[Cite as *State v. Rubin* , 2018-Ohio-3052.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106333

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

AMIR S. RUBIN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-611747-A

BEFORE: Boyle, J., E.A. Gallagher, A.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: August 2, 2018

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MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Amir Rubin, appeals his convictions and sentence. He raises five assignments of error for our review:

> 1. The trial court erred when it imposed consecutive sentences absent any analysis of the statutory criteria and where its findings under R.C. 2929.14(C)(4) are not supported by the evidence and facts in the record.
>
> 2. The trial court erred when it imposed a ten-year prison sentence upon appellant the length of which is not supported by the record.
>
> 3. The trial court erred in finding appellant guilty where the evidence presented at trial was insufficient to overcome appellant's Crim.R. 29 motion and to support a conviction at the close of the evidence.
>
> 4. The trial court erred in finding appellant guilty after a jury trial where the manifest weight of the evidence did not support appellant's convictions.
>
> 5. The trial court committed plain error when it failed to instruct the jury to find whether minors depicted were real children or virtual images.

{¶2} Finding no merit to his arguments, we affirm.

I. Procedural History and Factual Background

{¶3} In November 2016, Rubin was indicted on 95 counts related to child pornography: 21 counts of pandering sexually oriented matter involving a minor in violation of R.C. 2907.322(A)(1) and (2), felonies of the second degree; 30 counts of illegal use of a minor in nudity-oriented material or performance in violation of R.C. 2907.323(A)(1), felonies of the fifth degree; 15 counts of pandering sexually oriented matter involving a minor in violation of R.C. 2907.322(A)(5), felonies of the fourth degree; 28 counts of illegal use of a minor in nudity-oriented material or performance in violation of R.C. 2907.323(A)(3), felonies of the fifth degree; and one count of possessing criminal tools in violation of R.C. 2923.24(A), a felony of the fifth degree. Rubin pleaded not guilty to all charges, and the case proceeded to a jury trial where the following evidence was presented.

{¶4} David Frattare, director of state investigations and commander of the Internet Crimes Against Children Task Force ("ICAC") for the Cuyahoga County Prosecutor's Office, testified that between November 2014 and October 2015, the task force conducted an investigation that identified two separate "IP addresses," 24.210.238.50 and 24.210.228.196, which were advertising child pornography files or making them available to others. An IP address is a unique address for an individual computer that is using the internet. Investigator Frattare prepared a subpoena to Time Warner Cable to obtain the physical location of the IP addresses in question. He learned that the name on the account of both IP addresses belonged to Yeda, L.L.C., a business located in Cleveland, Ohio.

{¶5} Investigator Frattare explained that he and other officers began the investigation by looking at a "peer to peer program" that is "known as E-Mule." Between November 8, 2014 and March 2, 2015, the first IP address, 24.210.238.50, made 11 files of suspected child pornography available for sharing. The investigators were able to download 5 complete and 6 partial files, and determined that 6 of the 11 files were child pornography.

{¶6} Between June 12, 2015 and October 19, 2015, the investigators attempted to download 54 files of known or suspected child pornography from the second IP address, 24.210.228.196. Of those 54 files, they downloaded 7 complete and 4 partial files, and determined that 7 of the 54 were child pornography. Based on this information, the investigators obtained a search warrant of the business that used the IP addresses.

{¶7} Investigator Frattare and other officers executed the search warrant. Rubin was the only person there at the time. There were several rooms, including a main office area, a large work area, supply areas, a garage, and a laundry room. The investigators found two computers in the office area. One computer was on a "simple" desk with a couple of drawers. The "simple"

desk had envelopes on it with Shlomo Rubin's name on them. Shlomo Rubin's personal items were also on the desk. Shlomo Rubin is the defendant's father.

