[Cite as *State v. Clyde*, 2015-Ohio-1859.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio — Court of Appeals No. E-14-006

Appellee — Trial Court No. 2011-CR-334

v.

Jeffrey Clyde — **DECISION AND JUDGMENT**

Appellant — Decided: May 15, 2015

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Karin L. Coble, for appellant.

* * * *

SINGER, J.

{¶ 1} Appellant, Jeffrey Clyde, appeals from his convictions in the Erie County Common Pleas Court. For the reasons that follow, we affirm, in part, and reverse, in part, the judgment of the trial court.

{¶ 2} Appellant sets forth six assignments of error:

I. The convictions for compelling prostitution are not supported by sufficient evidence and are against the manifest weight of the evidence.

II. The convictions for attempted pandering obscenity are not supported by sufficient evidence and are against the manifest weight of the evidence.

III. Plain error occurred when the trial court tried two indictments together absent an order to do so, and absent a state's motion to do so.

IV. Trial counsel committed prejudicial ineffective assistance through multiple failures.

V. The convictions with respect to the victim K.T. were not supported by sufficient evidence and are against the manifest weight of the evidence

VI. The trial court erred in imposing consecutive sentences without the proper findings.

{¶ 3} On August 15, 2011, appellant was indicted on 13 counts of sexual offenses, all of which involved the same alleged victim, appellant's daughter, K.T. Counts 1, 2 and 3 charged appellant with gross sexual imposition, Count 4, 10, 11 and 12 charged appellant with rape, Counts 5, 7, 8 and 13 charged appellant with sexual battery, Count 6 charged appellant with corrupting with drugs, and Count 9 charged appellant with disseminating matter harmful to juveniles. Appellant pled not guilty to these charges.

{¶ 4} On September 9, 2011, appellant was indicted on 4 additional counts, none of which involved K.T. Counts 14 and 15 charged appellant with compelling prostitution and Counts 16 and 17 charged appellant with attempted pandering obscenity. Appellant pled not guilty to these charges.

{¶ 5} Following a bench trial on August 26, 2013, the trial court found appellant not guilty of Counts 1, 2, 3, 4, 10, 11 and 12 and guilty of Counts 5, 6, 7, 8, 9, 13, 14, 15, 16 and 17.

{¶ 6} Following the trial, appellant's trial counsel passed away. The trial court therefore appointed new counsel to represent appellant at sentencing.

{¶ 7} On December 10, 2013, the sentencing hearing was held. Appellant was classified as a Tier II and Tier III sexual offender, and was sentenced to 4 years in prison on Count 5, 17 months on Count 6, 4 years on Count 7, 4 years on Count 8, 11 months on Count 9, 4 years on Count 13, 2 years on Count 14, 2 years on Count 15, 2 years on Count 16 and 2 years on Count 17. The judge ordered the sentences imposed on Counts 5, 7, 8, 13, 14 and 15 to run consecutively and the sentences imposed on Counts 6, 9, 16 and 17 to run concurrently with each other and concurrently with Counts 5, 7, 8, 13, 14 and 15, for a total period of 20 years in prison. Appellant appealed.

{¶ 8} Appellant's first and second assignments of error will be addressed together. Appellant contends the convictions for compelling prostitution and attempted pandering obscenity are not supported by sufficient evidence and are against the manifest weight of the evidence.

{¶ 9} "A sufficiency of the evidence argument challenges whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or to sustain the verdict as a matter of law." *State v. Shaw*, 2d Dist. Montgomery No. 21880, 2008-Ohio-1317, ¶ 28, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). During a sufficiency of the evidence review, an appellate court's function is to "examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind 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, *superseded by state constitutional amendment on other grounds as stated in State v. Smith*, 80 Ohio St.3d 89, 684 N.E.2d 668 (1997), fn. 4. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Jenks* at paragraph two of the syllabus.

