[Cite as *State v. Broughton*, 2026-Ohio-4475.]

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

State of Ohio,	:	Case No. 26CA4168
Plaintiff-Appellee,	:	DECISION AND JUDGMENT ENTRY
v.	:	
Shelby Broughton,	:	
Defendant-Appellant.	:	**RELEASED 11/04/2026**

APPEARANCES:

Alana Van Gundy, Bellbrook, Ohio, for appellant.

Shane A. Tieman, Prosecuting Attorney, and Jay Willis, Assistant Prosecuting Attorney, Portsmouth, Ohio, for appellee.

Hess, J.

{¶1} Shelby Broughton appeals from a judgment of the Scioto County Common Pleas Court convicting her, following a guilty plea, of felonious assault, kidnapping, aggravated robbery, and conspiracy. Broughton presents five assignments of error asserting that: (1) the trial court erred and violated R.C. 2929.18(A)(1) and her due process rights by imposing restitution without competent, credible evidence and without conducting a hearing after the amount was disputed; (2) the trial court erred by imposing consecutive sentences without making the findings required by R.C. 2929.14(C)(4) and without support for consecutive sentences in the record, making her sentence contrary to

law; (3) the trial court erred by failing to merge allied offenses of similar import in violation of R.C. 2941.25 and the double jeopardy clauses; (4) her guilty plea was not knowingly, intelligently, and voluntarily entered because the trial court failed to properly explain the indefinite sentencing structure required by law; and (5) the trial court imposed a sentence materially inconsistent with the jointly recommended sentence that formed the basis of her plea agreement. For the reasons which follow, we overrule in part and sustain in part the first assignment of error and vacate the restitution order. We cannot review the merits of the second assignment of error, and we overrule the third, fourth, and fifth assignments of error. Accordingly, we affirm the trial court's judgment in part, vacate it in part, and remand for the trial court to determine the proper amount of restitution due.

I. FACTS AND PROCEDURAL HISTORY

{¶2} In February 2025, Broughton was indicted on 19 counts: 3 counts of attempted aggravated murder, 2 counts of attempted murder, 2 counts of felonious assault, 2 counts of kidnapping, 2 counts of aggravated robbery, 3 counts of robbery, 2 counts of conspiracy, and 3 counts of tampering with evidence. The charges evidently related to a conspiracy by Broughton and co-defendants Zander Daniels, Waylon Cooley, and Trinida Castro to rob E.L., who sustained a near-fatal stab wound when the plan was executed. In October 2025, Broughton pleaded guilty to four counts: (1) Count 6, felonious assault, a second-degree felony; (2) Count 8, kidnapping, a first-degree felony; (3) Count 10, aggravated robbery, a first-degree felony; and (4) Count 15, conspiracy, a second-degree felony. She signed a waiver of rights form, a maximum penalty form, and an indefinite sentencing advisory.

{¶3} At the change of plea hearing, the trial court asked if the parties had reached any agreement regarding sentencing. The assistant prosecutor stated, "Yes, Your Honor. The State intends to recommend a 15-year prison term. We haven't talked specifically about how that would be structured and the defendant agrees that she will be truthfully testifying against the remaining co-defendants. The State has already interviewed her in preparation for that." The court stated, "Alright, Ms. Broughton, is this what you want to do?" Broughton stated, "Yes, sir."

{¶4} The court also stated:

> You're pleading today to two Felony 1's and two Felony 2's. The Felony 1's carry a maximum sentence of 11 years. However, Ohio now has an indefinite sentencing law. So, on one of the two Felony 1's, either the Kidnapping or the Aggravated Robbery would be subject to indefinite sentencing. And in that event your maximum penalty in one of those will go up to 16 ½ years. On the Felony's [sic] of the second degree, there's two of them, and the maximum sentence on each of those is eight years. In addition, I can impose court costs, order restitution or impose other financial sanctions which are probation fees. Do you have any questions so far?

Broughton stated, "No, Your Honor." After addressing other matters with Broughton, the court stated:

> Now, your attorney has gone over a document with you called the indefinite sentencing advisory which basically deals with the indefinite sentence that the law requires that I give in this case. That's where the maximum penalty on an F1 is 11. But because of indefinite sentencing it goes up to 16 ½ and its [sic] basically half, an additional half of what I give on the underlying sentence. Whether or not that is going to be imposed will be up to the Ohio Department of Rehabilitation and Correction and its [sic] based upon your behavior in the institution. Do you have any questions about that?

Broughton stated, "No, sir." The court asked, "Do you have any questions about the form that you and your attorney went over that you signed." Broughton stated, "No, sir."

{¶5} The trial court accepted the guilty plea. Prior to sentencing, the State, with leave of court, dismissed Count 5 without prejudice. In addition, the trial court issued a

single entry under the case numbers for Broughton and her co-defendants stating, "This matter comes before the Court on the issue of merger. It is ORDERED that all parties shall submit an [sic] brief on the issue of merger by December 10, 2025." (Emphasis deleted.) The State submitted a brief but indicated it pertained to Daniels, who had entered a guilty plea which did not include a sentencing recommendation, and Cooley and Castro, who were found guilty of various offenses by a jury. The brief stated that Broughton "previously entered into a negotiated plea agreement with the State and the State intends to honor the same." The brief stated that Broughton's actions warranted "the jointly recommended 15-year prison sentence[.]" Broughton did not submit a brief.

{¶6} At the sentencing hearing, defense counsel asked the trial court to consider certain information in "thinking about this joint recommended sentence today" and asked the court "to adopt that joint recommendation and proceed with sentence as previously discussed." The court stated, "What is your understanding of the joint recommendation?" Defense counsel stated, "Fifteen years, Your Honor." The court asked, "Did you all discuss how to come up with that 15 years?" Defense counsel stated, "As far as numbers for each count?" The court stated, "Uh huh." Defense counsel stated, "We did at one point. I would have to dig through my file to see exactly how we came up with that. I know it would be (inaudible) that [an assistant prosecutor] did that while at one point we picked the counts." A different assistant prosecutor stated, "I don't recall breaking down the numbers, Judge." The court then asked if Broughton wanted to say anything, and Broughton said she wanted to tell E.L.'s mother that she was sorry for what she did to her son and hoped one day she would be able to forgive her.