{¶8} The other computer, a laptop, was on a "more modern desk with a credenza above it," which they determined belonged to Rubin. The laptop was running and had "the E-Mule icon for the peer to peer program" on the desktop. It also had a "U Torrent.exe" icon, a shortcut to the "Bit Torrent network," which is another peer-to-peer network. There was a men's wallet beside the laptop containing Rubin's credit cards and a driver's license. There was a credit card belonging to Rubin on the desk next to the computer. There were also several name badges on the desk from conferences or trade shows with Rubin's name on them.

{¶9} Investigator Frattare explained that when they execute search warrants, they use a "mobile investigations vehicle," which is a van divided into two sections. The van has an interview section in the back, and various "forensic work stations" in the front that allow the officers to examine hardware and software devices in the field.

{¶10} Rubin voluntarily spoke to the investigators during the search. He told them that he and his father were the only people who worked there. Rubin agreed that Bit Torrent and E-Mule were installed on his computer. He also agreed that he used the programs for personal use, not business. He told the officers that he used peer-to-peer networks to download "T.V., music and movies."

{¶11} Jason Howell, a digital forensics investigator for the Cuyahoga County's Prosecutor's Office, assigned to the ICAC, testified that he operates mobile investigations when investigators conduct "on scene triage examinations of computer evidence during search warrants." He was in charge of the mobile investigations vehicle when investigators executed the search warrant at Yeda, L.L.C.

{¶12} Investigator Howell said that the first device he examined on the scene was a Dell laptop computer, which was registered to "Rubin-97F5C5643." Investigator Howell explained that before he examined the laptop, he attached it to a "hardware write block device," which made it "read only." With the "write blocker," examiners could not alter what was on the computer in any way. Investigator Howell said that when he examined the laptop, it was in the process of sharing two child pornography files titled "Evelyn 12YO Evelyn 2010" and "PTHC 2009 New Brianna Jesse." "PTHC stands for preteen hardcore." There were also 16 files in the "temp folder" that the user was trying to download.

{¶13} Investigator Howell testified that he found "search terms" on the E-Mule software that a user of the laptop entered into the program. The user of the Dell laptop entered search terms that included "Nastia Mouse," which he explained was the name of a series of images of females from infants to teens in various states of nudity. It also included other common child pornography search terms such as "PTHC, PTSC, 16YO, 15YO, 14YO, 12YO, Evelyn, jailbait." PTSC "stands for preteen softcore."

{¶14} Investigator Howell discovered that multiple "USB devices" had been connected to the laptop. When a file is accessed, "Windows operating system" creates link files. The files that the user connected to the laptop were files of child pornography relating to children from 3 to 16 years old. He also found child pornography videos on the computer; one was titled, "12Y Evelyn blow job." In sum, Investigator Howell discovered hundreds of child pornography images and videos on the laptop computer. He also examined an external hard drive and USB drive that were found in the storage area of the building. These devices also had hundreds of child pornography videos and images. The child pornography files were "created" between 2008 and 2015.

{¶15} At the close of the state's case, Rubin moved for a Crim.R. 29(A) acquittal that the trial court overruled. Rubin presented one witness on his behalf, Mark Vassel, a self-employed "computer forensic examiner."

{¶16} Vassel testified that he started his company, Midwest Data Group, in September 2001. Before starting his own company, he worked for Olmsted Township Police Department. He became a police officer in 1991. Vassel testified his examination showed that someone accessed files on the laptop computer after the search warrant was executed (at 11:23 a.m.) but before the "write blocker" was installed (at 11:47 a.m.). He explained that "[t]he "write blocker" is "essentially an evidence bag" that "protects the integrity of the data of the information stored on the computer." Thus, Vassel stated that Investigator Howell could not have been correct when he stated that no one accessed the laptop before the write blocker was installed. Vassel further stated that in his opinion, the laptop was not running the E-Mule program at the time the computer was seized.

{¶17} At the close of his case, Rubin renewed his Crim.R. 29(A) acquittal that the trial court again denied.

{¶18} The jury found Rubin not guilty of two counts of second-degree illegal use of a minor in nudity-oriented material or performance, one count of second-degree pandering sexually oriented matter involving a minor, and two counts of fifth-degree illegal use of a minor in nudity-oriented material or performance. The jury found Rubin guilty of the remaining 90 counts.

