[Cite as *State v. Grahsel*, 2025-Ohio-580.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 22CA6
v.	:	
MICHAEL R. GRASHEL,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

James R. Kingsley, Circleville, Ohio, for appellant.

Judy C. Wolford, Pickaway County Prosecuting Attorney, and Heather MJ Carter, Pickaway County Assistant Prosecuting Attorney, Portsmouth, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:2-13-25
ABELE, J.

{¶1} This is an appeal from a Pickaway County Common Pleas Court judgment of conviction and sentence. Michael R. Grashel, defendant below and appellant herein, assigns two errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT ORDERED DEFENDANT'S TWELVE FOUR-YEAR SENTENCES TO BE SERVED CONSECUTIVELY FOR A

TOTAL OF FORTY-E[I]GHT YEARS."

SECOND ASSIGNMENT OF ERROR:

"THE TAIL SENTENCE IMPOSED (REGAN TOKES LAW) IS UNCONSTITUTIONAL."

{¶2} On May 6, 2021, a Pickaway County Grand Jury returned an indictment that charged appellant with 28 sex offenses that involved minors: (1) rape with specification, in violation of R.C. 2907.02(A)(1)(b), a first-degree felony (count one); (2) five counts of gross sexual imposition, in violation of R.C. 2907.05(A)(4), third-degree felonies (counts two through six); (3) three counts of importuning, in violation of R.C. 2907.07(A), third-degree felonies (counts seven through nine); (4) six counts of disseminating matter harmful to a juvenile, in violation of R.C. 2907.31(A)(1), fourth-degree felonies (counts 10 through 15); (5) pandering obscenity involving a minor, in violation of R.C. 2907.321(A)(1), a second-degree felony (count 16); and (6) twelve counts of illegal use of a minor in nudity-oriented material or performance, in violation of R.C. 2907.323(A)(1), second-degree felonies (counts 17 through 28). Appellant entered not guilty pleas.

{¶3} On October 4, 2021, appellant agreed to plead guilty to counts 16 through 28. The State moved to amend the

indictment to dismiss counts one through 15, and the court granted the motion.

{¶4} On January 26, 2022, the trial court held a sentencing hearing. At the hearing, appellant's counsel stated that the presentence investigation report is "substantially accurate in regard to the facts of this case" and noted that the report "is full and replete of Scioto County charges." Counsel indicated that appellant would be sentenced in Scioto County and stated that the Scioto County charges "should not be part of what he's doing in this particular – in our county[;] otherwise he would be punished for something he's not guilty of."

{¶5} Counsel continued to explain that appellant is an "admitted voyeur of a minor victim who was unaware that he was being photographed, and he pled guilty." Counsel asserted that appellant "took pictures of a child," and the child "was not aware of it." He further indicated that appellant did not disseminate or disclose the material to any other individuals and that appellant kept the images "for private purpose."

{¶6} Counsel further stated that appellant admitted "that he has a lifelong struggle with sexual addiction" and tried to avoid situations that placed him in close contact with children. Counsel indicated that appellant "did not know how to cure [his

addiction] because there is no cure." Appellant's counsel also pointed out that appellant had been sexually abused as a young child and attempted suicide multiple times.

{¶7} Counsel additionally asked the trial court to consider appellant's health and age. Counsel reported that appellant is 54 years of age and has "serious health conditions" such as diabetes, a brain tumor, sleep apnea, and high blood pressure. He further stated that appellant is "on a machine." Counsel also indicated that appellant "suffered a serious assault while in jail" that resulted in a broken nose.

{¶8} Consequently, counsel requested the trial court to consider the "proportionality of this act," meaning that he did not want appellant "to be sentenced as if he had" engaged in "sexual conduct or contact with the victim." Instead, counsel pointed out that "it was just a video tape," and other courts have imposed sentences that range from seven to ten years for similar offenses.

{¶9} At this juncture, the prosecutor spoke and stated she was "at a loss for words as [appellant's counsel] tried to explain to this court, it is quote unquote, just a video tape." The prosecutor continued: "It's not just a video tape. These are twelve videos with three minor victims, not just one,

three." The prosecutor further asserted that appellant "used his status as a business owner and his relationships to gain access to his victim" and noted that one of the victims, D.C., "was the child of an employee of [appellant]." The prosecutor explained that appellant "promised D.C. that he would take care of him, he acted as a[n] uncle to him, D.C. looked up to him, thought he could trust him, and now here we are." The prosecutor also pointed out that appellant has additional charges pending in Scioto County, victimized multiple individuals over the years, and "is a multi generational sexual offender." The presentence investigation report indicated that in the 1990s and early 2000s, appellant engaged in improper conduct with young family members.

