[Cite as *State v. T.D.J.*, 2018-Ohio-2766.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

T.D.J.,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 16 MA 0104

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2015 CR 270

BEFORE:
Cheryl L. Waite, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed in Part, Reversed in Part, Limited Remand.

Atty. Paul J. Gains, Mahoning County Prosecutor and
Atty. Ralph M. Rivera, Assistant Prosecuting Attorney
21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee

Atty. Richard Agopian, 1415 West Ninth, 2nd Floor, Cleveland, Ohio 44113, for Defendant-Appellant.

Dated: June 29, 2018

WAITE, J.

{¶1} Appellant T.D.J. appeals her convictions and sentence on two counts of endangering children in violation of R.C. 2919.22(B)(3), (E)(1)(3), and two counts of endangering children in violation of R.C. 2919.22(B)(4), (E)(1)(3), all felonies of the third degree, following a jury trial in the Mahoning County Court of Common Pleas. Her convictions are based on disciplinary measures administered over the course of roughly three months, from November 1, 2014 to January 26, 2015, to two of her children, nine-year-old L.J., and eight-year-old Q.J.

{¶2} The trial court merged the convictions in counts one and three (relating to L.J.), and counts two and four (relating to Q.J.), and sentenced Appellant to three years on each of the remaining two counts to be served consecutively, for an aggregate sentence of six years of imprisonment.

{¶3} Appellant advances both sufficiency and weight of the evidence challenges to the jury's verdicts. Appellant also contends that the trial court erred in imposing consecutive sentences and that she was denied due process of law when the judge, rather than the prosecutor, selected the crimes for which she was sentenced on merger. For the following reasons, Appellant's convictions and sentence are affirmed, but this matter is remanded to the trial court to enter a *nunc pro tunc* judgment entry memorializing the trial court's findings at the sentencing hearing regarding the imposition of consecutive sentences.

Law

{¶4} R.C. 2919.22(B) reads, in pertinent part:

> (B) No person shall do any of the following to a child under eighteen years of age * * *:

(3) Administer corporal punishment or other physical disciplinary measure, or physically restrain the child in a cruel manner or for a prolonged period, which punishment, discipline, or restraint is excessive under the circumstances and creates a substantial risk of serious physical harm to the child;

(4) Repeatedly administer unwarranted disciplinary measures to the child, when there is a substantial risk that such conduct, if continued, will seriously impair or retard the child's mental health or development;

* * *

(E)(1) Whoever violates this section is guilty of endangering children.

* * *

(3) If the offender violates division (B)(2), (3), (4), or (6) of this section, except as otherwise provided in this division, endangering children is a felony of the third degree.

Facts

{¶5} Appellant is the mother of four children. Nicole Davis, an intake worker in the physical and sexual abuse unit of Mahoning County Children's Services ("CSB"), testified that on January 13, 2015 she received her first referral concerning allegations that L.J., Appellant's second child and only boy, was the victim of emotional and physical abuse. (Trial Tr., pp. 197-198.) Davis received a total of six referrals over the course of the two-week period from January 13, 2015 to January 26, 2015. (Trial Tr., p. 207.) Davis testified that the identity of a reporter cannot be disclosed, but that some of the referrals were made by mandatory reporters. Mandatory reporters are individuals in

a position of trust who are obligated to report any concerns regarding a child's welfare to CSB. (Trial Tr., p. 401.)

{¶6} Davis made an unannounced visit to Appellant's residence that same day, where she thought she heard movement and voices in the house, but no one answered the door. Davis left her card in the mailbox. (Trial Tr., p. 198.) She returned within the hour with Kenny Bledsoe, a Mahoning County Sheriff's Deputy assigned to CSB to investigate allegations of child abuse and neglect. Bledsoe identified himself as a law enforcement officer, but again no one answered the door. The earlier correspondence and Davis' card had been removed from the mailbox, so Davis left a second card. (Trial Tr., p. 200.)

{¶7} The following day, January 14, 2015, Davis telephoned Appellant but received no answer. She left a voicemail, introducing herself and requesting a return call. Davis also sent a letter to the residence requesting that Appellant contact CSB.

{¶8} On January 16, 2015, Davis contacted L.J.'s school. She was informed that L.J. had been admitted to the partial program at Belmont Pines. (Trial Tr., p. 201.) Belmont Pines is a residential treatment center for children, but the facility also offers a partial program, which allows children to undergo treatment from 8 a.m. - 4 p.m. or from 9 a.m. – 5 p.m., then return home at the end of the day. (Trial Tr., pp. 202, 211.)