{¶19} The trial court merged Counts 54 through 94 into Counts 11 through 51. The state elected to proceed on the higher level felony counts. Thus, the trial court sentenced Rubin on Counts 1 through 51. The trial court sentenced Rubin to a total of ten years in prison; four years

each for multiple counts of second-degree felony pandering in violation of R.C. 2907.322(A)(2) to be served concurrent to each other but consecutive to the other offenses, three years each for multiple counts of second-degree felony pandering in violation of R.C. 2907.322(A)(1) to be served concurrent to each other but consecutive to the other offenses, and three years each for multiple counts of second-degree illegal use of a minor in nudity-oriented material or performance in violation of R.C. 2907.323(A)(1) to be served concurrent to each other but consecutive to the other offense, for a total of ten years in prison. The trial court also sentenced Rubin to six months for possessing criminal tools, which was to be served concurrent to all other offenses.

{¶20} It is from this judgment that Rubin appeals. We will address Rubin's assignments of error out of order for ease of discussion.

II. Sufficiency of the Evidence

{¶21} In his third assignment of error, Rubin argues that the trial court erred when it denied his Crim.R. 29(A) motion for acquittal with respect to his convictions for pandering sexually oriented matter involving a minor because the state failed to present sufficient evidence of pandering.

{¶22} Crim.R. 29(A) provides that a trial court "shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." When assessing whether the evidence presented at trial was sufficient to sustain a conviction, an appellate court reviews that evidence in a light most favorable to the prosecution to determine whether such evidence, if believed, would convince a rational trier of fact of the defendant's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. The proper inquiry is not whether the prosecution's "evidence is to be believed, but whether, if believed, the

evidence against a defendant would support a conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997). Accordingly, a challenge to the sufficiency of the evidence tests whether the prosecution has met its burden of production at trial. *Thompkins* at 390.

{¶23} Rubin first argues that the state failed to present sufficient evidence with respect to the "knowledge" element for pandering under R.C. 2907.322. Rubin was convicted of pandering sexually oriented matter involving a minor under R.C. 2907.322(A)(1), (2), and (5). R.C. 2907.322 provides in relevant part:

> (A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:
>
> (1) Create, record, photograph, film, develop, reproduce, or publish any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;
>
> (2) Advertise for sale or dissemination, sell, distribute, transport, disseminate, exhibit, or display any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;
>
> * * *
>
> (5) Knowingly solicit, receive, purchase, exchange, possess, or control any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality[.]

{¶24} R.C. 2901.22(B), which defines "knowingly" and "knowledge," provides:

> A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.

{¶25} Specifically, Rubin contends that the state failed to present sufficient evidence that he "knew what the material was when it was downloaded and thus 'created' on his computer or when it was transferred/disseminated to other users on the file sharing network." Rubin further

claims that there was no evidence that he actually "accessed" the files because E-Mule automatically "shares all files downloaded once the setting is enabled or disabled."

{¶26} The state may use either direct or circumstantial evidence to prove the essential elements of an offense. *Jenks*, 61 Ohio St.3d at 272, 574 N.E.2d 492. "'Circumstantial evidence * * * is proof of facts or circumstances by direct evidence from which [the factfinder] may reasonably infer other related facts which naturally and logically follow according to the common experience of mankind.'" *State v. Rohr-George*, 9th Dist. Summit No. 23019, 2007-Ohio-1264, ¶ 21, quoting *State v. Blankenship*, 9th Dist. Wayne No. 2815, 1994 Ohio App. LEXIS 4230 (Sept. 21, 1994). Thus, while we agree with Rubin that there is no direct evidence of his knowledge of the material, we can infer the element of knowledge from the evidence presented.