{¶ 10} The standard of review for manifest weight is the same in a criminal case as in a civil case, and an appellate court's function is to determine whether the greater amount of credible evidence supports the verdict. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 12; *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). "A manifest weight of the evidence challenge contests the believability of the evidence presented." (Citation omitted.) *State v. Wynder*, 11th Dist. Ashtabula No. 2001-A-0063, 2003-Ohio-5978, ¶ 23. When determining whether a conviction is against the manifest weigh, the appellate court must review the record,

weigh the evidence and all reasonable inferences drawn from it, consider the witnesses' credibility and decide, in resolving any conflicts in the evidence, 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." *State v. Prescott*, 190 Ohio App.3d 702, 2010-Ohio-6048, 943 N.E.2d 1092, ¶ 48 (6th Dist.), citing *Thompkins* at 387. It has long been held that the weight to be given to the evidence and the credibility of the witnesses is primarily for the trier of fact to decide. *State v. Thomas*, 70 Ohio St.2d 79, 80, 434 N.E.2d 1356 (1992). When reviewing a manifest weight of the evidence challenge, an appellate court sits as the "thirteenth juror." *Prescott* at ¶ 48, citing *Thompkins* at 387.

{¶ 11} Here, appellant was charged with compelling prostitution, Counts 14 and 15, and attempted pandering obscenity, Counts 16 and 17, against two different victims, B.M. and D.B. By way of background, B.M. was the 14 year-old daughter of appellant's girlfriend, Kristina M., and D.B. was B.M.'s 16 year-old boyfriend. B.M., Kristina M. and D.B. were all living for a time with appellant at appellant's house.

{¶ 12} B.M. testified at trial her relationship with appellant "wasn't all that great" once she moved into the house and appellant "made comments all the time about my ass, comments all the time about how he's the last person that gets out of the truck so he can just see my ass."

{¶ 13} As to Count 14, B.M. testified she was sitting around the kitchen table with her mother, D.B. and appellant when appellant "pops up with the question, [B.M.] I'll

give you $50 if you strip for me." B.M. testified she looked at her boyfriend and said, "No, not gonna happen." When B.M. was asked if she thought appellant was joking, she responded, "Not at all."

{¶ 14} With respect to Counts 15, 16 and 17, B.M. testified she was in her bedroom with D.B. when appellant came in the room and said, "[h]ey guys, do you want to make a porno for me? Said I'll give you $200 if you make it for me and I'll give you an additional $300 if you let me join in." B.M. testified appellant was not joking and she took him seriously. B.M. said she felt bad and it "[k]ind of made me feel I was like trash." D.B. testified "we were sitting in [B.M.'s bedroom] and Jeff walks in and asks us $200 to make a porno, $300 to join in * * *." D.B. stated he did not think appellant was joking as no one was laughing. D.B. testified he thought B.M. took appellant seriously. D.B. also believed appellant was drinking. Kristina M. testified appellant initiated the conversation about making a porno movie when they were sitting around the table downstairs and appellant was drinking. Kristina M. further testified appellant "would make rude comments" to B.M. like "[h]ow sexy she looked in her shorts."

{¶ 15} Appellant argues the state did not elicit any testimony from B.M. as to what "strip" meant, nor did the state elicit any testimony from B.M. or D.B. as to what "make a porno" meant. Appellant asserts B.M. did not testify that she understood "strip" or "make a porno" to mean sexual activity of any kind, nor did D.B. testify that he

understood appellant was requesting that he engage in sexual activity. Appellant contends neither request, to strip or make a porno, can or should be interpreted as a request for sexual conduct or contact.

{¶ 16} Appellant was charged with compelling prostitution under R.C. 2907.21(A)(3)(a), which provides:

> (A) No person shall knowingly do any of the following:
>
> * * *
>
> (3)(a) Pay or agree to pay a minor, either directly or through the minor's agent, so that the minor will engage in sexual activity, whether or not the offender knows the age of the minor * * *.

{¶ 17} R.C. 2907.01(C) defines "sexual activity" as "sexual conduct or sexual contact, or both." Sexual contact is "any touching of an erogenous zone of another * * * for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B). Sexual conduct is defined in R.C. 2907.01(A) 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.

