

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO  
Appellee

On Appeal from the  
Summit County Court of Appeals  
Ninth Appellate District

Vs.

LARRY McGOWAN  
Appellant

Court of Appeals  
Case No.: CA-27092

15-1596

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NOTICE OF CERTIFIED CONFLICT, S. CT. R. IV  
BY APPELLANT, LARRY McGOWAN

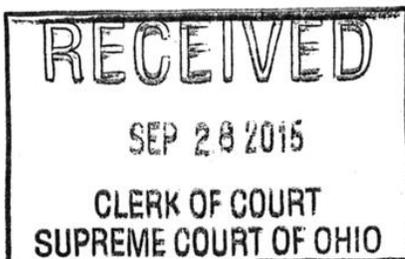
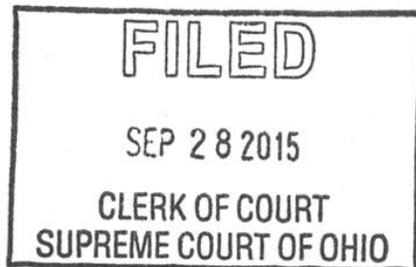
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**Notice of Certified Conflict by Appellant, Larry McGowan**

Appellant, Larry McGowan, hereby gives notice, pursuant to S.Ct. R. IV, §(B)(4), of a certified conflict to the Supreme Court of Ohio from the judgment of the Summit County Court of Appeals, Ninth Appellate District. The September 2, 2015 Journal Entry certifying the conflict is attached hereto and incorporated herein as Exhibit 1. The Ninth District Court's opinion in *State v. McGowan*, 9<sup>th</sup> Dist. No. 27092, 2015-Ohio-1804 decided May 13, 2015 is attached hereto and incorporated herein as Exhibit 2. The conflict exists with the following cases.

**First District**

*State v. Mack*, 1<sup>st</sup> Dist. No. C-140054, 2015-Ohio-1430, ¶14 (Appendix 2).

**Second District**

*State v. English*, 2<sup>nd</sup> Dist. No. 26337, 2015-Ohio-1665, ¶20 (Appendix 3).

**Third District**

*State v. Fletcher*, 3<sup>rd</sup> Dist. No. 2-13-02, 2013-Ohio-3076, ¶14 (Appendix 4).

**Fourth District**

*State v. Pettiford*, 4<sup>th</sup> Dist. No. 14CA3444, 2015-Ohio-1723, ¶11 (Appendix 5).

**Sixth District**

*State v. Schnitker*, 6<sup>th</sup> Dist. No. S-14-039, 2015-Ohio-1685, ¶15 (Appendix 6).

**Seventh District**

*State v. Wellington*, 7<sup>th</sup> Dist. No. 14MA115, 2015-Ohio-1359, ¶13 (Appendix 7).

**Eighth District**

*State v. Orr*, 8<sup>th</sup> Dist. No. 101582, 2015-Ohio-1738, ¶10 (Appendix 8).

**Tenth District**

*State v. Milhoan*, 10<sup>th</sup> Dist. No. 13AP-74, 2014-Ohio-310, ¶15 (Appendix 9).

**Eleventh District**

*State v. Locke*, 11<sup>th</sup> Dist. No. 2014-L-053, 2015-Ohio-1067, ¶80 (Appendix 10).

**Twelfth District**

*State v. Conn*, 12<sup>th</sup> Dist. No. CA2014-04-059, 2015-Ohio-1766, ¶21 (Appendix 11).

The above cases are attached hereto and incorporated herein as Exhibits 3 through 12 respectively.

Pursuant to Article IV, §3(B)(4) of the Ohio Constitution the Ninth Appellate District certified a conflict as to the following issues:

**In an appellate court's review of a felony sentence, should it apply the abuse of discretion standard articulated in *State v. Kalish*, 120 Ohio St. 3d 23, 2008-Ohio-4912, 896 N.E.2d 124, or should it apply the standard of review as set forth in R.C. 2953.08(G)(2)?**

In their September 2, 2015 order certifying the conflict the Ninth Appellate District referenced that the Supreme Court of Ohio had "taken this issue under consideration pursuant to a certified conflict in consolidated cases captioned *State v. Marcum*, Nos. 2014-1825 and 2014-2122.

Wherefore Appellant respectfully requests this Court determine that a conflict exists, and order briefing in this matter to resolve said conflict.

Respectfully submitted,

LEIPPLY & ARMSTRONG

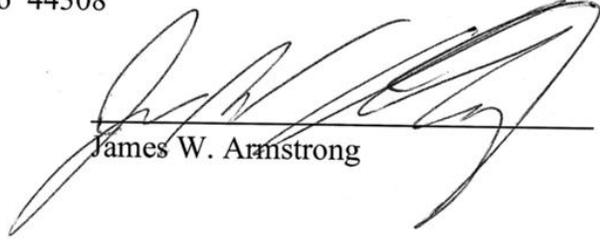


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**CERTIFICATE OF SERVICE**

This is to certify that a true copy of the foregoing Motion to Certify a Conflict was served via regular U.S. Mail this 25<sup>th</sup> day of September, 2015 to Richard S. Kasay, Esq., Assistant Prosecuting Attorney, 53 University Avenue, Akron, Ohio 44308



James W. Armstrong

COURT OF APPEALS  
SUMMIT COUNTY

STATE OF OHIO

) 2015 SEP -2 AM 10:23  
)ss:

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

COUNTY OF SUMMIT )

SUMMIT COUNTY  
CLERK OF COURT

State of Ohio,

C.A. No. 27092

Appellee,

v.

Larry McGowan,

JOURNAL ENTRY

Appellant.

This journal entry certifies a conflict between the judgment in this case, and the judgments of other appellate districts. We originally certified the same conflict by journal entry dated June 19, 2015. However, that journal entry was not served on the parties. Consequently, Appellant filed a motion to reissue the June 19, 2015 journal entry, averring that the failure of service caused him to miss the deadline to file in the Supreme Court of Ohio. The Supreme Court has held that the right to an appeal is a property interest subject to the requirements of due process, and must include a reasonable opportunity to file a timely appeal. *Rothman v. Rothman*, 124 Ohio St.3d 109, 2009-Ohio-6410, ¶ 4, 6. Because the failure to serve Appellant with the June 19, 2015 journal entry deprived him of his opportunity to file a timely appeal, we again certify the conflict. In so doing, we use language and reasoning identical to that in the June 19, 2015 journal entry.

Appellee has moved, pursuant to App.R. 25, to certify a conflict between the judgment in this case, which was journalized on May 13, 2015, and the judgments of the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Tenth, Eleventh, and Twelfth District Courts of Appeals in the following cases:

- (1) *State v. Mack*, 1st Dist. Hamilton No. C-140054, 2015-Ohio-1430;

EXHIBIT

- (2) *State v. English*, 2d Dist. Montgomery No. 26337, 2015-Ohio-1665;
- (3) *State v. Fletcher*, 3d Dist. Auglaize No. 2-13-02, 2013-Ohio-3076;
- (4) *State v. Pettiford*, 4th Dist. Ross No. 14CA3444, 2015-Ohio1723;
- (5) *State v. Schnitker*, 6th Dist. Sandusky No. S-14-039, 2015-Ohio-1685;
- (6) *State v. Wellington*, 7th Dist. Mahoning No. 14MA115, 2015-Ohio-1359;
- (7) *State v. Orr*, 8th Dist. Cuyahoga No. 101582, 2015-Ohio-1738;
- (8) *State v. Milhoan*, 10th Dist. Franklin No. 13AP-74, 2014-Ohio-310;
- (9) *State v. Locke*, 11th Dist. Lake No. 2014-L-053, 2015-Ohio-1067, ¶ 80; and
- (10) *State v. Conn*, 12th Dist. Warren Nos. CA2014-04-059; CA2014-04-061, CA2014-060084, 2015-Ohio-1766.

Appellees have not responded to the motion.

Article IV, Section 3(B)(4) of the Ohio Constitution requires this Court to certify the record of the case to the Ohio Supreme Court whenever the “judgment \*\*\* is in conflict with the judgment pronounced upon the same question by any other court of appeals in the state[.]” “[T]he alleged conflict must be on a rule of law – not facts.” *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St. 3d 594, 596 (1993).

Appellant has proposed that a conflict exists between this district and the above-named districts on the following issue:

In an appellate court’s review of a felony sentence, should it apply the abuse of discretion standard articulated in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d

124, or should it apply the standard of review as set forth in in  
[sic] R.C. 2953.08(G)(2)?

We find that a conflict of law exists. Indeed, the Supreme Court of Ohio apparently has taken this issue under consideration pursuant to a certified conflict in consolidated cases captioned *State v. Marcum*, Nos. 2014-1825 and 2014-2122. Therefore, the motion to certify is granted.



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Judge Beth Whitmore

Concur:  
Hensal, J.  
Moore, J.

2015-Ohio-1804

STATE OF OHIO Appellee

v.

LARRY MCGOWAN Appellant

C. A. No. 27092

Court of Appeals of Ohio, Ninth District, Summit

May 13, 2015

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 12 12 3401

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

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.

#### DECISION AND JOURNAL ENTRY

WHITMORE, Judge.

{¶1} Appellant, Larry McGowan, appeals from his prison sentence of 11 years for rape under R.C. 2907.02(A)(2), a felony of the first degree. We affirm.

I

{¶2} Mr. McGowan pled guilty to rape under R.C. 2907.02(A)(2), a first-degree felony. The trial court found Mr. McGowan guilty of rape on September 3, 2013. The court dismissed sexually violent and repeat violent predator specifications. The court sentenced Mr. McGowan to 11 years in prison, the maximum sentence.

{¶3} This is a reopened appeal. In his original appeal, Mr. McGowan challenged his sentence to the maximum prison term of 11 years. This Court affirmed because the pre-sentence investigation ("PSI") report and psycho-sexual evaluation of Mr. McGowan were not in the record, and the Court was obliged to assume regularity in the sentencing. *State v. McGowan*, 9th Dist. Summit No. 27092, 2014-Ohio-2630, ¶ 7. This Court then denied Mr. McGowan's motion to reconsider. The Court granted Mr. McGowan's motion to reopen the appeal on September 29, 2014 because, although Mr. McGowan's counsel had moved to include the PSI report in the record (and the trial court did so order), the report and other sentencing items were not

included in the record transferred from the trial court. The PSI report is now in the record.

{¶4} There was no recommendation as to sentence at Mr. McGowan's plea hearing. The parties were free to argue sentence.

{¶5} At the sentencing hearing, the prosecutor emphasized Mr. McGowan's extensive criminal history starting when he was a juvenile. He had 12 prior convictions. Mr. McGowan spent numerous years in prison. He committed the rape to which he pled guilty shortly after his release from prison.

{¶6} The prosecutor stated that DNA results pointed to Mr. McGowan as the perpetrator of three yet uncharged sexual assaults on women living in Cuyahoga County. One victim had a finger shot off

{¶7} Concerning the rape at issue, the prosecutor highlighted for the trial judge at sentencing that Mr. McGowan strangled the victim so violently that she urinated on herself. As a result of the strangulation, she passed out, falling face-first, causing extensive bleeding. After choking the victim, Mr. McGowan raped her vaginally and anally.

{¶8} The author of the psycho-sexual evaluation described Mr. McGowan as extremely hostile, violent and aggressive. He "is a very selfish individual who has learned to meet his needs through violence and intimidation. He is not concerned with the rights of others, does not show remorse for his actions or a desire to change." The psycho-sexual evaluation stated that Mr. McGowan poses a continuing danger, and there is very little chance for rehabilitation.

{¶9} Mr. McGowan did not speak at allocution.

{¶10} In imposing the maximum allowable sentence, the trial judge noted that there had been no conviction in the cases in Cuyahoga County, notwithstanding the DNA match. Accordingly, the trial judge did not take these offenses into account when formulating Mr. McGowan's sentence.[1] Instead, the trial court considered Mr. McGowan's history as reflected in the PSI report. The trial judge stated, "So what I'm looking at is this man's history that's presented to me, and several things are of note."

{¶11} As to Mr. McGowan's history, the trial judge stressed that Mr. McGowan recently had been released from prison when he committed the rape. The judge noted that the victim was seriously injured apart from the rape, and

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acknowledged the extent of the violent strangulation involved. The court remarked that first degree felony rape is one of the most serious types of crimes. The trial court was especially concerned with Mr. McGowan's very high risk of future sexually oriented offenses. The trial court further remarked that Mr. McGowan had committed a "string of offenses . . . over time with many incarcerations" and that his egregious conduct in prison had resulted in multiple transfers.

{¶12} The psycho-sexual assessment of Mr. McGowan revealed that he has poor insights about his conduct and how his conduct relates to others, that he is a manipulative individual who tends to be selfish and very hostile at times. Based on the evidence in the case, the trial judge found Mr. McGowan to be "violent and aggressive" and "the worst of the worst" before imposing the maximum sentence.

{¶13} Mr. McGowan now appeals from his sentence, raising two assignments of error for our review.

## II

### *Assignment of Error Number One*

THE TRIAL COURT ERRED WHEN IT ABUSED ITS DISCRETION AND SENTENCED APPELLANT TO THE MAXIMUM PRISON TERM OF ELEVEN YEARS.

{¶14} In his first assignment of error, Mr. McGowan argues that the trial court abused its discretion in imposing the maximum prison term by not considering the fact that Mr. McGowan pled guilty, thus sparing the victim from testifying, and accepting responsibility for his actions. We disagree.

{¶15} In reviewing a felony sentence, this Court follows the two-step approach set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912.[2] *E.g.*, *State v. Shank*, 9th Dist. Medina No. 12CA0104-M, 2013-Ohio-5368, ¶ 31. First, we "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." *Kalish* at ¶ 26. If the sentence is not contrary to law, then we review the trial court's sentence under an abuse-of-discretion standard. *Id.* An abuse of discretion indicates that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶16} Mr. McGowan does not contest that his 11 year sentence fell within the permitted statutory range, and thus was not contrary to law under the first prong of *Kalish*. [3] His only argument is that the trial court abused its discretion under the second step of the *Kalish* approach by imposing the maximum prison sentence despite his

purported display of remorse and acceptance of responsibility as demonstrated by his guilty plea.

{¶17} Trial 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 or more than minimum sentences. [4] *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶ 99. Nonetheless, trial courts are to consider the statutory considerations and factors in the general guidance statutes R.C. 2929.11 and R.C. 2929.12. These two sections apply as a general judicial guideline for every sentencing. *Foster* at ¶ 36; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38.

{¶18} R.C. 2929.12 lists general factors which must be considered by the trial court in determining the sentence to be imposed for a felony, and gives detailed criteria which do not control the court's discretion but which must be considered for or against severity or leniency in a particular case. The trial court retains discretion to determine the most effective way to comply with the purpose and principles of sentencing as set forth in R.C. 2929.11. R.C. 2929.12.

{¶19} Under R.C. 2929.11(A), 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 these 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. R.C. 2929.11(A).

{¶20} Among the various factors that the trial court must consider and balance under R.C. 2929.12 are: (1) serious physical, psychological, or economic harm to the victim as a result of the offense; (2) whether the offender has a history of criminal convictions; (3) whether the offender has not responded favorably to sanctions previously imposed by criminal convictions; and (4) whether the offender shows genuine remorse for the offense. R.C. 2929.12.

{¶21} Regarding the relevant R.C. 2929.12 factors, the trial court in this case had before it ample evidence that Mr. McGowan violently strangled the victim, causing her grievous physical harm apart from the rape. Mr. McGowan had 12 prior convictions. He had not responded favorably to previously-imposed criminal sanctions, as evidenced by the fact that he committed the rape shortly after being released from prison. Moreover, Mr. McGowan continued to engage in egregious misconduct while incarcerated. According to the psycho-sexual evaluation considered by the trial court,

Mr. McGowan reportedly received up to 150 disciplinary infractions during his time at various correctional institutions. The court also found, based on the PSI report and psycho-sexual evaluation, that Mr. McGowan was not likely to respond to rehabilitation, had a high likelihood of recidivism, and did not show remorse for the offense.

{¶22} Mr. McGowan claims that the conclusion in the PSI report that he lacked remorse and did not demonstrate acceptance of responsibility for his actions should have been given little weight. Mr. McGowan contends that this conclusion should be discounted because counsel had instructed him to limit his remarks to evaluators in light of the pending rape charges in Cuyahoga County.

{¶23} This argument rings hollow, however, considering that during the psycho-sexual evaluation Mr. McGowan's lack of remorse and acceptance of responsibility pertained to the rape at issue here - to which he had already pled guilty - and not to the uncharged offenses in Cuyahoga County. Indeed, Mr. McGowan claimed to the evaluators that he did not commit the rape in the instant case, despite his guilty plea. According to the evaluators, Mr. McGowan "did not appear anxious about his upcoming sentencing but rather spoke very matter-of-factly about having to spend ten years in prison and pleading guilty to an offense that he did not commit." Further, the evaluators did not express any problems with Mr. McGowan's cooperation. To the contrary, according to the evaluators Mr. McGowan was "cooperative" and "eager to answer questions." Mr. McGowan "often laughed while talking about his legal history and appeared to enjoy talking about the different correctional institutions in which he was incarcerated."

{¶24} However, Mr. McGowan remained silent at allocution. The trial court could not consider any acceptance of responsibility or remorse evident from Mr. McGowan's own statement.[5]

{¶25} The crux of Mr. McGowan's abuse of discretion argument appears to be that that he indeed showed remorse when he entered a guilty plea in open court, thus obviating the need for the admittedly-traumatized victim to testify, and accepting responsibility for his actions (despite having retracted this admission of guilt during the psycho-sexual evaluation). It certainly is true that a defendant's guilty plea could be a consideration in favor of a lesser sentence. However, even when a guilty plea is entered, a trial court does not abuse its discretion in assessing the relevant factors under R.C. 2929.12 and finding that a defendant's concession of guilt of the offense charged is outweighed by other factors: the severity of harm to the victim; the offender's extensive criminal record and lack of response to previous criminal sanctions; a demonstrated lack of remorse or willingness to

change criminal behavior; the likelihood of the offender committing future, similar crimes; and other factors. Thus, there is no basis here to conclude that the trial court abused its discretion in sentencing Mr. McGowan to the maximum allowable prison term.

{¶26} Indeed, the evidence supports that the trial court fully discharged its duty to protect the public from future crime by Mr. McGowan and to punish him in accordance with R.C. 2929.11(A). A trial court does not abuse its discretion by sentencing an offender to as much time as the law allows under the circumstances present in this case. Mr. McGowan's first assignment of error is overruled.

#### *Assignment of Error Number Two*

APPELLANT RECEIVED INEFFECTIVE ASSISTANCE FROM HIS COUNSEL.

{¶27} In his second assignment of error, Mr. McGowan argues that he received ineffective assistance of appellate counsel who, during his initial appeal, requested that the PSI report and other documents used by the trial court in sentencing be included in the record transferred to this Court, but did not confirm that the documents were, in fact, included in the appellate record.[6] This assignment of error lacks merit.

{¶28} An appellant must show prejudice to establish ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Mr. McGowan cannot demonstrate prejudice, for at least two reasons. First, Mr. McGowan received an adequate remedy for any error by counsel in the initial appeal, because this Court reopened the appeal and now has before it as part of the appellate record the sentencing materials upon which the trial court relied. Second, even with the complete record that includes the documents that the trial court relied upon at sentencing, this Court holds that the trial court did not abuse its discretion in imposing the maximum sentence. Accordingly, Mr. McGowan's second assignment of error is overruled.

#### III

{¶29} Mr. McGowan's assignments of error are overruled.

Judgment affirmed.

There were reasonable grounds for this appeal.

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.

HENSAL, P. J. MOORE, J. CONCUR.

Notes:

[1]Mr. McGowan does not argue on appeal that the trial judge considered the uncharged offenses or that the prosecutor's mention of the uncharged offenses at the sentencing hearing led to error.

[2]While acknowledging that this Court follows *Kalish*, Mr. McGowan appears to invite the Court to apply a de novo standard of review when reviewing a maximum sentence. We decline, and instead will continue to apply *Kalish* to appeals involving felony sentencing. We recognize, however, that other appellate districts have elected to follow the standard of review set forth in R.C. 2953.08(G)(2). See, e.g., *State v. White*, 1st Dist. Hamilton No. C-130114, 2013-Ohio-4225, ¶ 9; *State v. Rodeffer*, 2d Dist. Montgomery Nos. 25574, 25575, and 25576, 2013-Ohio-5759, ¶ 29; *State v. Fletcher*, 3d Dist. Auglaize No. 2-13-02, 2013-Ohio-3076, ¶ 14; *State v. Brewer*, 4th Dist. Meigs No. 14CA1, 2014-Ohio-1903, ¶ 33; *State v. McCormick*, 6th Dist. Lucas Nos. L-13-1147 and L-13-1148, 2014-Ohio-2433, ¶ 20-22; *State v. Wellington*, 7th Dist. Mahoning No. 14 MA 115, 2015-Ohio-1359, ¶ 13; *State v. Kopilchack*, 8th Dist. Cuyahoga No. 98984, 2013-Ohio-5016, ¶ 9-10; *State v. Allen*, 10th Dist. Franklin No. 10AP-487, 2011-Ohio-1757, ¶ 19-21; *State v. Long*, 11th Dist. Lake No. 2013-L-102, 2014-Ohio-4416, ¶ 71; *State v. Waggoner*, 12th Dist. Butler No. CA2013-02-027, 2013-Ohio-5204, ¶ 6.

[3]The trial court had the option of sentencing Mr. McGowan to a prison term of either three, four, five, six, seven, eight, nine, ten, or eleven years. R.C. 2929.14(A)(1).

[4]*Foster* declared unconstitutional portions of Ohio's felony sentencing statutes that required judges to make certain findings before imposing maximum, consecutive, or more than the minimum sentences. The United States Supreme Court later made it clear, however, that it was constitutionally permissible to require judicial fact-finding as a prerequisite for the imposition of consecutive sentences. *Oregon v. Ice*, 555 U.S. 160 (2009). The

Supreme Court of Ohio subsequently acknowledged that the legislature could reenact consecutive sentence finding requirements. *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, ¶ 36. The legislature responded by enacting 2011 Am.Sub.H.B. No. 86 ("H.B. 86"). The new legislation, effective September 30, 2011, revived the judicial fact-finding requirement for consecutive sentences, but did not revive the requirement for maximum or more than minimum sentences.

[5]Although the trial court did not rely on the uncharged assaults concerning the Cuyahoga County victims, uncharged conduct may be considered at sentencing. *State v. D'Amico*, 9th Dist. Summit No. 27258, 2015-Ohio-278, ¶ 6 (citations omitted) (a defendant's uncharged conduct may be considered in sentencing without resulting in error when it is not the sole basis for the sentence). The prosecutor's statements that DNA tests very strongly indicate that McGowan sexually assaulted these women, shooting the finger off of one of them, did not contribute to any abuse of discretion by the trial court. Mr. McGowan does not raise an argument to the contrary.

[6]Mr. McGowan is represented by the same counsel in this reopened appeal as in the original appeal.

2015-Ohio-1430

STATE OF OHIO, Plaintiff-Appellee,

v.

JORMELL MACK, Defendant-Appellant.

No. C-140054

Court of Appeals of Ohio, First District, Hamilton

April 15, 2015

Date of Judgment Entry on Appeal: April 15, 2015

Criminal Appeal From: Hamilton County Court of  
Common Pleas TRIAL NO. B-1305133

Joseph T. Deters, Hamilton County Prosecuting  
Attorney, and Judith Anton Lapp, Assistant Prosecuting  
Attorney, for Plaintiff-Appellee,

John Sinclair, for Defendant-Appellant.

#### OPINION

FISCHER, JUDGE.

{¶1} Defendant-appellant Jormell Mack appeals his conviction for trafficking in cocaine, a second-degree felony, following his guilty plea. In three assignments of error, he challenges the trial court's imposition of a four-year prison sentence, the voluntariness of his guilty plea, and the effectiveness of his trial counsel. Because the trial court's imposition of a four-year prison sentence was contrary to law, we modify the sentence to two years in prison. We affirm Mack's conviction and sentence in all other respects.

#### *Factual and Procedural Posture*

{¶2} On August 23, 2013, Mack was indicted in this case for one count of trafficking in cocaine in violation of R.C. 2925.03(A) and one count of possession of cocaine in violation of R.C. 2925.11(A). On January 15, 2014, the state and Mack informed the trial court that they had entered into a plea agreement. Mack would plead guilty to trafficking in cocaine and, in exchange, the state would dismiss the possession charge and recommend that Mack be sentenced to a two-year prison term.

{¶3} The trial court informed Mack that even though the state had recommended a two-year sentence on the trafficking charge, it was not required to accept the state's

recommendation. The trial court asked Mack if he still wished to plead guilty. Mack responded affirmatively. The trial court then asked the assistant prosecuting attorney to read the facts into the record.

{¶4} Thereafter, the trial court engaged Mack in a Crim.R. 11 dialogue on the record to determine whether he was making the plea knowingly, voluntarily, and intelligently. The trial court explained the nature of the charge and the maximum penalty for the trafficking offense. The trial court told Mack that the trafficking offense was a second-degree felony that carried a potential sentence of two to eight years in prison, a \$15,000 fine, and a five-year driver's license suspension. The trial court also told Mack that it could order him to pay court costs and the lab fee.

{¶5} The trial court informed Mack he was subject to three years' postrelease control, and explained the ramifications of any violation of his postrelease-control obligations. The trial court then asked Mack if he was currently on any type of probation, parole, or postrelease control. When Mack replied that he was on probation to the court, the court stated, "You understand by pleading guilty to this offense, it's a violation of your probation. I can give you a sentence of incarceration to this new charge and run it concurrent to the sentence on your probation violation. You understand that?" Mack replied, "Yes, ma'am, I do."

{¶6} The trial court explained to Mack the constitutional rights he would be waiving by pleading guilty, including the right to a jury trial, the right to confront his accusers, the right to compulsory process to obtain witnesses, the right to require the state to prove his guilt beyond a reasonable doubt, and the privilege against self-incrimination. The trial court then questioned Mack about the plea form. Mack indicated that he had discussed the form thoroughly with counsel, that he understood the form, and that he had signed the form of his own free will. The trial court then accepted Mack's guilty plea.

{¶7} The trial court then addressed Mack's community-control violation in a separate case. Mack had been serving a community-control sentence for failure to comply with an order or signal of a police officer, a felony of the third degree. *See State v. Mack*, 1st Dist. Hamilton No. C-140054, 2014-Ohio-4072, ¶ 1. Mack's indictment on the trafficking and possession charges had triggered a violation of his community control. After some discussion between the trial court and Mack's court appointed counsel, who had just recently begun representing Mack, the trial court stated that Mack had already pleaded no contest to violating his community control at a prior hearing and that Mack was before the court for sentencing.

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{¶8} Mack's counsel asked the trial court to continue sentencing to a later date, because he wanted to present further evidence in mitigation. The trial court denied counsel's request, and stated that it was proceeding with sentencing in both cases.

{¶9} Mack's counsel then relayed a number of facts about Mack in mitigation, including that Mack was 25 years old, had never been to prison, and that he had a substantial drug problem. Counsel stated that despite the drug problem, Mack had remained employed and had been caring for three young children. Mack also had substantial family support, and he had completed a prior term of probation successfully. Mack spoke thereafter. He told the court that he was caring for three children and his mother who was not in good health.

{¶10} The assistant prosecuting attorney then spoke. He asked the court to impose the recommended two-year sentence on the trafficking offense, but stated that the state was leaving the sentence for the community-control violation for the trial court to determine. Mack's probation officer also stated that he would submit the matter on the recommendation. The trial court told Mack:

Mr. Mack, it's good of you to take care of your children. A lot of people before me do not. But here's the issue, here's the problem I have. You have been on probation several years. You never said you needed help, that you had a drug problem. When you were back before me, all you said you were using was marijuana. That's all you said you were using, marijuana.