{¶27} The state presented evidence regarding the titles of the files found on Rubin's computer, which included many common child pornography terms. In fact, Rubin had hundreds of child pornography images and videos on his laptop, an external hard drive, and a storage device. In fact, the state established that Rubin had been downloading and sharing child pornography files since 2008. The names of many of the files included common child pornography terms, such as "PTHC" for "preteen hardcore." There were also videos being downloaded at the time of the search with the titles "Evelyn 12YO Evelyn 2010" and "PTHC 2009 New Brianna Jesse." Investigator Frattare explained that "YO" meant "years old." The state further presented evidence of Rubin's searches in the E-Mule program, which included many common child pornography search terms.

{¶28} Indeed, it is mystifying to us that Rubin can claim that he was not aware of the content of the child pornography files when the state presented evidence that he entered search

terms in his E-Mule program such as "Nastia Mouse," a known term for female infants to prepubescent girls in various states of nudity, and "PTHC," a term for "preteen hardcore." One would not enter these terms unknowingly. Because the many files on Rubin's computer contained these and similar common child pornography terms, the same reasoning applies.

{¶29} Thus, construing the evidence in a light most favorable to the state, a rational trier of fact could conclude that Rubin had knowledge of the content of the images and videos.

{¶30} Rubin next contends that the state failed to present sufficient evidence relating to Counts 1, 2, 3, 5, and 6, which charged pandering under R.C. 2907.322(A)(2). Rubin contends that the evidence only established that he "privately download[ed]" child pornography for his "personal consumption" and did not exhibit child pornography or display it to the public. He therefore asserts that his pandering offenses should have been classified as R.C. 2907.322(A)(5), which is only a fourth-degree felony, and not R.C. 2907.322(A)(2), which is a second-degree felony.

{¶31} Investigator Frattare testified that he and other investigators were able to download 22 complete or partial child pornography files from Rubin's E-Mule program. This evidence, if believed, establishes that Rubin disseminated child pornography to the investigators. Thus, the state presented sufficient evidence that Rubin was guilty of R.C. 2907.322(A)(2) beyond a reasonable doubt.

{¶32} Rubin's third assignment of error is overruled.

III. Manifest Weight of the Evidence

{¶33} In his fourth assignment of error, Rubin argues that his convictions were against the manifest weight of the evidence.

{¶34} Unlike a sufficiency challenge, a manifest weight of the evidence challenges

whether the prosecution met its burden of persuasion. *Thompkins*, 78 Ohio St.3d at 390, 678 N.E.2d 541. On review from a manifest weight challenge, the appellate court is tasked with reviewing all of the evidence in the record and in resolving the conflicts therein, determining whether the trier of fact "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Id*. at 387. "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Id*. Moreover, this court recognizes that the "weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the fact[.]" *State v. Peterson*, 8th Dist. Cuyahoga Nos. 100897 and 100899, 2015-Ohio-1013, ¶ 73 citing *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus.

{¶35} Rubin first incorporates his sufficiency arguments into his arguments challenging the weight of the evidence. He claims that because the state's evidence was not sufficient to convict him, it was also against the manifest weight of the evidence. For the reasons we previously stated, we find no merit to this argument.

{¶36} Rubin further argues that his expert established that the investigators did not properly preserve the Dell laptop "through an uninterrupted chain of custody." Rubin's expert, Vassel, testified that he found that the Dell laptop had been accessed between the time the investigators seized it and the time they placed the write blocker on it. The jury, however, heard the state's witnesses testify that they did not do anything to the laptop before Investigator Howell placed the write blocker on it. The jury may take note of any inconsistencies and resolve them accordingly, "believ[ing] all, part, or none of a witness's testimony." *State v. Raver*, 10th Dist. Franklin No. 02AP-604, 2003-Ohio-958, ¶ 21, citing *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964). The jury clearly believed the state's witness over Rubin's, as it was

permitted to do.

{¶37} Sitting as a "thirteenth juror," reviewing the entire record, weighing the evidence and all reasonable inferences, and considering the credibility of witnesses, we conclude that the jury did not clearly lose its way and create such a manifest miscarriage of justice that Rubin's convictions should be reversed for a new trial. *Thompkins* at 387.

