

ORIGINAL

IN THE SUPREME COURT OF OHIO
2014

STATE OF OHIO,

Case No. 14-0625

Plaintiff-Appellant,

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

-vs-

QUINCY PHIPPS,

Court of Appeals
Case No. 13AP-351

Defendant-Appellee.

MEMORANDUM OF PLAINTIFF-APPELLANT IN SUPPORT OF
JURISDICTION

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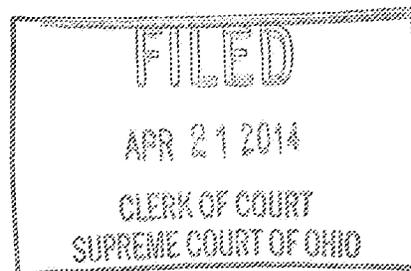


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EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION

One of the many changes brought about by Am.Sub.H.B. No. 86, effective September 30, 2011, was to “revive” the consecutive-sentence findings that this Court had severed in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. The findings formerly found in R.C. 2929.14(E)(4) are now codified in R.C. 2929.14(C)(4).

This case presents two important questions concerning R.C. 2929.14(C)(4): Is a trial court required to make consecutive-sentence findings when the offenses were committed before H.B. 86’s effective date? And are appellate courts bound by the customary standard governing plain-error review in addressing unpreserved defense claims that the common pleas court failed to make the consecutive sentence findings? These questions are recurring, and the bench and bar will benefit from having this Court’s resolution.

The first question implicates important issues regarding R.C. 1.58(B) generally that will affect the retroactivity of future sentencing statutes. Namely, when does an amendment or reenactment “reduce[]” a penalty, forfeiture, or punishment? And what is the meaning of “any offense”? Courts across Ohio have taken varying approaches on whether R.C. 1.58(B) requires trial courts to apply R.C. 2929.14(C)(4) retroactively. The Tenth District has determined that R.C. 2929.14(C)(4) applies retroactively to pre-H.B. 86 crimes. *See State v. Wilson*, 10th Dist. No. 12AP-551, 2013-Ohio-1520. Other courts, often using little or no analysis, have reached similar conclusions. *See, e.g., State v. Hites*, 3rd Dist. No. 6-11-07, 2012-Ohio-1892, ¶11, n. 1; *State v. Redd*, 8th Dist. No. 98064, 2012-Ohio-5417, ¶10.

In contrast, the Sixth District, while discussing R.C. 2929.14(C)(4), has drawn a sharp distinction between a “procedural benefit” and an “actual reduction” in a penalty, forfeiture, or punishment:

* * * It is true that judicial fact-finding affords a criminal defendant an additional procedural safeguard against consecutive sentences. However, R.C. 1.58(B) requires more than a procedural benefit. Rather, it requires an actual reduction in the penalty, forfeiture, or punishment for a particular offense. *State v. Edwards*, 6th Dist. No. WD-11-078, 2013-Ohio-519, ¶ 23.

This passage directly contradicts the Tenth District's view that the mere possibility that consecutive-sentence findings "might arguably" reduce a penalty or punishment is enough to make R.C. 2929.14(C)(4) retroactive under R.C. 1.58(B). *State v. Wilson*, 2013-Ohio-1520, ¶17. This Court should accept jurisdiction over the first proposition of law to resolve this tension and hold that R.C. 1.58(B) does not require that R.C. 2929.14(C)(4) be applied retroactively.

With respect to the second proposition of law, the Tenth District conceded that, given the defense failure to raise the need for findings below, it was bound by a plain-error standard on appeal. But the Tenth District's adherence to the plain-error standard stopped there. The Tenth District adamantly refused to consider all parts of the plain error standard. The Tenth District cited several cases in which it had concluded that the failure to make the findings was "plain error as a matter of law." Decision, ¶15, citing *State v. Bailey*, 10th Dist. No. 12AP-699, 2013-Ohio-3596, ¶46 ("Failure to fully comply with R.C. 2929.14(C)(4) is plain error as a matter of law.").

Critically, there simply is no such thing as "plain error as a matter of law." Plain-error review extends beyond whether an obvious error occurred. Plain-error review also includes whether the error was clearly outcome determinative. In addition, the plain-error standard vests discretion in the appellate court to refuse to reverse if there was no manifest miscarriage of justice or exceptional circumstances. All parts of the plain-error standard apply to the review of forfeited claims of sentencing error. *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-504, 873 N.E.2d 1263, ¶¶206-208; *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶¶15-17, 25. Nevertheless, the Tenth District refuses to consider the outcome-determination prong of the plain-

error standard.