{¶7} A victim's advocate read a written statement from E.L.' s mother which stated in part that "[w]e've had many medical appointments, bills and worries about his recovery." The assistant prosecutor stated, "Judge, they have accrued a number of medical bills. They are not insured so we would ask for restitution in terms of all of the bills that they have received thus far. I have copies of those here if the Court would like to review those?" The court stated, "Just give me an amount," and the assistant prosecutor stated the total was currently $223,768.08, which included "Air Evac, Ohio Health Grant, Portsmouth Ambulance, SOMC, Ohio Health Corporation, Team Health, Frost Arnett Radiation Corp., Grant Outpatient Care, SOMC Outpatient Care and the wages of [E.L.]" The court asked if the defense had anything to say regarding restitution, and defense counsel stated, "Your Honor, today is the first day that I've heard of a restitution amount that those are the numbers of what they are."

{¶8} The court then stated, "Anything else on behalf of the State?" The assistant prosecutor stated:

> Judge, again, we did have an agreed plea. Ms. Broughton sat on the witness stand and testified in this trial. So, you had the opportunity to observe her and hear her testimony. We felt like she was pretty straight forward about a lot of what she had to say in here. So, we would leave that at the discretion of the Court. If you want me to divide up numbers, I have a suggestion on that. If you want to do that yourself, I appreciate that as well.

The court stated, "Yeah, do you have a suggestion on what you think the indefinite sentence ought to go on?" The assistant prosecutor stated, "I would think the indefinite sentence would depend on one of the Felony 1's and which one had the highest sentencing penalty." The court stated, "I think the Aggravated Robbery would be the . . . ." The assistant prosecutor stated, "That's how I had it written down." Then the court

stated, "What do you recommend, what's the State recommend regarding how to break down those figures?" The assistant prosecutor stated, "So, the numbers I had were six on Aggravated Robbery, four on Felonious Assault, three on Kidnapping and two on Conspiracy, for a total of 15 to 18 years. If the Court wants to arrange that differently, I would appreciate that as well."

{¶9} The court then stated, "What's your position on Count 10 and Count 15 merging, Aggravated Robbery and Conspiracy to Aggravated Robbery?" The assistant prosecutor stated:

> [I]n our brief we kind of addressed that issue in terms of not thinking that doesn't merge and that was somewhat separate conduct from this because the testimony at the trial was that originally the conspiracy was sort of like a snatch and grab and went down hill from there. So, the original conspiracy was not necessarily an aggravated robbery, it was a robbery. It ended up being an aggravated robbery based on everything. But this conspiracy, this conspiracy happened separately days or a week before the actual event occurred. So, I don't necessarily think that is a situation where conspiracy would merge. Often times conspiracy does merge but the conspiracy is kind of played out with the crime, so to speak, with the commission of the crime.

Defense counsel made no comment regarding merger.

{¶10} The court asked, "Who do I make restitution payable to?" The assistant prosecutor stated it would be appropriate to make it to E.L. because the bills were in his name, and he was "of age." Defense counsel stated, "I assume the State's impressing joint and several liability on that [sic]?" The court stated, "Yeah, that will be ordered joint and severally."

{¶11} The court then stated that it was sentencing Broughton to six years on Count 6, three years on Count 8, six to nine years on Count 10, and two years on Count 15. The court ordered that the sentences on Counts 6, 8, and 10 run consecutive to each

other and that the sentence on Count 15 run concurrent with the sentence on Count 10 "for a total intended sentenced today of 15 to 18 years." The court made some findings regarding consecutive sentences and stated, "I further find that it's pursuant to agreement in that the agreement was for 15 years." In addition, the court stated, "I remind you of the indefinite sentencing, the additional three years. It will be based upon your behavior in the institution. You certainly have right [sic] to appeal any decision I've made, at least today. Maybe others, I'm not going to prevent you, at least cut you off. It's an agreement. What's your feelings on that?" Defense counsel stated, "Your Honor, I just confirmed with Ms. Broughton, she does not wish to seek an appeal at this time. If that should change let me know. I've got to know within 30 days." The court stated, "This was the agreement. I think I've followed the agreement. Anything further on behalf of the defense?" Defense counsel stated, "Jail time credit, Your Honor." The court stated that it was going to order restitution of $223,768.08 to E.L. and awarded 324 days of jail-time credit. The court asked, "Anything further on behalf of the defense?" Defense counsel indicated he had nothing further. After the court reiterated that restitution would be joint and several, court was adjourned.

{¶12} Subsequently, the court issued a sentencing entry which sets forth the prison terms for each offense, orders that the sentences for Counts 6, 8, and 10 run consecutive to each other, and orders that the sentence for Count 15 run concurrent to the sentence for Count 10, for a total sentence of 15 to 18 years. Regarding consecutive sentences, the entry sets forth various findings, including one stating: "**Pursuant to agreement**." (Emphasis in original.) The entry also states, "This sentence, pursuant to O.R.C. 2953.08(D), **IS** an AGREED SENTENCE." (Emphasis in original.) The entry

orders that Broughton make restitution payable to E.L. in the amount of $223,768.08, jointly and severally "between all defendants." The entry dismisses all remaining counts.

II. ASSIGNMENTS OF ERROR

{¶13} Broughton presents five assignments of error:

> **First Assignment of Error.** The trial court erred and violated R.C. 2929.18(A)(1) and appellant's due process rights by imposing restitution without competent, credible evidence and without conducting a hearing after the amount was disputed.
>
> **Second Assignment of Error.** The trial court erred by imposing consecutive sentences without making the findings required by R.C. 2929.14(C)(4) and without support for consecutive sentences in the record, thus, making Ms. Broughton's sentence contrary to law.
>
> **Third Assignment of Error.** The trial court erred by failing to merge allied offenses of similar import in violation of R.C. 2941.25 and the double jeopardy clauses.
>
> **Fourth Assignment of Error.** Appellant's guilty plea was not knowingly, intelligently, and voluntarily entered because the trial court failed to properly explain the indefinite sentencing structure required by law.
>
> **Fifth Assignment of Error.** The trial court imposed a sentence materially inconsistent with the jointly recommended sentence that formed the basis of Ms. Broughton's Plea Agreement.

We will address the assignments of error out of error.

