**[Cite as *State v. Rafferty*, 2024-Ohio-4906.]**

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT**
**COUNTY OF CUYAHOGA**

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|---|---|---|
| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | No. 113602 |
| v. | : | |
| PHILLIP RAFFERTY, | : | |
| Defendant-Appellant. | : | |

JOURNAL ENTRY AND OPINION

**JUDGMENT:** AFFIRMED IN PART; VACATED IN PART; REMANDED
**RELEASED AND JOURNALIZED:** October 10, 2024

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-23-682953-A

***Appearances:***

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Brian Callahan, Assistant Prosecuting Attorney, *for appellee*.

P. Andrew Baker, *for appellant*.

EILEEN A. GALLAGHER, P.J.:

{¶ 1} Defendant-appellant, Phillip Rafferty, appeals the sentences imposed after he pled guilty to burglary and attempted felonious assault. He contends that the trial court committed plain error in failing to merge his offenses for sentencing

and that the order of consecutive sentences should be vacated because the trial court's consecutive-sentence findings are not supported by the record. He also contends that the trial court erred in ordering him to pay extradition costs after he was determined to be indigent. For the reasons that follow, we vacate the trial court's judgment to the extent it orders Rafferty to pay extradition costs. We otherwise affirm the trial court but remand for the trial court to issue a nunc pro tunc order incorporating the consecutive-sentence findings it made at the sentencing hearing into its January 11, 2024 sentencing journal entry.

**Factual Background and Procedural History**

{¶ 2} On July 24, 2023, a Cuyahoga County Grand Jury indicted Rafferty for one count of aggravated burglary and one count of felonious assault. The charges related to a March 2, 2022 incident in which Rafferty allegedly entered the home of Nils Jaegersen without permission and then assaulted Jaegersen, causing him serious physical harm. Rafferty was extradited from New Jersey to face the charges against him.

{¶ 3} Rafferty agreed to withdraw his previously entered pleas of not guilty and to plead guilty to an amended count of burglary, a third-degree felony and an amended count of attempted felonious assault, a third-degree felony. The parties further agreed that there would be no contact with the victim and that "the defense would recommend a prison sentence at the time of sentencing with no date range attached," i.e., "[j]ust that they would recommend that there be some form of prison time imposed."

{¶ 4} Rafferty entered guilty pleas which the trial court accepted and then found him guilty. The trial court referred Rafferty to the probation department for a presentence-investigation report ("PSI") and scheduled a sentencing hearing.

{¶ 5} The PSI contains the following description of the incident giving rise to the charges in this case:

> On Wednesday, March 3, 2022, officers received a radio assignment for a fight at 1311 W. 110 Street . . . .
>
> Once officers arrived on scene, they began to knock on the front door. The suspect, who was later identified as Phillip Rafferty (defendant), opened the main door and immediately ran to the left side (1309 W. 110) of the duplex and locked the door. Officers saw the victim, Mr. Nils Jaegersen, on his hands and knees in the middle of the living room from the right side doorway . . . . Officer[s] could see that Mr. Jaegersen was bleeding heavily from his face and immediately told Radio to get EMS on scene.
>
> Officers got Mr. Jaegersen out of the duplex safely. Mr. Jaegersen was very confused and could not stand well. Mr. Jaegersen repeatedly stated "who called?" and "thank you guys so much." EMS Medic 33 arrived on scene and conveyed the victim to Fairview Hospital . . . .
>
> Officers went to the hospital to talk to the victim. While at the hospital Mr. Jaegersen stated that, his other roommate entered his residence (1311 W. 110), and then Rafferty followed behind his roommate. Mr. Jaegersen stated that Rafferty did not have permission to be in his residence, and he repeatedly told him to leave his residence. At that time Rafferty blocked the door with his body. He eventually pushed Jaegersen forcefully, with both arms. Jaegersen responded by swinging at Mr. Rafferty. Mr. Jaegersen stated that is when Rafferty began to strike him with his fists, multiple times in the face, and they ended up on the ground, with Rafferty on top of him, still striking him in the face. Rafferty eventually placed Jaegersen in a stranglehold, which led him to losing consciousness. Soon after the officers arrived on scene, and Rafferty opened the door and immediately fled inside and locked the door.

> Due to the above incident the victim suffered a laceration on his lip, that needed repaired with stitches. He also suffered a closed fracture of the orbit.

{¶ 6} At the sentencing hearing, the trial court heard from defense counsel, Rafferty, the State and Jaegersen.

{¶ 7} Defense counsel requested that the trial court impose a nine-month sentence. He stated that between the time of the March 2, 2022 incident at issue and his sentencing in this case, Rafferty had been incarcerated in New Jersey but had been transferred to a halfway house. Defense counsel argued that this showed that "the incarceration was working, that he was on the right path, and that what needed to be done was to gear him towards reentry into society."