{¶9} That same day, Davis made a third unannounced visit to Appellant's residence, this time accompanied by Sergeant Robert Smith, another Mahoning County Sheriff's Deputy assigned to perform investigations of child abuse and neglect at CSB. Davis and Smith spent roughly one half of an hour with Appellant. Appellant's other three children, I.C., J. (LNU), and Q.J. were present. (Trial Tr., p. 202.) Appellant told

Davis and Smith that L.J. "cause[ed] trouble at home" and "he would try burning the home down" so she had him admitted to the partial program at Belmont Pines. (Trial Tr., p. 333.) At the conclusion of the interview, Davis requested Appellant's permission, as required by law, to interview L.J. at Belmont Pines. (Trial Tr., p. 202.)

{¶10} Davis returned to Appellant's home on January 20, 2015 for a tour of the residence, then traveled to Belmont Pines to interview L.J. She described his demeanor as shy, timid, and hesitant to speak. He was disheveled and reluctant to make eye contact. Davis took photographs of L.J. to document marks and bruises on his body. Davis later admitted on cross-examination that L.J. became self-injurious when angry. (Trial Tr., p. 302.) L.J. was prescribed Risperdal at Belmont Pines. (Trial Tr., p. 399.)

{¶11} Unbeknownst to Davis, Q.J. had been admitted to the partial program at Belmont Pines that same day. Q.J. was also prescribed medication, which was not identified at trial. (Trial Tr., p. 399.) The prescription was stopped when Q.J.'s bloodwork revealed potentially dangerous side effects of the drug. (Trial Tr., p. 408.)

{¶12} Davis contacted Appellant by telephone the following day, January 21, 2015, to discuss allegations made in the referrals as well as allegations made by L.J. during his interview. (Trial Tr., p. 204.) According to a referral, Appellant placed L.J. on "slave punishment." (Trial Tr., p. 276.) Appellant confirmed that L.J. was confined to his room when he was disciplined and remained there "until he gets his act right." (Trial Tr., p. 204.) She also confirmed that he was fed only grits, which he does not like, and "[i]f he doesn't eat the grits and throws up that's on him." (Trial Tr., p. 205.) Appellant

denied having locks on the children's doors, but confirmed that she put bells on their doors so she could hear the children if they tried to leave their rooms.

{¶13} When asked if L.J. was ever stripped naked and left in his room, Appellant told Davis that L.J. was only left naked in his room one time in December of 2014. (Trial Tr., p. 226.) Appellant explained that L.J. was stripped to prevent him from urinating on his clothes. Appellant told Davis that L.J. regularly urinated on himself. (Trial Tr., p. 276.) L.J. conceded to Davis that his clothes were taken that day to prevent him from urinating on them. (Trial Tr., p. 304.)

{¶14} Finally, Appellant told Davis that L.J. gets nothing in his room when he is being punished. During Davis' tour on January 20, 2015, she observed that L.J.'s room contained a wooden bed frame with a mattress and one sheet. There was a dresser with all of the drawers removed and a television. (Trial Tr., p. 206.)

{¶15} Appellant explained that L.J. and Q.J. frequently misbehaved and were often destructive. She told Davis that L.J. and Q.J. almost set the house on fire. (Trial Tr., p. 276.) In fact, the children were playing with a ball that landed on the stove and caught fire. (Trial Tr., p. 283.) Appellant told Davis that L.J. and Q.J. dug a hole in the mattress in L.J.'s room. (Trial Tr., p. 295.)

{¶16} The next day, January 22, 2015, Davis contacted Amy Bowers, a counselor at Belmont Pines, and Kenneth Moore, a counselor at Churchill Counseling, who both expressed concern for the welfare of the children. (Trial Tr., pp. 207-208.) Bowers testified that Appellant told her on January 20, 2015 that L.J. was compliant with his medication, but that it was not working. Appellant stated that L.J. continued to

urinate and soil himself, and steal things. Bowers was alarmed when L.J. confided that his door was locked and Appellant would not let him out of his room. (Trial Tr., p. 400.)

