[Cite as *State v. Whitman*, 2019-Ohio-2718.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

KIMBERLY S. WHITMAN,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 CO 0029

Criminal Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2016-CR-379

BEFORE:
Cheryl L. Waite, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Robert Herron, Columbiana County Prosecutor and *Atty. Tammie M. Jones*, Assistant Prosecuting Attorney, 105 South Market Street, Lisbon, Ohio 44432, for Plaintiff-Appellee

Atty. Dominic A. Frank, Betras, Kopp & Harshman, LLC, 1717 Lisbon Street, East Liverpool, Ohio 43920, for Defendant-Appellant.

Dated: June 27, 2019

WAITE, P.J.

{¶1} Appellant Kimberly S. Whitman appeals the August 14, 2018 Columbiana County Common Pleas Court judgment entry sentencing her to a prison term of 102 months for her convictions after pleading guilty to three counts of theft and one count of money laundering. Appellant argues the trial court erred in imposing consecutive sentences without making the requisite statutory findings. Based on the following, Appellant's sentence is not clearly and convincingly contrary to law and is supported by the evidence. Appellant's assignment of error is without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} The facts in the record before us are limited. The victims in this matter are Alice Whitman ("Alice"), who is Appellant's mother-in-law, and Frank Goetz ("Goetz") who is Appellant's uncle by marriage and Alice's brother. The charges stem from Appellant's dishonest conduct in handling the financial affairs of Alice and Goetz.

{¶3} The following facts can be derived from the victims' statements at Appellant's sentencing hearing. Rosemary McClish, ("McClish") Alice's sister, testified under oath that Alice had invited her son (Appellant's husband), Appellant and their two sons to live with her because Appellant told her that their son had a terminal illness and they could not afford his care. McClish also testified:

> [Alice] was taken to a doctor in Cleveland because we were told she was suffering from severe dementia. And we were all told she had Alzheimer's disease diagnosed by this doctor and could not complete daily activities for herself and needed 24-hour care.

> The saddest part is no one had a clue that this was all a big lie and the goal was to institutionalize Alice and take everything from her.
>
> When, in fact, we discovered the truth; we went to the physician in Cleveland and learned her testing was normal and scans were all normal.
>
> My family and I thank God for Dr. Wilson, The Counseling Center, the adult protection agencies, for all stepping up and going to Court on her behalf and freeing Alice. Dr. Wilson testified and recognized that under their care Alice was being starved to death and would most likely die within a matter of a couple weeks.
>
> Thankfully, with everyone's help, Alice was removed from her home and came and lived with me for two and a half years; got her life back together. Alice bounced back to herself and now does all the things she always used to do. Look at her. She is able to cook, clean, drive the car, she has a job and a telephone and manages her own bank accounts.
>
> She went from 96 pounds to 145 pounds. And is, thankfully, healthy with no physical damages. She does have, and so does my family, emotional scars that will never go away.

(8/13/18 Tr., pp. 13-16.)

{¶4} The two victims also provided statements that, with consent of Appellant's counsel, were not required to be under oath. Alice stated:

Kim, I invited you into my home because I thought [Appellant's husband] was losing his job. I always knew you were a liar but I never would have imagined you could have done something like this.

* * *

You made me a prisoner in my own home because I was supposedly so sick. I couldn't use appliances in my home. * * * You put parental controls on my TV like I was a child. You turned the doorknob around in my bedroom upstairs so that you had the power to lock me into my bedroom if you felt like it. I was confined to walking only on our street and wasn't able to visit any of the neighbors because you feared that people would find out what you were doing to me. You gave me a little -- a nice little bracelet to wear in case I ever got lost, but you put the wrong phone number on it so whoever was trying to reach you in regards to me wouldn't be able to contact you.

You took every single freedom I ever had from me. You took my cell phone so that everyone I was in contact with would have to go through you to reach me. That is how you convinced me that all my friends and family wanted nothing to do with me.

I was forbidden to get my hair done by a professional. * * *

I started to feel like something was really wrong with me and stopped taking those pills and when you found out you made my [sic] swallow them in front of you -- by standing in front of you. * * *

> You ruined my life, my credit and everything that Bob and I spent a lifetime earning.
>
> You left my house $3,000 behind in mortgages; $1,700 behind in house taxes. If were not for my brother Bob my home would have been taken from me too.
>
> Thank God you sent me to Behavior Health. They were able to see that something wasn't right and got me out of the hell that I lived in every day. If it weren't for you sending me there to get me out of your hair for a couple of hours every day, I would be dead.
>
> But look at me now, Kim, I have a job, a car, a lot of other things you said I would never have.

(8/13/18 Tr., pp. 18-22.)

{¶5} Goetz, the second victim, also spoke at the sentencing hearing:

> Well, most all of what my sister said is about everything. I even have a letter here but I'm not going to read it. It would repeat.
>
> I know one thing, she has no remorse and neither does her husband. At least they would tell his mother they were sorry. * * *
>
> And as far as I am concerned, she needs to get most of that jail time. They never even offered any restitution or nothing yet.