III. FOURTH ASSIGNMENT OF ERROR

A. Positions of the Parties

{¶14} In the fourth assignment of error, Broughton contends her plea was not knowingly, intelligently, and voluntarily entered because the trial court failed to properly explain the indefinite sentencing structure required by law. Broughton maintains that Crim.R. 11(C)(2)(a) requires that a trial court determine the defendant understands the maximum penalty involved before accepting a felony plea. She asserts that for offenses

subject to Ohio's indefinite sentencing structure, "a defendant must understand the nature of the sentencing structure rather than merely the numerical range." She claims the trial court advised her "of a possible range of years but did not explain that release after the minimum term was only presumptive, that the decision to extend incarceration could be made administratively rather than judicially, or that additional prison time could be imposed without the commission of a new offense." She claims "[a] defendant hearing only a numerical range could reasonably believe that good behavior guarantees release at the minimum term. That is not the legal effect of an indefinite sentence." And "[b]ecause the trial court did not convey the nature of the penalty," she "could not fully appreciate the maximum punishment created by the plea."

{¶15} The State contends that "agreed sentences are not reviewable on appeal" pursuant to R.C. 2953.08(D)(1) and that "a guilty plea waives all claims relating to the deprivation of constitutional rights that occurred prior to entry of the guilty plea, unless such errors are shown to have precluded the defendant from voluntarily entering into his or her plea." The State asserts that "[a]s such, this appeal should be dismissed outright because Appellant entered a plea agreement for a sentence authorized by law that was jointly recommended by the defense and prosecution and imposed by the sentencing judge." The State also asserts that the record shows that Broughton received a full Crim. 11 hearing, fully understood the proceedings, and signed an indefinite sentencing advisory with the advice of counsel, and that the court reviewed the form with her, and she had no questions. Thus, Broughton has not shown her plea was not knowing, intelligent, and voluntary.

B. Applicability of R.C. 2953.08(D)(1)

{¶16} R.C. 2953.08 governs appeals based on felony sentencing guidelines. R.C. 2953.08(G)(2) states:

> The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:
>
> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law.

But R.C. 2953.08(D)(1) states: "A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge." "'The General Assembly intended a jointly agreed-upon sentence to be protected from review precisely because the parties agreed that the sentence is appropriate. Once a defendant stipulates that a particular sentence is justified, the sentencing judge no longer needs to independently justify the sentence.'" (Emphasis deleted.) *State v. Sergent*, 2016-Ohio-2696, ¶ 21, quoting *State v. Porterfield*, 2005-Ohio-3095, ¶ 25.

{¶17} The State's suggestion that we cannot review the fourth assignment of error due to R.C. 2953.08(D)(1) is not well taken. The fourth assignment of error challenges the validity of Broughton's guilty plea, not her sentence. Thus, R.C. 2953.08(D)(1) is not relevant to the fourth assignment of error.

C. Waiver

{¶18} The State's suggestion that Broughton waived the right to assert that her guilty plea was not knowing, intelligent, or voluntary by entering the plea is also not well taken. "Generally, a guilty plea waives most appealable errors, *except, for example, that a plea was not knowing, intelligent and voluntary*." (Emphasis added.) *State v. Wheeler*, 2016-Ohio-5503, ¶ 5 (4th Dist.), citing *State v. Robinson*, 2015-Ohio-2635, ¶ 45 (4th Dist.). "A defendant's decision to enter a guilty plea must be knowing, intelligent, and voluntary." *State v. Gowdy*, 2025-Ohio-5575, ¶ 18, citing *State v. Dangler*, 2020-Ohio-2765, ¶ 10. "And '[f]ailure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution.'" *Id.*, quoting *State v. Engle*, 1996-Ohio-179, ¶ 7. Thus, we proceed to the merits of the fourth assignment of error.

D. Legal Principles

{¶19} "'An appellate court determining whether a guilty plea was entered knowingly, intelligently, and voluntarily conducts a de novo review of the record to ensure that the trial court complied with the constitutional and procedural safeguards.'" *State v. Sillman*, 2024-Ohio-3363, ¶ 22 (4th Dist.), quoting *State v. Moore*, 2014-Ohio-3024, ¶ 13 (4th Dist.). "When reviewing guilty pleas, we focus on 'whether the dialogue between the court and the defendant demonstrates that the defendant understood the consequences of his [or her] plea.'" *Gowdy* at ¶ 19, quoting *Dangler* at ¶ 12, citing *State v. Veney*, 2008-Ohio-5200, ¶ 15-16, *State v. Clark*, 2008-Ohio-3748, ¶ 26 ("*Clark*"), and *State v. Miller*, 2020-Ohio-1420, ¶ 19. "'[A] defendant who challenges his [or her] guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made' is generally not entitled to

have [the] plea vacated unless [the defendant] demonstrates that he [or she] was prejudiced by the failure of the trial court to comply with the provisions of Crim.R. 11." *Id.*, quoting *State v. Nero*, 56 Ohio St.3d 106, 108 (1990). "The test for prejudice is '"whether the plea would have otherwise been made."'" *Id.* at ¶ 20, quoting *Dangler* at ¶ 16, quoting *Nero* at 108. "And prejudice must be established '"'on the face of the record."'" *Id.*, quoting *Dangler* at ¶ 24, quoting *Hayward v. Summa Health Sys./Akron City Hosp.*, 2014-Ohio-1913, ¶ 26, quoting *Wagner v. Roche Laboratories*, 1999-Ohio-309, ¶ 21.

{¶20} However, "there are two instances in which a defendant is excused from the burden of demonstrating prejudice: (1) when a trial court 'fails to explain the constitutional rights set forth in Crim.R. 11(C)(2)(c),' *Clark* at ¶ 31 and (2) when a trial court 'complete[ly] fail[s] to comply with' a requirement of Crim.R. 11, *State v. Sarkozy*, 2008-Ohio-509, ¶ 22." (Bracketed text in original.) *Id.* at ¶ 21. "Aside from these two exceptions, a defendant claiming that his [or her] guilty plea was not knowingly, intelligently, and voluntarily entered is required to show prejudice." *Id.*, citing *Dangler* at ¶ 16.

{¶21} The Supreme Court has stated that

> in undertaking this review, the questions to be answered are:
>
> > (1) has the trial court complied with the relevant provision[s] of [Crim.R. 11]? (2) if the court has not complied fully with the rule, is the purported failure of a type that excuses a defendant from the burden of demonstrating prejudice? and (3) if a showing of prejudice is required, has the defendant met that burden?

(Bracketed text in original.) *Id.* at ¶ 22, quoting *Dangler* at ¶ 17.