{¶17} Davis received another referral on January 23, 2015, and she and her supervisor made an unannounced visit at the residence but no one answered the door. (Trial Tr., p. 208.) Appellant telephoned Davis later that day. She was exasperated that CSB was still involved, and made an appointment to talk with Davis and her supervisor at the agency on Monday, January 26, 2015. Appellant did not cancel the appointment but did not appear for this appointment. (Trial Tr., p. 209.)

{¶18} That same day, Davis received the sixth and final referral regarding alleged emotional and physical abuse in Appellant's home. (Trial Tr., p. 210.) Bowers reported that there was a drastic change in the children's appearance from Friday, January 23, 2015 to Monday, January 26, 2015. (Trial Tr., pp. 337-338.) She testified that L.J. looked pale, slow, and lethargic after the weekend. (Trial Tr., p. 403.)

{¶19} As a consequence, Davis and Smith interviewed the children at Belmont Pines without Appellant's permission. A child may be interviewed without parental consent in Ohio when CSB officials believe the child is in immediate danger or is being intimidated. According to Davis' testimony, L.J. disclosed emotional and physical abuse inflicted by Appellant and her boyfriend, "Dollah," later identified as Albert Barnette. (Trial Tr., p. 211.) Q.J. reported that she had been recently beaten with a belt. (Trial Tr., p. 288.)

{¶20} Photographs were taken of marks and bruises on both children, which, according to Davis, confirmed the alleged physical abuse. (Trial Tr., pp. 211-213.) All

of the photographs offered at trial were of poor quality, which made it difficult to discern the children's injuries.

{¶21} During their interviews, both children disclosed that Appellant and Barnette showed them videos of children being beaten and killed in jail. Appellant and Barnette told the children that they would be beaten and possibly killed if they cooperated with CSB. (Trial Tr., pp. 212-213.)

{¶22} At the conclusion of the interview, Smith invoked Juv.R. 6, which authorizes a law enforcement officer to place a child in the custody of CSB. (Trial Tr., p. 215.) According to Davis' testimony, the children expressed concern about being harmed in foster care, but when they learned that they would not be returning to Appellant's home, "[t]hey were dancing around the agency." (Trial Tr., p. 216.)

{¶23} When Davis informed Appellant that the children were being taken from her, she responded, "I hope the foster parents can deal with them." During that telephone call, Appellant confirmed that she showed L.J. and Q.J. videos depicting violence toward children. (Trial Tr., pp. 216-218.)

{¶24} Appellant did not offer to pack clothing or medication for either child. Because foster care is a last resort, Appellant was asked if any relatives or friends were able to care for the children. She said there was no one. After some investigation, Davis was able to located several family members willing to care for the children. (Trial Tr., p. 218.) However, L.J. and Q.J. were ultimately placed together in foster care and never returned to Appellant's custody. (Trial Tr., p. 224.)

{¶25} Following the Juv.R. 6 hearing, Appellant was informed that I.C. and J (LNU) would be removed from her home as well. Appellant wept and asked if her

grandfather could care for the children in her stead. (Trial Tr., p. 221.) After a brief time in foster care, and following a second court hearing, I.C. and J (LNU) were returned to Appellant's custody. During a follow up visit, Davis learned that L.J.'s room was given to J (LNU). (Trial Tr., p. 223.) The room was filled with clothes and toys, and contained a new bed.

{¶26} At a home visit on February 10, 2015, Appellant gave Davis a prescription belonging to L.J. (Trial Tr., p. 223.) Davis testified that the children did not act out in foster care, and that L.J. was properly medicated. (Trial Tr., pp. 224-225, 276.) L.J. was ultimately placed with his biological father, Q.J. was placed with her godmother. (Trial Tr., p. 228.) Q.J.'s godmother testified that Q.J. was prescribed Concerta for Attention Deficit Hyperactivity Disorder and was doing well. (Trial Tr., p. 449.)

{¶27} Appellant was interviewed by Smith as a part of the criminal investigation. According to Smith's testimony, Appellant told him that L.J.'s confinement typically lasted three days. (Trial Tr., pp. 342-343.) L.J. often stole food from the kitchen, which he hid in the bathroom or in the hole in his mattress. Appellant claimed that she did not have enough money for food, so the children would be given one serving of the main meal, and then oatmeal if they were still hungry. (Trial Tr., pp. 343-344.)

