[Cite as *State v. Bunn*, 2019-Ohio-2703.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JERMAINE BUNN,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 MA 0125

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 16-CR-378

BEFORE:
Carol Ann Robb, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Reversed and Vacated in part; Affirmed in part.

Atty. Paul J. Gains, Mahoning County Prosecutor*, Atty. Ralph M. Rivera,* Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. Katherine R Ross-Kinzie, Assistant Public Defender, Office Of The Ohio Public Defender, 250 E. Broad St., Suite 1400, Columbus, Ohio 43215 for Defendant-Appellant.

Dated: June 14, 2019

Robb, J.

{¶1} Defendant-Appellant Jermaine Bunn appeals from his conviction in Mahoning County Common Pleas Court of having a weapon while under disability and tampering with evidence. Four issues are raised in this appeal. The first issue is whether the judicial sanction for committing the offenses while on postrelease control is a void sentence. Appellant alleges the trial court did not properly impose postrelease control for his 2009 conviction of felonious assault and therefore, that postrelease control term is void and he could not be sentenced to a judicial sanction for violating a void postrelease control term. The second issue is whether the trial court made the necessary statutory findings for imposing consecutive sentences. The third issue is whether the weapon while under disability and tampering with evidence offenses are allied offenses of similar import. The fourth issue is whether the convictions for having a weapon while under disability and tampering with evidence are against the manifest weight of the evidence.

{¶2} For the reasons expressed below, the first assignment of error has merit. The imposition of postrelease control in case number 2008-CR-742 is void and vacated; the judgment entry imposing postrelease control did not contain all the necessary advisements. Consequently, since postrelease control is void, the judicial sanction sentence imposed for violating postrelease control must be reversed and vacated. However, the second, third, and fourth assignments of error are meritless. The remainder of Appellant's convictions are affirmed.

Statement of Facts and Case

{¶3} In 2009 Appellant was found guilty of felonious assault and sentenced to seven years in prison. *State v. Bunn*, 7th Dist. Mahoning No. 10 MA 10, 2011-Ohio-1344, ¶ 1, 15; 1/27/10 J.E. case number 2008-CR-742. He also was sentenced to a mandatory three year term of postrelease control. 1/27/10 J.E. case number 2008-CR-742.

{¶4} On the evening of April 2, 2016 through the early morning hours of April 3, 2016, Thomas May was having a birthday party for himself at his residence located at 62 East Evergreen Avenue in Youngstown, Ohio. Michael Pete, Thomas Mays' cousin, attended this party.

{¶5} Appellant had been released from prison a couple of days prior to April 2, 2016. On the evening of April 2, 2016, Appellant and his two cousins, Steven Pickard and James Jackson, driving around Youngstown. At some point they were on East Evergreen and noticed Mays' birthday party. Tr. 305. Appellant, who was driving the car, stopped the car in the street and decided to attend the party. Jackson and Pickard remained in the car. Pickard at some point moved the car because it was blocking the street.

{¶6} During the party, Appellant and Michael Pete were alone on the porch talking. While they were talking on the porch, gunfire erupted. Michael Pete was shot in the side and Appellant was shot in the face.

{¶7} Appellant fled to the car and drove himself to the hospital. Although neither Pickard nor Jackson noticed Appellant carrying anything when he got into the car, they did see him throw a gun out the window of the car on the way to the hospital. Tr. 311, 435. When they arrived at the hospital, Appellant told Pickard to go back and get the gun. Tr. 312-313. Pickard and Jackson complied with the request, found the gun, and Pickard later threw the gun into McKelvey Lake. Tr. 313, 315, 435.

{¶8} Immediately after the gunfire, numerous people made 911 calls. During the police investigation of the scene, twenty-two casings were collected; it was determined that three different guns were involved in the shooting. Tr. 525. Nine people were tested for gunshot residue, including Appellant and Pete. State's Exhibit 107, 108, 109. All subjects tested positive for gunshot residue. State's Exhibit 107, 108, 109.

{¶9} The gunshot wound sustained by Michael Pete was fatal; it severed his spinal cord, went through his lung, and bruised his heart. Tr. 548. Appellant recovered from his gunshot wound.

{¶10} On April 14, 2016 Appellant was indicted for murder in violation of R.C. 2903.02(A)(1), an unclassified felony; improperly discharging a firearm into a habitation in violation of R.C. 2923.161(A)(1)(C), a second-degree felony; having weapons while

under disability in violation of R.C. 2923.13(A)(3)(B), a third-degree felony; and tampering with evidence in violation of R.C. 2921.12(A)(1)(B), a third-degree felony. 4/14/16 Indictment. The murder and improperly discharging a firearm into a habitation had attendant firearm specifications. 4/14/16 Indictment.