{¶10} The prosecutor agreed that count 16 should merge with count 17, which left 12 counts of second-degree felonies remaining. The prosecutor then asked the court to impose eight years on each count and to order appellant to serve them consecutively to one another.

{¶11} One of appellant's victims spoke and stated that "the man [he] used to know is dead." The victim explained that appellant "used" him and others "to get what he wanted," and appellant "is a manipulative coward." The victim informed the

court that appellant bought him "things to get closer to" the victim. The victim stated that he "will never be [him]self again" and that if appellant "gets out, he will do horrible things to other people." The victim indicated that he "never" wants appellant "to hurt anyone else again." The victim added that appellant "never should be able to enjoy normal life again after he made other people's lives so horrible."

{¶12} The victim's mother also spoke and stated that appellant "manipulated and deceived all of us by pretending [he] cared about us and particularly [D.C.]." The victim's mother reported that appellant had "taken so much away from [D.C.] by violating him the way [he] did." She pointed out that D.C. will have "to deal with this reality for the rest of his life," so appellant likewise "should have to deal with the consequences of what he did for the rest of his by sitting in prison." Both the victim and the victim's mother asked the court to impose the maximum sentence for each count.

{¶13} After hearing from appellant's counsel, the prosecutor, the victim, and the victim's mother, the trial court announced its sentence. The court first recognized that "there's been some comment that the court is aware of the case pending in Scioto County," but indicated that the Scioto County

case "has nothing to do with this case." The court stated that it would sentence appellant "on what's occurred here in Pickaway County" and that "[w]hat happened in Scioto County, is Scioto County's job and business." The court explained that it did not "want anyone to think [the Scioto County case] is influencing the court's decision with respect to sentencing."

{¶14} The trial court pointed out that appellant entered guilty pleas to "twelve very serious offenses" that "are felonies of the second degree," and "each carr[ies] a maximum penalty of eight years in prison, and there is a presumption for prison." The trial court continued to explain that appellant was "a monster, quite frankly," who "preyed on these kids repeatedly." The court stated that whether appellant's sentence would amount to a life sentence given his age of 54 was "beyond [the court's] control." The court found appellant's conduct "even more horrific" in light of appellant's own experience of being sexually abused as a child. The court believed that appellant's previous abuse should have made him "realize what [he was] doing to these kids, these victims." The court indicated that appellant acted selfishly when he "victimize[d] these children, and it can't be tolerated."

{¶15} The trial court then sentenced appellant to serve four

years in prison for each of the 12 offenses and that appellant serve these sentences consecutively, for a total of 48 to 50 years in prison. The court also indicated that it would order appellant to pay a $13,000 fine.

{¶16} At the sentencing hearing, the trial court found that "the consecutive sentences are necessary to protect the public from future crime and to punish [appellant], and that consecutive sentences are not disproportionate to the seriousness of [appellant]'s conduct and to the danger [appellant] poses to the public." The court also found that appellant committed at least two of the multiple offenses "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 [appellant]'s conduct."

{¶17} After the sentencing hearing, the trial court entered its judgment. The court (1) merged counts 16 and 17 and sentenced appellant to a four-year prison term, (2) ordered appellant to serve four-year prison terms for each remaining count (counts 18-28), (3) ordered the "sentences to be served consecutive to one another, for a minimum period of forty-eight

(48) years, up to a maximum period of fifty (50) years," (4) ordered appellant to pay a $13,000 fine and (5) ordered appellant to serve a mandatory five-year period of postrelease control. This appeal followed.

I

{¶18} In his first assignment of error, appellant asserts that the trial court erred when it imposed consecutive sentences that amount to 48 years in prison. He argues that (1) his sentence is "contrary to law and/or the Court relied upon prejudicial, not relevant, facts," (2) he did not cause "great or unusual" harm to the victims; (3) his sentence is "disproportionate to his conduct and inconsistent with those given to similar offenders," and (4) sentencing a 55-year old individual to serve 48 years in prison violates the United States and Ohio Constitutions' prohibitions against cruel and unusual punishment because the sentence "is tantamount to a de facto life sentence without parole."

A

{¶19} When reviewing felony sentences, appellate courts apply the standard set forth in R.C. 2953.08(G)(2). *E.g., State v. Jones*, 2024-Ohio-1083, ¶ 16; *State v. Nelson*, 4th Dist. Meigs, 2023-Ohio-3566, ¶ 63. The statute requires appellate

courts to "review the record, including the findings underlying the sentence or modification given by the sentencing court." R.C. 2953.08(G)(1). In reviewing the record, "[t]he appellate court's standard for review is not whether the sentencing court abused its discretion." R.C. 2953.08(G)(2)(a). 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.