{¶ 8} Rafferty "apologized" to Jaegersen "for assaulting him." Rafferty stated that Jaegersen "is my senior" and that he "should have [known] better than to hit [his] elder." Rafferty further stated:

> I'm also going to apologize to the fact he assaulted me at that time but that's what happened, he hit me, he hit me. I didn't run from the cops, I went upstairs, and that was it. I didn't think it was that serious of a situation or else I would have been taking this — I'm so sorry for causing so much trouble is what I mean. I'm apologizing.

{¶ 9} Jaegersen described the injuries he sustained as a result of the incident relating to the court stating that "[a]fter the assault and being choked out, I had little memory of the next week or so. I had suffered a concussion, fractured left eye orbit, considerable dental damage, cut lip which was sewed up in the ER. Mental and emotional trauma that put me in therapy for seven weeks regarding sleep issues, loss of sense of safety, hyper-vigilance, difficulty relaxing, irritability,

depression, and loss of concentration and ability to work . . . ." Jaegersen continued to describe a multitude of dental issues which he suffered, and for that he continues to receive treatment, as a result of the assault. According to Jaegersen, at the time of the sentencing hearing he had incurred $2000 in out-of-pocket dental expenses and, it is anticipated, will incur significantly more.

**{¶ 10}** Jaegersen stated that, in his view, "when [Rafferty] is released, it will be only a matter of time before another person is his next victim." He requested that "the maximum sentence" be imposed "to keep [Rafferty] out of the public, keep the public safe for as long as possible."

**{¶ 11}** The State requested that the trial court "take into consideration," when sentencing Rafferty (1) that the victim was "an elderly person within our community, a more susceptible group"; (2) the serious harm Rafferty caused to the victim and (3) Rafferty's criminal history. The State asserted that "violent behavior is not new to this defendant" and the State questioned whether Rafferty's apology was "truly forthright or sincere" given that "[w]hile [he] apologizes to Mr. Jaegersen in one regard," "he additionally blamed him for creating the situation, which is not the facts that we have." The State requested that "the maximum sentence" be imposed and that Rafferty also be ordered to pay Jaegersen $2,000 in restitution and to reimburse the State $2,527.80 in extradition costs.

**{¶ 12}** The trial court reviewed Rafferty's criminal history with Rafferty and defense counsel, including (1) pending charges in New Jersey (from 2021) for shoplifting and use/possession with intent to use drugs, (2) a 2021 conviction for

possession of a weapon for unlawful purposes for which he was sentenced to 364 days in jail (with credit for time served) and placed on probation for two years, (3) a 2020 conviction for hindering oneself (after he was charged with contempt three times in 2019 for violating a domestic violence order) for which he received one year of probation and (4) a 2014 conviction for resisting arrest to which he was sentenced to three years in prison and three years of parole. As Rafferty described his criminal history to the trial court:

> 2013 was the year I caught my prison sentence, I did three years for it. I came home in 2017 and I caught a contempt, got another contempt and another contempt. In 2019 I was out drunk, high and officers pulled up on me and I had 5150, I was trying to get help from an ambulance and he didn't know what was going on. We ended up getting into a tussle, bystander helped me, they took me to the hospital and then that's how that led out — that's what all led up to.

**{¶ 13}** Rafferty had advised the trial court that, at the time of the offense at issue, he was on probation or parole in New Jersey.

**{¶ 14}** The court sentenced Rafferty to an aggregate six-year prison sentence. He was ordered to serve 36 months on the burglary count and 36 months on attempted felonious assault count, consecutively. The trial court also imposed one-to-three years of postrelease control and ordered Rafferty to pay $2,000 in restitution and $2,527.80 in extradition costs.

**{¶ 15}** In support of its imposition of consecutive sentences, the trial court made the following findings at the sentencing hearing:

> I don't believe that prison worked at all for this defendant. He was sent to prison, according to the record, in 2014, or '13 as he says, but the record shows '14 early. And it didn't help at all. And he was

> obviously on parole at the time he committed these offenses. And so the Court believes that consecutive sentences do apply because it's necessary to protect the public from future crime and it's not — six years is not disproportionate for the physical violence that this defendant placed upon Mr. Jaegersen . . . . He committed these offenses while he was under a court sanction of parole according to the testimony of the defendant and these offenses were committed as a course of conduct and neither sentence of three years would be enough to not demean the felonious assault and the burglary that have been pled to as attempts.
>
> The history of this defendant's criminal conduct also warrants consecutive sentences. He has been, let's see, since 2008 he has been in and out of the courts through New Jersey where his hometown is, as well as the agg assault in 2013 that was dismissed, I believe. But that's where I got the three years prison with three years parole. Those should have ended in 2019 according to your client . . . . But he was also found in contempt at least three times which tells me prison did not work as he kept violating court orders. He also has very violent assaults on, let me see, I think it was a peace officer . . . . But throughout this defendant's criminal record, it is necessary to protect the public from future crime by this defendant . . . .