{¶11} Appellant waived his right to counsel and proceeded pro se; standby counsel was appointed. 2/23/17 J.E.; 2/24/17 J.E. Jury trial began on August 14, 2017. Appellant was acquitted of murder and improperly discharging a firearm into a habitation. 8/25/17 J.E. He was found guilty of having a weapon while under disability and tampering with evidence.

{¶12} Sentencing was held on August 24, 2017; Appellant received an aggregate nine-year sentence. 8/28/17 J.E. Appellant was sentenced to three years for having a weapon while under disability and three years for tampering with evidence. 8/28/17 J.E. The trial court ordered consecutive sentences. 8/28/17 J.E. Pursuant to R.C. 2929.141, the trial court also ordered Appellant to serve an additional three years, the balance of his postrelease control in case number 08-CR-742. 8/28/17 J.E. This was required to run consecutive to the above sentences. 8/28/17 J.E.

{¶13} Appellant timely appealed the convictions.

First Assignment of Error

"The trial court committed reversible error when it imposed a judicial sanction sentence on Mr. Bunn based on void postrelease control in Case No. 2008-CR-742."

{¶14} Appellant was sentenced to a judicial sanction because the crimes committed in this case were committed while Appellant was on postrelease control. The postrelease control term was issued in case number 2008-CR-742. Appellant argues the term of postrelease control was void because the judgment entry imposing postrelease control failed to include all the necessary language to properly impose a term of postrelease control. He cites this court to the Ohio Supreme Court decision *State v. Grimes*, 151 Ohio St.3d 19, 2017-Ohio-2927, 85 N.E.3d 700.

{¶15} In *Grimes*, the offender was convicted of crimes in 2011 and given postrelease control as part of his sentence. *Id.* at ¶ 2. Grimes served his prison sentence and was released on postrelease control. *Id.* While under supervision, Grimes committed another offense, was indicted, and found guilty. *Id.* at ¶ 3. Pursuant to R.C. 2929.141, in

addition to the sentence for the new crime, Grimes received a judicial sanction for having committed the offense while on postrelease control. *Id.* at ¶ 4. After completing the sentence for the new crime and while serving the judicial sanction sentence, Grimes filed a motion with the trial court that imposed the judicial sanction asking for the court to vacate the judicial sanction because the postrelease control sentence imposed for the 2011 crimes was not validly imposed. *Id.* at ¶ 5. The argument was based on the language in the judgment entry, not the advisement at the sentencing hearing. *Id.* at ¶ 2. The trial court denied the motion, however, the appellate court reversed. *Id.* at ¶ 5-6. The case was accepted by the Ohio Supreme Court on the following question:

> To impose valid post release control, the language in the sentencing entry may incorporate the advisements given during the sentencing hearing by referencing the post release control sections of the Ohio Revised Code and do not need to repeat what was said during the sentencing hearing.

Id. at ¶ 7.

{¶16} The Ohio Supreme Court reversed the appellate court's decision and found the judgment entry included the necessary advisements to validly impose postrelease control. The Court stated:

> We hold that to validly impose postrelease control when the court orally provides all the required advisements at the sentencing hearing, the sentencing entry must contain the following information: (1) whether postrelease control is discretionary or mandatory, (2) the duration of the postrelease-control period, and (3) a statement to the effect that the Adult Parole Authority ("APA") will administer the postrelease control pursuant to R.C. 2967.28 and that any violation by the offender of the conditions of postrelease control will subject the offender to the consequences set forth in that statute.

Id. at ¶ 1.

{¶17} Appellant acknowledges the trial court in 2008-CR-742 complied with the first two requirements. He argues the court did not comply with the third requirement.

The state counters asserting the judgment entry in 2008-CR-742 complied with all three requirements.

{¶18} At the outset it is noted that *Grimes* and the case at hand are procedurally different. In *Grimes*, the offender filed a motion with the trial court to vacate a void sentence. Here, Appellant attacked the judicial sanction on direct appeal arguing the postrelease control it is based upon is void and thus, a sentence cannot be given. Considering the issue involves postrelease control, both manners of attacking the alleged void sentence are proper. Recently we have stated, "A sentence that does not include the statutorily mandated term of postrelease control is void, is not precluded from appellate review by principles of res judicata, and may be reviewed at any time, on direct appeal or by collateral attack." *State v. Hutter*, 7th Dist. Mahoning No. 17 MA 0152, 2018-Ohio-3488, ¶ 12, citing *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 1.

{¶19} It is also noted that the only advisement we are reviewing in this assignment of error is the advisement given in the judgment entry in case number 2008-CR-742. The judgment entry from that case was properly made a part of the record before us. However, the sentencing transcript in that case is not a part of our record and there is no claim that the advisement at the sentencing hearing was inadequate. This is similar to *Grimes* where the Court stated:

> Notably, we caution that this appeal presents a case in which it is undisputed that the trial court provided all the required advisements regarding postrelease control to Grimes at the sentencing hearing. Grimes did not introduce a transcript of the hearing into the record, so we must assume the regularity of the sentencing hearing. *Natl. City Bank v. Beyer,* 89 Ohio St.3d 152, 160, 729 N.E.2d 711 (2000). Our holding is limited to those cases in which the trial court makes the proper advisements to the offender at the sentencing hearing. We reach no conclusion as to the requirements for sentencing entries in cases in which notice at the sentencing hearing was deficient.

