No. CA-19-108687

OHIO EIGHTH DISTRICT COURT OF APPEALS

STATE OF OHIO,

Plaintiff-Appellee,

v.

SHARON COLLIER,

Defendant-Appellant.

On Appeal from the Cuyahoga County Court of Common Pleas, Case No. CR-18-626420-A

BRIEF OF APPELLANT SHARON COLLIER

ORAL ARGUMENT REQUESTED

Paul N. Flannery (Bar No. 91480)
Edward Fadel (Bar No. 85351)
Flannery | Georgalis, LLC
1375 E. 9th St., 30th Floor
Cleveland, OH 44114
Telephone: (216) 367-2095
Email: paul@flannerygeorgalis.com
efadel@flannerygeorgalis.com

Attorneys for Appellant Sharon Collier

Of Counsel:

Emmett E. Robinson (Bar No. 88537)
ROBINSON LAW FIRM LLC
6600 Lorain Avenue #602731
Cleveland, Ohio 44102
Telephone: (216) 505-6900
Email: erobinson@robinsonlegal.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

State Statutes

Other Authorities

State Rules

ASSIGNMENTS OF ERROR

(1) The state breached its plea agreement with Mrs. Collier by advocating for a six-year prison term at sentencing despite its agreement to leave sentencing to the discretion of the trial court. Change-of-Plea Tr. at 7:18-21; Sentencing Tr. at 72:12-13.

(2) The trial court wrongly imposed consecutive sentences on Mrs. Collier without making all of the findings mandated by R.C. 2929.14(C)(4). *See* Sentencing Tr. at 73:3-75:25.

(3) Mrs. Collier's convictions for aggravated theft and money laundering were, on these facts, allied offenses that should have merged before sentencing. *See generally*, Change-of-Plea Tr.; Sentencing Tr.

(4) Mrs. Collier's sentences are not supported by the record. *See* Sentencing Tr.

STATEMENT OF THE ISSUES

(1) Whether Mrs. Collier's sentence should be vacated and her case remanded for resentencing before a different trial judge, where the state had agreed to leave sentencing to the "wise discretion of the Court" but then breached that portion of the parties' plea agreement by recommending a six-year prison sentence (the very sentence ultimately imposed by the trial court).

(2) Whether the trial court reversibly erred by imposing consecutive sentences, where the trial court failed to make all of the findings required by R.C. 2929.14(C)(4).

(3) Whether Mrs. Collier's convictions for aggravated theft and money laundering were allied offenses that should have merged, where the offenses were rooted in the same conduct and animus, and shared the same import.

(4) Whether Mrs. Collier's sentences are supported by the record, where the trial court misread Mrs. Collier's presentence investigation report and the record was bereft of evidence showing a likelihood of recidivism.

STATEMENT OF THE CASE

Mrs. Sharon Collier was charged with a number of offenses related her misuse of employer funds. She was indicted on March 27, 2018. She had no prior record. Sentencing Tr. at 40:24-25. On April 1, 2019, she pled guilty to one count of aggravated theft (R.C. 2913.02(A)(3)), two counts of money laundering (R.C. 1315.55(A)(1)), and seven counts of forgery (R.C. 2913.31(A)(1)). Apr. 4, 2019 Journal Entry at 1.

Cuyahoga County Common Pleas Judge Shirley Strickland Saffold held Mrs. Collier's sentencing hearing on June 10, 2019. She sentenced Mrs. Collier to the statutory maximum—36 months—for the aggravated theft and to the statutory maximum—12 months—for the forgery counts. July 8, 2019 Journal Entry at 1. The forgery counts were to run concurrently with the aggravated theft count. *Id.* The trial court likewise sentenced Mrs. Collier to 36 months on the money laundering counts—again, the statutory maximum. *Id.* Further, the court ordered that the 36-month money-laundering sentence be served *consecutively* to the aggravated theft sentence, for an aggregate sentence of 72 months—six years. *Id.* The parties agreed to $210,000 in restitution. *Id.*; Sentencing Tr. at 29:2-3.

Mrs. Collier timely filed her notice of appeal and praecipe on June 18, 2019. Notice of Appeal at 1; Praecipe at 1.

STATEMENT OF FACTS

Mrs. Collier worked part-time as office manager for Taylored Construction, a building and remodeling company. *See, e.g.*, Sentencing Tr. at 50:17. While working for

the company, she began to withdraw significant amounts of money from company accounts, using the funds to help her sister, who was in financial straits, and to finance her own gambling addiction. *Id.* at 30:1-12. Jeff Taylor, the company's owner, discovered the theft and alerted authorities. *Id.* at 61:9-15.

Mrs. Collier was indicted and ultimately pled guilty to one count of aggravated theft, two counts of money laundering, and seven counts of forgery. Apr. 4, 2019 Journal Entry at 1. Despite the similarity between the aggravated theft and money laundering counts, Mrs. Collier's counsel below did not argue for, nor did the trial court *sua sponte* grant, a hearing to determine whether, on the facts of the case, aggravated theft and money laundering were allied offenses.

In exchange for her plea, the state agreed to leave "the sentencing of Ms. Collier" "to the wise discretion of the Court at the time of sentencing." Change-of-Plea Tr. at 7:18-21. But despite this on-the-record agreement, at Mrs. Collier's June 10, 2019 sentencing hearing, the state advocated that Judge Saffold sentence Mrs. Collier to a hefty six years of imprisonment. Sentencing Tr. at 72:13 (seeking "six years for this individual to go to prison"). Judge Saffold complied with the request, using a potent combination of statutory-maximum sentences and consecutive sentencing to reach the requested six-year term. *See id.* at 73:3-75:25. The trial court's entire rationale for imposing consecutive sentences was as follows:

> The Court finds that a consecutive sentence is necessary to protect the public from future crimes. The Court finds the consecutive sentences are not disproportionate to the seriousness of the offender's conduct. The Court finds that consecutive sentences are not disproportionate to the danger the offender poses to the public.
>
> In making those findings, the Court has taken into consideration the operative facts of this case, the way these crimes were calculated and done, the way that the mitigation of the Defendant—of the Defendant and

> rendering that—her lack of guilt and her lack of remorse. The Court does note that they—the Defendant failed to adequately apologize to the victims in this case, who were friends.
>
> And, from reading the Probation Report, even though she didn't cooperate with the Probation Department, the Court does note that there were times that they got together as friends and they held each other out as friends and in an employment situation. And it appears to the Court that this is an employment situation that evolved to a friendship situation and that there has been a violation of the trust that the two parties had for each other.
>
> The Court does take into consideration the impact this client had on the plaintiff's [sic] lives. Both Mr. and Ms. Taylor have been greatly impacted by this betrayal, as well as this financial stress that was caused on this family and, therefore, the Court believes that consecutive sentences are necessary.

Id. at 73:18-75:4.

Mrs. Collier timely appealed.