**{¶ 16}** The trial court set forth its consecutive-sentence findings in its sentencing judgment entry as follows:

> The court imposes prison terms consecutively finding that consecutive service of the prison term is necessary to protect the public from future crime or to punish defendant; that the consecutive sentences are not disproportionate to the seriousness of defendant's conduct and to the danger defendant poses to the public; and that, at least two of the multiple offenses were committed in this case as part of one or more courses of conduct, and the harm caused by said multiple offenses 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 defendant's conduct, or defendant's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by defendant.

**{¶ 17}** Rafferty appealed, raising the following three assignments of error for review:

I. The order requiring defendant-appellant to pay for extradition costs must be vacated.

II. The imposition of consecutive sentences must be reversed.

III. The trial court committed plain error when it failed to merge the convictions for burglary and attempted felonious assault.

**Law and Analysis**

**Extradition Costs**

**{¶ 18}** In his first assignment of error, Rafferty contends that the trial court erred in ordering him to pay the costs of his extradition from New Jersey to Ohio because he was determined to be indigent, citing *State v. Beckwith*, 2022-Ohio-2362 (8th Dist.).

**{¶ 19}** "Under R.C. 2947.23(A)(1) and 2949.14, a trial court is routinely permitted to impose the cost of extradition upon nonindigent felony defendants." *State v. Maurer*, 2016-Ohio-1380, ¶ 30 (8th Dist.). R.C. 2947.231(A)(1)(a) provides, in relevant part:

> In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution, including any costs under section 2947.231 of the Revised Code, and render a judgment against the defendant for such costs.

**{¶ 20}** R.C. 2949.14 provides:

> Upon conviction of a *nonindigent* person for a felony, the clerk of the court of common pleas shall make and certify under the clerk's hand and seal of the court, a complete itemized bill of the costs made in such prosecution, including the sum paid by the board of county commissioners, certified by the county auditor, for the arrest and return of the person on the requisition of the governor, or on the request of the governor to the president of the United States, or on the return of the fugitive by a designated agent pursuant to a waiver of

> extradition except in cases of parole violation. The clerk shall attempt to collect the costs from the person convicted.

(Emphasis added.) *See also Beckwith* at ¶ 26-31 ("[R.C.] 2949.14 does not authorize the trial court to assess the costs of [the defendant's] extradition as prosecution costs against an indigent felony offender.").

**{¶ 21}** In this case, the trial court, in its September 19, 2023 journal entry following Rafferty's arraignment, declared that Rafferty was indigent and assigned him trial counsel. In its January 11, 2024 sentencing journal entry, the trial court once again declared Rafferty to be indigent, assigned him appellate counsel and ordered that a transcript be prepared at the State's expense. The State concedes error, stating that "the extradition costs must be vacated as Appellant was determined to be indigent at the time of sentencing." Accordingly, we sustain Rafferty's first assignment of error and vacate the trial court's judgment to the extent Rafferty is ordered to pay extradition costs.

**Imposition of Consecutive Sentences**

**{¶ 22}** In his second assignment of error, Rafferty challenges the imposition of consecutive sentences.

**{¶ 23}** Under Ohio's sentencing statutes, there is a presumption that a defendant's multiple prison sentences will be served concurrently, unless certain circumstances, not applicable in this case, apply or the trial court makes the required findings supporting the imposition of consecutive sentences under R.C. 2929.14(C)(4). R.C. 2929.41(A); *State v. Jones*, 2024-Ohio-1083, ¶ 11; *State v.*

*Reindl*, 2021-Ohio-2586, ¶ 14 (8th Dist.). To impose consecutive sentences, the 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) at least 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). The trial court must make each finding required under R.C. 2929.14(C)(4) at the sentencing hearing and incorporate those findings into its sentencing journal entry. *State v. Bonnell*, 2014-Ohio-3177, syllabus.

**{¶ 24}** To make the requisite findings under the statute, "'the [trial] court must note that it engaged in the analysis' and that it 'has considered the statutory criteria and specifie[d] which of the given bases warrants its decision.'" *Id.* at ¶ 26, quoting *State v. Edmonson*, 86 Ohio St.3d 324, 326 (1999). When imposing consecutive sentences, the trial court is not required to state reasons supporting its findings, nor is it required to give a "talismanic incantation of the words of the

statute." *Jones*, 2024-Ohio-1083, at ¶ 11, quoting *Bonnell* at ¶ 37. "[A]s long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld." *Bonnell* at ¶ 29. When considering whether the trial court has made the requisite findings, an appellate court must view the trial court's statements on the record "in their entirety." *See, e.g., State v. Blevins*, 2017-Ohio-4444, ¶ 21, 23, 25 (8th Dist.).