Had the Tenth District considered these matters, it would not have reversed. Defendant perpetrated multiple sexual assaults against two young children for more than 6 years. One of the victims testified that the defendant began sexually assaulting her when she was three and continued until she was 15 years old, while her sister was assaulted from age seven to age 14, and the defendant was married to their mother. The defendant's conduct in repeatedly sexually assaulting young children in his care warranted consecutive sentences. In addition, the defendant had had prior contacts with the criminal justice system, including an indictment for aggravated murder which had been dismissed when a witness failed to appear, and two misdemeanor convictions. Had the common pleas court addressed the consecutive sentence findings, it would have easily made them; it would have been unable to avoid them. Yet the Tenth District automatically reversed.

The Tenth District is abdicating its review under these prongs of the plain-error standard. Criminal Rule 52(B) and the case law thereunder mandate a plain-error standard that requires appellate courts to assess outcome determination and exercise their discretion. Automatic reversal is certainly not allowed by the nuanced plain-error standard established by this Court, and the Tenth District is not allowed to veto the plain-error standard established by this Court.

Additionally, unwarranted remands for resentencing consume valuable and limited resources of the state prison, the county jail, the county prosecutor's office, appointed counsel (in most cases), court staff, and the judicial system as a whole. Time spent on an unnecessarily-remanded case can be better spent on other cases. Conveying the prisoner back and forth from the prison to the jail to the court, etc., also creates risks of escape and harm that could be avoided entirely if the sentences were affirmed initially under harmless-error or plain-error review. Victims are also put through another sentencing process. And when the court adheres to its original consecutive sentencing on

remand, the case will entail another defense appeal, taking up even more judicial, prosecutorial, and appointed-counsel resources at the appellate level, and delaying even further the closure that victims should receive. Given these substantial costs and risks involved in unnecessary remands, this Court should address this issue now to avoid such costs and risks in the future.

Furthermore, other appellate courts are following the “plain error as a matter of law” approach. *See, e.g., State v. Jirousek*, 11th Dist. No. 2013-G-3128, 2013-Ohio-5267, 2 N.E.3d 981, ¶39. This heightens the need for review here. When multiple courts are applying the same flawed analysis and are not following this Court’s jurisprudence, they multiply the unnecessary costs and risks associated with unnecessary remands and increase the need for review. This Court can correct this flawed approach by accepting review here and rejecting the automatic-reversal rule.

Accordingly, the State respectfully requests review because the case involves questions of public and great general interest and warrants granting leave to appeal this felony case.

STATEMENT OF THE CASE AND FACTS

On February 3, 2012, the Franklin County Grand Jury issued a 13-count indictment against the defendant charging him with seven counts of felony-three gross sexual imposition, five counts of felony-four gross sexual imposition, and one count of rape. The offenses were committed against two different child victims for more than six years. To establish the defendant’s guilt, the State presented testimony from the victims, S.P. and K.P., their mother, A.P., who was married to the defendant, along with Emily Combes, a social worker employed at the Nationwide Center for Family Safety and Healing, and Gail Horner, a pediatric nurse practitioner also employed at Nationwide Center for Family Safety and Healing.

S.P. and K.P. provided extremely graphic testimony describing all of the elements of the offenses. Decision, ¶11. The sexual assaults occurred over an extended period of years. *Id.* at ¶4. K.P. was assaulted off and on beginning when she was three years old and continuing until

she was 15, and the offenses committed against her included repeated fondling in addition to vaginal penetration. *Id.* S.P. was sexually assaulted from the age of seven until she was 14 years old. *Id.* at ¶5. She testified to fondling, but not vaginal penetration. *Id.*

The jury found the defendant guilty of nine counts of GSI and one count of rape. The remaining charges were dismissed. On March 25, 2013, the defendant appeared with counsel for sentencing. The court first stated that it was agreed that House Bill 86 did not apply, then imposed an aggregate 27-year prison term. The court noted that it found that the victims credible.

The defendant filed an appeal to the Tenth District Court of Appeals, presenting two assignments of error for review, sufficiency of the evidence and plain error in imposing consecutive sentences. The court of appeals issued its decision on December 17, 2013, and its judgment on December 18, 2013. The court affirmed the defendant's conviction but vacated the sentence and remanded for resentencing based on the trial court's failure to make consecutive sentence findings under R.C. 2929.14(C), finding it constituted "plain error." Decision, ¶15. The Tenth District did not consider whether the error was outcome determinative or whether, in its discretion, it should let the consecutive sentences stand because there was no manifest miscarriage of justice.

