

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee

vs.

JONATHAN BRANDENBURG,

Appellant

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CASE NO. 15-1489

On Discretionary Appeal from the
Butler County Court of Appeals

Twelfth Appellate District

Court of Appeals Case No.
CA2014-10-0201

NOTICE OF CERTIFIED CONFLICT OF APPELLANT,
JONATHAN BRANDENBURG

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RECEIVED
SEP 09 2015
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
SEP 09 2015
CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Certified Conflict of Appellant, Jonathan Brandenburg

Appellant Jonathan Brandenburg hereby gives notice to the Supreme Court of Ohio that on August 11, 2015, the Butler County Court of Appeals, Twelfth Appellate District, in Court of Appeals Case No. CA2014-10-0201, certified a conflict with *State v. Hill*, 7th Dist., Carroll No. 13CA892, 2014-Ohio-1965, and *State v. Simmons*, 9th Dist., Summit No. 27197, 2014-Ohio-4191. The Twelfth District certified the following question: “whether the test outlined by the court in *State v. Kalish* applies when reviewing felony sentences after the passage of R.C. 2953.08(G).”

Respectfully submitted,



CHARLES M. CONLIFF (0059432)

COUNSEL FOR APPELLANT,
JONATHAN BRANDENBURG

Certificate of Service

I hereby certify that a copy of this Notice of Appeal has been sent by ordinary U.S. mail to counsel for Appellee, Michael Gmoser, Butler County Prosecuting Attorney, Lina M. Alkawahwi, Assistant Prosecuting Attorney and Chief of Appellate Division, this 8th day of September, 2015.



CHARLES M. CONLIFF (0059432)

COUNSEL FOR APPELLANT,
JONATHAN BRANDENBURG

IN THE COURT OF APPEALS OF BUTLER COUNTY, OHIO

STATE OF OHIO,

Appellee,

vs.

JONATHAN BRANDENBURG,

Appellant.

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CASE NO. CA2014-10-201
REGULAR CALENDAR

MARY L. SWAIN
BUTLER COUNTY
CLERK OF COURTS

FILED BUTLER CO.
COURT OF APPEALS

ENTRY GRANTING MOTION
TO CERTIFY CONFLICT

AUG 11 2015

MARY L. SWAIN
CLERK OF COURTS

The above cause is before the court pursuant to a motion to certify a conflict to the Supreme Court of Ohio filed by counsel for appellant, Jonathan Brandenburg, on July 1, 2015, and a responsive memorandum filed by counsel for appellee, the State of Ohio, on July 10, 2015.

Appellant was found guilty of one count of robbery and an amended charge of attempted failure to appear. He was sentenced to three years in prison for robbery and one year for the attempted failure to appear, and the sentences were ordered to be served concurrently. On appeal, appellant argued that the trial court abused its discretion by sentencing him to a maximum sentence. This court noted in its decision that the abuse of discretion standard first used in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, no longer applied and that felony sentencing is now guided by R.C. 2953.08(G).

In his motion for certification, appellant argues that this court's use of R.C. 2953.08(G) to review felony sentencing is in conflict with other districts that continue to use the standard set forth in *Kalish*, such as *State v. Hill*, 7th Dist. Carroll No. 13 CA 892, 2014-Ohio-1968.

Ohio Courts of Appeal derive their authority to certify cases to the Ohio Supreme Court from Section 3(B)(4), Article IV of the Ohio Constitution, which states

that whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by another court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

The exact issue which appellant requests that this court certify is currently pending before the Supreme Court of Ohio pursuant to a notice of conflict filed by the Fourth, Seventh, and Ninth Districts. The certified question is whether the test outlined by the court in *State v. Kalish* applies when reviewing felony sentences after the passage of R.C. 2953.08(G). Oral arguments are scheduled to be held before the Supreme Court of Ohio on October 27, 2015.

Based upon the foregoing, the motion for certification is GRANTED. The question for certification is as stated above.

IT IS SO ORDERED.



Robin N. Piper, Presiding Judge



Robert P. Ringland, Judge



Robert A. Hendrickson, Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

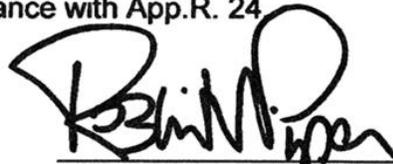
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MARY L. SWAIN
BUTLER COUNTY
CLERK OF COURTS

STATE OF OHIO, :
Plaintiff-Appellee, : CASE NOS. CA2014-10-201
 : CA2014-10-202
 :
- vs - : JUDGMENT ENTRY
 :
JONATHAN BRANDENBURG, : FILED BUTLER CO.
 : COURT OF APPEALS
 : JUN 29 2015
Defendant-Appellant. : MARY L. SWAIN
 : CLERK OF COURTS

The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

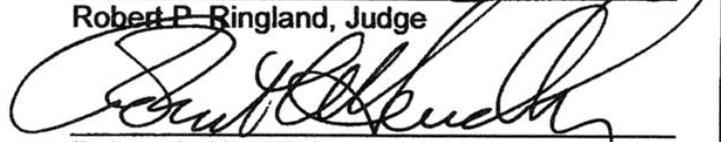
Costs to be taxed in compliance with App.R. 24



Robin N. Piper, Presiding Judge



Robert P. Ringland, Judge



Robert A. Hendrickson, Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NOS. CA2014-10-201
	:	CA2014-10-202
- vs -	:	<u>OPINION</u>
	:	6/29/2015
JONATHAN BRANDENBURG,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case Nos. CR2013-09-1498 and CR2014-05-0848

Michael T. Gmoser, Butler County Prosecuting Attorney, Audra R. Adams, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Charles Conliff, P.O. Box 18424, Fairfield, Ohio 45018-0424, for defendant-appellant

PIPER, P.J.

{¶ 1} Defendant-appellant, Jonathan Brandenburg, appeals his three-year sentence imposed by the Butler County Court of Common Pleas after pleading guilty to one count of robbery and one count of attempted failure to appear.

{¶ 2} Brandenburg and his co-defendant committed multiple robberies by stealing money from travelers who stopped at rest areas along Interstate 75. Brandenburg and his co-defendant would approach travelers and either ask for help in assisting another motorist

or ask the travelers to engage in card games for money. Once the travelers left their vehicle to help or gamble, Brandenburg and his co-defendant would surround the victim and steal his or her money. One victim, however, fought back and chased Brandenburg into the rest area facility where he hid in the bathroom. The victim called police, and Brandenburg was arrested.

