[Cite as *State v. McClain*, 2014-Ohio-4192.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PICKAWAY COUNTY

STATE OF OHIO, :
:
Plaintiff-Appellee, : Case No. 13CA17
:
vs. :
: DECISION AND JUDGMENT
PAUL ANDREW McCLAIN, : ENTRY
:
Defendant-Appellant. : **Released: 09/17/14**

APPEARANCES:

Michael D. Hess, Circleville, Ohio, for Appellant.

Judy C. Wolford, Pickaway County Prosecuting Attorney, Circleville, Ohio, for Appellee.

McFarland, J.

{¶1} This is an appeal from the Pickaway County Court of Common Pleas after a jury found Appellant guilty of two counts of unlawful sexual conduct with a minor, violations of R.C. 2907.04(A) and felonies of the second degree. Appellant contends: (1) the trial court erred by sentencing defendant-appellant to the maximum sentence on each count and by sentencing defendant-appellant to consecutive sentences; and (2) the guilty verdicts were against the manifest weight of the evidence.

Upon review, we find Appellant's maximum sentence on each count was not contrary to law, nor was the sentence contrary to law because the trial judge imposed a consecutive sentence. We further find the jury's verdict was not against the manifest weight of the evidence. Accordingly, we overrule both assignments of error and affirm the judgment of the trial court.

FACTS

{¶2} Appellant was indicted for two counts of unlawful sexual conduct with a minor, "S.F.," by the Pickaway County Grand Jury. The indictments arose from two incidents which occurred on or about October 18, 2012 and on or about November 1, 2012 in Pickaway County. Appellant was arraigned on the charges, entered a not guilty plea, and the matter proceeded to trial.

{¶3} At trial on April 18, 2013, the State of Ohio presented the testimony of Jennifer Greeno, Penelope Hyatt, Detective Phillip Roar, the victim, "S.F.," S.F.'s brother, "C.F." Appellant's sole witness was himself.

{¶4} Jennifer Greeno testified she was playing cards with Penny Hyatt, Appellant, and others on the evening of December 22, 2012. Appellant was drinking alcohol. Hyatt was taking pictures and Greeno was tagging[1] them on Facebook. Greeno could not get the pictures to upload to

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[1] "Tagging," according to the witness, is when you post a picture of someone to somebody else's page.

Appellant's Facebook page, so he gave her his password and login information. Appellant advised her how to change his security information. Then she was able to upload pictures. The group continued playing cards and listening to music.

{¶5} Greeno and Hyatt left around 5:30 a.m. to go to McDonalds. When they returned Appellant was passed out at the kitchen table. They tried to awaken him. Appellant became sick and vomited. Around 7:00 a.m., Greeno and Hyatt got on Facebook again. Appellant's Facebook page was still logged in. Greeno and Hyatt began reading messages Appellant's messages. They also saw pictures which disturbed them. One picture was a young girl in bra and panties. Another pictures showed the girl completely naked. There was also a picture of a little boy.

{¶6} Greeno also noticed a sexual conversation between Appellant and the young girl. The content of the conversation indicated the girl was being "blackmailed." There was also a message in which Appellant asked the girl if she was pregnant. Greeno clicked on the girl's name and it took her to the girl's Facebook page. The page indicated the girl was a high school student.

{¶7} Greeno and Hyatt left. Ultimately, they reported what they found on Appellant's Facebook page to the Circleville Police Department.

Greeno identified Appellant to the jury. On cross-examination, Greeno denied having any skill for “hacking” a Facebook page.

{¶8} Penelope Hyatt testified Appellant and she often played cards on the weekends. He was always “on guard” about his cell phone and he often changed his password. Hyatt testified to an incident in November 2012, when they were playing cards. That evening, Appellant seemed depressed and standoffish rather than his usual upbeat attitude. Hyatt later noticed Appellant was texting someone.[2]

{¶9} Hyatt’s testimony regarding the events of December 22, 2012 paralleled much of Jennifer Greeno’s testimony. Hyatt testified Jennifer Greeno, Jennifer Wilbanks, Damien Boysel, Appellant, and she were playing Euchre. Appellant and Damien Boysel were drinking alcohol. Hyatt was taking pictures on her phone and sending them to Facebook. Greeno was tagging the pictures, but there was a problem with loading them onto Appellant’s page. Appellant gave Greeno his password so she could post the pictures to his page. When that was successful, the group continued to listen to music and play cards. Appellant got drunk and was acting “belligerent and sexual” towards Greeno.

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[2] At trial, Hyatt actually testified as to S.F.’s first name.