{¶22} "'Crim.R. 11(C) governs the process that a trial court must use before accepting a felony plea of guilty or no contest.'" *Id.* at ¶ 23, quoting *Veney*, 2008-Ohio-

5200, at ¶ 8. Broughton's argument implicates a nonconstitutional aspect of the plea colloquy under Crim.R. 11(C)(2)(a), which states:

> In felony cases the court . . . shall not accept a plea of guilty . . . without first addressing the defendant personally . . . and doing all of the following:
>
> (a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

{¶23} The Reagan Tokes Law "relates to a defendant's maximum penalty." *State v. Clark*, 2024-Ohio-4930, ¶ 10 (4th Dist.) ("*Clark II*"). Effective March 22, 2019, the Reagan Tokes Law "implemented a system of indefinite sentencing for non-life felonies of the first and second degree committed on or after the effective date." *Id.* at ¶ 12, citing *State Jones*, 2024-Ohio-2034, ¶ 22 (11th Dist.). The Reagan Tokes Law requires that a court imposing a prison term under R.C. 2929.14(A)(1)(a) or (2)(a) for a first or second-degree felony committed on or after March 22, 2019, impose a minimum prison term under that provision and a maximum prison term determined under R.C. 2929.144(B). R.C. 2929.144(A) and (C). There is a presumption that the offender "shall be released from service of the sentence on the expiration of the offender's minimum prison term or on the offender's presumptive earned early release date, whichever is earlier." R.C. 2967.271(B). A presumptive earned early release date is a date determined under procedures described in R.C. 2967.271(F) which allow the sentencing court to reduce the minimum prison term under certain circumstances. R.C. 2967.271(A)(2).

{¶24} R.C. 2967.271(C) states that the department of rehabilitation and correction ("DRC") may rebut the presumption in R.C. 2967.271(B) if it determines, at a hearing, that one or more of the following applies:

> (1) Regardless of the security level in which the offender is classified at the time of the hearing, both of the following apply:
>
> (a) During the offender's incarceration, the offender committed institutional rule infractions that involved compromising the security of a state correctional institution, compromising the safety of the staff of a state correctional institution or its inmates, or physical harm or the threat of physical harm to the staff of a state correctional institution or its inmates, or committed a violation of law that was not prosecuted, and the infractions or violations demonstrate that the offender has not been rehabilitated.
>
> (b) The offender's behavior while incarcerated, including, but not limited to the infractions and violations specified in division (C)(1)(a) of this section, demonstrate that the offender continues to pose a threat to society.
>
> (2) Regardless of the security level in which the offender is classified at the time of the hearing, the offender has been placed by the department in extended restrictive housing at any time within the year preceding the date of the hearing.
>
> (3) At the time of the hearing, the offender is classified by the department as a security level three, four, or five, or at a higher security level.

If DRC rebuts the presumption, it "may maintain the offender's incarceration" after the expiration of the minimum prison term or presumptive earned early release date for a reasonable period, determined and specified by DRC, which "shall not exceed the offender's maximum prison term." R.C. 2967.271(D)(1).

E. Analysis

{¶25} During the plea colloquy, the trial court explained that Ohio has an indefinite sentencing law, and that either the kidnapping or aggravated robbery count would be subject to indefinite sentencing, making the maximum penalty for one of those counts 16.5 years instead of 11 years, which was "basically half, an additional half of what I give on the underlying sentence." The court explained that "[w]hether or not that is going to be imposed will be up to the Ohio Department of Rehabilitation and Correction and its [sic] based upon your behavior in the institution." Broughton told the court she had no

questions about that or the indefinite sentencing advisory she signed. The trial court did not explicitly state that release after the minimum term was only presumptive, that the decision to maintain incarceration after the minimum term could be made administratively rather than judicially, or that incarceration could be maintained after the minimum term without the commission of a new offense. However, Broughton presents no legal authority to support the position that a trial court must do so during the plea colloquy to determine that a defendant understands the maximum penalty involved with a Reagan Tokes sentence for purposes of Crim.R. 11(C)(2)(a).

{¶26} In *Clark II*, we considered whether a plea was invalidated due to allegedly deficient Reagan Tokes Law notifications. *Clark II*, 2024-Ohio-4930 at ¶ 16 (4th Dist.). We explained that during the plea colloquy, the trial court discussed a form indicating the maximum prison term for the count at issue and that the prison sentence was mandatory, and the trial court addressed the defendant and explained the maximum penalty of 8-12 years and mandatory sentence. *Id.* at ¶ 23. We found that "while the trial court was required to give the Reagan Tokes notifications to [the defendant] at sentencing, nothing mandates that these notifications be given prior to [the defendant's] entrance of his plea." *Id.* We found the record reflected that "the trial court substantially complied with its duty to provide an explanation of the maximum sentence," and the defendant's "argument that his plea was not entered knowingly, intelligently, or voluntarily based solely upon the lack of the Reagan Tokes notifications is without merit." *Id.*

{¶27} Consistent with *Clark II*, we conclude the trial court did not violate Crim.R. 11(C)(2)(a) by failing to discuss the Reagan Tokes Law related matters which Broughton has identified during the plea colloquy. Accordingly, we reject the

contention that the plea was not knowingly, intelligently, and voluntarily entered because the trial court failed to properly explain the indefinite sentencing structure required by law and overrule the fourth assignment of error.

IV. FIFTH ASSIGNMENT OF ERROR

A. Positions of the Parties

{¶28} In the fifth assignment of error, Broughton contends that "[t]he trial court imposed a sentence materially inconsistent with the jointly recommended sentence that formed the basis of [her] Plea Agreement." Broughton asserts that the issue presented for review is "[c]an the [c]ourt impose a sentence that is materially inconsistent with the sentence that [she] relied upon for her guilty plea?" Broughton maintains that "[a] guilty plea must be entered with understanding of the actual sentencing exposure created by the agreement." She asserts that "[w]hen a plea is induced by a specific sentencing representation, the defendant must be informed if the court may impose a materially different penalty." She claims "[a] plea entered under a mistaken understanding of the agreed sentence is not knowing and voluntary." Broughton maintains that during the plea proceedings, the State represented that it would recommend a 15-year prison term, so the plea was evaluated by her "against the risk of trial using a definite term of incarceration as the expected outcome." But at sentencing, "the court imposed an indefinite sentence permitting incarceration beyond fifteen years." Therefore, "[t]he practical sentencing exposure was . . . greater than the punishment reasonably understood when the plea was entered." She asserts that even if the Crim.R. 11 plea colloquy was "otherwise sufficient, a plea cannot stand where the defendant's decision was based upon a materially different sentencing expectation than the one imposed." She claims that "[b]ecause the sentence

imposed materially differed from the understood agreement, the plea was not entered knowingly and voluntarily." Thus, she "must be permitted to withdraw the plea" or the "matter should be remanded for further proceedings consistent with the plea agreement."