SUMMARY OF ARGUMENT

The trial court and the state committed several fundamental errors that were profoundly prejudicial to Mrs. Collier and merit redress from this Court. First, and perhaps most egregious, the state breached its plea agreement with Mrs. Collier. At Mrs. Collier's change-of-plea hearing, the state placed the terms of the agreement on the record: In exchange for Mrs. Collier's agreement to plead guilty to one count of aggravated theft, two counts of money laundering, and ten counts of forgery, the state agreed to nolle the remaining counts of the indictment against Mrs. Collier and to leave "[t]he sentencing of Ms. Collier . . . to the wise discretion of the Court at the time of sentencing." Change-of-Plea Tr. at 7:18-21. But despite this binding agreement, the state did a U-turn at Mrs. Collier's sentencing hearing, urging the trial court to impose a six-year prison term—advice the court readily heeded. This breach of the plea agreement irreparably tainted the proceedings below, violating the precedents of Ohio state courts, the Sixth Circuit, and the United States Supreme Court. It amounted to plain error that should be remedied by

vacation and remand for resentencing (this time, the state must abide by its agreement to refrain from recommending a sentence) before a different trial-court judge.

Second, Ohio law presumes concurrent sentencing. But the legislature permits consecutive sentences in rare instances, namely, when a trial court makes the findings required by R.C. 2929.14(C)(4) on the record and also places them in its sentencing journal entry. Here, the trial court failed to make all of these required findings. For this reason, this Court should convert Mrs. Collier's consecutive sentences to concurrent or, alternatively, vacate the sentences and remand for reconsideration by the trial court.

Third, Ohio law requires courts to "merge" allied offenses. That is, where a defendant pleads or is found guilty of multiple allied offenses, the defendant may only be convicted and sentenced as to one of them. The Ohio Supreme Court has made clear that, in determining whether the specific offenses at issue in a given case are allied, trial courts must look to the conduct, animus, and import at issue with respect to each offense. Applying that test here, Mrs. Collier's aggravated-theft offense and her two money-laundering offenses were allied and should have merged. The offenses were committed via the same conduct, and with the same animus and import. Because the offenses were allied and should have merged at sentencing, they cannot properly result in consecutive sentences.

Finally, Ohio courts of appeals may vacate, and remand or reduce, a sentence when the trial court's findings in support of the sentence are themselves unsupported by the record. Such is the case here. The consecutive sentences the trial court imposed upon Mrs. Collier cannot survive absent a finding that Mrs. Collier was likely to recidivate, that is, absent a finding that she posed an unusual "danger . . . to the public." The trial court purported to make such a finding here but based it solely on a misreading of Mrs. Collier's

presentence investigation report. Further, the record is devoid of support for any of the other statutory factors indicating a likelihood of recidivism. Accordingly, Mrs. Collier's consecutive sentences are unsupported by the record.

ARGUMENT

I. The State's Violation of the Terms of Its Plea Agreement with Mrs. Collier Constituted Plain Error.

At Mrs. Collier's change-of-plea hearing, the state placed on the record the parties' agreement that, in exchange for Mrs. Collier's plea of guilty to the counts at issue in this appeal, the state, among other things, would not make a sentencing recommendation. But at sentencing the state lobbied vociferously for a six-year sentence—the very sentence the trial-court imposed. This clear breach of the plea agreement was plain error. Mrs. Collier's sentence should be vacated and her case remanded for sentencing before a different trial-court judge.

A. The State Breached Its Plea Agreement with Mrs. Collier.

As is typical in Cuyahoga County, there was no written plea agreement in this case. But there was an oral agreement, placed on the record at Mrs. Collier's change-of-plea hearing. At that hearing, the state announced Mrs. Collier's intent to plead guilty and announced the terms of the plea agreement. First, the prosecutor stated it was his "understanding" that Mrs. Collier would plead guilty to ten specific counts. Change-of-Plea Tr. at 6:1-24. After listing the counts to which Mrs. Collier would plead, he immediately proceeded to place the state's side of the bargain on the record:

> Judge, if that plea [*i.e.*, Mrs. Coller's plea of guilty to the ten enumerated counts] is forthcoming, we request the Court to nolle the remaining counts. Also, Judge, there has been an agreed upon restitution of $210,000 in this case.
>
> * * *

> Judge, there have been no threats or promises made to . . . defendant[] concerning this plea. And there have been no threats or promises made to . . . defendant[] concerning any type of sentence, Your Honor. In fact, *the sentencing of Ms. Collier we're leaving to the wise discretion of the Court at the time of sentencing*.

Change-of-Plea Tr. at 6:25-7:21 (emphasis added). Accordingly, Mrs. Collier agreed to plead guilty to the ten counts. In exchange, the state agreed to request that the trial court nolle the remaining counts of the indictment and agreed that it would not make a sentencing recommendation at Mrs. Collier's sentencing hearing. *Id.* Following brief statements by, among others, Mrs. Collier's counsel, the trial court asked Mrs. Collier directly: "Do you wish to take this plea agreement?" *Id.* at 9:12-13. Mrs. Collier answered, "Yes." *Id.* at 9:15. The court proceeded to accept Mrs. Collier's plea of guilty to the ten agreed counts.

But despite the plain terms of this plea agreement, the state—represented by the same prosecutor who had placed the agreement on the record at the change-of-plea hearing—reneged at the sentencing hearing. At the sentencing hearing, the state argued passionately for a stiff sentence. *See, e.g.*, Sentencing Tr. at 70:22-71:9, 71:20-72:13. And in direct violation of the plea agreement, the state said that probation "would be an injustice to what is going on here," *id.* at 72:1-2, that "[t]his woman deserves to go to prison," *id.* at 72:3, and, most damningly, that "the State of Ohio is asking six years for this individual to go to prison," *id.* at 72:12-13. Judge Saffold complied, sentencing Mrs. Collier to six years' imprisonment. *See id.* at 73:3-75:25.

These facts hew closely to those in a watershed decision of the United States Supreme Court: *Santobello v. New York*, 404 U.S. 257 (1971). In *Santobello*, the defendant was charged with two first-degree gambling felonies. *Id.* at 258. "After negotiations," the state "agreed to permit [the defendant] to plead guilty to a lesser

included offense." *Id.* The prosecutor also "agreed to make no recommendation as to the sentence." *Id.* But at the sentencing hearing the state reversed course and "recommended the maximum one-year sentence." *Id.* at 259. Defendant pointed out that this was contrary to the parties' agreement, but the trial court assured the defense that he was "not at all influenced by" the state's recommendation. *Id.* The court proceeded to sentence the defendant to one year of imprisonment. *Id.* at 260. The New York state appellate court affirmed.