{¶10} Hyatt testified when Greeno and she returned from McDonald's, Appellant was passed out at the table. Greeno decided to look at Facebook and Appellant's page was still logged on. She notified Hyatt there were pictures of S.F. and a conversation between the two. Hyatt testified there were thousands of messages between Appellant and S.F., Appellant and another young girl, and Appellant and a young boy. Hyatt testified there were nude pictures of S.F. The messages between S.F. indicated Appellant was threatening her. There was a message indicating Appellant would bail S.F.'s boyfriend "Chris out of jail" if she would perform sexual favors. Hyatt testified the messages indicated Appellant pretended to be other people and then he would apologize and say his Facebook was hacked. Hyatt went with Greeno to report the incident to the police. On cross-examination, Hyatt acknowledged she was unaware of Appellant's other friendships and whether or not other people had access to his Facebook page.

{¶11} Detective Phillip Roar of the Circleville Police Department testified he spoke with Greeno and Hyatt on January 3, 2013.[3] Based on their reports, he proceeded to identify S.F., a high school freshman. He went to S.F.'s home and spoke to S.F., her mother, and her brother. Appellant's

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[3] He also spoke to Jennifer Wilbanks. The testimony indicates Jennifer Wilbanks was present at the card party early on December 22, 2012, but left early to go to work. The testimony also indicates she urged Jennifer Greeno and Penelope Hyatt to report their discovery to the police.

name and the name "Chris Miller" surfaced. S.F. advised Chris Miller was a friend of hers on Facebook. She described him as a "boyfriend she never met." She indicated Chris Miller was 17-years-old and attended Zane Trace High School. Detective Roar utilized various databases[4] and was unable to locate Chris Miller.

{¶12} On cross-examination, Detective Roar testified S.F. had taken nude photographs of herself and sent them to Chris Miller. S.F. told Detective Roar that Appellant and Chris Miller were best friends.

{¶13} S.F. testified she was 14-years-old and a freshman. She identified Appellant and testified she had gone to the same church as him, where her grandparents attended. She also knew Appellant through Chris Miller, a guy she was talking to on Facebook. She had never met Chris Miller face-to-face.

{¶14} S.F. testified she was looking at Chris Miller's Facebook page and messaged him. He sent a message back. This began when she was still 13-years-old. He asked her for "dirty" pictures. She viewed him as a boyfriend. They texted as well. Initially she refused to send pictures, but she later relented and sent two pictures: one in bra and panties, and one completely nude.

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[4] Detective Roar utilized OLEG which contains a wide variety of information, such as driving history and criminal history, if a person has been in Ohio. He also utilized LEADS, a broad information system used to verify people. He also checked with local high schools.

{¶15} Appellant started contacting her. "Chris Miller" told her Appellant bought his phone and the memory card was still inside. Appellant told her he had the pictures she sent Chris. Appellant continued to contact her, through texting. He wanted her to meet him. He told her they had to have sex in order for the pictures to "go away."

{¶16} S.F.'s brother refused to let S.F. meet Appellant away from home, so he came to her house in the mid-September 2012. S.F.'s brother talked to Appellant and wanted to know more about Chris Miller. Appellant told them Chris had a lot of money and girls were always chasing him. He stayed about 45 minutes. After he left, S.F. and her brother went inside, and Appellant texted S.F. He told her since they didn't have sex he was going to the cops with the pictures.

{¶17} S.F. agreed to meet him, but she did not agree to have sex. They met in October, before the Pumpkin Show, behind the Y.M.C.A. S.F. was on her way to a party. It was approximately 7:30 at night, after dark. S.F. testified Appellant "fingered her up," and she did not say stop. She performed oral sex on Appellant, and he performed it on her. S.F. testified as follows:

> "And he wanted to have sex, and I said that I didn't want to, and he said just let me put it in ten times. And I said, I don't want to, you know, and he said, just ten times, I said well, that's all. So I let him put it in ten times and I counted the ten out

> loud. And I said stop, and he said one more time, and I said No Paul, Stop. You said ten times. I'm crying the whole time, and I told him, and then he finally stops. And I just get up and I'm like I'm scared, and I say, I would like the pictures and stuff. And he handed me two pictures, and I said well, I've got to go. And he walked me to Blockbusters."

{¶18} S.F. then walked to the party. It was her understanding the pictures would be deleted. She felt very uncomfortable.

{¶19} S.F. testified she was continuing to hear from Chris Miller. A couple of weeks later, he told her Appellant had the pictures and he would take them to her parents and the police and she would have to have sex with him again.[5]

{¶20} S.F. then met Appellant at the Y.M.C.A. in Circleville on a Sunday, around 12:00 noon. They began talking and Appellant made the same threats. She again had oral sex and vaginal intercourse. S.F. told him to stop and he would not, so she did not say anything else. After it was over, Appellant showed her he deleted the pictures and she walked home. S.F. was too scared to tell anyone about the incident.