{¶ 3} Brandenburg was indicted on two counts of robbery and later charged with failure to appear when he did not attend a hearing as ordered. Brandenburg and the state entered into plea negotiations and Brandenburg agreed to plead guilty to one count of robbery and an amended charge of attempted failure to appear. The trial court accepted Brandenburg's pleas after a hearing on the matter. The trial court then ordered a presentence investigation report and scheduled a sentencing hearing.

{¶ 4} The trial court sentenced Brandenburg to three years in prison for the robbery charge and one year for the attempted failure to appear, and the sentences were ordered concurrently for an aggregate three-year sentence. Brandenburg now appeals his sentence, raising the following assignment of error.

{¶ 5} THE TRIAL COURT ERRED TO THE APPELLANT'S PREJUDICE BY IMPOSING A PRISON SENTENCE.

{¶ 6} Brandenburg argues in his assignment of error that the trial court abused its discretion by imposing a maximum prison sentence.

{¶ 7} In support of his argument that the trial court incorrectly sentenced him, Brandenburg relies upon the standard set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. However, and as this court has stated multiple times, the standard of review set forth in R.C. 2953.08(G)(2) shall govern all felony sentences. *State v. Crawford*, 12th Dist. Clermont No. CA2012-12-088, 2013-Ohio-3315, ¶ 6. Pursuant to R.C. 2953.08(G)(2), when

hearing an appeal of a trial court's felony sentencing decision, "the appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing." However, as explicitly stated in R.C. 2953.08(G)(2), "[t]he appellate court's standard for review is not whether the sentencing court abused its discretion." *Id.* at ¶ 7.

{¶ 8} Instead, an appellate court may only take action authorized by R.C. 2953.08(G)(2) if the court "clearly and convincingly finds" that the sentence is contrary to law. A sentence is not clearly and convincingly contrary to law where the trial court considers the purposes and principles of sentencing as set forth in R.C. 2929.11, as well as the seriousness and recidivism factors listed in R.C. 2929.12, and sentences appellant within the permissible statutory range. *Crawford* at ¶ 9; *State v. Elliott*, 12th Dist. Clermont No. CA2009-03-020, 2009-Ohio-5926, ¶ 10.

{¶ 9} After reviewing the record, the trial court's sentence is not contrary to law. We begin by noting that at the sentencing hearing, the trial court did not reference R.C. 2929.11 or R.C. 2929.12. However, and while a statement regarding the trial court's consideration of the statutory sentencing factors would have clarified the issue for Brandenburg, the record is obvious that the trial court made the proper considerations. Throughout the sentencing hearing, the trial court referenced information in the presentence investigation report, and also highlighted various aspects of Brandenburg's extensive criminal history and questioned Brandenburg's recidivism risks. The trial court also discussed facts of the case, specific to Brandenburg victimizing people at rest areas. These discussions by the trial court demonstrate that it had properly considered the purposes and principles of sentencing, as well as the seriousness and recidivism factors.

{¶ 10} Moreover, the trial court expressly stated in its entry that it had considered the

purposes and principles of sentencing according to R.C. 2929.11 as well as the seriousness and recidivism factors within R.C. 2929.12. See *State v. Ballard*, 12th Dist. Butler No. CA2014-09-197, 2015-Ohio-2084 (affirming a sentence where the trial court failed to cite R.C. 2929.11 or 2929.12 during the sentencing hearing but stated in its judgment entry of conviction that it had considered the principles and purposes of sentencing pursuant to R.C. 2929.11 and balanced the seriousness and recidivism factors pursuant to R.C. 2929.12); and *State v. Lancaster*, 12th Dist. Butler No. CA2007-03-075, 2008-Ohio-1665 (affirming a sentence where the trial court did not state at the sentencing hearing that the court considered R.C. 2929.11 or R.C. 2929.12 specifically, but stated its consideration of both statutes in its judgment entry of conviction). Based on the record, it is clear that the trial court gave the proper consideration to the purposes and principles of sentencing as well as the seriousness and recidivism factors as required by Ohio's sentencing statutes.

{¶ 11} Brandenburg was convicted of robbery in violation of R.C. 2911.02(A)(3), which is a third-degree felony. According to R.C. 2929.14(A)(3)(b), "for a felony of the third degree * * * the prison term shall be nine, twelve, eighteen, twenty-four, thirty, or thirty-six months." As such, Brandenburg's three-year sentence was within the sentencing range for a third-degree felony. Brandenburg was also convicted of attempted failure to appear in violation of R.C. 2937.29, a fifth-degree felony. According to R.C. 2929.14(A)(5), "for a felony of the fifth degree, the prison term shall be six, seven, eight, nine, ten, eleven, or twelve months." As such, Brandenburg's one-year sentence was also within the sentencing range for a fifth degree felony.

{¶ 12} After reviewing the record, we find that Brandenburg's sentence was not clearly and convincingly contrary to law where the trial court considered the purposes and principles of sentencing according to R.C. 2929.11, as well as the seriousness and recidivism factors

listed in R.C. 2929.12, and sentenced Brandenburg within the permissible statutory range.
Brandenburg's sentence was not contrary to law, and his assignment of error is overruled.

{¶ 13} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.

[Cite as *State v. Hill*, 2014-Ohio-1965.]

STATE OF OHIO, CARROLL COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 13 CA 892
PLAINTIFF-APPELLEE,)	
)	
VS.)	OPINION
)	
ANTHONY MICHAEL HILL,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 13CR5769.

JUDGMENT: Reversed and Remanded.

APPEARANCES:

For Plaintiff-Appellee:

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For Defendant-Appellant:

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: May 5, 2014

[Cite as *State v. Hill*, 2014-Ohio-1965.]
VUKOVICH, J.

{¶1} Defendant-appellant Anthony Michael Hill appeals from the decision of the Carroll County Common Pleas Court sentencing him to an aggregate sentence of six years for violations of R.C. 2907.322(A)(1) and (A)(5), pandering sexually oriented matter involving a minor, second and fourth degree felonies respectively, and ordering that sentence to be served consecutive to the sentence issued in Carroll County Case No. 12CR5603 (three year sentence for attempted rape). Two issues are raised in this case. The first is whether the trial court erred when it ordered more than the minimum sentences on the pandering sexually oriented matter convictions. The second issue is whether the trial court erred when it ordered the sentence in the case at hand to run consecutive.

{¶2} For the reasons expressed below, the trial court did not err in ordering more than the minimum sentence; the trial court appropriately considered and weighed the purposes and principles of sentencing stated in R.C. 2929.11 and the seriousness and recidivism factors set forth in R.C. 2929.12. However, as to the consecutive sentencing order, it is not clear that the trial court considered the appropriate consecutive sentencing factors at the sentencing hearing. Therefore, the sentence is reversed and the matter is remanded for resentencing.

