[Cite as *State v. Perez,* 2022-Ohio-1124.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JUAN D. PEREZ,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 21 MA 0058

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2020 CR 236

BEFORE:
Carol Ann Robb, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor, Atty. Edward A. Czopur, Assistant Mahoning County Prosecutor, Mahoning County Prosecutor's Office, 21 West Boardman St., 6th Floor, Youngstown, Ohio 44503 for Plaintiff-Appellee and

Atty. Nicholas S. Cerni, 755 Boardman Canfield Rd., Suite M-1, Youngstown, Ohio, 44512 for Defendant-Appellant.

Dated: March 29, 2022

Robb, J.

{¶1} Defendant-Appellant Juan D. Perez appeals after being sentenced on three counts of sexual battery by the Mahoning County Common Pleas Court upon his guilty plea. He contends the counts should have been merged into one conviction before sentencing. He also argues consecutive sentences were unsupported by the record. For the following reasons, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} On May 19, 2020, Appellant was indicted for offenses against the sixteen-year-old daughter of his fiancée occurring on the morning of December 14, 2019. Along with three counts of rape, he was indicted for three counts of sexual battery, third-degree felonies in violation of R.C. 2907.03(A)(5) (sexual conduct by a person in loco parentis).

{¶3} On April 1, 2021, the state dismissed the three rape counts in exchange for Appellant's plea of guilty to the three sexual battery counts. Appellant was informed the maximum prison sentence was five years on each count. As part of the plea agreement, the state would recommend a total of twelve years in prison while Appellant would argue for a lesser sentence.

{¶4} At sentencing, the prosecutor said Appellant was living with the victim and her mother when the victim reported the following events: the mother was at work when Appellant forced the victim to drink alcohol which he bought to celebrate their birthdays (he turned 45 and she turned 16); the victim went to her bed feeling sick; Appellant followed her; and he made her perform oral sex on him, vaginally penetrated her, and anally penetrated her while she cried, screamed, and asked him to stop.

{¶5} The victim thereafter called 911 and was taken to the hospital. Fissures were visible near her vagina and anus. Appellant's DNA matched the anal and pubic hair swabs collected at the hospital. Within days, Appellant quit his job and moved to Puerto Rico; he had to be returned from there. The state described Appellant as a predator who was a danger to those he befriended and a danger to the community.

{¶6} Defense counsel argued the offenses should be merged, characterizing them as one incident. It was pointed out that Appellant was remorseful and pled guilty so the victim and her mother would not have to go through a trial (where he apparently would have disputed penetration). Counsel also emphasized Appellant's minimal criminal record. Appellant apologized.

{¶7} The trial court considered the purposes and principles of sentencing, the seriousness and recidivism factors, the presentence investigation (PSI), and the victim impact statement from the victim's mother, which was marked as an exhibit. Denying the request for merger, the court found three separate acts with a separate animus for each. (Sent.Tr. 16). Consecutive sentence findings were made, including that the offenses were committed as a part of one or more courses of conduct and the harm caused was so great or unusual that no single prison term would accurately reflect the seriousness of the conduct. (Sent.Tr. 17). The court imposed four years on each offense to run consecutively (for a total sentence of twelve years as recommended by the state). (Sent.Tr. 16); (6/18/21 Amend. J.E.). The within appeal followed.

ASSIGNMENT OF ERROR ONE: MERGER

{¶8} Appellants sets forth two assignments of error, the first of which contends:

"THE TRIAL COURT ERRED WHEN IT FAILED TO MERGE THE THREE COUNTS FOR PURPOSES OF SENTENCING."

{¶9} Appellant argues the court should have merged the three sexual battery counts into one conviction, claiming there was no evidence of separate acts or separate animus. The state urges the oral, vaginal, and anal penetrations were distinct acts of sexual conduct which are not subject to merger, citing various appellate cases on the subject. *See, e.g., State v. Accorinti*, 12th Dist. Butler No. CA2012-10-205, 2013-Ohio-4429, ¶ 13 (describing this as "well-established principle"), quoting *State v. Daniels*, 9th Dist. Summit No. 26406, 2013-Ohio-358, ¶ 9 ("different forms of forcible penetration constitute separate acts of rape for which a defendant may be separately punished"). The state points out: "Each act is a further denigration of the victim's integrity and a further danger to the victim." *State v. Barnes*, 68 Ohio St.2d 13, 19, 427 N.E.2d 517 (1981) (Celebrezze, J., concurring).