I think you were using more than that.

You have been before me on probation violations before and you picked up other offenses. Not once did I ever hear you say I need some help, get me into a treatment program. In fact, you were back before me last summer and that was never mentioned to me. I gave you some consideration for things you did last summer and that was never mentioned to me. I gave you some consideration for some things that you did last summer and I told you, Mr. Mack, I looked you in the eye and I said, you come back before me on anything, you're gone. Do you remember me saying that?

{¶11} Mack replied, "Yes, ma'am I do."

{¶12} The trial court stated:

Okay. Mr. Mack, I'm a woman of my word. So here's what I am going to do. I am going to terminate probation on the old charge. But you get a penalty for that. I will give you the two years on the new charge, but you are getting two more on the probation violation. So on case number B-1305133, it will be four years Ohio Department of Corrections. Court costs. I will give you no fine, except that

you have a \$90 lab fee and you have a five year driver's license suspension. You will get credit for 142 days.

{¶13} Twelve days later, the trial court journalized an entry in this case sentencing Mack to four years only on the trafficking offense. Mack appealed. Mack's original appellate counsel filed a no-error brief pursuant to *Anders v. California*, 386 U.S. 738, 744, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). This court found legal points arguable upon their merits relating to Mack's guilty plea and sentence. See *State v. Mack*, 1st Dist. Hamilton No. C-140054, 2014-Ohio-4072, ¶ 7. We stated that "the trial court may have erred in the manner in which it executed the entry and may not have properly supported its imposition of consecutive sentences with appropriate findings." *Id.* We further stated, "Alternatively if Mack was sentenced to four years in prison for trafficking in cocaine, as the judgment entry states, the sentence imposed was twice what he had agreed to as part of his plea agreement." *Id.* We appointed new appellate counsel for Mack, and ordered that counsel address these legal points and any other matter that counsel discovered in a diligent review of the record. *Id.* at ¶ 9. Mack's new appellate counsel has filed a brief raising error as to his guilty plea, his sentence, and his counsel's representation.

#### *Mack's Sentence is Contrary to Law*

{¶14} In his first assignment of error, Mack argues that his sentence is contrary to law. See R.C. 2953.08(A)(4). We review felony sentences under R.C. 2953.08(G). *State v. White*, 2013-Ohio-4225, 997 N.E.2d 629, ¶ 11 (1st Dist.). R.C. 2953.08(G)(2) provides:

The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court. 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. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds \* \* \*:

(b) That the sentence is otherwise contrary to law.

See *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶ 23 ("As a general rule, if an appellate court determines that a sentence is clearly and convincingly contrary to law, it may remand for resentencing.")

{¶15} Mack argues that the trial court erred in imposing a four-year sentence on the trafficking offense, when the trial court had stated at the sentencing hearing that it was imposing a two-year sentence for the trafficking

offense and a two-year sentence for the community-control violation. He further argues that the trial court failed to make the necessary findings to order the sentence imposed for the trafficking offense in this case to be served consecutively to the sentence imposed for a community-control violation in a separate case.

{¶16} The state argues that the trial court speaks only through its journalized entry, which reflects that the trial court imposed a four-year sentence on the trafficking offense, and therefore, the trial court did not order the terms to be served consecutively, and thus, was not required to make consecutive-sentencing findings.

{¶17} While we recognize that the four-year prison sentence the trial court imposed on the cocaine-trafficking offense was within the range of prison terms for a second-degree felony, and the journalized entry reflects a four-year sentence on the trafficking offense alone, the record reflects that the trial court orally announced its intent to impose only a two-year sentence on the cocaine-trafficking offense. The trial court further stated that it was terminating Mack's community control, and imposing another, separate, two years in prison for Mack's violation of his community control. But rather than ordering that the two sentences be served consecutively, the trial court added the two sentences together and imposed them as one four-year prison sentence on the cocaine-trafficking offense.

{¶18} Because Mack's community-control violation had occurred in a separate case, the trial court had no authority to add the two-year sentence for the violation of his community control in that separate case to the two-year sentence it was imposing for his cocaine-trafficking offense.

{¶19} In *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 9, the Ohio Supreme Court held that "under Ohio's sentencing statutes, a judge lacks the authority to consider multiple offenses as a group and to impose only an omnibus sentence for a group of offenses." Rather, "a judge sentencing a defendant pursuant to Ohio law must consider each offense individually and impose a separate sentence for each offense." (Citations omitted.) *Id.*

{¶20} Here, by adding the two-year prison sentence for Mack's violation of his community control in a separate case to his two-year prison sentence in this case, the trial court failed to follow Ohio's statutory sentencing scheme and impose a separate sentence for each felony offense. By sentencing Mack to one combined sentence, the trial court effectively shielded Mack's sentence in the separate case from appellate review. *See id.* at ¶ 20 ("the legislature crafted the sentencing statutes in a manner that mandates individual consideration of each offense during sentencing

and allows meaningful review of the sentence for each offense individually on appeal"); *see also* R.C. 2929.15 and 2929.19(B)(4) (providing specific requirements a trial court must follow to revoke a community-control sanction and impose a prison term). We, therefore, sustain Mack's first assignment of error and we modify the judgment entry to reflect a two-year prison term on the cocaine-trafficking offense, as stated by the trial court at the sentencing hearing. *See* R.C. 2953.08(G)(2).

#### *Mack's Guilty Plea*

{¶21} In his second assignment of error, Mack argues that his guilty plea was involuntary because the trial court failed to comply with Crim.R. 11.

{¶22} When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. *State v. Engle*, 74 Ohio St.3d 525, 660 N.E.2d 450 (1996). Before accepting a guilty plea in a felony case, a trial court must inform the defendant that he is waiving certain constitutional rights, including the privilege against compulsory self-incrimination, the right to a jury trial, the right to confront his accusers, and his right of compulsory process of witnesses. *See State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093, 877 N.E.2d 677, ¶ 2. In addition to these constitutional rights, the trial court is required to determine that the defendant understands the nature of the charge, the maximum penalty involved, and the effect of the plea. Crim.R. 11(C)(2)(a-b); *Jones* at 214.

{¶23} While trial courts must strictly comply with Crim.R. 11 when notifying a defendant of the constitutional rights set forth in the rule, they need only substantially comply when informing the defendant of the nonconstitutional rights. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 14 and 18. Substantial compliance means that under the totality of the circumstances, the defendant understands the implications of his plea and the rights he is waiving. *Id.* at ¶ 15. A trial court's "failure to comply with nonconstitutional rights will not invalidate a plea unless the defendant thereby suffered prejudice." *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12. The test for prejudice is whether the plea would have otherwise been made. *Id.*

{¶24} Mack argues that the trial court failed to inform him about the effects of the guilty plea on the pending community-control violation. He argues that while the trial court told him that it could "give him a sentence of incarceration on the new charge and run it concurrent to the sentence of incarceration on [his] probation violation," it failed to inform him that it could also order that the sentences be served consecutively. Mack contends that absent such an advisement, his plea could not have been

entered voluntarily. We disagree.

{¶25} The Ohio Supreme Court has held that when a trial court has the option to impose consecutive sentences pursuant to the statute, its failure to inform a defendant who pleads guilty that his sentence may run consecutively rather than concurrently is not a violation of Crim.R. 11(C) and does not render the plea involuntary. *See State v. Johnson*, 40 Ohio St.3d 130, 532 N.E.2d 1295 (1998), syllabus; *see also State v. Clark*, 1st Dist. Hamilton No. C-010532, 2002-Ohio-3135, ¶ 5-8; *State v. Cummings*, 8th Dist. Cuyahoga No. 89093, 2007-Ohio-6305, ¶ 7. Mack, moreover, can demonstrate no prejudice from the trial court's statement that it could order his sentence on the trafficking offense to be served concurrently to any sentence on his community-control violation, because the guilty-plea form Mack signed expressly stated that any plea [on the trafficking offense] "may result in revocation proceedings and any new sentence could be imposed consecutively."

{¶26} Because the record reflects that the trial court complied with Crim.R. 11, and Mack's plea was entered voluntarily, we overrule his second assignment of error.

#### *Mack's Counsel was not Ineffective*

{¶27} In his third assignment of error, Mack argues his counsel should have moved to withdraw his guilty plea to the trafficking offense once counsel learned that Mack was being separately sentenced on the community-control violation.

{¶28} To succeed on his ineffective-assistance-of-counsel claim, Mack must show that defense counsel violated an essential duty and that he was prejudiced by the violation. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To show prejudice, Mack must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the proceeding would have been different. *Id.* at 694.

{¶29} The record reflects that at the January 15, 2013 hearing, when Mack entered into the plea agreement with the recommendation of the two-year prison term on the trafficking offense, both Mack and his counsel were aware that Mack had violated the terms of his community control in the separate case, because both cases had been set for hearing the same day. The separate case, however, was not made a part of Mack's plea agreement with the state. The trial court discussed the maximum penalty for the cocaine-trafficking offense, and informed Mack that "by pleading guilty to the trafficking offense, he could violate the terms of his community control." Thus, Mack cannot demonstrate that his guilty plea was unknowing. As a result,

we cannot conclude that Mack's counsel was ineffective for failing to file a motion to withdraw his plea on this basis. We, therefore, overrule his third assignment of error.

#### *Conclusion*

{¶30} In conclusion, Mack's second and third assignments of error are overruled. His first assignment of error is sustained, but only insofar as he is entitled to a modification of his cocaine-trafficking sentence from four years in prison to two years in prison. We, therefore, modify the trial court's judgment to reflect a two-year sentence for the cocaine-trafficking offense, and affirm the sentence as modified. We affirm the trial court's judgment in all other respects.

Judgment affirmed as modified.

Cunningham, P.J., concurs.

DeWine, J., concurring in part and dissenting in part.

{¶31} I agree that the sentence imposed by the court was contrary to law and concur in that part of the majority's opinion. But I must dissent from the decision of my colleagues to modify the sentence imposed by the trial court. The appropriate course in this instance is to vacate the sentence and remand to the trial court for resentencing.

{¶32} R.C. 2953.08(G)(2) provides that an 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." R.C. 2953.08(G)(2). "As a general rule, " if a sentence is contrary to law, an appellate court will remand for resentencing. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶ 23. Although the statute does allow for an appellate court to modify a sentence, such a remedy has typically been limited to instances where the lower court has no sentencing discretion. In the words of the Ohio Supreme Court, "[c]orrecting a defect in a sentence without a remand is an option that has been used in Ohio and elsewhere for years in cases in which the original sentencing court \* \* \* had no sentencing discretion." (Citations omitted.) *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 29. Thus in *Fischer*, the court adopted the modification remedy for cases in which a trial court did not impose postrelease control properly because the trial court had no sentencing discretion in that area. In doing so, the court was careful to explain that it was only selecting modification as a remedy in a "narrow area." *Id.* at ¶ 30.

{¶33} Here, the trial court had sentencing discretion. The sentencing range for trafficking was two to eight years. R.C. 2929.14(A)(2). While the trial court erred by consolidating the sentences for the probation violation with

the sentence for the trafficking charge, it would be perfectly appropriate for the trial court to consider in crafting its sentence that Mack was on community control at the time that he committed the offense. R.C. 2929.12(D)(1). Sentencing is a matter that has long been left to the discretion of the trial court. We have been cautioned that when it comes to sentencing, we are not to "simply substitute [our] judgment for that of the trial court." *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 14-15. But in this case, by choosing to modify rather than remand, I fear the majority is doing exactly that.

{¶34} Because I don't see this case as fitting in a narrow area where modification is appropriate, I would vacate Mack's sentence and remand the case for a de novo sentencing hearing. *See id.*

2015-Ohio-1665

STATE OF OHIO Plaintiff-Appellee

v.

DIONTE ENGLISH Defendant-Appellant

No. 26337

Court of Appeals of Ohio, Second District, Montgomery

May 1, 2015

Criminal Appeal from Common Pleas Court Trial Court Case No. 2014-CR-1291

MATHIAS H. HECK, JR., by KIRSTEN A. BRANDT, Atty. Reg. No. 0070162, Assistant Prosecuting Attorney, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, 301 West Third Street, Dayton, Ohio 45422 Attorney for Plaintiff-Appellee

LORI R. CICERO, Atty. Reg. No. 0079508, 500 East Fifth Street, Dayton, Ohio 45402 Attorney for Defendant-Appellant

### OPINION

WELBAUM, J.

{¶ 1} Defendant-appellant, Dionte English, appeals from his conviction and sentence in the Montgomery County Court of Common Pleas after pleading guilty to one count of aggravated robbery and one count of felonious assault. Specifically, English contends that he received ineffective assistance of trial counsel and that the trial court imposed a prison sentence that was contrary to law and in violation of his Eighth Amendment right against cruel and unusual punishment. For the reasons outlined below, the judgment of the trial court will be affirmed.

#### Facts and Course of Proceedings

{¶ 2} On April 14, 2014, English was indicted by the Montgomery County Grand Jury for one count of aggravated robbery in violation of R.C. 2911.01 (A)(3), a felony of the first degree, and one count of felonious assault in violation of R.C. 2903.11 (A)(1), a felony of the second degree. The charges arose from English severely beating a woman in the parking lot of a Butler Township Wal-Mart after she refused to give him her purse that he was attempting to steal.

{¶ 3} Following his indictment, on April 17, 2014, English filed a pro se motion for change of venue. In the motion, English argued that he would be unable to receive a fair trial and impartial jury due to an April 10, 2014 article in the Dayton Daily News reporting on the incident, the victim's injuries, and how English allegedly admitted to police that he had attacked the woman while high on drugs. English was appointed trial counsel the same day this motion was filed.

{¶ 4} After the appointment of counsel, on April 22, 2014, English filed a pro se motion to set aside his indictment on grounds that certain races were excluded from the grand jury. Thereafter, on April 30, 2014, English's trial counsel filed a motion to suppress certain statements English made during his arrest. Then, on May 6, 2014, English filed another pro se motion to set aside his indictment, again challenging the racial composition of the grand jury.

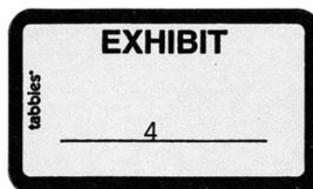
{¶ 5} A hearing on the motion to suppress was held on May 14, 2014. At the suppression hearing, English withdrew his motion to suppress and the trial court thereafter explained that it would not consider his pro se motions due to the fact that English had been appointed counsel. However, the trial court advised English's counsel to perform research on the issue of whether the grand jury was properly selected and whether its racial composition was in accord with constitutional standards. The trial court indicated that if counsel found merit to English's concerns, counsel could then file a new motion for the court's review. English indicated that he understood.

{¶ 6} The trial court scheduled a jury trial to commence on July 7, 2014. English then appeared in court on June 27, 2014, to plead guilty, but instead asked the judge for more time to talk it over with his attorney and family. The judge granted English's request. Thereafter, on July 7, 2014, English entered a guilty plea to both aggravated robbery and felonious assault. The parties then reconvened for sentencing on July 23, 2014. At that time, the trial court merged English's aggravated robbery and felonious assault offenses and sentenced English to eight years in prison for aggravated robbery. In addition, the trial court ordered English to pay \$3,359.04 in restitution.

{¶ 7} English now appeals from his conviction and sentence, raising two assignments of error for our review.

#### First Assignment of Error

{¶ 8} English's First Assignment of Error is as follows:



APPELLANTS CONVICTION SHOULD BE REVERSED  
BECAUSE HE RECEIVED INEFFECTIVE  
ASSISTANCE OF COUNSEL IN VIOLATION OF HIS  
RIGHTS UNDER THE SIXTH AMENDMENT TO THE  
UNITED STATES CONSTITUTION.

{¶ 9} Under his First Assignment of Error, English contends that his trial counsel was ineffective in failing to file a motion to change venue due to the Dayton Daily News article, and a motion to set aside the indictment due to the alleged exclusion of certain races from the grand jury.

{¶ 10} In order to prevail on a claim of ineffective assistance of counsel, a criminal defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), paragraph two of the syllabus; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph two of the syllabus. Therefore, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness and that counsel's errors were serious enough to create a reasonable probability that, but for the errors, the outcome of the proceeding would have been different. *Id.* In conducting this analysis, "we will not second-guess trial strategy decisions, and 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *State v. Mason*, 82 Ohio St.3d 144, 157-158, 694 N.E.2d 932 (1998), quoting *Strickland* at 689. (Other citation omitted.)

{¶ 11} "A guilty plea waives the right to allege ineffective assistance of counsel, except to the extent that the errors caused the plea to be less than knowing and voluntary." *State v. Webb*, 2d Dist. Montgomery No. 26198, 2015-Ohio-553, ¶ 15, citing *State v. Spates*, 64 Ohio St.3d 269, 272, 595 N.E.2d 351 (1992). (Other citation omitted.) "Only if there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty but would have insisted on going to trial will the judgment be reversed." (Citations omitted.) *State v. Huddleson*, 2d Dist. Montgomery No. 20653, 2005-Ohio-4029, ¶ 9.

{¶ 12} In the present case, English pled guilty to aggravated robbery and felonious assault and has not raised any arguments suggesting that his trial counsel's actions rendered his plea less than knowing, intelligent, and voluntary. It is well-established that "[i]n order for a plea to be given knowingly and voluntarily, the trial court must follow the mandates of Crim.R. 11(C)." *State v. Brown*, 2d Dist. Montgomery Nos. 24520, 24705, 2012-Ohio-199, ¶ 13. In reviewing the plea colloquy between the trial court and English, we find that the trial court complied with all aspects of Crim.R. 11(C) before it accepted English's guilty plea. Because English has not alleged that his trial counsel

engaged in any conduct affecting the knowing, intelligent, and voluntary character of his plea, and because the record indicates that his guilty plea was in fact knowingly, intelligently, and voluntarily made, English has waived his right to raise an ineffective assistance claim.

{¶ 13} English's ineffective assistance claim also fails under the *Strickland* test because he has not demonstrated that his counsel rendered deficient performance that prejudiced him. With regards to a motion to change venue, we note that "[t]rial counsel's failure to request a change of venue is not tantamount to ineffective assistance of counsel." *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 49. The decision whether to request a change of venue due to pretrial publicity is a matter of trial strategy, which is not to be second guessed by the reviewing court. *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, 873 N.E.2d 1263, ¶ 234; *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 156. "Moreover, a change of venue is not automatically granted when there is extensive pretrial publicity. Any decision to change venue rests largely within the discretion of the trial court." *Bryan* at ¶ 157, citing *State v. Maurer*, 15 Ohio St.3d 239, 251, 473 N.E.2d 768 (1984).

{¶ 14} In this case, English has failed to establish that his trial counsel's decision not to file a motion to change venue was anything other than sound trial strategy. In addition, English has not argued or presented any evidence indicating that the trial court would have granted a motion to change venue based on the Dayton Daily News article. As a result, English has not satisfied either prong of the *Strickland* test.

{¶ 15} As for trial counsel's failure to file a motion to set aside the indictment, the trial court specifically instructed counsel to research English's concern about certain races allegedly being excluded from the Montgomery County Grand Jury and to file such a motion if there was any merit to the claim. The trial court specifically stated that:

COURT: So-now-[defense counsel], as I understand it is going to do some research on that issue, is going to do some investigation regarding how it's-how grand juries are conducted or selected here in Montgomery County Ohio, and simply because you have that concern, that doesn't mean that [defense counsel] will come to the conclusion that there is a legitimate basis for filing such a motion. \* \* \* [Defense counsel] understands your concern, he's sensitive to your concern, he will review and investigate your concern. That doesn't mean at the end of the day he's going to conclude that there's merit to your concern, and that there is a need then to file a motion. If he does, great, we'll hear it and cite it. But simply because you have this idea, doesn't mean any validity [sic]. Do you understand that?

ENGLISH: Understood.

Transcript (May 14, 2014), p. 5-6.

{¶ 16} English has failed to demonstrate that his counsel's failure to file a motion to set aside the indictment on the above referenced claim was due to anything other than counsel finding that the claim lacked merit. As previously noted, we indulge in a strong presumption that counsel rendered effective assistance in choosing not to file the motion. Furthermore, English failed to demonstrate any resulting prejudice from counsel's failure to file a motion to set aside the indictment, as English did not argue or present any evidence indicating that such a motion had a reasonable probability of success. *See State v. Johns*, 10th Dist. Franklin No. 11AP-203, 2011-Ohio-6823, ¶ 25 (finding that "[w]hen a claim of ineffective assistance of counsel is based on counsel's failure to file a motion or make an objection, the appellant must show that the motion had a reasonable probability of success").

{¶ 17} For the foregoing reasons, English's First Assignment of Error is overruled.

#### Second Assignment of Error

{¶ 18} English's Second Assignment of Error is as follows:

APPELLANT SHOULD BE REMANDED TO THE TRIAL COURT FOR SENTENCING AS THE SENTENCE HE RECEIVED IS CONTRARY TO LAW, AND IN VIOLATION OF HIS RIGHTS UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

{¶ 19} Under his Second Assignment of Error, English contends that his eight-year prison sentence is contrary to law because he had no prior felony record or history of violence. English also contends that his sentence was grossly disproportionate, excessive, and amounts to cruel and unusual punishment in violation of his Eighth Amendment rights.

{¶ 20} This court now applies R.C. 2953.08(G)(2) as the appellate standard of review for all felony sentences. *State v. Rodeffer*, 2013-Ohio-5759, 5 N.E.3d 1069, ¶ 29 (2d Dist.). The statute states, in pertinent part, that:

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. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following: (a) That the record does not

support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

(b) That the sentence is otherwise contrary to law. R.C. 2953.08(G)(2).

{¶ 21} The trial court in this case did not make, and was not required to make, any of the findings under the statutory provisions listed in division (a) of R.C. 2953.08(G)(2). Therefore, the threshold issue is whether English's sentence is clearly and convincingly contrary to law. "[C]ontrary to law' means that a sentencing decision manifestly ignores an issue or factor which a statute requires a court to consider." (Citation omitted.) *State v. Lofton*, 2d Dist. Montgomery No. 19852, 2004-Ohio-169, ¶ 11. "[A] sentence is not contrary to law when the trial court imposes a sentence within the statutory range, after expressly stating that it had considered the purposes and principles of sentencing set forth in R.C. 2929.11, as well as the factors in R.C. 2929.12." *Rodeffer* at ¶ 32, citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 18.

{¶ 22} In making this determination, we emphasize that "[t]he court is not required to make specific findings or to use the exact wording of the statute[s]." (Citation omitted.) *State v. Wilson*, 2d Dist. Montgomery No. 24978, 2012-Ohio-4756, ¶ 8. "Furthermore, even if there is no specific mention of those statutes in the record, 'it is presumed that the trial court gave proper consideration to those statutes.'" *State v. Cave*, 2d Dist. Clark No. 09-CA-6, 2010-Ohio-1237, ¶ 10, quoting *Kalish* at fn. 4.

{¶ 23} In this case, English's eight-year prison sentence falls within the prescribed statutory-sentencing range for aggravated robbery, a felony of the first degree. *See* R.C. 2929.14(A)(1); R.C. 2911.01(C). In addition, the trial court expressly stated at the sentencing hearing that it "reviewed the statutory factors [it was] required to review before reaching a sentencing decision." *Trans.* (July 23, 2014), p. 25. The trial court also indicated that it had carefully reviewed the presentence investigation report, the parties' sentencing memoranda, the victim impact statement, and letters written by both English and the victim.

{¶ 24} In reaching a sentencing decision, the trial court considered the fact that English's only prior offense was a misdemeanor offense of resisting arrest. The trial court also noted that English's record was not indicative of his conduct in this case. However, the court weighed this fact against the severity of the offense against the victim, who English severely beat in front of the victim's three-year-old granddaughter. The trial court read a letter

written by the victim at the sentencing hearing in which the victim stated that she had to have facial surgery as a result of the attack and now has metal plates in her face. The victim indicated that one side of her face is numb due to nerve damage and that she has painful headaches, trouble walking, and is always hurting. In her victim impact statement, the victim indicated that the nerve damage to her face is irreparable, and that she will need more surgeries in the future. In addition to her physical trauma, the record reveals that the attack has left the victim emotionally distraught as well. In her letter to the court, the victim stated that her life is miserable, she is scared to leave her house, cries all the time, and has nightmares.

{¶ 25} Because the trial court indicated that it had considered all the required statutory factors-being the principles and purposes of sentencing under R.C. 2929.11 and the seriousness and recidivism factors under R.C. 2929.12-and given that an eight-year prison term is within the prescribed statutory range for first-degree felonies, we do not find that English's prison sentence is contrary to law.

{¶ 26} We reiterate that we have reviewed English's sentence under the standard of review set forth in *Rodeffer*, 2013-Ohio-5759, 5 N.E.3d 1069, in which we held that we would no longer use an abuse-of-discretion standard of review for felony sentences, but rather apply the standard of review set forth in R.C. 2953.08(G)(2). Since then, opinions from this court have expressed reservations as to whether our decision in *Rodeffer* is correct. *See, e.g., State v. Garcia*, 2d Dist. Greene No. 2013-CA-51, 2014-Ohio-1538, ¶ 9, fn. 1; *State v. Johnson*, 2d Dist. Clark No. 2013-CA-85, 2014-Ohio-2308, ¶ 9, fn. 1. However, in the case before us, we find no error in the sentence imposed under either standard of review.

{¶ 27} With respect to English's Eighth Amendment challenge, we note that "Eighth Amendment violations are rare, and instances of cruel and unusual punishment are limited to those punishments, which, under the circumstances, would be considered shocking to any reasonable person." (Citations omitted.) *State v. Harding*, 2d Dist. Montgomery No. 20801, 2006-Ohio-481, ¶ 77. "[W]e are bound to give substantial deference to the General Assembly, which has established a specific range of punishment for every offense[.]" (Citation omitted.) *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073, ¶ 24. Therefore, " 'as a general rule, a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment.' " *Id.* at ¶ 21, quoting *McDougle v. Maxwell*, 1 Ohio St.2d 68, 69, 203 N.E.2d 334 (1964). (Other citations omitted.) Accordingly, given that English's eight-year prison term falls within the specific range of punishment for his offenses, we do not find that it constitutes cruel and unusual punishment under the Eighth Amendment.

{¶ 28} English's Second Assignment of Error is overruled.

#### Conclusion

{¶ 29} Having overruled both assignments of error raised by English, the judgment of the trial court is affirmed.

FROELICH, PJ and HALL, J, concur

2013-Ohio-3076

STATE OF OHIO, PLAINTIFF-APPELLEE,

v.

MARK S. FLETCHER, DEFENDANT-APPELLANT.

No. 2-13-02

Court of Appeals of Ohio, Third District, Auglaize

July 15, 2013

Appeal from Auglaize County Common Pleas Court  
Trial Court No. 2012 CR 153

Gerald F. Siesel for Appellant

Edwin A. Pierce and R. Andrew Augsburg for  
Appellee

**OPINION**

SHAW, J.

{¶1} Defendant-appellant Mark S. Fletcher ("Fletcher") appeals the December 21, 2012, judgment of the Auglaize County Common Pleas Court sentencing Fletcher to 36 months in prison following Fletcher's guilty plea to "Illegal Assembly or Possession of Chemicals Used to Manufacture Controlled Substance (Methamphetamine) with Intent to Manufacture Controlled Substance," in violation of R.C. 2925.041(A)(C)(1), a felony of the third degree.

{¶2} On Friday August 31, 2012, Fletcher was pulled over for having an obscured rear license plate while driving in the village of Waynesfield, Ohio. Joanna Schaub and her teenage daughter were in the vehicle with Fletcher at the time of the stop. After some interaction between Fletcher and the officers who stopped him wherein the officers noted, *inter alia*, that Fletcher appeared nervous, Fletcher's vehicle was searched by a K-9 unit. The K-9 unit made a "hit" on the rear of the driver's side of the vehicle. The officers then searched the vehicle and found a red lunch bag in the vehicle's cargo area containing plastic baggies, sunglasses, lighter fluid, a lighter, drain cleaner, plastic tubing, batteries and Sudafed. Subsequently, the officers called Mike Vorhees of the Auglaize-Mercer County Drug Task Force for assistance. Vorhees arrived and indicated that the items were commonly used to make methamphetamines.