{¶ 18} Here, as to Count 14, appellant offered B.M. $50 if she would strip for him. There is nothing in the record to explain the meaning of "strip." However, the dictionary

meanings of "strip" include "to remove your clothing[,] to take the clothes off (someone) [or] to remove your clothing in a sexually exciting way while someone is watching." Merriam-Webster Online, available at http://www.merriam-webster.com/dictionary/strip (accessed Apr. 20, 2015). While "strip" may have a sexual implication, the request by appellant to "strip for me" does not fit the definition of "sexual activity" as set forth in R.C. 2907.01. This conclusion is consistent with the finding of the Second District Court of Appeals in *State v. Cooper*, 92 Ohio App.3d 108, 634 N.E.2d 273 (2d Dist.1994). There, the court held "[t]he act of causing another to disrobe, wholly or partially, for the purpose of sexual gratification, is clearly not within the scope of the definition of 'sexual activity' in R.C. 2907.01(C)." *Id.* at 111. "Similarly, the request that his victim remove her clothes, while reprehensible, was not a request that she engage in sexual activity with him." *Id.* at 112. "It was possibly preparatory to engaging in sexual activity and may, therefore, have constituted attempted importuning." *Id.*

{¶ 19} Moreover, the definition of "sexual activity" in R.C. 2907.01 necessitates some sort of touching or physical contact between two people. Thus, the offense of compelling prostitution, likewise, requires touching or physical contact. Here, there is no evidence in the record of any touching or suggestion of touching between B.M. and appellant when appellant offered B.M. $50 to strip for him. As there is no evidence that appellant offered to pay B.M. to engage in sexual contact or sexual conduct, as defined in R.C. 2907.01, there can be no underlying crime of compelling prostitution. Appellant's

conviction for compelling prostitution as to Count 14 is not supported by sufficient evidence and is against the manifest weight of the evidence. Accordingly, appellant's conviction as to Count 14 must be reversed and vacated.

{¶ 20} With respect to Count 15, the record shows appellant offered D.B. $200 to "make a porno" with B.M. or $300 if appellant could join in. There is nothing in the record to explain the meaning of "make a porno." The term "porno" is generally defined as "[p]ornography * * * [a] pornographic film or video." American Heritage Dictionary of the English Language (5th Ed.), available at http://www.thefreedictionary.com/porno (accessed Apr. 21, 2015). "Pornography" and "pornographic" share the same definition which is "[s]exually explicit writing, images, video, or other material whose primary purpose is to cause sexual arousal." *Id.* at http://www.thefreedictionary.com /pornography (accessed Apr. 21, 2015).

{¶ 21} Here, in reviewing the evidence and considering the testimony of D.B. and B.M., appellant's offer to pay money to the minors to "make a porno," and pay more money if appellant could join in, suggests a sexual purpose. That appellant intended sexual activity, as defined in R.C. 2907.017(A), (B) and (C), as a result of his proposition to the minors is reasonably inferable from this record. Moreover, the evidence shows B.M. and D.B. could reasonably have been expected to understand that appellant was requesting that they engage in sexual activity. Since appellant agreed to pay the minors so they would engage in sexual activity, the statutory definition of compelling

prostitution, under R.C. 2907.21(A)(3)(a), has been met. Therefore, there was substantial evidence to permit the trier of fact to find appellant guilty of Count 15. Accordingly, appellant's conviction for compelling prostitution as to Count 15 is supported by sufficient evidence and is not against the manifest weight of the evidence.

{¶ 22} Appellant was also charged with attempted pandering obscenity under R.C. 2907.321(A)(3) and R.C. 2923.02(A). R.C. 2907.321(A)(3) states:

> (A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:
>
> * * *
>
> (3) Create, direct, or produce an obscene performance that has a minor as one of its participants * * *.

{¶ 23} R.C. 2923.02(A) states:

> No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense.

{¶ 24} "Criminal attempt" is an act or omission which constitutes a substantial step in a course of conduct planned to culminate in the party's commission of the crime. *State v. Woods*, 48 Ohio St.2d 127, 357 N.E.2d 1059 (1976), paragraph one of the syllabus, *death penalty vacated*, 438 U.S. 910, 98 S.Ct. 3133 (1978), *overruled on other grounds by State v. Downs*, 51 Ohio St.2d 47, 364 N.E.2d 1140 (1977). A substantial step consists of conduct which is "strongly corroborative of the actor's criminal purpose."

Id. An attempt is complete when the defendant's conduct constitutes a substantial step in a sequence of events designed to result in the commission of a crime. *State v. Green*, 122 Ohio App.3d 566, 569-570, 702 N.E.2d 462 (12th Dist.1997). Neither the intent to commit a crime nor mere preparation constitutes criminal attempt. *Id.* at 570.