The State sought en banc review, because this decision conflicted with the Tenth District's decisions in *State v. Gilbert*, 10th Dist. No. 12AP-142, 2010-Ohio-5521, and *State v. Cusey*, 10th Dist. No. 13AP-243 (Oct. 3, 2013) (memorandum decision). The Tenth District denied the en banc application concluding that, because *Gilbert* was unique, plain error as a matter of law did not apply, and further, that any error in *Cusey*'s sentence was harmless error, because he was sentenced to serve life without parole.

ARGUMENT

Proposition of Law No. One:

R.C. 1.58(B) does not require that R.C. 2929.14(C)(4) be applied retroactively to crimes that were committed before the September 30, 2011 effective date of H.B. 86.

Generally, the “reenactment, amendment, or repeal of a statute does not * * * [a]ffect any violation therefore or penalty, forfeiture, or punishment incurred in respect thereto, prior to the amendment or repeal.” R.C. 1.58(A)(3). But “[i]f the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.” R.C. 1.58(B).

R.C. 2929.14(C)(4) does not apply retroactively under R.C. 1.58(B), because requiring a trial court to make consecutive-sentence findings does not “reduce[]” any penalty, forfeiture, or punishment. Rather, R.C. 2929.14(C)(4) merely creates a certain procedure that trial courts must follow before ordering consecutive prison terms. In this regard, the Sixth District has distinguished a mere “procedural benefit” from an actual reduction of a penalty, forfeiture, or punishment:

* * * It is true that judicial fact-finding affords a criminal defendant an additional procedural safeguard against consecutive sentences. However, R.C. 1.58(B) requires more than a procedural benefit. Rather, it requires an actual reduction in the penalty, forfeiture, or punishment for a particular offense. *Edwards*, at ¶23.

The Tenth District has determined that “[t]he penalty or punishment for the offenses *might arguably* be reduced if the trial court were required to make the findings required by R.C. 2929.14(C)(4) before imposing consecutive sentences.” *Wilson*, at ¶17 (emphasis added). But this conclusion lacks merit for several reasons.

First, *Wilson* considers the possibility of what “might arguably be” a reduction after the court applies the finding requirements, while R.C. 1.58(B) focuses on whether the

reenactment/amendment *itself* actually reduces the penalty. R.C. 1.58(B) contemplates reenactments/amendments that themselves reduce the penalty, not the mere potential for a reduced penalty after a court would apply a multi-factored test to the facts of a particular case. As Judge Brown emphasized in her partial dissent in *Wilson*, R.C. 1.58(B) applies to actual reductions, not mere potential reductions. *Wilson*, ¶¶23-24 (Brown, J., dissenting, in part). Providing that *some* defendants *might* benefit from the findings requirement is not the same thing as “reducing” the penalty for any offense.

The second flaw in the Tenth District’s approach in *Wilson* is that it considers the plural “offenses,” while R.C. 1.58(B) uses the singular “any offense.” Whether a trial court orders multiple prison terms to be served concurrently or consecutively does not affect the penalty for “any offense.” Rather, each individual offense receives its own sentence, and it is only after the trial court has imposed a prison term on each offense that it then decides whether the defendant must serve the prison terms consecutively or concurrently. *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶9. There is no “omnibus sentence” for multiple offenses. *Id.* It is of course true that whether multiple prison terms are served concurrently or consecutively can have a profound impact on how long a defendant is incarcerated. But the fact remains that the concurrent-consecutive decision does not factor analytically into the sentence for any particular “offense.” *Id.* at ¶¶12-15. Rather, it affects *how* the individual sentences for multiple offenses are served, i.e., at the same time or back-to-back. In other words, the issue of consecutive sentencing governs the *timing* of when the defendant serves the sentence for the offense, not the length of the particular sentence for any particular offense.

Furthermore, Section 11 of H.B. 86, referring to language in *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768, specifically states that the General Assembly’s intent was to

“revive” the consecutive-sentence findings that were found unconstitutional in *Foster*. This choice of words is significant, because R.C. 1.58(B) applies only to statutory “reenactment[s]” and “amendment[s].” While “revive” and “reenact” may have similar meanings in this context, the General Assembly’s deliberate use of the word “revive” in Section 11 suggests that it intended that R.C. 2929.14(C)(4) be outside of the scope of R.C. 1.58(B).