{¶3} On September 7, 2012, Fletcher was indicted by the Auglaize County Grand Jury for one count of "Illegal Assembly or Possession of Chemicals Used to Manufacture Controlled Substance (Methamphetamine) with Intent to Manufacture Controlled Substance" in the Vicinity of a Juvenile, in violation of R.C. 2925.041(A), a felony of the second degree. (Doc. 1).

{¶4} On September 12, 2012, Fletcher was arraigned and pled not guilty to the charge. (Doc. 17).

{¶5} On October 16, 2012, Fletcher filed a motion to suppress evidence obtained from the stop and the search. (Doc. 24).

{¶6} On November 15, 2012 a hearing was held on the motion to suppress.[1] (Doc. 58). On November 28, 2012, the trial court filed a judgment entry denying Fletcher's motion to suppress. (*Id.*)

{¶7} On December 19, 2012, the parties convened for a pre-trial conference and negotiated a plea agreement. (Doc. 98). As part of that plea agreement, Fletcher agreed to plead guilty in exchange for the State agreeing to amend the charge in the indictment to Illegal Assembly or Possession of Chemicals for Manufacture of Methamphetamines in violation of R.C. 2925.041(A)(C)(1), a felony of the third degree rather than a felony of the second degree. (Doc. 76).

{¶8} The court then conducted a Criminal Rule 11 plea colloquy with Fletcher, wherein Fletcher stated that he understood the nature of his plea, that he understood the rights he was waiving by agreeing to plead guilty, and that he understood the maximum penalties. (Doc. 98). Following the colloquy, Fletcher pled guilty to the charge as amended and the court accepted Fletcher's plea. (*Id.*) The court then proceeded to sentencing. (*Id.*)

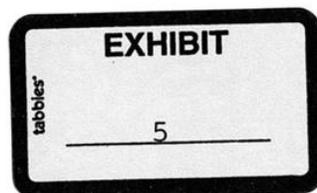
{¶9} Fletcher was given an opportunity to address the court regarding sentencing, and Fletcher's attorney questioned Fletcher in court to speak toward mitigation. (*Id.*) The State recommended that Fletcher receive the maximum 36 months in prison. (*Id.*)

{¶10} Ultimately the court sentenced Fletcher to 36 months in prison. A judgment entry reflecting this sentence was filed on December 21, 2012. (Doc. 75).

{¶11} It is from this judgment that Fletcher appeals, asserting the following assignment of error for our review.

**ASSIGNMENT OF ERROR**

**THE TRIAL COURT'S SENTENCE OF APPELLANT**



**TO A MAXIMUM SENTENCE OF THIRTY-SIX MONTHS WAS CONTRARY TO LAW AND FURTHER CONSTITUTED AN ABUSE OF DISCRETION IN FAILING TO PROPERLY CONSIDER AND APPLY THE SENTENCING GUIDELINES SET FORTH IN OHIO REVISED CODE, SECTION 2929.11 AND 2929.12.**

{¶12} In his assignment of error, Fletcher argues that the trial court erred by failing to properly consider and apply the sentencing guidelines in Revised Code sections 2929.11 and 2929.12. Specifically, Fletcher argues that at the time of sentencing, the trial court did not consider, nor did the trial court's subsequent judgment entry of sentence adequately state, that it had considered these sections of the Revised Code.

{¶13} A trial court's sentence will not be disturbed on appeal absent a defendant's showing by clear and convincing evidence that the sentence is unsupported by the record; the sentencing statutes' procedure was not followed or there was not a sufficient basis for the imposition of a prison term; or that the sentence is contrary to law. *State v. Ramos*, 3d Dist. No. 4-06-24, 2007-Ohio-767, ¶ 23 (the clear and convincing evidence standard of review set forth under R.C. 2953.08(G)(2) remains viable with respect to those cases appealed under the applicable provisions of R.C. 2953.08(A), (B), and (C) \* \* \*). Clear and convincing evidence is that "which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford*, 161 Ohio St. 469, (1954), paragraph three of the syllabus.

{¶14} A reviewing court must conduct a meaningful review of the trial court's imposed sentence. *State v. Daughenbaugh*, 3d Dist. No. 16-07-07, 2007-Ohio-5774, ¶ 8, citing *State v. Carter*, 11th Dist. No.2003-P-0007, 2004-Ohio-1181. In particular, R.C. 2953.08(G)(2) provides the following regarding an appellate court's review of a sentence on appeal.

(2) The court hearing an appeal \* \* \* shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

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. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

(a) That the record does not support the sentencing court's findings under division (B) or (D) or (C)(4) of section

2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

(b) That the sentence is otherwise contrary to law.

{¶15} Revised Code Chapter 2929 governs sentencing. Revised Code 2929.11 provides, in pertinent part, that the "overriding purposes of felony sentencing are to protect the public from future crime and to punish the offender." R.C. 2929.11(A). In advancing these purposes, sentencing courts are instructed to "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." *Id.* Meanwhile, R.C. 2929.11(B) states that felony sentences must be both "commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim" and consistent with sentences imposed in similar cases.

{¶16} In accordance with these principles, the trial court must consider the factors set forth under R.C. 2929.12(B), (C), (D), and (E) relating to the seriousness of the offender's conduct and the likelihood of the offender's recidivism. R.C. 2929.12(A). However, the trial court is not required to make specific findings of its consideration of the factors. *State v. Kincade*, 3d Dist. No. 16-09-20, 2010-Ohio-1497, ¶ 8.

{¶17} At Fletcher's sentencing hearing, the trial court heard Fletcher address his prior felony conviction for possession of methamphetamine in Tennessee, a conviction for which he was still on probation. (Tr. at 18-19). The trial court also heard Fletcher speak regarding his employment status, and his past trouble with marijuana and alcohol. (Tr. at 24-30). After hearing both the State and Fletcher, the court stated that, "[a]fter consideration of the information provided to the Court by the parties, the Defendant is SENTENCED to a term of imprisonment of THIRTY-SIX (36) MONTHS." (Tr. at 40).

{¶18} In the court's judgment entry on sentencing, the court stated that

[t]he Court has considered the record, oral statements, any Victim Impact Statement and Pre-Sentence Report prepared, as well as the principles and purposes of sentencing under Ohio Revised Code §2929.11, and has balanced the seriousness and recidivism factors under Ohio Revised Code §2929.12.

{¶19} On appeal, Fletcher argues that the trial court's statements in its sentencing entry were insufficient, and that because the court did not state that it had considered the requisite statutes on the record in open court at the sentencing hearing, Fletcher's sentence was invalid.

{¶20} In *State v. Arnett*, 88 Ohio St.3d 208, 215 (2000), the Ohio Supreme Court held that

[t]he Code does not specify that the sentencing judge must use specific language or make specific findings on the record in order to evince the requisite consideration of the applicable seriousness and recidivism factors. R.C. 2929.12. For this reason, the sentencing judge could have satisfied her duty under R.C. 2929.12 with nothing more than a *rote recitation* that she had considered the applicable age factor of R.C. 2929.12(B)(1).

(Emphasis Added.)

{¶21} The trial court's entry certainly meets the standard of a "rote recitation" pursuant to *Arnett* that it had considered the sentencing factors in its entry. See also *State v. Scanlon*, 3d Dist. No. 2-8-18, 2009-Ohio-2305. Fletcher points us to no law establishing that the trial court's entry was inadequate to satisfy *Arnett*.

{¶22} In *State v. Patrick*, 10th Dist. No. 10AP-26, 2011-Ohio-1592, the Tenth District Court of appeals considered a similar argument to Fletcher's in this case. In *Patrick*, the Tenth District held

[t]he failure to indicate at the sentencing hearing that the court has considered the factors in R.C. 2929.11 and 2929.12 does not automatically require reversal. *State v. Reed*, 10th Dist. No. 09AP-1163, 2010-Ohio-5819, ¶ 8. "When the trial court does not put on the record its consideration of R.C. 2929.11 and 2929.12, it is presumed that the trial court gave proper consideration to those statutes." *Id.*, citing *Kalish* at ¶ 18, fn. 4. "A trial court's rote recitation that it has considered applicable factors satisfies the court's duty to follow the relevant statutes in sentencing an offender." *State v. Easley*, 10th Dist. No. 08AP- 755, 2009-Ohio-2984, ¶ 19 (citations omitted). \* \* \*

Here, the trial court's December 17, 2009 journal entry states it has considered the purposes and principles of sentencing as set forth in R.C. 2929.11, as well as the factors set forth in R.C. 2929.12. (R. at 67.) We have previously found that such language in the judgment entry defeats a claim that the trial court failed to consider the purposes and principles of sentencing. *State v. Reeves*, 10th Dist. No. 09AP-493, 2010-Ohio-4018, ¶ 16.

*Patrick*, at ¶¶ 25-26.

{¶23} Our own case law reaffirms the principles of *Patrick*. In *Scanlon*, *supra*, we held that "[a]lthough the trial court did not specify the statutory factors it considered, the record indicates that the trial court did consider some of the factors as indicated in the dialogue between the trial court and Scanlon. In addition, the journal entry indicates that the trial court did consider the factors set forth in R.C. 2929.11

and 12." *Scanlon* at ¶ 4.

{¶24} Here the court clearly had information before it with which to consider the sentencing factors, and explicitly stated that it had considered those factors in its judgment entry. Under these circumstances we cannot find that the trial court's entry was inadequate to satisfy the sentencing statutes as the entry clearly reflected the court's consideration of those statutes.

{¶25} Finally, we would note that Fletcher does not argue that his sentence falls outside of the range permitted by the Revised Code, and we find that the sentence was, in fact, within the permissible range for a felony of the third degree pursuant to R.C. 2929.14. Therefore, we cannot find that his sentence was contrary to law. Accordingly, Fletcher's assignment of error is overruled.

{¶26} For the foregoing reasons, Fletcher's assignment of error is overruled and the judgment of the Auglaize County Common Pleas Court is affirmed.

Judgment Affirmed.

PRESTON, P.J., and WILLAMOWSI, J, concur.

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Notes:

[1] No transcript was included in the record of the suppression hearing.

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2015-Ohio-1723

STATE OF OHIO, Plaintiff-Appellee,

v.

LAUREL M. PETTIFORD, Defendant-Appellant.

No. 14CA3444

Court of Appeals of Ohio, Fourth District, Ross

May 1, 2015

APPEARANCES: Lori J. Rankin, Chillicothe, Ohio, for Appellant.

Matthew S. Schmidt, Ross County Prosecuting Attorney, and Jeffrey C. Marks, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio, for Appellee.

#### DECISION AND JUDGMENT ENTRY

Marie Hoover, Presiding Judge

{¶ 1} Defendant-appellant, Laurel M. Pettiford, appeals from the prison sentence she received in the Ross County Common Pleas Court following her plea of no contest to one count of complicity to aggravated robbery, a violation of R.C. 2923.03, a felony of the first-degree; and one count of tampering with evidence, a violation of R.C. 2921.12, a felony of the third-degree.

{¶ 2} Pettiford contends that her due process rights were violated when the trial court allegedly imposed a sentence based on findings not supported by the record. A review of the record reveals, however, that Pettiford's arguments are misplaced and without merit. Therefore, we overrule Pettiford's assignment of error and affirm the judgment of the trial court.

#### I. FACTS

{¶ 3} In January 2014, a Ross County grand jury indicted Pettiford on one count of complicity to aggravated robbery, a violation of R.C. 2923.03, a felony of the first-degree, and one count of tampering with evidence, a violation of R.C. 2921.12, a felony of the third-degree. At her arraignment, Pettiford pled not guilty to the charges.

{¶ 4} Pettiford and her son, Eric Pettiford, gave statements to the Chillicothe Police Department admitting their involvement in a robbery of the Circle K in Chillicothe, Ohio. The robbery occurred during the early morning hours of Christmas Eve 2013. Pettiford and her

son dressed in two layers of clothing so the outer layer could be discarded following the robbery. Pettiford wore a blue ski mask while her son also wore a covering over his face. Pettiford and her son walked to the store and waited in the grass at the edge of a tree line just east of the store for about an hour. Pettiford and her son eventually went into the store. Pettiford admitted that she possessed a folded knife concealed in her hand the entire time they were in the store. Pettiford stood behind her son as he displayed a knife with the blade extended and told the clerk to open the register. The clerk complied with Eric Pettiford's order and gave him \$22 in cash. Pettiford and her son then fled the store. Pettiford then discarded her toboggan, gloves, and knife in a hollow in a downed tree; and she discarded her jacket and maternity jeans in a garbage bin.

{¶ 5} During the pendency of Pettiford's case, Eric Pettiford had pled guilty and was sentenced to four years total on charges of aggravated robbery and tampering with evidence. In April 2014, Pettiford changed her plea of not guilty to a plea of no contest. During the plea hearing, and prior to Pettiford changing her plea to no contest, the trial court acknowledged that the State of Ohio had recommended a sentence for Pettiford similar to the four-year sentence that her son received; however, the trial court advised that it was not comfortable with that recommendation. The trial court explicitly stated on the record and in the presence of Pettiford that it "would be comfortable at five years."

{¶ 6} Pettiford was later sentenced to a prison term of five years on the complicity to aggravated robbery charge and twenty-four months on the tampering with evidence charge. The trial court ordered the sentences to run concurrently for a total sentence of five years.

{¶ 7} Pettiford filed a timely notice of appeal.

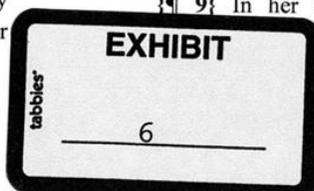
#### II. ASSIGNMENT OF ERROR

{¶ 8} Pettiford assigns the following error for our review:

THE TRIAL COURT ERRED IN VIOLATION OF THE DEFENDANT-APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE UNITED STATES AND OHIO CONSTITUTIONS WHEN THE TRIAL COURT IMPOSED A SENTENCE BASED ON FINDINGS NOT SUPPORTED BY THE RECORD.

#### III. LAW AND ANALYSIS

{¶ 9} In her sole assignment of error, Pettiford



contends that the trial court violated her due process rights by imposing a sentence based on findings not supported by the record.

{¶ 10} When reviewing felony sentences, we apply the standard of review set forth in R.C. 2953.08(G)(2). *State v. Mockbee*, 4th Dist. Scioto No. 14CA3601, 2014-Ohio-4493, ¶ 11; *State v. Graham*, 4th Dist. Highland No. 13CA11, 2014-Ohio-3149, ¶ 31; *State v. Bever*, 4th Dist. Washington No. 13CA21, 2014-Ohio-600, ¶ 13. R.C. 2953.08(G)(2) specifies that an appellate court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds either that "the record does not support the sentencing court's findings" under the specified statutory provisions or "the sentence is otherwise contrary to law."

{¶ 11} Pettiford argues that the five-year sentence that she received was based on findings not supported in any way by the record. This argument is flawed, however, because the trial court was not required to make any findings prior to sentencing Pettiford. R.C. 2953.08(G)(2) sets forth certain statutory provisions that require a trial court to make findings supported by the record. Pettiford's situation does not fall within the statutory provisions that are set forth in R.C. 2953.08(G)(2). Specifically, R.C. 2953.08(G)(2) states that an appellate court may take authorized action if it clearly and convincingly finds that the sentence is contrary to law or:

(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant \* \* \*.

Upon examination of the specific statutory provisions set forth above, it is clear that the section is inapplicable to Pettiford.

{¶ 12} For instance R.C. 2929.13(B) deals with offenders who are convicted of or pled guilty to felonies of the fourth or fifth-degree. R.C. 2929.13(D) applies when a trial court gives community control sanctions to persons convicted of felonies of the first or second-degree. Pettiford is in neither of these situations. Pettiford was convicted of a third-degree felony; and the trial court did not consider giving Pettiford community control for the first-degree felony charge of complicity to aggravated robbery.

{¶ 13} In addition, R.C. 2929.14(B)(2)(e) sets forth that if a trial court sentences an offender as a repeat violent offender, then it must set forth the findings explaining the imposed sentence. Pettiford is not a repeat violent offender. R.C. 2929.14(C)(4) deals with consecutive sentences and

the findings that must be made by a trial court prior to imposing consecutive sentences. This section also does not apply to Pettiford as she was sentenced to concurrent sentences.

{¶ 14} Lastly, R.C. 2929.20(I) is a section that applies to sentence reduction through judicial release. This is inapplicable to Pettiford as the sentencing in this case was an initial sentencing, not a sentence reduction through judicial release.

{¶ 15} Pettiford does not explicitly argue that the trial court's sentence is contrary to law; however, even if we construe Pettiford's argument as such, we find that the sentence is not clearly and convincingly contrary to law. "[A] sentence is generally not contrary to law if the trial court considered the R.C. 2929.11 purposes and principles of sentencing as well as the R.C. 2929.12 seriousness and recidivism factors, properly applied post-release control, and imposed a sentence within the statutory range." *State v. Brewer*, 2014-Ohio-1903, 11 N.E.3d 317, ¶ 38 (4th Dist.). "The sentence must also comply with any specific statutory requirements that apply, e.g. a mandatory term for a firearm specification, certain driver's license suspensions, etc." *Id.*

{¶ 16} While the sentencing court is required to consider the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors listed in R.C. 2929.12, it "need not make any specific findings in order to demonstrate its consideration of those factors, nor does it have to use the exact wording of the statute." *State v. Sparks-Arnold*, 2nd Dist. Clark No. 2014-CA-9, 2014-Ohio-4711, ¶ 8; *see also State v. Lister*, 4th Dist. Pickaway No. 13CA15, 2014-Ohio-1405, ¶ 15 ("[T]here is still no "mandate" for the sentencing court to engage in any factual findings under R.C. 2929.11 or R.C. 2929.12." ), quoting *State v. Jones*, 12th Dist. Butler No. CA2012-03-049, 2013-Ohio-150, ¶ 49. Moreover, the factors set forth in R.C. 2929.12 are non-exhaustive, and sentencing courts may consider "any other factors that are relevant to achieving those purposes and principles of sentencing." R.C. 2929.12(A).

{¶ 17} Here, the trial court expressly stated the following at the sentencing hearing when imposing its sentence:

THE COURT: ALRIGHT, THE COURT HAS CONSIDERED THE RECORD, THE STATEMENT OF DEFENDANT AND COUNSEL, I MAKE MY DECISION PRIMARILY BASED UPON THE OVERRIDING PRINCIPALS AND PURPOSES OF FELONY SENTENCING. I HAVE CONSIDERED ALL THE RELEVANCE [SIC] SERIOUSNESS AND RECIDIVISM FACTORS, FIND THE OFFENDER IS NOT AMENABLE TO COMMUNITY CONTROL, AND

THAT PRISON TERM IS CONSISTENT WITH PURPOSES AND PRINCIPALS OF FELONY SENTENCING.

{¶ 18} In addition, the sentencing entry expressly states that: The Court has considered the file in this matter, statements of counsel and the defendant, the negotiations that were entered into in this matter, the purposes of felony sentencing under Ohio Revised Code Section 2929.11, the seriousness and recidivism factors contained in Ohio Revised Code Section 2929.12. The court has also considered the felony sentence guidance as provided in Ohio Revised Code Section 2929.13. The court has also determined the minimum sanctions necessary to accomplish the purposes of felony sentencing without imposing an unnecessary burden on state or local government resources. Defendant is not amenable to available community control sanctions and a sentence to prison is consistent with the purposes and principles of felony sentencing.

{¶ 19} It is noteworthy that the trial court explicitly told Pettiford and her attorney at the change of plea hearing that:

I WAS NOT COMFORTABLE WITH THE RECOMMENDATION COMING FROM THE PARTIES, BUT I WOULD BE COMFORTABLE AT FIVE YEARS. I INITIALLY SAID SIX YEARS, BUT AFTER REVIEWING THE REPORT, I AGREED OR TOLD THE PARTIES THAT I WAS COMFORTABLE WITH THE FIVE YEAR SENTENCE. \* \* \*

The trial court also went through the following colloquy with Pettiford:

Q. YOU UNDERSTAND EVERYTHING THAT'S GOING ON TODAY? A. YES.

Q. ALRIGHT, HAS ANYONE THREATENED YOU TO CHANGE YOUR PLEA TO NO CONTEST?

A. NO.

Q. HAS ANYONE PROMISED YOU ANYTHING OTHER THAN WHAT I JUST SAID A FEW MINUTES AGO WHEN I WAS OUTLINING THE PLEA NEGOTIATIONS?

A. NO.

Q. ALRIGHT SO YOU'RE TELLING ME YOU'RE DOING THIS VOLUNTARILY?

A. YES.

Q. DO YOU UNDERSTAND THAT WHILE YOU AND THE STATE CAN PRESENT TO ME ANY

RECOMMENDATION YOU LIKE FOR SENTENCING, THAT I'M NOT BOUND TO ACCEPT ANY OF THOSE RECOMMENDATIONS. SO THAT MEANS I CAN SENTENCE YOU TO ANYTHING AT ALL IN THE LEGAL RANGE OF SENTENCES. DO YOU UNDERSTAND THAT?

A. YES.

{¶ 20} Therefore, the record demonstrates that the trial court considered R.C. 2929.11 and R.C. 2929.12 and properly informed Pettiford of post-release control when sentencing Pettiford. The sentences comply with all other statutory requirements. Pettiford's five-year prison term falls within the statutory range for complicity to aggravated robbery in violation of R.C. 2923.03, a felony of the first degree. *See* R.C. 2929.14(A)(1) ("For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, ten, or eleven years.") Pettiford's sentence of twenty-four months also falls within the statutory range for tampering with evidence in violation of R.C. 2921.12, a felony of the third degree. *See* R.C. 2929.14(A)(3)(b) ("For a felony of the third degree that is not an offense for which division (A)(3)(a) of this section applies, the prison term shall be nine, twelve, eighteen, twenty-four, thirty, or thirty-six months."). Accordingly, Pettiford's sentence is not clearly and convincingly contrary to law.

{¶ 21} Finally, Pettiford contends that the trial court erred by finding, at sentencing, that she was more culpable than her son because she was his mother and presumably had a hand in raising him. Pettiford argues that the record did not support such a finding, insinuating that her son was raised primarily by his grandmother. Thus, Pettiford argues that the trial court's reliance on such a finding in imposing a more severe sentence than her son's was a violation of due process. We disagree with Pettiford, however, because a "trial court has full discretion to impose any sentence within the authorized statutory range, and the court is not required to make any findings or give its reasons for imposing maximum or more than minimum sentences." (Quotations omitted). *State v. Coots*, 2nd Dist. Miami No. 2014CA1, 2015-Ohio-126, ¶ 81. Therefore, because the imposed sentence was within the statutory range and not otherwise contrary to law, the trial court's remarks at sentencing are irrelevant on appeal; and we overrule Pettiford's sole assignment of error.

#### IV. CONCLUSION

{¶ 22} Having overruled Pettiford's assignment of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED.  
Appellant shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

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

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of the proceedings in that court. If a stay is continued by this entry, it will terminate at the earliest of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to the expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Harsha, J. and McFarland, A.J. Concur in Judgment and Opinion.

2015-Ohio-1685

State of Ohio Appellee

v.

Richard D. Schnitker Appellant

No. S-14-039

Court of Appeals of Ohio, Sixth District, Sandusky

May 1, 2015

Trial Court No. 14 CR 295

Thomas L. Steirwalt, Sandusky County Prosecuting Attorney, and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Nathan T. Oswald, for appellant.

#### DECISION AND JUDGMENT

OSOWIK, J.

{¶ 1} This is an appeal from a September 12, 2014 judgment of the Sandusky Court of Common Pleas, which convicted appellant of two counts of pandering sexually oriented materials involving a minor, in violation of R.C. 2907.322. Pursuant to the plea agreement, 75 of the 77 felony pandering charges originally charged against appellant in the indictment were dismissed in exchange for appellant's plea on the remaining two counts. For the reasons set forth below, this court affirms the sentencing judgment of the trial court, but reverses and remands for the limited purpose of a nunc pro tunc sentencing entry to fully incorporate the consecutive sentencing findings made by the trial court.

{¶ 2} Appellant, Richard D. Schnitker, sets forth the following two assignments of error:

THE TRIAL COURT ERRED WHEN IT IMPOSED CONSECUTIVE SENTENCES WITHOUT MAKING THE FINDINGS REQUIRED BY R.C. 2929.14.

THE TRIAL COURT ERRED BY SENTENCING MR. SCHNITKER TO CONSECUTIVE TERMS OF IMPRISONMENT AFTER MAKING FINDINGS THAT LACK SUPPORT IN THE RECORD.

{¶ 3} The following undisputed facts are relevant to this appeal. Between September 2013, and February 2014, three separate Sandusky County, Ohio, police departments

received reports from parents of minor females who had been randomly befriended by an unknown adult male on social media sites seeking to develop sexual relationships with the girls. The majority of the girls ranged in age from 9 to 14 years of age.

{¶ 4} Appellant's modus operandi was to search popular social media sites such as Facebook to find profiles of attractive girls in the desired age range, and initiate discourse by sending them complimentary messages, exchanging pleasantries, and making Facebook friend requests.

{¶ 5} Appellant would thereby build familiarity and trust with them by initially exchanging primarily benign communications. Upon achieving a level of trust through regular message exchanges, appellant would then escalate and begin to forward increasingly sexually explicit messages, photos and videos to the girls. Appellant would simultaneously encourage the girls to send back to him increasingly more explicit sexual materials of them. As his demands increased to increasingly pornographic levels, some of the girls resisted and attempted to cease communications. When they did so, appellant would threaten to post the already received compromising materials of the girls on the Internet.

{¶ 6} Appellant eventually persuaded several of the girls to meet him in person for the express purpose stated by appellant of engaging in various sexual acts with them. Thankfully, the girls sensed danger and upon meeting appellant at the designated site, left and did not go with appellant.

{¶ 7} Based upon multiple reports regarding appellant's ongoing actions, the Sandusky County Sheriff's Department created a Facebook account of a 14-year-old girl and sent a friend request to appellant, a 28-year-old former volunteer firefighter from Sandusky County. Appellant accepted and began requesting sexually explicit photos and information from the party whom he believed to be a minor female. In addition, appellant sent sexually explicit photos and information to the Facebook account of the 14-year-old girl.

{¶ 8} Appellant ultimately encouraged the officer posing as the girl to slip out of her home without her parents' knowledge and covertly meet with him at a designated location. Appellant sent a picture of his vehicle and the exact location where she was to meet him. Appellant later sent a picture to the undercover officer of his aroused genitalia.

EXHIBIT

tabbles

7

{¶ 9} Ultimately, sufficient information was obtained in the investigation by the Sheriffs Department so that a search warrant for appellant's residence was obtained. During the execution of the search warrant, investigating officers recovered cell phones and multiple other mobile electronic devices which contained information and images from which investigators were able to identify numerous minor female victims.

{¶ 10} Upon recovering this information, the Sheriffs Department contacted and interviewed multiple parents and their minor daughters. The investigation confirmed that appellant was communicating with multiple minor females as young as nine years of age, initiating extremely sexually explicit communications, sending sexually explicit pictures of himself, and systematically requesting and encouraging sexually explicit photos and videos from the girls. The investigation also revealed appellant's pattern of threatening the girls with exposure when they attempted to cease communication with him. Appellant encouraged some of the girls to meet him in person and conveyed to them the desired sexual conduct that he wished to pursue with them.

