

Released 01/23/25

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
ADAMS COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 24CA1184
	:	
v.	:	
	:	
BRIAN BROWN,	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
	:	
Defendant-Appellant.	:	

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APPEARANCES:

Brian T. Goldberg, Cincinnati, Ohio, for Appellant.

Aaron E. Haslam, West Union, Ohio, for Appellee.

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Smith, P.J.

{¶1} Brian Brown, “Appellant,” appeals the Judgment Entry on Sentence of the Adams County Court of Common Pleas, entered January 17, 2024. Appellant pled guilty to five sex offenses and received a 19-year aggregate prison sentence. Within two assignments of error, Appellant argues that his consecutive sentence is not clearly and convincingly supported by the record and that his sentence is contrary to law. However, based on our review of the record, we find no merit to Appellant’s arguments. Accordingly, we overrule both assignments of error and affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>

{¶2} Appellant's convictions stem from unlawful sexual acts with his biological daughter, A.B. On October 30, 2023, Appellant was indicted on a five-count indictment as follows:

Count One: R.C. 2907.05(A)(1), Gross Sexual Imposition;

Count Two: R.C. 2907.02(A)(2), Rape;

Count Three: R.C. 2907.02(A)(2), Rape;

Count Four: R.C. 2907.02(A)(2), Rape;

Count Five: R.C. 2907.03(A)(5), Sexual Battery.

Count One is a felony of the fourth degree. Counts Two, Three, and Four are felonies of the first degree. Count Five is a felony of the third degree. While 18 at the time Appellant was sentenced, A.B. was 13 years old at the time of the first indicted offense.

{¶3} Appellant initially entered pleas of not guilty to all counts. However, on December 11, 2023, Appellant entered a plea of guilty as charged in Count One. Counts Two, Three, and Four were amended to R.C. 2907.03(A)(5), sexual battery, felonies of the third degree. Appellant also entered a plea of guilty to Count Five, Sexual Battery, as charged.

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<sup>1</sup> The State of Ohio agrees with the factual and procedural background in this matter as set forth in Appellant's brief.

{¶4} Appellant’s sentencing occurred on January 17, 2024. He was sentenced as follows: Count One, one year; Count Two, five years; Count Three, five years; Count four, five years; and Count Five, three years. The trial court imposed a consecutive sentence on all counts for a total stated prison term of 19 years to be served in the Ohio Department of Rehabilitation and Corrections.

{¶5} Appellant timely appealed. Additional facts are set forth below.

#### ASSIGNMENT OF ERROR

- I. THE TRIAL COURT ERRED WHEN IMPOSING CONSECUTIVE SENTENCES WHEN THE RECORD DID NOT SUPPORT THE FINDINGS MADE BY THE TRIAL COURT TO IMPOSE CONSECUTIVE SENTENCES.
- II. THE TRIAL COURT ERRED IN IMPOSING A TOTAL AGGREGATE PRISON SENTENCE OF 19 YEARS.

#### STANDARD OF REVIEW

{¶6} When reviewing felony sentences, appellate courts apply the standard set forth in R.C. 2953.08(G)(2). *State v. Spencer*, 2024 Ohio-59, ¶ 13 (4th Dist.). *See e.g. State v. Nelson*, 2023-Ohio-3566, ¶ 63 (4th Dist.). R.C. 2953.08(G)(2)(a) provides that “[t]he appellate court's standard for review is not whether the sentencing court abused its discretion.” Instead, the statute authorizes appellate courts to “increase, reduce, or otherwise

modify a sentence” “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.