Lastly, Sections 3 and 4 of H.B. 86 list the statutory provisions under the bill that call for application of R.C. 1.58(B), and R.C. 2929.14(C)(4) is conspicuously absent from the list. “The canon *expressio unius est exclusio alterius* tells us that the express inclusion of one thing implies the exclusion of the other.” *Crawford-Cole v. Lucas Cty. Dept. of Job & Family Servs.*, 121 Ohio St.3d 560, 2009-Ohio-1355, 906 N.E.2d 409, ¶42. Although a bill need not specifically reference R.C. 1.58(B) for it to apply, this omission combined with the use of the word “revive” in Section 11 is strong evidence that the General Assembly did not intend for R.C. 2929.14(C)(4) to apply to offenders like Phipps who committed their offenses before September 30, 2011.

Statutes are presumed to have only prospective application. R.C. 1.48. “In order to overcome the presumption that a statute applies prospectively, a statute must ‘clearly proclaim’ its retroactive application.” *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, 882 N.E.2d 899, ¶10. “Text that supports a mere inference of retroactivity is not sufficient to satisfy this standard; we cannot *infer* retroactivity from suggestive language.” *Id.* (emphasis sic). The General Assembly did not include any provision making the statutory consecutive-sentence requirements retroactive to pre-H.B. 86 offenses, and R.C. 1.58(B) does not support the application of those requirements to prior offenses. Accordingly, under R.C. 1.48 and 1.58(A), a trial court is not required to articulate consecutive-sentence findings in order to justify ordering prison terms for pre-H.B. 86 offenses to be served consecutively.

Proposition of Law No. Two:

When the defense fails to preserve the issue of consecutive-sentence findings in the trial court, the issue is reviewed on appeal under a plain-error standard that takes into account whether the issue was outcome determinative and whether a manifest miscarriage of justice warranting reversal has occurred.

Relying on R.C. 2929.14(C)(4), defendant claimed that the common pleas court erred when it failed to make findings before requiring the defendant to serve his prison terms consecutively. However, the defense did not object to the court's sentencing decision or request that the court make the findings, in apparent agreement that House Bill 86 did not apply to the defendant's case, and defendant could not demonstrate plain error warranting reversal.

Although acknowledging that a plain-error standard governed the appeal, because the defendant did not object to the imposition of consecutive sentences, the Tenth District refused to engage all parts of the plain-error standard, concluding only that a "plain error" existed. The Tenth District did not assess whether the error was outcome determinative or whether, in the court's discretion, it should let the consecutive sentences stand.

A.

At the sentencing proceeding, the defense did not alert the court to the need to make findings and did not otherwise raise any legal objection to the imposition of the consecutive sentences. Given the defendant's numerous sexual assaults of two young girls in his care for more than 6 years, and in light of the comments the court had already made, it is easy to see why the defense made no objection. It is readily apparent that consecutive sentencing is justified under the finding requirements.

B.

In the absence of the defense objecting or otherwise bringing the issue to the court's attention, the defense must show plain error in order to prevail on appeal. Crim.R. 52(B). As the

United States Supreme Court and this Court have found, the “plain error” standard of review applies to forfeited errors occurring at the sentencing stage. *Puckett v. United States*, 556 U.S. 129, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009); *State v. Silsby*, 119 Ohio St.3d 370, 2008-Ohio-3834, 894 N.E.2d 667, ¶ 20 (“failure to raise *Foster* errors at sentencing constitutes a forfeiture of the issue necessitating application of the plain-error doctrine by reviewing courts”); *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 378 (applying “stringent” plain-error standard to forfeited constitutional objection to consecutive sentencing); *Frazier*, supra; *Payne*, supra; *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶ 96 (no allied-offenses objection below; “waived all but plain error”); *State v. D’Ambrosio*, 73 Ohio St.3d 141, 144, 652 N.E.2d 710 (1995) (“sentencing modification does not rise to the level of plain error”).

“[B]y failing to object to the imposition of his consecutive sentences, [defendant] forfeited this issue, absent plain error.” *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶152.

