[Cite as *State v. Hutchins*, 2003-Ohio-1956.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NOS. 81578 & 81579

STATE OF OHIO	:	
	:	
Plaintiff-appellee	:	
	:	JOURNAL ENTRY
vs.	:	and
	:	OPINION
DARWIN HUTCHINS	:	
	:	
Defendant-appellant	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	APRIL 17, 2003
CHARACTER OF PROCEEDING	:	Criminal appeal from Cuyahoga County Common Pleas Court Case Nos. CR-416390, CR-411730
JUDGMENT	:	Affirmed in part; reversed in part and remanded.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellee:

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KENNETH A. ROCCO, A.J.:

{¶1} These appeals were consolidated for argument and decision, sua sponte, because they raise a common issue, that is, whether the court properly ordered that the sentences in these two cases should run consecutively.

{¶2} In Appeal No. 81578, defendant-appellant appeals from his conviction for sexual battery. He argues that (a) he was denied his right to a fair and impartial jury when the court allowed the jury to ask questions of the witnesses, (b)the court erred by making the sentence in this case consecutive to the sentence imposed in the case underlying Appeal No. 81579, and (c) he was denied the effective assistance of counsel. In Appeal No. 81579, defendant-appellant appeals from his convictions for possession of crack cocaine, preparation of crack cocaine for sale and trafficking in crack cocaine. He raises two assignments of error for our review, first, that the trial court denied him his right to a fair and impartial jury when it allowed the jury to ask questions of the witnesses, and second, that the imposition of consecutive sentences in this case and in the case underlying Appeal No. 81578 did not comport with R.C. 2929.14(E)(4).

{¶3} We find no error in the trial proceedings in either case. However, the common pleas court did not sufficiently state its

reasons for imposing consecutive sentences on appellant. Therefore, we reverse the sentence in each case to the extent they are made consecutive to one another and remand for further proceedings.

PROCEEDINGS BELOW

Appeal No. 81578

{¶4} Appellant was charged with kidnapping and rape in a two-count indictment filed November 15, 2001, Cuyahoga County Common Pleas Court Case No. CR-416390. Following a jury trial, he was found not guilty of either of these charges, but was found guilty of sexual battery, a lesser included offense of rape. At a joint sentencing hearing on this case and two others, the court sentenced appellant to four years' imprisonment, to run consecutive to the sentence imposed in the case underlying Appeal No. 81579 but concurrent to the sentence imposed in the other case.

Appeal No. 81579

{¶5} Appellant was charged in four counts of a six-count indictment filed October 18, 2001, Cuyahoga County Common Pleas Court Case No. CR-411730. The indictment charged appellant with possession of five to ten grams of crack cocaine, preparation of five to ten grams of crack cocaine for sale, trafficking in crack cocaine in an amount less than one gram, and possession of criminal tools. Although the indictment originally named appellant by an alias, Darrell Jenkins, the indictment was later amended to reflect his given name, Darwin Hutchins.

{¶6} The matter proceeded to trial on February 20, 2002. The charge of possession of criminal tools was dismissed during the trial. The jury found appellant guilty of all three of the remaining counts. The court sentenced appellant to concurrent terms of four years' imprisonment on counts one and two, and a concurrent term of eleven months' imprisonment on count three. Furthermore, the court ordered that the sentences in this case should run concurrently with the sentence imposed in Case No. CR-412221 but consecutively to the sentence in Case No. CR-416390, which is now before us as Appeal No. 81578.

{¶7} In imposing consecutive sentences, the court said:

> **"Now, consecutive sentences. The Court must make a finding by law these consecutive sentences are necessary to protect the public, and I'll point out that the Bellview area, especially. Punish the offender not disproportionate to the conduct and the danger he poses and the harm is so great or unusual that a single term does not adequately reflect the seriousness of his conduct, and his criminal history shows that consecutive terms are needed to protect the public ***."**

LAW AND ANALYSIS

{¶8} In both appeals, appellant asserts that the common pleas court erred by allowing the jury to ask questions of the witnesses. Throughout the trial in each case, at the conclusion of each witness' testimony, the court allowed the jurors to submit written questions for the witness. The court reviewed any questions submitted with counsel and asked those questions which it found to be appropriate. Appellant contends this procedure denied him a fair trial, because it made the jurors active participants in the

trial and advocates rather than the neutral factfinders they were supposed to be.