{¶ 11} On May 6, 2014, appellant was indicted on 77 felony counts including pandering obscenity involving a minor, in violation of R.C. 2907.321, felonies of the fourth and fifth degree, and pandering sexually oriented matter involving a minor, in violation of R.C. 2907.322, felonies of the second degree.

{¶ 12} On July 30, 2014, appellant entered into a voluntary plea agreement through which he pled guilty to two counts of pandering sexually oriented matter involving a minor, in violation of R.C. 2907.322, felonies of the second degree. In exchange, the remaining 75 charges were dismissed. A presentence investigation was ordered. On September 12, 2014, appellant was sentenced to serve seven years of incarceration on each of the two counts, ordered to be served consecutively, for a total term of incarceration of 14 years. This appeal ensued.

{¶ 13} Both of appellant's assignments of error similarly contend that the trial court erred in sentencing appellant on a consecutive basis. Given their common legal premise, we will address the assignments of error simultaneously.

{¶ 14} In support of his arguments disputing the underlying sentence, appellant requests this court modify, vacate, or remand the sentence back to the trial court pursuant to R.C. 2953.08(G)(2), the statutory provision that governs appellate review of disputed felony sentences.

{¶ 15} In conjunction with the above, we note that it is well-established that R.C. 2953.08(G)(2) directs that the proper appellate standard of felony sentence review is no

longer abuse of discretion review. The applicable standard of review is whether it is clearly and convincingly shown that the record does not support applicable findings made by the sentencing court or that the sentence is otherwise contrary to law. *State v. Tammerine*, 6th Dist. Lucas No. L-13-1081, 2014-Ohio-425, ¶ 11.

{¶ 16} Based upon the above governing legal parameters, we note that the permissible statutory sentencing range for a felony of the second degree, such as the convictions underlying this case, is between two and eight years. R.C. 2929.14(A). Thus, we find that the seven-year terms of incarceration imposed in this case squarely fall within the permissible range.

{¶ 17} The record further shows that the trial court properly applied post-release control and considered both the seriousness and recidivism factors underlying this case. The trial court properly considered appellant's criminal history and the seriousness of the crimes for which appellant was convicted. We find that the record does not demonstrate that appellant's sentence is clearly and convincingly contrary to law.

{¶ 18} Next, in connection to consideration of any statutory findings potentially relevant to our review of this case, the record reveals that one of the potential R.C. 2953.08 (G)(2) requisite statutory findings is applicable to the instant case.

{¶ 19} R.C. 2929.13(B) pertains to fourth or fifth degree felony cases. This case entails second-degree felony convictions and thus those statutory findings are not relevant to this case. R.C. 2929.13(D) pertains to the necessity to make findings in cases in which no prison term is imposed in a second-degree felony case. Because a prison term was imposed in this case, those statutory findings are not relevant.

{¶ 20} R.C. 2929.14(B)(2)(e) pertains to the sentencing of offenders who are repeat violent offenders. The case before us does not pertain to a repeat violent offender and thus those statutory findings are not relevant. R.C. 2929.20(I) pertains to judicial release hearings. As such, it is not relevant to this case.

{¶ 21} Lastly, R.C. 2929.14 (C)(4) pertains to multiple convictions on multiple offenses. That statutory consideration is applicable to the instant case. R.C. 2929.14(C)(4) establishes that in order to properly sentence a defendant to consecutive prison terms for convictions on multiple offenses the sentencing court must find that such a sentence 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."

{¶ 22} The statute further establishes that the court must also find that the offender falls within one of three additional delineated statutory findings. As relevant to the instant case, R.C. 2929.14(C)(4) delineates that one of the three potential findings satisfying that portion of the statute is a finding that the harm resulting from the multiple offenses was so great that a single term of incarceration for any of the crimes committed in that course of conduct would not adequately reflect the seriousness of the of the conduct.

{¶ 23} We have carefully reviewed and considered the record of evidence in this matter, paying particular attention given the nature of this appeal to the transcript of the sentencing proceedings. We note that the record reflects at pages 20-22 of the sentencing transcript that the trial court specifically referenced and explained the R.C. 2929.14(C)(4) statutory findings applicable to this case.

{¶ 24} The sentencing transcript reflects in pertinent part that the trial court stated, "[M]y job is to attempt to protect the public from future crime, and sometimes when the crime is heinous enough, the only thing we can do is take you out of commission for a while, so that's what we're going to do." As such, the trial court properly satisfied the first prong of the R.C. 2929.14(C)(4) required statutory findings prior to the imposition of the disputed consecutive sentences.

{¶ 25} The transcript further reflects in connection to the three potential statutory findings satisfying the second prong that, "[N]o 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. I am finding that this provision does apply." As such, the trial court properly satisfied the second prong of the R.C. 2929.14(C)(4) required statutory findings prior to the imposition of the disputed consecutive sentences.

{¶ 26} With respect to appellant's related contention that these findings lacked support in the record, we note that the record is replete with evidence demonstrating appellant's conduct in systematically initiating social media communications with girls ranging primarily in age from 9 to 14 and systematically encouraging and pressuring the exchange of explicit sexual messages and images. The record shows that appellant repeatedly encouraged the girls to send him explicit and staged sexual photos of themselves and encouraging them to make and send sexually explicit videos of themselves. The record also encompasses persuasive evidence of appellant's conduct in threatening to publicly expose the sexually explicit materials involving the girls whenever they would attempt to cease communications with him or not cooperate with his

requests.

{¶ 27} Wherefore, we find that the record encompasses convincing evidentiary support for the trial court's findings that consecutive sentences were necessary to protect the public from future crimes and that non-consecutive sentences would not adequately reflect the seriousness of appellants' conduct.

{¶ 28} Lastly, we note the sentencing entry itself states, "An analysis of ORC 2929.14(C) was conducted on the record as the result being application of consecutive sentences pursuant to 2929.14(c)(4)(b)." This is an insufficient sentencing entry as it fails to incorporate the findings described above properly made by the trial court in support of the imposition of consecutive sentences. Notably, this error only constitutes a clerical error that can be corrected through a nunc pro tunc entry. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 29.

{¶ 29} Wherefore, we find appellant's assignments of error not well-taken. The sentencing judgment of the Sandusky County Court of Common Pleas is hereby affirmed, but reversed and remanded for the limited purpose of a nunc pro tunc entry as described above. Appellant is ordered to pay the cost of this appeal pursuant to App.R. 24.

Judgment affirmed, in part, and reversed and remanded, in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, J. Thomas J. Osowik, J. Stephen A. Yarbrough, P.J. JUDGE CONCUR.

2015-Ohio-1359

STATE OF OHIO PLAINTIFF-APPELLEE

v.

DANIEL WELLINGTON DEFENDANT-APPELLANT

No. 14 MA 115

Court of Appeals of Ohio, Seventh District, Mahoning

March 31, 2015

Criminal Appeal from the Court of Common Pleas of Mahoning County, OH Case No. 11CR866

For Plaintiff-Appellee: Atty. Paul J. Gains Mahoning County Prosecutor Atty. Ralph M. Rivera Assistant Prosecuting Attorney

For Defendant-Appellant: Atty. John A. Ams

Hon. Carol Ann Robb Hon. Gene Donofrio Hon. Mary DeGenaro

**OPINION**

ROBB, J.

{¶1} Defendant-appellant Daniel Wellington ("Appellant") appeals the decision of the Mahoning County Common Pleas Court sentencing him to 10 years in prison, the maximum allowable by law, for one count of involuntary manslaughter. The crime Appellant committed occurred on August 5, 2011. Appellant contends the version of R.C. 2929.14(C) that was effective at the time the offense was committed mandated the sentencing court to make maximum sentence findings prior to ordering a maximum sentence. Appellant argues the sentencing court did not make the required maximum sentencing findings and therefore, the 10 year sentence is contrary to law and must be reversed.

{¶2} His argument is without merit. Prior to the commission of the offense, the Ohio Supreme Court deemed R.C. 2929.14(C) to be unconstitutional and severed that provision from the statute. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. As of date, the General Assembly has not enacted the maximum sentencing findings in the felony sentencing statutes. Hence, the trial court was not required to make maximum sentencing findings. For that reason and the reasons espoused below, the sentence is hereby affirmed.

*Statement of the Case*

{¶3} In August 2011, Appellant was indicted for one count of murder. Eventually a plea agreement was reached and Appellant pled guilty to one count of involuntary manslaughter, a first-degree felony in violation of R.C. 2903.04(A)(C). Appellant was sentenced on April 13, 2013 to an 11 year sentence. *State v. Wellington*, 7th Dist. No. 13MA90, 2014-Ohio-1179, ¶4 (*Wellington I*).

{¶4} He appealed the sentence to our court arguing that the sentence was contrary to law because the maximum sentence for a first-degree felony pursuant to the version of R.C. 2929.14(A)(1) that was in effect at the time of the commission of the offense was ten, not eleven years. *Id.* at ¶ 6-7. The state agreed and confessed error. *Id.* at ¶ 8. Upon review, we discussed the prior version of R.C. 2929.14(A)(1) and the current version of R.C. 2929.14(A)(1) that was enacted as part of House Bill 86 ("*H.B. 86*"). *Id.* at ¶ 10-13. We acknowledged that H.B. 86 changed the possible prison terms for felonies. However, the bill did not become effective until after the commission of the offense and the provisions of H.B. 86 indicated it does not apply retroactively. *Id.* at ¶ 1 2-13. Accordingly, this court reversed the sentence and remanded the matter to the trial court with instructions for it to utilize the version of R.C. 2929.14(A)(1) that was in effect on the date Appellant committed the offense. *Id.* at ¶ 17.

{¶5} The re-sentencing hearing was held on August 13, 2014. The trial court imposed a 10 year sentence, the maximum allowable by law. 8/14/14 J.E.; 8/13/14 Tr. 10.

{¶6} Appellant filed a timely appeal from that sentence.

*Assignment of Error*

"The trial court erred when it failed to make the required findings for imposing a maximum sentence pursuant to the pre-House Bill 86 version of the Revised Code Section 2929.14(C)."

{¶7} Appellant argues the version of R.C. 2929.14(C) that was effective when he committed the offense required sentencing courts to make maximum sentence findings prior to sentencing an offender to the maximum term. He asserts that since the trial court did not make those mandated findings, the sentence is contrary to law and must be reversed.

{¶8} The state disagrees with those arguments and contends that maximum sentence findings are not required.

**EXHIBIT**

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8

{¶9} Within the last year, we have stated that we will follow the felony sentencing standard of review as set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124 *State v. Hill*, 7th Dist No 13 MA 1, 2014-Ohio-919, ¶ 20 (Vukovich, J, Donofrio, J, majority with DeGenaro, J, concurring in judgment only with concurring in judgment only opinion). The *Kalish* review is a two-step approach which employs the "clearly and convincingly contrary to law" test and the abuse of discretion test. *Id.* at ¶ 12.

{¶10} Since our decision, the majority of appellate courts that have addressed the issue of felony sentencing standard of review have determined that H.B. 86 revived the standard of review set forth in R.C. 2953.08(G), which clearly indicates that appellate courts only review sentences to determine if they are contrary to law, not to determine if the trial court abused its discretion. *State v. Tammerine*, 6th Dist. No. L-13-1081, 2014-Ohio-425 ("Based upon all of the foregoing, we now likewise apply the statutory standard of review rather than the former *Kalish* approach to our review of felony sentences \* \* \* [W]e now will consider the propriety of the disputed sentence in this case pursuant to the new R.C. 2953.08(G)(2) statutory parameters."); *State v. Brewer*, 4th Dist. No. 14CA1, 2014-Ohio-1903, ¶ 33 ("we join the growing number of appellate districts that have abandoned the *Kalish* plurality's second-step abuse-of-discretion standard of review; when the General Assembly reenacted R.C. 2953.08(G)(2), it expressly stated that "[t]he appellate court's standard of review is not whether the sentencing court abused its discretion"); *State v. Tate*, 8th Dist. No. 97804, 2014-Ohio-5269, ¶ 55 (no longer applies the abuse of discretion standard of *Kalish*); *State v. Rodeffer*, 2013-Ohio-5759, 5 N.E.3d 1069 (2d.Dist.); *State v. Murphy*, 10th Dist. No. 12AP-952, 2013-Ohio-5599, ¶ 12; *State v. Crawford*, 12th Dist. No. CA2012-12-088, 2013-Ohio-3315; *State v. White*, 997 N.E.2d 629, 2013-Ohio-4225, ¶ 10 (1st Dist.). See also *State v. Marcum*, 141 Ohio St.3d 1453, 2015-Ohio-239, 23 N.E.3d 1453 (Ohio Supreme Court has accepted the certified conflict question of what is the felony sentencing standard of review).

{¶11} Likewise, recently the Ohio Supreme Court in *Bonnell* stated:

On appeals involving the imposition of consecutive sentences, R.C. 2953.08(G)(2)(a) directs the appellate court "to review the record, including the findings underlying the sentence" and to modify or vacate the sentence "if it clearly and convincingly finds \* \* \* [t]hat the record does not support the sentencing court's findings under division \* \* \* (C)(4) of section 2929.14 \* \* \* of the Revised Code." But that statute does not specify where the findings are to be made. Thus, the record must contain a basis upon which a reviewing court can determine that the trial court made the

findings required by R.C. 2929.14(C)(4) before it imposed consecutive sentences.

*State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 28.

{¶12} The Ohio Supreme Court did not reference the abuse of discretion standard of review in *Bonnell*. Such omission appears to be an implicit indication that the Court has moved away from the abuse of discretion standard and is embracing R.C. 2953.08 as the proper method of review.

{¶13} Considering the above, we depart from our prior holding in *Hill*, which indicated this court would continue to use the *Kalish* standard of review to review felony sentences. We do so not only based on the above reasoning, but the clear language of R.C. 2953.08(G), which was re-enacted as part of H.B. 86. That provision clearly states, "The appellate court's standard for review is not whether the sentencing court abused its discretion." R.C. 2953.08(G)(2).

{¶14} Having set forth the standard of review, we now turn to the merits of this appeal, which is whether the trial court was required to make maximum sentencing findings.

{¶15} As we stated in *Wellington I*, the commission of the offense occurred prior to H.B. 86. That bill made changes to R.C. 2929.14 and mandated in section (C)(4) that certain findings are required for the imposition of consecutive sentences. The H.B. 86 version of R.C. 2929.14 does not require findings for the imposition of maximum sentences.

{¶16} The pre-H.B. 86 version of R.C. 2929.14(C) mandated maximum sentencing findings before the imposition of a maximum sentence. However, what Appellant fails to acknowledge is that the pre-H.B. 86 version of R.C. 2929.14(C) that required judicial findings of fact for maximum prison terms was rendered unconstitutional and severed from the statute. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraphs two and three of the syllabus. The Court further stated, "Trial 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, consecutive, or more than the minimum sentences." *Id.* at paragraph 7 of the syllabus.

{¶17} Admittedly, three years after the Ohio Supreme Court's decision in *Foster*, the United States Supreme Court held that it is constitutionally permissible for states to require judges to make findings of fact before imposing consecutive sentences. *Oregon v. Ice*, 555 U.S. 160, 164, 129 S.Ct. 711 (2009). Thereafter, the Ohio Supreme Court acknowledged that the *Ice* decision "undermines some of the reasoning in the *Foster* decision that judicial

fact-finding in the imposition of consecutive sentences violates the Sixth Amendment" and that had it had the benefit of the United States Supreme Court's decision in *Ice* prior to *Foster*, it "likely would have ruled differently as to the constitutionality, and continued vitality, " of Ohio's consecutive-sentencing provisions. *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768, ¶ 19-20. Although the Ohio Supreme Court made those statements, it also specifically indicated that the United States Supreme Court's decision in *Ice* does not revive Ohio's former consecutive-sentencing statutory provisions that were held unconstitutional in *Foster*. *Id.* at ¶ 39. "Because the statutory provisions are not revived, trial court judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new legislation requiring that findings be made." *Id.*

{¶18} Multiple appellate courts have read *Hodge* to also apply maximum sentences. These courts have stated the Ohio Supreme Court in *Hodge* held that its decision in *Foster* remained valid after *Ice* and the judiciary was not required to make findings of fact prior to imposing maximum or consecutive sentences "unless the General Assembly enacts new legislation requiring that findings be made." *State v. Ross*, 8th Dist. No. 100708, 2014-Ohio-4566, fn. 2, quoting *Hodge* at paragraph three of the syllabus; *State v. Crum*, 4th Dist. No. 13CA13, 2014-Ohio-2361, fn. 4, quoting *Hodge* at paragraph three of the syllabus; *Rodeffer*, 2013-Ohio-5759, 5 N.E.3d 1069, at ¶ 27, quoting *Hodge* at paragraph three of the syllabus; *State v. Mullins*, 11 Dist. No. 2012-P-0144, 2013-Ohio-4301, ¶ 13; *State v. Martinez*, 3d Dist. No. 13-11-21, 2012-Ohio-3750, ¶ 18.

{¶19} Our sister districts' reasoning is logical because *Hodge* specifically indicated that *Ice* did not directly overrule *Foster*. *Hodge*, 2010-Ohio-6320 at ¶ 18. Accordingly, *Foster* remains valid in all respects until the General Assembly acts. *Id.* at ¶ 37, 39. In H.B. 86 the General Assembly did re-enact consecutive sentencing findings, however, maximum sentence findings were not revived in that bill or any bill to date. Therefore, the trial court was not required to make maximum sentencing findings; *Foster*, 2006-Ohio-856 at ¶ 99-100. See also *State v. Parsons*, 7th Dist. No. 12BE11, 2013-Ohio-1281, ¶ 14 (judicial fact-finding in order to justify imposing maximum sentences is no longer required pursuant to *Foster*).

{¶20} Consequently, for the reasons expressed above, the sole assignment of error lacks merit. The sentence is hereby affirmed.

Donofrio, P.J., Concur in judgment only; see concurring in judgment only opinion.

Donofrio, P.J. concurs in judgment only.

{¶21} For the following reasons, I respectfully concur in judgment only.

{¶22} For years this Court has followed the Ohio Supreme Court's plurality decision in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, regarding the standard of review for felony sentencing. *Kalish* employs a two-step approach examining first whether the sentence is clearly and convincingly contrary to law and then moving on to determine if the trial court abused its discretion in sentencing the offender. We most recently reexamined whether we would continue to apply *Kalish*'s two-step approach in *State v. Hill*, 7th Dist. No. 13 MA 1, 2014-Ohio-919. We reaffirmed that we would continue to follow *Kalish*. *Hill*, at ¶20.

{¶23} The majority now departs from our holding in *Hill*. For the reasons this Court set out in *Hill*, I respectfully disagree with this departure and would continue to employ the two-step review set out in *Kalish*. See *Hill*, at ¶¶15-20. The fact that the Ohio Supreme Court has accepted this issue for review in *State v. Marcum*, 141 Ohio St.3d 1453, 2015-Ohio-239, 23 N.E.3d 1453, as noted in the majority opinion, further supports my view that we should not depart at this time from our precedent.

{¶24} In this case, however, whether we apply the "contrary to law" test set out by the majority or the *Kalish* two-step approach, the result is the same. Therefore, I concur in judgment only.

DeGenaro, J., concurring.

{¶25} I concur with the majority's analysis, and write separately to respond to the minority opinion's concern regarding the propriety of overruling our prior decision in *State v. Hill*, 7th Dist. No. 13 MA 1, 2014-Ohio-919. Although it is rare to depart from prior precedent and courts must be cautious in doing so, here we are presented with a situation where it is the necessary and proper course of action. *Hill* must be rejected because it relies upon *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, a plurality decision that has merely persuasive rather than precedential value. More importantly, *Kalish* has been supplanted by the General Assembly's enactment of HB. 86.

{¶26} In *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 228, 2003-Ohio-5849, 797 N.E.2d 1256, the Supreme Court of Ohio established an analytical methodology to review precedent and determine the rare instance where a court should depart from principles of stare decisis and reverse that prior decision. *Galatis* frames the question as whether the prior decision was wrongly decided, defies practical workability, and there is no reliance interest that would suffer an undue hardship by abandoning the

precedent. *Id.* at ¶48. Thus, the propriety of reversing *Hill* instead of continuing to apply it (and ergo the *Kalish* two-part standard of review) when a defendant challenges a sentence on appeal must be examined within the *Galatis* framework.

{¶27} First, *Hill* was wrongly decided. As noted in the majority opinion here, we cannot continue to rely on *Kalish*-and by extension *Hill* -post-H.B. 86 because the General Assembly specifically reenacted the standard of review with respect to alleged felony sentencing errors: clearly and convincingly contrary to law and not abuse of discretion. *Hill* at ¶41 (DeGenaro, P.J., concurring in judgment only). To continue to do otherwise raises separation of powers concerns, because courts "cannot apply a standard of review that is expressly prohibited by the legislature." *Hill* at ¶44 (DeGenaro, P.J., concurring in judgment only).

{¶28} Second, *Hill* is unworkable due to its reliance on *Kalish*-the unworkability of which is self-evident given the confusion regarding its application- which has been recognized by more of our sister districts since we decided *Hill*. When *Hill* was decided just over a year ago, the First, Second, Third, Eighth and Twelfth Districts held that H.B. 86 supplanted *Kalish*. Since we decided *Hill*, the Fourth, Sixth and Tenth Districts have likewise applied the R.C. 2953.08(G)(2) standard of review. And the source of the unworkability of *Kalish* is that the decision has "questionable precedential value inasmuch as it was a plurality opinion which failed to receive the requisite support of four justices of this court in order to constitute controlling law." *Kraly v. Vannewkirk*, 69 Ohio St.3d 627, 633, 635 N.E.2d 323 (1994). "Thus, there is no controlling case law to guide the courts of appeals in the application of the syllabus law." *State v. Bickerstaff*, 7th Dist. No. 09JE33, 2011-Ohio-1345, ¶ 75. Our sister districts and the majority here recognize that by enacting H.B. 86, the General Assembly legislatively resolved the unworkability of *Kalish* by reenacting the standard of review articulated in R.C. 2953.08(G)(2), which specifically precludes abuse of discretion review.

{¶29} Third, there is no reliance interest that would suffer an undue hardship by abandoning the holding in *Hill*. The majority here and our sister districts recognize that the General Assembly expressly chose to replace a more deferential standard of review with one that is less deferential to the trial court's decision. This runs to the benefit, rather than the detriment, of defendants challenging their sentences on appeal.

{¶30} In sum, I concur with the majority's decision to overrule our decision in *Hill*, therefore applying the standard of review set forth in R.C. 2953.08(G)(2), and no longer applying the *Kalish* two-part analysis. By applying

the *Galatis* analysis, it is appropriate to depart from principles of stare decisis and hold that *Hill* no longer has precedential value.

2015-Ohio-1738

STATE OF OHIO PLAINTIFF-APPELLEE

v.

DAVID ORR DEFENDANT-APPELLANT

No. 101582

Court of Appeals of Ohio, Eighth District, Cuyahoga

May 7, 2015

Criminal Appeal from the Cuyahoga County Court of  
Common Pleas Case No. CR-13-577174-A

ATTORNEY FOR APPELLANT Kevin M.  
Cafferkey

ATTORNEYS FOR APPELLEE Timothy J.  
McGinty Cuyahoga County Prosecutor BY: RonniDucoff  
Mary McGrath Assistant County Prosecutors

BEFORE: Boyle, J., E.T. Gallagher, P.J., and  
Stewart, J.

### JOURNAL ENTRY AND OPINION

MARY J. BOYLE, JUDGE

{¶ 1} Defendant-appellant, David Orr, appeals his eight-year sentence for three counts of sexual battery and one count of gross sexual imposition, raising a single assignment of error:

The record does not support the R.C. 2929.14(C) findings by the sentencing court.

{¶ 2} Finding no merit to the appeal, we affirm but remand to the trial court to issue a nunc pro tunc entry to incorporate the findings made at the sentencing hearing into the journal entry.

#### *Procedural History and Facts*

{¶ 3} Orr, who was 40 years old at the time and a home healthcare aide, committed several sexual offenses against a former patient - a 62-year-old woman. According to the victim, nearly on a daily basis, between June 2, 2012 and October 20, 2012, Orr performed oral sex and had sexual intercourse with the victim without her consent while working as the victim's home healthcare aide. The victim, who suffers a host of medical problems, is confined to a wheelchair and dependent on oxygen for support. Orr was

arrested for the offenses after the victim presented a washcloth that contained Orr's sperm together with the victim's DNA.

{¶ 4} In April 2014, pursuant to a plea agreement, Orr pleaded guilty to an amended indictment containing four counts of sexual battery (amended Counts 1, 2, 3, and 8) in violation of R.C. 2907.03(A)(2); two counts of gross sexual imposition (Counts 5 and 6) in violation of RC. 2907.05(A)(1); and one count of abduction in violation of R.C. 2905.02(A)(1) (amended Count 7). The original counts for rape and kidnapping were dismissed.

{¶ 5} Following Orr's guilty plea, the trial court ordered a presentence investigation report ("PSF"), and the parties each submitted a sentencing memorandum to the court.

{¶ 6} In May 2014, the trial court held the sentencing hearing. Orr's counsel addressed the court, highlighting Orr's positive work history, strong family support, and his lack of a prior record, and requested that the court take mercy on his client. Orr's sister spoke on her brother's behalf, expressing the family's love and support of Orr, who "has always been a compassionate person." Orr addressed the court, apologizing to the victim and the victim's family and acknowledging that what he did "was wrong towards the victim in this situation."

{¶ 7} The state, however, urged the trial court to impose maximum, consecutive sentences. The prosecutor emphasized that Orr initially denied any sexual contact with the victim when first confronted and then maintained that the relationship was consensual. The prosecutor indicated that Orr told the victim that no one would believe her if she considered reporting the acts. The prosecutor stated that, based on the victim's medical issues, "she is totally dependent on her healthcare aide to help her do everything." The prosecutor further emphasized that Orr "sees his encounters as consensual," reporting during the PSI the following: "I was there to help the victim and try to make her feel better because she was always sad and crying and I wanted her to feel better, to cheer her up. I don't feel as though I was aggressive. I was just doing my work." Relying on these statements, the prosecutor argued that Orr's total disregard for the victim, the victim's health conditions, and the abuse of his position as a home healthcare aid warranted maximum, consecutive sentences.

{¶ 8} After making the required findings under R.C. 2929.14(C)(4), the trial court ultimately sentenced Orr to a prison term of eight years. Specifically, following the merger of certain counts, the trial court imposed the

EXHIBIT

tabbles

following prison terms on the remaining counts that the state elected to proceed upon: four years on Count 2, four years on Count 3, one year on Count 5, and four years on Count 8. The trial court further ordered that the four-year sentences in Counts 2, 3, and 5 be served concurrently to each other but consecutive to Count 8, for a total of eight years in prison. The trial court further informed Orr that five years of postrelease control was part of his sentence. The trial court additionally informed Orr of his status as a sexual offender and his accompanying duty to register.

{¶9} From this order, Orr appeals, challenging the imposition of consecutive sentences.

#### *Standard of Review*

{¶ 10} R.C. 2953.08(G)(2) provides that our review of felony sentences is not an abuse of discretion. An appellate court must "review the record, including the findings underlying the sentence or modification given by the sentencing court." *Id.* If an appellate court clearly and convincingly finds either that (1) "the record does not support the sentencing court's findings under [R.C. 2929.14(C)(4)]" or (2) "the sentence is otherwise contrary to law," then "the appellate court may increase, reduce, or otherwise modify a sentence \* \* \* or may vacate the sentence and remand the matter to the sentencing court for resentencing." *Id.*

#### *Consecutive Sentences*

{¶11} In his sole assignment of error, Orr argues that although the court made all the required findings under R.C. 2929.14(C)(4) before imposing consecutive sentences, the record does not support two of the trial court's findings. Specifically, Orr maintains that there is no evidence in the record to support the trial court's finding that "a consecutive sentence was not disproportionate to the danger defendant poses to the public" and that "the harm caused to the victim was so great or unusual that no single prison term adequately reflects the seriousness of the offender's conduct." We disagree.