R.C. 2953.08(G)(2).

{¶20} Practically speaking, 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 (lead opinion), quoting *State v. Rahab*, 2017-Ohio-1401, ¶ 10 (lead opinion); *accord State v. Glover*, 2024-Ohio-5195, ¶ 39 and 46 (lead opinion);[1] *State v. Creech*,

[1] Many of the Ohio Supreme Court's recent consecutive-sentencing opinions are plurality or "lead" opinions, meaning they do not carry precedential value, *see State ex rel. Ware v.*

2017-Ohio-6951, ¶ 11 (4th Dist.), quoting *State v. Venes*, 2013-Ohio-1891, ¶ 21 (8th Dist.) ("[t]he language in R.C. 2953.08(G)(2) establishes an 'extremely deferential standard of review' for 'the restriction is on the appellate court, not the trial judge'"). In other words, appellate courts may increase, reduce, or otherwise modify a sentence only if the court clearly and convincingly finds that (1) "the record does not support the sentencing court's findings" under the enumerated statutes, R.C. 2953.08(G)(2)(a), or (2) "the sentence is otherwise contrary to law," R.C. 2953.08(G)(2)(b). The term "contrary to law" means "'in violation of statute or legal regulations at a given time.'" *State v. Jones*, 2020-Ohio-6729, ¶ 34, quoting *Black's Law Dictionary* 328 (6th Ed.1990).

{¶21} Typically, the phrase "clear and convincing" appears in context with "evidence" to denote an evidentiary standard of proof that sits between preponderance of the evidence and

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Wine, 2022-Ohio-4472, ¶ 49 (Kennedy, J., concurring in part and dissenting in part) ("Article IV, Section 2(A) of the Ohio Constitution states that '[a] majority of the Supreme Court shall be necessary to . . . render a judgment.' Only two justices have joined the lead opinion, so anything written therein has no value as precedent."). Nonetheless, the discussions in the lead or principal opinions regarding an appellate court's standard of review align with this court's previous opinions regarding the proper standard of review.

reasonable doubt. *See Cross v. Ledford*, 161 Ohio St. 469 (1954), paragraph three of the syllabus. To say that evidence is clear and convincing means that the evidence produces "a firm belief or conviction as to the facts sought to be established." *Id.; accord Black's* (12th ed. 2024) (defining "clear and convincing evidence" as "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain"). As applied to R.C. 2953.08(G)(2), therefore, "clearly and convincingly" means that an appellate court must hold a firm belief or conviction–or find it "highly probable or reasonably certain"–that (1) "the record does not support the sentencing court's findings" under specified statutes, like R.C. 2929.14(C)(4), R.C. 2953.08(G)(2)(a), or (2) "the sentence is otherwise contrary to law," 2953.08(G)(2)(b). In the case sub judice, appellant asserts that his consecutive sentences are contrary to law and that the record does not support the trial court's R.C. 2929.14(C)(4) findings.

B

{¶22} We initially observe that, at the sentencing hearing, because appellant did not object to the court's imposition of consecutive sentences, he forfeited all but plain error. *See State v. Grate*, 2020-Ohio-5584, ¶ 204. A party asserting plain

error must demonstrate the following: (1) an error occurred; (2) the error was obvious; and (3) a reasonable probability that the error affected the outcome of the proceeding. *State v. Echols*, 2024-Ohio-5088, ¶ 50. However, even when a defendant demonstrates that a plain error or defect affected the defendant's substantial rights, the Ohio Supreme Court repeatedly has emphasized that courts should "notice plain error 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.'" *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002), quoting *State v. Long*, 53 Ohio St.2d 91, (1978), paragraph three of the syllabus; *e.g.*, *State v. Bailey*, 2022-Ohio-4407, ¶ 14 ("the plain-error doctrine is warranted only under exceptional circumstances to prevent injustice").

{¶23} However, consecutive sentences imposed without making the requisite findings or a sentence that is contrary to law constitutes plain error that an appellate court may recognize. *See State v. Gill*, 2024-Ohio-2792, ¶ 48 (1st Dist.) ("trial court's failure to make the required findings before imposing consecutive sentences was plain error"); *State v. Price*, 2024-Ohio-1641, ¶ 7 (4th Dist.) ("a sentence that is contrary to law is plain error"). In the case at bar, as we explain below, no

error–obvious or otherwise–occurred.