{¶ 25} Appellant submits, with respect to criminal attempt, there is no evidence which indicates preparation or that with the words he spoke he had formulated a criminal intention to commit pandering. We agree. A review of the record shows there is insufficient evidence that appellant undertook a "substantial step towards" creating an obscene performance with minors as participants. The only evidence in support of the attempted pandering counts was appellant's verbal offer to pay B.M. and D.B. money to "make a porno." No evidence was presented that appellant actually had the money that he offered the minors, that anyone disrobed or that a time or place was arranged. Nor is there evidence of any further discussion or offer of money to "make a porno" after appellant's initial offer was refused by B.M. and D.B. Because there was insufficient evidence presented to prove beyond a reasonable doubt that appellant attempted to pander obscenity involving B.M. or D.B., we must reverse and vacate appellant's convictions as to Counts 16 and 17.

{¶ 26} In light of the foregoing, appellant's first assignment of error is well-taken as to Count 14 and not well-taken as to Count 15, and appellant's second assignment of error is well-taken as to Counts 16 and 17.

{¶ 27} Appellant's fifth assignment of error will be addressed next. Appellant argues his convictions with respect to K.T. were not supported by sufficient evidence and are against the manifest weight of the evidence. Appellant acknowledges Count 5 is the only count supported by any evidence as there is corroborative evidence of K.T.'s testimony. With respect to Count 6, appellant claims at no time did K.T. testify appellant furnished weed to her. Appellant argues, regarding Counts 7, 8 and 13, there is no corroborative evidence of K.T.'s testimony and K.T. did not testify to any penetrative acts, which sexual conduct requires. As to Count 9, appellant submits K.T.'s testimony fails to establish the material was obscene.

{¶ 28} Counts 5, 7, 8, and 13, involve sexual battery, which R.C. 2907.03 defines as sexual conduct with a natural parent. With respect to this offense, evidence was presented that appellant is K.T.'s biological father. Furthermore, K.T. testified that she had sexual intercourse several times with appellant. K.T.'s testimony was corroborated by K.T.'s former girlfriend, Katherine Morrow, who testified she saw the two in the act, and appellant's former brother-in-law, Mark Hoover, who testified appellant admitted to having had sex with K.T.

{¶ 29} Count 6, charged corrupting with drugs, defined by R.C. 2925.02(A)(4)(a) as "furnish[ing] or administer[ing] a controlled substance to a juvenile who is at least two years the offender's junior, when the offender knows the age of the juvenile or is reckless in that regard." With respect to this offense, the record shows K.T. testified her father gave her marijuana to smoke.

{¶ 30} Count 9, charged disseminating matter harmful to juveniles, in violation of R.C. 2907.31(A)(1), where:

> [a] person, with knowledge of its character or content, * * * recklessly * * * [d]irectly sell[ing], deliver[ing], furnish[ing], disseminat[ing], provid[ing], exhibit[ing], rent[ing], or present[ing] to a juvenile * * * any material or performance that is obscene or harmful to juveniles[.]

{¶ 31} "Obscene performance" is defined in R.C. 2907.01(F)(5) as material which:

> contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such an interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

{¶ 32} At trial, K.T. testified appellant showed her and Morrow a video on his computer of two women who were naked and involved in sex acts.

{¶ 33} We find, based upon the evidence offered at trial as set forth above, sufficient evidence was offered to prove, beyond a reasonable doubt, that appellant committed Counts 5, 6, 7, 8, 9 and 13 of the indictment. In addition, upon our review of

the evidence adduced and consideration of the credibility of the 22 witnesses who testified at trial, we cannot say the trial court lost its way and created a manifest miscarriage of justice in finding appellant guilty of these offenses.

{¶ 34} In the third assignment of error, appellant asserts plain error occurred when the trial court tried the two indictments together without a motion by the state or an order pursuant to Crim.R. 13. Appellant argues the two indictments alleged dissimilar offenses which occurred at different times with different victims and the evidence of the offenses from the second indictment would not have been admissible in a trial on the first indictment and vice versa. He further asserts the evidence is not simple and distinct because it is highly inflammatory.

{¶ 35} The state maintains since the grand jury issued a superseding indictment which added counts to the original indictment, Crim.R. 8 does not provide that the court order the case be tried together, and the state was not required to move to try all of the counts together.

