[Cite as *State v. Hickman*, 2023-Ohio-2179.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO, :

Plaintiff-Appellee, :

No. 112002

v. :

ALPHONSO HICKMAN, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 29, 2023

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-21-666463-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, Michael Martinez and Fallon Radigan, Assistant Prosecuting Attorneys, *for appellee*.

Edward F. Borkowski, Jr., *for appellant*.

EILEEN A. GALLAGHER, J.:

{¶ 1} Defendant-appellant Alphonso Hickman appeals the aggregate eight-year prison sentence the trial court imposed on him after he pleaded guilty to voyeurism, pandering sexually oriented matter involving a minor and illegal use of a minor in nudity-oriented material or performance.

{¶ 2} Hickman contends that the trial court failed to adequately consider the factors set forth in R.C. 2929.11 and 2929.12 before sentencing him and, further, that the record does not support the trial court's reasons for running certain sentences consecutively. For the reasons that follow, we affirm.

I. Factual Background and Procedural History

{¶ 3} In May 2021, prior to the case at issue in this appeal, Hickman pleaded guilty to a charge of voyeurism in the Cuyahoga County Court of Common Pleas; the trial court sentenced him to five years of community control and classified him as a Tier I sex offender.[1] The state alleged that in March 2020 Hickman left a cell phone in the bathroom of the home where his wife and his wife's 14-year-old daughter, O.T. (Hickman's stepdaughter), lived. The phone was set to record video and was positioned to record O.T. in the shower.

{¶ 4} On December 28, 2021, a Cuyahoga County Grand Jury indicted Hickman on several new charges involving the creation, distribution and possession of sexually oriented matter involving a minor. The charges stemmed from Hickman again positioning his cell phone in the bathroom to record O.T. in the shower, this time when she was 16 years old and from Hickman emailing certain videos to himself. O.T. had created these videos of herself and they depicted her in a state of nudity.

[1] Cuyahoga C.P. No. CR-20-649413-A.

{¶ 5} On August 3, 2022, Hickman pleaded guilty to the following charges: two counts of pandering sexually oriented matter involving a minor in violation of R.C. 2907.322(A)(1), each a second-degree felony; two counts of illegal use of a minor in nudity-oriented material or performance (creating, producing or transferring the material) in violation of R.C. 2907.323(A)(1), each a second-degree felony; one count of illegal use of a minor in nudity-oriented material or performance (possessing or viewing the material) in violation of R.C. 2907.323(A)(3), a fifth-degree felony; and two counts of voyeurism in violation of R.C. 2907.08(C), each a fifth-degree felony. The state dismissed the remaining counts in the indictment.

{¶ 6} A presentence-investigation report was prepared and the parties submitted sentencing recommendations to the trial court.[2] The state asked for a "lengthy term of incarceration." Hickman asked for "concurrent sentences on the lower end."

{¶ 7} On August 29, 2022, the trial court held a sentencing hearing.

{¶ 8} The defense addressed the court and pointed out that Hickman "is remorseful for his actions" and did not cause or expect to cause physical harm to the victim. The defense stated that the COVID-19 pandemic delayed Hickman's ability to receive the treatment he was scheduled to complete as a result of the 2020

[2] The trial court stated at the sentencing hearing that it had not reviewed the parties' sentencing memoranda, which were filed prior to the hearing. No party assigns that fact as error in this appeal, but we nevertheless note that the parties reiterated their sentencing positions at the hearing.

voyeurism case. The defense stated that Hickman had been in treatment since January 2022 and that treatment was going well. The defense related that Hickman owned, at least in part, three different businesses, at least one of those businesses with his wife (the victim's mother). The defense asserted that Hickman had been married to his wife for five years and "he has her support in moving forward so that he can get on the right path and do better and be better."

{¶ 9} Ultimately, the defense made the following recommendation:

> We know that there are presumptions of prison on most of the counts * * * and he recognizes the fact he needs to be punished for his behavior so he does understand that the Court is likely to impose a prison term. We are asking the Court to consider some sort of concurrent sentences that will allow him to not only be punished but be rehabilitated in an amount of time that is not at — is not very significant. I'm not asking the Court to impose the minimum sentence. He does think that he should be punished for his behavior so that this isn't something that happens again in the future but he does have a lot of other positive things going on in his life prior to his incarceration. * * * So I would ask the Court to consider a lower prison term for my client understanding the fact that he's accountable for his actions in this case.

{¶ 10} The state emphasized that Hickman's attempt to record the victim in the shower occurred less than six months after he was sentenced to community control for doing the same thing to the same victim. The state pushed back on Hickman's assertion of remorse and argued that the victim suffered substantial mental injury because of her age and because Hickman's relationship to the victim facilitated the offense. The state argued that Hickman was likely to reoffend "because he is a predator"; the state asked "for a lengthier prison sentence in this matter."

{¶ 11} O.T. addressed the court, as did a police detective.

{¶ 12} Hickman's probation officer addressed the court and stated that Hickman had been compliant with his supervision conditions and was getting weekly sex-offender treatment. But the officer expressed concern that "there seems to be a trend of behavior," in that Hickman's "new case is following the exact patterns as the case that I'm supervising him on."

{¶ 13} Hickman then addressed the court. He claimed that he had positioned his phone in the bathroom because he was "trying to catch [the victim] with a cell phone." He claimed that the victim knew "how to set me up, set her mother up so she can be free and pick up a backup plan." He said he emailed the explicit videos the victim made to himself because he "was doing what a parent was supposed to do with permission to monitor what she was doing * * *." He said he could not see what the videos were without emailing them to himself. Hickman said he "take[s] full blame" for putting himself "back in this position of setting a cell phone under the bathroom sink because I felt uncomfortable because there was notes from her mouth saying about setting me up."

{¶ 14} The trial court then announced its sentence, beginning with the following statement:

> After consideration of the record, the oral statements made today, looking at the pre-sentence investigation report, the purposes and principles of sentencing under Ohio Revised Code section 2929.11, the seriousness and recidivism factors relevant to the offense and the offender pursuant to Revised Code section 2929.12, and the need for deterrence, incapacitation, rehabilitation and restitution, the Court finds that a prison term is consistent with the purposes and principles

> of sentencing set forth in section 2929.11 of the Revised Code and finds that the offender is not amenable to an available community control sanction.
>
> Furthermore, the Court has considered the factors set forth in section 2929.12 and finds that a prison term is commensurate with the seriousness of the defendant's conduct, its impact on the victim, that it's reasonably necessary to deter the offender in order to protect the public from future crimes and it would not place an unnecessary burden on government resources.

{¶ 15} The court sentenced Hickman to (1) four years in prison on each of the two pandering counts, to be served concurrently with each other; (2) four years in prison on each of the second-degree illegal-use-of-a-minor counts, to be served concurrently with each other but consecutive to the pandering sentences and (3) one year in prison on each of the fifth-degree felonies, to be served concurrently with the other sentences imposed. In total, then, the trial court sentenced Hickman to serve eight years in prison in this case.[3]

{¶ 16} The court made the following consecutive-sentence findings at the hearing:

> The Court finds that [a] consecutive sentence is necessary to protect the public from future crime or to punish the offender and that the consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. Furthermore, the Court finds that the defendant committed * * * some of the offenses in case number 666463 while he was on community control * * *.

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[3] The trial court also sentenced Hickman to serve one year in prison, consecutive to this eight-year sentence, for violating community control in the 2020 voyeurism case. That sentence is not presently before us on appeal.

{¶ 17} The state objected to the imposition of a definite sentence on the second-degree felony counts, arguing that the trial court was required to impose an indefinite sentence under the Reagan Tokes Law.[4] Hickman did not object to the sentence.

{¶ 18} The trial court journalized its sentence, writing the following in its journal entry, in relevant part:

> The court considered all required factors of the law. The court finds that prison is consistent with the purpose of R.C. 2929.11. The court imposes a prison sentence at the Lorain Correctional Institution of 8 year(s). The court finds that defendant committed some of the crimes in this matter while serving a term of community control supervision in Case #649413. * * * The court imposes prison terms consecutively finding that consecutive service of the prison term is necessary to protect the public from future crime or to punish defendant; that the consecutive sentences are not disproportionate to the seriousness of defendant's conduct and to the danger defendant poses to the public; and that, the defendant committed one or more of the multiple offenses while the defendant was awaiting trial or sentencing or was under a community control or was under post-release control for a prior offense.

{¶ 19} Hickman appealed, raising the following two assignments of error for review:

> Assignment of Error 1:
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> Appellant's sentence is contrary to law because the trial court failed to properly consider and weigh the relevant statutory factors.
>
> Assignment of Error 2:
>
> The record does not support the imposition of consecutive sentences.

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[4] The state did not appeal Hickman's sentence.

II. Law and Analysis

A. Standard of Review

{¶ 20} We review felony sentences under the standard of review set forth in R.C. 2953.08(G)(2). *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 21. Under R.C. 2953.08(G)(2), an appellate court may increase, reduce or otherwise modify a sentence or vacate a sentence and remand for resentencing if it "clearly and convincingly" finds that (1) the record does not support the sentencing court's findings under R.C. 2929.13(B) or (D), 2929.14(B)(2)(e) or (C)(4) or 2929.20(I) or (2) the sentence is "otherwise contrary to law." "'Clear and convincing evidence is that measure or degree of proof * * * which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.'" *State v. Franklin*, 8th Dist. Cuyahoga No. 107482, 2019-Ohio-3760, ¶ 29, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶ 21} Hickman asks us to modify his sentence. His argument is twofold: first, he says that a proper consideration of the purposes of felony sentencing set forth in R.C. 2929.11 and the seriousness and recidivism factors set forth in R.C. 2929.12 does not support "such a severe sanction" as was imposed here, so his sentence is "otherwise contrary to law"; second, he says that the record clearly and convincingly does not support the trial court's consecutive-sentence findings under R.C. 2929.14(C)(4).

B. First Assignment of Error

{¶ 22} "'A sentence is contrary to law if it falls outside the statutory range for the offense or if the sentencing court fails to consider the purposes and principles of sentencing set forth in R.C. 2929.11 and the sentencing factors in R.C. 2929.12.'" *State v. Scott*, 8th Dist. Cuyahoga No. 111212, 2022-Ohio-3549, ¶ 8, quoting *State v. Angel*, 8th Dist. Cuyahoga No. 110456, 2022-Ohio-72, ¶ 8.

{¶ 23} Hickman concedes that his sentence falls within the appropriate statutory range but he contends that the trial court failed to adequately consider R.C. 2929.11 and 2929.12 before imposing the sentence. The only evidence offered to support that argument is his assertion that a proper consideration of those statutes would have resulted in a shorter prison term. The argument is meritless.

{¶ 24} We presume that a trial court considered the factors in R.C. 2929.11 and 2929.12 "unless the defendant affirmatively shows otherwise." *State v. Pierce*, 8th Dist. Cuyahoga No. 111605, 2023-Ohio-528, ¶ 41. Hickman failed to affirmatively show that the trial court did not consider the factors. Therefore, he does not overcome that presumption. We also note that the trial court specifically stated at the sentencing hearing that it had considered the required factors and then wrote in its journal entry that it "considered all required factors of the law" and found "that prison is consistent with the purpose of R.C. 2929.11." Our court has found that statements like this fulfill the trial court's obligations under R.C. 2929.11

and 2929.12. *See, e.g.*, *Pierce* at ¶ 41.[5] Finally, we find that the record reflects that the trial court considered these factors when sentencing Hickman. The state addressed the court regarding its view of the seriousness of the offense. Both Hickman and his counsel addressed the court and discussed mitigation. The trial court reviewed the presentence-investigation report and discussed the circumstances of the offenses with Hickman; it heard his explanation for his conduct, asked questions and gave him the opportunity to add anything else he wished to the record prior to announcing its sentence. The trial court ultimately noted its disappointment that Hickman repeated the conduct that previously got him in trouble and noted that the offenses affected the same minor victim that he had previously victimized.

{¶ 25} The record reflects that the trial court adequately considered the R.C. 2929.11 and 2929.12 factors prior to imposing its sentence and the sentence falls within the appropriate statutory range. Therefore, we overrule Hickman's first assignment of error.

C. Second Assignment of Error

{¶ 26} Under Ohio law, sentences are presumed to run concurrently unless the trial court makes the required findings set forth in R.C. 2929.14(C)(4). *State v. Reindl*, 8th Dist. Cuyahoga Nos. 109806, 109807 and 109808, 2021-Ohio-2586,

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[5] We again note, as we did in *Pierce*, that the Ohio Supreme Court has accepted for review a proposition of law that states, "Meaningful appellate review of a sentence under 2953.08 should be permitted." *See Pierce*, 2023-Ohio-528 at ¶ 41 fn. 1, quoting the briefing in *State v. Fraley*, Ohio Supreme Court Case No. 2022-1281.

¶ 14; *State v. Gohagan*, 8th Dist. Cuyahoga No. 107948, 2019-Ohio-4070, ¶ 28. To impose consecutive sentences, the trial court must find that (1) consecutive sentences are necessary to protect the public from future crime or to punish the offender, (2) 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) at least one of the following applies:

> (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.

R.C. 2929.14(C)(4).

{¶ 27} Thus, a defendant can challenge consecutive sentences on appeal in two ways. First, the defendant can argue that consecutive sentences are contrary to law because the court failed to make the findings required by R.C. 2929.14(C)(4). *See* R.C. 2953.08(G)(2)(b); *Reindl* at ¶ 13. Second, the defendant can argue that the record "clearly and convincingly" does not support the court's findings made pursuant to R.C. 2929.14(C)(4). *See* R.C. 2953.08(G)(2)(a); *Reindl* at ¶ 13.

{¶ 28} Here, Hickman makes the latter argument. He concedes that the trial court made the required findings under R.C. 2929.14(C)(4) but argues that the record clearly and convincingly does not support the trial court's findings. While he concedes that he committed one or more of the offenses while he was on community control, he argues that consecutive sentences were not necessary to protect the public from future crime or to punish him and that consecutive sentences were disproportionate to the seriousness of his conduct and to the danger he poses to the public.

{¶ 29} He points out that he has not "committed robberies, homicides, or other high-level violent crimes." He says he "could have been adequately punished with a four- or five-year sentence, rather than [a sentence] twice as long." He also points out that he did not create the explicit videos he emailed to himself; the victim recorded the videos of herself and he emailed those videos to himself. He says this is not a "case of a predatory adult forcibly making and sending inappropriate videos of a minor."

{¶ 30} In addressing this assignment of error, we would ordinarily "review the record de novo and decide whether the record clearly and convincingly does not support the consecutive-sentence findings." *See State v. Gwynne*, Slip Opinion No. 2022-Ohio-4607, ¶ 1. However, because Hickman did not object to the imposition of consecutive sentences before the trial court, we review his sentence only for plain error. *See, e.g.*, *State v. Ayers*, 10th Dist. Franklin No. 13AP-371, 2014-Ohio-276, ¶ 7.

{¶ 31} Crim.R. 52(B) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." An appellate court notices plain error "'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.'" *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002), quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus. Plain error "must be an 'obvious' defect in the trial proceedings" and we will not find plain error unless, but for the error, the outcome would have been different. *Barnes* at 27; *Long* at paragraph two of the syllabus; *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, ¶ 78. "The burden of demonstrating plain error is on the party asserting it." *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 17.

{¶ 32} Hickman asks us to modify his sentence by ordering that all of his sentences be served concurrently. If we did so, it would have the effect of reducing Hickman's aggregate sentence by four years.

{¶ 33} After a thorough review of the record, we are not left with the "firm belief or conviction" that the consecutive sentences the trial court imposed were not necessary to protect the public or punish Hickman or were disproportionate to the seriousness of his conduct and the danger he poses.

{¶ 34} Hickman is cooperating with weekly sex-offender treatment but we share the trial court's view that Hickman's conduct was very serious and we are concerned about the danger Hickman poses to the public.

{¶ 35} Hickman attempted to record his minor stepdaughter in the shower less than a year after he was sentenced to community control for the same behavior targeting the same victim. While he pleaded guilty, accepting responsibility for these offenses, he also attempted to explain his conduct away because — in his mind — the victim was trying to "set him up." That statement reflects a concerning lack of remorse and suggests that Hickman still believes himself to be in the right. Hickman was separately charged with transferring and possessing explicit videos the victim had recorded of herself. His explanation that he was simply being a good parent displays a stunning lack of appreciation for the seriousness of his conduct and the effect of his conduct on the victim. O.T.'s own stepfather has twice attempted to record her naked in the shower while also transferring and possessing nearly 30 videos of her in a state of nudity. O.T.'s mother, apparently, continues to support Hickman despite this victimization.

{¶ 36} Hickman's criminal history extends back to 1999. While his convictions are primarily lower-level felonies and misdemeanors, we note that Hickman has convictions for attempted burglary, attempted felonious assault and domestic violence. The presentence-investigation report also reflects several violations of probation. This criminal history, and the circumstances of the offenses in the present case, do not give us confidence that Hickman poses no danger to the public.

{¶ 37} We have thoroughly reviewed the record and considered whether it clearly and convincingly does not support the trial court's finding that consecutive

sentences and an aggregate eight-year prison sentence are necessary to protect the public from future crime or to punish Hickman and that consecutive sentences are not disproportionate to the seriousness of Hickman's conduct and to the danger he poses to the public. After our review, and even considering that Hickman was also sentenced to an additional one year in prison in the 2020 voyeurism case, we do not have the firm conviction or belief that the record does not support the trial court's findings in light of the consecutive terms imposed and the resulting aggregate sentence. We find no error, let alone plain error, in the sentences.

{¶ 38} We, therefore, overrule Hickman's second assignment of error.

III. Conclusion

{¶ 39} Having overruled Hickman's assignments of error for the reasons stated above, we affirm.

It is ordered that the appellee recover from the appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

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

EILEEN A. GALLAGHER, JUDGE

FRANK DANIEL CELEBREZZE, III, P.J., and
LISA B. FORBES, J., CONCUR