{¶9} A conflict exists among the Ohio appellate courts on this issue. The matter is currently pending before the Ohio Supreme Court. *State v. Fisher* (2002), 94 Ohio St.3d 1484.

{¶10} This district has consistently held that it is within the sound discretion of the trial court to allow jurors to question witnesses at trial. *State v. Fallat*, Cuyahoga App. No. 81073, 2003-Ohio-169; *State v. Richards*, Cuyahoga App. No. 79350, 2002-Ohio-6623; *State v. Belfoure*, Cuyahoga App. No. 80159, 2002-Ohio-2959; *State v. Sheppard* (1955), 100 Ohio App. 345. These cases have found that a trial court did not abuse its discretion by following the procedure followed by the trial court here. Likewise, we find no abuse of discretion. Accordingly, we overrule the first assignment of error in each appeal.

{¶11} In Appeal No. 81578, appellant urges that he received ineffective assistance of counsel because his attorney did not challenge the court's decision to allow the jurors to ask questions. A defendant who claims ineffective assistance of counsel must show, first, that counsel's performance was deficient, and second, that he was prejudiced as a result. *Strickland v. Washington* (1984), 466 U.S. 668, 687. The performance inquiry requires a determination whether, under the totality of the circumstances, counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. The

prejudice inquiry requires a determination whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

{¶12} In light of the clear and unequivocal precedent in this district sanctioning the procedure followed by the trial court in these cases, we cannot say that counsel's performance was objectively unreasonable because he failed to challenge the court's decision to allow the jurors to ask questions. Therefore, we overrule the third assigned error in Appeal No. 81578.

{¶13} Appellant finally contends that the court erred by making the sentences in these cases consecutive to one another. The statutory scheme assumes that sentences imposed in separate cases will be concurrent unless the court determines that consecutive sentences should be imposed under R.C. 2929.14(E). *State v. Givens*, Cuyahoga App. No. 80319, 2002-Ohio-4904, ¶8; *State v. Gillman* (Dec. 13, 2001), Franklin App. No. 01AP-662. Thus, R.C. 5145.01 provides that "[i]f a prisoner is sentenced for two or more separate felonies, the prisoner's term of imprisonment shall run as a concurrent sentence, except if the consecutive sentence provisions of sections 2929.14 and 2929.41 of the Revised Code apply." Likewise, under R.C. 2929.41, "a sentence of imprisonment shall be served concurrently with any other sentence of imprisonment imposed by a court of this state," unless the court

finds consecutive sentences are warranted by R.C. 2929.14(E), 2971.03(D) or (E), or 2929.41(B).[1]

{¶14} Under R.C. 2929.14(E)(4), in order to impose consecutive sentences, the court must make three findings (1) consecutive sentences are necessary either to protect the public or to punish the offender, (2) consecutive sentences are not disproportionate to the seriousness of the offender's conduct and the danger the offender poses to the public, and (3) any of the following: (a) the offender committed the multiple offenses while awaiting trial or sentencing; (b) the harm caused by the multiple offenses was so great or unusual that no single term of imprisonment for offenses committed as part of a single course of conduct adequately reflects the seriousness of the offender's conduct, or (c) the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime. Pursuant to R.C. 2929.19(B)(2)(c), the court must make a finding that gives its reasons for imposing consecutive sentences.

{¶15} The court here attempted to parallel the statutory language of R.C. 2929.14(E)(4), and may have satisfied its burden of making findings in support of consecutive sentences. The court roughly made the two mandatory findings required by R.C.

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[1]Neither R.C. 2929.41(B) (concerning misdemeanor sentencing) nor R.C. 2971.03 (concerning sexually violent offenders) has any application here.

2929.14(E)(4), that consecutive sentences are necessary to protect the public, and are not disproportionate to the seriousness of the offender's conduct and the danger he poses to the public. The court further appears to have made two of the three alternative findings also required by the statute, first, that the harm caused was so great or unusual that no single term of imprisonment adequately reflects the seriousness of the conduct, and second, that the offender's criminal history demonstrates a need to impose consecutive sentences to protect the public from future crime.

{¶16} Even if we accept that these findings are adequate, however (a conclusion we do not reach), the court did not give reasons in support of its findings as required by R.C. 2929.19(B)(2)(c). "Reasons are different from findings. Findings are the specific criteria enumerated in [R.C. 2929.14(E)(4)] which are necessary to justify [consecutive] sentences; reasons are the trial court's bases for its findings ***." *State v. Anderson* (2001), 146 Ohio App.3d 427, 437 & 439. The common pleas court did not disclose the bases for its findings, so we must reverse the imposition of consecutive sentences and remand for further consideration of that issue.