{¶28} Smith testified that Appellant bragged to him that she wore expensive clothes. A photograph was offered into evidence by the state depicting Appellant carrying several department store shopping bags, with the caption "spoiled" taken from her Facebook page. (Trial Tr., pp. 345-347.) Smith further testified that Appellant identified her boyfriend as "Bill Jones," and that it was only through You Tube videos and Facebook posts that he was able to correctly identify Barnette. Appellant and

Barnette are aspiring rap artists, who post videos under the pseudonyms, "Dollar Dennaro" and "Queen Yola." (Trial Tr., pp. 349-350.)

{¶29} Todd Morris, the principal at Wilson Elementary, testified at trial. Wilson is a special education school for emotionally disturbed children, but also accepts students with behavioral problems. (Trial Tr., p. 425.) Morris acknowledged that L.J. and Q.J. were transferred from Harding Elementary School, where they were the subject of dozens of disciplinary reports. (Trial Tr., p. 438.) It is not entirely clear from the record when the children transferred to Wilson, however, based on a question posed by defense counsel, it appears that they began attending Wilson in the fall of 2014.

{¶30} Wilson operates on a point system. Points are assigned throughout the day, and students are assigned a goal of 200 points. Point totals are reported to the parents each day as a way to communicate each student's daily behavior.

{¶31} Morris testified that L.J. and Q.J. did not want to go home on days when they did not accumulate 200 points. L.J. would panic and have to be carried to the bus. L.J. objected so strenuously to returning home with fewer than 200 points that Morris decided to "just give him the 200 points." The same was done for Q.J. (Trial Tr., p. 430.)

{¶32} Morris became concerned when he noticed that L.J. was absent for seven days in November. Morris then lost track of L.J.'s attendance because there were roughly eleven snow days around the holidays. (Trial Tr., pp. 431-434.) At this same time, Q.J. described some of the events occurring at home to an educational assistant at the school. (Trial Tr., p. 435.)

{¶33} L.J., Q.J., and their oldest sister, I.C. testified at trial. L.J. testified that he was now ten years of age and in the fifth grade at Hubbard Middle School. L.J. was punished frequently when he lived with Appellant, particularly when he did not accumulate 200 points at school on a particular day. (Trial Tr., p. 454.) When he was being punished, he did not attend school. (Trial Tr., p. 464.) Some days he would get a "whooping" with a belt, and other days he would have to perform physical exercise. He described holding the plank position until his arms hurt. (Trial Tr., p. 455.)

{¶34} L.J. testified that he was often sent to his room, which contained only a mattress, a television that did not work, and a bed frame. He was required to relieve himself in a bucket, which he put in the closet so that the odor would not fill the bedroom. (Trial Tr., p. 456.) He was fed oatmeal, and sometimes grits with meat, which he refused to eat. As a consequence, he resorted to stealing other food. (Trial Tr., pp. 456-457.)

{¶35} Although L.J. testified that "[i]t felt like months" when he was confined to his room, he gave no actual estimate of the time he spent there. (Trial Tr., p. 483.) He said that he would have to go straight to his room after school. (Trial Tr., p. 484.) On cross-examination, L.J. testified that he was given breakfast, lunch, and dinner, even when he was confined to his room. (Trial Tr., p. 490.)

{¶36} L.J. testified that his room was cold because he and Q.J., who was also disciplined with confinement in L.J.'s room, made a hole in the plastic covering the window in his room. They would be given a blanket if it was especially cold in the room. (Trial Tr., p. 459.) L.J. testified that they made a hole in the plastic because they were

trying to escape. (Trial Tr., p. 463.) He also testified that he dug a hole in his mattress because he "wanted to know what was in there." (Trial Tr., p. 485.)

{¶37} L.J. and Q.J. were occasionally forced to sleep in the basement, which they called the "spider room." He was also forced to do push-ups there. L.J. testified that his other punishments included wearing girls' clothes and having a shaved head or a Mohawk. (Trial Tr., p. 458.) Neither he nor Q.J. received any Christmas presents in 2014. (Trial Tr., p. 460.) He testified that they were summoned from his room on Christmas morning to watch I.C. and J (LNU) open their presents.

{¶38} On cross-examination, L.J. conceded that he still gets into a great deal of trouble at school. He argues with a boy he described as the "biggest bully in the class." (Trial Tr., p. 467.) L.J. acknowledged that he has difficulty paying attention, has outbursts in class, and is a little fidgety. (Trial Tr., p. 469.)