{¶29} The State maintains that Broughton "was well-aware of the terms of the plea agreement" and that her argument "mischaracterizes both the record and the actual agreement." The State asserts that the parties "agreed that the court would determine the sentences for each count . . . amounting to a base agreed term of 15 years." The State claims "the sentence imposed was consistent with the terms the parties agreed to and jointly recommended." The State notes that neither Broughton nor defense counsel objected to the sentence imposed during the sentencing hearing and that no motion to withdraw the guilty plea or postconviction petition was filed. Therefore, the State claims "the negotiated plea agreement is not subject to review on appeal, any errors were waived and not preserved for appellate purposes, and the sentence should be affirmed."

B. Analysis

{¶30} The trial court did not err by imposing a sentence that was materially inconsistent with the jointly recommended sentence. "[G]enerally, 'a "trial court is not bound by a [sentencing] recommendation."'" (Bracketed text in *Dye*.) *State v. Dye*, 2025-Ohio-1973, ¶ 13 (4th Dist.), quoting *State v. Howard*, 2017-Ohio-9392, ¶ 58 (4th Dist.), quoting *State v. Bailey*, 2005-Ohio-5329, ¶ 15 (5th Dist). However, as explained below, in this case, the court followed the joint recommendation.

{¶31} "'[A] plea agreement is a contract and subject to interpretation under contract law standards.'" (Citations omitted in *Francis*) *State v. Francis*, 2011-Ohio-4497, ¶ 14 (4th Dist.), quoting *State v. Pasturzak,* 2009-Ohio-4222, ¶ 12 (4th Dist.). "'[E]ffect

must be given to the intention of the state and the defendant in their plea bargain, and courts should enforce what they perceive to be the terms of the original plea agreement.'" *State v. Azeen*, 2021-Ohio-1735, ¶ 20, quoting *State v. Dye*, 2010-Ohio-5728, ¶ 22. In determining the scope of the agreement, "we consider what terms both parties reasonably understood to be included in the agreement." *Id.* at ¶ 23, citing *State v. Zima*, 2004-Ohio-1807.

{¶32} Crim.R. 11(F) states: "When a negotiated plea of guilty . . . is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court." The Supreme Court of Ohio has stated that "[p]rudence also dictates that a plea agreement be in writing." *State v. Billingsley*, 2012-Ohio-4307, ¶ 25, citing *In re Mullen*, 2011-Ohio-3361, ¶ 29 (O'Connor, C.J., dissenting.). However, the record in this case does not contain or indicate there was a written plea agreement, so we presume the agreement was oral. "'Terms of an oral contract may be determined from "words, deeds, acts, and silence of the parties."'" *Selvage v. Emnett*, 2009-Ohio-940, ¶ 10 (4th Dist.), quoting *Kostelnik v. Helper*, 2002-Ohio-2985, ¶ 15, quoting *Rutledge v. Hoffman*, 81 Ohio App. 85 (1st Dist.1947), paragraph one of the syllabus.

{¶33} The words, deeds, acts, and silence of the parties as reflected in the record demonstrate that they reasonably understood that the joint recommendation of a 15-year prison sentence pertained to the aggregate minimum prison sentence. During the change of plea hearing, when asked if there was any sentencing agreement, the assistant prosecutor told the court, "The State intends to recommend a 15-year prison term. We haven't talked specifically about how that would be structured . . . ." Although the court explained to Broughton that it had to impose an indefinite sentence, no one clarified during

the change of plea hearing whether the 15-year recommendation applied to the aggregate minimum or maximum sentence. However, during the sentencing hearing, the State suggested that the court sentence Broughton to 6 years on Count 10, 4 years on Count 6, 3 years on Count 8, and 2 years on Count 15, "for a total of 15 to 18 years," implying that the 15-year recommendation applied to the aggregate minimum sentence. Later, the court imposed an aggregate 15-to-18-year prison sentence and expressed a belief that it had sentenced Broughton in accordance with the parties' agreement. At no time did Broughton express confusion regarding the terms of the plea agreement, assert that the State breached the agreement by recommending an aggregate 15-to-18-year prison sentence, challenge the trial court's position that it had sentenced Broughton in accordance with the parties' agreement, or move to withdraw her guilty plea.

{¶34} For these reasons, we conclude that the trial court, consistent with the plea agreement, imposed the jointly recommended aggregate minimum sentence of 15 years. And because the parties left it to the trial court to determine the sentence for each individual count and the aggregate maximum prison sentence, the court's decision to impose an aggregate maximum sentence of 18 years was consistent with the jointly recommended sentence. Thus, the court did not impose a sentence that was materially inconsistent with the jointly recommended sentence. Accordingly, we overrule the fifth assignment of error.

V. SECOND AND THIRD ASSIGNMENTS OF ERROR

A. Positions of the Parties

{¶35} In the second assignment of error, Broughton contends the trial court erred by imposing consecutive sentences without making the findings required by R.C.

2929.14(C)(4) and without support for consecutive sentences in the record, making her sentence contrary to law. She claims "[t]his case does not involve a jointly stipulated consecutive-sentence structure that would eliminate the court's duty to make statutory findings." In the third assignment of error, Broughton contends the trial court erred by failing to merge allied offenses of similar import in violation of R.C. 2941.25 and the double jeopardy clauses. Citing *State v. Underwood*, 2010-Ohio-1, Broughton maintains that a merger error remains reviewable on direct appeal even after a guilty plea. Broughton asserts that the trial court had a duty to determine whether her offenses were separately punishable before imposing sentence but failed to do so. She claims "[m]ultiple convictions may stand only if the offenses were committed separately, were committed with separate animus, or resulted in separate identifiable harm." She asserts that "all charges arose from a single incident involving one victim" and "[t]he record does not demonstrate that the restraint of the victim was prolonged beyond what was necessary to complete the robbery, nor that the assault created a distinct harm independent of the robbery itself." She claims "the restraint, injury, and theft were components of one continuous encounter," and "[w]here restraint and injury merely facilitate a robbery, the offenses share the same animus and must merge unless the court identifies a separate harm." And she contends that because the court imposed multiple punishments without determining whether the offenses were separately punishable, the sentence is contrary to R.C. 2941.25 and violates double jeopardy protections.