{¶10} The parties agree we review the trial court's merger decision de novo. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 26. The constitutional double jeopardy protection against multiple punishments for the same offense is codified in R.C. 2941.25. *In re A.G.*, 148 Ohio St.3d 118, 2016-Ohio-3306, 69 N.E.3d 646, ¶ 11; *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 10, 12. This statute provides:

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

R.C. 2941.25.

{¶11} In the cited *Barnes* case, three defendants (all named Barnes) were each convicted of two rape counts for forcing a woman to perform oral sex and then submit to vaginal sex. The appellate court held merger was required, opining the sexual conduct resulting in two offenses of the same or similar kind was not committed separately or with a separate animus as to each under R.C. 2941.25(B). The Supreme Court disagreed and reinstated the second rape conviction for each defendant. The Court pointed out: "In Ohio, either vaginal intercourse or fellatio constitutes separate sexual conduct, each punishable as rape * * *." *Barnes*, 68 Ohio St.2d at 14, fn. 1, citing R.C. 2907.01(A) (defining sexual conduct in pertinent part as "vaginal intercourse between a male and female; anal intercourse, fellatio * * * Penetration, however slight, is sufficient to complete vaginal or anal intercourse").

{¶12} The Supreme Court later maintained the principle in *Barnes*, holding: "[The defendant] was charged with three separate crimes involving distinct sexual activity: vaginal intercourse, cunnilingus, and digital penetration of the vaginal cavity of [the victim]. Since each constitutes a separate crime with a separate animus, they do not

constitute allied offenses of similar import." *State v. Nicholas*, 66 Ohio St.3d 431, 435, 613 N.E.2d 225 (1993).

{¶13} The justice quoted by the state here concurred in the *Barnes* case in order to add observations about the need to re-position the victim to effect the different types of intercourse and the factual distinction between the nature of an unlawful oral penetration versus an unlawful vaginal penetration. *See Barnes*, 68 Ohio St.2d at 17-18 (Celebrezze, J., concurring). It was pointed out, "the victim was exposed to a different kind, not merely a different degree, of injury, pain, danger, fear and humiliation from the vaginal penetration than from the oral penetration." *Id.* at 18. This justice also reasoned: "If this court were to identify only one rape offense for each defendant, we would, in effect, be issuing a license to rape. The appellate court's philosophy, enables a rapist, after the first penetration, to commit two or three rapes for the penal price of one." *Id.* at 18. Stated differently:

> Repeated acts of forcible sexual intercourse are not to be construed as a roll of thunder, -an echo of a single sound rebounding until attenuated. One should not be allowed to take advantage of the fact that he has already committed one sexual assault on the victim and thereby be permitted to commit further assaults on the same person with no risk of further punishment for each assault committed. Each act is a further denigration of the victim's integrity and a further danger to the victim.

Barnes, 68 Ohio St.2d at 19 (Celebrezze, J., concurring), quoting *Harrell v. State*, 88 Wis.2d 546, 565, 277 N.W.2d 462 (1979).

{¶14} This district has cited the Supreme Court's unanimous *Barnes* opinion and the additional concurring opinion for the proposition: "oral rape is distinct from anal rape, which is also distinct from vaginal rape. It is well-settled law that entry into separate orifices, or entry with separate body parts, constitutes separate acts of rape." *State v. Moore*, 161 Ohio App.3d 778, 2005-Ohio-3311, 832 N.E.2d 85, ¶ 88 (7th Dist.) (where the defendant was convicted of three counts of complicity to rape, this court rejected his merger arguments about sexual offenses occurring during one course of continuous conduct).