{¶21} S.F. continued to hear from Chris Miller and Appellant. Chris told her to "give Appellant a try" because he really liked her. Appellant was texting her and she deleted his number from his phone because she didn't

[5] At this point in the testimony, S.F. also testified Chris had told her the first time she would have to have sex with Appellant in order to get rid of the pictures.

want to talk to him. She still texted Chris. He told her he drove a Corvette, was really rich, and his parents were really strict. They set up dates, but Chris never showed up. Appellant sent her a Facebook message asking her if she was pregnant. S.F. testified she had no more contact with Appellant or Chris after Detective Roar talked to her. She did not tell anyone what had happened except her best friend.

{¶22} S.F.'s brother C.F. testified. He is a 17-year-old junior in high school. He testified Appellant came to their residence to meet his sister sometime before the Pumpkin Show in 2012. C.F. recalled it was dark outside. Appellant came to discuss photos on a phone he had swapped. S.F. wanted to meet him behind nearby dumpsters, but C.F. insisted Appellant come to the home. They talked outside about 30 minutes. Appellant told them he was friends with Chris. According to Appellant, Chris was a spoiled kid and drove a new Camaro. C.F. thought everything was o.k. and Appellant left. To his knowledge, nothing else happened at the time.

{¶23} Detective Roar was recalled to the witness stand. He testified Appellant was arrested in Williamsport. Roar interviewed him at the Circleville Police Department in the presence of three other officers. During the interview, Appellant explained he knew S.F. through church and he was friends with her grandparents. He acknowledged she was his friend

on Facebook and they texted occasionally. Appellant stated he had pictures of S.F. through the exchange of a memory card with his friend Chris Miller.

{¶24} Appellant also stated he typically left his phone lying around and lots of people used his phone to text. He stated lots of people used his Facebook page. Appellant stated he met Chris Miller in 2010 and they were casual friends. They always hung out with a group. He testified Chris Miller used his phone to text, used his Facebook page, and also communicated with S.F.

{¶25} Appellant provided a phone number for Chris Miller that was no longer in service. He refused to give a second number he had. He never gave a specific address for Chris Miller. When Detective Roar told Appellant that Chris Miller could potentially have valuable information, Appellant indicated Roar was a detective and he could "figure it out." Appellant also acknowledged he went to S.F.'s residence to discuss the photos.

{¶26} Detective Roar was able to find a profile picture of "Chris Miller" on a Facebook page belonging to "Brent Corrigan." The profile picture matched a picture S.F. had on her phone of Chris Miller. Brent Corrigan is a porn star. On redirect examination, Detective Roar

acknowledged Appellant maintained his innocence throughout the entire interview.

{¶27} Appellant also maintained his innocence at trial. He testified he was familiar with S.F. but never had sex with her. He denied posting her pictures on Facebook. He denied knowing where they originated. He testified he gave people access to his Facebook page on the evening of December 22, 2012, and actually 15-20 people had access. Appellant acknowledged he discussed the photographs of S.F. with her. He admonished her that she was 14-years-old and it was a "bad idea."

{¶28} On cross-examination, Appellant testified he met Chris Miller outside of Circle D one night. He testified Chris, age 17, was from Lima and lived in Williamsport. He denied telling anyone Chris went to Zane Trace. He acknowledged he was intoxicated on December 22, 2012.

{¶29} Appellant denied threatening S.F. about going to the police. He testified he told her he would talk to her grandparents and she should turn them in herself. He denied telling anyone he was best friends with Chris. He testified he didn't help Detective Roar find Chris Miller because the detective had accused him.

{¶30} The jury subsequently found Appellant guilty. He was sentenced on May 29, 2013 to a maximum prison term of eight years on

each count, with the sentences to be served consecutively. This timely appeal followed.

ASSIGNMENTS OF ERROR

> "I. THE LOWER COURT ERRED IN SENTENCING DEFENDANT-APPELLANT TO THE MAXIMUM SENTENCE ON EACH COUNT AND IN SENTENCING DEFENDANT-APPELLANT TO CONSECUTIVE SENTENCES."

> "II. APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

ASSIGNMENT OF ERROR ONE

{¶31} Appellant raises two issues under this assignment of error. Appellant argues the court failed to make any findings in reference to imposing maximum sentences. Appellant also argues the court failed to find that consecutive sentences were not disproportionate to the seriousness of the offender's conduct or to the danger posed to the public. Appellant requests this Court to reverse the trial court's judgment and the sentences imposed.