Statement of the Case

{¶3} On March 13, 2013, the grand jury issued a 30 count indictment against Hill. Counts 1 through 15 were for pandering sexually oriented matter involving a minor in violation of R.C. 2907.322(A)(5), fourth-degree felonies. Counts 16 through 30 were for pandering sexually oriented matter involving a minor in violation of R.C. 2907.322(A)(1), second-degree felonies. The evidence of these crimes was discovered during the investigation of Carroll County Case No. 12CR5603 (Hill pled to attempted rape and was sentenced to three years). The pandering offenses predate the offense in 12CR5603. 07/30/13 Sentencing Tr. 49-50.

{¶4} Hill originally pled not guilty to the offenses. However, a plea agreement was reached between the parties; the state entered a nolle prosequi for counts 17 through 30 and Hill changed his plea to guilty for the remaining 16 counts.

{¶15} After a Crim.R. 11 colloquy, the trial court accepted the guilty plea and proceeded directly to sentencing. The state recommended a 12 month sentence on each of counts 1 through 15 to be served concurrently with each other and an 8 year sentence on count 16 to be served consecutively with counts 1 through 15. 07/30/13 Sentencing Tr. 8. Thus, the state was recommending an aggregate sentence of 9 years for the pandering convictions. The state further recommended that the 9 year sentence be served concurrent with Hill's current 3 year term of incarceration for Carroll County Case No. 12CR5603. 07/30/13 Sentencing Tr. 8. Hill argued for a lesser sentence than the one recommended by the state.

{¶16} The court did not follow the state's recommendation. Instead, it sentenced Hill to 12 months for each conviction on counts 1 through 15. Those sentences were ordered to be served concurrent with each other. On count 16, the trial court issued a 5 year sentence and ordered that sentence to be served consecutive to the aggregate 12 month sentence on counts 1 through 15. Therefore, the trial court issued an aggregate sentence of 6 years for the instant case. The trial court then ordered the 6 year sentence to run consecutive to the 3 year sentence he was already serving for attempted rape.

{¶17} Hill timely appeals from that decision.

Assignment of Error

{¶18} "The court misapplied sentencing laws in imposing more than minimum sentence and running them consecutive to previous case."

{¶19} We review felony sentences using both the clearly and convincingly contrary to law and abuse of discretion standards of review. *State v. Hill*, 7th Dist. No. 13MA1, 2014-Ohio-919, ¶ 20. We first determine whether the sentencing court complied with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. *State v. Gratz*, 7th Dist. No. 08MA101, 2009-Ohio-695, ¶ 8, citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 13-14. Then, if it is not clearly and convincingly contrary to law, we must determine whether the sentencing court abused its

discretion in applying the factors in R.C. 2929.11, R.C. 2929.12 and any other applicable statute. *Gratz* at ¶ 8, citing *Kalish* at ¶ 17.

{¶10} Two arguments are presented under the sole assignment of error. The first is that the trial court erred in not giving the minimum sentence allowable by law for these offenses. Hill specifically contends that the trial court abused its discretion in weighing the factors in R.C. 2929.11 and R.C. 2929.12. The second argument concerns the trial court's imposition of consecutive sentences. Each will be addressed in turn.

1. Non Minimum Sentences

{¶11} Hill was sentenced to 5 years on the second-degree felony pandering conviction. The sentencing range for a second-degree felony is two, three, four, five, six, seven, or eight years. R.C. 2929.14(A)(2). Thus, Hill received neither the maximum nor the minimum sentence for that conviction. Likewise, the sentence for each of the 15 convictions for fourth-degree felony pandering was neither the maximum or minimum sentence allowable by law. The sentencing range for those offenses are: six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen or eighteen months. Hill received a 12 month sentence for each of those convictions.

{¶12} In reaching the appropriate sentence, the trial court considered R.C. 2929.11, the principles and purposes of sentencing; and R.C. 2929.12, the seriousness and recidivism factors. 07/31/13 J.E.; 7/30/13 Sentencing Tr. 55-67. Hill acknowledges that the trial court considered these statutes, but asserts that the court improperly weighed the seriousness and recidivism factors and had they been weighed properly, he should have received the minimum sentence.

{¶13} The seriousness factors are set forth in R.C. 2929.12(B) and (C). Division (B) sets forth the factors that indicate that the offender's conduct is more serious than conduct normally constituting the offense. The trial court discussed all nine factors and concluded that none applied. 07/30/13 Sentencing Tr. 59-62. Section (C) sets forth the factors that indicate that the offender's conduct is less serious than conduct normally constituting the offense. The trial court considered all

four factors and determined that all were inapplicable. 07/30/13 Sentencing Tr. 62-63.

{¶14} The trial court then went on to discuss the recidivism factors found in R.C. 2929.12(D) and (E). Section (D) sets forth the factors indicating that the offender is likely to commit future crimes, while section (E) sets forth the factors indicating that the offender is less likely to commit future crimes. A criminal history, including adjudication as a delinquent and not responding favorably to previous sanctions imposed, are factors that demonstrate that recidivism is likely. R.C. 2929.12(D)(2), (3). Conversely, having no criminal history, including no juvenile record, and leading a law abiding life for a significant number of years, demonstrates that recidivism is unlikely. R.C. 2929.12(E)(1)-(3). The presentence investigation report showed that Hill had been adjudicated a delinquent child and has a criminal history. 07/30/13 Sentencing Tr. 64-66. Therefore, R.C. 2929.12(D)(2) and (3) were applicable, while R.C. 2929.12(E)(1)-(3) were not applicable. Thus, the trial court found that under those factors, recidivism was likely.

{¶15} However, those were not the only factors that indicated that recidivism was likely. The trial court also stated that the offense was committed under circumstances that were likely to reoccur. 07/30/13 Sentencing Tr. 66. This statement is an indication that division (E)(4), which states that the offense was committed under circumstances not likely to reoccur, was not applicable.

{¶16} Remorsefulness is also a consideration in determining whether recidivism is likely or unlikely. An offender who is remorseful is less likely to recommit, while an offender who is not remorseful is more likely to recommit. R.C. 2929.12(D)(5) (no genuine remorse); R.C. 2929.12(E)(5) (genuine remorse). The trial court neither found that Hill was remorseful or that he was unremorseful. 07/30/13 Sentencing Tr. 64-65, 66. Rather, the trial court stood neutral on the position of remorse:

[(D)](5) The offender shows genuine remorse of the offense.

I'll give you credit at this hearing, whether it's for show or otherwise, you have demonstrated that you're learning insights into your condition with regard to this and your other sexual offense.