{¶15} The test for evaluating merger changed over the years but has returned to a factual inquiry. *Ruff*, 143 Ohio St.3d 114 at ¶ 30, 32 (there is no bright-line rule governing the comparison of the elements of the offenses, the offenses may have different import as an offense may be committed in a variety of ways, and thus, there may be "varying results for the same set of offenses in different cases"). Moreover, the analysis of separate conduct or animus in the aforecited cases remains applicable under the current merger precedent.

{¶16} In evaluating whether allied offenses must be merged into a single conviction under R.C. 2941.25(A), the court "must first take into account the conduct of the defendant. In other words, how were the offenses committed? * * * 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." *Id.* at ¶ 25-26. As explained in *Ruff*:

> If any of the following is true, the offenses cannot merge and the defendant may be convicted and sentenced for multiple offenses: (1) the offenses are dissimilar in import or significance—in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, or (3) the offenses were committed with separate animus or motivation.

Id. at ¶ 25.

{¶17} Post-*Ruff*, courts continue to hold: "The law in Ohio is clear that multiple separate and distinct acts of penetration will support multiple convictions and sentences, and oral, anal, and vaginal rapes constitute separate and distinct acts." *State v. Hall*, 6th Dist. Lucas No. L-17-1069, 2018-Ohio-619, ¶ 10 (if the defendant penetrated the victim "both anally and vaginally on one occasion, [then] two separate and distinct rapes were committed and two sentences were properly imposed"). *See also State v. Williams*, 5th Dist. Fairfield No. 2019 CA 00050, 2021-Ohio-797, ¶ 38 (engaging in vaginal intercourse and engaging in anal intercourse, even though committed close in time, are different sexual acts which were committed separately and are not allied offenses of similar import).

{¶18} "[R]ape involving different types of sexual activity, such as vaginal intercourse, digital penetration, and oral intercourse, arise from distinct conduct and are not considered allied offenses, even when committed during the same sexual assault."

State v. Townsend, 8th Dist. Cuyahoga No. 107186, 2019-Ohio-1134, ¶ 70. Likewise, the appellate court found three rape counts did not merge where the defendant vaginally raped the victim in the room where she was resting, let her use the bathroom, vaginally raped her again, and then raped her anally. *State v. Simpson*, 12th Dist. Butler No. CA2018-06-121, 2019-Ohio-1493, ¶ 14 (in part pointing to the "separate sexual conduct imposed upon a different part of her body").

{¶19} Regarding any suggestion of a lack of evidence on penetration, we emphasize that Appellant pled guilty to three counts of sexual battery containing the elements of sexual *conduct* by a person in loco parentis. R.C. 2907.03(A)(5). In other words, he admitted he was guilty of three offenses that require more than mere sexual *contact.* Rather, sexual conduct is defined as "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another." R.C. 2907.01(A) ("Penetration, however slight, is sufficient to complete vaginal or anal intercourse").

{¶20} The information relayed by the prosecutor during the merger arguments at the sentencing hearing and the information contained in and attached to the PSI describe three distinct types of sexual conduct contained in the definition statute: vaginal intercourse, anal intercourse, and fellatio. Notably, "no formal hearing is required, and the entire record—including the PSI and arguments and information presented at the sentencing hearing—may be considered in determining whether to merge multiple offenses at sentencing." *Hall*, 6th Dist. No. L-17-1069 at ¶11 ("Thus, the statement offered by the victim's mother and the information provided in the PSI may be considered in a merger analysis").

{¶21} Although not required, there was also evidence of repositioning and temporal breaks in the conduct. Appellant initially left the victim's bedroom after penetrating her anus and being told to stop because it hurt. When he returned, he forced the victim to perform oral sex on him. Then, he penetrated her vagina. There was also an indication that before she went to her room, he may have inserted his penis into her

mouth during a guessing-game while she was blindfolded. It appears the victim vomited after this incident and again after the initial anal penetration.

{¶22} This court could conclude the trial court correctly found the offenses represented three separate acts of sexual conduct. The conduct required for each offense was distinct, and each offense was committed separately. An unlawful penetration into a victim's vagina is much different conduct than an unlawful penetration into the victim's anus which are both also much different than an unlawful placement of a penis in a victim's mouth.

