quoting R.C. 2953.08(G)(2)(a).

{¶ 15} Salyer challenges his consecutive sentences in two ways. First, he argues

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[1] "Manufacture" is statutorily defined as meaning "to plant, cultivate, harvest, process, make, prepare, or otherwise engage in any part of the production of a drug, by propagation, extraction, chemical synthesis, or compounding, or any combination of the same, and includes packaging, repackaging, labeling, and other activities incident to production." R.C. 2925.01(J).

that consecutive sentences are contrary to law because the trial court failed to make the findings required by R.C. 2929.14(C)(4). He says that the trial court merely recited the statutory language but made no related findings of fact. Second, Salyer argues that the facts in this case do not justify consecutive sentences.

{¶ 16} R.C. 2929.14(C)(4) pertinently provides that 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:
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> * * *
>
> (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.

The trial court here essentially repeated this statutory language at the sentencing hearing and in the sentencing entry. Using the statutory language, however, is sufficient to make the required findings. *State v. Adams*, 2d Dist. Clark No. 2014-CA-13, 2015-Ohio-1160, ¶ 18. "[T]he trial court was not required to provide reasons to support its findings." *Id.*, citing *Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, at ¶ 37. We note that the trial court here made other sentencing-related findings that are also relevant to the

consecutive-sentence decision.

{¶ 17} Salyer also argues that the facts do not justify his sentence, because consecutive sentences are disproportionate to his conduct and to the sentences that the trial court imposed on the Coles. Salyer says that his role was minimal compared with their roles. He says that they were manufacturing meth before he arrived and continued manufacturing it after he left. His was not an ongoing course of conduct, says Salyer, and he was not the leader.

{¶ 18} R.C. 2929.11(B) requires an offender's sentence be consistent with sentences imposed for similar crimes committed by similar offenders. Consistent, though, does not always mean identical. Rather, "[c]onsistency merely requires the trial court to weigh the same statutory sentencing factors for each defendant." (Citation omitted.) *State v. Houston*, 1st Dist. Hamilton No. C-130429, 2014-Ohio-3111, ¶ 16; *see also State v. Murphy*, 10th Dist. Franklin No. 12AP-952, 2013-Ohio-5599, ¶ 15 (saying that "consistency in sentencing [results] * * * by the trial court's proper application of the statutory sentencing guidelines"). "Even though offenses may be similar, 'distinguishing factors may justify dissimilar sentences.' " (Citation omitted.) *Murphy* at ¶ 15, quoting *State v. Battle*, 10th Dist. Franklin No. 06AP-863, 2007-Ohio-1845, ¶ 24. Accordingly, "in order to demonstrate a sentence is inconsistent or disproportionate under R.C. 2929.11(B), a defendant 'must demonstrate the trial court failed to properly consider the statutory sentencing factors and guidelines found in R.C. 2929.11 and 2929.12.' " *Id.* at ¶ 13, quoting *State v. McMichael,* 10th Dist. Franklin No. 11AP-1042, 2012-Ohio-3166, ¶ 4.

{¶ 19} The record here shows that the trial court properly considered the statutory

factors and guidelines before imposing Salyer's sentence. The court said that the testimony and evidence suggests that the idea of meth production did not initiate with Salyer but with the Coles. And the court found that before committing the offenses in this case, Salyer had not been convicted of or pleaded guilty to a criminal offense. But the court also found that Salyer "has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the Defendant refuses to acknowledge that the Defendant has demonstrated that pattern, or the Defendant refuses treatment for the drug or alcohol abuse." Journal Entry of Judgment, Conviction, and Sentence, 6 (Nov. 15, 2013). And the court found that Salyer "shows no genuine remorse for the offense." *Id*.

{¶ 20} The Coles' cases contain factors that distinguish them from Salyer's case.[2] Perhaps the most significant factor is that Salyer was convicted of all the charged offenses whereas the Coles both accepted reduced plea deals and pleaded guilty. While Anthony Cole was charged with the same six offenses that Salyer was charged with, Cole was convicted of only illegal assembly or possession of chemicals for the manufacture of drugs—which Salyer was not sentenced for, it having merged into the illegal-manufacture offenses. And we do not know what Cole's sentence would have been if he too had been convicted of all the charges. Moreover, Cole was sentenced before Salyer's trial, at which the State presented the testimony of numerous witnesses. The trial court could have learned additional facts at trial that led it to believe that the offenses were worse than it had initially thought.

{¶ 21} Salyer's sentence is undoubtedly harsh. But as the Eighth District has said:

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[2] Salyer attached to his brief Anthony Cole's and Lisa Cole's judgments of conviction. And we sustained Salyer's unopposed motion to supplement the record with a transcript of Anthony Cole's sentencing hearing. *See generally* App.R. 9(E).