#### *A. "Not Disproportionate to the Danger Defendant Poses to the Public"*

{¶ 12} Orr argues that his lack of a prior criminal record and his existing support network preclude any finding that consecutive sentences are not disproportionate to the danger that he poses to the public. Specifically, he contends that there is nothing in the record indicating that he abused his position or committed any crimes before this case; therefore, he does not pose a threat to the public. These arguments, however, lack merit.

{¶ 13} Orr had his support network in place at the time that he committed the offenses and yet this support

network did not prevent him from committing these offenses. As for this being Orr's first felony convictions, this alone does not mandate the imposition of concurrent sentences. Notably, the trial court expressly considered on the record the mitigating factors in Orr's favor but ultimately concluded that consecutive sentences were necessary. Specifically, the trial court stated, among other things, the following:

Indicators you're more likely to reoffend under 2929.12(D), there really aren't any except what I consider unbelievable lack of insight. You told the Probation Officer, they quoted, "I was there to help [the victim] and try to make her feel better because she was always sad and crying and I wanted her to feel better, to cheer her up." As somehow having sex with you was the answer to her life problem. You say, "I didn't feel as though I was aggressive." That's another quote. Another quote, "I was just doing my work." Those statements are so incredible and wrongheaded, I don't even know where to start.

I think all of us who have had parents, aunts, uncles, children in situations where they were given care either in a hospital or nursing home or their own home and to think that any one of those people was abusing them in any way, whether it was stealing from them, whether it was being physically abusive, or whether it was in this case sexually assaulting them, it's unthinkable in our society that that should happen. And your statements don't reflect any empathy or any understanding of how wrong this is.

I'm sure you can't envision anyone in your family being sexually assaulted by a stranger who is supposed to help them, but that's what happened to this lady. And apparently she needs a lot of care and she's on her own, and you said no one would believe her about this event. But it is true. It did happen. And it didn't just happen once. It happened a period of July and August of 2012 and it happened again between another period September 1st and October 23rd. These were ongoing incidents. She deserves much, much better.

You were not a gift to her in that sense. I mean, she didn't - whether you thought she was enjoying this or whatever your thoughts were, that's completely wrong. She is a patient. She deserves to be treated with dignity, respect and good care, and providing a sexual assault is none of those. This is intolerable. No patient should be abused in any way by a caregiver ever. You stole her dignity. And your comments are kind of arrogant. You may not have intended them that way, but that's how they sound. You sound like somehow you were gifting yourself to her. This is awful. And you have a family that's very accomplished in the community and other activities. They wouldn't tolerate this and I'm sure they're wondering how this happened. But it's not the victim's fault.

{¶ 14} Orr's conduct in this case coupled with his own justification for such conduct support the trial court's finding that consecutive sentences are not disproportionate to the danger that Orr poses to the public.

*B. "Harm Caused to the Victim "*

{¶ 15} Orr further argues that the record does not support the court's finding under R.C. 2929.14(C)(4)(b), namely, that "the harm caused by two or more of the multiple offenses committed was so great or unusual that no single prison term adequately reflects the seriousness of the offender's conduct." He argues that the victim's own statement in the victim impact statement reveals that the harm was not "so great or unusual" to justify consecutive sentences. Specifically, he points to the victim's desire that she did "not wish for anyone to go to prison" and that the harm constituted an abuse of trust, which alone is not "so great or unusual."

{¶ 16} According to the record, however, the victim refused to speak with the probation officer as part of the PSI because she is afraid of people that she does not know. There is also other evidence in the record that the victim is now afraid to answer her door. The trial court properly recognized and explained the physical and emotional harm endured by the victim, stating the following:

More significantly, she had health issues that prevented her from walking for any distance. She had to be transported through special care and special caregivers, and she was essentially unable to move much on her own, and she was on oxygen. There couldn't have been a person with many more restrictions than she had that was still living independently. And you took advantage of her. Also the relationship; you were her caregiver among others and you sexually assaulted her, caused her serious physical harm in the sense that any man or woman or child who is sexually assaulted there is physical harm. Also a psychological harm. She doesn't want to talk to anyone, answer the phone, go to the door. She doesn't have that sense of trust anymore.

{¶ 17} Based on the totality of the record at the time of sentencing, we cannot say that the record does not clearly and convincingly support the trial court's findings under R.C. 2929.14(C)(4).

{¶ 18} Orr's sole assignment of error is overruled.

{¶ 19} While we affirm the trial court's sentence, we remand the case for the limited purpose of having the trial court incorporate, nunc pro tunc, its consecutive findings into the sentencing entry. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus and } 30 (trial court is not only required to make the statutory findings mandated under R.C. 2929.14(C) to support consecutive sentences but also incorporate its findings into

its sentencing entry; trial court's omission is a clerical mistake and may be corrected through a nunc pro tunc entry).

{¶ 20} Judgment affirmed and case remanded.

It is ordered that appellee recover from appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

EILEEN T GALLAGHER, PJ, and MELODY J STEWART, J, CONCUR

2014-Ohio-310

State of Ohio, Plaintiff-Appellant,

v.

Ryan L. Milhoan, Defendant-Appellee.

No. 13AP-74

Court of Appeals of Ohio, Tenth District

January 30, 2014

APPEAL from the Franklin County Court of Common Pleas. No. 11CR-01-20

Ron O'Brien, Prosecuting Attorney, and Steven L. Taylor, for appellant.

Dennis C. Belli, for appellee.

**DECISION**

GREY, J.

{¶ 1} Plaintiff-appellant, the State of Ohio, appeals from a judgment of the Franklin County Court of Common Pleas sentencing defendant-appellee, Ryan L. Milhoan, to a term of 48 months of community control in lieu of prison time.

{¶ 2} This case is before the court for the second time after a prior remand. *Statev. Milhoan*, 10th Dist. No. 12AP-61, 2012-Ohio-4507 ("*Milhoan I*"). By way of background, we quote directly from our prior decision:

On January 3, 2011, the Franklin County Grand Jury indicted Milhoan on 12 counts of pandering sexually oriented material involving a minor, felonies of the second degree, and 12 counts of pandering sexually oriented material involving a minor, felonies of the fourth degree. The charges arose following an investigation with the Internet Crimes Against Children Task Force. Milhoan's IP address was associated with numerous files containing child pornography. Following a complete forensics exam conducted on three different computers seized from Milhoan, 960 images and 75 videos of child pornography were found.

Milhoan pled guilty to pandering sexually oriented material involving a minor, Counts 1, 2, 3, and 4 of the indictment, felonies of the second degree, and to Counts 21, 22, 23, and 24 of the indictment, felonies of the fourth degree. As part of the plea agreement, the State agreed not to prosecute

Milhoan on Counts 5 through 20 of the indictment. Also, as part of the plea agreement, the State agreed that they would not present the matter to the United States Attorney for potential federal prosecution. The trial court ordered a pre-sentence investigation and continued the case for sentencing. Ultimately, the trial court placed Milhoan on community control for a period of four years, and ordered that he be placed on intensive sex offender supervision, as well as ordering him to maintain employment, submit to urine screens, pay costs, and to have no use of the internet. Milhoan was classified as a Tier II sex offender.

*Id.* at ¶ 2-3.

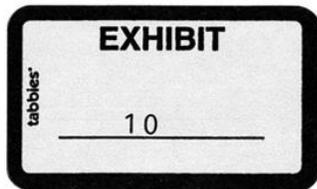
{¶ 3} In the case's first iteration before this court, we held that the trial court had failed to make the findings required by R.C. 2929.13(D)(2) to overcome the statutory presumption that a prison term is an appropriate sentence for a first or second-degree felony. We vacated the sentence on this basis and remanded the matter to the trial court for re-sentencing in compliance with R.C. 2929.13(D). *Id.* at ¶ 7.

{¶ 4} The trial court has now re-sentenced appellee to a sentence that again does not include a prison term and the state has again appealed, bringing the following two assignments of error:

[I.] THE TRIAL COURT ERRED IN IMPOSING COMMUNITY CONTROL WHEN IT FAILED TO MAKE THE FULL REQUIRED FINDINGS FOR OVERCOMING THE PRESUMPTION OF PRISON AND WHEN IT RELIED ON AN ERRONEOUS CLAIM THAT DEFENDANT COULD ONLY RECEIVE TREATMENT IF HE WAS PLACED ON COMMUNITY CONTROL.

[II.] THE TRIAL COURT'S IMPOSITION OF COMMUNITY CONTROL IS CONTRARY TO LAW, AS DEFENDANT CANNOT OVERCOME THE PRESUMPTION IN FAVOR OF A PRISON TERM.

{¶ 5} Appellee was convicted of four second-degree felonies and four fourth-degree felonies. Pursuant to R.C. 2929.13(D)(1), "for a felony of the first or second degree, \* \* \* it is presumed that a prison term is necessary in order to comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code." Despite this presumption in favor of prison time, the sentencing court may deviate downward and impose community control instead of a prison term if the court makes both of the following findings set forth in R.C. 2929.13(D)(2)(a) and (b):



(a) A community control sanction or a combination of community control sanctions would adequately punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a lesser likelihood of recidivism outweigh the applicable factors under that section indicating a greater likelihood of recidivism.

(b) A community control sanction or a combination of community control sanctions would not demean the seriousness of the offense, because one or more factors under section 2929.12 of the Revised Code that indicate that the offender's conduct was less serious than conduct normally constituting the offense are applicable, and they outweigh the applicable factors under that section that indicate that the offender's conduct was more serious than conduct normally constituting the offense.

{¶ 6} The sentencing court must make both the findings specified above before it may deviate from the presumption that a prison term should be imposed. *Id.* at ¶ 6; *State v. Fisher*, 10th Dist. No. 13AP-236, 2013-Ohio-4063, ¶ 7. "These findings must be made at the sentencing hearing." *Id.* at ¶ 7, citing *State v. Martin*, 10th Dist. No. 08AP-1103, 2009-Ohio-3485, ¶ 7; *State v. Wooden*, 10th Dist. No. 05AP-330, 2006-Ohio-212, ¶ 5. The enactment of 2011 Am.Sub.H.B. No. 86, effective September 30, 2011, removed the requirement for the trial court to state its reasons for making findings under R.C. 2929.13(D)(2). *Fisher* at ¶ 6; compare former R.C. 2929.19(B)(2)(b) and *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 23. While the court is no longer required to articulate reasons to explain its findings, the record must still reflect that the court clearly did make the findings required by statute. *Fisher* at ¶ 6.

{¶ 7} In defining the standard for a downward departure in sentencing, R.C. 2929.13(D)(2) references the sentencing factors of R.C. 2929.12. With respect to the seriousness of the offense, R.C. 2929.12(B) and (C) set forth the "more serious" and "less serious" factors respectively:

(B) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is more serious than conduct normally constituting the offense:

(1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.

(2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.

(3) The offender held a public office or position of trust in the community, and the offense related to that office or position.

(4) The offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to justice.

(5) The offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others.

(6) The offender's relationship with the victim facilitated the offense.

(7) The offender committed the offense for hire or as a part of an organized criminal activity.

(8) In committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion.

(9) If the offense is a violation of section 2919.25 or a violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code involving a person who was a family or household member at the time of the violation, the offender committed the offense in the vicinity of one or more children who are not victims of the offense, and the offender or the victim of the offense is a parent, guardian, custodian, or person in loco parentis of one or more of those children.

(C) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is less serious than conduct normally constituting the offense:

(1) The victim induced or facilitated the offense.

(2) In committing the offense, the offender acted under strong provocation.

(3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.

(4) There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.

{¶ 8} With respect to the likelihood of recidivism, R.C. 2929.12(D) and (E) set forth the factors indicating "a greater likelihood of recidivism" and "lesser likelihood of recidivism" respectively.

(D) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is likely to

commit future crimes:

(1) At the time of committing the offense, the offender was under release from confinement before trial or sentencing, under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or under postrelease control pursuant to section 2967.28 or any other provision of the Revised Code for an earlier offense or had been unfavorably terminated from post-release control for a prior offense pursuant to division (B) of section 2967.16 or section 2929.141 of the Revised Code.

(2) The offender previously was adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has a history of criminal convictions.

(3) The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has not responded favorably to sanctions previously imposed for criminal convictions.

(4) The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse.

(5) The offender shows no genuine remorse for the offense.

(E) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is not likely to commit future crimes:

(1) Prior to committing the offense, the offender had not been adjudicated a delinquent child.

(2) Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense.

(3) Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.

(4) The offense was committed under circumstances not likely to recur.

(5) The offender shows genuine remorse for the offense.

{¶ 9} The state's first assignment of error asserts that the trial court once again failed to make the requisite findings to overcome the presumption that a prison term was the appropriate sentence for appellee's convictions. Subsumed in this position is the argument that, if the court

did make the requisite findings, those findings are not supported by the record.

{¶ 10} Our discussion begins with the threshold question of how the recent enactment of H.B. No. 86 has affected the nature and scope of our review of trial court decisions. Specifically, we must decide whether the law requires the trial court to make "findings" with respect to each of the itemized factors set forth in R.C. 2929.12, or whether these factors are more in the nature of "reasons" supporting the court's R.C. 2929.13(D)(2) findings. If the R.C. 2929.12 factors are not required findings unto themselves, the court must still satisfy its statutory obligation to consider and weigh those reasons, but need go no further in its expressed reasoning than to state that it had done so. Neither of our two post-H.B. No. 86 cases addressing amended R.C. 2929.13(D)(2), *Fisher* and *Milhoan I*, expressly addresses these questions because both were decided on bare failure by the trial court to make the two initial findings under R.C. 2929.13(D)(2) proper.

{¶ 11} Cases decided under pre-H.B. No. 86 law, in which the trial court was required to state its reasons for making R.C. 2929.13(D) findings, tended to discuss the R.C. 2929.13(D)(2) determination concurrently with the itemization of underlying considerations set forth in R.C. 2929.12. This sometimes implied that the required express findings by the trial court consist not only of the two-pronged determination required by R.C. 2929.13(D)(2)(a) and (b), but also a detailed examination of each of the factors to be considered under R.C. 2929.12.

{¶ 12} Unlike other aspects of felony sentencing, the statutory language governing the procedure for a downward departure under R.C. 2929.13(D)(2) was unaffected by the Supreme Court of Ohio's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. Pre-*Foster* cases addressing the consideration of R.C. 2929.12 factors in other felony sentencing situations, such as the imposition of consecutive terms of imprisonment in derogation of the presumption for concurrent terms, are therefore instructive.

{¶ 13} Even pre-*Foster*, the Supreme Court did not require particularized explanations of the R.C. 2929.12 factors: "The Code does not specify that the sentencing judge must use specific language or make specific findings on the record in order to evince the requisite consideration of the applicable seriousness and recidivism factors. R.C. 2929.12. For this reason, the sentencing judge could have satisfied her duty under R.C. 2929.12 with nothing more than a rote recitation that she had considered the applicable age factor of R.C. 2929.12(B)(1)." *State v. Arnett*, 88 Ohio St.3d 208, 215 (2000), citing *State v. Edmonson*, 86 Ohio St.3d 324, 326 (1999). Post-*Foster* cases continued this interpretation: "R.C. 2929.11 and 2929.12 \* \* \* are not fact-finding statutes like R.C. 2929.14. Instead, they serve

as an overarching guide for trial judges to consider in fashioning an appropriate sentence." *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 17 (footnote omitted) (plurality opinion) (explaining why R.C. 2929.12 sentencing factors were unaffected by *Foster*). More explicitly put, "the trial court's considerations under R.C. 2929.11 and 2929.12 are not 'findings.'" *Id.* at ¶ 36 (*Willamowski, J.*, sitting by assignment, concurring in judgment). Accordingly, "[t]he Code does not specify that the sentencing judge must use specific language or make specific findings on the record in order to evince the requisite consideration of the applicable seriousness and recidivism factors." *State v. Saur*, 10th Dist. No. 10AP-1195, 2011-Ohio-6662, ¶ 44, quoting Arnett at 215. See also *State v. Stevens*, 1st Dist. No. 130278, 2013-Ohio-5218, ¶ 12, citing *State v. Kennedy*, 1st Dist. No. C-120337, 2013-Ohio-4221: "R.C. 2929.11 and 2929.12 are not 'fact finding' statutes, and \* \* \* we may presume a trial court has considered these factors absent an affirmative demonstration by a defendant to the contrary."

¶ 14 We conclude from this that, while R.C. 2929.13(D)(2) requires express findings that include a general declaration that the court has weighed the R.C. 2929.12 factors as directed by R.C. 2929.13(D)(2)(a) and (b), any further explanation by the trial court is optional because it constitutes the expression of "reasons" that are no longer required by statute.

¶ 15 This clarification leads us to the standard of review to be applied on appeal. The prosecution brings the present appeal under R.C. 2953.08(B), pursuant to which the state "may appeal as a matter of right a sentence imposed upon a defendant \* \* \* on any of the following grounds: (1) the sentence did not include a prison term despite a presumption favoring a prison term for the offense for which it was imposed." R.C. 2953.08(G)(2) defines our standard of review:

The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

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. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13.

(b) That the sentence is otherwise contrary to law.

¶ 16 Under this standard of review, we consider whether the sentence imposed is both in accordance with applicable law and supported by the record. The "clear and convincing" standard of R.C. 2929.08(G)(2) is unaffected by the Supreme Court's abrogation of Ohio's felony sentencing scheme in *Foster*, and subsequent clarifications to *Foster* provided by *Kalish*, as well as the legislature's reinstatement of some *Foster*-affected provisions by H.B. No. 86. *State v. Sherman*, 8th Dist. No. 97840, 2012-Ohio-3958. As the case is now postured, this asks us to determine whether the trial court expressly made the required findings and whether we determine by clear and convincing evidence that those findings are not supported by the record.

¶ 17 The standard of "clear and convincing evidence" is defined as "that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford*, 161 Ohio St. 469 (1954), paragraph three of the syllabus. In applying the clear and convincing standard when reviewing a sentence imposed by the trial court, "we neither substitute our judgment for that of the trial court nor simply defer to its discretion." *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, ¶ 25, quoting *State v. Vickroy*, 4th Dist. No. 06CA4, 2006-Ohio-5461, ¶ 16 (both cases overruled by *Kalish* as to the standard of review in upward departures, *State v. Murphy*, 10th Dist. No. 12AP-952, 2013-Ohio-5599). Under this standard, we "look to the record to determine whether the sentencing court considered and properly applied the non-excised statutory guidelines and whether the sentence is otherwise contrary to law." *Id.* at ¶ 12, citing *Vickroy* at ¶ 16 (alterations in *Burton* omitted).

¶ 18 Having clarified our interpretation of the statutory requirements placed upon the trial court at sentencing, we turn to the merits of the appeal. Upon remand from this court pursuant to *Milhoan I*, the trial court held a new sentencing hearing beginning on December 4, 2012, and continued to conclusion on December 20, 2012. At the outset of proceedings, the state argued vigorously for imposition of a prison sentence emphasizing the vast quantity of carefully catalogued and organized child pornography discovered on appellee's computer, and the fact that appellee's training and degree in computer science obviated the possibility of the materials being acquired or retained in error. The state also stressed appellee's reported lack of cooperation with probation authorities, and appellee's perceived lack of repentance or acknowledgement of the seriousness of his crime.

{¶ 19} Defense counsel responded by pointing to appellee's ongoing psychological treatment for severe psychological and neurological disorders, lack of criminal history, and a strong family support network. Defense counsel also expressed surprise at the prosecution's assertion that appellee had not cooperated with the probation process; defense counsel claimed that conversations with appellee's probation officer in Jefferson County revealed no such lack of cooperation.

{¶ 20} When the hearing reconvened on December 20, the court had before it the pre-sentence investigation report prepared by the Franklin County Adult Probation Department. This report concluded with a recommendation of community control: "Based on the information obtained throughout the PSI process, no prior criminal history, and the offender's low risk on the ORAS [Ohio Risk Assessment System] risk assessment tool, the offender is amenable to community control." (PSI at 10.) The court also had available several summaries prepared by different mental health caregivers who had counseled or treated appellee. The court heard live comments from counsel, appellee's mother, appellee himself, and Ms. Sean Kelly, an officer of the Franklin County Adult Probation Department. Because appellee's supervision is in part delegated to a probation officer in Jefferson County, where appellee resides with his family, and the Jefferson County officer did not appear, the court was again faced with conflicting accounts of appellee's conduct and attitude while under supervision. The assigned Franklin County officer, however, did relate her personal observations as well as those expressed to her by her Jefferson County colleague. Among these was the belief that appellee had access to a computer and the internet while living in his mother's home, in clear violation of his terms of community control. In response, appellee and his mother both stated that this was no longer the case.

{¶ 21} The court then made the following findings, which we reproduce in toto:

[THE COURT:] But the concern I have is that this problem is not a problem that is cured. In fact, it isn't cured. It is controlled. But I have not been able to find anything that says that imprisonment is an effective method of dealing with this problem. It does teach the defendant that there are consequences for his behavior, but it doesn't get to the root of the problem.

And so what I achieve when I put somebody like Mr. Milhoan in prison for a specific period of time is to protect the public, which is a very important fact. It is a primary concern that I have in this matter.

But eventually he will be back into society if he goes to prison. And he won't have benefited from any kind of - - I

am not aware there is any program within the ODRC that deals with this particular issue on an incarceration basis.

Another thing that has to be considered in Mr. Milhoan's case is that he has a number of several other emotional difficulties to deal with and they are all outlined. I don't need to go through them and put them on the record. I am sure counsel on both sides are aware of that.

That has relevance in the context of it does make him a more challenging individual to deal with than a person that didn't have those emotional conflicts that he has. It doesn't mean that he is impossible to deal with.

My interest is protecting the public. It is also in protecting the public today, tomorrow and into the future. The short-term answer is imprisonment to protect the public. The long-term answer is I don't think there is an effective way of protecting the public with this type of problem. A better way is to give the type of counseling that's been considered here an opportunity to work.

I think it is appropriate that the first thing I consider in this case is to review the seriousness and recidivism factors as they are set forth in Revised Code 2929.12.

In considering what I should be regarding the impact on the victim, and other relevant factors indicating that the defendant's conduct is more serious than the conduct normally constituting the offense, there are actually nine different categories to review to make this assessment.

But the only two that really apply in this particular type of a case are the physical or mental injuries suffered by the victim of the offense due to the conduct of the offender and whether or not it was exacerbated because of physical or mental condition or age of the victim.

There is a direct implication here. And I think I am safe in taking judicial notice the victim is not only society, but more narrowly the victims are the children that are the subject of these films and downloads. And clearly no one can argue that they aren't being victimized in a very gross fashion.

The other thing to consider is the victim of the offense suffered serious physical or physiological or economic harm. That's probably true. In fact, I would say that is true to one degree or another. In every instance when you have this type of - - I am going to call it reproduction, if you will, different forms.

The other things to consider typically, those would be three through nine, which don't apply to this type of case.

For instance, just picking one at random, offender's occupation, elected office or profession, that sort of thing.

We are not playing with that. I do think that I have \* \* \* addressed the first two things that makes it more likely to consider the offense being repeated by the defendant.

Then the next thing under Item "C" of that statute is I am supposed to consider all of the following items that make this offense less serious.

Well, looking down through, the victim induced or facilitated the offense. That certainly doesn't apply here.

In committing the offense the offender acted under strong provocation. That doesn't apply. In fact, the bottom line is that none of the remaining conditions are applicable here just because of the nature of the crime. It is not because they don't exist, but they just don't exist in this type of an offense. There may be some effort made to update that statute to take into consideration what we are dealing with here.

Having concluded and put on the record the court's views on the requirements of 2929.12, the next thing for me to consider are the elements that are set forth in Section 2929.13. This would be (D)2.

Now, basically, it is presumed that the prison term is appropriate for a felony of the second degree, which is what we are dealing with here. Notwithstanding the presumption of community control may be imposed, the trial court makes both of the following findings:

*The first thing I have to do is a community control sanction or a combination of control sanctions that would adequately punish the offender and protect the public from future crime, because of the applicable factors under Section 2929.12 of the Revised Code indicating a lesser likelihood of recidivism outweigh the applicable factors under that section indicating a greater likelihood of recidivism.*

*The other thing that I need to consider under 13 is whether or not the community control sanction or a combination of sanctions would not demean the seriousness of the offense because of one or more factors under 2929.12 of the Ohio Revised Code and so forth.*

*I am determining that it is appropriate for me to move on from 2929.12. And I do feel that the criteria set forth in that statute have resolved those elements in favor of the defendant, which then moves me into 2929.13.*

Applying the standards that are set forth in that section of the code, with the responsibility of the supervision of Mr. Milhoan resting with the authorities in Jefferson County, and based on the report from the person that has that responsibility, which has more positives to it than negatives, and further based on the fact that Mr. Milhoan

will be accepted into the program at the Tri-County Health Center and will successfully complete that program, I do feel that it is appropriate to grant community control in this case.

Now, I am placing Mr. Milhoan on community control for a period of 48 months. The supervision is to be intensive and it is to be administered by Jefferson County. And it is their responsibility to report to the community control authorities in Franklin County any violation or failure or omission that is apart of Mr. Milhoan's supervision.

In addition to that, another condition is that he enter and successfully complete the Tri-County Health Center program.

I want to make it clear, Mr. Belli, your responsibility is to find out whether he, in fact, has successfully completed the assessment program and is admitted into that program. If he is not, then he is in automatic violation of the community control sanctions.

And under those circumstances, it will be my call to make, and it will be between now and the 31st of this month if he is not accepted.

You are telling me you will know tomorrow. If he is not accepted, I will still be here. And I want your client back in this courtroom prepared for sentencing, and the sentencing will be imprisonment. So, it is a condition that he complete that program.

The other conditions that were originally imposed will remain in full force and effect. The primary change is in the length of the supervision. I am also going to modify that portion of what happens if - - let me back up for a second.

Mr. Milhoan, you need to understand if you fail to comply with the conditions of the community control I have just stated and were previously imposed, I have options of making the community control last for a longer period of time. I can put on additional conditions or I can revoke the community control and put you in prison.

If I put you in prison, it will be for a period of three years. And there are two counts involved here. And those three-year sentences will run consecutive to each other. The fine and costs, those obligation remain the same as they were before.

I want to note on the record that this sentence meets with the strong disapproval of Miss Russo, who has done a very good job of representing the interest of the state.

(Emphasis added.) (Tr. 18-25.)

{¶ 22} Before we consider whether the "record does

not support the sentencing court's findings under division (B) or (D) of section 2929.13, " R.C. 2953.08(G)(2)(a), we consider whether the trial court in fact made the affirmative findings required by R.C. 2929.13(D)(2)(a) and (b). The italicized passage in the transcript excerpt above establishes that the trial court made the necessary affirmative finding that the imposition of community control sanctions would adequately punish the offender and protect the public from future crime, and would not demean the seriousness of the offenses committed. The court references the weighing of R.C. 2929.12 factors and expressly determines that they favor a downward departure in sentencing. We find that the court made the requisite findings.

{¶ 23} We now turn to the question of whether we can find, by clear and convincing evidence, that the record does not support the court's determination. The state first argues that the above analysis by the court does not effectively apply the balancing of more serious and less serious factors required by R.C. 2929.12(A), because the court did not adequately take note of the fact that, in this case, there are no "less serious" factors present under R.C. 2929.12(C). The state asserts that the basic logical structure underpinning the balancing test of R.C. 2929.12 dictates that at least one "less serious" factor must, in fact, be present in order for the "less serious" to outweigh the "more serious." Absent this, the state urges, R.C. 2929.12(A) cannot be met as a matter of law.

{¶ 24} The state also argues that another "more serious" factor should have been applied by the trial court. The state argues that the downloading of child pornography to a computer, by use of file-sharing peer-to-peer networks, constituted organized criminal activity that satisfies R.C. 2929.12(B)(7). The state also argues that the court failed to consider the fact that appellant pleaded guilty to a total of eight counts, including four second-degree felonies, out of the more numerous indictments arising from the large quantity of child pornography discovered on his home computer equipment.