{¶23} We also note the vaginal and anal penetrations caused separate and identifiable physical harms which were discussed at sentencing and in the PSI documentation: fissures were discovered at both the vagina and the anus (and the anal penetration caused the victim to voice pain during the assault). Oral, vaginal, and anal sex when unlawfully performed also involve different risks and psychological effects that may be separately identifiable without being vocalized on the record at a plea or sentencing hearing.

{¶24} Additionally and alternatively, the trial court correctly found the offenses were committed with separate animus or motivation. The animus "must be inferred from the surrounding circumstances" with consideration of whether one act was merely incidental to another act or whether the allegedly incidental act had independent significance. *See generally State v. Logan*, 60 Ohio St.2d 126, 131, 397 N.E.2d 1345 (1979). Here, separate motivational scenarios can be inferred (e.g., initiating anal sex but stopping for a time due to objection, using oral sex as foreplay and/or re-stimulation or hoping she would actively perform, and then resorting to vaginal sex after the anal sex was too difficult). Even simpler, the animus behind each offense was separate as his motive for one offense was to have anal sex, his motive for a second offense was to receive fellatio, and his motive for a third offense was to receive vaginal intercourse.

{¶25} In conclusion, the trial court's alternative reasons for refusing to merge the three sexual battery offenses were not erroneous. This assignment of error is overruled.

ASSIGNMENT OF ERROR TWO: CONSECUTIVE SENTENCES

{¶26} Appellant's second assignment of error alleges:

"IT WAS AN ABUSE OF DISCRETION TO ORDER DEFENDANT-APPELLANT TO SERVE CONSECUTIVE SENTENCES."

{¶27} Appellant states the trial court abused its discretion in sentencing him to consecutive prison terms (four years on each of the three counts) claiming he engaged in a single episode of indiscretion which was not a course of conduct. Citing the purposes and principles of sentencing in R.C. 2929.11, Appellant claims the court failed to consider the likelihood of rehabilitation and failed to use minimum sanctions to achieve the sentencing goals. Citing R.C. 2929.12(E)(2)-(5), he contends the likelihood of recidivism was low as his criminal record was minimal, he led a law-abiding life for a significant number of years, this was an isolated incident which was not likely to recur, and he expressed remorse (while relieving the victim and her mother from taking the case through trial).[1]

{¶28} First, we point out in reviewing a felony sentence: "The appellate court's standard for review is not whether the sentencing court abused its discretion." R.C. 2953.08(G)(2). "[A]n 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. Notably,

> the clear and convincing standard used by R.C. 2953.08(G)(2) is written in the negative. It does not say that the trial judge must have clear and convincing evidence to support its findings. Instead, it is the court of appeals that must clearly and convincingly find that the record does not support the court's findings. In other words, the restriction is on the appellate court, not the trial judge. This is an extremely deferential standard of review.

State v. Venes, 8th Dist. Cuyahoga No. 98682, 2013-Ohio-1891, 992 N.E.2d 453, ¶ 21

{¶29} Next, we note the *Marcum* Court additionally said "it is fully consistent for appellate courts to review those sentences that are imposed solely after consideration of the factors in R.C. 2929.11 and 2929.12 under a standard that is equally deferential to

[1] Appellant says he has only one criminal conviction on his record, a misdemeanor charged in 2002. We note, however the PSI contained four convictions.

the sentencing court." *Id.* at ¶ 23. However, this statement has since been declared dicta and rejected. *State v. Jones*, 163 Ohio St.3d 242, 2020-Ohio-6729, 169 N.E.3d 649, ¶ 28.

{¶30} As the state points out, the Supreme Court in *Jones* decided a reviewing court cannot use subdivision (a) of R.C. 2953.08(G)(2) to review whether the record supports R.C. 2929.11 or R.C. 2929.12 findings as those statutes are not listed in (G)(2)(a). *Id.* at ¶ 27-29. Moreover, "neither R.C. 2929.11 nor 2929.12 requires a trial court to make any specific factual findings on the record." *Id.* at ¶ 20. The *Jones* Court concluded R.C. 2953.08(G) does not allow an appellate court to review whether the record supports the sentence under R.C. 2929.11 and R.C. 2929.12 as this would allow the appellate court to substitute its judgment for the trial court on the selection of a sentence. *Id.* at ¶ 30-32, 38-39, 41-42. And, the Court opined the statutory language "otherwise contrary to law" meant something other than an appellate court finding "the record does not support the sentence." *Id.* at ¶ 38. *See also State v. Toles*, __ Ohio St.3d __, 2021-Ohio-3531, __ N.E.3d __ (affirming based on *Jones* where a defendant argued the record did not support the findings of organized activity and no mitigating factors).

