

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

STATE OF OHIO,	:	APPEAL NO. C-110491
Plaintiff-Appellee,	:	TRIAL NOS. B-1004070 B-1005913
vs.	:	
MATTHEW HERRMANN,	:	<i>JUDGMENT ENTRY.</i>
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar. This judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 3(A); App.R. 11.1(E); Loc.R. 11.1.1.

Defendant-appellant Matthew Herrmann, a former teacher at an elementary school, appeals the convictions and sentences imposed for sexual offenses committed against two teenage, female students. In 2010, Herrmann had electronically obtained sexually explicit photographs of both girls, had digitally penetrated one of the students, and had sought to engage in other sexual activities with the girls. Herrmann entered guilty pleas to one count of sexual battery, two counts of illegal use of a minor in nudity-oriented material, and five counts of importuning. In exchange for his guilty pleas to those offenses, the state dismissed 17 additional serious felony charges.

The text of counts seven and eight of the indictment alleging that Herrmann had illegally used B.O., a minor, in nudity-oriented photographs, had omitted the word “not” from the phrase “not his child or ward,” and thus appeared to indicate that the victim was Herrmann’s child. The state moved to amend the indictment to add the word “not.” The bill of particulars also clearly identified the two victims as teenager students who could not have been Herrmann’s daughter, then three-years old. And the assistant prosecuting

attorney correctly stated the elements of the offenses immediately prior to Herrmann's waiver of his right to have the state prove those elements beyond a reasonable doubt. *See* R.C. 2907.323(A)(1).

The trial court accepted his pleas and found him guilty of each offense. The court reviewed Herrmann's sentencing memorandum, the presentence investigation and victim impact statements, and entertained extended argument including Herrmann's personal statement. In July 2011, the trial court explained its reasoning and imposed 21 years' imprisonment for the offenses against B.O. and ordered them to be served consecutive to a term of five-years' imprisonment for the importuning of victim S.B.

On appeal, Herrmann first alleges that the trial court committed plain error in accepting his guilty pleas to counts seven and eight of the B.O. indictment. Herrmann asserts that because the indictment had indicated that B.O. *was* Herrmann's child by omitting the word "not," and because the trial court had failed to rule on the state's motion to amend the indictment to add the word "not," we must reverse.

But because Herrmann waived any alleged errors in the indictment by entering guilty pleas to the offenses, we overrule his first assignment of error on the authority of *State v. Morgan*, 181 Ohio App.3d 747, 2009-Ohio-1370, 910 N.E.2d 1075 (1st Dist.), ¶ 25. *See* Crim.R. 11(B)(1); *see also State v. Hunter*, 1st Dist. No. C-080730, 2009-Ohio-3259.

In his second assignment of error, Herrmann asserts that the trial court imposed an excessive and disproportionate sentence for conduct that involved the mere gathering of salacious photographs of his victims and only one incident of sexual contact. We conduct a two-part review of Herrmann's sentences of imprisonment. *See State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. First we must determine whether the sentences were contrary to law. *See id.* at ¶ 14. Then, if the sentences were not contrary to law, we must review each to determine whether the trial court abused its discretion in imposing it. *See id.* at ¶ 17.

Here, the sentences imposed were not contrary to law. Herrmann concedes that the sentences were within the ranges provided by statute. *See* R.C. 2929.14.

But Herrmann argues that the trial court abused its discretion in imposing a 26-year aggregate sentence. By reference to cases listed in the sentencing memorandum he submitted to the trial court, Herrmann now contends that the aggregate sentence imposed was not consistent with sentences imposed for similar crimes committed by similar offenders, as required by R.C. 2929.11(B). Providing a list of thirteen, unnamed court decisions, many from other counties, “is of dubious value” since the list does not take into account the unique factors that may distinguish one case from another. *State v. Ryan*, 1st Dist. No. C-020283, 2003-Ohio-1188, ¶ 12. Consistency does not mean uniformity. It “accepts divergence within a range of sentences” and is achieved by the trial court’s weighing of the relevant statutory factors. *Id.* at ¶ 10; *see also State v. Stern*, 137 Ohio App.3d 110, 115, 738 N.E.2d 76 (1st. Dist.2000).

In light of the trial court’s careful review of the facts of these offenses, including that Herrmann had used his position of trust to obtain access to the victims, and the serious impact of his actions on the victims and their families, we cannot say that the trial court abused its discretion in imposing sentence. *See Kalish* at ¶ 17. The assignment of error is overruled.

Therefore, the trial court’s judgments are 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.

**HILDEBRANDT, P.J., CUNNINGHAM and DINKELACKER, JJ.**

To the clerk:

Enter upon the journal of the court on May 2, 2012  
per order of the court \_\_\_\_\_.  
Presiding Judge