{¶39} L.J. testified on cross-examination that his room at Appellant's residence was full of clothes and toys, but when he began misbehaving in the summer of 2014, Appellant started removing items from his room. (Trial Tr., p. 476.) L.J. admitted that he fought with Q.J. and threatened to hurt her. (Trial Tr., p. 489.) He had also threatened to kill people, specifically a girl at his bus stop. (Trial Tr., pp. 489-490.) L.J. admitted that he had stabbed himself with a fork because he was angry about being confined to his room. (Trial Tr., p. 494.) L.J. intentionally urinated on the bed out of anger. (Trial Tr., pp. 487-488.)

{¶40} Q.J. was nine years of age and in the fourth grade at Wilson when she testified. Q.J. was also confined to L.J.'s room for misbehaving in school. (Trial Tr., p. 499.) She and L.J. were forced to use a bucket to relieve themselves. (Trial Tr., p.

509.) Appellant would feed them oatmeal and grits, so L.J. would sneak out of his room to get other food. (Trial Tr., p. 501.) Barnette made them perform physical exercise as a form of punishment. As an example, she and L.J. were made to hold books until their arms tired. (Trial Tr., p. 503.) She spent one evening on a mattress in the spider room, and got hit with a belt on more than one occasion. (Trial Tr., pp. 503-504.)

{¶41} Q.J. testified that she and Appellant repeatedly watched a video called "Scared Straight." (Trial Tr., p. 507.) She was reluctant to report Appellant's behavior to her teachers for fear of reprisals by Appellant.

{¶42} On cross-examination, Q.J. conceded that food was always available but she did not eat. (Trial Tr., p. 514.) She testified that all that Appellant fed her was oatmeal and grits, all the time. (Trial Tr., pp. 515-516.) She did testify that there was a heater in L.J.'s room when it was cold. (Trial Tr., p. 500.)

{¶43} I.C. was twelve years of age, in the sixth grade at Hermitage Middle School, and living with her grandmother when she testified. She said that L.J. and Q.J. were frequently confined to L.J.'s room when they lived with Appellant. (Trial Tr., p. 520.) They were punished when they did not behave in school. (Trial Tr., p. 529.) I.C. testified that Q.J. was frequently confined to L.J.'s room. When asked if L.J.'s confinement was an "everyday occurrence," I.C. responded, "[k]ind of." (Trial Tr., p. 529.)

{¶44} She confirmed that L.J. and Q.J. were fed grits and oatmeal when they were confined to L.J.'s room, and that they were forced to relieve themselves in a bucket. (Trial Tr., p. 522.) She also confirmed that L.J. and Q.J. were forced to perform physical exercise as a form of punishment, including push-ups and holding heavy

books, sometimes in the spider room. (Trial Tr., pp. 523-525.) I.C. testified that L.J. was stripped naked and confined to his room only one time. (Trial Tr., p. 524.) On cross-examination, she conceded that L.J. and Q.J. were permitted to eat at the table, even when they were confined to L.J.'s room. (Trial Tr., p. 532.)

{¶45} We will address Appellant's assignments of error out of order for the sake of clarity.

Analysis

ASSIGNMENT OF ERROR NO. 2

THE EVIDENCE WAS INSUFFICIENT TO CONVICT THE DEFENDANT OF "ENDANGERING CHILDREN" PURSUANT TO R.C. 2919.22.

ASSIGNMENT OF ERROR NO. 3

THE APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST OF THE WEIGHT OF THE EVIDENCE.

{¶46} Because Appellant's second and third assignments of error call into question the sufficiency and weight of the evidence adduced at trial, we will address them together to avoid repetition. "When a court reviews a record for sufficiency, '[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' " *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 146, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

{¶47} In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 119. "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence." *Thompkins* at 387, 678 N.E.2d 541.

{¶48} The weight to be given to the evidence and the credibility of the witnesses are nonetheless issues for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967). The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997).

{¶49} Here, Appellant was convicted and sentenced on counts one and two for administering corporal punishment or other physical disciplinary measures, or physically restraining L.J. and Q.J. in a cruel manner or for a prolonged period. This punishment, discipline, or restraint was excessive under the circumstances and created a substantial risk of serious physical harm to the children. R.C. 2919.22(B)(3), (E)(1)(3).