> It is important to understand that the "clear and convincing" standard applied in R.C. 2953.08(G)(2) is not discretionary. In fact, R.C. 2953.08(G)(2) makes it clear that "[t]he appellate court's standard for review is not whether the sentencing court abused its discretion." As a practical consideration, this means that appellate courts are prohibited from substituting their judgment for that of the trial judge.
>
> It is also important to understand that the clear and convincing standard used by R.C. 2953.08(G)(2) is written in the negative. It does not say that the trial judge must have clear and convincing evidence to support its findings. Instead, it is the court of appeals that must clearly and convincingly find that the record does not support the court's findings. In other words, the restriction is on the appellate court, not the trial judge. This is an extremely deferential standard of review.

State v. Venes, 2013-Ohio-1891, 992 N.E.2d 453, ¶ 20-21 (8th Dist.). We do not clearly and convincingly find that the trial court's findings are not supported. Therefore we must defer to its sentencing decision.

{¶ 22} The second assignment of error is overruled.

C. Sufficiency of the Evidence

{¶ 23} The third assignment of error alleges that there is insufficient evidence to support any of the convictions for illegal manufacture of drugs.

{¶ 24} "[A]n appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the

defendant's guilt beyond a reasonable doubt." (Citation omitted.) *State v. Jenks*, 61 Ohio St.3d 259, 273, 574 N.E.2d 492 (1991). "[T]he inquiry is, after viewing the evidence in the light most favorable to the prosecution, whether any reasonable trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." (Citation omitted.) *Id*.

{¶ 25} There is testimony that shows Salyer manufactured methamphetamine in each of the three locations alleged by the illegal-manufacture charges—at or near the train tracks behind the Coles' property, in a tent in the yard, and inside the house. Anthony Cole testified that Salyer went back to the train tracks to make meth. And the Coles' son, when asked whether he "ever saw [Salyer] take meth or make drugs out by the train tracks," answered, "Yes. Him and my dad took all kinds of this stuff and walked back to the train tracks." (Trial Tr. 189). Anthony Cole also testified that he watched Salyer first start making meth in the tent. And one of the Coles' daughters testified that she saw Salyer in the tent using her hair dryer to dry the cooked meth. Anthony Cole testified that Salyer made meth in the house too, in his son's room, which they were letting Salyer use while he stayed with them. And the Coles' daughter testified that she saw Salyer making meth in her brother's room. The Coles' son testified that he saw Salyer making meth in a Mountain Dew bottle, while sitting on the couch. Viewing this testimony in a light most favorable to the State, a reasonable factfinder could find that Salyer knowingly manufactured methamphetamine near the train tracks, in the tent, and in the house.

{¶ 26} Salyer was also found guilty of the juvenile specification, which acts as a penalty enhancement, attached to each of the illegal-manufacture offenses. R.C. 2925.04(C)(3)(b) provides that if the drug involved is methamphetamine and the

manufacturing was "committed in the vicinity of a juvenile," illegal manufacture of drugs is a first-degree felony that carries a mandatory prison term of at least four years. Salyer contends that there is insufficient evidence to find that the manufacturing near the train tracks was "committed in the vicinity of a juvenile."

{¶ 27} By statute, "[a]n 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." R.C. 2925.01(BB). There is no evidence here as to exactly how far the tracks are from the Coles' house. Salyer testified that the tracks are "two or three miles from the house," (Trial Tr. 549), and Anthony Cole testified that they are "a long ways from the house," (*Id*. at 253). Detective Shawn Schmidt, who investigated the case for the Urbana Police Department, admitted that he did not measure the distance between the house and the tracks. But when Detective Schmidt was asked, "if someone were in the train track area manufacturing methamphetamine, based on your conversation with [the Coles' son], were they within his view and vision," Schmidt replied, "Yes, they were." (*Id*. at 427). Moreover, as we said earlier, the Coles' son testified that he saw Salyer making drugs by the railroad tracks. Viewing this testimony in the light most favorable to the state, a reasonable factfinder could find that the manufacture by the tracks was committed "within the view of a juvenile" and therefore was "committed in the vicinity of a juvenile."

{¶ 28} Salyer claims that his trial counsel was ineffective because counsel did not move for acquittal, under Crim.R. 29, as to the charge that he manufactured

methamphetamine at or near the train tracks. To show that his trial counsel was ineffective, Salyer "must show that his attorney's performance was deficient and that the deficient performance prejudiced him." *State v. Hall*, 2d Dist. Montgomery No. 25858, 2014-Ohio-416, ¶ 6, citing *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Crim.R. 29 provides that the trial court must enter a judgment of acquittal of a charged offense "if the evidence is insufficient to sustain a conviction of such offense." Crim.R. 29(A). We have concluded that the evidence is sufficient to sustain Salyer's conviction for illegal manufacture of drugs at or near the train tracks committed in the vicinity of a juvenile. Therefore counsel's performance cannot be called deficient for not moving for acquittal.

{¶ 29} The third assignment of error is overruled.

II. Conclusion

{¶ 30} We have overruled all of the assignments of error. The trial court's judgment is affirmed.

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DONOVAN, J., and WELBAUM, J., concur.

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