Grimes, 2017-Ohio-2927 at ¶ 20.

{¶20} The judgment entry in 2008-CR-742 stated:

> AND THEREFORE, the Court Orders that the Defendant serve a term of SEVEN (7) YEARS in prison, of which ZERO (0) years is a mandatory term pursuant to R.C. 2929.13(F), 2929.14(D)(3) or 2925, followed by **a mandatory period of post-release control of THREE (3) YEARS** to be monitored by the Adult Parole Authority.

1/27/10 J.E.

{¶21} Clearly, Appellant received a mandatory three year term of postrelease control. The question for this court is whether "to be monitored by the Adult Parole Authority" is a statement to the affect "that the Adult Parole Authority ("APA") will administer the postrelease control pursuant to R.C. 2967.28 and that any violation by the offender of the conditions of postrelease control will subject the offender to the consequences set forth in that statute." *Grimes* at ¶ 1.

{¶22} In *Grimes*, the language of the judgment entry included a reference to the statute governing postrelease control, R.C. 2967.28. *Id.* at ¶ 12. The state argued that was sufficient and the trial court did not need to repeat all the required oral advisements. *Id.* at ¶ 12-13. The Supreme Court agreed:

> We agree with the state that in order to validly impose postrelease control, the trial court must incorporate into its sentencing entry the notifications it provides to the offender relating to postrelease control at the sentencing hearing but that it need not repeat those notifications verbatim in the entry. We conclude that to validly impose postrelease control, a minimally compliant entry must provide the APA the information it needs to execute the postrelease-control portion of the sentence. This conclusion reconciles the statutory requirements for imposition of postrelease control with our analyses in our postrelease-control decisions preceding this one.

Id. at ¶ 13.

{¶23} Although we have addressed *Grimes*, this court has not specifically addressed what language in the judgment entry is required to comply with the third *Grimes* requirement. *See State v. Smith*, 7th Dist. Mahoning No. 17 MA 0174, 2018-Ohio-4562, ¶ 8 (phrase "up to" five years addressed); *State v. Zechar*, 7th Dist. Mahoning

No. 17 MA 0111, 2018-Ohio-3731, ¶ 19 (use of the words "up to five years" addressed); *Hutter*, 2018-Ohio-3488 at ¶ 20 (mandatory versus discretionary addressed); *State v. Amos*, 7th Dist. Belmont No. 17 BE 0041, 2018-Ohio-3426, ¶ 18, citing *Grimes,* 2017-Ohio-2927 (Without providing a transcript, appellant generically argued postrelease control was not valid. We looked solely at the judgment entry and stated, "Turning to the judgment entry of sentence, the trial court indicates that postrelease control is mandatory; specifies its duration; and states that the parole authority may increase or reduce restrictions imposed by the parole board."). However, the Eighth and Tenth Appellate Districts have decided cases concerning the third *Grimes* requirement. *State v. Harper*, 10th Dist. No. 17AP-762, 2018-Ohio-2529, 115 N.E.3d 840, ¶ 12, *appeal allowed,* 153 Ohio St.3d 1503, 2018-Ohio-4285, 109 N.E.3d 1260, ¶ 12 (2018); *State v. Tolbert*, 8th Dist. Cuyahoga No. 105326, 2017-Ohio-9159, 103 N.E.3d 245, ¶ 28-30.

{¶24} The *Tolbert* court found the language, "postrelease control is part of this prison sentence for three years for the above felony(s) under R.C. 2967.28" was insufficient to comply with the third requirement in *Grimes*. *Tolbert*, 2017-Ohio-9159 at ¶ 28-30. It reasoned that pursuant to *Grimes*, the sentencing entry must contain an advisement "that any violation by the offender of the conditions of postrelease control will subject the offender to the consequences set forth in the statute." *Id.* at ¶ 29. Since the sentencing entry did not state anything about Tolbert being subject to any consequences for violating the terms of his postrelease control, it did not comply with the *Grimes* third requirement. *Id.*

{¶25} Similarly, the *Harper* court determined a judgment entry stating, "the Court also notified the Defendant of the applicable period of 3 years mandatory post-release control pursuant to R.C. 2929.19(B)(3)(c), (d) and (e)" was not sufficient to meet the third requirement in *Grimes*. *Harper,* 2018-Ohio-2529 at ¶ 12, 14. Although the offender had already served his prison term, the Harper court indicated release from supervision was not warranted because the judgment entry could be corrected nunc pro tunc. *Id.* at ¶ 16-19.