{¶38} Accordingly, Rubin's fourth assignment of error is overruled.

IV. Consecutive Sentences

{¶39} In his first assignment of error, Rubin concedes that the trial court made the proper findings under R.C. 2929.14(C)(4) to impose consecutive sentences, but maintains that the record does not support those findings.

{¶40} An appellate court must conduct a meaningful review of the trial court's sentencing decision. *State v. Johnson*, 8th Dist. Cuyahoga No. 97579, 2012-Ohio-2508, ¶ 6, citing *State v. Hites*, 3d Dist. Hardin No. 6-11-07, 2012-Ohio-1892. R.C. 2953.08(G)(2) provides that our review of consecutive sentences is not an abuse of discretion. Instead, an appellate court must "review the record, including the findings underlying the sentence or modification given by the sentencing court." *Id.* If an appellate court clearly and convincingly finds either that (1) "the record does not support the sentencing court's findings under [R.C. 2929.14(C)(4)]," or (2) "the sentence is otherwise contrary to law," then "the appellate court may increase, reduce, or otherwise modify a sentence * * * or may vacate the sentence and remand the matter to the sentencing court for resentencing." *Id.* The Ohio Supreme Court has further explained that

> some sentences do not require the findings that R.C. 2953.08(G) specifically addresses. Nevertheless, 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 the sentencing court. That is, an appellate court may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellant court finds by clear and

convincing evidence that the record does not support the sentence.

State v. Marcum, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 23.

{¶41} R.C. 2929.14(C)(4) provides that in order to impose consecutive sentences, the trial court must find (1) that consecutive sentences are necessary to protect the public from future crime or to punish the offender, (2) that such sentences would not be disproportionate to the seriousness of the conduct and to the danger the offender poses to the public, and (3) that 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 postrelease 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.

{¶42} At the sentencing hearing, the trial court indicated that it had reviewed the presentence investigation report, Rubin's pretrial compliance report, as well as his sentencing memorandum and letters that people wrote on his behalf. The trial court then heard from defense counsel, the state, and Rubin.

{¶43} Defense counsel informed the court that Rubin had no prior criminal history. Rubin had also been attending individual and group counseling sessions with a psychotherapist for "well over a year." The psychotherapist he had been seeing "handles more sex offenders than anybody" in northeast Ohio. Additionally, Rubin had been active in a men's support group. Defense counsel further informed the court that Rubin's 70-year-old father was having a very hard

time handling the family business without Rubin who is an engineer. Rubin had also gotten married during the pendency of the action; his wife is also an engineer. Finally, defense counsel told the court that Rubin had an exemplary "18 months of supervision on pretrial release[.]" Rubin followed all rules of his pretrial release and reported regularly. According to his supervisor, Shontrell Thompson, Rubin would be a good candidate for community control sanctions in the sex offender's unit.

{¶44} The state requested the court to consider the fact that the jury found that Rubin shared hundreds of videos on his devices for at least three and a-half years before he was arrested. The state indicated that Rubin was not a person who looked at child pornography a couple of times and then deleted it. The state maintained that "thousands of files had been shared," but that they only charged 91 images and videos in this case. The state requested the trial court to send Rubin to prison.

{¶45} Rubin talked to the court next. He explained his role in the family business. He discussed his support system, including many family members who were at the sentencing hearing. Rubin told the court that he sought treatment and counseling on his own. He "took two standardized tests that clearly show [he is] not attracted to or threat to children in anyway." He also regularly attended a 12-step program for sex addicts and had been doing so for nearly two years.

{¶46} The court told Rubin that it had presided over his trial, and in doing so, it was forced to look at all of the child pornography videos and images. The court explained that it was "very disturbing" to everyone who had to look at them. The court told the defendant with all of his findings of guilt, it could sentence him to "hundreds of years" in prison. The court further explained that because of "people like [him]," people continue to make "these horrible videos and

images." The court stated that child pornography is not a victimless crime.