{¶36} The State contends that the sentence was "within the statutory range, an agreed joint recommended sentence, and not a maximum sentence," so "the trial court was not required to make consecutive-sentencing findings and the sentence is not

reviewable on appeal pursuant to R.C. §2953.08(D)(1).” The State also contends that Broughton waived any arguments pertaining to merger and that the trial court had no obligation to make any findings on the subject. The State maintains that Broughton ignores cases decided after *Underwood* regarding waiver of rights under R.C. 2941.25. The State relies on *State v. Lee*, 2018-Ohio-1839 (8th Dist.), for the proposition that an agreement to serve consecutive sentences is equivalent to agreeing that multiple offenses are separate under R.C. 2941.25.

B. Analysis

{¶37} Broughton’s prison sentence is not subject to review pursuant to R.C. 2953.08(D)(1), which again, states: “A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge.” The parties jointly recommended a 15-year aggregate minimum prison sentence, leaving it to the trial court to determine the sentence for each individual count and the aggregate maximum prison sentence. The trial court imposed the jointly recommended 15-year aggregate minimum prison sentence and an 18-year aggregate maximum prison sentence, and Broughton has not demonstrated that the sentence is not authorized by law. “A sentence is ‘authorized by law’ and is not appealable within the meaning of R.C. 2953.08(D)(1) only if it comports with all mandatory sentencing provisions.” *Underwood*, 2010-Ohio-1, at paragraph two of the syllabus. As we explain below, even if the trial court did not make all the consecutive-sentence findings required by R.C. 2929.14(C)(4) or the record does not support such findings, such facts would not

make the sentence not authorized by law. In addition, the fact that the court did not merge any of the offenses does not make Broughton's sentence not authorized by law.

1. Consecutive Sentences

{¶38} R.C. 2929.14(C)(4) states:

> 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.

{¶39} Because the statute "permits, but does not require, a trial court to impose consecutive sentences," it "is not a mandatory sentencing provision." *State v. Howard*, 2017-Ohio-9392, ¶ 54 (4th Dist.), citing *Sergent*, 2016-Ohio-2696, at ¶ 28-30. "[I]n the context of a jointly recommended sentence that includes nonmandatory consecutive sentences, a trial court is not required to make the consecutive-sentence findings set out in R.C. 2929.14(C)(4)." *Sergeant* at ¶ 43. Therefore, "when a trial judge imposes such an agreed sentence without making those findings, the sentence is nevertheless 'authorized by law' and not reviewable on appeal pursuant to R.C. 2953.08(D)(1)." *Id.*

{¶40} In this case, the jointly recommended sentence included nonmandatory consecutive sentences. The parties jointly recommended a 15-year aggregate minimum prison sentence, which could not be achieved without nonmandatory consecutive sentences because the highest minimum term for Counts 8 and 10, first-degree felonies, was 11 years, and the highest minimum term for Counts 6 and 15, second-degree felonies, was 8 years. *See* R.C. 2929.14(A)(1)(a) (prison term for first-degree felony committed on or after March 22, 2019, "shall be an indefinite prison term with a stated minimum term selected by the court of three, four, five, six, seven, eight, nine, ten, or eleven years and a maximum term that is determined pursuant to [R.C. 2929.144]"); R.C. 2929.14(A)(2)(a) (prison term for second-degree felony committed on or after March 22, 2019, "shall be an indefinite prison term with a stated minimum term selected by the court of two, three, four, five, six, seven, or eight years and a maximum term that is determined pursuant to [R.C. 2929.144]"); and *State v. Riggens*, 2025-Ohio-3028, ¶ 10 (4th Dist.) (concluding jointly recommended sentence included nonmandatory consecutive sentences where parties agreed to aggregate 17-year prison sentence which could not be achieved without nonmandatory consecutive sentences). Therefore, the trial court was not required to make the consecutive-sentence findings or support the findings it made "'with sufficient evidence on the record.'" *Id.*, quoting *State v. Ross*, 2017-Ohio-9400, ¶ 71 (4th Dist.). Consequently, even if the trial court did not make all the consecutive-sentence findings required by R.C. 2929.14(C)(4) or the record does not support such findings, such facts would not make the sentence not authorized by law.

2. Merger

{¶41} "R.C. 2941.25 codifies the protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, which prohibits multiple punishments for the same offense." *Underwood*, 2010-Ohio-1, at ¶ 23. R.C. 2941.25 states:

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

{¶42} In *Underwood*, the Supreme Court explained that "R.C. 2941.25(A) clearly provides that there may be only one conviction for allied offenses of similar import. Because a defendant may be convicted of only one offense for such conduct, the defendant may be sentenced for only one offense." (Emphasis deleted.) *Underwood* at ¶ 26. "[A]llied offenses of similar import are to be merged at sentencing." *Id.*, citing *State v. Brown*, 2008-Ohio-4569, ¶ 43, and *State v. McGuire*, 80 Ohio St.3d 390, 399 (1997). "Thus, a trial court is prohibited from imposing individual sentences for counts that constitute allied offenses of similar import." *Id.* "A defendant's plea to multiple counts does not affect the court's duty to merge those allied counts at sentencing." *Id.* "This duty is mandatory, not discretionary." *Id.* Therefore, "when a sentence is imposed on multiple counts that are allied offenses of similar import in violation of R.C. 2941.25(A), R.C. 2953.08(D) does not bar appellate review of that sentence even though it was jointly recommended by the parties and imposed by the court." *Id.* However, in *Underwood*,

the State conceded certain offenses were allied offenses of similar import prior to sentencing, *id.* at ¶ 5, and the Supreme Court noted that "nothing in this decision precludes the state and a defendant from stipulating in the plea agreement that the offenses were committed with separate animus, thus subjecting the defendant to more than one conviction and sentence." *Id.* at ¶ 29.