{¶26} The Supreme Court has accepted *Harper* for review. *State v. Harper*, 153 Ohio St.3d 1503, 2018-Ohio-4285, 109 N.E.3d 1260. In addition to arguing what is required to comply with the third Grimes requirement, there is also a retroactivity

argument raised in that appeal (specifically, whether *Grimes* is to be applied retroactively). 1/8/19 Merit brief of the State.

{¶27} Although retroactive application of *Grimes* may be an issue, the result in this case is the same if we apply *Grimes* or if we apply our pre-*Grimes* case law. Postrelease control is void.

{¶28} If *Grimes* is applied, the judgment entry was required to indicate that at a minimum there are consequences for violating the terms of postrelease control. The specific language of *Grimes* requires the judgment entry to contain "a statement to the effect that the Adult Parole Authority ("APA") will administer the postrelease control pursuant to R.C. 2967.28 and that any violation by the offender of the conditions of postrelease control will subject the offender to the consequences set forth in that statute." *Grimes*, 2017-Ohio-2927 at ¶ 1. This is essentially two requirements – (1) the APA will administer postrelease control and (2) the offender will be subject to consequences for violating postrelease control. The statement in the 2008-CR-742 judgment entry imposing postrelease control stated Appellant will be "monitored by the Adult Parole Authority." This statement complies with the first part of the *Grimes* third factor that the APA will administer postrelease control pursuant to R.C. 2967.28. However, there is no statement regarding the second part of the *Grimes* third requirement; the judgment entry is devoid of any statement that a violation of postrelease control will result in consequences. Therefore, there is no compliance with *Grimes*.

{¶29} If *Grimes* cannot be applied retroactively, that leaves this court with our pre-*Grimes* case law. Pre-*Grimes*, this district required the judgment entry to contain a more specific advisement about the penalties that could be imposed for violating postrelease control. *See State v. Kozic*, 7th Dist. Mahoning No. 15 MA 0215, 2016-Ohio-8556, ¶ 10; *State v. Williams*, 7th Dist. Mahoning No. 11 MA 131, 2012-Ohio-6277, ¶ 65 ("R.C. 2929.19(B)(2)(e) provides that at the sentencing hearing, the trial court must notify the offender that if a period of supervision is imposed following his or her release from prison, and if the offender violates that supervision, then the parole board may impose a prison term of up to one-half of the prison term originally imposed on the offender. The trial court must also include this notice in the sentencing entry."). Although that is no longer the law, it is what was required by this court pre-*Grimes*. The statement that Appellant's

postrelease control would be monitored by the APA is clearly not sufficient to comply with pre-*Grimes* case law from this district.

{¶30} Accordingly, we hold the statement in the 2008-CR-742 judgment entry imposing postrelease control indicating Appellant will be "monitored by the Adult Parole Authority" does not comply with *Grimes* or our pre-*Grimes* case law.

{¶31} The deficiency of the judgment entry in this case cannot be corrected through a nunc pro tunc order. Admittedly, we are presuming the regularity of the sentencing hearing in case number 2008-CR-742 and presuming the trial court correctly advised Appellant of postrelease control. However, Appellant had completed his prison term in that case and was released on postrelease control for three days prior to committing the offenses in this case. In cases similar to the one before us, we held a nunc pro tunc judgment entry cannot be used to correct the deficiency when the offender has already completed the prison term and been released from prison. *State v. Baird*, 7th Dist. Mahoning No. 15 MA 0155, 2016-Ohio-8211, ¶ 15-20 (argument only concerned whether judgment entry correctly advised of postrelease control); *State v. Bundy,* 7th Dist. Mahoning No. 12 MA 86, 2013–Ohio–2501 (properly advised at sentencing hearing, but not in judgment entry). In reaching this conclusion we cited the Ohio Supreme Court's *Qualls* decision stating, "unless a sentencing entry that did not include notification of the imposition of postrelease control is corrected before the defendant completed the prison term for the offense for which postrelease control was to be imposed, postrelease control cannot be imposed." *Baird*, 2016-Ohio-8211 at ¶ 17 and *Bundy,* 2013–Ohio–2501 at ¶ 16, quoting *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, ¶ 16.