Defendant cannot satisfy the plain-error standard under Crim.R. 52(B). The plain-error standard is “dispositive” when “there is simply no reason to believe the judge would have reached a different decision as to sentencing if a more detailed explanation had been requested when it could have easily been provided.” *State v. Gilbert*, 10th Dist. No. 12AP-142, 2012-Ohio-5521, ¶¶13-14. Under the plain-error standard as applicable to sentencing, “[n]othing in the record suggests that the noncapital sentencing would have been different * * *.” *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶243 (quoting *Frazier*). Defendant “cannot establish that but for the * * * error, he would have received a more lenient sentence.” *Payne*, ¶25.

Although the common pleas court did not say the “magic words” required by R.C. 2929.14(C)(4), its comments at the sentencing hearing indicate that it would have easily made the statutory findings. The court noted various aspects of the case that would warrant making the consecutive-sentence findings, including that the victims were credible, that the defendant violated a position of trust, and “God rest your sole (*sic*) for what you did.”

The defendant’s conduct easily provided grounds for consecutive sentencing under R.C. 2929.14(C)(4), as he repeatedly sexually assaulted two different children in his care for more than 6 years. Given the seriousness of his criminal conduct and his demonstrated pattern of sexual abuse of young children, “consecutive service is necessary to protect the public from future crime or to punish the offender.” R.C. 2929.14(C)(4).

Likewise, “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). The court noted that the victims were credible and that the defendant betrayed a position of trust. The court also expressed its personal reprehension over the defendant’s conduct. Consecutive sentencing is highly proportionate to the seriousness of defendant’s crimes and/or the danger to the public.

Also, defendant’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)(c). Again, the defendant repeatedly sexually assaulted his stepdaughters for more than 6 years. Moreover, the defendant had prior contacts with the criminal justice system, including an indictment for aggravated murder and two misdemeanor convictions. Given the defendant’s demonstrated pattern of repeatedly sexually assaulting young children in his care, consecutive sentences are warranted.

If the defense had directed the court to the need to make the findings, the court easily could have and would have made the findings. Defendant could not show that the court clearly would not have made the findings or that the court would have been unable to make the findings.

C.

The Tenth District has contended that a failure to address the consecutive-sentence findings is “plain error as a matter of law.” *State v. Bender*, 10th Dist. No. 12AP-934, 2013-Ohio-2777, ¶7. The Tenth District’s decision below wholeheartedly followed this line of cases, citing several of them. Decision, ¶15. But this “matter of law” approach conflicts with the earlier Tenth District decision in *Gilbert*, which did not follow any “matter of law” (i.e., automatic-reversal) approach when it affirmed the consecutive sentences in that case.

In any event, the “matter of law” approach is fundamentally inconsistent with plain-error review. There is no “plain error as a matter of law,” as plain-error review only partially involves matters of law. Plain-error review includes issues of outcome determination and discretion that defy any “matter of law” approach.

“The waiver rule requires that a party make a contemporaneous objection to alleged trial error in order to preserve that error for appellate review. The rule is of long standing, and it goes to the heart of an adversary system of justice.” *State v. Murphy*, 91 Ohio St.3d 516, 532, 747 N.E.2d 765 (2001). The longstanding waiver rule is “strict.” *State v. Long*, 53 Ohio St.2d 91, 96, 372 N.E.2d 804 (1978).

“In Ohio, Crim.R. 52 gives appellate courts narrow power to correct errors that occurred during the trial court proceedings.” *State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, 884 N.E.2d 45, ¶19; *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 543, ¶9 (same). Although an issue is forfeited through lack of objection, Crim.R. 52(B) provides that “[p]lain errors

or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” Crim.R. 52(B). But plain error will be recognized only when, “but for the error, the outcome of the trial clearly would have been otherwise.” *Long*, paragraph two of the syllabus. “Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *Id.* at paragraph three of the syllabus.

“The power afforded to notice plain error, whether on a court’s own motion or at the request of counsel, is one which courts exercise only in exceptional circumstances, and exercise cautiously even then.” *Id.* at 94. As stated in *State v. Campbell*, 69 Ohio St.3d 38, 41 n. 2, 630 N.E.2d 339 (1994), “[o]ur cases make clear that we will not *overturn* a conviction for alleged error not raised below, unless it amounts to plain error.” (Emphasis *sic*). “[T]he lack of a ‘plain’ error within the meaning of Crim.R. 52(B) ends the inquiry and *prevents recognition of the defect.*” *State v. Barnes*, 94 Ohio St.3d 21, 28, 759 N.E.2d 1240 (2002) (emphasis added).

