IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NOs. C-190273 C-190274
Plaintiff-Appellee,	:	C-190275
vs.	:	*(Consolidated)*
MICHAEL PARKS,	:	Trial Nos. C-19CRB-1554 C-19CRB-2744A
Defendant-Appellant	:	C-19CRB-2744B

JUDGMENT ENTRY.

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

In February and March of 2019, defendant-appellant Michael Parks pled guilty to violating a protection order, menacing by stalking, and telecommunications harassment. The trial court imposed the statutory maximum sentence of 180 days for each offense, running the three sentences consecutively. Mr. Parks now appeals, raising two assignments of error: first, that the trial court erred by failing to merge Mr. Parks's convictions for menacing by stalking and telecommunications harassment as allied offenses under R.C. 2941.25; and second, that the trial court failed to consider the sentencing purposes and factors set forth in R.C. 2929.21 and 2929.22 when it imposed maximum, consecutive sentences. We address both assignments of error in turn and ultimately affirm the trial court's judgment.

During his plea hearing, Mr. Parks waived a recitation of the facts. As a consequence, the factual basis of Mr. Parks's offenses is woefully underdeveloped. The record consists mainly of a court-ordered presentence investigation ("PSI"), victim-impact statement, and clinical evaluation, as well as comments made by Mr. Parks at the

sentencing hearing. These sources, in turn, document numerous texts, calls, and Facebook messages sent by Mr. Parks to the victim, Ms. Jones, despite her repeated requests for Mr. Parks not to contact her. According to the victim-impact statement, Mr. Parks's communications to Ms. Jones included derogatory statements, such as calling vile names, and threats of physical violence against Ms. Jones and her family. Mr. Parks also reached out to her friends, spreading innuendo and posting inappropriate pictures of her on Facebook. Most notably, Mr. Parks discovered where Ms. Jones worked and applied, using Ms. Jones as a reference without her consent. Mr. Parks was hired, but fired a few days later.

We first address Mr. Parks's contention that the trial court was obligated to merge his convictions for menacing by stalking and telecommunications harassment. As the defendant, Mr. Parks bears the burden of demonstrating his entitlement to the protection afforded by R.C. 2941.25. *See State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, ¶ 18 ("We have consistently recognized that 'the defendant bears the burden of establishing his entitlement to the protection, provided by R.C. 2941.25, against multiple punishments for a single criminal act.' "). Moreover, because Mr. Parks did not raise the issue of merger of allied offenses below, he has forfeited all but plain error. *See State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 3; *see also State v. Burrows*, 1st Dist. Hamilton No. C-190277, 2020-Ohio-3646, ¶ 11. To prevail on his plain-error claim here, Mr. Parks "must demonstrate a prejudicial effect—a 'reasonable probability' that 'he has, in fact, been convicted of allied offenses of similar import committed with the same conduct and with the same animus.' " *State v. Daniels*, 1st Dist. Hamilton No. C-160203, 2017-Ohio-548, ¶ 14, quoting *Rogers* at ¶ 3.

Mr. Parks maintains that because the "pattern of conduct" underlying his menacing by stalking conviction "was accomplished by telecommunications that also

support the telecommunications charge, [he] should not have been convicted of and sentenced on both offenses." While an overlap exists between the facts supporting the two offenses, this overlap does not, in itself, satisfy the definition of an "allied offense of similar import" in R.C. 2941.25. Mr. Parks was convicted of menacing by stalking in violation of R.C. 2903.211(A)(1), which prohibits a person from "engaging in a pattern of conduct [that] shall knowingly cause another person to believe that the offender will cause physical harm to the other person or a family or household member * * * or cause mental distress" to the same persons. Likewise, Mr. Parks was convicted of telecommunications harassment under R.C. 2917.21(A)(5), which provides in relevant part that "[n]o person shall knowingly make * * * a telecommunication * * * if the caller * * * [k]nowingly makes the telecommunication to the recipient * * * and the recipient * * * previously has told the caller not to make a telecommunication[.]"

In this case, Mr. Parks's menacing by stalking offense is supported, in part, by his repeated and unwelcome telecommunications to Ms. Jones. But his harassment was not limited exclusively to telecommunications—and it is here that his claim of allied offenses must fail. Convictions do not merge under R.C. 2941.25(B) "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." *State v. Ruff,* 143 Ohio St.3d 114, 2015-Ohio-995, 24 N.E.3d 892, ¶ 13. We may end our inquiry upon finding that any of these three conditions apply. *See State v. Lee,* 1st Dist. Hamilton No. C-190149, 2020-Ohio-944, ¶ 6.