C

{¶24} R.C. 2929.41(A) states that "a prison term . . . shall be served concurrently with any other prison term," except as otherwise provided in specified statutes, like R.C. 2929.14(C). As relevant here, R.C. 2929.14(C)(4) allows a court to require an offender "to serve the prison terms consecutively" if the court makes the following findings: (1) "the consecutive service 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 three circumstances contained in R.C. 2929.14(C)(4)(a)-(c) applies. As relevant here, R.C. 2929.14(C)(4)(b) states that consecutive sentences may be appropriate if

> [a]t 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 offenders conduct.

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

{¶25} A trial court must make the R.C. 2929.14(C)(4) findings "at the sentencing hearing and incorporate its findings

into its sentencing entry." *State v. Bonnell*, 2014-Ohio-3177, ¶ 37. However, the court need not "state reasons to support its findings" or "give a talismanic incantation of the words of the statute, provided that the necessary findings can be found in the record and are incorporated into the sentencing entry." *Id.*; *accord State v. Nolan*, 2024-Ohio-1245, ¶ 18 (4th Dist.).

1

{¶26} In the case sub judice, our review of the sentencing hearing transcript and the sentencing entry reveals that the trial court made the appropriate R.C. 2929.14(C)(4) findings. Appellant nevertheless asserts that the trial court "hollowly recited the required statutory requirements for consecutive sentences," and contends that consecutive sentences are not appropriate for some of the following reasons: (1) he does not have a prior criminal record; (2) "the victims were unaware that they were being filmed"; (3) the victim's statement made during the sentencing hearing "is inconsistent with his civil deposition wherein he simply stated he was disappointed"; and (4) appellant did not share the videos with any other individuals but used them "only for his private, personal, sexual gratification." Appellant suggests that his crimes are less serious because he did not disseminate the images and that

"surreptitious videotaping . . . causes no actual harm to the unknowing victim." He additionally states that he has "not physically molested children in the last 20 years." Appellant thus believes that "[t]he only conclusion to be drawn is that the extreme sentence was imposed because the [c]ourt improperly considered counts to which [appellant] did not plead, as well as the Scioto County pending charges, all of which were disclaimed." Appellant contends that the court's statement that "it did not consider Scioto County was incredulous." He thus argues that his "sentence [is] contrary to law" because the court considered "improper facts."

{¶27} Initially we point out that, even if the trial court did consider other pending charges or previous acts, Ohio law does not prohibit sentencing courts from "weigh[ing] such factors as arrests for other crimes." *State v. Burton*, 52 Ohio St.2d 21, 23 (1977). Indeed, "[f]ew things can be so relevant as other criminal activity of the defendant." *Id.* Moreover, "the function of the sentencing court is to acquire a thorough grasp of the character and history of the defendant before it." *Id.* Thus, the court may consider "negative as well as favorable data." *Id.; accord State v. Ice*, 2024-Ohio-5341, ¶ 15 (7th Dist.), citing *State v. Hutton*, 53 Ohio St.3d 36, 43 (1990)

("the sentencing court can consider prior allegations or arrests even if no conviction resulted"); *State v. Watson*, 2021-Ohio-2549, ¶ 29 (11th Dist.) ("[c]onsideration of a pending felony charge at sentencing is appropriate because this information is required to be in a presentence investigation report."); *State v. Brown*, 2015-Ohio-365, ¶ 21 (12th Dist.) ("during sentencing a trial court can consider a defendant's pending criminal charges").

{¶28} We therefore do not agree with appellant that any reliance the trial court may have placed on any other pending charges in Scioto County or prior acts means that the trial court's imposition of consecutive sentences is contrary to law. The law does not prohibit sentencing courts from considering other criminal activity of a defendant.

2

{¶29} Appellant also asserts that the record fails to support the court's finding that his conduct resulted in "great or unusual harm" to the victim. Appellant instead claims that the State caused the harm by executing a search warrant that uncovered evidence that appellant had videotaped the victims. He thus argues that his sentence is contrary to law because his conduct did not cause "the harm contemplated by the statute."

{¶30} First, appellant's assertion that the State caused the harm is devoid of merit. Appellant caused harm through his surreptitious videotaping of the victims. Furthermore, nothing in R.C. 2929.14(C)(4) indicates that "consecutive sentences are only appropriate when an offender inflicts physical harm on his victims." *Glover*, 2024-Ohio-5195, at ¶ 55 (lead opinion).

{¶31} Additionally, we reject appellant's "insinuation that possession of [nudity-oriented material] is not particularly harmful to the children depicted therein." *State v. Smith*, 2021-Ohio-4234, ¶ 26 (6th Dist.). As the Ohio Supreme Court explained,

> the difference between child-nudity-oriented material and child pornography [is] a matter of degree, not of kind. All the state interests that apply to eliminating child pornography apply to eliminating child-nudity-oriented material. Even if child-nudity-oriented material is less harmful to the child depicted than child pornography, it is undeniably harmful. Even if child-nudity-oriented material is less exploitative of a child than child pornography, it is undeniably exploitative. Similarly, child-nudity-oriented material leaves a permanent record that can haunt a child into adulthood and provides an economic incentive to its purveyors and possessors.