In *Barnes*, the Court stated that the plain-error analysis begins with three criteria: (1) there must be “a deviation from a legal rule”; (2) the defect must be “‘obvious’”; and (3) the error “must have affected the outcome of the trial.” But even if the error satisfies the first three prongs, there is still discretion for the appellate court to decline to afford relief.

Even if a forfeited error satisfies these three prongs, however, Crim.R. 52(B) does not demand that an appellate court correct it. Crim.R. 52(B) states only that a reviewing court “may” notice plain forfeited errors; a court is not obliged to correct them. We have acknowledged the discretionary aspect of Crim.R. 52(B) by admonishing courts to notice plain error “with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *Barnes*, 94 Ohio St.3d at 27-28 (citations omitted).

As can be seen, any court conducting a plain-error review must go beyond “matter of law” review to determine whether the outcome clearly would have been different if the error had not been made. Even an obvious legal error will not alone warrant reversal. The appellant must

also show clear outcome determination, even for claims of sentencing error. *D'Ambrosio*, 73 Ohio St.3d at 144.

Defendant cannot show clear outcome determination. In fact, the exact opposite conclusion is reached here, as the court would have clearly (and easily) made the consecutive-sentence findings even if the issue had been sufficiently preserved.

In addition, beyond any “matter of law,” the Tenth District could have concluded as a matter of discretion that it would not reverse. Using the “utmost caution,” the Tenth District could have readily concluded that defendant cannot show the necessary “exceptional circumstances” and “manifest miscarriage of justice” so as to justify reversal. This “miscarriage of justice” aspect of plain-error review “is meant to be applied on a case-specific and fact-intensive basis,” not on a “per se” or “matter of law” basis. *Puckett*, 556 U.S. at 142. As noted earlier, these parts of the plain-error standard apply to review of sentencing error. *D'Ambrosio*, 73 Ohio St.3d at 144.

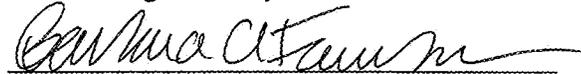
The defendant fully deserved to receive consecutive sentences given his demonstrated pattern of sexually assaulting his wife’s young daughters for over 6 years. It was hardly a “manifest miscarriage of justice” or an “exceptional circumstance” that a defendant who has committed numerous sexual assaults against multiple young victims for more than 6 years would receive consecutive sentences. It was par for the course. And yet the Tenth District applied a rule of automatic reversal, refusing to assess outcome determination and refusing to exercise any discretion. The State’s second proposition of law warrants review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal presents questions of such constitutional substance and of such great public interest to warrant further review by this Court. It is respectfully submitted that jurisdiction should be accepted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, April 21st, 2014, to Todd W. Barstow, at 538 S. Yearling Rd., Suite 202, Columbus, Ohio, 43213, counsel for defendant-appellee.



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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 13AP-351
	:	(C.P.C. No. 12CR-606)
Quincy Phipps,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 17, 2013

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Todd W. Barstow, for appellant.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Defendant-appellant, Quincy Phipps, is appealing from his convictions and sentences on charges of rape and gross sexual imposition. He assigns two errors for our consideration:

I. THE TRIAL COURT ERRED AND DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION BY FINDING HIM GUILTY OF RAPE AND GROSS SEXUAL IMPOSITION AS THOSE VERDICTS WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WERE ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

II. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY IMPROPERLY SENTENCING HIM TO CONSECUTIVE TERMS OF INCARCERATION IN CONTRAVENTION OF OHIO'S SENTENCING STATUTES.

{¶ 2} Phipps was originally charged with 12 counts of gross sexual imposition ("GSI") and 1 count of rape. The trial court judge assigned to the case found the evidence insufficient to support a conviction for three of the charges of GSI and granted an acquittal as to those charges. The remaining charges were submitted to a jury which convicted Phipps of 9 counts of GSI and the one rape charge.

{¶ 3} The judge sentenced Phipps to 8 years of incarceration as a result of the rape conviction, 15 years as a result of five of the GSI convictions which were felony 3 convictions, and 4 years as a result of the GSI conviction which were felony 4 convictions. All of the sentences were ordered to be served consecutively for a total sentence of 27 years of incarceration.

{¶ 4} Phipps was accused of molesting two young girls for many years. The girls are referred to as KP and SP to preserve the secrecy of their identity. The sexual assaults occurred over an extended period of years. One of the girls was only 3-years old when the assaults started. This girl was assaulted off and on until she was 15-years old. She was fondled repeatedly and also penetrated vaginally by Phipps' fingers and penis.