{¶32} Admittedly, this conclusion is at odds with the Tenth Appellate District's *Harper* decision holding the deficiency in the judgment entry could be corrected nunc pro tunc. *Harper,* 2018-Ohio-2529 at ¶ 16-19. In reaching that conclusion, the *Harper* court examined the Ohio Supreme Court's *Qualls*, *Watkins,* and *Hernandez* cases. *Id.* citing *Qualls*, 2012-Ohio-1111; *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301; *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, 857 N.E.2d 78. It reasoned that since there was partial compliance with the notification in that the offender was informed of the duration and mandatory and discretionary nature of the postrelease

control, nunc pro tunc could be used to correct the deficiency of failing to inform the offender that he would be supervised by the APA under R.C. 2967.28 and there would be consequences as set forth in that statute for violating the terms of postrelease control. *Harper* at ¶ 16-19. The reasoning in *Harper* makes many good points; however, as cited above the *Qualls* Court specifically indicated the judgment entry must be corrected prior to the offender's release from prison. The *Harper* analysis does not alter our pre-*Grimes* position that a judgment entry cannot be corrected nunc pro tunc after the offender has been released from prison.

{¶33} For the above stated reasons, we conclude the imposition of postrelease control in case number 2008-CR-742 is void and vacated. Therefore, the judicial sanction sentence imposed for violating postrelease control is reversed and vacated. This assignment of error has merit.

Second Assignment of Error

"The trial court erred when it imposed consecutive sentences based on a finding that Mr. Bunn's offenses were committed while he was serving void PRC."

{¶34} In this assignment of error, Appellant attacks the trial court's imposition of consecutive sentences.

{¶35} When a trial court imposes consecutive sentences for multiple convictions, it must make the required R.C. 2929.14(C)(4) findings at the sentencing hearing, and it must incorporate those findings into the sentencing entry. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 29, 37. R.C. 2929.14(C)(4) contains three statutory findings: (1) consecutive sentences are necessary to protect the public from future crime or to punish the offender; (2) consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger posed to the public; and (3) one of the three alternative findings in subdivisions (a), (b), or (c). *State v. Beasley*, 153 Ohio St.3d 497, 2018-Ohio-493, 108 N.E.3d 1028, ¶ 252. Subsections (a), (b), and (c) provide:

> (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.

R.C. 2929.14(C)(4)(a)–(c).

{¶36} At the sentencing hearing, the trial court stated, "I am additionally going to find that consecutive sentences are necessary to protect the public, to punish you, that they are not disproportionate and that the crimes were committed while under post-release control. So I am going to order that Count Four be served consecutively with Count Three." 8/25/17 Sentencing Tr. 13.

{¶37} Appellant does not dispute the trial court made the required findings. Rather, he contends that the third finding is not supported by the record. This argument is based on his arguments set forth in the first assignment of error. The third finding is that Appellant was on postrelease control when crimes were committed, which is a subsection (a) finding. If the postrelease control sentence was void, Appellant contends there is no third finding and consecutive sentences cannot be imposed.

{¶38} The state counters asserting that based on its reasons in the first assignment of error, the postrelease control sentence was not void. It also contends that it can be gleaned from the record the trial court also found Appellant's extensive criminal record demonstrates consecutive sentences are necessary to protect the public from future crime by the offender. This would constitute a subsection (c) finding.

{¶39} In the first assignment of error we determined the trial court could not impose a judicial sanction because postrelease control was void. This means the subsection (c) finding is not supported by the record. It is noted that the validity of postrelease control was not raised to the trial court. Therefore, at the time the trial court was imposing consecutive sentences it was under the assumption Appellant was validly on postrelease control at the time of the commission of the offense. Unless this court can

glean from the record that the trial court made the alternative extensive criminal record finding, the matter must be remanded for a new sentencing hearing.

{¶40} We have previously explained a trial court is not required to use magic or talismanic words, so long as it is apparent the court conducted the proper analysis. *State v. Jones*, 7th Dist. Mahoning No. 13 MA 101, 2014–Ohio–2248, ¶ 6; *see also Bonnell* at ¶ 37. We may liberally review the entire sentencing transcript to discern whether the trial court made the requisite findings. *Bonnell* at ¶ 29.

{¶41} In the judgment entry, the trial court clearly makes the subsection (c) extensive criminal record finding, along with the other two required findings. It stated:

> The Court further finds, pursuant to Ohio Revised Code Section 2929.14(C)(4), that consecutive sentences are necessary in order to protect the public, to punish Defendant, and that Defendant's criminal history shows that consecutive terms are needed to protect the public, and that consecutive sentences are not disproportionate.

8/28/17 J.E.

{¶42} At the sentencing hearing, the prosecutor began the hearing with the following statement:

> The defendant, as you know, was found guilty after a jury trial of a weapons under disability and tampering with evidence. Your Honor, as well you know from the evidence that the defendant was on post-release control after having been out for less than three days from being released from prison He was in prison, Your Honor, on a possession of cocaine in 09 CR 514. Actually 514 is a felony theft, a third degree felony. Case number 08 CR 742, that was a felonious assault. And third case was – it's the one that we put into evidence, I can't remember what the number was I want to say maybe 914 or 942.
>
> Your Honor, he had spent seven years in prison at that time. Each of those cases that he was sentenced to in front of Judge Sweeney involved a gun as well. The felonious assault, the defendant had a gun and hurt a female victim in that case. He stole a gun from a girlfriend of his in the theft case.