{¶50} There is no question that the evidence in the record establishes a pattern of corporal punishment, other physical disciplinary measures, and physical restraint in a cruel manner or for a prolonged period of time. Both L.J. and Q.J. testified that they

were beaten with a belt. Davis testified that marks and bruises on their bodies were consistent with beatings. Three of the children, including I.C., testified that L.J. and Q.J. were forced to perform physical exercise to the point of pain. They also testified that Q.J., and to a greater degree, L.J., were frequently confined to a bare room with a single blanket, or were forced to sleep in the basement. In fact, I.C., the oldest of the children, testified that confinement was "[k]ind of" an everyday occurrence for L.J. Further, all three children testified that L.J. and Q.J. were not permitted to use the toilet, relying instead on a bucket that L.J. put in his closet to prevent the stench of urine and feces from filling the bedroom.

{¶51} Appellant's methods were clearly excessive, based not only on the consistent nature of the punishment, but on the unique circumstance that both L.J. and Q.J. were suffering from behavioral and emotional problems. Appellant should have recognized that her methods of discipline were ineffective not only because they were harsh or inconsistently imposed, but also because L.J. and Q.J. do not have the same mental and psychological ability to process information.

{¶52} Finally, Davis, Smith, and Bowers testified that the physical punishments, sensory deprivation, and withholding of food manifested themselves in L.J. and Q.J.'s physical appearance. Bowers reported that the children were noticeably weak and pale when they returned to Belmont Pines on January 26, 2015, after spending more than 48 hours in Appellant's care. While it is clear that Appellant provided oatmeal and grits to the children, the fact that they chose not to eat it in no way vindicates her actions. She was solely responsible for their health and well-being. She abandoned her role as their primary caretaker in the name of discipline that was as ineffectual as it was cruel.

Based on the forgoing, we conclude that there was sufficient evidence in the record to support Appellant's convictions.

{¶53} Likewise, the evidence supports Appellant's convictions, under counts three and four, that Appellant repeatedly administered unwarranted disciplinary measures to the children and that there was a substantial risk that such conduct, if continued, would seriously impair or retard the children's mental health or development. R.C. 2919.22(B)(4), (E)(1)(3).

{¶54} The major distinction between the two subsections rests on the type of harm potentially suffered by the children. Under subsection (B)(4), Appellant's disciplinary measures need not be extreme, but, instead, repetitious and unwarranted. A conviction turns on whether there is a substantial risk that Appellant's continued conduct would seriously impair or retard the children's mental health or development, rather than any impact on their physical health.

{¶55} The record reveals sufficient evidence of the serious impairment of the children's mental health or development. The testimony established that both children were afraid to disclose Appellant's disciplinary methods, because they had been told that they would be beaten or killed in foster care. The children demonstrated so much fear and anxiety about returning home after school each day if they did not accumulate 200 good behavior points that school policy was suspended for them. L.J. testified that he stabbed himself with a fork because he was so frustrated by his confinement, and that he and Q.J. put a hole in the window cover because they were trying to escape. The foregoing testimony from two elementary school children is sufficient evidence to

support Appellant's conviction. It reflects that her continued conduct would seriously impair or retard the children's mental health or development.

{¶56} Turning to the weight of the evidence, defense counsel attempted to discredit the witnesses' testimony at trial. In his opening argument, defense counsel asserted that Appellant's reluctance to medicate her children made her a target of CSB. He further argued that the children were defiant, and resented Appellant's discipline. He claimed that the children were brainwashed by CSB to believe that they were abused.

{¶57} However, Morris' testimony established that the children were panicked when the school day was complete and they did not accumulate 200 good behavior points. L.J. had to be carried to the bus. The children's fear of Appellant's home was so apparent that Morris chose to override school policy in order to quiet them and convince them to return home. Morris' testimony regarding the children's state of mind corroborates the testimony of the children, as well as the testimony of the state's other witnesses. Because Appellant has offered no reason for us to conclude that the jury lost its way in crediting the testimony of the state's witnesses, we find that the manifest weight on the evidence supports Appellant's convictions.

{¶58} In summary, we find that there was sufficient evidence to support Appellant's convictions, and that the manifest weight of the evidence supported the jury's verdicts. Accordingly, we find that Appellant's second and third assignments are meritless.

ASSIGNMENT OF ERROR NO. 4

> DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT IMPOSED MULTIPLE SENTENCES WITHOUT A DETERMINATION AS TO WHICH OF THE TWO OFFENSES SHOULD MERGE.

{¶59} The fourth assignment of error does not clearly state the basis for Appellant's claimed due process challenge to the trial court's sentence. In her appellate brief, Appellant argues that the trial court usurped the role of the state when it selected the counts on which she was sentenced following her conviction.