**{¶ 25}** As the Ohio Supreme Court recently stated in *Jones*:

> R.C. 2953.08(G) instructs appellate courts reviewing the imposition of consecutive sentences, as follows:
>
> (2) The court hearing an appeal under [R.C. 2953.08(A), (B), or (C)] 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 [R.C. 2929.14(C)(4)];
>
> (b) That the sentence is otherwise contrary to law.
>
> R.C. 2953.08(F) requires an appellate court to review the entire trial-court record, including any oral or written statements made to or by the trial court at the sentencing hearing, and any presentence, psychiatric, or other investigative report that was submitted to the court in writing before the sentence was imposed. R.C. 2953.08(F)(1) through (4).

> R.C. 2953.08(G) permits an appellate court to increase, reduce, otherwise modify, or vacate a sentence only "if it clearly and convincingly finds" that the record does not support the sentencing court's findings or that the sentence is otherwise contrary to law. R.C. 2953.08(G)(2); *see also State v. Marcum*, 146 Ohio St.3d 516, ¶ 22 (2016). The standard to be applied is the standard set forth in the statute: an appellate court has the authority to increase, reduce, otherwise modify, or vacate a sentence only after it has reviewed the entire trial-court record and "clearly and convincingly f[ound] either . . . [t]hat the record does not support the sentencing court's findings under [certain statutes]" or "[t]hat the sentence is otherwise contrary to law," R.C. 2953.08(G)(2).

(Brackets in original.) *Jones*, 2024-Ohio-1083, at ¶ 12-13.

**{¶ 26}** A defendant can challenge consecutive sentences on appeal in two ways. First, the defendant can argue that consecutive sentences are contrary to law because the trial court failed to make the findings required by R.C. 2929.14(C)(4). *See* R.C. 2953.08(G)(2)(b); *Reindl,* 2021-Ohio-2586, at ¶ 13 (8th Dist.). Second, the defendant can argue that the record "clearly and convincingly" does not support the trial court's findings made pursuant to R.C. 2929.14(C)(4). *See* R.C. 2953.08(G)(2)(a); *Reindl* at ¶ 13. A matter is "clear and convincing" if it "produce[s] 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.

**{¶ 27}** In this case, Rafferty concedes that the trial court made all of the necessary findings under R.C. 2929.14(C)(4). However, he argues that his consecutive sentences should be vacated because the record clearly and convincingly does not support the trial court's finding under R.C. 2929.14(C)(4) that consecutive

sentences are not disproportionate to the seriousness of Rafferty's conduct and to the danger he poses to the public. Specifically, he argues that although he "certainly caused serious physical harm to the victim, he received the maximum sentence for that charge," that there "is nothing about the burglary in the record that appears so aggravated as to justify a consecutive sentence" and that "his criminal history was [not] so extensive as to justify the consecutive sentences under a disproportionality analysis." He also argues that "his criminal history was not so extensive as to provide a separate justification for consecutive sentences," presumably also challenging the trial court's finding under R.C. 2929.14(C)(4)(c).

**{¶ 28}** Following a thorough review of the record, we find that the record clearly and convincingly supports the requisite findings to support the trial court's imposition of consecutive sentences.

**{¶ 29}** With respect to the trial court's finding under R.C. 2929.14(C)(4) that "consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public," the information set forth in the PSI and the conduct described at the sentencing hearing showed that Rafferty committed a brutal assault of an elderly victim after entering his home without permission and refusing to leave. After blocking the door with his body, Rafferty pushed Jaegersen forcefully with both arms and when Jaegersen attempted in vain to defend himself "by swinging at" Rafferty, Rafferty beat Jaegersen severely and choked him until he lost consciousness, causing serious, continuing physical and emotional injuries. The record reflects that Rafferty had a criminal history that

included noncompliance with domestic violence court orders, a weapons offense and resisting arrest. The record further reflects that the prior sentences Rafferty had received had not been effective in modifying his conduct. At the sentencing hearing, Rafferty did not appear to appreciate the seriousness of his conduct and attempted to shift blame to the victim rather than take full responsibility for his actions. Given the seriousness of Rafferty's conduct, the harm caused to the victim, Rafferty's prior criminal conduct and the ineffectiveness of prior criminal sanctions to modify his behavior, we cannot say that the record clearly and convincingly 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" under R.C. 2929.14(C)(4).