And, hopefully – and I believe that you're showing insight. I don't know if you're remorseful, but I would think that those two things would go hand-in-hand. But I'm going to go neutral on number (5) because I don't know if what you've said is remorse or just insight. I'll give you some credit for it.

* * *

And says here [(E)(5)], the offender shows genuine remorse for the offense. I believe you mean to show remorse, but that's a judgment call. And I believe that I'm neutral on that finding.

07/30/13 Sentencing Tr. 64-65, 66.

{¶17} The trial court's analysis does show that it considered all relevant factors. Considering that the recidivism factors show that committing future crimes is likely, we hold that the trial court did not abuse its discretion when it ordered a nonminimum sentence. Therefore, Hill's argument regarding the nonminimum sentence is meritless.

2. Consecutive Sentences

{¶18} Next, Hill argues that the trial court erred when it ordered the sentence for the second-degree felony pandering conviction to run consecutive to the fourth-degree felony pandering convictions, and when it ordered that sentence to run consecutive to the sentence issued in Carroll County Case No. 12CR5603. He cites to R.C. 2929.41(A) for support for his position.

{¶19} That is the statute governing multiple sentences. It provides, in pertinent part:

(A) Except as provided in division (B) of this section, division (C) of section 2929.14, or division (D) or (E) of section 2971.03 of the Revised Code, a prison term, jail term, or sentence of imprisonment shall be served concurrently with any other prison term, jail term, or

sentence of imprisonment imposed by a court of this state, another state, or the United States.

R.C. 2929.41(A).

{¶20} This statute has three provisions for when ordering consecutive sentences is appropriate. R.C. 2929.41(B) deals with misdemeanor sentences, which is not applicable in this case. R.C. 2971.03(D) and (E) deals with life imprisonment sentences, which also is inapplicable in this case. R.C. 2929.14(C) is the new felony sentencing provision requiring a trial court to make certain findings before imposing consecutive sentences. Pre-*Foster*, appellate courts consistently stated that consecutive sentencing findings are required when the sentences are imposed in separate cases. *State v. Givens*, 8th Dist. No. 80319, 2002-Ohio-4904, at ¶ 8 (pre-*Foster* case discussing consecutive sentence findings under R.C. 2929.14(E)); *State v. Wallace*, 5th Dist. No. 03-CA-A-07-043, 2004-Ohio-1694, at ¶ 25 (same); *State v. Gillman*, 10th Dist. No. 01AP-662, 2001-Ohio-3968 (same). The wording of R.C. 2929.14(C) and R.C. 2929.41 indicates that that rule of law is still applicable. Thus, in order for the trial court to order the second-degree felony pandering and fourth-degree felony pandering sentences in the case at hand to be served consecutive to each other and consecutive to the sentence imposed in Carroll County Case No. 12CR5603, the trial court had to comply with R.C. 2929.14(C).

{¶21} That statute provides:

(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a

sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

R.C. 2929.14(C)(4).

{¶22} This consecutive sentencing statutory provision was part of House Bill 86 and became effective September 20, 2011. The legislation was enacted in response to the Supreme Court's statement that its *Foster* decision was incorrect in striking down statutory consecutive sentence provisions and that the legislature would need to enact a new statute to revive any requirement of findings for consecutive sentences. *State v. Hodge*, 128 Ohio St.3d 1, 2010–Ohio-6320, 941 N.E.2d 768, ¶ 3 of syllabus.

{¶23} At this point, it is pointed out that the crimes in this case occurred prior to the effective date of the statute; the indictment indicates that the crimes occurred in April and May 2011. Although not raised in this case, the state has argued to another appellate court that this provision is inapplicable to offenses committed before the effective date. Since application of the appropriate standard is imperative to determine whether the trial court erred when it issued consecutive sentences, we must determine if R.C. 2929.14(C), as amended by House Bill 86, is applicable to Hill. If it is not applicable, then the law as announced in *Foster* would control, i.e. the trial court would not be required to articulate any specific statutory findings before issuing multiple prison terms to be served consecutively.

{¶24} In other cases, the state has argued that R.C. 1.58 indicates that the consecutive sentencing findings required by House Bill 86 does not apply to offenses committed prior to the effective date of the bill. *State v. Wilson*, 10th Dist. No. 12AP-551, 2013-Ohio-1520, ¶ 14-18. The Tenth Appellate District has disagreed with such conclusion. *Id.* It explained that R.C. 1.58(A) provides that an amendment or reenactment of a statute does not apply to pending cases unless R.C. 1.58(B) applies. R.C. 1.58(B) provides that when a statutory penalty or punishment for an offense is reduced by a statutory reenactment or amendment, the reduced penalty or punishment shall apply if the penalty or punishment is not “already imposed.” *Id.* at ¶ 16. It explained that 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. *Id.* at ¶ 17. Therefore, it was concluded that the consecutive sentence findings required by House Bill 86 applied to all offenders who had not been sentenced prior to its effective date. *Id.*

{¶25} Furthermore, recently we have likewise concluded that the consecutive sentencing findings in R.C. 2929.14(C)(4) are applicable even though the crimes were committed prior to the effective date of the statute. *State v. Stout*, 7th Dist. No. 13MA30, 2014-Ohio-1094, ¶ 17. Therefore, R.C. 2929.14(C) is applicable to Hill.

{¶26} This leads us to whether the trial court made the required findings. This court and our sister courts have explained that under R.C. 2929.14(C)(4), the trial court is once again required to make consecutive sentencing findings. *State v. Power*, 7th Dist. No. 12CO14, 2013-Ohio-4254, ¶ 38. However, unlike the pre-*Foster* consecutive sentencing requirements, R.C. 2929.14(C) does not require the court to provide reasons on the record for those findings. *Id.*, citing *State v. Galindo-Barjas*, 7th Dist. No. 12MA37, 2013-Ohio-431, ¶ 16-17, 19; *State v. Wilson*, 2d Dist. No. 24978, 2012-Ohio-4756, ¶ 18 (court need not specifically identify the factual bases for its findings); *State v. Frasca*, 11th Dist. No. 2011-T-0108, 2012-Ohio-3746, ¶ 57 (reasons were required by former R.C. 2929.19(B)(2), which was not reenacted).

{¶27} Furthermore, we have explained that the sentencing court should, but need not, use the exact statutory language to make the findings required by statute.

Id. at ¶ 40, citing *State v. Verity*, 7th Dist. No. 12MA139, 2013–Ohio–1158, ¶ 28–29; *State v. Thompson*, 7th Dist. No. 05JE16, 2005–Ohio–6792, ¶ 58. That is, the trial court is not required to recite any “magic” or talismanic” words when imposing consecutive sentences, as long as it is “clear from the record that the trial court engaged in the appropriate analysis.” *State v. McKenzie*, 3d Dist. No. 15–12–07, 2012–Ohio–6117, ¶ 10; *State v. Nowlin*, 5th Dist. No. CT2012–0015, 2012–Ohio–4923, ¶ 70; *State v. Davis*, 8th Dist. Nos. 97689, 97691, 97692, 2012–Ohio–3951, ¶ 8.