{¶60} At the sentencing hearing, the prosecutor said, "the State today is going to agree that Counts One and Three would merge for purposes of sentencing, as would Counts Two and Four." (Sentencing Hrg. Tr., p. 2.) The trial court later parroted the state's words, saying, "[t]he Court further finds that Counts One and Three will merge together, as will Counts Two and Four." (Sentencing Hrg. Tr., p. 9.) The trial court imposed the following sentences:

> [O]n Counts One and Three, which merge together, the defendant will be sentenced to 36 months in the Department of Rehabilitation and Corrections. On Counts Two and Four, the defendant will be sentenced to 36 months in the Department of Rehabilitation and Corrections, consecutive to the sentence imposed on Count One.

(Sentencing Hrg. Tr., p. 10.)

{¶61} This records shows that neither the state nor the trial court specifically identified the counts on which Appellant was sentenced at the sentencing hearing. Only

the judgment entry of sentence establishes that Appellant was sentenced on counts one and two, violations of R.C. 2919.22(B)(3), (E)(1)(3).

{¶62} The general assembly has determined that for merger purposes, it is the state that chooses which of the allied offenses to pursue at sentencing. *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 16, 43. When the state elects which of two allied offenses on which to seek sentencing, the court must accept the state's choice and merge the crimes into a single conviction for sentencing purposes. *Id.* at ¶ 42.

{¶63} The Ohio Supreme Court announced the proper procedure for courts of appeal to follow after finding reversible error with regard to sentences imposed for allied offenses of similar import in *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶ 1, 11, 14. The Court held that where the appellate court finds merger is required, it must remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against the defendant. *Id*. at ¶ 25.

{¶64} It appears from this record that the state has waived its right to elect which of two allied offenses will be used for sentencing purposes. The state did not object to the trial court's failure to identify the specific counts on which Appellant was sentenced, nor to the trial court's usurpation of the state's power to select the offenses on which to sentence. An appellate court is not required to resolve an alleged error if it was never brought to the attention of the trial court "at a time when such error could have been avoided or corrected by the trial court." *State v. Carter*, 89 Ohio St.3d 593, 598, 2000-Ohio-172, 734 N.E.2d 345.

{¶65} In the absence of objection, we may only examine the court's actions for plain error. *Id.* Plain error should be used "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-Ohio-68, 759 N.E.2d 1240.

{¶66} Here, Appellant has not demonstrated that she suffered any prejudice as a result of the trial court's selection of the counts on which she was sentenced. Appellant was subject to the same penalties on all of the counts for which she was indicted. The state conceded at oral argument that the trial court's error was harmless. Insofar as Appellant has suffered no prejudice, and the state has admitted that no plain error occurred, we find that Appellant's fourth assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 1

> APPELLANT'S SENTENCE IS CONTRARY TO LAW AND THE RECORD DOES NOT SUPPORT THE IMPOSITION OF CONSECUTIVE SENTENCES.

{¶67} In reviewing a felony sentence, "an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1.

{¶68} R.C. 2929.14(C)(4) requires a trial court to make specific findings when imposing consecutive sentences:

> (4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison

> terms consecutively if the court finds that the consecutive sentence is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶69} Although the trial court is not required to recite the statute verbatim or utter "magic" or "talismanic" words, there must be an indication that the court found: (1) that consecutive sentences are necessary to protect the public from future crime or to punish the offender, (2) that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger posed to the public, and (3) one of the findings described in R.C. 2929.14(C)(4)(a), (b), or (c). *State v. Bellard*, 7th Dist.

No. 12-MA-97, 2013-Ohio-2956, ¶ 17. The court need not give its reasons for making those findings. *State v. Power*, 7th Dist. No. 12 CO 14, 2013-Ohio-4254, ¶ 38.

{¶70} The Ohio Supreme Court has held that the trial court must make its findings at the sentencing hearing and not simply in the sentencing judgment entry alone:

> 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, but it has no obligation to state reasons to support its findings.