{¶17} The sentences imposed in these causes are reversed to the extent they were made consecutive to one another. These cases are remanded to the lower court for further proceedings consistent with this opinion. In all other respects, these matters are affirmed.

{¶18} It is, therefore, considered that said appellant recover of said appellee his costs herein.

ADMINISTRATIVE JUDGE
KENNETH A. ROCCO

COLLEEN CONWAY COONEY, J. CONCUR

ANN DYKE, J. CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE CONCURRING AND DISSENTING OPINION

DYKE, J., CONCURRING IN PART AND DISSENTING IN PART:

{¶19} I concur in part and respectfully dissent in part from the opinion of the majority. While I agree that there is no error in the trial proceedings of either case, I find that the trial court sufficiently stated its reasons on the record for imposing consecutive sentences upon the appellant.

{¶20} Pursuant to R.C. 2929.19 (B)(2)(c), if the trial court imposes consecutive sentences under R.C. 2929.14, it must make a finding on the record giving the reasons for imposing consecutive sentences. *State v. Corrigan* (May 25, 2000), Cuyahoga App. No. 76124, citing *State v. Stroud* (Oct. 28, 1999), Cuyahoga App. No. 74756. It must be clear from the record that the trial court made the required findings. *State v. Garrett* (Sept. 2, 1999), Cuyahoga App. No. 74759, citing *State v. Veras* (July 8, 1999), Cuyahoga App. Nos. 74416 and 74466.

{¶21} The appellant admits that the trial court made the required findings, but argues that the record does not support the imposition of consecutive sentences. The record reveals that the trial court made the required findings under R.C. 2929.14(E) and stated its reasons for doing so pursuant to R.C. 2929.19 (B)(2)(c).

{¶22} At the sentencing hearing, the trial court heard the victim's statement and heard defense counsel and the appellant in mitigation. The trial court addressed the appellant and noted that he was being sentenced for three felonies of the third degree and two felonies of the fifth degree. The trial court stated:

{¶23} "Now, for the drugs it's mandatory time for whatever the Court gives you, between one and five years. On the sexual battery it's just discretionary, one to five years, and that's not mandatory, and the possession of drugs and trafficking in drugs, the F5's, are six to twelve months.

{¶24} "Factors I consider in every case with the sexual battery defendants; relationship with the victim facilitated the offense. I would say that in listening to the trial, the victim suffered some psychological harm.

{¶25} "Less serious. Doesn't appear to be anything there. Recidivism, more likely. History of criminal convictions. You do have prior convictions. You do have prior convictions, assault on a peace officer for which you did 11 months.

{¶26} "You had a misdemeanor, attempted preparation of drugs, and there was a trafficking for which the judge ran concurrent time of the 11 months.***

{¶27} "Mr. Hutchins, I do understand your circumstances growing up. Unfortunately, we have many young men in our society that fall in the same trap and find themselves in those circumstances. I understand how that can happen. Quite frankly, I know people need to survive, but unfortunately everything you did was against the law. That is why you are here.***

{¶28} "The point is that you have been in the area, you have been selling drugs and making things worse. You are spreading the poison. You talk about your four year old son. Well, you have kids in the neighborhood that are getting hooked and getting used to the idea that drugs are being sold and one day they can grow up to be a big drug dealer and have money coming out of their pockets and not worry about working for a living. They can sell drugs and poison people on the street. That is the bottom line. So drugs are bad. You've been doing it, as you know, and admitted, for many, many years.***

{¶29} "You are viewed as an opportunist both in the drug area and in the sexual area. That is the way I view it too.***

{¶30} "Now, consecutive sentences. The Court must make a finding by law these consecutive sentences are necessary to protect the public, and I'll point out that the Bellview area especially. Punish the offender not disproportionate to the conduct and the

danger he poses and the harm is so great or unusual that a single term does not adequately reflect the seriousness of his conduct, and his criminal history shows that consecutive terms are needed to protect the public; up to five years post-release control."

{¶31} After reviewing the record, it is clear that the trial court sentenced appellant in accordance with the mandates of R.C. 2929.14(E) and 2929.19 (B)(2)(c). The trial court set forth sufficient reasons for its findings, including the appellant's criminal history, long history of selling drugs in the Bellview area, taking advantage of an impaired woman and her psychological harm.