> And in the possession of cocaine, which we used for the weapon under disability, they actually forfeited a gun because a gun was found on him as well.
>
> That's not defendant's only prior record. The defendant, in 1997, was convicted in 96 CR 164, with a weapon under disability and a CCW. The defendant was also convicted for possession of cocaine and assault on a police officer in 96 CR 578, and that conviction was in 1997.
>
> The defendant was also convicted of trafficking in drugs in 1998 in Case Number 97 CR 835.

8/25/17 Sentencing Tr. 2-3.

{¶43} The state then asked for three years for each offense and the remainder of the postrelease control sentence on the 08-CR-742 case as a judicial sanction and asked the sentences to run consecutive to each other.

{¶44} Appellant then argued for merger, concurrent sentences, and no judicial sanction. 8/25/17 Sentencing Tr. 5-11.

{¶45} In addressing the arguments, the trial court began by stating:

> Thank you. A number of things that I need to say. The prosecutor brings up your past because she believes, and I agree, that the continued use or possession of guns, when you are legally not permitted to own, possess or use a firearm, is very significant in terms of the sentence that I feel appropriate for these two convictions. It's not necessary to cause physical harm to be convicted of felonious assault when the essential element is a fiream. And your prior record with firearms concerns me.

8/25/18 Sentencing Tr. 11.

{¶46} This statement indicates the trial court considered Appellant's criminal record when imposing the sentence. Although the trial court at the hearing specifically stated postrelease control was its third finding for consecutive sentences and did not specifically state Appellant's criminal record as an alternative third finding, from the above statements we can glean from the record that the trial court did use this as an alternative finding. This assignment of error lacks merit.

Third Assignment of Error

"The trial court failed to merge allied offenses of similar import and thus imposed more prison terms than authorized by law."

{¶47} Appellant was found guilty of having weapons while under disability in violation of R.C. 2923.13(A)(3) and tampering with evidence in violation of R.C. 2921.12(A)(1). Having weapons while under disability as set forth in R.C. 2923.13(A)(3) provides:

> (A) Unless relieved from disability under operation of law or legal process, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:
>
> (3) The person is under indictment for or has been convicted of any felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.

R.C. 2923.13(A)(3).

{¶48} Tampering with evidence as defined by R.C. 2921.12(A)(1) provides:

> (A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:
> (1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation

R.C. 2921.12(A)(1).

{¶49} Prior to imposition of sentence, Appellant argued the trial court was only authorized to issue one sentence for his having weapons while under disability and tampering with evidence convictions because they are allied offenses and merger was required. 8/25/17 Sentencing Tr. 6-8. The trial court disagreed and refused to merge the offenses.

{¶50} Merger of allied offenses pursuant to R.C. 2941.25 presents a question of law that we review de novo. *State v. Fortner*, 2017-Ohio-4004, 82 N.E.3d 60, ¶ 7 (7th Dist.).

{¶51} R.C. 2941.25 is the codification of the constitutional protection against multiple punishments for the same offense. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 13. That statute provides:

> (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.

R.C. 2941.25.

{¶52} The Ohio Supreme Court set forth the test to determine if two offenses are allied offenses of similar import in *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892. The *Ruff* Court created a fact-specific analysis that looks at the defendant's conduct, the animus, and the import. *State v. Williams*, 2015-Ohio-4100, 43 N.E.3d 797, ¶ 17, (7th Dist.) citing *Ruff*, 2015-Ohio-995 at ¶ 26. The analysis is three-part: (1) whether the offenses are dissimilar in import or significance: that is, whether each offense caused a separate and identifiable harm; (2) whether the offenses were separately committed; and, (3) whether the offenses were committed with separate animus or motivation. *Ruff* at ¶ 26. If the answer to any of these questions is "yes," then the offenses do not merge. *Id.* However, when offenses must merge under R.C. 2941.25(A), the defendant can be found guilty of all, but can be punished only on one. The *Ruff* Court acknowledged that, due to the fact-specific nature of the test, results will vary on a case-by-case basis; "no bright-line rule can govern every situation." *Id.* at ¶30.

{¶53} Appellant argued to the trial court and now argues to this court that merger was required because disposing of the gun and having the gun in his possession was a single transaction. 8/25/17 Sentencing Tr. 6-8.

{¶54} The trial court disagreed with Appellant's analysis:

> As it relates to your argument, and you did a fine job outlining the law as it related to the merger doctrine, but the merger doctrine requires a court to consider whether or not the offenses are allied, whether they are of similar import, and whether or not there was a separate animus during the commission of both offenses. And the evidence that I heard, and that the jury agreed, was that you had a weapon, a firearm, on the porch and, subsequent to that, that you instructed two people to get rid of the gun. There's no question in my mind factually in this case that there was a separate animus for both offenses. So I do not agree with you, I do not believe that these two offenses merge by law * * *.