> And part of this - - I've been going through treatments for cancer and that made it a little rougher. And I'm coming to losing my house but I'm not going to. I have been paying all these bills and it cost me a couple thousand dollars extra a month because of her.
>
> * * *
>
> And the people she works for, to me, they're not too bright keeping her working but they are afraid to get sued, I imagine. But where she works she takes care of older people too. And I don't think that's a very good place for her.

(8/13/18 Tr., pp. 23-24.)

{¶6} Appellant and her family lived with Alice between 2013 and 2015. On September 14, 2016, the Columbiana County Grand Jury returned an indictment against Appellant charging the following: theft, in violation of R.C. 2913.02(A)(2), a felony of the second degree; money laundering, in violation of R.C. 1315.55(A)(2), a felony of the third degree; two counts of theft, in violation of R.C. 2913.02(A)(2), felonies of the third degree; and theft, in violation of R.C. 2913.02(A)(2), a felony of the fourth degree.

{¶7} Following a discovery period, multiple continuances filed by Appellant, and numerous meetings in an attempt to reach resolution, Appellant entered into a plea agreement pursuant to Crim.R. 11 on April 24, 2018. Appellant pleaded guilty to one count of theft in violation of R.C. 2913.02(A)(2), a third degree felony; money laundering in violation of R.C. 1315.55(A)(2), a third degree felony; theft in violation of R.C. 2913.02(A)(2), also a third degree felony; and theft in violation of R.C. 2913.02(A)(2), a

fifth degree felony. Pursuant to the terms of the plea agreement, the state agreed it would take no position on the issue of community control sanctions at the sentencing hearing. If community control sanctions were granted, the state would recommend "[i]ntensive supervision following a ninety day term of incarceration at the county jail and/or definite term at EEOC; Restitution (amount to be determined at a restitution hearing prior to sentencing.)" (4/25/18, Felony Plea Agreement.) If a prison sentence were to be imposed, the state recommended a thirty-month term of incarceration on each of the third degree felonies, to run consecutively to each other, and a twelve-month term of incarceration on the fifth degree felony to run consecutively with the other counts, for a total stated prison term of one hundred two (102) months. The state would also ask to dismiss count two of the indictment at sentencing.

{¶8} A plea hearing was held on April 24, 2018. Appellant was presented with a written "Judicial Advice to Defendant" and Appellant executed a written "Response to Court," wherein Appellant expressly noted she was informed and understood the constitutional and nonconstitutional rights she waived as a result of her Crim.R. 11 guilty plea. The trial court subsequently accepted Appellant's guilty plea. A presentence investigation was ordered. The court ordered a hearing on restitution prior to sentencing.

{¶9} The restitution hearing commenced on May 25, 2018. On August 3, 2018 another restitution hearing occurred. There are no transcripts from these hearings in the record. After the hearings, the trial court took the matter under advisement. However, no determination as to restitution was ever reached by the trial court.

{¶10} The sentencing hearing was held on August 13, 2018. As noted above, McClish (Alice's sister) provided a sworn statement and both victims provided unsworn

statements. Susan Frenger, owner of Visiting Angels, Appellant's employer, testified under oath at sentencing on Appellant's behalf. She acknowledged that Appellant had worked for her for approximately five and one-half years, first as a caretaker for the elderly for approximately three months and then in the front office for the remainder of her tenure. Frenger testified that she would continue to employ Appellant if she were not incarcerated. She also testified that she was not aware of the nature of Appellant's conduct or the amount of money involved. She also testified that Appellant had never expressed remorse to her for her actions. (8/13/18 Tr., pp. 26-33.)

{¶11} Appellant also made a statement on her own behalf at sentencing:

> I would like to apologize for everything that has happened, anything that I have put my friends and family through, any embarrassment.
>
> I would like to say, my son does have a very rare disease. It's called IPEX. He was life-flighted five years ago. He had baseball size blood clot in the middle of his brain. So he is very ill. They don't know what this disease is going to do to him. He does treatments weekly. He is on a lot of medications. So, yes, that is true that he is sick. If you need documentation of that we can get that for you.
>
> And, again, I just want to apologize for everything that has happened.

(8/13/18 Tr., pp. 33-34.)

{¶12} Appellant also acknowledged that she had not made any restitution. (8/13/18 Tr., p. 34.)

{¶13} The trial court indicated it had reviewed the presentence investigation report. The court spoke of the principles and purposes of sentencing and discussed the seriousness and recidivism factors related to Appellant's conduct. The trial court made consecutive findings as enumerated in R.C. 2929.14. Appellant was sentenced to a term of incarceration of one hundred two months as recommended by the state in the plea agreement. The court informed Appellant she could be subject to postrelease control for up to three years. If she violated the terms of postrelease control the parole board could return her to prison for a maximum of one-half of her stated prison term. The court also explained that the parole authority could punish her separately for any felony she committed while under postrelease control. The trial court made the same findings in its written judgment entry of sentence, dated August 14, 2018.

{¶14} Appellant brings this timely appeal.

ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED BY IMPOSING CONSECUTIVE SENTENCES AGAINST THE APPELLANT IS CONTRARY TO LAW WHEN IT FAILED TO MAKE THE FINDINGS REQUIRED BY R.C. 2929.14(C)(4).