{¶ 25} With respect to the state's argument that the balancing test could not be resolved in appellee's favor as matter of law, the court did determine that, because of the child pornography nature of the offense, in addition to the generalized harm caused to society, the specific victims were involved in the form of the children who were made to be the object of the abuse depicted in the pornography. Thus, the "more serious" factors of R.C. 2929.12(B)(1) and (2), physical or mental injuries suffered by the victim and the physical or mental condition or age of the victim, as well as the physical or psychological harm suffered as a result of the offense, were present. The court went on to note that, because the nature of the offense, none of the enumerated factors under R.C. 2929.12(C) were particularly relevant. The court nonetheless found that the "less serious"

outweighed the "more serious."

{¶ 26} We agree with the trial court's observation that most of the specific "less serious" factors under R.C. 2929.12(C) are not likely to apply to crimes arising from possession of child pornography. There is little chance of finding that the victim facilitated the offense (R.C. 2929.12(C)(1)) or that the offender acted under strong provocation (R.C. 2929.12(C)(2)). Nor can one logically conclude that the offender did not cause or expect to cause harm (R.C. 2929.12(C)(3)), since the harm from this type of crime is both a generalized injury to society and is imputable from the abuse suffered by victims at the time of creation of pornography.

{¶ 27} Nonetheless, to accept the state's argument is to find that for all crimes of this type the weighing of factors under R.C. 2929.12 is futile. Since the legislature has not specifically exempted such crimes from eligibility for a downward departure in sentencing, we do not accept the postulated premise that prison is mandatory in such cases. Furthermore, the state's position renders meaningless the "any other relevant factors" language contained in R.C. 2929.12(C), as well as the general catch-all "less serious" mitigating factors contained in R.C. 2929.12(C)(4). The record before us does, in fact, present extensive evidence relied upon by the trial court regarding appellee's mental, neurological, and emotional conditions that could be assessed under these broad provisions. While the state points out that these conditions are less severe than in other cases in which a downward departure was found appropriate, *see, e.g., State v. Stewart*, 8th Dist. No. 84157, 2004-Ohio-5612 (paranoid schizophrenia), the trial court was not obligated to share that opinion as a matter of law.

{¶ 28} With respect to the likelihood of recidivism, the state argues that the court again failed to particularize its consideration of the enumerated statutory factors under R.C. 2929.12(D) and (E). The state asserts that, had the court undertaken an explicit analysis of these factors, it would have found at least three factors indicating a greater risk of recidivism were present: an absence of genuine remorse (including appellee's minimization of his own conduct), denial of having done anything illegal, and the enormous quantity of child pornography present on appellee's computer equipment. The state points out that repeated commission of the same sex offense demonstrates a compulsion and likelihood to re-offend, citing *State v. Bartis*, 10th Dist. No. 97APA05-600 (Dec. 9, 1997), affirmed 84 Ohio St.3d 9 (1998). The state also argues that the trial court did note one factor that indicates a greater likelihood of recidivism, when the court described appellant's behavior as a condition that cannot be cured but, at best, controlled.

{¶ 29} The state also argues that the court created a

false dilemma when the court concluded that effective control of appellee's condition could only be obtained through types of treatment that were unavailable in prison. The state then goes on to assert that multiple sex offender treatment programs exist. The state further asserts that appellee could obtain the requisite treatment once he completed his prison term, undergoing his treatment as part of a post-release control sanction.

{¶ 30} It is clear that the court in fact devoted the bulk of its rationale in its decision to weighing the risk of recidivism, concluding that community control in fact presented the best option for reducing the risk of recidivism from this particular defendant. During the course of the first day's hearing, the judge noted that opportunities for effective counseling and rehabilitation in prison were "slight to none." (Dec. 4, 2012 Tr. 18.) While the prosecution vigorously disagreed with this proposition both at the hearing and in the present appeal ("an internet search easily refutes this assumption," state's reply brief at 12), we have no specific record evidence before us otherwise and defer to the trial court's perception of the opportunities for effective treatment. In contrast, counsel for appellee was able to assure the court by the time of the December 20th hearing that appellee had been accepted into a comprehensive treatment program near his current home in Jefferson County.

{¶ 31} The court also noted that appellee was severely beaten by other inmates in the Franklin County Jail upon his initial arrest. Appellee's mother stated that, due to his neurological conditions (Tourette's syndrome, inter alia) and social deficits, he lacked any functional skills to avoid such confrontations and violence while incarcerated. The court decided that appellee's expressed extreme fear of returning to prison would serve as a powerful incentive for appellee to adhere to his conditions of community control and pursue his treatment. The state concedes that "the record is silent on what safety measures are or are not available in prison." (State's reply brief at 13.) More to the point, appellee's personal safety in prison was not the driving concern expressed by the trial court. Rather, the court stressed the likelihood that appellee's concern for his own safety, should he violate the terms of his sentence, was a strong factor supporting a decreased likelihood of recidivism.

{¶ 32} We conclude that, under the clear and convincing standard of review, there was sufficient evidence before the trial court to support this determination. The court's observations regarding appellee's emotional and neurological deficits, the likelihood of appellee benefiting from rehabilitation programs while in prison, and his participation in such programs, with the support of his family, while under community control, are supported by the record. The trial court's finding that the sentence

imposed would effectively lessen the likelihood of recidivism is supported by the record.

{¶ 33} We reach this conclusion with due consideration of the limits conferred upon this court and the corresponding latitude afforded the trial court in sentencing matters. Our role as a reviewing court on appeal does not permit us to substitute our judgment for that of the trial court in assessing the weight and credibility of matters in the record. *Burton*. The trial court here applied the proper statutory framework, considered the appropriate factors, and the record provides the requisite measure of support for the trial court's findings. Under the standard of review imposed by statute, it is not the role of this court to substitute its judgment for the trial court simply because members of this court might have made a different decision. *Potter v. Baker*, 162 Ohio St. 488 (1955); *State v. Dawson*, 10th Dist. No. 00AP-1052 (Dec. 11, 2001); *State v. Weaver*, 10th Dist. No. 84AP-937 (Dec. 12, 1985).

{¶ 34} In sum, because we find that the record does not present clear and convincing evidence that the trial court's R.C. 2929.13(D)(2) findings are unlawful or unsupported by the evidence, the state's first assignment of error is overruled.

{¶ 35} The state's second assignment of error urges us to find that, as a matter of law, the trial court could not, on these facts, have found that a downward deviation was appropriate. Our conclusion with respect to the first assignment of error renders this assignment of error moot. Moreover, as we have observed in comparable cases, "we have consistently rejected similar arguments by the state and we do so here." *Fisher* at ¶ 10. We decline to infringe upon the trial court's domain as the initial finder of fact and decider of issues that the statute clearly places as a matter of original jurisdiction before the trial court. *See, generally, Milhoan I* at ¶ 9. The state's second assignment of error is overruled.

{¶ 36} In accordance with the foregoing, the state's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas sentencing appellee to a period of community control for his convictions is affirmed.

*Judgment affirmed.*

SADLER, P.J., and DORRIAN, J., concur.

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

2015-Ohio-1067

STATE OF OHIO, Plaintiff-Appellee,

v.

CORY D. LOCKE, Defendant-Appellant.

No. 2014-L-053

Court of Appeals of Ohio, Eleventh District, Lake

March 23, 2015

Criminal Appeal from the Lake County Court of  
Common Pleas, Case No. 13 CR 000229.

Charles E. Coulson, Lake County Prosecutor, and  
Teri R. Daniel, Assistant Prosecutor, (For  
Plaintiff-Appellee).

Pamela D. Kurt, (For Defendant-Appellant).

**OPINION**

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Cory D. Locke, appeals his convictions and sentences for multiple counts of Trafficking in Heroin, Failure to Comply with Order or Signal of Police Officer, Tampering with Evidence, and Possession of Heroin, following a jury trial in the Lake County Court of Common Pleas. Locke was sentenced to an aggregate prison term of eleven years, including maximum and consecutive sentences. The issues before this court are whether convictions for Trafficking in Heroin are supported by the weight of and sufficient evidence when based on the testimony of a confidential informant whose identity is not revealed until trial; whether Trafficking in Heroin and Possession of Heroin are allied offenses of similar import where the defendant sold a quantity of heroin and retained a quantity for future sale; whether an extensive criminal history, including violent crimes, justifies the imposition of maximum and consecutive sentences; whether a defendant is entitled to discharge his third appointed counsel where the motion is made on the day of trial and after prior counsel sought leave to withdraw; whether a defendant may be found competent to stand trial based on the conclusions of a stipulated psychological evaluation; whether trial counsel is ineffective in failing to seek an independent psychological evaluation in the absence of incompetency on the face of the record; whether trial counsel is ineffective for not filing a motion to suppress and raising other objections in the absence of justification for taking such

actions; and whether it is error to order a defendant to appear in restraints during trial when the restraints are not visible to the jury. For the following reasons, we affirm Locke's convictions and sentence.

{¶2} On July 8, 2013, the Lake County Grand Jury returned an Indictment against Locke for: Trafficking in Heroin (Count 1), a felony of the fourth degree in violation of R.C. 2925.03(A)(1); Trafficking in Heroin (Count 2), a felony of the fifth degree in violation of R.C. 2925.03(A)(1); Trafficking in Heroin (Count 3), a felony of the fourth degree in violation of R.C. 2925.03(A)(1); Failure to Comply with Order or Signal of Police Officer (Count 4), a felony of the third degree[1] in violation of R.C. 2921.331(B); Failure to Comply with Order or Signal of Police Officer (Count 5), a felony of the fourth degree in violation of R.C. 2921.331(B); Tampering with Evidence (Count 6), a felony of the third degree in violation of R.C. 2921.12(A)(1); and Possession of Heroin (Count 7), a felony of the fifth degree in violation of R.C. 2925.11. Counts 1, 2, 3, and 7 contained Forfeiture Specifications pursuant to R.C. 2941.1417 and 2981.04.

{¶3} On July 12, 2013, the trial court accepted Locke's waiver of the right to be present at arraignment and entered pleas of "Not Guilty" to all charges.

{¶4} On March 17 and 18, 2014, Locke's case was tried before a jury. The following persons testified on behalf of the prosecution:

{¶5} Aaron McArdle testified that he agreed to act as a confidential informant (CI-137) for the Wickliffe Police Department in order to have misdemeanor charges for drug abuse instruments and driving under suspension against him dismissed.

{¶6} McArdle testified that, on February 27, 2013, he placed a phone call to a person known as "B" to arrange a purchase of heroin. An audio recording of the call was played for the jury. On the recording, McArdle arranges to buy "two jeezies" (two grams) for "three bills" (three hundred dollars) at his mother's home at 2831 Green Ridge Drive in Wickliffe. A video recording of the buy was played for the jury. The recording contained no visual images of the buy. McArdle can be heard giving directions to his home. The man with whom McArdle is speaking asks to be called "Unc." In court, McArdle identified Locke as Unc, the man who sold him two grams of heroin for three hundred dollars on February 27, 2013.

{¶7} McArdle testified that, on March 4, 2013, he again contacted Unc and arranged to purchase a "jeezy." An

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audio recording of the call was played for the jury. McArdle testified that Unc came to his home where he sold him a gram of heroin for one hundred fifty dollars. A video recording of the buy was played for the jury in which Unc is visible.

{¶8} McArdle testified that, on March 6, 2013, he contacted Unc for a third time, arranging to buy "two of them" for "three bucks." An audio recording of the call and a video recording of the buy in which Unc is visible was played for the jury.

{¶9} McArdle testified that each of the three buys took place in Wickliffe; the person with whom he arranged the buys was the person who delivered the heroin; and that person was Locke. For each of the buys, Locke remained in his vehicle.

{¶10} Lieutenant John Bush of the Wickliffe Police Department assisted in the February 27, 2013 buy. Bush was observing the approach to Green Ridge from an unmarked vehicle. He followed a white Cadillac, identified as the vehicle in which the buy occurred, from Green Ridge to Route 2 where he lost sight of the Cadillac.

{¶11} Lieutenant Bush assisted in the March 4, 2013 buy, again in an unmarked vehicle. Bush noticed the same white Cadillac observed previously park on the street in front of the Green Ridge residence, and McArdle exit the residence to conduct "some type of transaction" with a male seated in the passenger seat. A video of Bush's surveillance was played for the jury. After the Cadillac departed, Bush recovered two plastic baggies containing heroin from McArdle.

{¶12} Patrolman Daniel Sabruno of the Wickliffe Police Department testified that, on March 6, 2013, he was positioned on I-90 near the Route 2 split and ordered to stop a black Honda, identified by license plate number and operated by "a black male with a shaved head, wearing a blue t-shirt." After observing a vehicle matching the description, Sabruno initiated a traffic stop. The Honda exited the freeway and stopped at East 232nd Street in Euclid. As Sabruno approached the Honda on foot, the Honda sped away. Sabruno began pursuit and observed two plastic baggies thrown from the driver's side window. Sabruno pursued the Honda north on East 222nd Street to Tracey Avenue, driving through a red light and passing through a construction zone with workers present. At Tracey Avenue, Sabruno broke off the pursuit. He then recovered the baggies thrown from the window. One of the baggies was empty and the other contained two smaller baggies of heroin.

{¶13} Later that day, Patrolman Sabruno responded to a report that a suspect was in custody near East 164th Street

and Arcade Avenue in Cleveland. Sabruno identified Locke as the driver of the black Honda and as the suspect taken into custody.

{¶14} Detective Donald Dondrea of the Wickliffe Police Department was involved in the March 4, 2013 buy and followed the white Cadillac in an unmarked vehicle to a residence on East 161st Street in Cleveland.

{¶15} Detective Dondrea was also involved in the March 6, 2013 buy. From an unmarked vehicle, Dondrea observed a black Honda Civic pull in the driveway of the Green Ridge residence, and McArdle exit the residence and enter the Honda's front passenger's side. A video of Dondrea's surveillance was played for the jury. After the Honda departed, Dondrea recovered four plastic baggies containing heroin from McArdle.

{¶16} When Detective Dondrea heard of the black Honda's flight from Patrolman Sabruno, he responded to the area of Cleveland where he had previously followed the white Cadillac. On East 164th Street, he began to follow the white Cadillac. At the corner of Arcade Avenue, Dondrea observed Locke approach the Cadillac. Dondrea arrested Locke and the Cadillac drove away. The black Honda was located on East 169th Street.

{¶17} Lieutenant Pat Hengst of the Wickliffe Police Department testified that he was the lead investigator on Locke's case. Hengst described the February 27, 2013 and March 4, 2013 buys as "buy walks" "meaning we intended to let the money walk away and not make an arrest that day" because "we wanted an opportunity to attempt to build a case" and "identify our suspect."

{¶18} Lieutenant Hengst testified that, on February 27, he recovered a small baggie of heroin from McArdle following the buy. Hengst also determined that the white Cadillac was titled to Locke's mother, Brenda D. Locke.

{¶19} Lieutenant Hengst testified that, following the March 4, 2013 buy, he followed the white Cadillac to a residence at 365 East 161st Street, at which a black Honda was parked. This address was searched through OHLEG (the Ohio Law Enforcement Gateway) and Locke was associated with the address. By comparing Locke's driver's license photo with the video recording of the March 4, 2013 buy, Unc was identified as Locke.

{¶20} Lieutenant Hengst testified that, following the March 6, 2013 buy bust, he followed the black Honda Accord[2] onto I-90 westbound until it stopped at East 232nd Street. Hengst observed the Honda pull away from Patrolman Sabruno "at a high rate of speed" and run the red light at East 222nd Street. Hengst advised Sabruno to discontinue pursuit "fearing the real possibility of a crash." After the Honda's flight, Hengst proceeded to the residence

on East 161st Street. Following Locke's arrest, Hengst recovered \$300 in marked bills (provided to McArdle for the purchase two grams of heroin) from his front right pants pocket, \$400 from his wallet, and \$9 from his front left pants pocket. Hengst also recovered four cell phones and a key for the Honda from Locke's person.

{¶21} Ray Jorz, the senior fingerprint and firearms examiner of the Lake County Crime Laboratory, testified that he tested the plastic baggies containing heroin for latent prints but was not able to develop any.

{¶22} Kimberly Gilson, a forensic chemist at the Lake County Crime Laboratory, testified that the baggie recovered from McArdle on February 27, 2013, contained 1.61 grams of heroin; the baggies recovered from McArdle on March 4, 2013, contained 0.35 and 0.46 grams of heroin; the baggies recovered from McArdle on March 6, 2013, contained 0.34, 0.35, 0.57, and 0.53 grams of heroin; and the baggies recovered during the pursuit of the Honda on March 6, 2013, contained 0.38 and 0.48 grams of heroin.

{¶23} At the close of the State's case, Locke moved for acquittal pursuant to Criminal Rule 29(A).

{¶24} On March 19, 2014, the jury returned a verdict finding Locke guilty of all charges. At this time, the trial court merged Failure to Comply with Order or Signal of Police Officer (Count 5) with Failure to Comply with Order or Signal of Police Officer (Count 4).

{¶25} On April 24, 2014, the sentencing hearing was held. Locke was sentenced to eighteen months in prison for Trafficking in Heroin (Count 1); twelve months in prison for Trafficking in Heroin (Count 2); eighteen months in prison for Trafficking in Heroin (Count 3); thirty-six months in prison for Failure to Comply with Order or Signal of Police Officer (Count 4); thirty-six months in prison for Tampering with Evidence (Count 6); and twelve months in prison for Possession of Heroin (Count 7). The trial court ordered the sentences to be served consecutively for an aggregate prison term of eleven years. The court ordered the forfeiture of the contraband, instrumentalities (cell phones), and \$500 in U.S. currency. The court suspended Locke's driver's license for life. The court advised Locke that post-release control was optional for a period of up to three years.

{¶26} On April 30, 2014, Locke's sentence was memorialized in a written Judgment Entry of Sentence.

{¶27} On May 28, 2014, Locke filed a Notice of Appeal. On appeal, Locke raises the following assignments of error:

{¶28} "[1.] The appellant's convictions on each and all counts were based upon insufficient evidence and were

otherwise against the sufficient and/or manifest weight of the evidence and not beyond a reasonable doubt contrary to Ohio law and the state and federal constitutions."

{¶29} "[2.] The trial court erred in not granting the appellant's motion on all counts for acquittal and renewed motion pursuant to Rule 29 of the Ohio Rules of Criminal Procedure and Ohio and federal law and constitutions."

{¶30} "[3.] The trial court erred in convicting and sentencing the appellant to separate, consecutive prison terms for Trafficking in Drugs and Possession of Drugs as these crimes are allied offenses of similar import and should have been merged at the very least."

{¶31} "[4.] The appellant was denied due process by a sentence contrary to Ohio law and the state and federal constitutions including maximum prison terms and an order that all counts be served consecutively."

{¶32} "[5.] The trial court erred to the prejudice of the appellant and violated constitutional, statutory and all other rights and privileges when the trial court denied his request to terminate the services of his appointed trial counsel."

{¶33} "[6.] The trial court erred in finding the appellant competent to stand trial pursuant to Section 2945.371 of the Ohio Revised Code and all other Ohio, federal and constitutional law."

{¶34} "[7.] The appellant was denied effective assistance of counsel contrary to Ohio law and the state and federal constitutions due to his ineffective assistance of trial counsel."

{¶35} "[8.] The trial court erred to the prejudice of the appellant when the court denied his motion to appear at the trial without restraints."

{¶36} Locke's first two assignments of error challenge the sufficiency and/or manifest weight of the evidence against him.

{¶37} The manifest weight of the evidence and the sufficiency of the evidence are distinct legal concepts. *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, 857 N.E.2d 547, ¶ 44. With respect to the sufficiency of the evidence, "[t]he 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, 574 N.E.2d 492 (1991), paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

{¶38} Whereas "sufficiency of the evidence is a test of

adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, \* \* \* weight of the evidence addresses the evidence's effect of inducing belief." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1997). "In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's?" *Id.* An appellate court considering whether a verdict is against the manifest weight of the evidence must consider all the evidence in the record, the reasonable inferences, the credibility of the witnesses, and 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." *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶39} In order to convict Locke of Trafficking in Heroin, the State had to prove that he knowingly sold or offered to sell heroin. R.C. 2925.03(A)(1). Locke contends "the State failed to prove beyond a reasonable doubt that it was the Appellant himself who sold a controlled substance to the Confidential Informant and that, even if so, the substance in the Confidential Informant's possession after the alleged 'sale' was actually transferred from the Appellant, and not the Confidential Informant (a self-proclaimed criminal and Heroin addict) \* \* \*." Appellant's brief at 14. Locke also contends that the State failed to prove that he "knowingly" sold heroin "because the State of Ohio had no eyewitness other than the Confidential Informant and had no statement or utterance from the Appellant regarding his state of mind." Appellant's brief at 15.

{¶40} We find no deficiency in the evidence identifying Locke as the person who sold McArdle heroin on February 27, March 4, and March 6, 2013. McArdle was an eyewitness to all three transactions and unequivocally identified Locke as the person who sold him heroin. For the March 4 and 6 buys, McArdle's testimony was corroborated by video recordings containing images of the person with whom McArdle is dealing. McArdle's testimony is further corroborated by the facts that the February 27 and March 4 buys were conducted from a white Cadillac titled to Locke's mother, Patrolman Sabruno identified Locke as the sole occupant of the black Honda involved in the March 6 buy, and marked money used in the March 6 buy was recovered from Locke's person. As to whether Locke actually transferred to McArdle the heroin recovered after the buys, McArdle's testimony is corroborated by the phone calls initiating the transactions. In each of these calls, McArdle directs Unc to his residence to purchase heroin. It is reasonable to infer that, when Locke arrives at McArdle's residence, it is for the purpose of selling McArdle heroin. The jury's acceptance of McArdle's testimony did not create a miscarriage of justice.

{¶41} In order to convict Locke of Possession of Heroin, the State had to prove that he knowingly possessed heroin, meaning that he had "control over the heroin (but may not be inferred solely from "mere access"). R.C. 2925.11(A) and 2925.01(K). Locke contends the jury improperly inferred possession of the heroin "solely from the Appellant being in or near the [vehicle] pulled over on the March 6, 2013 third attempted drug bust." Appellant's brief at 15.

{¶42} We disagree. Patrolman Sabruno observed two bags thrown from the driver's side window of the black Honda he was pursuing. Locke was the sole occupant of the vehicle and necessarily exercised control over the bags in order to throw them out of the window. There was also testimony that heroin in the bags thrown from the Honda was packaged in a manner similar to the heroin sold to McArdle. The Possession conviction was supported by sufficient and credible evidence.

{¶43} In order to convict Locke of third degree Failure to Comply, the State had to prove that he willfully fled from a police officer after receiving a signal from the officer to stop his vehicle, while causing "a substantial risk of serious physical harm to persons or property." R.C. 2921.331(B) and (C)(5)(a)(ii). A substantial risk connotes "a strong possibility, as contrasted with a remote or significant possibility." R.C. 2901.01(A)(8). Locke contends that the State failed to "proffer competent, credible evidence that the Appellant was the driver of the vehicle in question" or that there was "physical harm or any substantial risk thereof." Appellant's brief at 16.

{¶44} Locke's identity as the operator of the black Honda was established by McArdle's testimony and the video recording of the buy. It was also established by Patrolman Sabruno who observed Locke operate the Honda on I-90. Sabruno observed Locke flee through a "business district" and "construction zone," travelling at a high rate of speed, passing left-of-center, and driving through red lights. Sabruno's testimony was corroborated by Lieutenant Hengst's observations. In light of this testimony, there was nothing improper with the jury concluding that Locke's conduct created a strong possibility of physical harm.

{¶45} In order to convict Locke of Tampering with Evidence, the State had to prove that he, knowing that an investigation was in progress, purposely removed and disposed of the plastic baggies so as to impair their availability as evidence. R.C. 2921.12(A)(1). Locke contends that the State failed to prove "that it was Appellant who had possession of the alleged Heroin baggies or that he was the one who threw the baggies out of the car window." Appellant's brief at 17.

{¶46} Locke's possession of the baggies and identity

as the sole occupant of the Honda was established by the evidence discussed above. The Tampering conviction was supported by competent and credible evidence.

{¶47} Locke raises additional arguments under these assignments of error relating to the evidence against him.

{¶48} Locke contends that the trial court "erred in refusing to timely compel the Appellee to reveal the identity of the confidential informant and his deal."

{¶49} On August 26, 2013, Locke filed a Motion to Reveal Deal and Identity of Confidential Informant.

{¶50} On September 10, 2013, the State filed Supplemental Discovery consisting of the confidential informant's redacted criminal history. On October 2, 2013, the State filed a Response, advising that the confidential informant "was cooperating with law enforcement on this case for a positive recommendation on Possessing Drug Abuse Instruments charges."

{¶51} On November 26, 2013, the trial court denied the Motion to Reveal Deal and Identity of Confidential Informant, noting "that the state has provided the defendant with information regarding the deal with the confidential informant."

{¶52} On January 30, 2014, the State filed Supplemental Discovery, advising that the confidential informant "was cooperating with law enforcement on this case for a positive recommendation on a Driving Under Suspension charge (in addition to the Possessing Drug Abuse Instruments charge already disclosed)."

{¶53} "The identity of an informant must be revealed to a criminal defendant when the testimony of the informant is vital to establishing an element of the crime or would be helpful or beneficial to the accused in preparing or making a defense to criminal charges." *State v. Williams*, 4 Ohio St.3d 74, 446 N.E.2d 779 (1983), syllabus. "In general, courts have compelled disclosure in cases involving 'an informer who helped to set up the commission of the crime and who was present at its occurrence' whenever the informer's testimony may be helpful to the defense." *State v. Bays*, 87 Ohio St.3d 15, 25, 716 N.E.2d 1126 (1999). The decision to reveal a confidential informant's identity lies within the trial court's discretion. *Id.*

{¶54} "If the prosecuting attorney does not disclose materials or portions of materials under [Criminal Rule 16], the prosecuting attorney shall certify to the court that the prosecuting attorney is not disclosing material or portions of material otherwise subject to disclosure" and the reasons therefor. Crim.R. 16(D). "Protecting the safety of a witness is a permissible reason for non-disclosure of materials under Crim.R.16(D)(1)." *State v. Howard*, 2d Dist. Greene No.

2012-CA-39, 2013-Ohio-2343, ¶ 51.

{¶55} In the present case, the State did not disclose the identity of its confidential informant prior to trial and did not file a certificate of nondisclosure. However, we find the trial court's failure to compel disclosure of McArdle's identity harmless beyond a reasonable doubt. Crim.R. 52(A) ("[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded"). The State disclosed the conditions under which McArdle agreed to work for the Wickliffe Police Department and his criminal history. The State also made available to Locke the audio and video recordings documenting the buys. As a practical matter, Locke knew who the informant was and where he lived. Locke did not object to McArdle's testimony at trial and has made no demonstration of prejudice. In his opening statement at trial, counsel for Locke demonstrated a familiarity with McArdle's history with the Wickliffe Police Department and the circumstances of his involvement in the three controlled buys. Where the reviewing court determines that the alleged error "did not affect the defendant's substantial rights, " i.e. was not prejudicial, "then the error is harmless and 'shall be discarded.'" (Citation omitted.) *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.2d 1153, ¶ 23; *State v. Singh*, 8th Dist. Cuyahoga No. 96049, 2011-Ohio-6447, ¶ 16 ("Singh failed to make any showing whatsoever that disclosure of the CI's identity would be helpful in preparing his defense"); *State v. Kidan*, 6th Dist. Lucas No. L-88-118, 1989 Ohio App. LEXIS 767, 8 (Mar. 10, 1989) ("even were disclosure required in this case, the denial of disclosure would be harmless error \* \* \* because appellant knew the identity of the police informant").

{¶56} Locke also contends that the trial court erred by admitting the audio and video recordings on the grounds that the "State failed to lay the proper foundation of these alleged recordings, the persons are not properly or sufficiently identified, and certainly contain prejudicial and inadmissible hearsay." Appellant's brief at 13.

{¶57} "[A] trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence." *Rigby v. Lake Cty.*, 58 Ohio St.3d 269, 271, 569 N.E.2d 1056 (1991).

{¶58} "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A). The Rules of Evidence, "[b]y way of illustration only, and not by way of limitation, " expressly sanction the following methods of authentication: "Testimony that a matter is what it is claimed to be, " "Identification of a

voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker, " and "Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result." Evid.R. 901(B)(1), (5), and (9).

{¶59} "To be admissible, a tape recording must be authentic, accurate, and trustworthy." *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶ 109. "The threshold for admission is quite low \* \* \*." *State v. Long*, 2014-Ohio-4416, 19 N.E.3d 981, ¶ 25 (11th Dist.); *State v. Nixon*, 2014-Ohio-4303, 20 N.E.3d 404, ¶ 33 (11th Dist.).

{¶60} In the present case, McArdle testified that the audio recordings fairly and accurately reflected the conversations he engaged in to arrange the buys. Similarly, McArdle testified that the video recordings fairly and accurately reflected the buys. McArdle created the recordings with equipment provided by the Wickliffe Police Department. McArdle identified the person in the audio recordings as the same person who sold him the heroin on three occasions and Locke as that person. Lieutenant Bush testified that he provided McArdle with recording devices on February 27 and March 4, 2013. Following the buys, Bush recovered the recordings made by McArdle and downloaded them onto the police server. Lieutenant Hengst testified that, following the March 4, 2013 buy, he took the S.D. card from the informant's recording device and played the video using Quick Time. He was able to pause a frame and use the Microsoft Office "snipping tool" to create still images from the video, in this case depicting Locke as the person conducting the transactions with McArdle. Hengst used the same technique to produce still images from the video of the March 6, 2013 buy. Finally, Hengst testified that he was familiar with Locke's voice and identified the voice on the audio recordings as Locke's.

{¶61} The testimony of McArdle, Lieutenant Bush, and Lieutenant Hengst provided a sufficient foundation to establish the audio and video recordings were what the State claimed that they were - recordings documenting Locke selling heroin on three occasions. The threshold for admissibility is low and other courts have found it satisfied based on comparable testimony. *Long* at ¶ 25 (the victim was able to identify the defendant's voice in conversation with a third party); *State v. Munion*, 4th Dist. Scioto No. 12CA3520, 2013-Ohio-3776, ¶ 20 (the detective "searched the informant for contraband, issued the recording device, then sent the informant into the driveway of Ms. Collier's residence [to purchase methamphetamine], \* \* \* [a]fter the informant came out \* \* \*, [he] collected the video device"); *State v. Bell*, 3rd Dist. Seneca No. 13-12-39, 2013-Ohio-1299, ¶ 45 (the detective "indicated that he

personally placed the video and audio recording device on the confidential informant[, ] \* \* \* removed the device once the controlled buy operation was complete and downloaded its contents into the evidence database"); *State v. Cox*, 2d Dist. Greene No. 2011 CA 19, 2012-Ohio-2100, ¶ 74 (detective who conducted undercover buy "would be able to state his opinion on voice identification, thus identifying Cox's voice as the one on the recordings").

{¶62} With respect to the alleged hearsay contained in the recordings, Locke identifies no specific statements as being hearsay or prejudicial. With respect to McArdle's statements, "tape recordings of controlled drug buys are not considered hearsay, " based on the rationale "that the confidential informant's statements on the tape are not offered to show the truth of the matters asserted, but rather to show context for the drug transaction." *State v. Thompson*, 7th Dist. Columbiana No. 08 CO 41, 2010-Ohio-3278, ¶ 35 (cases cited). Likewise, "[a] defendant's own out-of-court statements, offered against him at trial, are not hearsay." *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 112, citing Evid.R. 801(D)(2)(a) ("[a] statement is not hearsay if \* \* \* [t]he statement is offered against a party and is \* \* \* the party's own statement").

{¶63} Locke also argues under this assignment of error that "a juror member \* \* \* witnessed [him] bound in chains during the trial, " and, "[a]s a result, that juror was clearly and naturally prejudiced and likely poisoned the other jury's objectivity [sic]." Appellant's brief at 14.

{¶64} During trial, counsel for Locke advised the court that "my client [has] informed me that juror number 11 saw him coming out of the elevator being escorted \* \* \* in custody." At the close of trial, counsel for Locke declined having a voir dire of the juror, opting instead for a curative instruction. The trial court subsequently instructed the jury as follows:

Some of you jurors may have seen the Defendant, Cory Locke, accompanied by a Sheriff's Deputy. Mr. Locke is presently in the custody of the Sheriff because he has not been able to post bail. You're to draw no adverse inference whatsoever because he is in custody, or because he has not been able to post bail. That has nothing to do with the issues presented to you for your determination.

{¶65} We note that Locke's trial counsel agreed to the curative instruction and, thus, there was no objection or motion for mistrial. Any error would have to constitute plain error to be reversible. *State v. Spees*, 5th Dist. Stark No. 2002CA00420, 2003-Ohio-7278, ¶ 61.

{¶66} The Ohio Supreme Court has held that, "where a juror's view of defendants in custody is brief, inadvertent

and outside of the courtroom, " the "danger of prejudice to defendants is slight, " and "[a]ny error which may have resulted from the failure to conduct a voir dire of the lone juror [is] harmless \* \* \* given the brief, single observation and the general corrective instruction given thereafter." *State v. Kidder*, 32 Ohio St.3d 279, 286, 513 N.E.2d 311 (1987).

{¶67} In the present case, the juror's observation of Locke was brief, inadvertent, and outside the courtroom and the trial court removed the possibility of prejudice by giving a curative instruction. *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 220 ("the fact that the jury observed appellant handcuffed on one occasion did not deprive him of a fair trial, " and "the trial court's curative instruction removed any prejudice"); *State v. Davis*, 2d Dist. Clark No. 2011 CA 15, 2012-Ohio-1225, ¶ 19 ("[w]hen jurors have briefly glimpsed a defendant in shackles outside of the courtroom, the proper procedure is for the trial court to give a curative instruction"). We find no error, harmless or otherwise.

{¶68} The first two assignments of error are without merit.

{¶69} In his third assignment of error, Locke contends the trial court erred by convicting him and sentencing him for Trafficking in Heroin (Count 3) and Possession of Heroin (Count 7) on the grounds that these were allied offenses of similar import.

{¶70} Ohio's multiple counts statute or allied offenses of similar import statute provides:

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

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

R.C. 2941.25.

{¶71} In considering if two offenses are allied offenses of similar import, the trial court must determine "whether it is possible to commit one offense *and* commit the other with the same conduct." *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 48. "If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses

were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" (Citation omitted.) *Id.* at ¶ 49; *State v. Logan*, 60 Ohio St.2d 126, 131, 397 N.E.2d 1345 (1979) (the use of the term "animus" in R.C. 2941.25(B), interpreted as meaning "purpose or, more properly, immediate motive, " requires an examination of "the defendant's mental state in determining whether two or more offenses may be chiseled from the same criminal conduct").

{¶72} "An appellate court should apply a de novo standard of review in reviewing a trial court's R.C. 2941.25 merger determination." *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 28.

{¶73} To commit Trafficking in Heroin, a person must "knowingly \* \* \* [s]ell or offer heroin. R.C. 2925.03(A)(1). To commit Possession of Heroin, a person must "knowingly obtain, possess, or use" heroin. R.C. 2925.11(A). Inasmuch as selling heroin necessarily entails the obtaining, possession, and/or use of heroin, the two offenses may be committed by the same conduct. *State v. Montoya*, 12th Dist. Clermont No. CA2012-02-015, 2013-Ohio-3312, ¶ 63.

{¶74} In the present case, the trafficking of the heroin sold to McArdle and the possession of the heroin thrown from the Honda were differentiated both by the conduct underlying the commission of each offense and by the animus motivating the conduct, i.e., Locke's state of mind or immediate purpose. Locke sold a quantity of heroin to McArdle. That transaction was completed, yet Locke still possessed heroin for some purpose other than sale to McArdle. Whether Locke retained the heroin for sale to another customer or for personal use does not matter, only that his animus for retaining part of the heroin was distinct from the animus which motivated the sale to McArdle. This is a distinction recognized in case law. *State v. Brown*, 5th Dist. Richland No. 13 CA 43, 2014-Ohio-1409, ¶ 64 (separate convictions for Trafficking and Possession upheld based upon the defendant's having driven "to Columbus to purchase a quantity of heroin large enough to keep some for personal use and allow him to sell the remainder for profit to cover his personal use"); *State v. Lewis*, 12th Dist. Clinton No. CA2008-10-045, 2012-Ohio-885, ¶ 21 (Trafficking convictions did not merge, where "Lewis sold less than five grams of crack cocaine to an undercover agent, left the scene, and when stopped by law enforcement, discarded other crack cocaine rocks, and a bag of crack cocaine rocks was found near him after he was tackled").

{¶75} The third assignment of error is without merit.

{¶76} In the fourth assignment of error, Locke challenges the trial court's imposition of maximum prison terms to be served consecutively. Locke argues broadly that the court "fail[ed] to engage in a proportionality analysis, "

"fail[ed] to properly consider Section 2929.11(B), " "did not, on the record, engage in an analysis required under Section 2929.14, " and imposed an aggregate term of imprisonment "grossly disproportionate to the sentences for other similar offenses, resulting in cruel and unusual punishment." Appellant's brief at 24 and 26.

{¶77} The overriding purposes of felony sentencing in Ohio "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." R.C. 2929.11(A). "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." R.C. 2929.11(B).

{¶78} It is well-recognized that a sentencing court "has discretion to determine the most effective way to comply with the purposes and principles of sentencing." R.C. 2929.12(A).

In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct, the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism, and the factors set forth in division (F) of this section pertaining to the offender's service in the armed forces of the United States and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

*Id.*

{¶79} The Ohio Supreme Court has described a sentencing court's discretion as "full discretion to impose a prison sentence within the statutory range." *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, paragraph three of the syllabus. "[T]he trial court is not obligated, in the exercise of its discretion, to give any particular weight or consideration to any sentencing factor." *State v. Holin*, 174 Ohio App.3d 1, 2007-Ohio-6255, 880 N.E.2d 515, ¶ 34 (11th Dist.).

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).

{¶80} "The court hearing an appeal [of a felony sentence] shall review the record, including the findings underlying the sentence or modification given by the sentencing court." R.C. 2953.08(G)(2). "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 \* \* \* if it clearly and convincingly finds \* \* \* [t]hat the record does not support the sentencing court's findings under division \* \* \* (C)(4) of section 2929.14, or \* \* \* [t]hat the sentence is otherwise contrary to law." R.C. 2953.08(G)(2)(a) and (b).

{¶81} In passing sentence on Locke, the trial court stated on the record:

The Court has considered the record, the oral statements made, the pre-sentence report, my conference in chambers with counsel and probation, and the statements of the Defendant and Defendant's counsel. The Court has also considered the overriding purposes of felony sentencing pursuant to R.C. 2911 \* \* \* \* \* I have reasonably calculated this sentence to achieve the two overriding purposes of felony sentencing, and to be commensurate with and not demeaning to the seriousness of this offender's conduct and its impact on society, and to be consistent with sentences imposed for similar crimes committed by similar offenders. In using my discretion to determine the most effective way to comply with the purposes and principles of sentencing, I have considered all relevant factors including the seriousness and recidivism factors \* \* \*. The Court determines that there are no factors making any of these offenses less serious. In terms of recidivism, the Court finds that the Defendant has a long and violent criminal history,

that there has been rehabilitation failure after failure, after these previous convictions, including a conviction for one of the same crimes we have here, the fleeing from the police; that the Defendant has failed to respond in the past to probation or parole. The Court finds no genuine remorse. The Court finds no factors making recidivism less likely, in fact the Court finds that the Defendant has the greatest likelihood of committing future crimes. The Court determines that a prison sentence is needed to protect the public from future crime, that consecutive sentences are necessary to protect the public and punish the offender. Consecutive sentences would not be disproportionate to the Defendant's conduct and the danger he poses. \* \* \* That the harm was so great or unusual that a single term would not adequately reflect the seriousness of his conduct, and his criminal history shows that consecutive terms are needed. \* \* \* This Court finds that the Defendant committed a worst form of each of these offenses, particularly \* \* \* the tampering with evidence and the failure to comply.

{¶82} Contrary to Locke's arguments, the trial court fully complied with the directives of R.C. 2929.11 and 2929.12 in imposing its sentence upon him, and with the directives of R.C. 2929.14(C)(4) in ordering consecutive prison terms. The sentence was not contrary to law and the record clearly and convincingly supported the court's findings with respect to consecutive sentences. Locke, age forty-three at the time of sentencing, has an uninterrupted criminal history dating back to 1992 which includes convictions for, inter alia, Assault, Domestic Violence, Failure to Comply, Rape, Compelling Prostitution, and Promoting Prostitution.

{¶83} The fourth assignment of error is without merit.

{¶84} In his fifth assignment of error, Locke maintains that he "was deprived of his Sixth Amendment right to effective assistance of counsel because the trial court refused to allow [him] to terminate his appointed trial counsel and obtain new trial counsel." Appellant's brief at 26.

{¶85} Locke was represented by three attorneys during the course of these proceedings. On April 16, 2013, the trial court appointed Attorney Mark A. Glinski to represent Locke. On June 28, 2013, for reasons not apparent from the face of the record, the court withdrew Glinski as counsel and appointed Attorney Joseph R. Klammer to represent Locke.

{¶86} On October 10, 2013, Klammer filed a Motion to Withdraw as Counsel, based on "D.R. 20110(C)(1)(a) [which] allows withdraw[al] where the client insists on pursuing a position that is not warranted; \* \* \* where the client's conduct 'renders it unreasonably difficult for the lawyer to carry out' the relationship; \* \* \* where the client

insists that the attorney 'engage in conduct that is contrary to the judgment and advice of the lawyer, but not prohibited under the Disciplinary Rules;' and \* \* \* where the attorney 'believes in good faith \* \* \* that the tribunal will find the existence of other good cause for withdrawal.'"

{¶87} On December 4, 2013, the trial court granted Klammer's Motion to Withdraw and appointed Attorney Aaron Baker to represent Locke.

{¶88} In the trial court's March 20, 2014 Journal Entry on July Trial Proceedings, there is a note that, on March 17, 2014 (the first day of trial), "the court heard and overruled the defendant's oral motion to discharge counsel." Locke's oral motion to discharge counsel was not included in the transcripts prepared for appeal.

{¶89} The decision whether to allow an indigent defendant to discharge his or her counsel or seek substitute counsel is within the discretion of the trial court. *State v. Burrell*, 11th Dist. Lake No. 2013-L-024, 2014-Ohio-1356, ¶ 21.

{¶90} In the absence of a record, this court cannot speculate as to Locke's reasons for wanting to discharge trial counsel or the trial court's reasons for denying the motion. "When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980).

{¶91} The fifth assignment of error is without merit.

{¶92} In the sixth assignment of error, Locke asserts that the trial court erred in finding him competent to stand trial.

A defendant is presumed to be competent to stand trial. If, after a hearing [as prescribed in R.C. 2945.37(B) through (E)], the court finds by a preponderance of the evidence that, because of the defendant's present mental condition, the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense, the court shall find the defendant incompetent to stand trial \* \* \*

R.C. 2945.37(G); *State v. Berry*, 72 Ohio St.3d 354, 359, 650 N.E.2d 433 (1995) (the United States Supreme Court has stated that the test to determine a defendant's competency for purposes of due process is "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him") (citation omitted).

{¶93} A reviewing court will not disturb the finding that a defendant is competent to stand trial if "there was some reliable, credible evidence supporting the trial court's conclusion that [the defendant] understood the nature and objective of the proceedings against him." *State v. Williams*, 23 Ohio St.3d 16, 19, 490 N.E.2d 906 (1986). "Deference on these issues should be given to those 'who see and hear what goes on in the courtroom.'" (Citation omitted.) *State v. Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193, 790 N.E.2d 303, ¶ 33; *State v. Cowans*, 87 Ohio St.3d 68, 84, 717 N.E.2d 298 (1999) ("[l]imited to reviewing the black-and-white record, we are in no position to second-guess factual determinations made by a trial judge, which may be based on a person's demeanor, conduct, gestures, tone of voice, or facial expressions").

{¶94} On October 10, 2013, Locke filed a Motion to Determine Competency. The trial court referred Locke to the Lake County Adult Probation Department for a competency evaluation.

{¶95} On November 21, 2013, a competency hearing was held. The parties stipulated to the admission of a competency evaluation conducted by Dr. Rindsberg, in which Locke was found "capable of understanding the nature and objective of the proceedings against him and of assisting in his defense." Counsel for Locke made the following argument before the court:

I put the motion [to determine competency] in because of my experiences with him, that they were just complicated and at some point, with all due respect to Cory, my experience was that he was confused about the proceedings against him and how we were gonna present a defense. I understand that criminal cases put a lot of pressure on clients, and all defenses can be complicated. But my experience with him was that he does lack a reasonable degree of rational understanding of the proceedings, or possible defenses, or, in fact, the evidence that is against him. Reviewing the evidence at time [sic] complicated for Cory to put them in perspective of a defense. I know this is tough for him to hear, but it's important for the record. But I think that my experience is, to the extent that that's evidence, reaches the preponderance of the evidence burden per R.C. 2945.37(G).

{¶96} The trial court determined that Locke was competent to stand trial.

{¶97} Locke argues that Dr. Rindsberg's report was "the only evidence presented by either side" and that "trial counsel was ineffective for not requesting an independent competency evaluation." Appellant's brief at 28.

{¶98} We find no error. Dr. Rindsberg's report and the trial court's interactions with Locke were sufficient

evidence on which to base a competency determination. Dr. Rindsberg acknowledged Locke's difficulties in working with his attorneys, but did not believe that they were related to incompetency or mental illness: "While he may be somewhat more difficult because he is so engrossed in what he believes is right and wrong with his case, Mr. Locke understands the ramifications of pursuing the defense that he wants to pursue."

{¶99} The trial court's interactions with Locke included a lengthy change of plea hearing conducted several months prior to the competency hearing, during which the court reviewed with Locke the charges against him. *State v. McQueen*, 10th Dist. Franklin No. 09AP-195, 2009-Ohio-6272, ¶ 14 ("[a]lthough the trial court did not hold a full evidentiary hearing, the court did consider the report submitted by NetCare [Forensic Psychiatry Center], and held a colloquy with appellant regarding his understanding of the proceedings"); *In re Lloyd*, 5th Dist. Richland No. 96 CA 86, 1997 Ohio App. LEXIS 1004, 1 and 5 (Jan. 27, 1997) ("[b]ased upon a [stipulated] report \* \* \*, we find there was sufficient evidence presented to support the juvenile court's conclusion that appellant was competent to stand adjudication").

{¶100} Furthermore, we note that throughout the course of these proceedings Locke would speak on his own behalf before the trial court. In none of these interactions did Locke appear to lack an understanding of the nature and objective of the proceedings against him. Specific interactions of this sort will be set forth in greater detail in the next assignment of error.

{¶101} With respect to an independent competency evaluation, Locke cites no authority for the proposition that he was entitled to an independent evaluation or evidence that such an evaluation was necessary.

{¶102} When the issue of a defendant's competency is raised, it is within the trial court's discretion whether an evaluation should be conducted. R.C. 2945.371(A) ("[i]f the issue of a defendant's competence to stand trial is raised \* \* \*, the court may order one or more evaluations of the defendant's present mental condition"); *State v. Bailey*, 90 Ohio App.3d 58, 67, 627 N.E.2d 1078 (11th Dist.1992) ("a trial court is not required to order an evaluation of the defendant's mental condition every time he raises the issue"); *State v. Alvarado*, 4th Dist. Ross No. 14CA3423, 2014-Ohio-5374, ¶ 6 (cases cited). Likewise, "[a] defendant in a criminal case has no absolute right to an independent psychiatric evaluation' to determine competency." (Citation omitted.) *State v. Hill*, 177 Ohio App.3d 171, 2008-Ohio-3509, 894 N.E.2d 108, ¶ 106 (11th Dist.).

{¶103} Given the lack of any indicia of incompetency on the face of the record, we find no deficiency in Locke's

trial counsel's decision not to seek an independent evaluation.

{¶104} The sixth assignment of error is without merit.

{¶105} In the seventh assignment of error, Locke contends that trial counsel's performance was constitutionally deficient.

{¶106} To reverse a conviction for ineffective assistance of counsel, the defendant must prove "(1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding." *State v. Madrigal*, 87 Ohio St.3d 378, 388-389, 721 N.E.2d 52 (2000), citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶107} Locke raises various instances of trial counsel's alleged deficiencies, none of which we find fell below an objective standard of reasonableness or compromised the reliability and fairness of the proceedings below.

{¶108} Locke argues trial counsel was incompetent for stipulating to the admission of Dr. Rindsberg's report and for not filing a motion to suppress. Appellant's brief at 30. However, Locke cites no legal or factual grounds for objecting to the report's admissibility or filing a motion to suppress. In the absence of grounds for taking these actions, Locke cannot demonstrate that counsel was ineffective for not doing so. *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶ 35 ("where the record contains no evidence justifying a motion to suppress, defendant has not met his burden of proving that his attorney violated an essential duty by failing to file the motion") (citation omitted).

{¶109} Locke contends that trial counsel was incompetent for not objecting to one of the jurors on the panel who, according to Locke, "had two people in her family that died because of drug overdoses and that couldn't be fair through the trial." Appellant's brief at 30.

{¶110} We find no prejudice as Locke was allowed to raise the objection himself. The trial court rejected Locke's contention, stating that if the juror had claimed she could not be fair, he would have excused her. Trial counsel advised the court that he recalled the juror "specifically saf[ying] that despite the overdoses she could be fair." Locke disputed counsel's recollection of the juror's statement. Regardless, the voir dire of the jury has not been transcribed and made part of the record. In the absence of a record, we must defer to the court's ruling on Locke's objection.

{¶111} Locke also raised several instances of trial

counsel's alleged ineffectiveness at sentencing. Locke disputed the content of a written stipulation that his mother is Brenda Locke and that he "has listed 365 E. 161st Street, Cleveland, Ohio, as his residence on documents." As noted by the court, Locke voluntarily signed the stipulation.

{¶112} Locke argues that the prosecutor had sent a letter to Attorney Klammer "concerning the mislabeling of some of the lab reports" and that trial counsel failed to raise the issue before the jury. Without the prosecutor's letter in the record, this court is unable to consider the merits of this argument.

{¶113} Finally, Locke claims trial counsel failed "to pursue the substantive, date, and time discrepancies in the phone and video recordings and the testimony of the various witnesses." Appellant's brief at 31. These otherwise unidentified discrepancies fail to establish grounds for reversing Locke's convictions. A review of the trial proceedings reveal no such discrepancies of sufficient substance as to undermine the fundamental fairness of the proceedings.

{¶114} The seventh assignment of error is without merit.

{¶115} In the eighth assignment of error, Locke maintains the trial court erred by refusing to allow him to appear for trial without restraints.

Ordinarily a prisoner is entitled to appear free of shackles or bonds which would restrict his free movements. It is uniformly held, however, that the prisoner may be shackled when such precaution is shown to be necessary to prevent violence or escape. It lies within the discretion of the trial court to determine such necessity, based upon the conduct of the accused. An appellate court will not reverse the trial court's action except in case of an abuse of that discretion.

*State v. Woodards*, 6 Ohio St.2d 14, 23, 215 N.E.2d 568 (1966); *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112, ¶ 82.

{¶116} The issue of whether a conviction should be reversed where the defendant has appeared in restraints is subject to a harmless error analysis. *Neyland* at ¶ 109, citing *Deck v. Missouri*, 544 U.S. 622, 635, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005); *United States v. Miller*, 531 F.3d 340, 346 (6th Cir.2008) ("[i]n *Deck*, the Supreme Court confirmed that harmless error analysis applies to the use of physical restraints on a criminal defendant at trial").

{¶117} In the present case, Locke filed a Motion to Permit Accused to Appear in Civilian Clothing without Restraints at All Proceedings on January 27, 2014. On February 13, 2014, the trial court entered an Order that "defendant is permitted to wear civilian clothes for the

duration of trial, " but denied the request to appear without restraints. In the same Order, the court did instruct "the sheriff \* \* \* to take all necessary precautions to keep any restraints worn by the defendant concealed."

{¶118} The State argues that Dr. Rindsberg's psychological evaluation of Locke and his history of violent crime, including "prior convictions for failure to comply and for failure to verify his address as sexual offender, " justified the use of restraints during trial. Appellee's brief at 39. In particular, the State notes several violent incidents with other inmates during Locke's pre-trial captivity, a heated encounter with one of his defense attorneys, and antisocial personality traits.

{¶119} Apart from the observation of Locke by juror number 11 "being escorted \* \* \* in custody, " discussed under the first assignment of error, nothing in the record suggests that Locke was observed in restraints during the course of the trial. When witnesses identified Locke at trial, he was described as wearing civilian clothing.

{¶120} We find that any arguable error by the trial court in having Locke restrained during trial was harmless beyond a reasonable doubt given the facts that the court ordered the restraints to be concealed and that there is no evidence that the restraints were visible to members of the jury.

{¶121} The Ohio Supreme Court has held that a defendant, tried in restraints, "cannot establish any resulting prejudice, [where] nothing shows that the leg restraints were visible to the jury." *Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112, at ¶ 114; *Ochoa v. Workman*, 669 F.3d 1130, 1145 (10th Cir.2012) ("the trial court erred in requiring Ochoa to wear the shock sleeve [during trial] but the error was harmless \* \* \* [since] there was nothing in the record indicating the shock sleeve was visible to the jury") (cases cited); compare *State v. Ayers*, 12th Dist. Warren Nos. CA2010-12-119 and CA2010-12-120, 2011-Ohio-4719, ¶ 61 ("as it relates to his ineffective assistance claim resulting from his trial counsel's failure to object to him being shackled, appellant cannot establish any resulting prejudice for, as the trial court found, the jury was unable to see \* \* \* him in shackles as he was 'under the skirts'" (cases cited).

{¶122} The Ohio Supreme Court also considered the fact that "overwhelming evidence of Neyland's guilt was presented at trial, " and, thus, "little chance that leg restraints, even if observable, affected the verdict or the sentence in this case." *Neyland* at ¶ 110. The same consideration applies to the present case, where the evidence of Locke's guilt was substantial and uncontradicted.

{¶123} The eighth assignment of error is without merit.

{¶124} For the foregoing reasons, Locke's convictions and sentence are affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, PJ, THOMAS R WRIGHT, J, concur.

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Notes:

[1]By amendment, dated July 29, 2013.

[2]Lieutenant Hengst testified that Detective Dondrea was mistaken about the Honda's make.  
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2015-Ohio-1766

STATE OF OHIO, Plaintiff-Appellee,

v.

ANTHONY CONN, Defendant-Appellant.

Nos. CA2014-04-059, CA2014-04-061, CA2014-06-084

Court of Appeals of Ohio, Twelfth District, Warren

May 11, 2015

CRIMINAL APPEAL FROM WARREN COUNTY  
COURT OF COMMON PLEAS Case No. 2013 CR 29504

David P. Fornshell, Warren County Prosecuting  
Attorney, Michael Greer, for plaintiff-appellee

Gray & Duning, Neal W. Duiker, for  
defendant-appellant

M. POWELL, J.

{¶ 1} Defendant-appellant, Anthony Conn, appeals his conviction and sentence in the Warren County Court of Common Pleas for trafficking in drugs and illegal manufacture of drugs.

{¶ 2} Appellant was indicted in September 2013 on 50 separate counts, including counts for trafficking in steroids, possession of steroids, illegal manufacture of steroids, and endangering children. The illegal manufacture of steroids charge was accompanied by a specification seeking forfeiture of appellant's vehicle, a 2001 Ford F-250 pick-up truck. The charges stemmed from three separate incidents. Specifically, on January 17, 2013, and on February 7, 2013, appellant sold anabolic steroids to a confidential informant. These covert operations were conducted in part by the Warren County Drug Task Force. Then, on March 20, 2013, the Warren County Drug Task Force conducted a third covert operation during which appellant was pulled over while en route to sell anabolic steroids to the confidential informant. Following the traffic stop and appellant's subsequent arrest, a search of appellant's vehicle and home yielded large quantities of steroids as well as items used to manufacture steroids.

{¶ 3} On January 29, 2014, appellant pled guilty to eight counts, to wit: two counts of trafficking in drugs in violation of R.C. 2925.03(A)(1), four counts of trafficking in drugs in violation of R.C. 2925.03(A)(2), one count of child endangering in violation of R.C. 2919.22(B), one

count of illegal manufacture of drugs, in violation of R.C. 2925.04(A), and the forfeiture specification. A sentencing hearing was held in March 2014.

{¶ 4} A few days before the sentencing hearing, appellant filed a sentencing memorandum under seal. Appellant asserted that given the nature of his offenses, his cooperation with the police, and the financial losses he sustained following his resignation as an employee of the Ohio Department of Rehabilitation and Corrections (DRC), he should only be sentenced to two years in prison. Appellant also moved the trial court "for an order suspending any mandatory fines for the reason that the Defendant has lost his retirement, and will be spending time in prison and will not have the funds to pay any fines upon his release." On March 24, 2014, the trial court sentenced appellant to an aggregate prison term of five years, three of which was mandatory, through a combination of concurrent and consecutive sentences. The trial court also imposed an aggregate mandatory fine of \$42, 500 and ordered the forfeiture of appellant's vehicle.

{¶ 5} Appellant appeals, raising five assignments of error.

{¶ 6} Assignment of Error No. 1:

{¶ 7} APPELLANT'S TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE FOR FAILING TO FILE AN AFFIDAVIT OF INDIGENCY PRIOR TO SENTENCING PURSUANT TO [R.C.] 2929.18(B)(1) IN ORDER TO COMPEL THE TRIAL COURT NOT TO IMPOSE FINES; TRIAL COUNSEL'S ASSISTANCE IN THIS REGARD WAS IN VIOLATION OF THE APPELLANT'S SIXTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AS WELL AS SECTION 10 OF ARTICLE 1 OF THE OHIO CONSTITUTION.

{¶ 8} Appellant argues he received ineffective assistance of counsel because his trial counsel failed to file an affidavit of indigency with the trial court regarding mandatory fines. Appellant asserts the trial court would have been precluded from imposing any fines upon him had the affidavit of indigency been filed. In support of his assertion, appellant notes that the trial court found him to be indigent for purposes of this appeal and consequently appointed appellate counsel and granted transcripts at state expense.

{¶ 9} Appellant pled guilty to seven drug-related offenses. Five of the offenses were felonies of the second degree, one was a felony of the third degree, and one was a

EXHIBIT

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12

felony of the fourth degree. R.C. 2929.18(B)(1) imposes a mandatory fine upon all first, second, and third-degree drug offenders. However, the mandatory fine will not be imposed if the offender "alleges in an affidavit filed with the [trial] court prior to sentencing that [he] is indigent and unable to pay the mandatory fine and if the court determines the offender is an indigent person and is unable to pay the mandatory fine[.]" R.C. 2929.18(B)(1).

{¶ 10} This court and other Ohio courts have held that the failure to file an affidavit of indigency only constitutes ineffective assistance of counsel when the record shows a reasonable probability that the trial court would have found the defendant indigent and unable to pay the fine had the affidavit been filed. *State v. Russia*, 12th Dist. Butler No. CA2013-01-003, 2013-Ohio-4125, ¶ 8. *See, e.g., State v. Hubbard*, 8th Dist. Cuyahoga No. 99093, 2013-Ohio-1994; *State v. McDowell*, 11th Dist. Portage No. 2001-P-0149, 2003-Ohio-5352; *State v. Powell*, 78 Ohio App.3d 784 (3d Dist.1992).

{¶ 11} The filing of an affidavit of indigency by a defendant does not automatically entitle the defendant to a waiver of the mandatory fine. *State v. Bolden*, 12th Dist. Preble No. CA2003-03-007, 2004-Ohio-184, ¶ 35. The burden is upon the defendant opposing the mandatory fine to demonstrate that he is indigent *and* unable to pay the fine. *State v. Gipson*, 80 Ohio St.3d 626, 635 (1998); *State v. Johnson*, 12th Dist. Butler No. CA2011-11-212, 2014-Ohio-3776, ¶ 11. In addition, a determination that a criminal defendant is indigent for purposes of appointed counsel is separate and distinct from a determination of being indigent for purposes of paying a mandatory fine. *Bolden* at ¶ 35. Thus, the determination that a defendant is indigent for purposes of appointing counsel does not prohibit the trial court from imposing a mandatory fine. *State v. Rice*, 12th Dist. Butler No. CA2006-04-091, 2007-Ohio-1367, ¶ 7.

{¶ 12} Nonetheless, before a trial court imposes a mandatory fine under R.C. 2929.18, the court is required to "consider the offender's present and future ability to pay the amount of the \* \* \* fine." R.C. 2929.19(B)(5); *Johnson* at ¶ 12. There are no express factors that must be considered or specific findings that must be made on the record. *Johnson* at *id.* Compliance with R.C. 2929.19(B)(5) can be shown when the trial court considers a Presentence Investigation Report (PSI) which typically provides financial and personal information. *Id.* In the case at bar, the trial court ordered a PSI which detailed appellant's age, education, physical and mental health, and employment history. The record indicates that the trial court reviewed the PSI before sentencing appellant.

{¶ 13} In imposing the \$42, 500 mandatory fine, the trial court found that "[e]ven though at this time you

couldn't possibly pay that fine[, ] you're young enough and healthy enough to work once you're released from custody and in the future I can't find that you would not ever have the ability to pay towards these mandatory fines." [1] The trial court further stated, "The legislature has quite clearly chosen to try to take the financial gains out of drug trafficking. They've imposed mandatory fin[e]s on many levels of drug trafficking and you fall within the clear ambit of those so I am imposing those fin[e]s."

{¶ 14} When evaluating the indigency of a defendant opposing the mandatory fine, a trial court is not limited to the indigency status of the defendant at the time the fine was imposed. *McDowell*, 2003-Ohio-5352 at ¶ 69; *Johnson*, 2014-Ohio-3776 at ¶ 19. A trial court is not precluded from imposing a fine on an able-bodied defendant who is fully capable of work but who happens to be indigent and unemployed at the moment of sentencing. *Gipson*, 80 Ohio St.3d at 636.

{¶ 15} In the case at bar, the record shows that appellant, age 42 at the time of his sentencing, has a GED, earned an "Associates of Applied Science" degree from a community college, and subsequently attended additional classes in two other universities. Appellant also honorably served in the U.S. Army and National Guard and reached the grade of Captain during his career with the DRC. The record further shows that appellant had an auto shop side business before his promotion to Captain in 2005, but that lower back issues prevented him from reopening it a few years later.

{¶ 16} In light of the foregoing, we find that the record is insufficient to show a reasonable probability that appellant would have been found indigent for purposes of paying the mandatory fine had the affidavit of indigency been filed. *See State v. Botos*, 12th Dist. Butler No. CA2004-06-145, 2005-Ohio-3504. The record supports the trial court's finding that appellant has future earning capabilities that would allow him to pay the mandatory fine. Appellant, therefore, did not receive ineffective assistance of trial counsel with regard to the mandatory fine. *Id.*

{¶ 17} Appellant's first assignment of error is overruled.

{¶ 18} Assignment of Error No. 2:

{¶ 19} THE APPELLANT'S SENTENCE IS CONTRARY TO LAW UNDER [R.C.] 2953.08, THE OHIO CONSTITUTION, AND THE U.S. CONSTITUTION.

{¶ 20} Appellant challenges his five-year prison sentence on the grounds that (1) the trial court abused its discretion in sentencing him to consecutive nonminimum prison terms, (2) his sentence is disproportionate to

sentences imposed for similar crimes committed by similar offenders in similar circumstances, and (3) his sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

{¶ 21} We no longer review felony sentences under an abuse of discretion standard. *State v. Stamper*, 12th Dist. Butler No. CA2012-08-166, 2013-Ohio-5669, ¶ 9. Rather, we review felony sentences under the standard of review set forth in R.C. 2953.08(G)(2) to determine whether those sentences are clearly and convincingly contrary to law. *Id.* A sentence is not clearly and convincingly contrary to law where the trial court makes the required findings under R.C. 2929.14(C)(4) and the record supports those findings, and where the trial court considers the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12, properly applies postrelease control, and sentences appellant within the permissible statutory range. *Id.*; R.C. 2953.08(G)(2).

{¶ 22} Appellant first challenges the trial court's imposition of nonminimum prison terms. Appellant asserts the trial court failed to properly consider the factors under R.C. 2929.12, when it failed to properly consider the fact "he was a first-time offender who cooperated with the police and showed sincere remorse for his actions," and the fact "there were no actual victims as [he] was the subject of a police sting operation."

{¶ 23} Appellant does not dispute that the trial court sentenced him within the statutory range, nor does he dispute that the trial court properly applied postrelease control in this case. The judgment entry of conviction specifically states that the trial court considered "the principles and purposes of sentencing under R.C. §2929.11, and has balanced the seriousness and recidivism factors under R.C. §2929.12."

{¶ 24} We find that the trial court did not err in sentencing appellant to more than the minimum prison term on each of the eight counts to which he pled guilty. When sentencing a defendant, a trial court is not required to consider each sentencing factor, "but rather to exercise its discretion in determining whether the sentence satisfies the overriding purpose of Ohio's sentencing structure." *State v. Oldiges*, 12th Dist. Clermont No. CA2011-10-073, 2012-Ohio-3535, ¶ 17. Factors set forth in R.C. 2929.12 are nonexclusive, and R.C. 2929.12 explicitly permits a trial court to consider any relevant factors in imposing a sentence. *State v. Birt*, 12th Dist. Butler No. CA2012-02-031, 2013-Ohio-1379, ¶ 64.

{¶ 25} In sentencing appellant to more than minimum prison terms, the trial court acknowledged appellant's prior spotless criminal record, his service in the military, his former employment with DRC, his cooperation with the

police, and the fact he took responsibility for his actions. However, the trial court also found that appellant did not simply take steroids for himself but also "distributed this poison to other people." In fact, the "behavior ha[d] gone on for quite some time. There were a large number of people that were on the receiving end of your distribution of these drugs[.]" The trial court noted that while steroids were different from "street drugs," they nevertheless had dangerous and harmful side effects. The trial court found that once appellant started selling steroids to other people, "you're really no different th[a]n the person trafficking in heroin, cocaine, marijuana." Consequently, the trial court found that appellant "deserve[d] something far less th[a]n the maximum sentence but deserve[d] more than the minimum sentence at the same time."

{¶ 26} In light of the foregoing, we find that the trial court did not err in sentencing appellant to more than the minimum prison term for each of the eight counts to which he pled guilty. Appellant's nonminimum sentences are therefore not clearly and convincingly contrary to law.

{¶ 27} Appellant next asserts his sentence is disproportionate to and inconsistent with the four-year prison sentence his co-defendant received.[2]

{¶ 28} A "defendant has no substantive right to a particular sentence within the statutorily authorized range." *State v. Isreal*, 12th Dist. Butler No. CA2010-07-170, 2011-Ohio-1474, ¶ 70. "A consistent sentence is not derived from a case-by-case comparison, but from the trial court's proper application of the statutory sentencing guidelines." *State v. Graham*, 12th Dist. Warren No. CA2013-07-066, 2014-Ohio-1891, ¶ 14. "In other words, a defendant claiming inconsistent sentencing must show the trial court failed to properly consider the statutory sentencing factors and guidelines found in R.C. 2929.11 and 2929.12." *Id.* "When sentencing an offender, each case stands on its own unique facts." *State v. Mannarino*, 8th Dist. Cuyahoga No. 98727, 2013-Ohio-1795, ¶ 58.

{¶ 29} Although appellant's co-defendant received a shorter prison sentence than appellant, that fact alone does not require a finding that the trial court erred in its sentencing decision. *Graham* at ¶ 15; *State v. Lee*, 12th Dist. Butler No. CA2012-09-182, 2013-Ohio-3404, ¶ 13 (a sentence is not contrary to law because the trial court failed to impose an identical sentence to that of another offender who committed similar acts). As stated earlier, the trial court properly considered all relevant statutory sentencing factors and guidelines found in R.C. 2929.11 and 2929.12 before sentencing appellant, and imposed a sentence within the statutory range for the offenses. *Isreal*, 2011-Ohio-1474 at ¶ 73.

{¶ 30} In addition, although appellant claims his

sentence is disproportionate to and inconsistent with his co-defendant's prison sentence, appellant does not provide any facts about his co-defendant's case, such as the offense or offenses his co-defendant was charged with and convicted of, and whether the co-defendant pled guilty or was tried to a jury. Appellant does not even provide the co-defendant's name. Consequently, we do not know whether the co-defendant was similar to appellant, and the mere fact the co-defendant was sentenced to four years in prison is of no use to this court. See *Mannarino*, 2013-Ohio-1795 at ¶ 61. Appellant, therefore, failed to show his sentence is inconsistent with other similarly situated offenders, including his co-defendant.

{¶ 31} While we find that the trial court did not err in imposing the individual prison terms, we sua sponte find it improperly imposed consecutive sentences. *Stamper*, 2013-Ohio-5669 at ¶ 21. After reviewing the record, we find that the consecutive sentences are clearly and convincingly contrary to law and must be reversed because the trial court failed to make the required statutory findings.

{¶ 32} Pursuant to R.C. 2929.14(C)(4), a trial court must engage in a three-step analysis and make certain findings before imposing consecutive sentences. *State v. Smith*, 12th Dist. Clermont No. CA2014-07-054, 2015-Ohio-1093, ¶ 7. Specifically, the trial court must find that (1) the consecutive sentence is necessary to protect the public from future crime or to punish the offender, (2) consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and (3) one of the following applies:

(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); *Smith at id.*

{¶ 33} "In order to impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing

and incorporate its findings into its sentencing entry[.]” *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, ¶ 37. While the trial court is not required to give reasons explaining these findings, it must be clear from the record that the trial court actually made the required statutory findings. *Smith at ¶ 8.*

{¶ 34} The record shows that the trial court failed to make the required statutory findings under R.C. 2929.14(C)(4) during the sentencing hearing prior to imposing consecutive sentences. The sentencing entry likewise fails to set forth the required statutory findings under R.C. 2929.14(C)(4). Accordingly, and as conceded by the state, appellant's consecutive sentences are contrary to law and must be reversed. *Smith*, 2015-Ohio-1093 at ¶ 11.

{¶ 35} Finally, appellant argues that given his former employment with DRC for 19 years, his five-year prison sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution because it will put him in serious danger of retaliation, physical harm, or even death while incarcerated. However, given our decision to remand this case for resentencing, we find that this issue is moot and we decline to address it. *Smith at ¶ 15.*

{¶ 36} Having found that appellant's individual prison terms were proper, but that the trial court failed to make the required statutory findings under R.C. 2929.14(C)(4) during the sentencing hearing at the time it imposed consecutive sentences, and did not incorporate the required findings into its sentencing entry, we find that the trial court's imposition of consecutive sentences is contrary to law. *Smith*, 2015-Ohio-1093 at ¶ 11. We therefore vacate appellant's consecutive sentences and remand this matter to the trial court for resentencing. On remand, the trial court shall consider whether consecutive sentences are appropriate under R.C. 2929.14(C)(4), and if so, shall make the required statutory findings on the record at resentencing and incorporate its findings into a sentencing entry. *Bonnell*, 2014-Ohio-3177 at ¶ 29, 37.

{¶ 37} Appellant's second assignment of error is overruled in part and sustained in part.

{¶ 38} Assignment of Error No. 3:

{¶ 39} THE APPELLANT'S CHARGES, CONVICTIONS AND SENTENCES VIOLATE THE DUE PROCESS AND EQUAL PROTECTION CLAUSES, AS WELL AS THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT, WHEN COMPARED TO FEDERAL LAW AND THAT OF OTHER STATES.

{¶ 40} Appellant argues his five-year prison sentence must be reduced because the Ohio statutory definition of "bulk amount" and "unit ester" under R.C. 2925.01 is void

for vagueness, especially when compared to federal law, and thus, the statute violates his rights to due process and equal protection as well as the prohibition against cruel and unusual punishment.[3] Appellant spends a great deal of time under this assignment of error comparing Ohio guidelines and requirements with their federal counterparts.

{¶ 41} We first note that "we need not resort to federal law, or a federal court's interpretation of a federal statute for that matter, to construe our own \* \* \* statute. At issue here is state law and, absent a clear pronouncement from Congress preempting the field, it will be given independent construction." *State v. Hill*, 70 Ohio St.3d 25, 30 (1994) (addressing defendant's reliance on federal statute to construe Ohio's criminal forfeiture statute).

{¶ 42} More importantly, appellant failed to raise either argument before the trial court. It is well-established that "an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected." *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, ¶ 15. "[T]he constitutionality of a statute must generally be raised at the first opportunity and, in a criminal prosecution, this means in the trial court." *State v. Awan*, 22 Ohio St.3d 120, 122 (1986). Thus, the failure to raise the issue of the constitutionality of a statute or its application, which issue is apparent at the trial court level, constitutes a waiver of that issue and need not be heard for the first time on appeal. *Id.* at syllabus; *State v. Myers*, 12th Dist. Madison No. CA2012-12-027, 2014-Ohio-3384, ¶ 12.

{¶ 43} Appellant's third assignment of error is accordingly overruled.

{¶ 44} Assignment of Error No. 4:

{¶ 45} THE INDICTMENT IS FATALLY DEFECTIVE REQUIRING THAT THE CONVICTIONS AND SENTENCES BE VACATED AND THE CASE DISMISSED WITH PREJUDICE.

{¶ 46} Appellant argues his 50-count indictment was defective and multiplicitous because it "charges multiple offenses that are not punishable as separate offenses, " and fails to adequately apprise him of "what he must be prepared to meet." Specifically, appellant argues that the counts related to January 17, 2013 (Counts 1 through 5), and those related to February 7, 2013 (Counts 6 through 10), improperly charge "each particular ester of testosterone \* \* \* as an individual count, which does not comport with either law or fact." With regard to the counts related to March 20, 2013, appellant argues the indictment improperly "charges individual counts for each ester of testosterone" as well as "more than one offense for each [dose] of

testosterone" seized that day at his home, and includes "double-counting and even miscounting." In addition, Count 50 (illegal manufacture of drugs) is "a duplicitous offense to nearly all other counts in the indictment related to the events of March 20, 2013." Appellant asserts "a proper indictment would have included only half a dozen counts instead of fifty."

{¶ 47} Appellant, however, "waived any deficiency in the indictment by failing to object to the indictment and by pleading guilty to the offense." *State v. Barton*, 108 Ohio St.3d 402, 2006-Ohio-1324, ¶ 73. It is well-established that when a defendant enters a guilty plea and thereby admits he is in fact guilty of the charged offenses, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. *See State v. Spates*, 64 Ohio St.3d 269, 272 (1992); *State v. Hedgecock*, 12th Dist. Fayette No. CA97-08-022, 1998 WL 233380, \*5 (May 11, 1998). There is no evidence in the record that appellant raised the alleged defects in the indictment prior to entering his guilty plea. Additionally, nothing in the record indicates that appellant's guilty plea was not knowingly, intelligently, and voluntarily made. *State v. Fugate*, 12th Dist. Butler No. CA2003-03-074, 2004-Ohio-182, ¶ 6. We also note that 29 of the counts challenged by appellant in this assignment of error were dismissed in exchange for his guilty plea.

{¶ 48} Furthermore, the state may charge a defendant with multiple counts for multiple offenses, based upon the criminal conduct of the defendant. *See State v. Ruff*, Slip Opinion No. 2015-Ohio-995, ¶ 13. R.C. 2941.25, which codifies the protections of the Double Jeopardy Clause of the United States and Ohio Constitutions, clearly provides that "where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, *the indictment or information may contain counts for all such offenses*, but the defendant may be convicted of only one." R.C. 2941.25(A). (Emphasis added.) That is exactly what occurred here.

{¶ 49} Appellant's fourth assignment of error is accordingly overruled.

{¶ 50} Assignment of Error No. 5:

{¶ 51} THE FORFEITURE OF THE VEHICLE PURSUANT TO THE SPECIFICATION TO COUNT FIFTY OF THE INDICTMENT WAS CONTRARY TO LAW AND VIOLATES THE APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

{¶ 52} Appellant argues the trial court erred in ordering the forfeiture of his pick-up truck because (1)

appellant did not use the vehicle in a manner sufficient to warrant its forfeiture under R.C. 2981.02(B), (2) he is not the owner of the vehicle, rather his wife is, and (3) the forfeiture specification in the indictment was defective as it only applied to illegal manufacture of steroids, and not to trafficking in or possession of steroids.

{¶ 53} Forfeiture is generally not favored in Ohio. *See Sogg v. Zurz*, 121 Ohio St.3d 449, 2009-Ohio-1526. R.C. Chapter 2981 sets forth procedures that must be followed before seized property may be forfeited. *State v. Eppinger*, 8th Dist. Cuyahoga No. 95685, 2011-Ohio-2404, ¶ 8. Appellant concedes his pick-up truck was an instrumentality under R.C. 2981.02(A)(3) (that is, a property that is otherwise lawful to possess but that is used or intended to be used in the commission or facilitation of a felony offense).

{¶ 54} Appellant first argues the trial court erred in ordering the forfeiture of his pick-up truck because his use of the vehicle did not warrant forfeiture under R.C. 2981.02(B). Appellant asserts the case at bar is factually similar to a decision of the Ninth Appellate District, and thus his pick-up truck was not subject to forfeiture. *See State v. Jelenic*, 9th Dist. Medina No. 10CA0024-M, 2010-Ohio-6056.

{¶ 55} Pursuant to R.C. 2981.02(B),

In determining whether an alleged instrumentality was used in or was intended to be used in the commission or facilitation of an offense or an attempt, complicity, or conspiracy to commit an offense in a manner sufficient to warrant its forfeiture, the trier of fact shall consider the following factors the trier of fact determines are relevant:

- (1) Whether the offense could not have been committed or attempted but for the presence of the instrumentality;
- (2) Whether the primary purpose in using the instrumentality was to commit or attempt to commit the offense;
- (3) The extent to which the instrumentality furthered the commission of, or attempt to commit, the offense.

{¶ 56} The record shows that the trial court did not consider the foregoing factors before ordering the forfeiture of appellant's vehicle. Rather, the trial court simply ordered the forfeiture of appellant's pick-up truck during the sentencing hearing. However, appellant pled guilty to eight counts of the indictment, including the illegal manufacture of steroids count and its accompanying forfeiture specification.

{¶ 57} By pleading guilty, appellant admitted the allegations in the indictment that his vehicle was used as an

instrumentality in committing or facilitating the commission of the offenses. *State v. Luong*, 12th Dist. Butler No. CA2011-06-101, 2012-Ohio-4519, ¶ 40; R.C. 2981.02. Therefore, there was no need for the trial court to consider and address the factors under R.C. 2981.02(B). *Luong at id.* *See also State v. Deibel*, 3d Dist. Allen No. 1-10-70, 2011-Ohio-3520 (plea agreement calling for the forfeiture of property amounts to a waiver of the statutory requirements that the trial court conduct the analysis under R.C. 2981.02[B]); *Eppinger*, 2011-Ohio-2404 (when a defendant enters a plea agreement calling for the forfeiture of seized property, adherence to the statutory procedures are unnecessary); *State v. Sammor*, 9th Dist. Summit No. 24094, 2008-Ohio-4847 (by entering plea agreement calling for the forfeiture of property, defendant waived application of the statutory provisions governing forfeiture procedure; in addition, defendant's due process rights are not violated).

{¶ 58} Likewise, by pleading guilty to the forfeiture specification, appellant waived any alleged defect in the indictment. *Fugate*, 2004-Ohio-182 at ¶ 6. Accordingly, we find no merit to appellant's assertion that the trial court erred in ordering the forfeiture of appellant's pick-up truck because the forfeiture specification in the indictment was allegedly defective.

{¶ 59} Finally, appellant argues the trial court erred in ordering the forfeiture of the pick-up truck as the vehicle belongs to his wife and not to him.

{¶ 60} "A person with an interest in seized property may seek its return by means of a motion filed in the criminal case before the prosecuting attorney has filed a charging instrument containing a forfeiture specification, or by means of a petition filed in a civil-forfeiture proceeding." *State v. North*, 1st Dist. No. C-120248, 2012-Ohio-5200, ¶ 10; R.C. 2981.04(E)(1) (as applicable here). "In either case, the trial court must conduct a hearing and must return the property upon proof of an entitlement to the property." *North at id.*; R.C. 2981.04(E)(3), (F)(1) (as applicable here).

{¶ 61} In the case at bar, three months after appellant's conviction, his wife filed a petition in the trial court for "Remission or Mitigation of Forfeiture" of the forfeited pick-up truck on the ground she was the sole legal owner of the vehicle. A hearing on the petition was scheduled to be held on July 28, 2014. On July 29, 2014, the trial court dismissed appellant's wife's petition for failure to prosecute her claim. The trial court found that "the petitioner was notified of [the] hearing date and contacted the Court and advised the court that she wanted to drop the petition, and would not appear for the hearing[.]" Accordingly, we find no merit to appellant's argument.

{¶ 62} Appellant's fifth assignment of error is

overruled.

{¶ 63} Judgment affirmed in part, reversed in part, and cause remanded to the trial court for further proceedings consistent with this opinion.

PIPER, P.J., and HENDRICKSON, J., concur.

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Notes:

[1]Appellant takes issue with the trial court's following comments: "I don't consider only present ability, I have to look at your future ability to pay. You could inherent [sic] money, you could win the lottery, there are ways that people can come into funds[.]" We note that these comments were made during the plea hearing and were not reiterated when the trial court imposed the mandatory fine during the sentencing hearing. During the plea hearing, the trial court also noted that appellant was "a young man, you look physically healthy, you should be able to work in the future."

[2]In his brief, appellant alleges that throughout the plea negotiations, both his trial counsel and the state essentially told him he would only be sentenced to two years in prison. However, "at the sentencing hearing, the state reneged" by asking that appellant be sentenced to a greater prison term than the co-defendant's sentence. In his reply brief, appellant further states that he "operated under the belief that \* \* \* an agreed upon two year sentence was recommended." Appellant fails to cite any case law or to the record in support of his allegation. We find there is no evidence in the record supporting appellant's allegation. To the contrary, at the plea hearing, the trial court expressly told appellant it was required to sentence him to at least two years in prison, otherwise made no indication or promises regarding the length of the sentence it ultimately planned to impose, and told appellant it would sentence him of its own accord. In addition, even in cases where the state and a defendant have negotiated a plea and the state agrees to a recommended sentence, the trial court is not bound by such a recommendation. See *State ex rel. Duran v. Kelsey*, 106 Ohio St.3d 58, 2005-Ohio-3674; *State v. Sheet*, 12th Dist. Clermont No. CA2006-04-032, 2007-Ohio-1799.

[3]Appellant also broadly asserts that Ohio law governing prosecution of anabolic steroids-related offenses is "grossly inconsistent with law developed under \* \* \* other states." However, appellant does not identify the states in question.

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