State v. Martin, 2016-Ohio-7196, ¶ 12.

{¶32} Moreover, one victim and his mother spoke at the trial court's sentencing hearing to explain the great harm that appellant's criminal conduct caused. The victim stated that he

"will never be [him]self again." The victim's mother indicated that appellant had "taken so much away from [D.C.] by violating him the way [he] did" and pointed out that D.C. will have "to deal with this reality for the rest of his life." We therefore disagree with appellant that his conduct did not cause great or unusual harm to the victims.

3

{¶33} Appellant next contends that his sentence is disproportionate to his conduct and appears to be inconsistent with sentences given to similar offenders. He asserts that "surreptitiously recording a minor on a motion-activated camera for personal use only, without internet distribution, does not warrant a death sentence."

{¶34} The consecutive-sentencing statute requires a trial court to find that consecutive sentences are "not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." R.C. 2929.14(C)(4). The focus of this part of the statute is the seriousness of the offender's conduct and the danger that the offender poses to the public. The statute does not instruct courts to consider the seriousness of the offender's conduct or danger in relationship to similar offenders. *Compare* R.C.

2929.11(B) ("A sentence imposed for a felony shall be . . . consistent with sentences imposed for similar crimes committed by similar offenders."). Thus, R.C. 2929.14(C)(4) does not require trial courts or reviewing courts "to engage in a comparative analysis of other cases."[2] *Glover*, 2024-Ohio-5195, at ¶ 59 (lead opinion).

{¶35} Moreover, for an appellate court to reverse or modify a trial court's imposition of consecutive sentences, the appellate court must clearly and convincingly find that the record does not support the trial court's finding that consecutive sentences are "not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public," R.C. 2929.14(C)(4). The statute does not permit an appellate court to reverse or modify a trial court's imposition of consecutive sentences upon a finding that consecutive sentences are not proportionate (e.g., commensurate) to the seriousness of the offender's conduct–the statute reads

[2] We further note that on appeal, appellant lists some cases for comparison purposes. Appellant did not, however, present the trial court with a list of cases for comparison purposes. Thus, even if comparison were proper, we would hesitate to compare appellant's sentence with sentences imposed in other cases when appellant did not present these cases to the trial court for comparison.

"not disproportionate," meaning not "being out of proportion." *See Merriam-Webster Dictionary Online*, available at https://www.merriam-webster.com/ dictionary/disproportionate; *see also Black's* (12th ed. 2024) ("disproportionate" means "[h]aving too much or too little in relation to something else; not suitable in comparison with something else in size, amount, importance, etc.").

{¶36} In the case at bar, our review of the record does not clearly and convincingly show that the record fails to support the trial court's finding that appellant's consecutive sentences are "not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." R.C. 2929.14(C)(4). Here, appellant committed 12 offenses that involve surreptitious videotaping of three minors. The videos range in length from 3 minutes to more than 26 minutes and depict the minor victims in various states of nudity. One victim was frequently videotaped while showering and with a laptop placed outside of the shower that displayed pornographic or otherwise inappropriate material. In at least one video, the victim masturbated upon appellant's instruction. Appellant also photographed this victim's penis. We find nothing in the record to clearly and convincingly show that the record fails to

support the trial court's finding that appellant's consecutive sentences are not disproportionate to the seriousness of appellant's conduct and to the danger appellant poses to the public.

{¶37} Regarding the number (12) and total length of appellant's consecutive sentences (48 years), we observe that in *State v. Gwynne*, 2022-Ohio-4607*(Gwynne IV*), the Ohio Supreme Court informed courts that they must consider the number of consecutive sentences and the aggregate sentence, i.e., the total of all of the consecutive sentences, when reviewing consecutive sentences. The majority opinion concluded that R.C. 2929.14(C)(4)'s use of the terms "consecutive sentences" and "the consecutive service" rendered the statute ambiguous. *Id.* at ¶ 13. The court thus held this ambiguity required courts to consider "the number of consecutive sentences it intends to impose and the aggregate sentence that will result from those consecutive sentences." *Id.*

{¶38} The next year, however, the supreme court reconsidered and vacated *Gwynne IV*. However, the court could not reach a majority opinion. Instead, the lead opinion determined that R.C. 2929.14(C)(4) is plain and unambiguous and that "consecutive service" and "consecutive sentences" mean "the

running of two or more sentences one right after the other." *State v. Gwynne*, 2023-Ohio-3851, ¶ 21 *(Gwynne V)*, citing *Black's* (10th Ed.2014) (defining "consecutive sentences" as "[t]wo or more sentences of jail time to be served in sequence"). The lead opinion did not believe that either term "is synonymous with the term 'aggregate sentence,' which means '[t]he total sentence imposed for multiple convictions.'" *Id.* at ¶ 21, quoting *Black's*.