{¶43} "Waiving rights under R.C. 2941.25 arises in a variety of ways and is not limited to an agreement expressly referencing R.C. 2941.25." *Lee*, 2018-Ohio-1839, at ¶ 7 (8th Dist.), citing *State v. Black*, 2016-Ohio-383, ¶ 16 (8th Dist.), citing *State v. Rogers*, 2015-Ohio-2459, ¶ 20. "A defendant cannot agree to consecutively serve sentences without agreeing that the court has authority to impose the individual sentences on each count." *Id.* at ¶ 9. "Stated another way, agreeing to the imposition of multiple sentences is a necessary prerequisite to agreeing to consecutive service, for it is '[o]nly after the judge has imposed a separate prison term for each offense may the judge then consider in his discretion whether the offender should serve those terms concurrently or consecutively.'" (Bracketed text in *Lee*.) *Id.*, quoting *State v. Saxon*, 2006-Ohio-1245, ¶ 9. Therefore, "[a]greeing to serve consecutive sentences is equivalent to agreeing that multiple offenses are separate under R.C. 2941.25." *Id.* at ¶ 8.

{¶44} In *State v. Word*, 2019-Ohio-795 (8th Dist.), the defendant pleaded guilty to involuntary manslaughter with a firearm specification, attempted murder with a firearm specification, and having a weapon while under disability. *Word* at ¶ 2. The defendant agreed "to jointly recommend a sentencing range of 20 to 25 years, with the trial court being permitted to determine how to fashion the aggregate term to effectuate the agreement." *Id.* The trial court accepted the jointly recommended sentencing range and

imposed a 22-year aggregate prison term. *Id.* at ¶ 3. The court sentenced the defendant to 8 years for involuntary manslaughter, 54 months on the accompanying firearm specification to be served consecutive to the base sentence, 5 years for attempted murder, 54 months on the accompanying firearm specification to be served consecutive to the base sentence, and 36 months for having a weapon while under disability. *Id.* The court ordered that the defendant serve the involuntary manslaughter and attempted murder sentences consecutive to each other and serve the having a weapon while under disability sentence concurrently with all other sentences. *Id.* at ¶ 3, 7. On appeal, the defendant claimed, among other things, that the trial court erred by failing to merge the involuntary manslaughter and attempted murder counts. *Id.* at ¶ 8.

{¶45} The appellate court concluded it could not review the merger argument. *Id.* at ¶ 9. The court explained that even though the defendant "did not expressly agree to serve his sentences consecutively, he agreed to permit the trial court to impose the sentences in any manner to achieve a 20- to 25-year aggregate term of imprisonment." *Id.* "The only way to achieve the agreed sentencing range in this case was through the imposition of consecutive sentences." *Id.* The court explained that the defendant's "agreement to serve consecutive sentences necessarily included the affirmative concession that the offenses were committed separately, with a separate animus or against separate victims because consecutive sentences cannot be imposed for allied offenses." *Id.* at ¶ 10. Thus, the defendant "waived his ability to challenge the merger issue through his agreement to the sentencing range that required consecutive service of separate sentences on the offenses." *Id.* at ¶ 11. And because the defendant "thereby

conceded that the offenses were not allied, the trial court satisfied all mandatory obligations and the sentences are authorized by law." *Id.*

{¶46} In this case, Broughton, like the defendant in *Word*, implicitly agreed to serve consecutive sentences. The parties jointly recommended a 15-year aggregate minimum prison sentence. In doing so, Broughton agreed to permit the trial court to impose the sentences for each count in any manner to achieve that aggregate minimum prison sentence. As previously explained, this could not be achieved without consecutive sentences because the highest minimum term for Counts 8 and 10, first-degree felonies, was 11 years, and the highest minimum term for Counts 6 and 15, second-degree felonies, was 8 years. *See* R.C. 2929.14(A)(1)(a) and (A)(2)(a). And because "[a]greeing to serve consecutive sentences is equivalent to agreeing that multiple offenses are separate under R.C. 2941.25," *Lee*, 2018-Ohio-1839, at ¶ 8 (8th Dist.), Broughton waived her ability to raise the merger issue through her agreement to an aggregate minimum prison sentence which required consecutive sentences. Consequently, the fact that the court did not merge any of the offenses does not make Broughton's sentence not authorized by law.

3. Summary

{¶47} Because the trial court did not err by failing to merge allied offenses of similar import in violation of R.C. 2941.25 and the double jeopardy clauses, we overrule the third assignment of error. And because the trial court imposed a jointly recommended prison sentence which is authorized by law, Broughton's prison sentence is not reviewable under R.C. 2953.08(D)(1), and we cannot review the merits of the second assignment of error.

VI. FIRST ASSIGNMENT OF ERROR

A. Positions of the Parties

{¶48} In the first assignment of error, Broughton contends the trial court erred and violated R.C. 2929.18(A)(1) and her due process rights by imposing restitution without competent, credible evidence and without conducting a hearing after the amount was disputed. She claims that during the sentencing hearing, the State "announced for the first time that the victim's medical expenses exceeded $223,000," and "[d]efense counsel immediately informed the court that sentencing was the first notice of any restitution amount and therefore disputed the figure." Broughton asserts that once the amount was disputed, the trial court had to conduct an evidentiary hearing but did not do so. Broughton further asserts that the restitution order "rests solely upon the prosecutor's representations, which are not evidence." And she asserts that "[b]ecause the restitution amount is unsupported by competent, credible evidence and no hearing was conducted after the dispute, the order is contrary to law."

{¶49} The State contends that the jointly recommended sentence is not subject to review on appeal pursuant to R.C. 2953.08(D). The State also contends that R.C. 2929.18(A)(1) states that certain people, including the victim's representative and the prosecutor or prosecutor's designee, may provide information relevant to the determination of the amount of restitution. The State asserts that "[t]he victim through his representative and the State had documentation available, presented a total number stating who the medical bills were owed to," and Broughton did not object to or request a hearing regarding the amount or object to the restitution order itself. Therefore, she waived any objection to the restitution order, no hearing was required, "the trial court

properly decided the amount of restitution by a preponderance of the evidence supported by competent, credible evidence allowed by statute," and there was no abuse of discretion.