The factual record below, though limited, establishes that Mr. Parks physically appeared at Ms. Jones's place of employment. He used her name as an employment reference without her permission and asked coworkers inappropriate questions about

her. These actions, coupled with his threatening phone calls and texts, support his menacing by stalking offense. *See State v. Boczek,* 8th Dist. Cuyahoga No. 103811, 2016-Ohio-5708, ¶ 15 ("The menacing by stalking count arose out of [the defendant's] specific presence at the victim's employment where he waited outside the building and harassed her after a series of threatening telephone calls, including one to her insurance agent.").

We see no plain error for the trial court to infer that these actions "caused separate, identifiable harm" to Ms. Jones, thus constituting an offense of "dissimilar import" to the telecommunications harassment. *See Ruff* at ¶ 25. Mr. Parks's objection in his reply brief that his appearance at Ms. Jones's workplace was only "one act," and thus could not support a menacing by stalking conviction, falls well short. It was perfectly reasonable for the trial court to find that Mr. Parks's in-person harassment of Ms. Jones was both separate from and enhanced by his telecommunications harassment, which together inflicted harm on her separate from (and additional to) the harm inflicted by the telecommunications alone. It is Mr. Parks's burden, and not the court's, to demonstrate otherwise—and he cannot do so on the meager factual record before us. *See Burrows* at ¶ 11 (defendant "cannot prevail on his plain-error claim merely by arguing that the offenses would merge if additional facts are assumed."). Accordingly, we overrule Mr. Parks's first assignment of error.

In his second assignment of error, Mr. Parks asserts that the trial court failed to consider the purposes and principles of sentencing under R.C. 2929.21 and the sentencing factors set forth in R.C. 2929.22. Specifically, Mr. Parks contends that the trial court's imposition of maximum, consecutive sentences did not support the purpose of rehabilitation, and that he did not commit the worst form of each offense. *See* R.C. 2929.22(C) (a "court may impose the longest jail term authorized * * * only upon offenders who commit the worst forms of the offense [.]").

But, as Mr. Parks concedes, his 180-day sentence for each of the three offenses fell within the statutory range. *See* R.C. 2929.24(A)(1). And where a misdemeanor sentence falls within the statutory limits, we presume that the trial court properly considered the sentencing criteria in R.C. 2929.21 and 2929.22. *See State v. Jones,* 1st Dist. Hamilton No. C-140241, 2015-Ohio-490, ¶ 20; s*ee also State v. Brown,* 1st Dist. Hamilton No. C-140509, 2015-Ohio-2960, ¶ 10 ("Where the trial court imposes a misdemeanor sentence within the statutory range for the offense, we presume that the trial court considered the appropriate misdemeanor-sentencing considerations set forth in R.C. 2929.21 and R.C. 2929.22."). The trial court was not required to state its reasons for the misdemeanor sentences on the record, nor to explicitly characterize Mr. Parks's conduct as the worst form of each offense. *See State v. Whitman*, 5th Dist. Ashland Nos. 18-COA-030 and 18-COA-031, 2019-Ohio-2307, ¶ 67; *State v. Masson*, 2017-Ohio-7705, 96 N.E.3d 1225, ¶ 33 (7th Dist.) ("[A] court sentencing for a misdemeanor is not required to state on the record its consideration of the sentencing factors[.]"). Even so, the trial court highlighted at sentencing the "frightening" effect of Mr. Parks's behavior and the "very serious nature of the facts," which, coupled with the fact that Mr. Parks is a "Tier II registered sex offender who has previously ceased psychiatric treatment," swayed the court to consider "probation [] simply not appropriate."

In light of the above, we hold that the trial court did not abuse its discretion in sentencing Mr. Parks to 180 days in jail for each offense. Accordingly, we overrule his second assignment of error as well as his first. The judgment of the trial court is affirmed.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

MYERS, P.J., BERGERON and **CROUSE, JJ.**

To the clerk:

Enter upon the journal of the court on September 16, 2020,
per order of the court_____.

Presiding Judge