A. STANDARD OF REVIEW

{¶32} In the past, this court has reviewed felony sentences under the two-step process set forth in *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶4. *State v. Batty,* 4th Dist. Ross No. 13CA3398, 2014-Ohio-2826; see, also, *State v. McClintock,* 4th Dist. Meigs No. 13CA4,

2013-Ohio-5598, ¶4; *State v. Evans,* 4th Dist. Washington No. 11CA16, 2012-Ohio-850, ¶5; *State v. Moman,* 4th Dist. Adams No. 08CA876, 2009-Ohio-2510, ¶6. Pursuant to K*alish*, an appellate court first determines whether the trial court complied with all applicable rules and statutes. *Kalish, supra,* at ¶4. If it did, the appellate court then reviews the sentence under the abuse of discretion standard. *Id; State v. Roach,* 4th Dist. Lawrence No. 11CA12, 2012-Ohio-1295, ¶4.

{¶33} However, a growing number of appellate districts have abandoned K*alish's* second step "abuse of discretion" standard of review. *Batty, supra*; *State v. Brewer*, 4th Dist. Meigs No. 14CA1, 2014-Ohio-1903, ¶33. Former R.C. 2953.08(G)(2) authorized a court of appeals to take any action if it clearly and convincingly found either of the following: "(a) That the record did not support the sentencing court's findings under division (B) of (D) of section 2929.13, division (E)(4) of section 2929.14, or division (H) of section 2929.20 of the Revised Code, whichever, if any, was relevant; and (b) That the sentence was otherwise contrary to law." *Kalish,* 896 N.E.2d 124, ¶10; 2004 Am.Sub. H.B.No. 473, 150 Ohio laws, Part IV, 5814. In *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶99,[6] the Supreme Court of Ohio declared certain provisions of the felony

[6] *Foster* was abrogated by *Oregon v. Ice*, 129 S. Ct. 711, 716, 555 U.S. 160, 167 (2009), and superseded by statute as stated in *State v. Rodeffer,* 5 N.E.3d 1069, 2013-Ohio-5759.

sentencing statues unconstitutional. *Brewer, supra*, at ¶27. The Supreme Court held that insofar as former R.C. 2953.08(G) referred to the unconstitutional provisions, it no longer applied. *Id*; *Foster, supra* at ¶99. Following *Foster,* appellate districts applied different standards of review in felony sentencing cases. *Brewer, supra*, at ¶28. In *Kalish,* the Supreme Court of Ohio attempted to resolve the conflicting standards, and a three-judge plurality held that based on the court's previous opinion in Foster, "[A]ppellate courts must apply a two-step approach when reviewing felony sentences. " *Brewer, supra,* at ¶28, quoting *Kalish,* at ¶26. However, following *Kalish,* the United States Supreme Court decided *Oregon v. Ice,* 555 U.S. 160, 164, 129 S. Ct. 711 (2009), in which it held, contrary to *Foster,* that it is constitutionally permissible for states to require judges rather than juries to make findings of fact before imposing consecutive sentences. Then in *State v. Hodge,* 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768, paragraphs two and three of the syllabus, the Supreme Court of Ohio then held that the sentencing provisions it ruled unconstitutional in *Foster* remained invalid following *Ice* unless the General Assembly enacted new legislation requiring the judicial findings. Thereafter, the General Assembly enacted 2011 Am. Sub. H.B. No. 86(H.B. 86), which revised some of the judicial fact-finding requirements for sentences and reenacted

the felony sentencing standard of review in R.C. 2953.08(G). *Brewer, supra,* at ¶30.

{¶34} When the General Assembly reenacted R.C. 2953.08(G)(2), it expressly stated that "[t]he appellate court's standard of review is not whether the sentencing court abused its discretion." Id. See generally *State v. White,* 2013-Ohio-4225,997 N.E.2d 629 (1st. Dist.), ¶9 ("we cannot justify applying an abuse of discretion standard where the legislature has explicitly told us that the standard of review is not an abuse of discretion. Thus, henceforth, we will apply the statutory standard rather than the *Kalish* plurality framework to our review of felony sentences.")[7] Pursuant to R.C. 2953.08(G)(2) an appellate court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds either "that the record does not support the sentencing court's findings" under the specified statutory provisions, or "the sentence is otherwise contrary to law." *Brewer, supra,* at ¶37.