{¶28} We now turn to the determination of whether the trial court “engaged in the appropriate analysis.” In the sentencing judgment entry, the trial court specifically lays out R.C. 2929.14(C)(4) and makes all of the required findings. It found that “a consecutive sentence is necessary to protect the public from future crime and to punish the defendant and that consecutive sentences are not disproportionate to the seriousness of the defendant’s conduct and to the danger the defendant poses to the public.” 07/31/13 J.E. This is the requirement in R.C. 2929.14(C)(4). The trial court also found that “defendant’s history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the defendant.” 07/31/13 J.E. This met the requirement in R.C. 2929.14(C)(4)(c).

{¶29} Despite the trial court’s concise findings in the sentencing entry, the sentencing transcript does not evince that the trial court engaged in the appropriate analysis for issuing consecutive sentences.

{¶30} As discussed above, the trial court discusses, in depth, all of the provisions of R.C. 2929.11 and 2929.12 in determining the appropriate sentence. Following that discussion directly before imposition of the sentence, the trial court made the following statement:

Now, having reviewed those two statutes on the record and going through the factors, speaking to each of those factors, it is the Court’s intention to follow, to the best of the Court’s ability the law in this area and view this as objectively as possible rather than subjectively or emotionally or personally with you.

This Court finds it has to protect the public from future crime by you in this area of sexual offense. And the Court believes it needs to invoke a punishment for the offenses that you have committed. But the Court does understand that it can use minimum sanctions to accomplish those goals. But it cannot do that to the degree that it demeans the seriousness of your conduct.

07/20/13 Sentencing Tr. 66-67.

{¶31} The above statement does not indicate that the trial court **only** considered R.C. 2929.11 and R.C. 2929.12 when issuing the sentence. However, in reviewing the entire transcript, it is devoid of any clear reference to R.C. 2929.14(C)(4) or its factors. While it is possible to envision a situation where we could glean the factors from a sentencing hearing transcript even when there is no reference to R.C. 2929.14(C)(4) made during the sentencing hearing, this is not one of those situations. Given the trial courts in-depth discussion and reference to the multiple factors in R.C. 2929.11 and 2929.12 in determining the appropriate length of the sentences, and the fact that there is no discussion or mention of R.C. 2929.14(C)(4) or its factors, we must conclude that the trial court did not engage in the appropriate analysis prior to issuing a consecutive sentence. Thus, the trial court did not comply with the mandates of R.C. 2929.14(C) by making the consecutive sentencing findings solely in the sentencing judgment entry.

{¶32} That conclusion is supported by a decision from our sister district that found that the consecutive sentence findings are required to be made at the sentencing hearing. *State v. Brooks*, 9th Dist. No. 26437, 2013-Ohio-2169, ¶¶ 12-13. In reaching that decision, it considered both R.C. 2929.14(C) and Crim.R. 32(A)(4), which states that at the time of imposing sentence, the court shall state its statutory findings and, if appropriate, give reasons supporting those findings. The *Brooks* court reasoned:

We agree with our colleagues' sentiments. In an environment of prison overcrowding, funding limitations, and remedial alternatives to prison, the reenactment of R.C. 2929.14(C)(4) evidences the General

Assembly's intent that trial courts carefully consider certain factors and make certain findings prior to making the decision to impose consecutive sentences. See Ohio Legislative Service Commission, *Fiscal Note and Local Impact Statement*, <http://www.lsc.state.oh.us/fiscal/fiscalnotes/129ga/hb0086en.pdf> (accessed Mar. 13, 2013) (noting that the changes made by the new legislation, including the reenactment of some of the provisions struck by *Foster*, "are generally designed to reduce the size of the state's prison population and related institutional operating expenses[.]"). The fact that trial courts do not have to explain their reasoning behind their findings does not negate the fact that the trial courts still must make the findings. See R.C. 2929.14(C)(4). In light of the foregoing, this Court concludes that such findings must be made at the sentencing hearing on the record. See also Crim.R. 32(A)(4) ("At the time of imposing sentence, the court shall[] * * * [i]n serious offenses, state its statutory findings and give reasons supporting those findings, if appropriate."). Ideally, those findings would also then be memorialized in the sentencing entry.

State v. Brooks, 9th Dist. No. 26437, 2013-Ohio-2169, ¶ 12-13.

{¶33} Considering the language of Crim.R. 32(A)(4), we find that this reasoning is sound and adopt it as our own to a limited extent. Previously, we have considered both the sentencing entry and the transcript of the sentencing hearing to determine whether the findings under R.C. 2929.14(C) were made. *Verity*, 7th Dist. No. 12MA139, 2013-Ohio-1158, ¶ 34-35; *Power*, 7th Dist. No. 12CO14, 2013-Ohio-4254, ¶ 42-43. We find that considering both is permissible. However, in situations like the one before us where the sentencing transcript is devoid of any indication that the consecutive sentencing factors articulated in R.C. 2929.14(C) were considered, the case must be remanded for resentencing. The failure to consider the mandated consecutive sentencing findings cannot be cured by a journal entry that uses boilerplate language from the statute. Therefore, on that basis, we reversed and

remanded the matter for resentencing, at which the trial court should consider R.C. 2929.14(C) and determine which, if any, of those factors are applicable.

Conclusion

{¶34} The imposition of nonminimum sentences was not an abuse of discretion. However, given the record, it is unclear to this court whether the trial court considered the consecutive sentencing factors when issuing the sentence. Thus, the matter is reversed and remanded for resentencing.

Waite, J., concurs.

DeGenaro, P.J., concurs.

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 27197

Appellee

v.

AARON J. SIMMONS

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE Nos. CR 13 07 1991
 CR 13 08 2208

Appellant

DECISION AND JOURNAL ENTRY

Dated: September 24, 2014

MOORE, Judge.

{¶1} Defendant-Appellant, Aaron J. Simmons, appeals from the December 12, 2013 judgment entries of the Summit County Court of Common Pleas. We affirm.

I.