{¶7} The Supreme Court of Ohio has recognized that R.C. 2953.08(G)(2) means that appellate courts ordinarily, “ ‘defer to trial courts’ broad discretion in making sentencing decisions.’ ” *State v. Gwynne*, 2023-Ohio-3851, ¶ 11, quoting *State v. Rahab*, 2017-Ohio-1401, ¶ 10; *see also State v. Marcum*, 2016-Ohio-1002, ¶ 23 (appellate court's review of whether sentence is clearly and convincingly contrary to law under R.C. 2953.08(G) is deferential to sentencing court); *State v. Collins*, 2024-Ohio-2891, ¶ 22 (4th Dist.). Thus, R.C. 2953.08(G)(2) provides that an appellate court may increase, reduce, or otherwise modify consecutive sentences only if the record does not “clearly and convincingly” support the trial court's R.C. 2929.14(C)(4) consecutive-sentence findings. The clear-and-convincing standard for appellate review in R.C. 2953.08(G)(2) is written in the negative. *Gwynne*, 2023-Ohio-3851, at ¶ 13. Moreover, “clear and convincing evidence” is “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.

{¶8} Furthermore, we note that Appellant failed to object to imposition of the consecutive sentence at his sentencing hearing. Therefore, Appellant has waived all but plain error review of the trial court’s sentence. *See State v. Spencer*, 2024-Ohio-59, ¶ 27, ¶ 34 (4thDist.); *State v. Ashcraft*, 2021-Ohio-3842, ¶ 14 (5th Dist.). Under the plain error rule, “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” Crim.R. 52(B). The rule places the following limitations on a reviewing court’s determination to correct an error despite the absence of timely objections at trial: (1) “there must be an error, i.e. a deviation from a legal rule,” (2) “the error must be plain,” that is an error that constitutes “an ‘obvious’ defect in the trial proceedings,” and (3) the error must have affected “substantial rights” such that “the trial court’s error must have affected the outcome of the trial.” *Id.*

## LEGAL ANALYSIS

## Consecutive Sentence

{¶9} Appellant concedes that the trial court made the appropriate consecutive sentence findings on the record and in the sentencing entry. However, while admitting that his conduct was egregious, Appellant argues that concurrent sentences would accomplish the objectives of felony sentencing. Appellant argues that although the court made the necessary findings to support a consecutive sentence, these findings are not actually supported by the record. Appellant requests this court order that the sentences be served concurrently or, in the alternative, remand the matter to the trial court for a new sentencing hearing.

{¶10} In general, a statutory presumption exists in favor of concurrent sentences pursuant to R.C. 2929.41(A) and R.C. 2929.14(C)(4) governs the imposition of consecutive terms of imprisonment. *Collins*, ¶ 23. To justify the imposition of consecutive terms of imprisonment, “a trial court must make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry, but the court has no obligation to state reasons to support its findings.” *State v. Blair*, 2019-Ohio-2768 ¶ 52 (4th Dist.), citing *State v. Bonnell*, 2014-Ohio-3177,

syllabus. This Court explained the findings required to support the imposition of consecutive sentences:

“Under the tripartite procedure set forth in R.C. 2929.14(C)(4), prior to imposing consecutive sentences a trial court must find that: (1) consecutive sentences are necessary to protect the public from future crime or to punish the offender; (2) consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public; and (3) that one of three circumstances specified in the statute applies.”

*State v. Cottrill*, 2020-Ohio-7033, ¶ 14 (4th Dist.), quoting *State v. Baker*, 2014-Ohio-1967, ¶ 35-36 (4th Dist.).

{¶11} Further, as we outlined in *Cottrill*, and more recently in *Collins*, the three circumstances are:

“(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.”

*Cottrill* at ¶ 14, and *Collins*, ¶ 24, quoting R.C. 2929.14(C)(4)(a)(c).

{¶12} The record must support any findings that the applicable statutory sentencing provisions require and that are made by the sentencing court, such as those contained in R.C. 2929.14(C)(4)(c). *State v. Gray*, 2019-Ohio-5317, ¶ 21 (4th Dist.); *State v. Drummond*, 2024-Ohio-81, ¶ 11 (4th Dist.). Further, in *Drummond* we observed that the plain language of R.C. 2953.08(G)(2) requires an appellate court to defer to a trial court's consecutive-sentence findings, and to uphold the trial court's findings unless those findings are clearly and convincingly not supported by the record. *Drummond* at ¶ 12. In *State v. Bonnell*, 2014-Ohio-3177, the Supreme Court of Ohio held, “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[.]” *Id.* at ¶ 37.