{¶47} The court told Rubin that it "applauded" the fact that he was working with a psychiatrist and had a sponsor, and that he was trying to make himself better. But the court stated that it could not sentence him to community control sanctions. The court indicated that it had considered the record, the oral statements made at sentencing, the presentence investigation report, the purposes and principles of sentencing under R.C. 2929.11, the seriousness and recidivism factors under R.C. 2929.12, and the need for deterrence, incapacitation, rehabilitation, and restitution.

{¶48} The court imposed its aggregate sentence of ten years, ordering that several of the counts be served consecutive to each other. In doing so, the trial court made the proper findings under R.C. 2929.14(C)(4). The court explained that "these are little kids that on video are having sex with grown men."

{¶49} After review, we conclude that the record supports the trial court's imposition of consecutive sentences. The state only indicted him on charges back to 2012, but Rubin had been downloading and sharing images and videos of child pornography since 2008. The state played videos in court that Rubin had shared with others that had very young girls in various sexual acts with adult males. As the trial court indicated, the victims of child pornography are harmed each time someone views or shares an image or video.

{¶50} Accordingly, we find that the record supports the trial court's imposition of consecutive sentences.

{¶51} Rubin's first assignment of error is overruled.

V. Mitigating Sentencing Factors

{¶52} Rubin contends in his second assignment of error that a "ten-year prison sentence"

is not supported by the record given his mitigating factors. We disagree.

{¶53} When sentencing a defendant, the court must consider the purpose and principles of felony sentencing set forth in R.C. 2929.11 and the serious and recidivism factors in R.C. 2929.12. *State v. Hodges*, 8th Dist. Cuyahoga No. 99511, 2013-Ohio-5025, ¶ 7. R.C. 2929.11(A) and (B) states that the "overriding purposes of felony sentencing are to protect the public from future crime by the offender and others to punish the offender using the minimum sanctions that the court determines accomplish those purposes" and requires that the sentence be "commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim."

{¶54} R.C. 2929.12 sets forth a nonexhaustive list of factors that the court must consider in relation to the seriousness of the underlying crime and likelihood of recidivism, including "(1) the physical, psychological, and economic harm suffered by the victim, (2) the defendant's prior criminal record, (3) whether the defendant shows any remorse, and (4) any other relevant factors." *State v. Kronenberg*, 8th Dist. Cuyahoga No. 101403, 2015-Ohio-1020, ¶ 26, citing R.C. 2929.12(B) and (D).

{¶55} Trial courts, however, are not required to make factual findings under R.C. 2929.11 or 2929.12 before imposing the maximum sentence. *Id*. at ¶ 27. In fact, "[c]onsideration of the factors is presumed unless the defendant affirmatively shows otherwise." *State v. Seith*, 8th Dist. Cuyahoga No. 104510, 2016-Ohio-8302, ¶ 12, citing *State v. Keith*, 8th Dist. Cuyahoga Nos. 103413 and 103414, 2016-Ohio-5234. "[T]his court has consistently recognized that a trial court's statement in the journal entry that it considered the required statutory factors, without more, is sufficient to fulfill its obligations under the sentencing statutes." *Kronenberg* at ¶ 27, citing *State v. Wright*, 8th Dist. Cuyahoga No. 100283, 2014-Ohio-3321.

{¶56} In this case, after merging the allied offenses, Rubin was convicted of 49 counts. He was facing a maximum of 385 years in prison. He received 10. Despite the fact that Rubin had never been convicted of a crime, he downloaded and shared hundreds of child pornography images and videos in the three and a-half years before he was arrested.

{¶57} The trial court expressly stated that it considered the purposes and principles of felony sentencing, as well as the factors listed in R.C. 2929.12. Although Rubin claims that the trial court "was seemingly indifferent to the mitigating evidence," we disagree. The trial court noted that it considered the fact that he had no prior offenses, and it "applauded" Rubin's efforts regarding counseling and the 12-step sex addict program. But the trial court also considered the age of the victims in the images and videos and the fact that victims of child pornography are continuously harmed every time an image is shared.