{¶2} This matter arises from two separate incidents involving the same three individuals: Mr. Simmons, Ms. Kayla Hale, and Mr. Daryle Dean. The first incident occurred at the Circle K gas station when Mr. Dean approached his estranged wife, Ms. Hale, as she was pumping gas.¹ Mr. Dean grabbed Ms. Hale's arm and began questioning her about Mr. Simmons. While this was happening, Mr. Simmons was seated in the passenger's seat of Ms. Hale's car, and Ms. Hale's two young children were in the back seat. Mr. Simmons got out of the car and began arguing with Mr. Dean, and Ms. Hale asked Mr. Simmons to drive her children

¹ Ms. Hale and Mr. Dean had a child together and she had a protection order against Mr. Dean at this time.

to a nearby parking lot. Mr. Simmons complied and when the police arrived, Mr. Dean stated that Mr. Simmons threatened him with a gun. The police searched Mr. Simmons' person, but did not find a weapon. Mr. Dean then told the police that the gun was in Ms. Hale's car, and during a second search, they discovered a black and silver Taurus .45 caliber semiautomatic pistol.

{¶3} The second incident occurred several weeks later, when Mr. Simmons and Ms. Hale allegedly drove past Mr. Dean's house, pointed a gun at him, and threatened him, saying: "[i]t ain't over with yet[.]"

{¶4} In Case No. CR 13 07 1991, Mr. Simmons was indicted for having weapons while under disability, in violation of R.C. 2923.13(A)(3), a felony of the third degree; carrying concealed weapons, in violation of R.C. 2923.12(A)(2), a felony of the fourth degree; and aggravated menacing, in violation of R.C. 2903.21, a misdemeanor of the first degree. In Case No. CR 13 08 2208, Mr. Simmons was indicted for intimidation of a crime victim or witness, in violation of R.C. 2921.04(B), a felony of the third degree, with a firearm specification pursuant to R.C. 2941.145; possession of cocaine, in violation of R.C. 2925.11(A)(C)(4), a felony of the fifth degree; violating a protection order, in violation of R.C. 2919.27, a misdemeanor of the first degree; aggravated menacing, in violation of R.C. 2903.21, a misdemeanor of the first degree; and possession of marijuana, in violation of R.C. 2925.11(A)(C)(3), a minor misdemeanor.

{¶5} Mr. Simmons pleaded not guilty to all charges and filed a motion to suppress. After a hearing, the trial court denied Mr. Simmons' motion, and these matters proceeded to jury trial. The jury resolved Case No. CR 13 07 1991 by finding Mr. Simmons guilty of (1) having weapons while under disability, (2) carrying concealed weapons, and (3) aggravated menacing. Additionally, in Case No. CR 13 08 2208, the trial court dismissed the charge of possession of cocaine, and the jury found Mr. Simmons not guilty of (1) intimidation of a crime victim or

witness, with a firearm specification, (2) violating a protection order, and (3) aggravated menacing. The jury, however, did find Mr. Simmons guilty of possession of marijuana.

{¶6} The trial court sentenced Mr. Simmons to 30 months' imprisonment for having weapons while under disability, which, pursuant to *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, merged with the charge of carrying concealed weapons, and six months in the Summit County Jail for aggravated menacing, to run concurrently with one another. The trial court also ordered Mr. Simmons to pay a fine of \$150 for possession of marijuana, suspended his driver's license for six months, and further ordered him to have no contact with Mr. Dean.

{¶7} Mr. Simmons appealed, raising five assignments of error for our consideration. To facilitate our discussion, we will address Mr. Simmons' assignments of error out of order.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED BY DENYING [MR. SIMMONS'] MOTION TO SUPPRESS.

{¶8} In his first assignment of error, Mr. Simmons argues that the trial court erred in denying his motion to suppress. Specifically, Mr. Simmons argues that Ms. Hale "never gave specific consent to the Akron Police to search her vehicle." The State responds by arguing that Mr. Simmons did not have standing to contest the search of Ms. Hale's vehicle because he does not own it, nor did he present any evidence at the suppression hearing of an expectation of privacy in the vehicle.

{¶9} In *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8, the Supreme Court of Ohio set forth the appellate standard of review on motions to suppress, stating:

Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of

trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. (Citations omitted.)

{¶10} “The Fourth Amendment to the United States Constitution and Article I, Section 14, of the Ohio Constitution prohibit the police from conducting unreasonable and warrantless searches and seizures.” *State v. White*, 9th Dist. Lorain No. 11CA010005, 2011-Ohio-6748, ¶ 6. “However, ‘Fourth Amendment rights are personal in nature and may not be vicariously asserted by others.’” (Citations omitted.) *White* at ¶ 6, quoting *State v. Dennis*, 79 Ohio St.3d 421, 426 (1997). Therefore, “suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself[.]” *Alderman v. United States*, 394 U.S. 165, 171–72 (1969).

{¶11} “Both drivers and passengers in a vehicle may challenge the validity of a traffic stop.” *White* at ¶ 7, citing *State v. Carter*, 69 Ohio St.3d 57, 63 (1994). “This is because, ‘when the vehicle is stopped, they are equally seized, and their freedom of movement is equally affected.’” *Id.* “However, ‘[t]he question of whether a person may challenge the search of a vehicle in which they have placed an item of property is a distinct inquiry.’” *White* at ¶ 7, quoting *State v. Redding*, 9th Dist. Medina No. 10CA0018-M, 2010-Ohio-4286, ¶ 9; *see also Brendlin v. California*, 551 U.S. 249, 256-58 (2007). “Thus, the passenger of a car which was validly stopped must establish a legitimate expectation of privacy in the vehicle in order to contest its search.” *White* at ¶ 7; citing *Rakas v. Illinois*, 439 U.S. 128, 148 (1978) (“[Defendants] made no showing that they had any legitimate expectation of privacy in the glove compartment or area under the seat of the car in which they were merely passengers.”); *see also State v. McCoy*, 9th Dist. Lorain No. 08CA009329, 2008-Ohio-4947, ¶ 6 (the defendant bears

the burden of establishing a legitimate expectation of privacy). This legitimate expectation of privacy may be established by the defendant's testimony or otherwise be established by the evidence at the suppression hearing. *See Simmons v. United States*, 390 U.S. 377, 390 (1968).

{¶12} In the present matter, it is undisputed that Ms. Hale owned the vehicle in question, and that Mr. Simmons only challenged the *search* of the vehicle. As such, Mr. Simmons had to point to evidence that demonstrated his legitimate expectation of privacy in Ms. Hale's vehicle. *See White* at ¶ 10 (observing that "no facts indicate that the gun was found within a container in which [Mr.] White would have a reasonable expectation of privacy."). At the suppression hearing, Akron Police Officers Edward Patalon and Dean Prosperi testified that Ms. Hale twice gave them permission to search her vehicle for Mr. Simmons' alleged gun. Officer Prosperi further testified that, during the second search of the vehicle, he found a loaded black and silver Taurus .45 caliber semiautomatic pistol underneath the carpeted area by the plastic console.