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[7] See, also *State v. Scates,* 2nd Dist. Clark No. 2013-CA-36, 2014-Ohio-418, ¶11 ("*Kalish*'s two-step approach no longer applies to appellate review of felony sentences"); *State v. Tammerine,* 6th Dist. Lucas No. L-13-1081, 2014-Ohio-425, ¶10 (Given recent legislative action in Ohio, culminating in the passage of a new statute directly addressing appellate court felony sentence review and a growing body of recent appellate cases applying the new statutory parameters, we are no longer utilizing the former *Kalish* approach'); *State v. Venes,* 2013-Ohio-1891, 992 N.E.2d 453 (8th Dist.), ¶10 ("With the basis for the decision in *Kalish* no longer valid and given that *Kalish* had questionable precedential value in any event, we see no viable reasoning for continuing to apply the standard of review used in that case"); *State v. Ayers,* 10th Dist. Franklin No. 13AP-371, 2014-Ohio-276, ¶8, quoting *State v. Allen,* 10th Dist. Franklin No. 10AP-487, 2011-Ohio-1757, ¶21 (" ' since *Kalish,* this court has * * *only applied the contrary-to-law standard of review' "); *State v. Waggoner,* 12th Dist. Butler No. CA2013-27-027, 2013-Ohio-5204, ¶6, quoting *State v. Crawford,* 12th Dist. Clermont No. CA2012-12-088, 2013-Ohio-3315, ¶6 ("we recently stated that 'rather than continue to apply the two-step approach as provided by *Kalish* ' in reviewing felony sentencing, 'the standard of review set forth in R.C. 2953.08(G)(2) shall govern all felony sentences.' ").

B. LEGAL ANALYSIS

{¶35} Appellant has not specifically brought this appeal under the Provisions of R.C. 2953.08(G)(2). Appellant argues that the trial court erred by ordering the maximum sentence on each count. He also argues the trial court erred by ordering the sentence on each count to run consecutively. Our analysis must determine, pursuant to R.C. 2953.08(G)(2), if we can find that the maximum and consecutive nature of the sentence is clearly and convincingly contrary to law. We begin by referencing the trial judge's language as he imposed sentence, as follows:

> "Well, as indicated by the prosecutor, the court finds this to be a very aggravated case in the sense that these are two unlawful sexual conduct with a minor charges, the minor is 14 years of age. The Court does find, in fact, Mr. McClain committed the worst form of this offense in the sense that he extorted this young lady basically for sex, based upon the threat to reveal the pictures and nude photographs he had of her to the law enforcement authorities, and that is extortion and it makes this case that much worse. And, based upon the conduct of the defendant, coupled with his prior record, which is set forth in the presentence investigation, which will be filed and made a part of the record, he does have a prior adjudication as a juvenile for the offense of rape; he was, at the time, a sex offender, who he has a lengthy criminal history even in the juvenile system, and he's not 25 years of age and has continued this course of conduct as an adult.
>
> In order to make these sentences consecutive, which this court is going to do, the court must find consecutive sentences is necessary to protect the public from future crime, or to punish the offender, which it does make.

> The court finds that consecutive sentences are not disproportionate to the seriousness of the offender's conduct; and to the danger the offender poses to the public. Based upon his lengthy criminal history, even at 25 years of age, the court finds that under 2929.14(C)(4)(c), his history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.
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> The court has weighed all the factors in 2929.11 and 2929.12, obviously find that a prison sanction is the appropriate sanction, the court finds that the maximum sentence of eight years on each count is appropriate, those will be ordered consecutive to each other."

1. Maximum sentences

{¶36} Maximum sentences do not require specific findings. *State v. Lister,* 4th Dist. Pickaway No. 13CA15, 2014-Ohio-1405, ¶10, citing *State v. White,* 2013-Ohio-4225, 997 N.E.2d 629, (1st. Dist.), ¶7. Although trial courts have full discretion to impose any term of imprisonment within the statutory range, they must consider the sentencing purposes in R.C. 2929.11 and the guidelines contained in R.C. 2929.12. *Lister, supra,* at ¶14. H.B. 86 amended R.C. 2929.11, which states:

> "(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and

> making restitution to the victim of the offense, the public, or both."

R.C. 2929.12 also provides a non-exhaustive list of factors a trial court must consider when determining the seriousness of the offense and the likelihood that the offender will commit future offenses. *Lister, supra,* at ¶15.

{¶37} Here, the trial court sentenced Appellant to eight years in prison for each violation of unlawful sexual conduct with a minor, R.C. 2907.04(A), a second degree felony. Under R.C. 2929.14(A)(2), the range of statutory prison terms for a second degree felony is two to eight years. As referenced above, the trial court stated on the record:

> "The court has weighed all the factors in 2929.11 and 2929.12, obviously finds that a prison sanction is the appropriate sanction, the court finds that the maximum sentence of eight years on each count is appropriate, those will be ordered consecutive to each other."