{¶39} More recently, in *Glover*, 2024-Ohio-5195, the lead opinion concluded that R.C. 2953.08 does not instruct appellate courts to consider a defendant's aggregate sentence. *Id.* at ¶ 43. Instead, the lead opinion determined that R.C. 2953.08(G)(2)(a) confines an appellate court's review of consecutive sentences to determining whether "the record clearly and convincingly does not support the trial court's [R.C. 2929.14(C)] findings." *Id.* at ¶ 44. The lead opinion thus concluded that the statute does not allow appellate courts to "reverse or modify a trial court's sentence" because it subjectively disagrees with the consecutive sentences that the trial court imposed. *Id.* at ¶ 45.

{¶40} We recognize that in *Glover* Justice Fischer concurred in judgment in part and concurred in judgment only in part.

Justice Fischer disagreed with the lead opinion that courts need not consider a defendant's aggregate sentence when reviewing consecutive sentences. *Id.* at ¶ 63. Justice Fischer opined that "consecutive sentences," as used in R.C. 2929.14(C)(4) and when read in context with R.C. 2929.14(C)(9), means that "courts must consider the aggregate prison term." *Id.* at ¶ 67; *see also* R.C. 2929.14(C)(9) ("When consecutive prison terms are imposed . . . the term to be served is the aggregate of all of the terms so imposed."). The justice further indicated that reviewing whether consecutive sentences are not disproportionate to the offender's conduct and the danger the offender poses to the public necessarily requires courts to consider the total number of years and ask whether that total is not disproportionate to the offender's conduct. *Id.* at ¶ 68. "[O]therwise, there is no other way to conduct a proportionality analysis." *Id.*

{¶41} Justice Stewart, along with Justices Donnelly and Brunner, dissented. Justice Stewart wrote that, although the lead opinion is not "a paragon of clarity, lower courts can be sure that . . . four members of this court . . . believe that trial courts must consider whether the aggregate sentence imposed is disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public."

Id. at ¶ 73.

{¶42} Given the absence of a majority opinion that requires courts to consider the number of consecutive sentences and the aggregate sentence, we are unable to conclude that we must consider these items when reviewing appellant's consecutive sentences. *See Phoenix Lighting Group, L.L.C. v. Genlyte Thomas Group, L.L.C.*, 2024-Ohio-5729, ¶ 37 (Kennedy, J., concurring in judgment only), quoting *State ex rel. Klein v. Precision Excavating & Grading Co.*, 2018-Ohio-3890, ¶ 89 (Kennedy, J., concurring in judgment only) ("'[w]hen the law is uncertain, there is no law'").

{¶43} In any event, even if we consider the number of consecutive sentences and the aggregate sentence of 48 years, we do not clearly and convincingly find that the record does not support the trial court's finding that consecutive sentences are not disproportionate to the seriousness of appellant's conduct and to the danger appellant poses to the public. The presentence investigation report shows that appellant engaged in a repeated pattern of behavior that victimized young children. One of appellant's more recent victims is the child of one of appellant's employees. This victim and his mother spoke at the

sentencing hearing and informed the trial court of the lifelong harm appellant had inflicted upon him. Thus, appellant's assertion that the victim's "life has not changed" is completely meritless and fails to recognize the serious emotional damage that appellant inflicted upon this victim.

{¶44} Furthermore, at the sentencing hearing, appellant's counsel stated that appellant suffers from a sexual addiction for which a cure does not exist. If a cure for appellant's addiction indeed does not exist, then he would certainly appear to pose a significant danger to the public if released from prison.

{¶45} Moreover, even if the members of this court may have chosen to impose a shorter aggregate sentence, R.C. 2953.08(G)(2) does not permit us to substitute our judgment for the trial court's. Additionally, "Ohio courts have regularly found consecutive sentences to be appropriate where a defendant is in possession of multiple pornographic images." *State v. Sanders*, 2021-Ohio-2431, ¶ 45 (2d Dist.), citing *State v. Bosley*, 2017-Ohio-7643, ¶ 10-12 (7th Dist.) (affirming consecutive sentences where the defendant downloaded 97 files of child pornography at one time), and *State v. Duhamel*, 2015-Ohio-3145, ¶ 54-55 (8th Dist.) (affirming consecutive sentences where

the defendant downloaded child pornography at different times as part of a course of conduct). Here, consecutive sentences that amount to 48 years in prison are not disproportionate to the seriousness of appellant's conduct and to the danger appellant poses to the public. *State v. Gornall*, 2016-Ohio-7599, ¶ 41 (5th Dist.) (concluding that aggregate sentence of 56 years not disproportionate to defendant's conduct, which included "surreptitiously taping his own students using the restroom").