{¶ 5} The sexual assaults of SP began when she was 7-years old and continued until she reached the age of 14. SP did not testify that she was penetrated, only fondled.

{¶ 6} Phipps' first assignment of error argues that the verdicts are not supported by either sufficient evidence and were also against the manifest weight of the evidence.

{¶ 7} Sufficiency of the evidence is the legal standard applied to determine whether the case should have gone to the jury. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). In other words, sufficiency tests the adequacy of the evidence and asks whether the evidence introduced at trial is legally sufficient as a matter of law to support a verdict. *Id.* "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307 (1979). The verdict will not be disturbed unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier of fact. *Jenks* at 273. If the court determines that the evidence is insufficient as a matter of law, a judgment of acquittal must be entered for the defendant. *See Thompkins* at 387.

{¶ 8} Even though supported by sufficient evidence, a conviction may still be reversed as being against the manifest weight of the evidence. *Thompkins* at 387. In so doing, the court of appeals, sits as a "thirteenth juror" and, after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Id.* (quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983)); see also *Columbus v. Henry*, 105 Ohio App.3d 545, 547-48 (10th Dist.1995). Reversing a conviction as being against the manifest weight of the evidence should be reserved for only the most "exceptional case in which the evidence weighs heavily against the conviction." *Thompkins* at 387.

{¶ 9} As this court has previously stated, "[w]hile the jury may take note of the inconsistencies and resolve or discount them accordingly, see [*State v.*] *DeHass* [10 Ohio St.2d 230 (1967)], such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Nivens*, 10th Dist. No. 95APA09-1236 (May 28, 1996). It was within the province of the jury to make the credibility decisions in this case. See *State v. Lakes* 120 Ohio App. 213, 217 (4th Dist.1964), ("It is the province of the jury to determine where the truth probably lies from conflicting statements, not only of different witnesses but by the same witness.")

{¶ 10} See *State v. Harris*, 73 Ohio App.3d 57, 63 (10th Dist.1991), (even though there was reason to doubt the credibility of the prosecution's chief witness, he was not so unbelievable as to render verdict against the manifest weight).

{¶ 11} The testimony of the girls fully supports the convictions. In fact, the girls alleged far more assaults than those charged by way of indictment. The testimony was extremely graphic and described all the elements necessary for conviction of rape and GSI.

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

{¶ 13} The more challenging issue is the proceeding surrounding the 27-year sentence. We are mindful that in Ohio, a conviction for murder results in a mandatory sentence of 15 years to life imprisonment. Phipps argues the trial court erred when it

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failed to make findings in accordance with the recently amended R.C. 2929.14(C)(4) before requiring the prison terms to be served consecutively.

{¶ 14} The State of Ohio has argued that recent statutory changes enacted by the Ohio legislature do not apply because the offenses were committed before the statutory modifications. We have rejected that position in our prior decision and found that because the statutory changes potentially work to reduce criminal sentences, R.C. 1.58(A) applies and mandates that the new sentencing statute apply to persons who had not been sentenced by the date the statute went into effect. *See State v. Wilson*, 10th Dist. No. 12AP-551, 2013-Ohio-1520, ¶ 12 ("In the present case, there is no dispute that appellant's sentence had not been 'already imposed' at the time H.B. No. 86 became effective. The state argues, however, that R.C. 1.58(B) does not apply because 'requiring trial courts to make [the consecutive sentencing] findings does not "reduce [] the penalty for any offense." * * * We disagree. The penalty or punishment for the offenses might arguably be reduced if the trial court were required to make the findings required by R.C. 2929.14(C)(4) before imposing consecutive sentences.").

{¶ 15} The State has also argued that a plain error standard should be applied in situations such as that presented here. Several recent cases from this court have found that failure to abide by the new sentencing statutes constitute plain error. *See State v. Bender*, 10th Dist. No. 12AP-934, 2013-Ohio-2777, ¶ 7 (Noting, in response to State's argument that plain error standard should be applied to court's failure to comply with R.C. 2929.14(C)(4), "[o]ur recent cases indicate a tendency of this court to view a failure to precisely comply with R.C. 2929.14 as plain error as a matter of law."); *State v. Bailey*, 10th Dist. No. 12AP-699, 2013-Ohio-3596, ¶ 46 ("Failure to fully comply with R.C. 2929.14(C)(4) is plain error as a matter of law."). We follow that recent line of cases.