{¶38} When sentencing an offender, each case stands on its own unique facts. *Lister, supra*, at ¶13 citing *State v. Stamper,* 12th Dist. Butler No. CA2012-08-166, 2013-Ohio-5669, ¶15, quoting *State v. Mannarino,* 8th Dist. Cuyahoga No. 98727, 2013-Ohio-1795, ¶58. In the sentencing remarks, the trial judge here noted he found the case to be aggravated in the sense that "these are two unlawful sexual conduct with a minor charges, the minor is 14 years of age." The trial judge also found Appellant committed

the worst form of the offense in that he "extorted this young lady basically for sex, based upon the threat to reveal the pictures and nude photographs he had of her to the law enforcement authorities, and that is extortion and it makes this case that much worse." The trial judge also commented that Appellant's conduct "coupled with his prior record" was a factor in his sentencing decision.

{¶39} The trial court imposed a sentence within the appropriate definite prison term pursuant to R.C. 2929.14. The record reflects that the trial court considered the purposes and principles of felony sentencing under R.C. 2929.11, and balanced the seriousness and recidivism factors under R.C. 2929.12. The court also provided his reasoning for finding Appellant's case unique and finding a maximum sentence of eight years on each count appropriate. We find that the trial court complied with all applicable rules and statutes.

2. Consecutive sentences

{¶40} "In 2003, the Ohio Supreme Court held in *State v. Comer*, 99 Ohio St.3d 463, 2013-Ohio-4165, a court may not impose consecutive sentences unless it 'finds' three statutory factors enumerated in then 2929.14(E)(4). The statutory factors were the same as those now enumerated in the revised version of R.C. 2929.14(C)(4) following

enactment of H.B. 86. The revised version of the statute again requires the trial court to "find" the factors enumerated." *State v. Troutt,* 5th Dist. Muskingum No. CT2013-0042, 2014-Ohio-1705, ¶13, quoting *State v. Williams,* 5th Dist. Stark No.2013CA00189, 2013-Ohio-3448. "The Court in *Comer, supra,* read R.C. 2929.14(E)(4), as it existed then, in conjunction with then R.C. 2929.19(B), to reach its conclusion the trial court must also state its reasons for the sentence imposed. *Id.* Then R.C. 2929.19(B) stated the trial court 'shall impose a sentence and shall make a finding that gives its reasons for selecting the sentence imposed in any of the following circumstances…(c) if it imposes consecutive sentences under R.C. 2929.14.'" *Id.* 2011 Am. Sub. H.B. No. 86, which became effective on September 30,2011, revived the language provided in former R.C. 2929.14(E) and moved it to R.C. 2929.19(C)(4).

{¶41} Under R.C. 2929.14(C)(4), a sentencing court must engage in a three-step analysis and make certain findings before imposing consecutive sentences. *State v. Bever,* 4th Dist. Washington No. 13CA21, 2014-Ohio-600, ¶15; *State v. Black*, 4th Dist. Ross No. 12CA3327, 2013-Ohio-2105, ¶57; *State v. Clay*, 4th Dist. Lawrence No. 11CA23, 2013-Ohio-4649, ¶64; *State v. Howze,* 10th Dist. Franklin Nos.13AP386 and 387, 2013-Ohio-4800, ¶18. Specifically, the sentencing court must find that (1) "the consecutive

service is necessary to protect the public from future crime or to punish the offender"; (2) "the consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public"; and (3) one 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. *State v. Bever,* 4th Dist. Washington No. 13CA21, 2014-Ohio-600, ¶16.

{¶42} While the sentencing court is required to make these findings, it is not required to give reasons explaining the findings. *Bever, supra,* at ¶17. H.B. 86 does not require the trial court to give its reasons for selecting the sentence imposed. *State v. Williams,* 5th Dist. Licking No. 11-CA-115, 2012-Ohio-3211, ¶47, (Hoffman, P.J., concurring). R.C. 2929.14 now clearly states the trial court may impose a consecutive sentence if it "finds" the statutorily enumerated factors. *Id.*

{¶43} Furthermore, the sentencing court is not required to recite any "magic" or "talismanic" words when imposing consecutive sentences. *Id; State v. Clay,* 4th Dist. Lawrence No. 11CA23, 2013-Ohio-4649, ¶64. However, it must be clear from the record that the sentencing court actually made the required findings. *Bever,* at ¶17; *Clay*, at ¶64. A failure to make the findings required by R.C. 2929.14(C)(4) renders a consecutive sentence contrary to law. *Bever,* at ¶17; *State v. Stamper,* 12th Dist. Butler No. CA2012-08-166, 2013-Ohio-5669, ¶23.

{¶44} Here, a review of the record reveals the trial court engaged in the required three-step analysis under R.C. 2929.14(C)(4). The trial court clearly stated:

> " In order to make these sentences consecutive, which this court is going to do, the court must find consecutive sentences is necessary to protect the public from future crime, or to punish the offender, which it does."