{¶31} Regardless, Appellant is challenging the consecutive nature of his sentences. *See generally State v. Gwynne*, 158 Ohio St.3d 279, 2019-Ohio-4761, 141 N.E.3d 169. The question of whether the record supports the consecutive sentence findings made under R.C. 2929.14(C) is reviewable under R.C. 2953.08(G)(2)(a). Again, this statute provides the appellate court can only reverse the sentence "if it clearly and convincingly finds" the record does not support the R.C. 2929.14(C) findings or is otherwise contrary to law. R.C. 2953.08(G)(2)(a)-(b). The consecutive sentence statute provides in pertinent part:

> If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following: * * *

> (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.

R.C. 2929.14(C)(4)(b). "In order to impose consecutive term 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.

{¶32} As acknowledged, the court set forth the above-quoted statutory consecutive sentence findings at the hearing and in the entry. Although the court was not required to set forth reasons to support those findings, various considerations were explained. The court also declared that it considered the purposes and principles of sentencing, the seriousness and recidivism factors, the statements at sentencing, the PSI, and the victim impact statement from the victim's mother.

{¶33} The court pointed out Appellant's relationship with the victim facilitated the offense as Appellant was a father figure whom she trusted. He knew the victim for over five years, was engaged to her mother, lived with them, and instructed the victim as if she were his daughter. The police report attached to the PSI noted the victim described Appellant as her "step dad" when speaking to the 911 dispatcher. This relationship would also exacerbate the resulting emotional trauma.

{¶34} The trial court discussed the psychological effects on the victim, finding the mental harm was exacerbated by her age and observing Appellant stole her innocence while destroying her life. The victim continued to suffer serious psychological harm, including depression, and made concerning statements about death. She went from a happy A/B student to a frightened and nervous D/F student.

{¶35} Appellant apologized, but the trial court was not bound to believe the remorse was genuine. The court opined Appellant developed a plan to intoxicate the victim in order to commit the offenses. According to the reports attached to the PSI, the police collected evidence showing Appellant purchased wine glasses at one store just

before 8:30 a.m. and purchased hard lemonade at another store around 9:00 a.m. The victim reported Appellant first made her drink wine (by holding a wine glass to her mouth from behind) and then went to buy other alcohol after she told him the wine was horrible. Although Appellant urges this was an isolated incident which was not likely to recur, the trial court believed he posed the greatest likelihood of committing future crimes of this type.

{¶36} As described in the prior assignment of error, Appellant engaged in three types of unlawful sexual activity, each of which carried its own risk and trauma. The offenses were committed during a course of conduct where he had multiple opportunities to discontinue the plan (after she vomited the first time, after she went to rest, after she objected to his anal penetration and voiced pain, after he left the bedroom, after she vomited more, and after the oral sex or before the vaginal sex). Although Appellant's recorded criminal history is not damning, this does not preclude a court from making the consecutive sentence findings relevant here. The trial court found consecutive prison terms were: necessary to protect the public from future crime and to punish the offender; were not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public; and the offenses were committed as part of one or more courses of conduct and the harm caused by the offenses was so great or unusual that no single prison term would adequately reflect the seriousness of Appellant's conduct. *See* R.C. 2929.14(C)(4)(b).

{¶37} We do not clearly and convincingly find the consecutive sentence findings were unsupported by the record or the sentence was otherwise contrary to law. This assignment of error is overruled.

{¶38} For the foregoing reasons, Appellant's convictions and sentences are affirmed.

Waite, J., concurs.

D'Apolito, 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. Costs waived.

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.