[Cite as *State v. Lucas*, 2019-Ohio-2607.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. DUANE MARQUISE LUCAS Appellant	C.A. No. 29077 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR-2017-03-0876

DECISION AND JOURNAL ENTRY

Dated: June 28, 2019

SCHAFER, Judge.

{¶1} Defendant Appellant, Duane Marquise Lucas, appeals his sentence issued by the Summit County Court of Common Pleas on May 10, 2018. We affirm.

I.

{¶2} The Summit County Grand Jury indicted Lucas on ten charges related to the death of B.L. Pursuant to a negotiated plea agreement, he ultimately entered a plea of guilty to: murder in violation of R.C. 2903.02(A), a special felony, with an attached firearm specification in violation of R.C. 2941.145; domestic violence in violation of R.C. 2919.25(A), a third degree felony; having weapons while under disability in violation of R.C. 2923.13(A)(2), a third degree felony; and possession of heroin in violation of R.C. 2925.11(A)(C)(6), a fifth degree felony.

{¶3} Following a presentence investigation ("PSI"), the trial court sentenced Lucas to life imprisonment with parole eligibility after 15 years for murder and a mandatory three years for the attendant firearm specification. The court then sentenced him to 36 months for domestic

violence, 36 months for having weapons while under disability, and 12 months for possession of heroin. The court ordered the sentences to be served consecutively for a term of life imprisonment with parole eligibility after 25 years.

{¶4} Lucas timely appealed his conviction and presents four assignments of error for our review. For ease of analysis, we elect to consider assignments of error one and two together and assignments of error three and four together.

II.

Assignment of Error I

> **The trial court erred to the prejudice of [Lucas] by not finding that Murder and Domestic Violence are allied offenses of similar import and by sentencing him to consecutive terms for each one of them.**

Assignment of Error II

> **The trial court erred to the prejudice of [Lucas] by not finding that Murder with [a firearm specification] and Having Weapons Under Disability are allied offenses of similar import, and by sentencing him to consecutive terms for each of them.**

{¶5} In his first assignment of error, Lucas argues that the trial court committed plain error by not determining that his convictions for murder and domestic violence are allied offenses of similar import. Similarly, Lucas argues in his second assignment of error that the trial court erred by not finding that the firearm specification and his conviction for having weapons while under disability are allied offenses.

{¶6} This Court generally applies a de novo standard of review when reviewing a trial court's decision regarding the merger of convictions for the purposes of sentencing. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, ¶ 1. However, because Lucas failed to raise the issue of allied offenses at his sentencing hearing, he has forfeited all but plain error on appeal. *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, ¶ 3. Although Lucas does raise a plain

error argument in his first assignment of error, he does not raise a plain error argument in his second assignment of error relating to his contention that the firearm specification and his conviction for having weapons while under disability are allied offenses and we decline to construct an argument on his behalf. *See State v. Hariston*, 9th Dist. Lorain No. 05CA008768, 2006-Ohio-4925, ¶ 11, citing App.R. 16(A)(7).

{¶7} The Supreme Court of Ohio has held that:

> [A] forfeited error is not reversible error unless it affected the outcome of the proceeding and reversal is necessary to correct a manifest miscarriage of justice. Accordingly, an accused has the burden to demonstrate a reasonable probability that the convictions are for allied offenses of similar import committed with the same conduct and without a separate animus; absent that showing, the accused cannot demonstrate that the trial court's failure to inquire whether the convictions merge for purposes of sentencing was plain error.

Rogers at ¶ 3.

{¶8} "R.C. 2941.25 codifies the protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article 1 of the Ohio Constitution, which prohibits multiple punishments for the same offense." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶ 23. R.C. 2941.25 states:

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

The Supreme Court of Ohio has held that when a defendant's conduct supports multiple offenses, that defendant may be convicted of all offenses if "(1) the conduct constitutes offenses of dissimilar import, (2) the conduct shows that the offenses were committed separately, or (3)

the conduct shows that the offenses were committed with separate animus." *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, paragraph three of the syllabus.