{¶ 36} Crim.R. 8(A) provides that multiple offenses may be charged in the same indictment if the offenses are "of the same or similar character," or "based on the same act or transaction or * * * two or more acts or transactions connected together or constituting parts of a common scheme or plan," or "part of a course of criminal conduct." Similarly, indictments may be tried together if the offenses could have been joined in a single indictment. Crim.R. 13. The joinder of charges is the rule rather than the exception, and it is favored by the law. *State v. Whipple*, 2012-Ohio-2938, 972

N.E.2d 1141, ¶ 14 (1st Dist.). A party who claims joinder of offenses is improper has the burden of making an affirmative showing that his rights will be or had been prejudiced. Crim.R. 14; *State v. Roberts*, 62 Ohio St.2d 170, 175, 405 N.E.2d 247 (1980), *cert. denied* 449 U.S. 879, 101 S.Ct. 227, 66 L.Ed.2d 102 (1980). Furthermore, even when evidence of an offense would not be admissible if indictments were tried separately, joinder is permissible if the evidence of the offenses under each indictment is simple and distinct. *State v. Lott*, 51 Ohio St.3d 160, 163, 555 N.E.2d 293 (1990).

{¶ 37} Here, the record shows appellant did not object to the joinder of the indictments for trial nor did appellant move the trial court to sever the counts for trial. A party's failure to object at trial waives all but review but plain error. *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, ¶ 139. "Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise." *State v. Wogenstahl*, 75 Ohio St.3d 344, 357, 662 N.E.2d 311 (1996). The record indicates appellant was initially charged with thirteen counts of sexual offenses against one minor victim, and was then charged with four additional sexual offenses against two different minor victims. The counts arose out of appellant's alleged sexual relationship with his minor daughter or appellant's inappropriate sexual comments to his girlfriend's minor daughter and her minor boyfriend. The offenses all allegedly occurred at appellant's home where the minors lived, at different times, with appellant. All counts of the two indictments were filed under one case number and were tried together to the bench.

{¶ 38} Separate and direct evidence was adduced at trial as to the counts involving appellant's daughter and the counts concerning the other two victims such that there was no confusion in the record and no overlap in testimony; each victim testified as to his or her own experiences with appellant. In *State v. Lewis*, 6th Dist. Lucas Nos. L-09-1224, L-09-1225, 2010-Ohio-4202, ¶ 33, this court observed that "Ohio appellate courts routinely find no prejudicial joinder where the evidence is presented in an orderly fashion as to the separate offenses or victims without significant overlap or conflation of proof." Here, no evidence was presented that appellant was prejudiced by trying the thirteen counts of sexual offenses against one victim with the four counts of sexual offenses against two other victims. Trying the charges together was therefore not plain error. Appellant's third assignment of error is not well taken.

{¶ 39} In his fourth assignment of error, appellant asserts his trial counsel committed ineffective assistance through multiple failures, including not filing a motion to sever the indictments and not objecting to prejudicial evidence and hearsay testimony.

{¶ 40} Two objective factors must be proven to establish ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "First, the defendant must show that counsel's performance was deficient." *Id.* "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* Counsel's errors must have been serious enough to disrupt the protections afforded through the Sixth Amendment and the defendant's right to a fair trial. *Id.* An attorney's trial strategy does not usually provide for a claim of ineffective assistance of

counsel. *State v. Gaston*, 6th Dist. Lucas No. L-06-1183, 2008-Ohio-1856, ¶ 33. Courts give deference to the strategy of an appointed counsel and tend to presume that counsel acted in a reasonable manner. *Id.* at ¶ 31. In Ohio, a properly licensed attorney is presumed to be competent and the burden is on the defendant to show counsel's ineffectiveness. *State v. Hamblin*, 37 Ohio St.3d 153, 156-157, 524 N.E.2d 476 (1988).

{¶ 41} Here, appellant contends his trial counsel was ineffective for failing to object to the joint trial of two indictments, for failing to object to prejudicial, "other acts" evidence, for eliciting evidence contrary to appellant's interest, for failing to object to numerous hearsay statements made by various witnesses and for failing to object to testimony concerning polygraphs.

{¶ 42} As to the failure to object to "joint trials," given our ruling under the third assignment of error that no evidence was presented that appellant was prejudiced by one trial to the bench on all counts in the indictments, we cannot find counsel's failure to object to "joint trials" affected the outcome of appellant's trial or amounted to ineffective assistance of counsel.