8/25/17 Sentencing Tr. 12-13.

{¶55} The Third District Court of Appeals has aptly explained:

> Other Ohio courts of appeal have concluded that having-weapons-while-under-disability and tampering-with-evidence convictions do not merge. *See State v. Lyons*, 7th Dist., 2017-Ohio-4385, 93 N.E.3d 139, ¶ 42; *State v. Wilcox*, 2d Dist. Clark No. 2013-CA-94, 2014-Ohio-4954, 2014 WL 5794291, ¶ 20. *See also State v. Ervin–Williams*, 8th Dist., 2014-Ohio-5473, 25 N.E.3d 435, ¶ 88, fn. 1 (noting "that having weapons while under disability and tampering with evidence have been found to not be allied offenses" under the pre-*Ruff* analysis), citing *State v. Thomas*, 8th Dist. Cuyahoga No. 94042, 2010-Ohio-5237, 2010 WL 4286283, ¶ 28, fn. 4 (concluding that having-weapons-while-under-disability and tampering-with-evidence convictions did not merge under the pre-*Ruff* analysis requiring courts to compare the elements of offenses without reaching the second-prong of the test, which "considers whether there was a separate animus supporting each conviction"). The cornerstone of the analysis is

> whether the evidence reflects that an offender acquired a firearm "at some time prior" to concealing the firearm to impair its availability as evidence in a proceeding or investigation. *Compare Lyons* at ¶ 42 (concluding that "Lyons acquired and possessed a firearm at some time prior to the fight at the club" and "he discarded the firearm while being chased by police; specifically, to conceal the firearm with the purpose to impair its availability as evidence"); *Wilcox* at ¶ 20 ("He committed the offense of having weapons while under disability when he (necessarily) acquired the gun before he got into the SUV * * * and the evidence the State presented in support of the tampering offense occurred when he hid the gun under the driver's seat."). *See State v. Petty*, 8th Dist. Cuyahoga No. 105222, 2017-Ohio-8732, 2017 WL 5903449, ¶ 16 ("""[The] animus of having a weapon under disability is making a conscious choice to possess a weapon. [The defendant] necessarily acquired the guns sometime prior to committing the other crimes. The fact that he then used the weapons to commit the other crimes does not absolve [the defendant] of the criminal liability that arises solely from his decision to illegally possess the weapons."""), quoting *State v. Brown*, 8th Dist. Cuyahoga No. 102549, 2015-Ohio-4764, 2015 WL 7300727, ¶ 12, quoting *State v. Cowan*, 8th Dist. Cuyahoga No. 97877, 2012-Ohio-5723, 2012 WL 6088306, ¶ 39. *But see State v. Clark*, 2d Dist. Montgomery No. 27365, 2017-Ohio-7633, 2017 WL 4082799, ¶ 31 ("We have said that to prove that the offenses of felonious assault and having weapons under disability merge, the defendant must show that he acquired the weapon with an immediate, virtually simultaneous intent to fire it at the victim and had no other reason for possessing the weapon."), citing *Grissom*, 2014-Ohio-857, at ¶ 44.

State v. Frye, 3d Dist. No. 1-17-30, 2018-Ohio-894, 108 N.E.3d 564, ¶ 133

{¶56} Given the facts of this case and the case law, the trial court's reasoning is correct; the evidence shows two distinct animus – possession and tampering. Witnesses testified Appellant shot Michael Pete, which would indicate Appellant had a gun while he was on the porch. Although the jury did not find Appellant guilty of murder that does not

mean the jury did not believe Appellant had a gun while he was on the porch; the jury found him guilty of having a weapon while under disability and tampering with evidence. Furthermore, testimony established that although shot in the face and in route to the hospital, Appellant threw a gun out the window of the car. This testimony came from Steven Pickard and James Jackson who were in the car with Appellant. Steven Pickard gave a statement to the police after the shooting. He stated that before they got to the hospital they took a detour to Oak Hill Cemetery to dispose of the gun. Tr. 633. Going through Oak Hill Cemetery is not the most direct route to the hospital from East Evergreen Avenue and demonstrates a distinct animus to dispose of the gun. Moreover, at the hospital, Appellant instructed Steven Pickard and James Jackson, who were in the car with him, to go and get the gun. If the above evidence was not sufficient to show a separate animus of tampering, this act alone of instructing them to go and retrieve the gun shows a clear separate and distinct animus from possession. This evidence reflects Appellant acquired a firearm "at some time prior" to concealing the firearm to impair its availability as evidence in a proceeding or investigation.

{¶57} The trial court's decision to deny merger is affirmed.