{¶9} Nonetheless, a review of the sentencing transcript shows that the trial court considered the PSI when it sentenced Lucas. However, a copy of the PSI was not a made a part of the record on appeal. "It is the appellant's responsibility to ensure that the record on appeal contains all matters necessary to allow this Court to resolve the issues on appeal." *State v. Yuncker*, 9th Dist. Medina No. 14CA0068-M, 2015-Ohio-3933, ¶ 17, citing App.R. 9. "[If] an appellant does not provide a complete record to facilitate our review, we must presume regularity in the trial court's proceedings and affirm." *State v. McGowan*, 9th Dist. Summit No. 27092, 2014-Ohio-2630, ¶ 6, quoting *State v. Taylor*, 9th Dist. Lorain Nos. 13CA010366, 13CA010367, 13CA010368, 13CA010369, 2014-Ohio-2001, ¶ 6; *See State v. Asefi*, 9th Dist. Summit No. 26931, 2014-Ohio-2510, ¶ 12-15 (presuming regularity in the proceedings below where a trial court did not merge convictions for the purposes of sentencing where the court specifically relied on a presentence investigation report that was not made a part of the record on appeal).

{¶10} Lucas' first and second assignments of error are overruled.

Assignment of Error III

The trial court abused its discretion and erred to the prejudice of [Lucas] by sentencing him to a total of twenty five years imprisonment, in that the prison term is excessive for the purposes set forth in Ohio Revised Code §2929.11(A) and (B), and is not necessary to protect the public.

Assignment of Error IV

The trial court abused its discretion and erred to the prejudice of [Lucas] by sentencing him to a total of twenty five years imprisonment, including consecutive sentences, in that a consecutive sentence is not necessary to protect the public, and is disproportionate to the seriousness of the offender's conduct.

{¶11} In his third and fourth assignments of error, Lucas argues that the trial court abused its discretion by imposing an excessive prison term and ordering his sentences to be served consecutively.

{¶12} In reviewing a felony sentence, "[t]he appellate court's standard of 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 (1) "the record does not support the trial court's findings under relevant statutes," or (2) "the sentence is otherwise contrary to law." *State v. Marcum*, 146 Ohio St.3d 516, 2016–Ohio–1002, ¶ 1. Clear and convincing evidence is that "which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford*, 161 Ohio St. 469 (1954), paragraph three of the syllabus.

{¶13} A sentencing court has "full discretion to impose a prison sentence within the statutory range" and is not "required to make findings or give their reasons for imposing * * * more than the minimum sentences." *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, paragraph seven of the syllabus. Additionally, "[i]n 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, syllabus. Nevertheless, "the court must carefully consider the statutes that apply to every felony case[,]" including "R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12, which provides guidance in considering factors relating to the seriousness of the offense and recidivism of the offender." *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38.

{¶14} On appeal, Lucas concedes that the trial court considered R.C. 2929.11 and R.C. 2929.12 and instead "strongly disagrees regarding how the trial court weighed the factors." Although Lucas also concedes that the trial court considered the factors listed in R.C. 2929.14(C)(4), he argues that the trial court's finding that Lucas' history of criminal conduct demonstrated that consecutive sentences were necessary to protect the public is not supported by the record.

{¶15} However, as recognized above, although the trial court specifically relied on the PSI, no summary or report was made a part of the record on appeal. Again, "[i]t is the appellant's responsibility to ensure that the record on appeal contains all matters necessary to allow this Court to resolve the issues on appeal." *Yuncker,* 2015-Ohio-3933 at ¶ 17, citing App.R. 9. "[If] an appellant does not provide a complete record to facilitate our review, we must presume regularity in the trial court's proceedings and affirm." *McGowan*, 2014-Ohio-2630 at ¶ 6, quoting *Taylor*, 2014-Ohio-2001 at ¶ 6. "Accordingly, without the context that the PSI report might provide, we cannot conclude that there is clear and convincing evidence in the record that [Lucas'] sentence is contrary to law." *State v. Shelton*, 9th Dist. Lorain No. 18CA011368, 2019-Ohio-1694, ¶ 8, citing R.C. 2953.08(G)(2).

{¶16} Lucas' third and fourth assignments of error are overruled.

III.

{¶17} Lucas' assignments of error are overruled. Therefore, the judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

JULIE A. SCHAFER
FOR THE COURT

CARR, P. J.
HENSAL, J.
CONCUR.

APPEARANCES:

RICHARD P. KUTUCHIEF, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.