{¶58} As this court stated in *State v. Mahan*, 8th Dist. Cuyahoga No. 95696, 2011-Ohio-5154, the defendant was a first-time offender, as Rubin is here. Mahan also had the support of family and friends, was gainfully employed, and had attended 100 meetings for sexual addicts. This court stated:

> We acknowledge that a 16 year prison term imposed on a first-time offender who has, by all accounts, led an otherwise productive, law abiding life is a harsh sentence and is perhaps not one that we may have imposed. Nonetheless, the sentence was significantly less than what the court could have imposed based on defendant's 95 convictions. There was ample testimony in the record of the harm that has been, and continues to be, inflicted upon the victims who are the subjects of the material being viewed in these types of cases. The images, once uploaded, continue to circulate on the internet where individuals, like defendant, view them and make them available for viewing by others. The wide range of sentences that have been apparently imposed on defendants convicted of similar offenses is the result of the discretion vested in the trial court. Defendant's sentence was within the statutory range, lawful, and supported by the record, thus we cannot say it was unconscionable or otherwise an abuse of the trial court's discretion.

Id. at ¶ 63.

{¶59} Like *Mahan*, we find that the record supports Rubin's 10-year prison sentence in this case despite the mitigating factors.

{¶60} Accordingly, Rubin's second assignment of error is overruled.

VI. Real versus Virtual Children

{¶61} In his fifth assignment of error, Rubin contends that the trial court committed plain error when it failed to instruct the jury that it had to find that the minors depicted in the images and videos were actual children and not virtual ones. Rubin acknowledges that his trial counsel failed to raise this issue in the trial court, and thus, we review for plain error.

{¶62} Under Crim.R. 52(B), plain errors affecting substantial rights may be noticed by an appellate court even though they were not brought to the attention of the trial court. To constitute plain error, there must be: (1) an error, i.e., a deviation from a legal rule, (2) that is plain or obvious, and (3) that affected substantial rights, i.e., affected the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). Even if the error satisfies these prongs, appellate courts are not required to correct the error. *Id*., citing Crim.R. 52(B). Appellate courts retain discretion to correct plain errors. *Id*. Courts are to notice plain error under Crim.R. 52(B), "'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.'" *Id*., quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978).

{¶63} In *State v. Tooley*, 114 Ohio St.3d 366, 2007-Ohio-3698, 872 N.E.2d 894, the Ohio Supreme Court held that the state must prove beyond a reasonable doubt that a real child is depicted to support a conviction for possession of child pornography under either R.C. 2907.322 or 2907.323. *Id*. at paragraph three of the syllabus.

{¶64} The defendant in *Tooley* argued that in light of *Ashcroft v. The Free Speech*

Coalition, 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002) (which held that virtual child pornography is protected expression under the First Amendment), "mere images alone are now insufficient to prove that a real child is involved." *Id*. at ¶ 50. The Ohio Supreme Court disagreed with this argument, stating that "*Ashcroft* did not impose a heightened evidentiary burden on the state to specifically identify the child or to use expert testimony to prove that the image contains a real child." *Id*.

{¶65} Instead, the high court explained that "[i]n most cases, meeting this burden will require presentation of the images themselves. Expert witnesses may not be needed if the state's assertion that an actual child is involved goes unchallenged." *Id*. at ¶ 49. The court noted that "despite advances in technology, '[j]uries are still capable of distinguishing between real and virtual images.'" *Id.* at ¶ 50, quoting *United States v. Kimler*, 335 F.3d 1132, 1142 (10th Cir.2003).

{¶66} In this case, the state showed the jury the images involved for each count. Neither Rubin nor his expert claimed that the images were not real children. Accordingly, we find no error on the part of the trial court, plain or otherwise.

{¶67} Rubin's fifth assignment of error is overruled.

{¶68} Judgment affirmed.

It is ordered that appellee recover from appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

of Appellate Procedure.

MARY J. BOYLE, JUDGE

EILEEN A. GALLAGHER, A.J., and
ANITA LASTER MAYS, J., CONCUR