{¶13} In order to effectively argue that the search of Ms. Hale's vehicle violated his Fourth Amendment rights, Mr. Simmons "was required to show that his expectation of privacy was one that 'society is prepared to consider reasonable[.]'" *White* at ¶ 11, citing *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). "This required [Mr. Simmons] to do more than to show a 'subjective expectation of not being discovered,'" through his placement of the gun under the carpeted area of the vehicle. *White* at ¶ 11, citing *Rakas*, 439 U.S. at 143 fn. 12; *see also State v. Earley*, 9th Dist. Wayne No. 99CA0059, 2000 WL 840506, *4 (June 28, 2000), (concluding that a defendant passenger did not have standing to contest the validity of the search of a vehicle when he failed to show that he had a legitimate expectation of privacy in the vehicle's console). However, the officers' testimony does not support the conclusion that Mr. Simmons had a legitimate expectation of privacy in Ms. Hale's vehicle, nor did Mr. Simmons testify or present

any evidence to support that conclusion. Therefore, because the suppression record before us does not establish that Mr. Simmons had a legitimate expectation of privacy in Ms. Hale's vehicle, we cannot say that his Fourth Amendment rights were violated in this instance.

{¶14} Accordingly, Mr. Simmons' first assignment of error is overruled.

ASSIGNMENT OF ERROR II

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A FINDING OF GUILT FOR HAVING WEAPON[S] WHILE UNDER DISABILITY, CARRYING CONCEALED WEAPON[S], AND AGGRAVATED MENACING.

ASSIGNMENT OF ERROR IV

THE TRIAL COURT ERRED BY NOT GRANTING DEFENSE COUNSEL'S CRIMINAL RULE 29 MOTION.

{¶15} In his second and fourth assignments of error, Mr. Simmons argues that there is insufficient evidence to support his convictions for having weapons while under disability, carrying concealed weapons, and aggravated menacing. As such, Mr. Simmons also argues that the trial court erred in denying his Crim.R. 29 motion for acquittal.

{¶16} In determining whether a conviction is supported by sufficient evidence:

An 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. 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. *See also State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). "In essence, sufficiency is a test of adequacy." *Id.*

{¶17} Further, Crim.R. 29(A) provides, in relevant part, that:

The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The

court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

Having weapons while under disability

{¶18} R.C. 2923.13 states, in relevant part, that:

(A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, 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.

{¶19} As stated above, Officer Prosperi discovered a black and silver Taurus .45 caliber semiautomatic pistol in Ms. Hale's vehicle. On direct examination, Mr. Dean testified that Mr. Simmons threatened him with this gun at the Circle K gas station. Additionally, Officer Patalon testified that, after completing his initial investigation, he ran a criminal case history on Mr. Simmons "which brings up the prior convictions of a particular person which may exclude him from possessing a firearm." Officer Patalon indicated that he conducted this search by using the birthdate and social security number provided to him by Mr. Simmons. As a result, Officer Patalon discovered that Mr. Simmons had previously been convicted of trafficking in marijuana, a fourth degree felony. *See State v. Ward*, 9th Dist. Lorain No. 09CA009720, 2011-Ohio-518, ¶ 18 (Pursuant to R.C. 2923.13(A)(3), marijuana is a "drug of abuse."). Further, the State introduced evidence of a certified copy of Mr. Simmons' September 29, 1995 Hamilton County sentencing entry for trafficking in marijuana.

{¶20} In viewing this evidence in a light most favorable to the prosecution, we conclude that a rational jury could have found the essential elements of having weapons while under disability proven beyond a reasonable doubt.

Carrying concealed weapons

{¶21} Pursuant to R.C. 2923.12: “(A) No person shall knowingly carry or have, concealed on the person’s person or concealed ready at hand, any of the following: * * * (2) a handgun other than a dangerous ordnance[.]”

{¶22} On direct examination, Mr. Dean testified as follows:

[The State]: So [] Mr. Simmons asks who you are and you say [Ms. Hale’s] husband?

[Mr. Dean]: Uh-huh.

[The State]: What happens next?

[Mr. Dean]: [Mr. Simmons] reached in his – somewhere in his front pants, or whatever that is, and brandished a silver handgun, and he cocked it. And I know when he cocked it he had loaded the chamber, you know. And when he did that I just looked at him like, okay, you got your gun. You pulled out your gun on me, you know what I’m saying? Now what?

Because my focus was on my wife because I immediately grabbed her and pushed her towards the gas station because I didn’t know what he was going to do with this gun.

And once I got her up towards the gas station area that’s when I began to question her, like: Who is this guy that’s pulling this gun out on me.

* * *

So [while] we were, you know, basically in a confrontation about who this guy is, by that time he had jumped in the car with my daughter and stepson in the car and he pulled off.

Well, that’s when me and [Ms. Hale], we both started running toward the car. By that time he had parked on the other side of the gas station over by this little deli and got out of the car and he started coming towards us.

And by the time we got, not even five feet, ten feet from one another, the police pulled up and they told him to get down on the ground. And when they came I immediately told them, you know: He's got a gun, you know.

And they searched the car. They initially searched it and they kept looking and they said they didn't see a gun. And I'm telling them there is a gun in that car, you know. And * * * everybody was asking me why I didn't leave, you know. I wasn't about to leave, not with my daughter in the back seat of that car. So I kept pressing the issue, like: There is a gun in that car.

And they searched it, I think, a second time and that's when they found the gun.

* * *

Additionally, Officer Patalon testified that when he arrived at the scene, Mr. Dean was "very agitated and very adamant over and over again that Mr. Simmons threatened him with a gun."

Mr. Dean also identified State's Exhibit 2 at trial as the gun Mr. Simmons "pulled" on him.

{¶23} In viewing this evidence in a light most favorable to the prosecution, we conclude that a rational jury could have found the essential elements of carrying concealed weapons proven beyond a reasonable doubt.

Aggravated menacing

{¶24} R.C. 2903.21 states, in relevant part, that: "[n]o person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family."

{¶25} As indicated above, the State presented evidence that Mr. Simmons threatened Mr. Dean with a black and silver Taurus .45 caliber semiautomatic pistol, and then drove away in Ms. Hale's vehicle with Mr. Dean's daughter in the back seat. Further, Mr. Dean testified that Mr. Simmons cocked the gun, and that he was "scared" for his daughter's safety, causing him to run after the car.

{¶26} In viewing this evidence in a light most favorable to the prosecution, we conclude that a rational jury could have found the essential elements of aggravated menacing proven beyond a reasonable doubt.