**{¶ 30}** Rafferty also challenges the trial court's finding under R.C. 2929.14(C)(4)(c). As Rafferty acknowledges, however, at the sentencing hearing, in addition to its finding under R.C. 2929.14(C)(4)(c), the trial court also made findings under R.C. 2929.14(C)(4)(a) and (b).

**{¶ 31}** Only one of the three findings under R.C. 2929.14(C)(4)(a)-(c) must be made to support the imposition of consecutive sentences. If the trial court properly made a finding under R.C. 2929.14(C)(4)(a) or (b), it was not also required to make a finding under R.C. 2929.14(C)(4)(c). *See, e.g., State v. Mitchell*, 2022-Ohio-3818, ¶ 11 (8th Dist.); *State v. Black*, 2020-Ohio-188, ¶ 11 (8th Dist.); *State v. Nave*, 2019-Ohio-348, ¶ 6-7 (8th Dist.). Rafferty does not challenge the trial court's findings under R.C. 2929.14(C)(4)(a) or (b). Accordingly, even if we agreed with

Rafferty that the record did not clearly and convincingly support the trial court's finding under R.C. 2929.14(C)(4)(c), the trial court's additional findings under R.C. 2929.14(C)(4)(a) and (b) satisfied the consecutive-sentencing requirements. *See, e.g., Black* at ¶ 11; *see also Mitchell* at ¶ 13 (where appellant did not challenge the factual underpinnings of the alternative finding the trial court made in the case under R.C. 2929.14(C)(4)(b), the court could not find error in the imposition of consecutive sentences).

**{¶ 32}** We cannot say, based on the record before us that the trial court's finding under R.C. 2929.14(C)(4)(c) was clearly and convincingly unsupported by the record. As stated above, the record reflects that Rafferty had a criminal history dating back more than ten years that included noncompliance with domestic violence court orders, a weapons offense and resisting arrest. The record further reflects that prior sentences Rafferty had received had not been effective in modifying his conduct. While he was on parole and/or probation in New Jersey, Rafferty continued to commit criminal offenses. After a thorough review of the record, we are not left with the "firm belief or conviction" that the record did not support the trial court's finding that "[t]he offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender" or its other consecutive-sentence findings.

**{¶ 33}** The trial court's finding under R.C. 2929.14(C)(4)(a), unlike the trial court's other consecutive-sentence findings, was not set forth in the trial court's January 11, 2024 sentencing journal entry. However, it is well established that the

trial court's "inadvertent failure to incorporate the statutory [consecutive-sentence] findings in the sentencing entry after properly making those findings at the sentencing hearing does not render the sentence contrary to law; rather, such a clerical mistake may be corrected by the court through a nunc pro tunc entry to reflect what actually occurred in open court." *Bonnell*, 2014-Ohio-3177, at ¶ 30.

{¶ 34} Accordingly, we overrule Rafferty's second assignment of error and affirm his consecutive sentences but remand for the trial court to issue a nunc pro tunc order incorporating all of the consecutive-sentence findings it made at the sentencing hearing into its January 11, 2024 sentencing journal entry, including its finding under R.C. 2929.14(C)(4)(a).

### C. Merger of Offenses for Sentencing

{¶ 35} In his third assignment of error, Rafferty contends that the burglary and attempted felonious assault offenses of which he was convicted are allied offenses of similar import and that the trial court committed plain error when it failed to merge them for sentencing. R.C. 2941.25, Ohio's allied-offenses statute, states:

> (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.

**{¶ 36}** In determining whether offenses are subject to merger for sentencing under R.C. 2941.25, courts evaluate three factors — the import, the conduct and the animus. *State v. Ruff*, 2015-Ohio-995, paragraphs one and three of the syllabus. Offenses do not merge, and a defendant may be convicted of and sentenced on multiple offenses if any one of the following is true: (1) the offenses are dissimilar in import or significance, (2) the offenses were committed separately or (3) the offenses were committed with separate animus or motivation. *Id.* at paragraph three of the syllabus, ¶ 25, 31. In other words,

> [a]s a practical matter, when determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must ask three questions when defendant's conduct supports multiple offenses: (1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation? An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, and the import must all be considered.

*Id.* at ¶ 31. The defendant bears the burden of establishing his entitlement to the protection provided by R.C. 2941.25 against multiple punishments for a single criminal act. *State v. Washington*, 2013-Ohio-4982, ¶ 18; *see also State v. Davids*, 2022-Ohio-2272, ¶ 43 (8th Dist.); *State v. Burey*, 2021-Ohio-943, ¶ 17 (8th Dist.).