4

{¶46} Appellant next contends that the trial court's sentence is contrary to law because it constitutes cruel and unusual punishment. Appellant argues that sentencing a 54-year-old criminal to 48 years in prison violates the constitutional command against cruel and unusual punishments "because it is tantamount to a de facto life sentence without parole." Appellant further asserts that his 48-year sentence violates "the Eighth Amendment requirement of proportionality."

{¶47} The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive

fines imposed, nor cruel and unusual punishments inflicted."[3] Section 9, Article I of the Ohio Constitution similarly states that "[e]xcessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted."

{¶48} "'The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime.'" *State v. Weitbrecht*, 86 Ohio St.3d at 373 (1999), quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and in judgment); *accord State v. Hairston*, 2008-Ohio-2338, ¶ 13. Moreover, "'"only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality"' may a court compare the punishment under review to punishments imposed in Ohio or in other jurisdictions." *Hairston* at ¶ 13, quoting *Weitbrecht* at 373, fn. 4, quoting Harmelin, 501 U.S. at 1005 (Kennedy, J., concurring in part and in judgment). "'Cases in which cruel and unusual punishments have been found are limited to those

[3] The amendment applies to the states pursuant to the Fourteenth Amendment. *See State v. Broom*, 2016-Ohio-1028, ¶ 45, fn. 1, citing *Robinson v. California*, 370 U.S. 660 (1962); *State v. Hairston*, 2008-Ohio-2338, ¶ 12.

involving sanctions which under the circumstances would be considered shocking to any reasonable person.'" *Weitbrecht* at 371, quoting *McDougle v. Maxwell*, 1 Ohio St.2d 68, 70 (1964), and citing *State v. Chaffin*, 30 Ohio St.2d 13 (1972), paragraph three of the syllabus. Thus, to establish that a sentence constitutes cruel and unusual punishment, "'the penalty must be so greatly disproportionate to the offense as to shock the sense of justice of the community.'" *Weitbrecht* at 371, quoting *McDougle*, 1 Ohio St.2d at 70, and citing *Chaffin*, paragraph three of the syllabus. "As a general rule, a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment." (Citations omitted.) *McDougle*, 1 Ohio St.2d at 69.

{¶49} In the case at bar, each of appellant's individual prison terms fall within the statutorily authorized sentence range. The trial court sentenced appellant for 12 second-degree-felony counts of illegal use of a minor in nudity-oriented material or performance, in violation of R.C. 2907.323(A)(1). R.C. 2929.14(A)(2)(a) allows a sentencing court to impose a prison term of two to eight years for a second-degree felony. The trial court sentenced appellant to serve a four-year prison term for each offense. These four-year terms

fall within the middle of the statutorily authorized range and do not constitute cruel and unusual punishment.

{¶50} Appellant recognizes that when courts consider whether a cumulative prison term imposed for multiple offenses is cruel and unusual punishment "proportionality review should focus on individual sentences rather than on the cumulative impact of multiple sentences imposed consecutively," and that when "none of the individual sentences imposed on an offender are grossly disproportionate to their respective offenses, an aggregate prison term resulting from consecutive imposition of those sentences does not constitute cruel and unusual punishment." *Hairston*, 2008-Ohio-2338, at ¶ 20. Thus, when "none of the individual sentences imposed on an offender are grossly disproportionate to their respective offenses, an aggregate prison term resulting from consecutive imposition of those sentences does not constitute cruel and unusual punishment." *Id.* at syllabus. Appellant nevertheless contends that *Hairston* "is contrary to law." However, as an intermediate appellate court, we lack the authority to declare *Hairston* "contrary to law." *See Crawford v. Euclid Nat. Bank*, 19 Ohio St.3d 135, 142, fn. 6, *holding modified by Trussell v. Gen. Motors Corp.*, 53 Ohio St.3d 142 (1990) (Ohio appellate courts must follow supreme

court precedent unless and until the supreme court overrules it); *accord State v. Dickens*, 2008-Ohio-4404, ¶ 25 (9th Dist.) ("An appellate court has no authority to overrule decisions of the Ohio Supreme Court but is bound to follow them.").