The United States Supreme Court granted certiorari, vacated the sentence, and remanded. *Id.* at 263. The Court held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, *such promise must be fulfilled.*" *Id.* at 262 (emphasis added). The fact that the trial court had "stated that the prosecutor's recommendation did not influence him" did not alter this conclusion. Regarding relief, the Court ordered that, on remand, the trial court was required either to allow the defendant to withdraw his guilty plea (this was the relief the defendant had sought) or to provide for resentencing by a *different trial judge*. *Id.* at 263. This new-judge requirement was not intended to cast aspersions on the original trial-court judge. Rather, a remand for plea withdrawal or sentencing by a different judge was mandated by "the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty." *Id.* at 262. The defendant was entitled to sentencing by a judge who had not been exposed to the state's improper sentencing recommendation. *See id.*

Santobello is, of course, strikingly similar to the facts of Mrs. Collier's case. In both cases, the defendants agreed to plead guilty to reduced (either in quantity or severity)

charges in exchange for dismissal of other charges and an agreement that the government would not make a sentencing recommendation. In both, the government went back on its word and sought a harsh sentence—the statutory maximum in Mr. Santobello's case and a sentence that was reached by a combination of maximum sentences *and* consecutive sentencing in Mrs. Collier's case. Unlike Mr. Santobello, however, Mrs. Collier does not seek to withdraw her guilty plea but, rather, merely requests that her case be remanded for resentencing before a different trial-court judge—one who has not already been tainted by the state's wrongful breach of the plea agreement.

B. The Breach Was Plain Error that Requires Vacating Mrs. Collier's Sentence and Remanding for Resentencing Before a Different Trial-Court Judge.

The only difference of note between Mrs. Collier's case and *Santobello* is that Mrs. Collier's trial-court counsel failed to object on the spot to the state's breach. Accordingly, plain error review applies to her claim. *See* Crim.R. 52(B); *State v. Adams*, 2014-Ohio-724, 8 N.E.3d 984, ¶ 13 (7th Dist.) (applying plain-error review where defense counsel "failed to object to" the state's breach of the plea agreement at sentencing). But even under that relaxed standard of review, the state's breach of the plea agreement still requires that Mrs. Collier's sentence be vacated and her case remanded for sentencing before a different trial judge.

Criminal Rule 52(B) grants to appellate courts the power to correct "[p]lain errors or defects affecting substantial rights" notwithstanding a defendant's failure to raise an on-point objection before the trial court. The defendant bears the burden of showing plain error and, to satisfy the burden, "must show an error, *i.e.*, a deviation from a legal rule that constitutes an obvious defect in the . . . proceedings." *State v. Thomas*, 152 Ohio St.3d 15, 2017-Ohio-8011, 92 N.E.3d 821, ¶ 32 (citation and internal quotation marks

omitted). Further, the error "must have affected substantial rights": "[T]he accused is required to demonstrate a reasonable probability that the error resulted in prejudice." *Id.* at ¶ 33 (citation, internal quotation marks, and emphasis omitted).

This standard is plainly satisfied here. The state's breach of the plea agreement was in direct contradiction of the legal rule announced in *Santobello* and constituted an obvious defect in the proceedings. *See, e.g., State v. Wilson*, 2d Dist. Clark No. 11-CA-04, 2011-Ohio-6184, 2011 Ohio App. LEXIS 5071 (state "concede[d] error" where prosecution recommended sentencing range despite agreement to "remain silent" at sentencing). Further, there can be no question but that Mrs. Collier's substantial rights were affected, *i.e.*, there is certainly a reasonable probability that the state's reneging on the plea deal affected the trial-court's calculus regarding Mrs. Collier's sentence, and the prejudicial taint of the breach is, at any rate, undeniable. *See, e.g., United States v. Swanberg*, 370 F.3d 622, 629 (6th Cir. 2004) ("violations of . . . plea agreements on the part of the government serve not only to violate the constitutional rights of the defendant, but directly involve the honor of the government [and] public confidence in the fair administration of justice" (internal quotation marks omitted)); *United States v. Riggs*, 287 F.3d 221, 225 (1st Cir. 2002) ("In a plea agreement, the defendant is bargaining for the prestige of the government and its *potential* to influence the district court." (internal quotation marks omitted)). Indeed, the trial-court adopted the *very sentence the state recommended*. The sentence was extraordinary for the crimes committed: The court could only comply with the state's six-year request by implementing *maximum, consecutive* sentences.

Indeed, Ohio Courts of Appeals, as well as the United States Court of Appeals for the Sixth Circuit, have repeatedly found plain error in analogous situations. The Seventh

District's decision in *State v. Adams*, 2014-Ohio-724, 8 N.E.3d 984 (7th Dist.), for example, is virtually indistinguishable from this case. There, the defendant pled guilty to felonious assault. As part of the plea deal, the state agreed to "make no recommendation at sentencing." *Id.* at ¶ 1. Despite this commitment, however, at the sentencing hearing the state "ask[ed] the court to impose the maximum sentence of eight years in prison." *Id.* at ¶ 6. "[T]he defense entered no objection to the state's recommendation," and so the state "urge[d]" on appeal that its "breach [of the agreement] did not constitute plain error." *Id.* at ¶ 1. Among other things, the state argued that there was no plain error because "the trial court [was] not bound by [the state's] recommendation of the maximum" sentence. *Id.* at ¶ 16.

The court of appeals saw things differently. "A defendant has a contractual right," the court said, "to enforcement of the prosecutor's obligations under [a] plea agreement after the plea has been accepted by the court." *Id.* at ¶ 17. In concluding that the plain-error standard had been satisfied, the court pointed out that "the difference between [the prosecutor] standing silent and pressing for a maximum sentence of eight years is great," *id.* at ¶ 34 (emphasis deleted), and found that such an affirmative request for harsh punishment is more likely to be "outcome-determinative," than a simple "omission of an agreed upon recommendation," *id.* at ¶ 33 (emphasis deleted). Further, it was likely, the court of appeals reasoned, that the trial-court's unusually harsh sentence could be attributed at least in part to the state's request, given that "the trial court did not have a career criminal before it." *Id.* at ¶ 35. "The state's recommendation is a well-recognized tool in the plea bargaining process," and its "promise to refrain from insisting upon a lengthy sentence is a favorable factor in a decision to enter a plea." *Id.* at ¶ 36. The court

vacated the defendant's sentence and "remanded for a new sentencing hearing before a different trial judge where the state shall abide by its agreement." *Id.* at ¶ 39.

The parallels between *Adams* and Mrs. Collier's case are remarkable. Just as in *Adams*, the state committed that it would *not* weigh in with a recommended sentence in Mrs. Collier's case. Just as in *Adams*, the state weighed in anyway and recommended the statutory maximum. Just as in *Adams*, Mrs. Collier's trial counsel failed to object to the state's breach of the plea agreement. Just as in *Adams*, the trial court here "did not have a career criminal before it." *Id.* at ¶ 35. Mrs. Collier had *no* criminal record. Sentencing Tr. at 40:24-25. Just as in *Adams*, the state's breach consisted of an affirmative recommendation of a harsh sentence after a pledge of silence, rather than silence after a pledge to note an agreed upon sentence. And just as in *Adams*, this Court should reverse Mrs. Collier's sentence because the state's breach of the plea agreement constituted plain error. Indeed, the only material difference between *Adams* and Mrs. Collier's case *bolsters* Mrs. Collier's position. Whereas in *Adams* the trial court imposed a sentence 25% shorter than that requested by the state, in Mrs. Collier's case, the trial-court imposed the exact sentence the state requested, reaching the level of punishment the state sought via the compound severities of maximum and consecutive sentences. The prejudicial effect of the state's breach is thus even easier to spot in Mrs. Collier's case than it was in *Adams*.

And *Adams* is by no means an outlier. Similar to the state's promise here, in *State v. Wilson*, 2d Dist. Clark No. 11-CA-04, 2011-Ohio-6184, 2011 Ohio App. LEXIS 5071, the state had agreed, as part of its plea deal with the defendant, to "remain silent" at sentencing. *Id.* at *2. But the state breached the agreement by requesting, at the sentencing hearing, "consecutive sentences on the high end of the range." *Id.* at *4. Trial

counsel failed to object (or so it appears, there is no mention of any objection in the opinion). On appeal, the state "concede[d] error, admitting that the prosecutor violated the plea agreement by speaking about the sentence at disposition."[1] *Id.* at *6. "Under the circumstances," the court of appeals concluded, "the appropriate remedy is to remand for resentencing or other appropriate relief." *Id.* at *7.

And neither are such findings of plain error confined to the state courts. The Sixth Circuit has on multiple occasions vacated and remanded cases on plain error review where the government failed to abide by the terms of a plea agreement, often under circumstances significantly less egregious than those in Mrs. Collier's case. In *United States v. Murchison*, 231 Fed.Appx. 453 (6th Cir. 2007), the court vacated and remanded for resentencing where the government had failed to discuss at the sentencing hearing the defendant's cooperation despite the fact that it had pledged to do so in the plea agreement. *Id.* at 456, 457. And in *United States v. Hemphill*, 221 Fed.Appx. 435 (6th Cir. 2007), the court vacated and remanded when the government merely failed to analyze, as it said it would, whether the defendant's cooperation warranted a request by the government to reduce the applicable offense level. *Id.* at 436-38. *See also, e.g., United States v. Swanberg*, 370 F.3d 622, 629 (6th Cir. 2004) (plain error where government broke plea agreement provision that defendant's guilty plea proffer would not be used against him in sentencing); *United States v. Barnes*, 278 F.3d 644 (6th Cir. 2002) (plain error where prosecutor was silent at sentencing despite agreement to recommend sentence at low end of guidelines range).

---

[1] Mrs. Collier likewise asks the state to consider admitting error on this point in her case as well. Such would avoid the needless expenditure of the Court's, and the parties', resources in litigating this point further.

In short there is no question here but that (1) the state agreed to leave "the sentencing of Ms. Collier" "to the wise discretion of the Court," (2) the state subsequently reneged and requested a six-year sentence, (3) the trial-court complied, sentencing Mrs. Collier to precisely six years, (4) this blatant violation of the plea agreement constituted plain error, and (5) remand for resentencing by a different trial-court judge is necessary.

C. Counsel Below Was Ineffective for Failing to Object to the State's Plea-Agreement Breach.

If, for some reason, this Court were to disregard the above precedents and conclude that the plain error at issue here does not warrant vacating Mrs. Collier's sentence and remanding for resentencing, Mrs. Collier's sentence should still be vacated on grounds of ineffective assistance.

"In evaluating claims of ineffective assistance of counsel, a two-step process is used. 'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial.'" *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 61 (quoting *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Here, both prongs of the test are satisfied. As to the first prong, counsel's failure to object to the state's breach of the plea agreement was unquestionably deficient performance. As already discussed, the state's breach was a clear violation of law, and there was no strategic advantage to be gained by failing to object. Thus, in standing silent, counsel below ceased on this point to "function[] as the 'counsel' guaranteed by the Sixth

Amendment." *Id.* Second, the failure was undoubtedly prejudicial to Mrs. Collier. Had trial-court counsel objected immediately, then the case could have been transferred to a different trial-court judge to pronounce sentence without the taint of the state's breach and before the onerous six-year sentence was imposed. Instead, the state's recommendation—which "carr[ies] great weight" with a sentencing court, *Adams*, 2014-Ohio-724, at ¶ 36—was allowed to stand unchallenged; indeed, it was ultimately adopted as the judgment of the trial court. *See also United States v. Riggs*, 287 F.3d at 225 ("the prestige of the government" and its recommendation can have great influence over a court's sentencing decision (internal quotation marks omitted)). And, as stated, there was no upside for Mrs. Collier in this. The failure to object was purely prejudicial.

II. The Trial Court's Imposition of Consecutive Sentences Should Be Vacated for Failure to Comply with R.C. 2929.14(C)(4).

In imposing consecutive sentences on Mrs. Collier, the trial court failed to make all of the findings required by R.C. 2929.14(C)(4) and by the precedents of this Court and the Ohio Supreme Court. Accordingly, the trial court's imposition of consecutive sentences should be vacated and the case remanded for the trial court to consider anew whether consecutive sentences are legally appropriate.

A. Ohio Law Requires a Trial Court to Make Explicit Findings Before Imposing Consecutive Sentences.

Ohio law includes "a statutory presumption in favor of concurrent sentences." *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 4. "In order to impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry." *Id.* at ¶ 37. *See also State v. Vinson*, 2016-Ohio-7604, 73 N.E.3d 1025, ¶ 67 (8th Dist.) ("In Ohio, there is a presumption that prison sentences

should be served concurrently unless the trial court makes the findings outlined in R.C. 2929.14(C)(4) to warrant consecutive service of the prison terms"). Revised Code 2929.14(C)(4) provides:

> 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 **[1]** that the consecutive service is necessary to protect the public from future crime or to punish the offender ***and*** **[2]** 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*** **[3]** 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.

(Emphasis added).

Accordingly, before consecutive sentences may be imposed, a trial court must make three sets of findings. First, it must find that consecutive sentences are "necessary to protect the public from future crime or to punish the offender." *Id.* Second, it must find that such sentences "are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." *Id.* Third and finally, the trial court must make one of the three findings set out in subparagraphs (a), (b), and (c), above.

B. The Trial Court Failed to Make All of the Requisite Findings Here.

Here, the trial court complied with its obligations concerning findings one and two above—that consecutive sentences were "necessary to protect the public from future crime or to punish the offender" and were "not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." *Id.* But the trial court failed to make the required finding with respect to subparagraphs (a), (b), or (c) of R.C. 2929.14(C)(4). For this reason, the trial court's imposition of consecutive sentences must be vacated.

Indeed, it would have been impossible for the trial court to find that either paragraph (a) or (c) was satisfied here. Paragraph (c) applies when an "offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender." But the 54-year-old Mrs. Collier had *zero* criminal history. *See, e.g.*, Sentencing Tr. at 40:24-25 (Mrs. Collier had "never been charged or convicted with [sic] any other crimes"). Similarly, subparagraph (a) only applies when an "offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a[n] [alternative felony] 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." Given that Mrs. Collier's record was clean and that was she not awaiting trial or sentencing in any other matter, subparagraph (c) is off the table here as well.

That leaves subparagraph (b), which requires a trial court to find that "[a]t 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 [those offenses] 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." The record is bereft of any such finding.

To be sure, a "talismanic incantation of the words of the statute" is unnecessary, and "a word-for-word recitation of the language of the statute is not required." *Bonnell* at ¶¶ 37, 29. But "the trial court must note that it engaged in the analysis and that it has considered the statutory criteria and specified which of the given bases warrants its decision." *Id.* at ¶ 26 (international quotation marks and brackets omitted). The trial court utterly failed to do this with respect to paragraph (b). "[A]s long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the finding[]," the requirements of R.C. 2929.14(C)(4) are satisfied. *Id.* at ¶ 29. But there is nothing in the record to indicate that the trial court engaged in any analysis of subparagraph (b), let alone a thorough and "correct" analysis. *Id.* And there is likewise insufficient evidence in the record to "support [such a] finding." *Id.* In the absence of such record evidence, an imposition of consecutive sentences must be reversed. *See* part IV, below. Additionally, a court "should also incorporate its statutory findings into [its] sentencing entry," *id.*, but no reference to the contents of subparagraph (b) can be found in the journal entry here, *see* July 8, 2019 Journal Entry at 1-2.

The closest the trial court came to meeting the requirements of R.C. 2929.14(C)(4)(b) was its statement that the Taylors "have been greatly impacted by this betrayal, as well as this financial stress that was caused on this family and, therefore, the Court believes that consecutive sentences are necessary." Sentencing Tr. at 74:25-75:4. But this still comes nowhere near satisfying R.C. 2929.14(C)(4)(b)'s requirements that the trial court find the offenses were a part of one or more courses of conduct and that "the

harm caused . . . 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." Indeed, courts of appeals, including this one, have found much clearer statements than this insufficient for purposes of paragraph (b). *See, e.g.*, *State v. Wilson*, 8th Dist. Cuyahoga No. 97827, 2012-Ohio-4159, ¶ 12 (no part of R.C. 2929.14(C)(4), including paragraph (b), was satisfied by trial court's statement that the "offense was very serious and that [defendant's] sentence was in parity with his accomplices); *State v. Farnsworth*, 7th Dist. Columbiana No. 12 CO 10, 2013-Ohio-1275, ¶ 11 (statement that trial court did not want the sentences it imposed to "demean the serious nature of the offenses" did not satisfy R.C. 2929.14(C)(4)(b); that provision "requires more than a statement of the serious nature of the crime").

The R.C. 2929.14(C)(4) deficiency in this case is analogous to that in *State v. Vinson*, wherein this Court reversed this same trial-court judge for failure to comply with the statute when imposing consecutive sentences. *Id.*, 2016-Ohio-7604, 73 N.E.3d 1025, ¶ 72 (8th Dist.). In *Vinson*, the defendant committed a string of violent crimes including attempted murder and numerous counts of aggravated robbery and kidnapping. *Id.* at ¶ 15. After plea, the trial court imposed consecutive sentences totaling 99 years. The defendant raised a number of issues on appeal. This Court rejected every one of them, but raised, *sua sponte*, the trial court's failure to comply with R.C. 2929.14(C)(4). *Id.* at ¶¶ 66-67. While "all of the required statutory findings were incorporated into the trial court's sentencing journal entry," a "review of the record reveal[ed] that the trial court" failed to comply with part [2] of R.C. 2929.14(C)(4). *Id.* at ¶ 69. Specifically, the trial court "failed to make a finding at the sentencing hearing that consecutive sentences [were] not disproportionate to the seriousness of [the defendant's] conduct." *Id.*

Although the defendant himself "d[id] not dispute that his conduct was reprehensible, that fact alone" was not enough to satisfy the requirements of this prong of R.C. 2929.14(C)(4). *Id.* at ¶ 71. Consequently, this Court vacated the trial court's imposition of consecutive sentences and remanded "for the trial court to consider whether consecutive sentences are appropriate pursuant to R.C. 2929.14(C)(4)." *Id.* at ¶ 72.

The same result should obtain here. Just as it did in *Vinson*, here the trial court made *some* of the findings required by R.C. 2929.14(C)(4). But also as in *Vinson*, the trial court omitted a critical portion of R.C. 2929.14(C)(4)'s requirements. Accordingly, Mrs. Collier's consecutive sentences should be vacated.

III. The Trial Court Committed Plain Error By Failing to Conclude—and Counsel Below Was Constitutionally Ineffective for Failing to Argue—that Aggravated Theft and Money Laundering Were Allied Offenses.

The aggravated-theft and money-laundering offenses to which Mrs. Collier pled guilty are allied offenses pursuant to R.C. 2941.25 and the standard set forth in *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 3. "When a defendant has been found guilty of offenses that are allied offenses, R.C. 2941.25 prohibits the imposition of multiple sentences. Therefore, a trial court must merge the crimes into a single conviction and impose a sentence that is appropriate for the offense chosen for sentencing." *State v. Damron*, 129 Ohio St.3d 86, 2011-Ohio-2268, 950 N.E.2d 512, ¶ 17. Therefore, the trial court committed plain error when it convicted and sentenced (and consecutively, at that) Mrs. Collier for *both* aggravated theft and money laundering. Additionally, counsel below was constitutionally ineffective for failing to raise this issue in the trial court.

A. Aggravated Theft and Money Laundering Are Allied Offenses on These Facts.

Revised Code 2941.25 provides:

> (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.

And in *State v. Ruff*, the Ohio Supreme Court set forth the latest iteration of the standard for determining whether offenses are allied pursuant to R.C. 2941.25:

> 1. In 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.
>
> 2. Two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable.
>
> 3. Under R.C. 2941.25(B), a defendant whose conduct supports multiple offenses may be convicted of all the offenses if any one of the following is true: (1) the conduct constitutes offenses of dissimilar import, (2) the conduct shows that the offenses were committed separately, or (3) the conduct shows that the offenses were committed with separate animus.

Id., 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, paragraphs one through three of the syllabus. "At its heart, . . . allied-offense analysis is dependent upon the facts of a case because R.C. 2941.25 focuses on the defendant's conduct." *Id.* at ¶ 26. In conducting the analysis, courts look to "[t]he evidence at trial or during a plea or sentencing hearing." *Id.*

Here, all three factors—"the conduct, the animus, and the import," *Ruff* at paragraph one of the syllabus—are satisfied, and thus Mrs. Collier's aggravated-theft and

money-laundering offenses are allied and must merge pursuant to R.C. 2941.25. The sentencing hearing established that Mrs. Collier stole funds from Taylored Construction for use by herself and her sister. Sentencing Tr. at 30:1-12. She took the funds by making personal charges to the company credit card, by withdrawing company cash via ATM, and by depositing Taylored-Construction checks in her own account. *E.g.*, *id.* at 45:17-18 (Mrs. Collier took money from Taylored Construction via "unauthorized checks, credit card, [and] cash withdrawals"); *id.* at 64:3-5, 11-13. This conduct was the basis for her aggravated-theft conviction *and* her money-laundering convictions. Aggravated theft centers on "depriv[ing] the owner of property," R.C. 2913.02(A), while money laundering is centers on "conduct[ing] a transaction . . . in . . . the proceeds of . . . unlawful activity," R.C. 1315.55(A)(1). But here the same conduct—the charging of the company credit card, depositing of company checks, and withdrawal of company cash—constituted both the "depriv[ation] . . . of property," R.C. 2913.02(A), and the "transaction . . . in . . . the proceeds of . . . unlawful activity," R.C. 1315.55(A)(1). Thus, the second prong of the *Ruff* test is satisfied: The conduct underlying the offenses "[*does not*] show[] that the offenses were committed separately." *Ruff* at paragraph three of the syllabus. Indeed, the conduct underlying the aggravated-theft and money-laundering offenses is *one and the same.*

The "import" prong is also satisfied here. "Two or more offenses of *dissimilar* import exist . . . when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable." *Id.* at paragraph two of the syllabus (emphasis added). Here, the victim of the aggravated theft and of the money laundering was but one entity: Taylored Construction. Likewise, the resultant harm of both the aggravated-theft and money-laundering offenses was the same: loss of funds to Taylored Construction.

Finally, the "animus" prong is satisfied here as well. "Animus means purpose or, more properly, immediate motive and can be inferred from the surrounding circumstances." *State v. Williams*, 8th Dist. Cuyahoga No. 100898, 2014-Ohio-4475, ¶ 41 (internal quotation marks omitted). *See also Black's Law Dictionary* 103 (9th ed. 2009) (defining animus as "[i]ntention"). The sole intention of Mrs. Collier's offenses was plainly to take Taylored Construction's funds for use by herself and her sister. *E.g.*, Sentencing Tr. at 30:1-12. No other animus is evident in the record or even logically tenable.

B. The Trial Court's Failure to Merge the Aggravated-Theft and Money-Laundering Offenses Was Plain Error.

Criminal Rule 52(B), as already discussed, allows appellate courts to correct "[p]lain errors or defects affecting substantial rights" even where a defendant has failed to raise an objection before the trial court.[2] To satisfy the plain-error test, a defendant "must show an error, *i.e.*, a deviation from a legal rule that constitutes an obvious defect in the trial proceedings." *State v. Thomas*, 152 Ohio St.3d 15, 2017-Ohio-8011, 92 N.E.3d 821, ¶ 32 (citation and internal quotation marks omitted). The error "must have affected substantial rights." That is, "the accused is required to demonstrate a reasonable probability that the error resulted in prejudice." *Id.* (citation, internal quotation marks, and emphasis omitted).

This test has been met here. As shown directly above, there can be no doubt but that, in failing to merge the aggravated-theft and money-laundering offenses—offenses which, by the terms of *Ruff*, were plainly allied—the trial court "deviat[ed] from a legal

---

[2] Unfortunately, Mrs. Collier did not raise the allied-offense issue in the court below.

rule" in a way that "constitute[d] an obvious defect in the trial [court] proceedings." *Thomas* at ¶ 32. And it is likewise clear that the error resulted in grave prejudice to Mrs. Collier. Had the offenses merged, Mrs. Collier would have been subject to a single 36-month conviction and sentence for a single offense, a dramatic difference from the 36-month *consecutive* sentences that the trial court imposed as a consequence of not merging the aggregated-theft and money-laundering offenses.[3] Failing to remedy this plain error would allow a "manifest miscarriage of justice" to go unchecked. *Thomas* at ¶ 34.

C. Mrs. Collier's Counsel Below Was Constitutionally Ineffective for Failing to Raise the Allied-Offenses Issue.

Even if this Court were to conclude that the trial court's failure to apply R.C. 2941.25 and *Ruff* was not plain error meriting remedy in this Court, still Mrs. Collier's triple conviction—for aggravated theft and two counts of money laundering—should be reversed because her trial-court counsel was ineffective for failing to raise the allied-offenses issue in the first instance.

As discussed in part I.C above, the two-pronged *Strickland* test applies to claims of ineffective assistance. "First, the defendant must show that counsel's performance was deficient"—so deficient that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

---

[3] Though Mrs. Collier pled guilty to two counts of money laundering, both should properly merge with the aggravated-theft conviction (or all three should merge into a single money-laundering conviction). Revised Code 2941.25 and *Ruff* apply, after all, whenever "two *or more*" allied offenses are at issue. R.C. 2931.25(A) (emphasis added); *Ruff* at paragraph two of the syllabus (emphasis added).

Both prongs are satisfied here. As to the first prong, for the reasons discussed above, aggravated theft and money laundering are, on these facts, allied offenses. Counsel below was therefore deficient in failing to raise the issue of merger. *See State v. Elem*, 8th Dist. Cuyahoga No. 105821, 2018-Ohio-1194, ¶ 20 ("We do not doubt that failure to request merger of allied offenses may in some cases"—*e.g.*, when the offenses at issue do in fact meet the requirements for merger—"constitute deficient performance."). There was no strategic advantage, or anything else to gain, in failing to raise it. Second, counsel's deficiency was plainly prejudicial. Had counsel raised the issue, Mrs. Collier's aggravated theft and money laundering offenses very likely would have—and, at any rate, should have—been merged for the reasons discussed in part III.A above. This would have resulted in cutting Mrs. Collier's overall sentence in half—from 72 months to 36. Accordingly, counsel's failure to pursue this issue before the trial court constituted ineffective assistance.[4]

IV. Mrs. Collier's Sentence Is Not Supported By the Record.

The trial court justified imposing such a lengthy sentence on Mrs. Collier primarily on the grounds that Mrs. Collier allegedly lacked remorse. But the trial court based this conclusion on an erroneous factual premise. The trial court also ignored other statutory factors that must be considered in fashioning an appropriate sentence. Accordingly, Mrs.

---

[4] If this Court determines that, due to insufficient facts in the record, it is unable to conclude that the aggravated-theft and money-laundering offenses should have merged, trial-court counsel still should be found constitutionally ineffective. This is because any deficiency this Court perceives in the record can be attributed to counsel's failure to raise the allied-offenses issue below. In other words, counsel's raising of the issue would have been the impetus for developing the record in greater detail. Of course, Mrs. Collier submits that the record as is provides a sufficient basis for concluding that the aggravated-theft and money-laundering offenses were allied. *See* part III.A, *supra*.

Collier asks this Court to remedy these errors by reducing, or in the alternative, vacating and remanding, Mrs. Collier's sentence.

Revised Code 2953.08(G)(2) provides, in part:

> 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 . . . (C)(4) of section 2929.14 . . . ;
>
> (b) That the sentence is otherwise contrary to law.

In *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, the Ohio Supreme Court made clear that this same standard applies to all felony sentencing. Accordingly, post-*Marcum* "an appellate court [may] increase, reduce, or otherwise modify a sentence only when it clearly and convincingly finds that the sentence is (1) contrary to law and/or (2) unsupported by the record." *State v. McGowan*, 147 Ohio St.3d 166, 2016-Ohio-2971, 62 N.E.3d 178, ¶ 1.

Mrs. Collier's consecutive sentences are clearly and convincingly contrary to law for the reasons stated in the preceding sections of this brief, mostly part II. But her sentences are also clearly and convincingly unsupported by the record.

Specifically, pursuant to R.C. 2929.14(C)(4), the trial court purportedly found "that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." This finding was a prerequisite to imposing consecutive sentences. But though the trial court did utter these magic words, the record does not support the finding that Mrs. Collier posed an unusually high danger to the public. As previously discussed, she was 54 years old at the time of

sentencing and had never before been convicted of a crime. *See State v. Hicks*, 2d Dist. Greene No. 2015-CA-20, 2016-Ohio-1420, ¶ 25 (reversing trial court's decision to impose consecutive sentences in part because the defendant was a "fifty-two year-old, first-time, non-violent offender"). She was able to take from Taylored Construction by virtue of her position of financial responsibility within the company, the type of position she is very unlikely to hold ever again. *See State v. Polizzi*, 11th Dist. Lake Nos. 2018-L-063, 2018-L-064, 2019-Ohio-2505 (fact that the defendant, who had used his teaching position to commit his crimes, would not be permitted to teach in the future, reduced the chances of recidivism).

In discussing the reasons undergirding its R.C. 2929.14(C)(4) findings, the trial court cited only three "facts" that it had considered in imposing consecutive sentences. The court noted that, in its view, Mrs. Collier expressed a "lack of guilt and . . . lack of remorse," Sentencing Tr. at 74:6-7; that Mrs. Collier's relationship with the Taylors had been "an employment situation that evolved to a friendship situation," *id.* at 74:17-18; and that the Taylors had been "greatly impacted by" Mrs. Collier's "betrayal" and the "financial stress" it caused, *id.* at 74:25-75:1. The second and third "facts"—the relationship between Mrs. Collier and the Taylors and the scope of the loss she caused to the Taylors—have no bearing on the "danger" Mrs. Collier poses "to the public," *i.e.*, her likelihood of recidivism..[5] Accordingly, the only possible support in the record for the trial court's

---

[5] Citing the "financial stress"—*i.e.*, the degree of loss—caused by Mrs. Collier's offenses as justification for consecutive sentencing is also problematic in that it ignores the fact that the amount of loss was already built into sentencing because it was an *element of the offense*. *See* 2913.02(B)(2) ("If the value of the property or services stolen is *one hundred fifty thousand dollars or more and is less than seven hundred fifty thousand dollars*, a violation of this section is aggravated theft, a felony of the third

finding that Mrs. Collier posed an unusually high "danger . . . to the public" was the court's own assertion that Mrs. Collier lacked remorse. *Id.* at 74:6-7.

But the record does not support the trial-court's misplaced conclusion that Mrs. Collier lacked remorse. At her sentencing hearing, Mrs. Collier stated:

> Over the course of the last year, I've had many sleepless nights lying awake and replaying the circumstances during my employment with Taylored Construction that led me to where I am today. The situation has adversely impacted so many people, and that has caused me great pain, grief, anguish, and remorse. I realize the impact that my actions have had on Taylored Construction and I will make it right . . . I'm truly, truly sorry.

Id. at 23:22-24:11. Despite this clear apology and expression of regret, the trial court, in determining that Mrs. Collier lacked remorse, wrongly stated that she "failed to adequately apologize to the victims." *Id.* at 74:8-9.

Even more significantly, it appears that the trial court's dubious conclusion that Mrs. Collier lacked remorse was premised primarily on a misreading of the presentence investigation report ("PSI"). The following exchange occurred at Mrs. Collier's sentencing hearing:

> THE COURT: I'm going to read to you a sentence and you can listen carefully and tell me whether or not you agree with the sentence. . . . The Defendant claimed that she did nothing wrong. She admitted to withdrawing large amounts of cash from the business but believes that it was owed to her because she paid herself in cash and has lent Taylored Constriction [sic] a lot of money. The victim denies taking any loans from the Defendant. Is that accurate or that's not?
>
> THE DEFENDANT: No. When I met with Probation, the case was never discussed. She read—she got on her computer and she read the—what I pleaded to.

---

degree." (emphasis added)). "A trial court may not elevate the seriousness of an offense by pointing to a fact that is also an element of the offense itself." *State v. Polizzi*, 11th Dist. Lake Nos. 2018-L-063, 2018-L-064, 2019-Ohio-2505, ¶ 28 (collecting sources).

> THE COURT: So you never said those things?
>
> THE DEFENDANT: I never said those things. On the advice of counsel, that was the one thing that I've never—the case was never discussed.

Id. at 24:16-25:16. At this point in the proceedings, Mrs. Collier's trial-court counsel intervened to explain that he had advised Mrs. Collier to be fully cooperative with the presentence investigation but also to decline to make any statements regarding the facts of her offense; therefore, the quotation read by the court could not possibly have come from Mrs. Collier during her presentence investigation interview. *See id.* at 25:17-27:17. Indeed, it appears that the trial court had mistaken the PSI's quotation of the original police report in the case—made roughly *two years* earlier—with what Mrs. Collier said (or, more accurately, did not say) to the probation officer at the time the PSI was compiled. Pages one and two of the PSI state:

> The following synopsis is derived from information provided by the Glenwillow Police Department: On 5/10/17, [description of offense]. . . . The defendant claims that she did nothing wrong. She admitted to withdrawing large amounts of cash from the business but believes that it was owed to her because she paid herself in cash and has leant [sic] Taylored Construction a lot of money.

Despite these facts, the trial court persisted in its errant belief that Mrs. Collier had failed to show remorse.

On this issue, Mrs. Collier's case is similar to *State v. Whitaker*, 8th Dist. Cuyahoga Nos. 107584, 107967, 2019-Ohio-2823, in which this Court reversed a sentence imposed by this same trial-court judge due to the trial-court judge's misapprehension of the PSI. In *Whitaker*, the trial court had sentenced the defendant to consecutive 36-month sentences—the statutory maximum—reasoning that the defendant's "prior convictions" justified the hefty judgment. *Id.* at ¶ 1. But "[t]he trial court had apparently misinterpreted the presentence investigation report." *Id.* at ¶ 14. While the PSI included

information on "alleged criminal incidents [that] occurred *subsequent* to" the offense for which the defendant was being sentenced, there were no prior convictions. *Id.* at ¶ 15. As with trial counsel's clarifications here, "Whitaker's counsel repeatedly attempted to clarify the court's misunderstanding, but to no avail." *Id.* In light of the trial court's error, this Court concluded that it was "constrained to find by clear and convincing evidence that the record d[id] not support the sentence and reverse the sentence and remand the matter for resentencing." *Id.* at ¶ 18.

The trial court's misguided finding also runs afoul of R.C. 2929.12, which directs a trial court to consider specific factors in determining whether a defendant is likely or not to commit future crimes. That statute provides, at subsections (D) and (E):

> (D) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is likely to commit future crimes:
>
> (1) At the time of committing the offense, the offender was under release from confinement before trial or sentencing [or had some other negative status not applicable here].
>
> (2) The offender previously was adjudicated a delinquent child . . . or the offender has a history of criminal convictions.
>
> (3) The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child pursuant . . . or the offender has not responded favorably to sanctions previously imposed for criminal convictions.
>
> (4) The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse.
>
> (5) The offender shows no genuine remorse for the offense.
>
> (E) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is not likely to commit future crimes:

(1) Prior to committing the offense, the offender had not been adjudicated a delinquent child.

(2) Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense.

(3) Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.

(4) The offense was committed under circumstances not likely to recur.

(5) The offender shows genuine remorse for the offense.

Regarding subsection (D)—the factors that make an individual more likely to commit future crime—Mrs. Collier has no criminal record (or juvenile offenses), and thus factors (1) through (3) do not apply. Factor (4) also does not apply, as there is nothing in the record to indicate Mrs. Collier abused drugs or alcohol in connection with her offense. Factor (5)—"[t]he offender shows no genuine remorse"— also does not apply, given Mrs. Collier's statement at sentencing and, especially, the trial court's misreading of the PSI. Thus, none of the statutory factors indicative of recidivism apply.

Contrastingly, all five of the subsection (E) factors, pertaining to the likelihood that a defendant will *not* reoffend, apply here. The first three apply since Mrs. Collier has no record. Factor (4) applies as well considering the special circumstances (employed in a position granting sole control over employer's finances) under which Mrs. Collier's offenses were committed. Factor (5) also applies here, given Mrs. Collier's statement of remorse at sentencing.[6] Pursuant to R.C. 2929.12(D) and (E), then, Mrs. Collier was *not* likely to reoffend—yet another reason why the trial court's finding that Mrs. Collier posed

---

[6] Or, at the very worst, if the court were to disbelieve Mrs. Collier's statement, this factor is neutral, given that the trial court's finding of lack of remorse was based on a misreading of the PSI.

an unusually high "danger . . . to the public," R.C. 2929.14(C)(4), was unsupported by the record.

On this point, Mrs. Collier's case is reminiscent of *State v. Polizzi*, 11th Dist. Lake Nos. 2018-L-063, 2018-L-064, 2019-Ohio-2505. There, the defendant was convicted of multiple sex offenses as a result of his relationships with two underage girls. *Id.* at ¶ 2. He was sentenced to consecutive sentences totaling 33 years. *Id.* at ¶ 1. He had no prior or subsequent criminal record. *Id.* at ¶ 31. On appeal, the Eleventh District noted that "[o]ther than a lack of remorse, there is no support in the record for concluding that [the defendant] was likely to re-offend." *Id.* at ¶ 31. Turning to 2929.12(D) and (E), the court stated:

> In subsection (D), it is clear that the lack of remorse is the only thing militating toward appellant's likelihood of committing future crime. All of the other factors suggest little or no likelihood. In subsection (E), all of the factors again suggest little or no likelihood of appellant committing future crime, with the exception of the lack of remorse.

Id. at ¶ 34. Accordingly, the court held that "the record does not support the trial court's determination that [the defendant] poses a great risk to the public based on the likelihood he will commit future crime." *Id.* at ¶ 35. "Upon review of the record, there is no support under R.C. 2929.14(C)(4) for some of the findings the trial court made to justify imposition of consecutive sentences." *Id.* at ¶ 47. The court reversed and remanded for resentencing.

Also of note is *State v. Hicks*, 2d Dist. Greene No. 2015-CA-20, 2016-Ohio-1420. In *Hicks*, the trial court imposed maximum, consecutive sentences totaling nine years after the defendant pled guilty to stealing $75,000 from mentally and physically disabled adults who were in her care. *Id.* at ¶ 17. The thefts prevented some of the disabled individuals from purchasing basic necessities, include clothing. *Id.* at ¶ 24.

The court of appeals reversed and ordered that the trial court impose concurrent sentences on remand. *Id.* at ¶ 30. The court "clearly and convincingly [found] that the record fail[ed] to support the findings necessary for the imposition of consecutive sentences." *Id.* at ¶ 28. It reasoned that the "facts [were] not conducive to recidivism given [the defendant's] age, lack of prior incarceration, and otherwise decades of law-abiding life." *Id.* at ¶ 22. The court of appeals also faulted the trial court for fixating on protection of the public while ignoring R.C. 2929.11's requirement to consider the other purposes of sentencing, including rehabilitation. *Id.* at ¶ 25. What the *Hicks* majority said is applicable to Mrs. Collier's case as well: "by sentencing this fifty-two year-old, first-time, non-violent offender to nine years in prison, the trial court failed to reasonably consider the concept of rehabilitation, as well as recidivism." *Id.*[7]

In short, the trial court's finding—essential to the imposition of consecutive sentences—that Mrs. Collier posed an usually high "danger . . . to the public" was unsupported by the record. In making that finding, the trial court relied on a single piece of information. But just like in *Whitaker*, that information was false—attributable to a misreading of the PSI. Also, here, just like in *Polizzi*, the recidivism factors found in R.C. 2929.12(D) and (E) weigh strongly—here, universally—in favor of a finding that Mrs. Collier was *not* likely to commit future offenses. And just like in *Hicks*, the trial court

---

[7] The *Hicks* court also concluded that a finding under R.C. 2929.14(C)(4)(b)—also one of the purported bases for imposing consecutive sentences on Mrs. Collier—was unsupported by the record. That subparagraph requires, among other things, "harm . . . so great or unusual that no single prison term . . . adequately reflects the seriousness of the offender's conduct." R.C. 2929.14(C)(4)(b); *Hicks* at ¶ 14. "[T]here is no evidence," the court said, "that Hicks caused physical harm to any of the [victims] subject to her fiscal supervision, hence the conduct does not fit" the great-or-unusual harm requirement. *Id.* at ¶ 23.

threw additional mitigating considerations—including Mrs. Collier's age and lack of a record, the absence of physical harm, and the statutorily mandated rehabilitative component of sentencing—to the wind, relying solely on a (deficient) recitation of R.C. 2929.14(C)(4) findings and a misreading of the record to impose consecutive, maximum sentences. For all the reasons stated above, these sentences were contrary to law and should not be permitted to stand. "[F]or too long appellate courts, including this one, have been too much of a 'rubber stamp' when it comes to sentencing, especially in instances of excessive consecutive sentences." *State v. Metz*, 8th Dist. Cuyahoga Nos. 107212, 107246, 2019-Ohio-4054, ¶ 109. Mrs. Collier urges the court to be mindful of this consideration here.

CONCLUSION

In light of the state's plain-error breach of the parties' plea agreement, Mrs. Collier's sentence should be vacated in full and the case remanded to a different trial judge for resentencing. Alternatively, this court should vacate Mrs. Collier's sentences, reduce the term of the 36-month and 12-month sentences and order that all sentences be served concurrently, or modify the sentence and impose community control sanctions.

Dated: October 3, 2019

Respectfully submitted,

/s/ Paul M. Flannery
Paul N. Flannery (Bar No. 91480)
Edward Fadel (Bar No. 85351)
Flannery | Georgalis, LLC
1375 E. 9th St., 30th Floor
Cleveland, OH 44114
Telephone: (216) 367-2095
Email: paul@flannerygeorgalis.com
Email: efadel@flannerygeorgalis.com

Of Counsel:

Emmett E. Robinson (Bar No. 88537)
ROBINSON LAW FIRM LLC
6600 Lorain Avenue #602731
Cleveland, Ohio 44102
Telephone: (216) 505-6900
Email: erobinson@robinsonlegal.org

Attorneys for Appellant Sharon Collier

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2019, this Brief of Appellant Sharon Collier was filed electronically. Notice of this filing will be sent to all parties through this Court's electronic filing system.

/s/Paul M. Flannery
Paul M. Flannery

Attorney for Appellant Sharon Collier