**{¶ 37}** "At its heart, the allied-offense analysis is dependent upon the facts of a case because R.C. 2941.25 focuses on the defendant's conduct" and "an offense may be committed in a variety of ways" or "offenses committed may have different import." *Ruff* at ¶ 26, 30. Offenses are dissimilar in import or significance within the meaning of R.C. 2941.25(B) "when the defendant's conduct constitutes offenses

involving separate victims or if the harm that results from each offense is separate and identifiable." *Id.* at ¶ 23. Thus, "a defendant's conduct that constitutes two or more offenses against a single victim can support multiple convictions if the harm that results from each offense is separate and identifiable from the harm of the other offense." *Id.* at ¶ 26. "The evidence at trial or during a plea or sentencing hearing will reveal whether the offenses have similar import." *Id.*

**{¶ 38}** Offenses are committed separately within the meaning of R.C. 2941.25(B) if "'one offense was complete before the other offense occurred, . . . notwithstanding their proximity in time and that one [offense] was committed in order to commit the other.'" *State v. Woodard*, 2022-Ohio-3081, ¶ 38 (2d Dist.), quoting *State v. Turner*, 2011-Ohio-6714, ¶ 24 (2d Dist.). Thus, "'when one offense is completed prior to the completion of another offense during the defendant's course of conduct, those offenses are separate acts.'" *Woodard* at ¶ 38, quoting *State v. Mooty*, 2014-Ohio-733, ¶ 49 (2d Dist.); *see also State v. Fisher*, 2024-Ohio-4484, ¶ 216 (8th Dist.).

**{¶ 39}** For purposes of R.C. 2941.25(B), animus has been defined as "'"purpose or more properly, immediate motive."'" *State v. Pries*t, 2018-Ohio-5355, ¶ 12 (8th Dist.), quoting *State v. Bailey*, 2014-Ohio-4684, ¶ 34 (8th Dist.), quoting *State v. Logan*, 60 Ohio St.2d 126, 131 (1979). "'If the defendant acted with the same purpose, intent, or motive in both instances, the animus is identical for both offenses.'" *State v. Lane*, 2014-Ohio-562, ¶ 12 (12th Dist.), quoting *State v. Lewis*, 2012-Ohio-885, ¶ 13 (12th Dist.). "Animus is often difficult to prove directly, but

must be inferred from the surrounding circumstances." *Lane* at ¶ 12, citing *State v. Lung*, 2012-Ohio-5352, ¶ 12 (12th Dist.).

**{¶ 40}** We ordinarily review de novo whether two offenses are allied offenses of similar import. *Burey*, 2021-Ohio-943, at ¶ 17, citing *State v. Williams*, 2012-Ohio-5699, ¶ 28. Where, as here, however, where the defendant did not raise the allied offense issue below, we review for plain error. *State v. Rogers*, 2015-Ohio-2459, ¶ 28 ("[T]he failure to raise the allied offense issue at the time of sentencing forfeits all but plain error.").

**{¶ 41}** Crim.R. 52(B) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Plain error is an obvious error or defect in the trial court proceedings that affects a substantial right. *Rogers* at ¶ 22. Reversal for plain error requires a showing that there was an error, that the error was obvious and that there is "a reasonable probability that the error resulted in prejudice," meaning that the error affected the outcome. (Emphasis deleted.) *Id.* The party asserting plain error "bears the burden of proof to demonstrate plain error on the record." *Id.*, citing *State v. Quarterman*, 2014-Ohio-4034, ¶ 16. An appellate court notices 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, quoting *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus.

**{¶ 42}** Rafferty plead guilty to, and was convicted of, burglary in violation of R.C. 2911.12(A)(3) and attempted felonious assault in violation of R.C. 2923.02 and 2903.11(A)(1).

**{¶ 43}** R.C. 2911.12(A)(3) states, in relevant part, that "[n]o person, by force, stealth, or deception, shall . . . [t]respass in an occupied structure . . ., with purpose to commit in the structure . . . any criminal offense." A trespass occurs when an offender knowingly enters or remains on the premises of another without the privilege to do so. R.C. 2911.21(A)(1); *State v. Kirby*, 2020-Ohio-4005, ¶ 30 (12th Dist.)

**{¶ 44}** R.C. 2903.11(A)(1) states, in relevant part, that "[n]o person shall knowingly . . . [c]ause serious physical harm to another." R.C. 2923.02(A) states that "[n]o person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."