The trial judge further stated:

> "The court finds that consecutive sentences are not disproportionate to the seriousness of the offender's conduct; and to the danger the offender poses to the public."

Finally, the trial judge alluded to Appellant's lengthy criminal history, "even at 25 years of age" stated:

> "The court finds that under 292914(C)(4)(c), his history of criminal conduct demonstrates that consecutive sentences are

necessary to protect the public from future crime by the offender."

{¶45} Based on the above, we find the imposition of a consecutive sentence is not clearly and convincingly contrary to law. The trial court did not err with regard to Appellant's consecutive sentence. We also reiterate the trial court complied with all applicable rules and statutes and the imposition of a maximum sentence for each count is not clearly and convincingly contrary to law. We conclude Appellant's first assignment of error has no merit and is therefore, overruled.

ASSIGNMENT OF ERROR TWO

{¶46} Appellant also contends his convictions are against the manifest weight of the evidence. He argues the State of Ohio failed to corroborate S.F.'s allegations, including her testimony that she had numerous telephone and text conversations with Appellant. As such, Appellant argues the trier of fact lost its way and his conviction creates a manifest miscarriage of justice which must be reversed. Appellee responds that the manifest weight of the evidence was carried by the burden of persuasion and the jury obviously found the testimony of the State's witnesses and evidence to be more persuasive than that of Appellant. We must agree.

A. STANDARD OF REVIEW

{¶47} In determining whether a criminal conviction is against the manifest weight of the evidence, we must review the entire record, weigh the evidence and all the reasonable inferences, consider the credibility of the witnesses, and determine whether, in resolving conflicts in the evidence, 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 granted. *State v. Garrow,* 103 Ohio App.3d 368, 370-371, 659 N.E.2d 814, (4th Dist.1995); *State v. Martin*, 20 Ohio App.3d 172,175, 485 N.E.2d 717(1st. Dist.1983).

{¶48} "A reviewing court will not reverse a conviction where there is substantial evidence upon which the court could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt." *State v. Eskridge,* 38 Ohio St.3d 56, 526 N.E.2d 304 (1988), paragraph two of the syllabus. Whether the evidence supporting a defendant's conviction is direct or circumstantial does not bear on our determination. "Circumstantial evidence and direct evidence inherently possess the same probative value and therefore should be subjected to the same standard of proof." *Jenks* at paragraph one of the syllabus.

B. LEGAL ANALYSIS

{¶49} Appellant was convicted of two counts of unlawful sexual conduct with a minor, violations of R.C. 2907.04. The statute states in pertinent part:

> (A) No person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard.
>
> (B) Whoever violates this section is guilty of unlawful sexual conduct with a minor.
>
> (4) If the offender previously has been convicted of or pleaded guilty to a violation of section 2907.02, 2907.03, or 2907.04 of the Revised Code or a violation of former section 2907.12 of the Revised Code, unlawful sexual conduct with a minor is a felony of the second degree.

{¶50} It appears that here, the jury found the testimony of the State's witnesses more persuasive than that of Appellant. The weight to be given evidence and the credibility to be afforded testimony are issues to be determined by the trier of fact. *State v. Frazier,* 73 Ohio St.3d 323, 339, 1995-Ohio-235, 652 N.E.2d 1000, citing *State v. Grant,* Ohio St.3d 465, 477, 1993-Ohio-171, 620 N.E.2d 50. The fact finder "is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co. v. Cleveland,* 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

{¶51} Appellant urges reliance on the *Mattison* factors. In *State v. Mattison,* 23 Ohio App.3d 10, 490 N.E.2d 926 (8th Dist.1985), the court set forth the following eight factors:

> "1. The reviewing court is not required to accept as true the incredible;
>
> 2. Whether the evidence is uncontradicted;
>
> 3. Whether a witness was impeached;
>
> 4. What was not proved;
>
> 5. The certainty of the evidence;
>
> 6. The reliability of the evidence;
>
> 7. Whether a witness testimony is self-serving;
>
> 8. Whether the evidence is vague, uncertain, conflicting, or fragmentary."

{¶52} We have previously declined to adopt the *Mattison* factors as "hard and fast rules." *State v. Chambers,* 4th Dist. Adams No. 10CA902, 2011-Ohio-4352, ¶23, quoting *State v. Reeves*, 4th Dist. Highland No. 757. We have determined that the *Mattison* factors are mere "guidelines" that we may consider. *Chambers, supra,* see, generally *State v. Dixon,* 4th Dist. Scioto No. 06CA3114, 2008-Ohio-3184.