Fourth Assignment of Error

"The trial court violated Jermaine Bunn's right to due process and a fair trial when it entered judgment of convictions for having a weapon under disability and tampering with evidence against the manifest weight of the evidence."

{¶58} Appellant argues his convictions for tampering with evidence and having a weapon while under disability are against the manifest weight of the evidence because the only evidence that he had a gun and that he disposed of that gun came from two witnesses that were not credible, Steven Pickard and James Jackson. He contends their testimony was vague; they could not indicate on what street Appellant threw the gun out of the car, where they found it, and if they used a flashlight or other means to find it. Furthermore, Jackson admitted he was intoxicated that evening. Tr. 440. In addition to their vague testimony, he contends the witnesses had a vested interest in avoiding culpability which further renders them not credible.

{¶59} Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other."

State v. Thompkins, 78 Ohio St.3d at 387. It depends on the effect of the evidence in inducing belief, but it is not a question of mathematics. *Id.* When a defendant claims the conviction is contrary to the manifest weight of the evidence, the appellate court is to review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, citing *Thompkins*, 78 Ohio St.3d at 387.

{¶60} Although the appellate court acts as the proverbial "thirteenth" juror under this standard, it rarely substitutes its own judgment for that of the jury's. *State v. Merritt*, 7th Dist. Jefferson No. 09 JE 26, 2011-Ohio-1468, ¶ 45. "This is because the trier of fact was in the best position to determine the credibility of the witnesses and the weight due the evidence." *Id.* citing *State v. Higinbotham*, 5th Dist. Stark No. 2005CA00046, 2006-Ohio-635.

{¶61} In this case, it is clear the jury assessed the credibility of each witness. Appellant was indicted for murder and discharging a firearm into a habitation. At trial, admitted into evidence was a 911 call from a witness indicating Appellant shot Michael Pete. State's Exhibit 2. Thomas May additionally testified Appellant shot Michael Pete. Tr. 209. He explained that as he was exiting the house and going onto the porch shots were fired. Tr. 204. He testified after Michael Pete was shot he dropped a gun from his hand and said something to the effect of: "he hit me, I'm hit, call the ambulance." Tr. 204. William Hopkins also testified at trial. He saw the shooting from his house on East Glenaven. Tr. 469. He testified Michael Pete and another man were on the porch and the other man on the porch shot Pete. Tr. 474. Hopkins testified Appellant looked like the man he saw on the porch with Pete. Tr. 485. The jury, however, found Appellant not guilty of murder and discharging a firearm into a habitation. Thus, it found the above testimony did not establish the crimes beyond a reasonable doubt.

{¶62} The jury did find Appellant guilty of having a weapon under disability based on Jackson and Pickard's testimony. As stated above, Pickard testified he saw Appellant throw a pistol out the window of the car and after dropping Appellant off at the hospital, Appellant instructed Pickard and Jackson to go get the gun. Tr. 311-312. Jackson, who

was intoxicated, indicated after dropping Appellant off at the hospital they went to find the gun. Tr. 435. Neither witness could testify on what street they found the gun, how long it took them to find the gun, or if they used any kind of flashlight to help them find it. Tr. 315, 434. On cross-examination, Pickard testified he had a few drinks that night. Tr. 319. Jackson admitted he was intoxicated that night. Tr. 440. Both testified they were not promised anything for their testimony or threatened in anyway. Tr. 319, 332, 338, 438.

{¶63} Detective Sergeant John Perdue also testified about the interview he had with Pickard after the shooting. Tr. 633. Pickard told him that prior to going to the hospital they drove by the Oak Hill Cemetery and that is where Appellant threw the gun out of the car. Tr. 633. Pickard stated Appellant told him at the hospital to go and get rid of the gun. Tr. 633-634. Pickard indicated to the detective that he and Jackson went to the cemetery to get the gun and then he took it to McKelvey Lake. Tr. 634. The detective testified that Jackson told them a similar account of the events; the gun was disposed of at Oak Hill Cemetery and he and Pickard went to the Cemetery to get it and then Pickard later without him threw it in McKelvey Lake. Tr. 634.

{¶64} A review of the testimony does not indicate that Pickard and Jackson clearly lacked credibility. Thus, this is not the exceptional case where a manifest miscarriage of justice can be found. The jury was clearly in the best position to determine credibility of the witnesses and evidence. This assignment of error is meritless.

Conclusion

{¶65} Appellant's convictions are reversed and vacated in part, and affirmed in part. The first assignment of error has merit. The imposition of postrelease control in case number 2008-CR-742 is void and vacated. Therefore, the judicial sanction sentence imposed for violating postrelease control is reversed and vacated. The remainder of Appellant's convictions and sentences are affirmed; the second, third, and fourth assignments of error lack merit.

Waite, P.J., concurs.

D'Apolito, J., concurs

For the reasons stated in the Opinion rendered herein, it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, reversed and vacated in part, and affirmed in part. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.