{¶27} Therefore, based upon the foregoing, the State presented sufficient evidence to support Mr. Simmons' convictions for having weapons while under disability, carrying concealed weapons, and aggravated menacing. The trial court did not err in denying Mr. Simmons' Crim.R. 29 motion.

{¶28} Accordingly, Mr. Simmons' second and fourth assignments of error are overruled.

ASSIGNMENT OF ERROR III

THE VERDICT OF GUILTY FOR HAVING WEAPON[S] WHILE UNDER DISABILITY, CARRYING CONCEALED WEAPON[S], AND AGGRAVATED MENACING WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶29} In his third assignment of error, Mr. Simmons asserts that his convictions for having weapons while under disability, carrying concealed weapons, and aggravated menacing are against the manifest weight of the evidence. However, Mr. Simmons only specifically develops a weight of the evidence argument regarding his conviction for having weapons while under disability. We limit our discussion accordingly.

{¶30} When a defendant asserts that his conviction is against the manifest weight of the evidence:

an appellate court must 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. Otten, 33 Ohio App.3d 339, 340 (9th Dist.1986).

{¶31} In making this determination, this Court is mindful that “[e]valuating evidence and assessing credibility are primarily for the trier of fact.” *State v. Shue*, 97 Ohio App.3d 459, 466 (9th Dist.1994), citing *Ostendorf-Morris Co. v. Slyman*, 6 Ohio App.3d 46, 47 (8th Dist.1982) and *Crull v. Maple Park Body Shop*, 36 Ohio App.3d 153, 154 (12th Dist.1987).

{¶32} Here, Mr. Simmons argues that the testimony of Officer Dean Reed “clearly refutes” Officer Patalon’s testimony that Mr. Simmons “could be connected to the 1995 conviction in Hamilton County using the LEADS computer.”

{¶33} As previously stated, Officer Patalon testified that he used Mr. Simmons’ birthdate and social security number to run a criminal case history report in order to find any prior convictions which may exclude Mr. Simmons from possessing a firearm. In doing so, Officer Patalon discovered that Mr. Simmons had a 1995 conviction for trafficking in marijuana, which would prevent him from possessing a firearm. Officer Patalon explained that he requested a copy of the criminal case history from *the office where LEADS is located* and Mr. Simmons’ unique identifiers, (name, birthdate and social security number), matched up with the 1995 conviction.

{¶34} Officer Reed testified that, on a subsequent occasion, he ran Mr. Simmons’ social security number through LEADS in the police cruiser, and found that Mr. Simmons had a felony warrant. When asked whether LEADS shows “any prior criminal history,” Officer Reed responded, “[i]n our computers it doesn’t show any previous charges, no.”

{¶35} We note that Officer Patalon did not testify that he *got* Mr. Simmons’ criminal case history through LEADS, but that he *requested* it from the office where LEADS is located. Additionally, even if Officers Patalon and Reed testified differently about LEADS’ functionality, the jury was free to believe the testimony of Officer Patalon over that of Officer Reed. *See State*

v. *Howard*, 9th Dist. Lorain No. 13CA010372, 2014-Ohio-3373, ¶ 57; *Prince v. Jordan*, 9th Dist. Lorain No. 04CA008423, 2004-Ohio-7184, ¶ 35 (“[I]n reaching its verdict, the jury is free to believe all, part, or none of the testimony of each witness.”).

{¶36} Therefore, after review of the record, we cannot conclude that this is the exceptional case where the jury clearly lost its way and created a manifest miscarriage of justice. See *Otten*, 33 Ohio App.3d at 340.

{¶37} Accordingly, Mr. Simmons’ third assignment of error is overruled.

ASSIGNMENT OF ERROR V

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY SENTENCING [MR. SIMMONS] TO THIRTY MONTHS IN PRISON.

{¶38} In his fifth assignment of error, Mr. Simmons argues that, in sentencing him to 30 months of imprisonment, the trial court failed to comply with the sentencing guidelines set forth in R.C. 2929.11.

{¶39} This Court reviews sentences pursuant to the two-step approach set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912.

First, [we] must examine the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court’s decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard.

Id. at ¶ 26. Further, in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, paragraph seven of the syllabus, the Supreme Court of Ohio held that “[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum * * * sentences.”

[N]evertheless, in exercising its discretion, the [trial] court must carefully consider the statutes that apply to every felony case. Those include R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12, which provides

guidance in considering factors relating to the seriousness of the offense and recidivism of the offender.

State v. Mathis, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38. “An abuse of discretion implies that the court’s decision is arbitrary, unreasonable, or unconscionable.” *Smith v. Smith*, 9th Dist. Summit No. 26013, 2012-Ohio-1716, ¶ 8, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶40} R.C. 2929.11 sets forth Ohio’s guidelines for felony sentencing as follows:

(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender’s conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

(C) A court that imposes a sentence upon an offender for a felony shall not base the sentence upon the race, ethnic background, gender, or religion of the offender.

{¶41} In the present matter, the trial court sentenced Mr. Simmons to 30 months’ imprisonment, which falls within the statutory range of 36 months for third degree felonies of this nature. *See* R.C. 2929.14(A)(3)(b). The record reflects that the trial court had before it information from which it could make the required inquiry pursuant to R.C. 2929.11. Additionally, to the extent Mr. Simmons argues, pursuant to R.C. 2929.11(B), that he and Mr. Dean received inconsistent sentences for similar crimes, the record before us does not support this contention. As such, Mr. Simmons’ sentence is not contrary to law.

{¶42} Further, based upon Mr. Simmons' criminal record dating back to 1992², the higher likelihood of recidivism as noted in the PSI report, the State's and probation department's recommendation that Mr. Simmons be sentenced to the Ohio Department of Rehabilitation and Corrections, Mr. Dean's victim impact statement, the trial court's concern that Mr. Simmons had a loaded .45 semiautomatic pistol in a vehicle with two minor children, the fact that the trial court did not sentence Mr. Simmons to the maximum time allowed by statute, and the trial court's statement that it considered all "relevant sentencing factors and the Revised Code," we cannot conclude that the trial court's sentence of 30 months' imprisonment was arbitrary, unreasonable, or unconscionable.

{¶43} Therefore, the trial court did not abuse its discretion in sentencing Mr. Simmons to 30 months' imprisonment for having weapons while under disability.

{¶44} Accordingly, Mr. Simmons' fifth assignment of error is overruled.

III.

{¶45} In overruling Mr. Simmons' five assignments of error, the judgments of the Summit County Court of Common Pleas are affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

² The trial court ordered a pre-sentence investigation ("PSI") report which was supplemented into the record on appeal and reviewed by this Court.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

BELFANCE, P. J.
CARR, J.
CONCUR

APPEARANCES:

JAMES W. ARMSTRONG, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.