{¶51} Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

II

{¶52} In his second assignment of error, appellant asserts that R.C. 2967.271, the Reagan Tokes Law, is unconstitutional because it violates his right to a jury trial and the separation-of-powers doctrine.

{¶53} "'[T]he question of the 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. Quarterman*, 2014-Ohio-4034, ¶ 15, quoting *State v. Awan*, 22 Ohio St.3d 120, 122 (1986). A reviewing court nevertheless has "discretion to consider a forfeited constitutional challenge to a statute" and "may review the trial court decision for plain error." *Id.* at ¶ 16.

{¶54} Here, appellant did not argue plain error on appeal, and we decline to construct a plain error argument on his behalf. *See State v. Conant*, 2020-Ohio-4319, ¶ 40 (4th Dist.)

(declining to construct plain error argument for appellant challenging Reagan Tokes Law). Furthermore, even if appellant had argued plain error, his argument would not have merit. In *State v. Hacker*, 2023-Ohio-2535, the Ohio Supreme Court held that the Reagan Tokes Law does not violate the right to a jury trial or the separation-of-powers doctrine. *Hacker* at ¶ 1, 25, 28. Therefore, even if we reviewed appellant's second assignment of error for plain error, *Hacker* establishes that the trial court did not plainly err by failing to determine that the Reagan Tokes Law is unconstitutional.

{¶55} Accordingly, based upon the foregoing reasons, we overrule appellant's second assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

Brogan, V.J., dissenting:

{¶56} I must dissent. The record clearly and convincingly does not support the consecutive 48-year sentence imposed by the trial court upon the defendant. R.C. 2953.08 (G)(2).

{¶57} The prosecutor at sentencing did not dispute that Grashel's videotaping of the three juveniles was not disseminated to the public. The prosecutor also pointed out that most of the juveniles were not even aware they were being photographed. Although the defense counsel pointed out to the court that his client was an admitted "voyeur" he did not

specifically argue that the less serious crime of voyeurism be considered by the trial judge as a lesser included offense.

{¶58} R.C. 2907.08 (C) defines voyeurism as follows: No person shall knowingly, secretly, or surreptitously videotape, film, photograph, broadcast stream, or otherwise record a minor, in a place where a person has a reasonable expectation of privacy, for the purpose of viewing the private areas of the minor. A violation of these provisions of the Revised Code is a felony of the fifth degree.

{¶59} R.C. 2907.323(A)(1) provides in pertinent part that no person shall (1) photograph any minor or impaired person who is not the person's child or ward in a state of nudity or create, direct produce or transfer any material or performance that shows the minor in a state of nudity. The prosecutor did not dispute defense counsel's assertion that Grashel only used the videos for his own personal consumption.

{¶60} Had the defendant been sentenced under the appropriate voyeurism statute, the most he could have received would have been 12 years in prison rather than the 48-year term he received in this matter.

{¶61} Prior to sentencing, Grashel's counsel made the trial court aware of a similar case in Franklin County where the

defendant was sentenced to four concurrent four-year sentences. The trial judge was not impressed and stated that the defendant in Franklin County "is not in my court, that's Franklin County." The trial judge obviously misspoke because Pickaway County was not a party, the State of Ohio was.

{¶62} Because the State was a party the court should have considered any similar cases decided in Ohio. The appellant argues that the trial judge should have considered sentences given to other sex offenders with similar facts. For example, appellant points to the case of *State v. Bonness*, 2012-Ohio-474, (where the Eighth District Court of Appeals found the 52-year sentence imposed by the trial court to be excessive and disproportionate). In that case the defendant was convicted in a sting operation of attempted rape of a minor, 14 counts of pandering sexually oriented matter involving a minor and two counts of possession of criminal tools.

{¶63} Judge Melody Stewart stated in *Bonness* that while it is difficult to compare child pornography sentences, "nevertheless the comparison of one sentence against other sentences given for similar cases is a useful guide for determining if the court abused its discretion in a particular case."

{¶64} R.C. 2929.11(B) provides specifically that sentences should be consistent with sentences for similar crimes by similar offenders.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee shall recover of 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 Pickaway 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, it is continued for a period of 60 days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the 60-day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the 45-day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said 60 days, the stay will terminate as of the date of such dismissal.

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

Wilkin, J.: Concurs in Judgment & Opinion
*Brogan, V.J.: Dissents with Dissenting Opinion

For the Court

BY:_____
Peter B. Abele, 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.

*Judge James A. Brogan, a retired judge of the Second District Court of Appeals, sitting by assignment of the Ohio Supreme Court in the Fourth Appellate District.