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

{¶71} The Court stressed the importance of making the findings at the sentencing hearing, noting this gives notice to the offender and to defense counsel. *Id.* at ¶ 29. And while the trial court should also incorporate its statutory findings into the sentencing entry, the court's inadvertent failure to do so is merely a clerical mistake and does not render the sentence contrary to law. *Id.* at ¶ 30. The proper remedy is for the trial court to issue a *nunc pro tunc* judgment entry to reflect what actually occurred in open court. *Id.*

{¶72} The transcript of the sentencing hearing must make it "clear from the record that the trial court engaged in the appropriate analysis." *State v. Hill*, 7th Dist. No. 13 CA 82, 2014-Ohio-1965, ¶ 27. However, "[p]ost-*Bonnell*, [this Court] may liberally review the entire sentencing transcript to discern whether the trial court made the requisite findings." *State v. Fleeton*, 7th Dist. No. 15 MA 180, 2016-Ohio-5484, ¶ 17.

{¶73} At the sentencing hearing, the trial court stated:

> The Court further finds that given the age of the children and the evidence the Court heard from the trial, that it is necessary to protect the public from future crime from this defendant, and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct.
>
> The Court further finds that these offenses were committed as part of a course of conduct, and the harm caused to a child of such tender age is so great that no single prison term for any of the offenses committed adequately reflects the seriousness of the offender's conduct.

(Sentencing Hrg. Tr., p. 9.)

{¶74} Appellant complains that, "[a]lthough the court quoted the statutory findings required for imposing consecutive sentences, there was no reasoning given to support them." (Appellant's Brf., p. 11.) However, the trial court need only "engage[] in the appropriate analysis," *Hill*, *supra*, and not required to provide a rationale for its sentence. *Power*, *supra*.

{¶75} Appellant also urges that, "[e]ven if the court makes all of the findings during the sentencing hearing, they would not be supported by the record. The harm in this case was not so great that concurrent terms would not adequately reflect the seriousness of the conduct involved." (Appellant's Brf., p. 12.) Appellant seeks to have us examine her disciplinary measures in a piecemeal fashion, in order to conclude that each act on its own was not serious. However, based upon Appellant's disciplinary tactics over the course of the three months at issue in the indictment, this record reveals that consecutive sentences are warranted to protect the public, and that they are not disproportionate to the seriousness of her conduct. Appellant's first and foremost

concern as a mother should have been her children's physical and mental health. She clearly abandoned her role as the primary caretaker for two children under the age of ten, in the name of discipline that proved from the outset to be as ineffectual as it was cruel. Moreover, although the record does not show that she was necessarily a danger to the entire public at large, she was certainly a threat to the remaining children in her care. Up to the date of trial, Appellant's other two children had apparently not exhibited the behavioral problems for which she "disciplined" L.J. and Q.J. Nonetheless, there is a distinct possibility that I.C. and J (LNU), like most children, may develop problems in the future for which Appellant has demonstrated a complete inability to handle and redress. Appellant's first assignment of error lacks merit, and the imposition of consecutive sentences is not contrary to law.

{¶76} However, although Appellant did not challenge the judgment entry of sentence in this appeal, we have determined that an error does exist in the trial court's sentencing on this matter.

{¶77} Despite numerous remands on this same issue by this Court, the trial court has continued the practice of restating the entirety of the statutory language in the sentencing entry instead of complying with the statute's conditional language and documenting its actual findings as required by *Bonnell*, *supra*. See, e.g. *State v. Toney*, 7th Dist. No. 16 MA 0124, 2017-Ohio-9384, ¶ 20, citing *State v. Williams*, 7th Dist. No. 16 MA 0041, 2017-Ohio-856, ¶ 20. We repeat here that a "finding" by its very nature cannot contain conditional language, and that the trial court must memorialize its findings made at the sentencing hearing in the judgment entry of sentence. Even though the trial court's *verbatim* recitation of the sentencing statute can no longer be

described as “inadvertent” or a “clerical error”, this matter is remanded only for the entry of a *nunc pro tunc* judgment entry of sentence documenting the trial court’s findings with respect to R.C. 2929.14(C)(4) and pursuant to law.

Conclusion

{¶78} For the foregoing reasons, Appellant’s convictions and sentence are affirmed in part, reversed in part only as to the language used in the judgment entry to support the consecutive sentencing findings, and remanded solely for the entry of a *nunc pro tunc* judgment entry of sentencing memorializing the trial court’s findings at the sentencing hearing regarding the imposition of consecutive sentences.

Donofrio, J., concurs.

Robb, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed in part, reversed in part only as to the language used in the judgment entry to support the consecutive sentencing findings, and remanded solely for the entry of a *nunc pro tunc* judgment entry of sentencing memorializing the trial court's findings at the sentencing hearing regarding the imposition of consecutive sentences. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.