**{¶ 45}** Rafferty argues that "[t]he unlawful entry appears to be so closely related in time to the assault that . . . it was effectively one offense with one animus" and merger was, therefore, "mandated" in this case. In support of his claim, Rafferty cites *State v. Seymore*, 2022-Ohio-2180 (12th Dist.), and *State v. Fisher*, 2014-Ohio-4257. In *Seymore*, the defendant pled guilty to burglary in violation of R.C. 2911.12(A)(3) and aggravated assault in violation of R.C. 2903.12(A)(2), charges that stemmed from allegations that, although the defendant had lawfully entered the victim's home, the defendant and the victim engaged in an argument during which

the defendant assaulted the victim with a firearm and inflicted physical harm. *Id*. at ¶ 2, 20. The defendant argued that his burglary and aggravated assault convictions should have merged at sentencing because he lawfully entered the victim's home and did not become a trespasser until he began assaulting the victim, i.e., the trespass element of the burglary was based entirely upon his perpetrating the aggravated assault. *Id*. at ¶ 16. Based on the specific facts in the record in that case, the Twelfth District agreed and found that the trial court had committed plain error in failing to merge the offenses for sentencing. *Id*. at ¶ 19-25. The court explained:

> [W]e find that appellant's burglary and aggravated assault convictions are allied offenses of similar import.
>
> As stated above, the parties were arguing about the victim's alleged infidelity. Although appellant was initially permitted to be inside the victim's home, his privilege to remain there was revoked and he became a trespasser the moment he shoved a firearm in the victim's mouth and threatened her. *See State v. Powell*, 2018-Ohio-3944 (10th Dist.); *State v. Williams*, 2013-Ohio-573 (8th Dist.). Thus, appellant committed burglary when he knowingly remained in the victim's home without privilege to do so and by force by shoving the firearm into the victim's mouth and threatening her. Appellant further committed aggravated assault when he knowingly caused or attempted to cause physical harm to the victim by means of a deadly weapon by shoving the firearm into the victim's mouth and threatening her. Thus, both offenses were based upon appellant's conduct inside the victim's home when he shoved a firearm into her mouth and threatened her.
>
> Appellant's burglary and aggravated assault offenses involved neither separate/multiple victims nor separate and identifiable harm. Rather, appellant's use of force resulted in trespassing into the victim's home and physical harm to the victim. The offenses were thus of similar import. Both offenses were committed at the same time and with the same conduct in that the conduct — appellant's use of force — that allowed him to remain in the victim's home without privilege to do so caused physical harm to the victim. Finally, the surrounding circumstances indicate appellant committed both offenses while acting

> with the same purpose, intent, or motive. *See State v. Fisher*, 2014-Ohio-4257 (4th Dist.).

*Id.* at ¶ 22-24. This case is readily distinguishable.

**{¶ 46}** In *Fisher*, 2014-Ohio-4257, decided before the Ohio Supreme Court's decision in *Ruff,* the defendant and his daughter went to the victim's residence. The victim claimed that after he opened the door, both individuals "charged" into his apartment and the defendant stabbed the victim. The defendant and his daughter claimed that when the victim opened the door, he grabbed the defendant's daughter by the throat and assaulted her and that the defendant then poked the victim with a knife in defense of his daughter and punched the victim in self-defense. The altercation lasted approximately five minutes and then the defendant and his daughter left the scene. *Fisher* at ¶ 2. The trial court found that the offenses merged for sentencing and sentenced the defendant only on the burglary count. *Id.* at ¶ 13, 22. On appeal, the defendant argued that the trial court had erred in merging the offenses for sentencing. *Id.* at ¶ 13-14. The Fourth District disagreed, reasoning:

> [T]he facts demonstrate that Appellant forced his way into the victim's residence and stabbed the victim. Appellant's own version of the incident is that the victim assaulted his daughter first and Appellant reacted. Under either scenario, the incident occurred very quickly after the victim opened the door of his apartment. The facts also demonstrate Appellant used a knife and did, in fact, cause physical harm to the victim. Both offenses were committed with the same conduct. At sentencing, Appellant indicated he overreacted in order to protect his daughter. However, animus may be inferred from the surrounding circumstances, and the surrounding circumstances indicate Appellant went to the victim's apartment with a deadly weapon and the incident happened almost immediately when the victim opened his door. Despite Appellant's statement to the contrary at sentencing, the surrounding circumstances indicate Appellant

> committed both offenses while acting with the same purpose, intent, or motive. We do not find error in the trial court's decision to merge the two offenses for sentencing.

*Id.* at ¶ 21. Once again, this case is different.

**{¶ 47}** In reviewing a claim that offenses are allied, "'the focus of allied offense inquiries is on the offender's conduct that constitutes the commission of the offense, not upon the temporally related course of conduct or . . . the act being considered as one continuous act.'" *State v. Head*, 2023-Ohio-1364, ¶ 49 (8th Dist.), quoting *State v. Rucker*, 2020-Ohio-2715, ¶ 24 (8th Dist.).

**{¶ 48}** Because Rafferty pled guilty to the offenses at issue, the record contains limited facts for use in conducting a merger analysis. Rafferty did not offer his version of the events below — at least not in any detail. The only facts in the record here are those set forth in the PSI and the limited description of the incident provided during the sentencing hearing. Taken together, the facts set forth therein do not support Rafferty's merger argument.