{¶15} Appellant contends the trial court's imposition of consecutive sentences is contrary to law, as the court failed to make the required statutory findings pursuant to R.C. 2929.14(C) on the record at the hearing and in the judgment entry. We note at the outset that Appellant raises no error regarding her Crim.R. 11 guilty plea, which clearly specified that should the trial court determine that incarceration be imposed, the state

would recommend consecutive sentences. Appellant argues only that the trial court did not make the requisite statutory findings for consecutive sentences.

{¶16} Pursuant to the Ohio Supreme Court's holding in *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1, "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." *Id.*

{¶17} Clear and convincing evidence "is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Id.* at ¶ 22, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph one of the syllabus.

{¶18} A sentence is considered to be clearly and convincingly contrary to law if it falls outside of the statutory range for the particular degree of offense; if the trial court failed to properly consider the purposes and principles of felony sentencing as enumerated in R.C. 2929.11 and the seriousness and recidivism factors set forth in R.C. 2929.12; or if the trial court orders consecutive sentences and does not make the necessary consecutive sentencing findings. See *State v. Collins,* 7th Dist. Noble No. 15 NO 0429, 2017-Ohio-1264, ¶ 9; *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 30.

{¶19} R.C. 2929.14(C)(4) sets forth the necessary findings required for the imposition of consecutive sentences:

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:

(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.

{¶20} When a trial court imposes consecutive sentences it must make the R.C. 2929.14(C)(4) findings at the sentencing hearing and must also incorporate those findings into the judgment entry of sentence. *Bonnell*, 2014-Ohio-3177, at ¶ 29.

{¶21} In the instant matter, the trial court stated at the sentencing hearing:

> Well, the Court's job is to protect the public, punish offenders and decree a fair sentence. Those are the purposes and principles of Ohio Felony Sentencing Law.

(8/13/18 Tr., pp. 35-36.)

{¶22} The court further stated at the hearing when imposing sentence:

> All the count [sic] are to run consecutively, one after the other, for a total of 102 months in a state correctional facility.
>
> The Court finds in this case that consecutive sentences are necessary. The harm here has been so great. This case is about a lot more than just money and that a price has to be paid in terms of prison time.
>
> The Court finds that the sentence, consecutive in nature, is necessary. It's not disproportionate to the criminal conduct involved. And it's necessary because the harm caused here is so great that it justifies such a harsh, in some people's mind, a harsh sentence. I don't think it's harsh. I think it's based on the evidence and I think it's necessary.

(8/13/18 Tr., pp. 39-40.)

{¶23} In its written judgment entry of sentence the trial court concluded:

> After due consideration of the pre-sentence investigation, statements of counsel for both parties, and statement by the Defendant, the Defendant's request for probation is DENIED.
>
> With the purposes and principles of the sentencing law in mind, the Court finds that this Defendant has pled "Guilty" to counts, one, three, four and five of the Indictment[.]
>
> * * *
>
> The Court finds that the sentence, consecutive in nature, is necessary to carry out the purpose and principles of the felony sentencing law. It is not disproportionate to the criminal conduct involved which case [sic] great financial and mental harm to the victims.

(8/14/18 J.E. pp. 1-2.)

{¶24} The sentencing court did not recite the language of the statute verbatim at the hearing. However, the court's finding that "the harm here has been so great" and "[i]t's not disproportionate to the criminal conduct involved" and that "the harm caused here is so great" and "it's based on the evidence" falls under the second part of R.C. 2929.14(C)(4), that Appellant's conduct caused such great harm that consecutive sentences are warranted.

{¶25} The Ohio Supreme Court has indicated that "a word-for-word recitation of the language of the statute is not required, and as long as the reviewing court can discern

that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld." *Bonnell,* at ¶ 29. Thus, utilizing "magic" or "talismanic" words is not required in order to impose consecutive sentences. *State v. Bellard*, 7th Dist. Mahoning No. 12 MA 97, 2013-Ohio-2956, ¶ 17. In reviewing the statements made by the trial court at the sentencing hearing, this record reflects the trial court engaged in the correct analysis and complied with the mandates of R.C. 2929.14(C)(4) and *Bonnell.*

{¶26} The trial court is also required to state the consecutive sentencing findings in the judgment entry of sentence. The trial court here also concluded that the sentence was not disproportionate to Appellant's conduct and the financial and mental harm to multiple victims was great.

{¶27} Although the trial court did not recite the statute verbatim, we can glean from the language that the trial court carefully considered the statutory factors before imposing consecutive sentences. Appellant's assignment of error is without merit and is overruled.

Conclusion

{¶28} Based on the foregoing, we conclude the trial court did not err in imposing consecutive sentences. The transcript of the sentencing hearing indicates the trial court carefully considered factors relating to consecutive sentencing provided in R.C. 2929.14(C)(4). The written sentencing entry also reflects that a proper consideration of the consecutive sentencing requirements was made by the trial court. This record provides clear and convincing evidence that Appellant's sentence is not contrary to law. Appellant's assignment of error is without merit and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

D’Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. 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.