{¶53} In this case, the lack of documentation or testimony regarding S.F.'s telephone and text conversations with Appellant is not problematic.

Appellant was convicted of unlawful sexual conduct. The case was largely a "he said/she said" scenario. Although the actual sexual conduct was not witnessed by anyone besides Appellant and S.F., other aspects of the case were corroborated. And again, the jurors were in the best position to determine the credibility of the witnesses who testified.

{¶54} In this case, it appears Appellant created a Facebook page under the name "Chris Miller," but Appellant was actually passing himself off as Chris Miller. It appears Appellant used a picture of another person, "Brent Corrigan" on the "Chris Miller" profile picture. Unfortunately, S.F. contacted Chris Miller and communications began. S.F. did not know she was communicating with Appellant and, as "Chris Miller," he requested that she send him nude photographs. S.F. was 13-years-old when the communications began. Appellant was 25 at the time of trial, approximately one year later. S.F. never met "Chris Miller" in person although she communicated with him for months and they scheduled dates. Appellant's actions in pretending to be "Chris Miller" and establishing a relationship with an underage teenage girl were predatory and devious.

{¶55} The jury heard testimony from Greeno and Hyatt, describing what they saw on Appellant's Facebook page, and the disturbing content they saw in the messages and pictures. They were the persons who reported

the crime, not S.F. Only after they reported the crime, and Detective Phillip Roar made contact with S.F., did she then report the unwanted sexual conduct which occurred, which made her cry, which made her uncomfortable and scared, and which was against the law. S.F.'s testimony identifying the pictures of herself and how they came into existence matched the sexual pictures Greeno and Hyatt discovered on Appellant's Facebook page. S.F.'s testimony that Appellant sent her a message asking if she was pregnant matched the content in a message Greeno saw on Appellant's Facebook page to the young girl in the picture. Hyatt testified Appellant pretended to be "Chris" and other people, on his Facebook page. The jury apparently found all this testimony to be corroborative of "contact" between S.F. and Appellant.

{¶56} S.F. testified she sent the photographs of herself to "Chris Miller," the "boyfriend she never met," and later, Appellant contacted her that he was in possession of the photographs. These were the same photographs Greeno and Hyatt saw on Appellant's Facebook page. S.F. testified Appellant told her that he would go to her parents and the police if she did not have sex with him. She also testified "Chris Miller" told her to have sex with Appellant to keep him from going to the authorities. S.F.

ultimately had unwanted[8] sexual conduct with Appellant on two occasions. This testimony further demonstrated Appellant's actions as threatening and manipulative.

{¶57} C.F. also testified that Appellant came to their home to discuss the nude photographs. C.F. testified Appellant told them specific facts about his friend Chris Miller, such as Chris was "spoiled" and he drove a new Camaro. S.F. recalled the conversation among the three slightly different. She recalled Appellant telling them Chris had a lot of money and "girls were always chasing him." Although the testimony indicated Appellant knew quite a lot of information about Chris Miller, Appellant later testified they were casual friends. This is in contrast to Detective Roar's testimony that S.F. told him Appellant told her he and Chris were "best friends." Also, despite knowing a lot about "Chris Miller," Appellant's interview with Detective Roar on the subject of Chris's contact information seems evasive.

{¶58} Although Appellant denied having sexual contact with S.F., he did admit to having the nude photographs. The evidence demonstrated that S.F. sent the photographs to "Chris Miller" and Appellant ended up with the photographs. S.F. never met "Chris Miller" face-to-face. Detective Roar could never locate "Chris Miller." Appellant did not assist the detective in

[8] The "wanted" or "unwanted" nature of the sexual conduct is really irrelevant, given Appellant's predatory and threatening tactics and S.F.'s age.

finding "Chris Miller." Again, Hyatt testified Appellant pretended to be "Chris" on his Facebook page.

{¶59} The jury had these witnesses and their testimony to evaluate. Appellant's defense was essentially a denial of the sexual conduct and suggesting to the jury that 15-20 other people had access to his Facebook page and his page may have been hacked. He explained his lack of willingness to assist Detective Roar in finding "Chris Miller" as his reaction after the detective accused him.

{¶60} In light of the evidence adduced at trial, and the credibility determinations which were the jury's to make, we cannot conclude the jury lost its way and created a manifest miscarriage of justice by finding Appellant guilty of two counts of unlawful sexual conduct with a minor. Under these circumstances, we decline to substitute our judgment for that of the jury.

{¶61} As such, we find the jury's verdict was not against the manifest weight of the evidence. We hereby overrule Appellant's second assignment of error.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pickaway County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Abele, P.J.: Concurs in Judgment and Opinion.
Hoover, J.: Concurs in Judgment Only.

For the Court,

BY: ______________________________
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.