{¶13} Here, it is undisputed that the trial court included the necessary findings under R.C. 2929.14 (C)(4) to support the imposition of Appellant’s consecutive sentences in the January 17, 2024 Judgment Entry on Sentence. At the sentencing hearing, the court also stated that consecutive sentences were necessary to protect the public from future crime and to punish the offender; that consecutive sentences were not disproportionate to the seriousness of Appellant’s conduct and the danger he poses to the public;



and that at least two of the offenses were committed as part of one or more courses of conduct and that the harm caused by the offenses was so great or unusual that no single prison term for any of the offenses adequately reflects the seriousness of the offender's conduct. Nevertheless, Appellant cites the following as factors militating in favor of his argument that a concurrent sentence would achieve the goal of protecting the public from future crime and punishing him:

- 1) that he sought help for anger management, depression, anxiety, and sexual issues treatment while awaiting disposition of his case;
- 2) that he intends to continue treatment upon completion of his sentences;
- 3) that his risk assessment performed through the probation department indicated a low risk of reoffending;
- 4) that a concurrent sentence would still subject him to mandatory post-release control for five years, entailing supervision through a parole officer which would keep him out of trouble;
- 5) that he is mandatorily required to register as a sex offender for the rest of his life;
- 6) that his guilty pleas saved the victim from having to testify at trial; and,
- 7) that he had expressed genuine remorse.

{¶14} We have reviewed the sentencing transcript in its entirety.

Prior to imposition of sentence, the trial court read through a summary of

A.B.'s oral statements made to an investigator with the Adams County Prosecutor's Office, discussing the five incidents of sexual activity as charged in the indictment. We will not recount them here. The sentencing transcript indicates that the five indicted counts were the only ones A.B. could recall with specificity because, as the trial court noted, A.B. stated to the investigator that Appellant sexually assaulted her "more times than she could ever count."

{¶15} The trial court continued:

The facts are nothing shy of shocking....[M]y understanding is it was with the acquiescence and the approval of, the victim....[T]he plea negotiations certainly eliminated [A.B.] having to relive...the most trying times of her life in the presence of multiple people that she does not know, and subjecting her to the trial....Sentencing guidelines are clear and the overriding purposes is to protect the public from future crime by the offender....And the reason that the language is such...it's also a statement to those that wish to cross this, what would seem an insurmountable barrier to violate a daughter in the manners in which she was violated.[I]t's also a message to those that are considering this, there is punishment and there are consequences for the actions....[A]s far as rehabilitation, while there has been some consideration of mental health, and I appreciate the fact that the defendant has addressed those matters, suggesting that this was not the person that he truly is,...it is the fact that these are the actions that he really truly committed. T]herefore, after due consideration, the court finds that the defendant is not amenable to available community control sanctions....And the court further finds that at least two of these multiple offenses were

committed as part of one or more courses of conduct, again, being years and years of abuse of his own daughter.

In our view, the above indicates that the trial court did incorporate its reasons to support its findings. Thus, based on our review of the sentencing transcript, we find that the trial court's finding that consecutive sentences were necessary to protect the public and punish Appellant is clearly and convincingly supported by the record and is not clearly and convincingly contrary to law.

{¶16} The trial court also found that consecutive sentences were not disproportionate to the seriousness of Appellant's conduct and the danger he poses to the public. Appellant also argues that, although serious, his convictions did not warrant a total aggregate prison sentence of 19 years. Appellant also points to his age of 41 at the time of sentencing. He contends that if he serves the entire prison sentence, he will not be released until he is approximately 60 years old. Appellant notes that if he had committed murder, he would be eligible for parole after having served 15 years. R.C. 2929.02(b)(1). Appellant is generally arguing that his sentence is disproportionate.

{¶17} In *State v. Alexander*, 2024-Ohio-2565, the appellate court held that “[a] defendant alleging disproportionality in felony sentencing has the burden of producing evidence to ‘indicate that his sentence is directly

disproportionate to sentence given to other offenders with similar records who have committed these offenses.’ ” *Id.* ¶ 112, quoting *State v. Williams*, 2015-Ohio-4100, 43 N.E.3d 797, ¶ 52 (7th Dist.). Thus, not only must a defendant demonstrate a disproportionate sentence, he must also provide evidence of a similarly situated co-defendant, including consideration of all prior criminal records. Appellant has not provided such evidence. Nor has Appellant argued that any of his individual sentences are disproportionate to the offenses committed. Each of his individual sentences was within the statutory range.

{¶18} In this case, the trial court reviewed the presentence investigation report and the victim’s statement. The court also considered the necessary factors and imposed a sentence within the guidelines. We do not find anything in the record giving us reason to declare that Appellant’s sentence is disproportionate. We find that the trial court’s finding that a consecutive sentence is not disproportionate to the seriousness of Appellant’s conduct is supported by the record and is not contrary to law. Appellant’s first assignment of error is without merit and is hereby overruled.

## R.C. 2929.11 and R.C. 2929.12

{¶19} Appellant contends that his sentence is contrary to law, claiming that the trial court failed to consider the purposes and principles of sentencing under R.C. 2929.11 and seriousness and recidivism factors in R.C. 2929.12. Appellant again concedes that the trial court stated on the record that he was considering the required statutes when imposing the sentence. However, he concludes that the record itself demonstrates that these statutes were not considered “at all” when the court decided his 19-year, unwarranted, sentence. Appellant requests this court to vacate the unlawful sentence and remand for new sentencing.

{¶20} We disagree with Appellant’s assertions that the trial court did not consider the principles of sentencing pursuant to R.C. 2929.11, and the seriousness and recidivism factors set forth in R.C. 2929.12. R.C. 2929.11 states:

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

the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

- (B) A sentence imposed for a felony shall be reasonably calculated to achieve the three 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.

{¶21} R.C. 2929.12(A) states:

Unless otherwise required by section 2929.13 or 2929.14 of the Revised Code, a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code. In exercising that discretion, the court shall consider the factors set forth in [divisions (B) through (F)] of this section \* \* \* and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

R.C. 2929.12(B) through (F) then set out factors for the court to consider relating to the seriousness of the offender's conduct, the likelihood of the offender's recidivism, and the offender's service in the armed forces of the United States, if any. *See State v. Nolan*, 2024-Ohio-1245, ¶ 42 (4th Dist.).

{¶22} “Because both R.C. 2929.11 and R.C. 2929.12 require the trial court to consider the factors outlined in those two statutory provisions, \* \* \* a trial court's failure to consider the factors would render the sentence \* \* \* ‘contrary to law.’ ” *Nolan, supra*, ¶ 43; *State v. Poole*, 2022-Ohio-2391, ¶ 17 (4th Dist.). However, “neither R.C. 2929.11 nor 2929.12 requires a trial court to make any specific factual findings on the record.” *State v. Jones*, 2020-Ohio-6729, ¶ 20.