{¶ 16} As a result, we sustain the second assignment of error. We vacate the trial court's sentence and remand the case for a new sentencing hearing that complies with the mandates of R.C. 2929.14(C)(4) regarding the findings necessary for the imposition of consecutive sentences.

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{¶ 17} The first assignment of error, as indicated above, is overruled. The second assignment of error is sustained and the case is remanded for new sentencing proceedings.

Judgment affirmed in part and reversed in part; remanded for new sentencing proceedings.

DORRIAN and McCORMAC, JJ., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under the authority of Ohio Constitution, Article IV, Section 6(C).

Franklin County Ohio Court of Appeals Clerk of Courts- 2013 Dec 17 12:05 PM-13AP000351

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio, :

Plaintiff-Appellee, :

v. :

Quincy Phipps, :

Defendant-Appellant. :

No. 13AP-351
(C.P.C. No. 12CR-606)

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on December 17, 2013, appellant's first assignment of error is overruled and the second assignment of error is sustained. Therefore, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed in part and remanded for new sentencing proceedings in accordance with law and consistent with said decision. Costs shall be assessed against appellee.

TYACK, DORRIAN & McCORMAC, JJ.

/S/JUDGE

Judge G. Gary Tyack, P.J.

Franklin County Ohio Court of Appeals Clerk of Courts-2013 Dec 18 11:12 AM-13AP000351

Tenth District Court of Appeals

Date: 12-18-2013
Case Title: STATE OF OHIO -VS- QUINCY S PHIPPS
Case Number: 13AP000351
Type: JEJ - JUDGMENT ENTRY

So Ordered



/s/ Judge G. Gary Tyack

Electronically signed on 2013-Dec-18 page 2 of 2

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 13AP-351
	:	(C.P.C. No. 12CR-606)
Quincy Phipps,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

MEMORANDUM DECISION

Rendered on April 10, 2014

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Todd W. Barstow, for appellant.

ON APPLICATION FOR EN BANC CONSIDERATION

TYACK, J.

{¶ 1} The State of Ohio has filed an application requesting en banc consideration of this case. The State of Ohio has pointed out what it sees as an inconsistency between our decision in *State v. Gilbert*, 10th Dist. No. 12AP-142, 2012-Ohio-5521 and the present case, *State v. Phipps*, 10th Dist. No. 13AP-351, 2013-Ohio-5546. We view *Gilbert* as presenting a unique situation. Several panels of this court have addressed this issue since *Gilbert*, and all have decided the issue in the same way as in *Phipps*. The court as a whole has made *Gilbert* a unique holding based upon those specific facts. In short, in a very unique situation, plain error as a matter of law does not apply; but, in the vast majority of cases, the doctrine does apply when a trial court judge fails to follow the statute necessary to be followed when giving consecutive sentences.

{¶ 2} The State of Ohio also argues that *State v. Cusey*, 10th Dist. No. 13AP-243 (June 18, 2013), is inconsistent with our holding in *Phipps*. Cusey received a 62-year sentence to be served consecutive to his life without parole sentence on an aggravated murder charge of which he was convicted. The handling of the consecutive sentences was harmless error in light of the life without parole sentence. The failure to follow R.C. 2929.14(C) was plain error in light of our recent decision, but it was harmless error.

{¶ 3} Cusey cannot serve more incarceration after his life ends.

{¶ 4} The application for en banc consideration is denied.

*Application for en banc
consideration denied.*

DORRIAN and O'GRADY, JJ., concur.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 13AP-351
 : (C.P.C. No. 12CR-606)
 Quincy Phipps, :
 : (REGULAR CALENDAR)
 Defendant-Appellant. :

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on April 10, 2014, it is the order of this court that appellant's application for en banc consideration is denied.

TYACK, DORRIAN & O'GRADY, JJ.

/S/JUDGE

Judge G. Gary Tyack

Tenth District Court of Appeals

Date: 04-14-2014
Case Title: STATE OF OHIO -VS- QUINCY S PHIPPS
Case Number: 13AP000351
Type: JOURNAL ENTRY

So Ordered



/s/ Judge G. Gary Tyack

Electronically signed on 2014-Apr-14 page 2 of 2

Court Disposition

Case Number: 13AP000351

Case Style: STATE OF OHIO -VS- QUINCY S PHIPPS

Motion Tie Off Information:

1. Motion CMS Document Id: 13AP0003512013-12-2799980000
Document Title: 12-27-2013-MOTION
Disposition: 3200