**{¶ 49}** In contrast to *Seymour*, the record in this case indicates that Rafferty did not have permission to enter Jaegersen's residence; the trespass occurred as soon as Rafferty entered his home, not when he physically assaulted Jaegersen. Accordingly, the burglary was complete when Rafferty entered Jaegersen's residence without permission with the intent to commit a criminal offense.

**{¶ 50}** There is nothing in the record regarding why Rafferty entered Jaegersen's residence without permission. Likewise, there is no evidence as to how long Rafferty was in Jaegersen's residence before Rafferty assaulted (or attempted

to assault) Jaegersen. The PSI indicates that after Jaegersen repeatedly told Rafferty to leave, Rafferty blocked the door with his body and "eventually pushed Jaegersen forcefully, with both arms." The PSI further indicates that Jaegersen "responded by swinging at Mr. Rafferty" and that "that is when Rafferty began to strike him with his fists, multiple times in the face," "eventually," "plac[ing] Jaegersen in a stranglehold," causing him to lose consciousness. At the sentencing hearing, Rafferty stated that he struck and assaulted Jaegersen only after Jaegersen assaulted him first.

**{¶ 51}** The recitation of the facts set forth above could support the imposition of separate sentences based on separate conduct or separate animus — if not separate and identifiable harm. *cf. State v. McFarland*, 2018-Ohio-2067, ¶ 47 (8th Dist.) (aggravated burglary counts were not subject to merger with the aggravated murder, murder and felonious assault counts; aggravated burglary occurred when the defendants entered the apartment complex with the intent to harm defendant, a separate act from the shooting of defendant); *State v. Craig*, 2017-Ohio-4342, ¶ 37-39 (4th Dist.) (trial court was not required to merge aggravated burglary and felonious assault offenses for sentencing because offenses were dissimilar in import and significance and were committed separately, i.e., victim sustained a "separate and identifiable emotional harm or trauma" from the aggravated burglary when defendant refused to leave victim's residence, obtained a knife without permission and brandished it at her, forcing her to retreat to a corner

of the room that was separate from and prior to the physical harm "she suffered shortly thereafter" when defendant stabbed her).

**{¶ 52}** As stated above, unless a defendant shows — based on the record — a reasonable probability that his convictions are for allied offenses of similar import committed with the same conduct and without a separate animus, he cannot demonstrate that the trial court's failure to inquire whether the convictions merged for sentencing was plain error. *Rogers*, 2015-Ohio-2459, at ¶ 3, 29; *State v. Hawkins*, 2022-Ohio-4288, ¶ 33 ( 8th Dist.).

**{¶ 53}** Rafferty has not met his burden here. On the limited record before us, Rafferty has not shown that the burglary and attempted felonious assault offenses of which he was convicted were (1) similar in import and significance, (2) committed with the same conduct and (3) committed with the same animus. Accordingly, the trial court did not commit plain error in failing to merge his convictions for sentencing. *See, e.g., Hawkins* at ¶ 31-34 (trial court did not commit plain error in failing to merge murder and aggravated burglary offenses for sentencing because defendant did not point to anything in the record overcoming the State's recitation of the facts and its assertion that the offenses at issue were committed in separate acts); *State v. Collier*, 2020-Ohio-3033, ¶ 36-38 (8th Dist.) (where indictment and bill of particulars were not fact specific and defendant failed to cite any information in the record to overcome the State's recitation of facts and its assertion that defendant committed money laundering offenses subsequently and in separate acts, defendant failed to meet her burden of demonstrating a

reasonable probability that her convictions for theft and money laundering constituted allied offenses of similar import); *State v. Ross*, 2018-Ohio-2738, ¶ 20 (8th Dist.) (where record contained insufficient facts to determine whether defendant's aggravated robbery and theft convictions involved allied offenses of similar import, trial court did not commit plain error in failing to merge defendant's convictions); *State v. Hilliard*, 2015-Ohio-3142, ¶ 28 (8th Dist.) (where limited facts in the record were insufficient to determine whether defendant's kidnapping and aggravated murder convictions involved allied offenses of similar import, defendant failed to meet his burden of demonstrating a reasonable probability that his convictions constituted allied offenses of similar import and trial court did not commit plain error in failing to merge the offenses for sentencing).

**{¶ 54}** Judgment affirmed in part, vacated in part; remanded.

It is ordered that appellee and appellant share the costs herein taxed.

The court finds that there were reasonable grounds for this appeal.

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

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

EILEEN A. GALLAGHER, PRESIDING JUDGE

MICHELLE J. SHEEHAN, J., and
FRANK DANIEL CELEBREZZE, III, J., CONCUR