{¶23} We are also mindful that “R.C. 2953.08(G)(2) does not permit an appellate court to conduct an independent review of a trial court's sentencing findings under R.C. 2929.12 or its adherence to the purposes of felony sentencing under R.C. 2929.11.” *State v. Bryant*, 2022-Ohio-1878, ¶ 21, citing *Jones* at ¶ 41-42. “R.C. 2953.08(G)(2) does not allow an appellate court to modify or vacate a sentence based on its view that the sentence is not supported by the record under R.C. 2929.11 and 2929.12.” *Id.* at ¶ 22, citing *Jones* at ¶ 31, 39. *See also State v. Cook*, 2024-Ohio-2798, ¶ 38 (4th Dist.); *State v. Gay*, 2024-Ohio-4800, ¶ 39 (8th Dist.); *State v. Wells*, 2024-Ohio-4813, ¶ 48 (2nd Dist.). If we were to infer a sentence was contrary to law and vacate it merely because we did not believe the sentencing factors supported it, we would in effect be vacating a sentence based on our view

that it is not supported by the record under R.C. 2929.11 and 2929.12. *See Nolan*, ¶ 44.

{¶24} It is the trial court’s duty to fashion an appropriate sentence. In addition to stating on the record and in the judgment entry that the court had considered the principles and purposes of sentencing under R.C. 2929.11 as well as balancing the seriousness and recidivism factors under R.C. 2929.12, the court also considered the record, the oral statements, the victim impact statements, and the presentence investigation report. Appellant concedes he has a criminal history.<sup>2</sup> The trial court discussed this history.

{¶25} Appellant also points out that he accepted responsibility for his actions by entering pleas of guilty and that his acceptance of responsibility saved the victim appearing in court and testifying about her long-term sexual abuse in a public jury trial. The court noted that Appellant had expressed sorrow, verbalizing that he had “failed” his family. The trial court noted that Appellant had been cooperative throughout the trial court proceedings. The court also noted Appellant’s score on the Ohio Risk Assessment, a tool that helps determine a person’s risk of reoffending, indicated a low risk of

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<sup>2</sup> The trial court discussed Appellant’s criminal history. Appellant had a prior felony record from Texas. He was adjudicated for sexual assault in 1996 in juvenile court. He also had a felony burglary in 1998. He also had misdemeanors from Texas. Appellant also had a misdemeanor assault conviction from Adams County. He served his jail sentence while awaiting resolution of these sex offense cases.



reoffending. The trial court stated it was “ill-equipped” to make a finding on Appellant’s remorse, due to limited interaction with him.

{¶26} Although Appellant claims that the trial court did not consider the relevant statutes “at all,” we cannot agree. We are not convinced that the trial court’s sentence is unsupported by the record or contrary to law. The fact that Appellant did not receive a more lenient sentence does not mean that the trial court ignored the factors more favorable to Appellant. *See State v. Netter*, 2024-Ohio-1068, ¶ 40 (4th Dist.) (“Simply because the trial court did not find the factors identified by appellant to militate in favor of a less severe sentence does not imply the sentence is contrary to law.”) (Citations omitted.) As set forth above, the trial court discussed the allegations of the five counts and A.B.’s indication that there were more incidents than she was able to recall. The court also noted that in A.B.’s impact statement she stated that she “does not want Mr. Brown near her.”

{¶27} Appellant’s sentence fell within the statutory range and nothing in the record suggests that the trial court ignored these statutes. In the absence of any affirmative showing that the trial court failed to consider the criteria set forth in R.C. 2929.12 or consider the principles set forth in R.C. 2929.11, we presume the trial court accurately followed the law. *See State v. Blosser*, 2024-Ohio-1649, ¶ 14 (11th Dist.).

{¶28} Based on the foregoing, we cannot find that the trial court's sentence is clearly and convincingly unsupported by the record. Furthermore, we cannot find that the record clearly and convincingly shows that Appellant's sentence is contrary to law. Accordingly, we overrule the second assignment of error.

{¶29} Having found no merit to either of Appellant's assignments of error, the judgment of the trial court is affirmed.

**JUDGMENT AFFIRMED.**

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Adams 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 60 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 proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the 60-day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-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 expiration of 60 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.

Abele, J. and Hess, J., concur in Judgment and Opinion.

For the Court,

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Jason P. Smith  
Presiding Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**