B. Legal Principles

{¶50} "'An order of restitution imposed by the sentencing court on an offender for a felony is part of the sentence * * *.'" (Omission in *Minshall*.) *State v. Minshall*, 2024-Ohio-1035, ¶ 15 (4th Dist.), quoting *State v. Danison*, 2005-Ohio-781, syllabus. While the parties jointly recommended an aggregate minimum prison sentence, which the court imposed, they did not jointly recommend restitution, so R.C. 2953.08(D)(1) does not bar our review of Broughton's restitution challenge. "Generally, we review a restitution order to determine whether it is clearly and convincingly contrary to law." *State v. Hardesty*, 2025-Ohio-5744, ¶ 43 (4th Dist.), citing *State v. Patton*, 2019-Ohio-2769, ¶ 23 (4th Dist.), and R.C. 2953.08(G)(2). In this case, plain error review applies because Broughton did not object to the imposition of restitution without competent, credible evidence and without a hearing. *See State v. White*, 2019-Ohio-4288, ¶ 22 (4th Dist.), citing *State v. Coleman*, 2018-Ohio-1709, ¶ 12-14 (4th Dist.). To prevail under the plain error standard, "the defendant must establish that an error occurred, it was obvious, and it affected his or her substantial rights." *State v. Fannon*, 2018-Ohio-5242, ¶ 21 (4th Dist.), citing Crim.R. 52(B), and *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus.

{¶51} R.C. 2929.18(A) states in part:

> Financial sanctions that either are required to be or may be imposed pursuant to this section include, but are not limited to, the following:
>
> (1) Restitution by the offender to the victim of the offender's criminal offense or the victim's estate, in an amount based on the victim's economic loss. In open court, the court shall order that full restitution be made to the victim, to the adult probation department that serves the county on behalf of the victim, to the clerk of courts, or to another agency designated by the court. At sentencing, the court shall determine the amount of restitution to be made by the offender. The victim, victim's representative, victim's attorney, if applicable, the prosecutor or the prosecutor's designee, and the offender may provide information relevant to the determination of the amount of restitution. The amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. . . . The court shall hold a hearing on restitution if the offender, victim, victim's representative, or victim's estate disputes the amount. The court shall determine the amount of full restitution by a preponderance of the evidence.

{¶52} "'"[T]he amount of the restitution must be supported by competent, credible evidence in the record from which the court can discern the amount of the restitution to a reasonable degree of certainty."'" *State v. Martin*, 2024-Ohio-2334, ¶ 100 (4th Dist.), quoting *State v. Alexander*, 2012-Ohio-2041, ¶ 12 (4th Dist.), quoting *State v. Johnson*, 2004-Ohio-2236, ¶ 10 (4th Dist.). "The evidence to support a restitution order can take the form of either documentary evidence or testimony." *State v. Linek*, 2024-Ohio-6127, ¶ 33 (4th Dist.), citing *State v. Noble*, 2017-Ohio-1440, ¶ 52 (4th Dist.).

C. Analysis

{¶53} The trial court did not err, let alone commit plain error, by imposing restitution without conducting a hearing. R.C. 2929.18(A)(1) mandates a restitution hearing "if the offender, victim, victim's representative, or victim's estate disputes the amount." Broughton did not dispute the amount of restitution. After the assistant prosecutor provided information relevant to the determination of the amount, the court asked if defense counsel had anything to say regarding restitution. Counsel stated, "Your

Honor, today is the first day that I've heard of a restitution amount that those are the numbers of what they are." But counsel did not explicitly dispute the amount requested by the State, and we do not interpret counsel's comment as implicitly disputing the amount. Although counsel indicated he had just heard the amount that day, counsel did not question the State's calculation or seek to verify it by reviewing the documentation the State indicated it possessed. And later when the trial court imposed the amount of restitution requested by the State, counsel still did not dispute the amount.

{¶54} The trial court did, however, commit plain error by imposing restitution without competent, credible evidence. Even though Broughton did not dispute the amount of restitution, she also did not agree to the amount, and the only information in the record regarding the amount is statements made by the assistant prosecutor. R.C. 2929.18(A)(1) states that the prosecutor or the prosecutor's designee "may provide information relevant to the determination of the amount of restitution." But R.C. 2929.18(A)(1) mandates that the court "determine the amount of full restitution by a preponderance of the evidence." "'[S]tatements made by the prosecutor are not considered evidence,' *State v. Jackson*, 4th Dist. Ross No. 11CA3263, 2012-Ohio-4235, ¶ 10, and a trial court errs if it orders restitution based solely on a statement by the prosecutor." *Linek* at ¶ 34, citing *Patton*, 2019-Ohio-2769, at ¶ 23, 27-28 (4th Dist.), and *Alexander* at ¶ 8-14. "In this type of situation, we have vacated restitution orders and remanded for trial courts to determine the appropriate amount of restitution due to the victim." *Linek* at ¶ 34, citing *Patton* at ¶ 28, and *Alexander* at ¶ 14. Given our past precedent, the trial court's imposition of restitution based solely on the assistant prosecutor's statement of the amount of loss was obvious error. And we have explained

that such an error affects substantial rights because the trial court cannot order restitution "'greater than the amount of economic loss suffered as a direct and proximate result of the commission of the offense,' [*State v. Lalain*, 2013-Ohio-3093,] paragraph one of the syllabus, and no loss has been established." *White*, 2019-Ohio-4288, at ¶ 25 (4th Dist.). Therefore, even though Broughton does not explicitly argue plain error under her first assignment of error, consistent with our prior precedent, we conclude the trial court committed plain error by imposing restitution without competent, credible evidence.

{¶55} Accordingly, we overrule the first assignment of error to the extent it asserts the trial court erred by imposing restitution without a hearing, sustain the first assignment of error to the extent it asserts the trial court erred by imposing restitution without competent, credible evidence, vacate the restitution order, and remand for the trial court to determine the proper amount of restitution due.

VII. CONCLUSION

{¶56} For the foregoing reasons, we overrule the first assignment of error to the extent it asserts the trial court erred by imposing restitution without conducting a hearing. We sustain the first assignment of error to the extent it asserts that the trial court erred by imposing restitution without competent, credible evidence, and vacate the restitution order. We cannot review the merits of the second assignment of error, and we overrule the third, fourth, and fifth assignments of error. Accordingly, we affirm the trial court's judgment in part, vacate it in part, and remand for the trial court to determine the proper amount of restitution due.

JUDGMENT AFFIRMED IN PART
AND VACATED IN PART.
CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED IN PART AND VACATED IN PART and that the CAUSE IS REMANDED. Appellant and appellee shall split the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto 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 60 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 60-day period, or the failure of the appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-day appeal period set forth in the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of 60 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.

Smith, P.J. & Wilkin, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Michael D. Hess, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 22, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.