{¶ 43} Next, as to counsel's failure to object to prejudicial, "other acts" evidence, appellant refers to testimony regarding his bad conduct or dishonorable discharge from the navy for a "computer criminal history" that showed indecent acts or liberties with a child, as well as a question asked of another witness as to the witness's awareness of the cultivation of marijuana in appellant's closet.

{¶ 44} Regarding the dishonorable discharge testimony, the record shows appellant's counsel did raise an issue with this testimony, although counsel did not specifically lodge an objection. As to the query about the cultivation of marijuana in appellant's closet, the record reveals appellant's counsel did not object to this testimony, but did vigorously cross-examine B.M. about this line of testimony such that B.M. admitted the detectives who investigated never found any pot cultivation. Assuming arguendo the foregoing testimony was prejudicial, appellant has failed to demonstrate how his counsel's failure to object to the testimony affected the outcome of his trial or constituted ineffective assistance of counsel.

{¶ 45} Appellant cites other instances of alleged ineffective assistance of counsel in failing to object to hearsay statements and testimony concerning polygraphs. However, with respect to each instance, appellant fails to show the deficiency in counsel's performance or that such conduct affected the outcome of the trial. Applying *Strickland* to the record herein and the examples cited by appellant, we are unable to find that counsel's representation fell below a standard of reasonableness or that, but for the perceived errors of counsel, appellant would not have been convicted. Accordingly, we find that appellant's fourth assignment of error not well-taken.

{¶ 46} In his sixth assignment of error, appellant contends the trial court failed to make all of the findings required under R.C. 2929.14(C) for consecutive sentences.

{¶ 47} The standard of appellate review of felony sentences is set forth in R.C. 2953.08. This court outlined that standard of review in *State v. Tammerine*, 6th Dist.

Lucas No. L-13-1081, 2014-Ohio-425, as limiting our review to whether there is clear and convincing evidence to support the court's findings and whether the sentence is contrary to law.

{¶ 48} Here, appellant submits, at the least, the trial court failed to find one of the factors of R.C. 2929.14(C)(4)(a), (b) or (c) at the sentencing hearing, and none of the required findings was incorporated into the judgment entry of sentencing.

{¶ 49} The state counters the trial court did make the required findings under R.C. 2929.14(C)(4). The state contends the trial court stated that it considered the presentence report, appellant's criminal history and background, the victims' impact statements and the statements made by the victims at sentencing. The state observes the statements made by K.T. at the sentencing hearing demonstrate the offenses were part of a course of conduct, and the state's representations to the court show a course of conduct as well as appellant's history of drug abuse.

{¶ 50} Consecutive sentences may be imposed at the court's discretion. Before imposing consecutive sentences, the trial court must find that consecutive sentences are "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 that one of the circumstances listed at R.C. 2929.14(C)(4)(a), (b), (c) existed, which in this case was that "multiple offenses were committed as part of one or more courses of conduct * ** and

the harm * * * was so great * * * that no single prison term * * * adequately reflects the seriousness of the offender's conduct." R.C. 2929.14(C)(4)(b). *See State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus.

{¶ 51} Here, a review of the record, including the transcript of the sentencing hearing, shows the trial court found "consecutive sentences are necessary in proportion to the seriousness of the [appellant's] conduct and the danger of future crimes the [appellant] poses to the public." This satisfies the first and second statutory requirements under R.C. 2929.14(C)(4). However, the court failed to find that one of the circumstances listed in R.C. 2929.14(C)(4)(a)-(c) applies. In addition, the trial court failed to incorporate the required findings into the judgment entry of sentencing. As the record does not support a conclusion that the trial court made all findings required by R.C. 2929.14(C) at the time it imposed consecutive sentences, the imposition of consecutive sentences in this case is contrary to law. *See Bonnell* at ¶ 37. This matter must be remanded for a new sentencing hearing. We therefore find appellant's sixth assignment of error well-taken.

{¶ 52} The judgment of the Erie County Court of Common Pleas is affirmed, in part, and reversed, in part. Appellant's convictions on Counts 14, 16 and 17 are vacated, and this case is remanded for resentencing in accordance with R.C. 2929.14(C)(4). Appellant and appellee are each ordered to pay one-half of the costs of this appeal pursuant to App.R. 24.

Judgment affirmed, in part,
and reversed, in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE