[Cite as *In re J.O.*, 2023-Ohio-2293.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

IN RE J.O.	:	
A Minor Child	:	No. 111747
	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED IN PART, VACATED IN PART, AND REMANDED
RELEASED AND JOURNALIZED: July 6, 2023

Civil Appeal from the Cuyahoga County Common Pleas Court
Juvenile Division
Case No. DL-22-102807

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Jacob Williams, Assistant Prosecuting Attorney, *for appellee*.

The Law Office of Jaye M. Schlachet, Jaye M. Schlachet, and Eric M. Levy, *for appellant*.

ANITA LASTER MAYS, A.J.:

{¶ 1} Appellant J.O. appeals her delinquency adjudications and asks this court to either vacate the delinquency or vacate her disposition. We affirm in part, vacate in part, and remand for a disposition hearing.

I. Procedural History

{¶ 2} On March 21, 2022, J.O. was charged with the following three counts:

> Count 1 — felonious assault by means of deadly weapon, a second-degree felony, in violation of R.C. 2903.11(A)(2), with one- and three-year firearm specifications;
>
> Count 2 — felonious assault resulting in serious physical harm, a second-degree felony, in violation of R.C. 2903.11(A)(1), with one- and three-year firearm specifications; and
>
> Count 3 — tampering with evidence, a third-degree felony, in violation of R.C. 2921.12(A)(1), with one- and three-year firearm specifications.

{¶ 3} Prior to the start of the bench trial, J.O. stipulated to the hospital record and that she was 15 years old at the time of the offense. (Tr. 8.) Next, the defense stipulated to the authenticity of the news clip from Action 19 news. (Tr. 8.) Finally, the state requested a separation of witnesses that was granted by the trial court. (Tr. 9.) The court stated to the testifying witnesses:

> You're gonna be asked to testify either today or Thursday, and then you are instructed that you are not to discuss your testimony with anyone else that's in your group. You can't get on the stand, testify, and then go tell them what you said and what was asked. If it is relayed and shown to me that you do in fact violate this order, you will be held in contempt and you will be incarcerated.

(Tr. 36.)

{¶ 4} After the separation-of-witnesses instruction, the victim, C.H., was the first to testify. However, the trial court did not swear in C.H., and J.O.'s trial counsel failed to object. (Tr. 40.) After the remaining witnesses testified, the state

rested, and the defense rested its case without calling any witnesses. In the state's closing argument, the state conceded that the three-year firearm specification was improperly applied to the tampering with evidence count, and the trial court agreed. In the defense's closing argument, trial counsel requested that the trial court consider lesser included offenses and argued that the shooting was an accident.

{¶ 5} The matter proceeded to disposition on June 30, 2022, and the trial court imposed a disposition of one year on Count 1 and one year on the three-year firearm specification, to be run prior and consecutive to the one year on the underlying offense for a total of a two-year sentence with respect to Count 1. The trial court found that the gun specification in Count 2 merged with the gun specification in Count 1 and that the time from Counts 2 and 3 be served concurrently to Count 1 for a total of two years at the Ohio Department of Youth Services with credit for time served.

II. Facts

{¶ 6} At the bench trial, the court heard testimony from six witnesses. The following pertinent testimony was proffered.

{¶ 7} On March 19, 2022, J.O., C.H., two additional teenagers, and one baby were gathered in a bedroom when C.H. was shot in the face. Officer Sean Kiernan ("Officer Kiernan") was one of the officers called to scene. Officer Kiernan testified that upon arrival, he initially thought that J.O. was still at the house but was informed that she had fled the home. Upon locating the victim, Officer Kiernan

testified that he tried applying first aid because C.H. was covered in blood and barely conscious. Officer Kiernan stated that there was a considerable amount of blood around C.H. as well. C.H. was taken outside to the ambulance, and Officer Kiernan began searching the scene looking for evidence and witnesses. Officer Kiernan observed a live round, a round that could be fired and contained the bullet, casing, gun powder, and primer still intact inside one of the doors in a bedroom. Officer Kiernan and the other officers that searched the bedroom never found the spent shell casing from the fired gun.

{¶ 8} Officer Kiernan testified that once C.H. was in the ambulance, J.O. returned to the home, admitted being the shooter and was taken into custody to be questioned. J.O. did not have the firearm with her. However, J.O. did eventually tell the officers where the gun was located after sending them to several other addresses.

{¶ 9} C.H., the victim, testified that she and J.O. met on Instagram and then started dating. C.H. stated that the relationship ended because J.O. shot her. C.H. also stated that on the previous day, C.H. was on the phone, "Facetiming"[1] with one of her friends. J.O., who was at C.H.'s house at the time, took the phone and stated that she was going to kill C.H. and C.H.'s friend.

---

[1] FaceTime Video is a video calling feature on Apple devices. The feature allows users to see and hear the person on the other end of the phone call.

{¶ 10} The day of the shooting, C.H. testified she was lying on her side, on the bed, speaking with one of the minors in the bedroom. C.H. stated that she heard a boom. C.H. realized that J.O. had shot her in the face with the gun that C.H. had observed J.O. with the day before. C.H. stated that the bullet from the gun entered her face under her right eye and came out behind her right ear. After the shooting, C.H. observed J.O. running out of the room with the gun. On cross-examination, C.H. testified that J.O. was playing with the gun and that she told her mother that the shooting was an accident. C.H. also testified that her mother told Action 19 news that the shooting was an accident.

{¶ 11} Next, K.W.B., one of the teenagers in the bedroom at the time of the shooting, testified that J.O. shot C.H. in the face. K.W.B. testified that she observed J.O. with the gun at the basketball court the previous day. On the day of the shooting, K.W.B. testified that after J.O. shot C.H. in the face, she took the spent shell casing and put it in her pocket.

{¶ 12} Det. Salvatore Santillo ("Det. Santillo"), the detective assigned to the case and to question J.O., testified that his investigation did not reveal that anyone other than J.O. was in possession of the gun. He testified that upon searching the room where the shooting took place, he did not find the spent shell casing from the bullet that struck C.H. in the face. Det. Santillo also testified that when asked where the gun was located, J.O. took him and other officers to several addresses. Eventually J.O. took them to the correct address where the gun was located.

Det. Santillo observed that the magazine had been removed from the gun and the chamber had been cleared.

{¶ 13} Det. Santillo continued his testimony by stating that the gun had a finger safety on it, which keeps the gun from being accidentally discharged. The gun required five to six pounds of pressure to pull the trigger. Det. Santillo testified that the firearm would not have gone off unless there was a deliberate squeeze of the trigger.

{¶ 14} At the end of the trial, the trial court adjudicated J.O. delinquent. On June 8, 2022, J.O.'s trial counsel filed a written request for a "Finding of Fact and Conclusion" pursuant to Juv.R. 29(F)(3) and Civ.R. 52. At the disposition hearing, the trial court stated that it disagreed with trial counsel that the judge has to make findings of fact and conclusions of law and denied the request. The trial court proceeded with disposition of J.O. to two years at the Ohio Department of Youth Services with credit for time served.

{¶ 15} J.O. filed this timely appeal and assigned eight errors for our review:

1. Appellant's adjudication must be reversed as the state of Ohio failed to present sufficient evidence to support the conviction;

2. Appellant's adjudications are against the manifest weight of the evidence;

3. The testimony of the victim and material witness, C.H., was given without swearing the witness in and absent any oath in violation of appellant's Sixth Amendment right to confrontation;

4. Appellant's trial counsel was ineffective in failing to object to C.H. testifying without being sworn in;

5. The trial court erred by entering convictions and sentence on both felonious assault counts, which were required to be merged;

6. The trial court erred when it refused to issue a written findings of fact and conclusion of law after a timely request by appellant;

7. The trial court erred when it did not consider the lesser included offenses to felonious assault; and

8. The trial court erred when it imposed a sentence in its journal entry that differed from that orally pronounced in court.

III. Sufficiency of the Evidence

A. Standard of Review

{¶ 16} "The standard of review employed by this court in determining whether a juvenile's adjudication as a delinquent child was supported by sufficient evidence is the same as the standard used in adult criminal cases." *State v. A.N.C.*, 12th Dist. Warren No. CA-2017-02-012, 2018-Ohio-362, ¶ 8, citing *In re B.T.B.*, 12th Dist. Butler No. CA-2014-10-199, 2015-Ohio-2729, ¶ 16.

{¶ 17} "'An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt.'" *State v. Bradley*, 8th Dist. Cuyahoga No. 108983, 2020-Ohio-3460, ¶ 6, quoting *State v. Driggins*, 8th

Dist. Cuyahoga No. 98073, 2012-Ohio-5287, ¶ 101, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997).

{¶ 18} "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id.* at ¶ 7, citing *State v. Vickers*, 8th Dist. Cuyahoga No. 97365, 2013-Ohio-1337, citing *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991).

B. Law and Analysis

{¶ 19} In J.O.'s first assignment of error, J.O. contends that the mens rea element of knowingly with regard to the felonious assault charges was not supported by sufficient evidence. J.O. was adjudicated delinquent on two charges of felonious assault, in violation of R.C. 2903.11(A)(1) and (2), which state:

> (A) No person shall knowingly do either of the following:
>
> (1) Cause serious physical harm to another or to another's unborn;
>
> (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

{¶ 20} J.O. argues that she did not knowingly cause physical harm to C.H. and that the shooting was accidental. Knowingly is defined as:

> A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is

> an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.

R.C. 2901.22(B).

{¶ 21} The evidence presented at trial demonstrates that J.O.'s arguments are misplaced. The record reveals that the day before the shooting, J.O. stated that she was going to kill C.H. K.W.B. stated that J.O. shot C.H. in the face and then removed the shell casing from the room before leaving the scene. Det. Santillo testified that the gun had a finger safety on it, which keeps the gun from being accidentally discharged. The gun required five to six pounds of pressure to pull the trigger. Det. Santillo testified that the firearm would not have gone off unless there was a deliberate squeeze of the trigger. Also, when asked if he thought the shooting was an accident, Det. Santillo replied: "No. * * * Based in my experience, a bullet doesn't bend or do anything like that. Where the firearm is pointed, that's where the bullet goes." (Tr. 136.)

{¶ 22} "'The shooting of a gun in a place where there is a risk of injury to one or more person supports the inference that appellant acted knowingly.'" *State v. Grant*, 8th Dist. Cuyahoga Nos. 90465 and 90466, 2008-Ohio-3970, ¶ 18, quoting *State v. Gregory*, 90 Ohio App.3d 124, 131, 628 N.E.2d 86 (12th Dist.1993). J.O. shot the gun in a small room with five people. We find that the state presented

evidence that, if believed, demonstrated that J.O. acted knowingly in the shooting of C.H.

{¶ 23} Second, J.O. argues that the state did not present sufficient evidence to prove that she tampered with evidence. J.O. was adjudicated delinquent for tampering with evidence, in violation of R.C. 2921.12(A)(1), which states:

> (A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:
>
> > (1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation.

{¶ 24} J.O. argues that leaving the scene with the gun and hiding it at another location was because she was a minor, had no prior experience with the law, and was scared. She also argues that she promptly admitted that she shot C.H. and took officers to the location of the gun. However, we determine that J.O.'s arguments fail. J.O.'s actions on the day of the shooting demonstrates that she knowingly tampered with evidence. First, after the shooting, J.O. picked up the shell casing and put it in her pocket. J.O. then left the scene of the shooting, taking the gun and shell casing with her, and stashed it at another house. When she finally took the police to the correct location, the magazine had been removed from the gun and the chamber had been cleared.

{¶ 25} In order to prove that J.O. tampered with evidence, the state had to prove that J.O. "(1) had knowledge that an official proceeding or investigation was

in progress or likely to be instituted; and (2) altered, destroyed, concealed, or removed the potential evidence; (3) for the purpose of impairing the potential evidence's availability or value in such proceeding or investigation." *State v. Shaw*, 2018-Ohio-403, 105 N.E.3d 569, ¶ 16 (8th Dist.), citing *State v. Straley*, 139 Ohio St.3d 339, 2014-Ohio-2139, 11 N.E.3d 1175, ¶ 11.

{¶ 26} We determine that J.O. had knowledge that an investigation into the shooting of C.H. would likely be instituted and that she concealed or removed potential evidence when she removed the shell casing and the gun from the scene. Next, J.O. hid the gun and mislead officers several times regarding the location of the gun. As stated above, the magazine had been removed. We find that the evidence was sufficient to demonstrate that J.O. tampered with the evidence.

{¶ 27} Therefore, J.O.'s first assignment of error is overruled.

IV. Manifest Weight of the Evidence

A. Standard of Review

{¶ 28} "[T]he standard of review employed by this court in determining whether a juvenile's adjudication as a delinquent child was against the manifest weight of the evidence is the same standard used in adult criminal cases." *A.N.C.*, 12th Dist. Warren No. CA-2017-02-012, 2018-Ohio-362, at ¶ 9, citing *In re D.T.W.*, 12th Dist. Butler No. CA-2014-09-198, 2015-Ohio-2317, ¶ 32.

{¶ 29} "The manifest-weight-of-the-evidence standard concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support

one side of the issue rather than the other.'" *State v. Walker*, 8th Dist. Cuyahoga No. 111656, 2023-Ohio-810, ¶ 17, citing *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 12, quoting *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541.

> A reviewing court "'weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [factfinder] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.'"

Id., quoting *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). "'In weighing the evidence, the court of appeals must always be mindful of the presumption in favor of the trier of fact.'" *Id.*, quoting *Eastley* at ¶ 21.

B. Law and Analysis

{¶ 30} In J.O.'s second assignment of error, she argues that her adjudication is unsupported by the manifest weight of the evidence. Specifically, J.O. contends that it cannot be found that she believed her conduct would cause C.H. to suffer physical harm or serious physical harm. J.O.'s contention fails.

> "Serious physical harm" is defined in R.C. 2901.01(A)(5). It means any of the following:
>
> (a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;
>
> (b) Any physical harm that carries a substantial risk of death;

> (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;
>
> (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;
>
> (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

State v. Montgomery, 8th Dist. Cuyahoga No. 102043, 2015-Ohio-2158, ¶ 10. The evidence demonstrates that J.O. knew that her conduct would cause serious physical harm to C.H. First, J.O. threatened to kill C.H. the day before the shooting. Second, the gun was not accidently discharged. Third, C.H. was shot in the face and the physical harm from the gunshot would carry a substantial risk of death. Finally, J.O. discharged the weapon inside a small room with five people, including an infant.

{¶ 31} J.O. also argues that the facts do not support a conviction for tampering with evidence. However, J.O. does not demonstrate that her conviction was against the manifest weight of the evidence. The evidence demonstrates that J.O. removed evidence from the scene and continuously misled the police about the location of the gun.

{¶ 32} "When reviewing a claim that a verdict is against the manifest weight of the evidence, we do not view the evidence in a light most favorable to the state." *State v. Ford*, 6th Dist. Lucas Nos. L-20-1054 and L-20-1112, 2021-Ohio-3058, ¶ 50.

"'Instead, we sit as a "thirteenth juror" and scrutinize "the factfinder's resolution of the conflicting testimony.'"" *Id.*, quoting *State v. Robinson*, 6th Dist. Lucas No. L-10-1369, 2012-Ohio-6068, ¶ 15, quoting *Thompkins* at 387. "Reversal on manifest weight grounds is reserved for "'the exceptional case in which the evidence weighs heavily against the conviction.'"" *Id.*, quoting *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541, at 387, quoting *Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶ 33} "In reviewing a manifest weight challenge, an appellate court 'must be mindful that the original trier of fact was in the best position to judge the credibility of the witnesses and the weight to be given the evidence.'" *State v. Sizemore*, 12th Dist. Warren No. CA2019-01-006, 2019-Ohio-4400, ¶ 21, quoting *State v. Hilton*, 12th Dist. Butler No. CA2015-03-064, 2015-Ohio-5198, ¶ 18. Accordingly, this is not the exceptional case where J.O.'s conviction for felonious assault and tampering with evidence must be reversed as being against the manifest weight of the evidence. *See State v. Bolden*, 8th Dist. Cuyahoga No. 104227, 2016-Ohio-8488, ¶ 21.

{¶ 34} Therefore, J.O.'s second assignment of error is overruled.

V. Unsworn Testimony

{¶ 35} In J.O.'s third assignment of error, she argues that because the trial court did not swear in C.H., her testimony is a violation of J.O.'s Sixth Amendment right to confrontation.

> A defendant's right of confrontation consists of four "elements": [1] the witness's "physical presence" in court; (2) the witness's testimony under oath, which impresses upon the witness "the seriousness of the matter and guard[s] against the lie by the possibility of a penalty for perjury;" (3) the witness being subjected to cross-examination, "the greatest legal engine ever invented for the discovery of the truth[";] and (4) providing the factfinder with the ability "to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing [the witness's] credibility." (Citations omitted.)

State v. Durst, 6th Dist. Huron No. H-18-019, 2020-Ohio-607, ¶ 62.

{¶ 36} The trial court failed to swear in C.H.; however, J.O.'s trial counsel did not object to this at trial. "'Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.'" *In re E.C.*, 3d Dist. Defiance No. 4-15-08, 2015-Ohio-4807, ¶ 6, quoting Evid.R. 603. "Similarly, the legislature has mandated that '[b]efore testifying, a witness shall be sworn to testify the truth, the whole truth, and nothing but the truth.'" *Id.,* quoting R.C. 2317.30. "The oath or affirmation is a prerequisite to the testimony of a witness and a trial court errs by relying on unsworn testimony in reaching its decision." *Id.*, citing *Allstate Ins. Co. v. Rule*, 64 Ohio St.2d 67, 69, 413 N.E.2d 796 (1980) (holding that relying upon unsworn testimony violates the Ohio Constitution and is error), and *Wasaleski v. Jasinski*, 9th Dist. Lorain No. 14CA010660, 2015-Ohio-2307, ¶ 5. "However, if a party fails to timely object to the missing oath, all but plain error is waived." *Id.*, citing *Stores Realty Co. v. Cleveland, Bd. of Bldg. Stds. & Bldg. Appeals*, 41 Ohio St.2d 41, 43, 322 N.E.2d 629 (1975).

{¶ 37} Because J.O.'s trial counsel did not raise this issue at trial, we will review for plain error. "Under Crim.R. 52(B), '[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.'" *E. Cleveland v. Harris*, 8th Dist. Cuyahoga No. 109404, 2021-Ohio-952, ¶ 20. "The plain-error rule is to be invoked only under exceptional circumstances to avoid a manifest miscarriage of justice." *Id.*, citing *State v. Long*, 53 Ohio St.2d 91, 97, 372 N.E.2d 804 (1987). "Plain error does not occur unless, but for the error, the outcome of the trial clearly would have been different." *Id.*, citing *id.*

{¶ 38} There is no question that the failure to administer the required oath prior to allowing the witness to testify is an error. However, no objection was made at the time of the trial. Thus, this court must review the alleged error using a plain error standard. This means that absent a showing that the error likely affected the outcome of the case, the error is not reversible. *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 22.

{¶ 39} J.O. does not indicate how the trial court's error affected the outcome of the case. The victim was questioned and subject to cross-examination. There is no indication that the testimony would have been different if the oath had been given. Even if C.H.'s testimony was eliminated, other witnesses testified as to the events that occurred at the time of the shooting, and their testimony was not in conflict with C.H.'s testimony.

{¶ 40} Therefore, J.O.'s third assignment of error is overruled.

VI. Ineffective Assistance of Counsel

{¶ 41} In J.O.'s fourth assignment of error, she argues that her trial counsel's performance was ineffective in failing to object to C.H. testifying without being sworn in. "A claim of ineffective assistance of counsel is judged using the standard announced in *Strickland* [*v. Washington*,] 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)." *State v. Sims*, 8th Dist. Cuyahoga No. 109335, 2021-Ohio-4009, ¶ 21, citing *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). "'Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance.'" *Id.*, quoting *id.* at paragraph two of the syllabus.

{¶ 42} "In *State v. Bradley*, the Ohio Supreme Court truncated this standard, holding that reviewing courts need not examine counsel's performance if a defendant fails to prove the second prong of prejudicial effect." *State v. Crosby*, 186 Ohio App.3d 453, 2010-Ohio-1584, 928 N.E.2d 795, ¶ 39 (8th Dist.), citing *Bradley*. At the time of C.H.'s testimony, the trial court was in the process of instructing all of the witnesses of their responsibility to not communicate about their testimony. (Tr. 36.) Then the state called C.H. as a witness, and the trial court failed to administer the swearing in oath. J.O.'s counsel did not object. However, J.O. has not demonstrated how counsel's failure prejudiced her.

{¶ 43} Therefore, J.O.'s fourth assignment of error is overruled.

VII. Failure to Merge Convictions and Sentence

A. Standard of Review

{¶ 44} "Generally, a de novo standard of review is applied when reviewing an alleged error regarding a merger determination." *State v. Terrel*, 2d Dist. Miami No. 2014-CA-24, 2015-Ohio-4201, ¶ 10, citing *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245.

{¶ 45} However, J.O.'s trial counsel's decision not to argue for merger resulted in a failure to preserve this issue for appellate review, although we may still review it for plain error. "Under Crim.R. 52(B), '[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.' An error rises to the level of plain error only if, but for the error, the outcome of the proceedings would have been different." *State v. Tate*, 8th Dist. Cuyahoga No. 97804, 2014-Ohio-5269, ¶ 35, citing *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547, 912 N.E.2d 1106, ¶ 61; *Long*, 53 Ohio St.2d at 97, 372 N.E.2d 804. "The Ohio Supreme Court has held that the imposition of multiple sentences for allied offenses of similar import is plain error." *Id.*, citing *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 31, citing *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶ 96-102.

B. Law and Analysis

{¶ 46} In J.O.'s fifth assignment of error, she argues that the trial court erred by entering convictions and disposition on both counts of felonious assault, which

were required to be merged. J.O. was adjudicated delinquent on both counts. The state concedes that the disposition for both counts should merge, but does not concede that the delinquent adjudications for both counts should merge. R.C. 2941.25; *see State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, 911 N.E.2d 882, ¶ 7-10 ("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."). *Id.* at ¶ 8.

{¶ 47} J.O.'s trial counsel did not preserve this issue for appeal. So we will review it for plain error.

> "We have found plain error when three elements are met: 1) there must be an error or deviation from a legal rule, 2) that error must be plain, defined as 'an obvious defect in the trial proceedings,' and 3) the error must have affected a 'substantial right,' meaning the error must have affected the ultimate outcome, and a correction is needed to 'prevent a manifest miscarriage of justice.'"

Terrel, 2d Dist. Miami No. 2014-CA-24, 2015-Ohio-4201, at ¶ 10, quoting *State v. LeGrant*, 2d Dist. Miami No. 2013-CA-44, 2014-Ohio-5803, ¶ 9.

{¶ 48} We have found plain error and determine that both the convictions and disposition should merge.

> This court has interpreted R.C. 2941.25 to involve a two-step analysis. "In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's

> *conduct* is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses."

(Emphasis sic.) *Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, 911 N.E.2d 882, at ¶10, quoting *State v. Blankenship*, 38 Ohio St.3d 116, 117, 526 N.E.2d 816 (1988).

{¶ 49} "[I]n determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts 'must evaluate three separate factors — the conduct, the animus, and the import.'" *State v. Black*, 2016-Ohio-383, 58 N.E.3d 561, ¶ 12 (8th Dist.), quoting *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, paragraph one of the syllabus.

> A trial court and the reviewing court on appeal when considering whether there are allied offenses that merge into a single conviction under R.C. 2941.25(A) must first take into account the conduct of the defendant. In other words, how were the offenses committed? If any of the following is true, the offenses cannot merge and the defendant may be convicted and sentenced for multiple offenses: (1) the offenses are dissimilar in import or significance — in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, and (3) the offenses were committed with separate animus or motivation.
>
> At its heart, the allied-offense analysis is dependent upon the facts of a case because R.C. 2941.25 focuses on the defendant's conduct. The evidence at trial or during a plea or sentencing hearing will reveal whether the offenses have similar import. When a defendant's conduct victimizes more than one person, the harm for each person is separate and distinct, and therefore, the defendant can be convicted of multiple counts. Also, a defendant's conduct that constitutes two or more offenses against a single victim can support multiple convictions if the harm that results from each offense is separate and identifiable from the harm of the other offense.

Id. at ¶ 12, quoting *id*. at ¶ 25-26.

{¶ 50} In reviewing J.O.'s conduct, animus, and import, we determine that her conduct did not cause a separate and identifiable harm. She shot a gun in C.H.'s face and caused serious physical harm. J.O.'s conduct did not victimize more than one person nor was it committed separately with a separate animus or motivations. R.C. 2903.11 states:

> (A) No person shall knowingly do either of the following:
>
> (1) Cause serious physical harm to another or to another's unborn;
>
> (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

The only difference between subsections (1) and (2) is that a deadly weapon was used; however, the same harm was caused by the same act. Thus, both counts should merge for the purpose of adjudication of delinquency and disposition.

{¶ 51} We remand to the trial court to vacate J.O.'s adjudication of delinquency on one of the felonious assault counts. Also, "the imposition of separate sentences on those offenses was contrary to law, and the sentences are void." *State v. Reyes*, 8th Dist. Cuyahoga No. 108947, 2019-Ohio-4795, ¶ 8. Although the court ordered the disposition to be served concurrently, "'the imposition of concurrent sentences is not the equivalent of merging allied offenses of similar import.'" *Id*., quoting *State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, ¶ 34. "A resentencing hearing limited to correcting a void sentence is

the proper remedy for a trial court's failure to comply with mandatory sentencing laws." *Id.*, citing *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 29. "On remand, the state has the right to elect which offense to pursue at resentencing." *Id.*, citing *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶ 21.

{¶ 52} Therefore, J.O. fifth assignment of error is sustained.

VIII. Findings of Fact and Conclusions of Law

{¶ 53} In J.O.'s sixth assignment of error, she argues that the trial court erred when it denied her request to issue written findings of fact and conclusions of law. On June 8, 2022, J.O. filed a written request for findings of fact and conclusion of law pursuant to Juv.R. 29(F) and Civ.R. 52. At the time of disposition, trial counsel reminded the trial court of the request, stating: "Your Honor, I filed a request for findings of fact and conclusions of law. It is our intention to appeal this decision, so I would ask the Court, those were timely and the Court shall provide or make written findings of facts and conclusions of law." (Tr. 11.) The trial court disagreed that the judge has to make findings of fact and conclusions of law and denied the request and stated that only magistrates are required to make the findings. (Tr. 12.)

{¶ 54} "According to Juv.R. 29(F), upon determination of the issues, if the allegations of the complaint are admitted or proved, the court shall: '(3) Upon request make written findings of fact and conclusions of law pursuant to Civ.R. 52.'"

In re Raypole, 12th Dist. Fayette Nos. CA2002-01-001 and CA2002-01-002, 2003-Ohio-1066, ¶ 34. Juv.R. 29(F) does not stipulate that only magistrates have to make the written findings. Instead, it states, "the court shall."

{¶ 55} Civ.R. 52 states:

> When questions of fact are tried by the court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise before the entry of judgment pursuant to Civ. R. 58, or not later than seven days after the party filing the request has been given notice of the court's announcement of its decision, whichever is later, in which case, the court shall state in writing the findings of fact found separately from the conclusions of law.
>
> When a request for findings of fact and conclusions of law is made, the court, in its discretion, may require any or all of the parties to submit proposed findings of fact and conclusions of law; however, only those findings of fact and conclusions of law made by the court shall form part of the record.
>
> Findings of fact and conclusions of law required by this rule and by Civ.R. 41(B)(2) and Civ.R. 23(G)(3) are unnecessary upon all other motions including those pursuant to Civ.R. 12, Civ.R. 55 and Civ.R. 56.
>
> An opinion or memorandum of decision filed in the action prior to judgment entry and containing findings of fact and conclusions of law stated separately shall be sufficient to satisfy the requirements of this rule and Civ.R. 41(B)(2).

{¶ 56} The state argues that the findings of fact and conclusions of law are unnecessary in this case because the record is complete in detailing the trial court's decision. In support of the state's assertion, it cites *Werden v. Crawford*, 70 Ohio St.2d 122, 435 N.E.2d 424 (1982), which states: "The purpose of the rule is therefore

clear: to aid the appellate court in reviewing the record and determining the validity of the basis of the trial court's judgment."

{¶ 57} "We acknowledge that, consistent with appellee's argument, a court need not issue findings of fact when its decision is based solely on conclusions of law. However, the provisions of Civ.R. 52 are mandatory when questions of fact are determined by the court without a jury." *Brandon/Wiant Co. v. Teamor*, 135 Ohio App.3d 417, 422, 734 N.E.2d 425 (8th Dist.1999), citing *Werden* at 124; *State ex rel. Papp v. James*, 69 Ohio St.3d 373, 377, 632 N.E.2d 889 (1994). "Thus, when pursuant to Civ.R. 52, a party requests the court to reduce its findings of fact and conclusions of law to writing in an action tried without a jury, the court has a mandatory duty to do so." *Id.*, citing *In re Adoption of Gibson*, 23 Ohio St.3d 170, 492 N.E.2d 146 (1986). "The purpose of the rule is to aid the appellate court in reviewing the record and determining the validity of the basis of the trial court's judgment." *Id.*, citing *id.*

{¶ 58} However, the state is correct in its assertion that the record is complete in aiding the appellate court to determine the validity of the basis of the trial court's judgment. "We concede that a trial court may substantially comply with Civ.R. 52 where its judgment adequately explained the basis for the decision." *Id.*, citing *Strah v. Lake Cty. Humane Soc.*, 90 Ohio App. 3d 822, 631 N.E.2d 165 (11th Dist.1993).

> The purpose of separately stated findings of fact and conclusions of law is to enable the reviewing court to determine existence of assigned error; if the trial court's ruling or opinion, together with other parts of the trial court's record, provides adequate basis upon which the appellate court can decide legal issues presented, there is substantial compliance with the procedural rule requiring the court to make separate findings of fact and conclusions of law.

Id., citing *Abney v. W. Res. Mut. Cas. Co.*, 76 Ohio App. 3d 424, 602 N.E.2d 348 (12th Dist.1991).

{¶ 59} "The test for determining whether a trial court's opinion satisfies the requirements of Civ.R. 52 is whether the contents of the opinion, when considered together with other parts of the record, forms an adequate basis upon which to decide the narrow legal issues presented." *Id.*, citing *Werden,* 70 Ohio St.2d at 124, 435 N.E.2d 424.

{¶ 60} The record adequately reflects the basis for the trial court's decision. Written findings of fact and conclusions of law are unnecessary for this court to decide the legal issues presented. The trial stated:

> If this case, [J.O.], was a situation where you found a gun, picked it up and it went off or you found a gun, picked it up, dropped it and it went off, then my decision would be different, but those aren't the facts we have here.
>
> You sit here as a 15-year-old and you have more knowledge of weapons and guns than I do, clearly. I've never held one, never shot one.
>
> You had the gun the day before. There's evidence that you may have had it on an Instagram or on a video. I mean, it's frightening to me. Based on the testimony and evidence presented, the Court is going to find that the State has met its burden of beyond a reasonable doubt

> and the statutory definition of knowingly, and I'm gonna put in on the record, the law states that to act knowingly means to be aware that engaging in certain conduct may cause a specific result.
>
> Therefore, I'm gonna adjudicate you delinquent of Felonious Assault in Count One and Count Two with the accompanying specifications, and Tampering with Evidence with the one-year specification.

(Tr. 175-176.)

{¶ 61} Therefore, J.O.'s sixth assignment of error is overruled.

IX. Lesser Included Offenses of Felonious Assault

{¶ 62} In J.O.'s seventh assignment of error, she argues that the trial court erred when it did not consider the lesser included offenses to felonious assault. "In a bench trial, it is presumed that 'the court considered inferior and lesser-included offenses.'" *State v. Travis*, 8th Dist. Cuyahoga No. 110514, 2022-Ohio-1233, ¶ 21, quoting *State v. Churn*, 8th Dist. Cuyahoga No. 105782, 2018-Ohio-1089, ¶ 13. *See, e.g.*, *State v. Masci*, 8th Dist. Cuyahoga No. 96851, 2012-Ohio-359, ¶ 25; *State v. Perez*, 8th Dist. Cuyahoga No. 91227, 2009-Ohio-959; and *State v. Waters*, 8th Dist. Cuyahoga No. 87431, 2006-Ohio-4895, ¶ 11.

{¶ 63} "[R]eckless assault, in violation of R.C. 2903.13(B), is a lesser included offense of felonious assault, in violation of R.C. 2903.11(A)(1)." *State v. Tolle*, 12th Dist. Clermont No. CA2014-06-042, 2015-Ohio-1414, ¶ 10, citing *State v. Gatliff*, 12th Dist. Clermont No. CA2012-06-045, 2013-Ohio-2862, ¶ 51. R.C. 2903.13(B) states, "No person shall recklessly cause serious physical harm to another or to another's unborn." "The distinction between felonious assault and

reckless assault is the mental state." *Tolle* at ¶ 15. "A person acts knowingly when, 'regardless of purpose, the person is aware that [his] conduct will probably cause a certain result or will probably be of a certain nature.'" *Id.*, quoting R.C. 2901.22(B). "By contrast, '[a] person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that [his] conduct is likely to cause a certain result or is likely to be of a certain nature.'" *Id.*, quoting R.C. 2901.22(C).

{¶ 64} "'[A]n instruction on a lesser included offense is warranted if the jury could reasonably conclude that the evidence supported the lesser charge and did not support the greater charge.'" *Travis* at ¶ 22, quoting *State v. Berry*, 8th Dist. Cuyahoga No. 83756, 2004-Ohio-5485, ¶ 48. The trial court here found that the evidence supported the charge of felonious assault. This finding, in light of the presumption that the trial court considered lesser included offenses, supports a conclusion that the trial court did not err in failing to consider the lesser included offense of reckless assault.

{¶ 65} In assignment of error No. 1, we determined that there was sufficient evidence to prove the element of knowingly. The record reflects that the day before the shooting, J.O. threatened to kill C.H. All minors were in a small room when the gun was discharged. Evidence was presented that the gun was not accidently discharged given the pounds of pressure needed to fire the gun. As previously stated, "'[t]he shooting of a gun in a place where there is a risk of injury to one or

more person supports the inference that appellant acted knowingly.'" *State v. Grant*, 8th Dist. Cuyahoga Nos. 90465 and 90466, 2008-Ohio-3970, ¶ 18, quoting *State v. Gregory*, 90 Ohio App.3d 124, 131, 628 N.E.2d 86 (12th Dist.1993). Therefore, the trial court did not err.

{¶ 66} Therefore, J.O.'s seventh assignment of error is overruled.

X. Journal Entry

{¶ 67} In J.O.'s eighth assignment of error, she argues that the trial court erred when it imposed a sentence in its journal entry that differed from what was stated in court on Counts 1 and 2.

{¶ 68} In the fifth assignment of error, we ordered the trial court to hold a new disposition hearing for J.O. on one count of felonious assault. Upon a new hearing, the trial court will issue a new journal entry. Therefore, this assignment of error is moot pursuant to App.R. 12(A)(1)(c).

{¶ 69} Judgment affirmed in part, vacated in part, and remanded for a new disposition hearing on J.O.'s adjudication for felonious assault.

It is ordered that appellee and appellant share 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 common pleas court, juvenile division, 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.

_____
ANITA LASTER MAYS, ADMINISTRATIVE JUDGE

LISA B. FORBES, J., and
EMANUELLA D. GROVES, J., CONCUR