

IN THE SUPREME COURT OF OHIO

Case No. **07-0472**

State of Ohio, :
Appellee, :
v. :
D.H. (a minor child), :
Appellant. :

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 06AP-250

**NOTICE OF A CERTIFIED CONFLICT
FILED BY D. H. (A MINOR CHILD), APPELLANT AND REQUEST TO CONSOLIDATE
WITH CASE NO. 07-0291 PENDING IN THIS COURT**

Yeura R, Venters (0014879)
Franklin County Public Defender

and

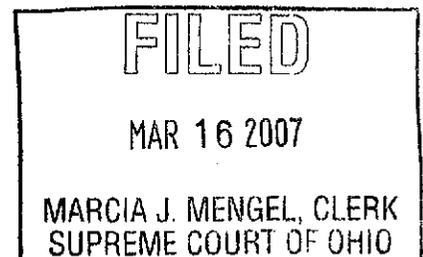
John W. Keeling 0014860, Counsel of Record
373 South High Street
Twelfth Floor
Columbus, Ohio 43215
Phone: (614) 719-8783
Fax: (614) 461-6470

Counsel for Appellant, D. H. (minor child)

Ron O'Brien 0017245
Prosecuting Attorney
Franklin County, Ohio
373 South High Street
Columbus, Ohio 43215
Phone: (614) 462-3555

and

Katherine J. Press (0023422), Counsel of Record
Assistant Prosecuting Attorney
Counsel for Plaintiff-Appellee



IN THE SUPREME COURT OF OHIO

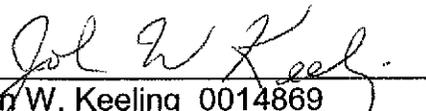
State of Ohio,	:	Case No.
Appellee,	:	On Appeal from the
v.	:	Franklin County Court
D.H. (a minor child),	:	of Appeals, Tenth
Appellant.	:	Appellate District
	:	Court of Appeals
	:	Case No. 06AP-250

NOTICE OF A CERTIFIED CONFLICT

Now comes D. H. (a minor child), defendant-appellant, pursuant to S.Ct.Prac.R. IV and through counsel, to file the copy of the order of the Franklin County Court of Appeals, Tenth Appellate District, certifying a conflict pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution. This matter should be consolidated with pending Case No. 07-0291, a matter waiting ruling on the claimed appeal of right or discretionary appeal.

Respectfully submitted,

Yeura R. Venters
Franklin County Public Defender

By 
John W. Keeling 0014869
Counsel of Record for Appellant

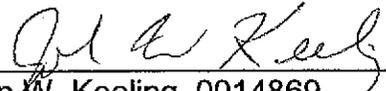
MEMORANDUM

Pursuant to S.Ct.Prac.R. IV, D. H. (a minor child) the defendant-appellant, hereby files the order from the Franklin County Court of Appeals certifying that its decision herein is in conflict with that of another appellate district. Under Section 2 of the above rule, this

Court must review the order of the court of appeals to determine whether a conflict exists. The conflict is set forth in the attached Journal Entry of the Franklin County Court of Appeals (Appendix, page A-1) and the attached memorandum decision on the motion to certify (Appendix, page A-2). The decision herein, in *State v. D.H. Franklin* App. No. 06AP-250, 2006-Ohio-6953 (attached, A-8), is in conflict with the judgment of the Court of Appeals for Allen County in *In re Hill*, Allen App. No. 1-05-65, 2006-Ohio-2504 (attached A-44).

Respectfully submitted,

Yeura R. Venters
Franklin County Public Defender

By 
John W. Keeling 0014869
Counsel of Record Appellant

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	Case No.
Appellee,	:	On Appeal from the
v.	:	Franklin County Court
D.H. (a minor child),	:	of Appeals, Tenth
Appellant.	:	Appellate District
		Court of Appeals
		Case No. 06AP-250

APPENDIX

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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State of Ohio, :
Plaintiff-Appellee, : No. 06AP-250
v. : (C.P.C. No. 05CR04-2388)
D.H., : (C.P.C. No. 04JU12-17636)
Defendant-Appellant. : (REGULAR CALENDAR)

CLERK OF COURTS

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on February 27, 2007, it is the order of this court that the motion to certify the judgment of this court as being in conflict with the judgment of the Court of Appeals for Allen County in *In re Hill*, Allen App. No. 1-05-65, 2006-Ohio-2504, is granted and, pursuant to Section 3(B)(4), Article IV, Ohio Constitution, the record of this case is certified to the Ohio Supreme Court for review and final determination upon the following issue in conflict:

Do constitutional jury trial rights, as articulated under the Sixth Amendment to the United States Constitution and Sections 5 and 10, Article I of the Ohio Constitution, and as applied to an adult felony sentencing in accordance with *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, and *Blakely v. Washington* (2004), 542 U.S. 296, also apply, in a pre-*Foster* sentencing, to findings that a juvenile court has made under Ohio's adult felony sentencing statutes when the juvenile court imposed the adult portion of a blended juvenile/adult sentence under R.C. 2152.13 of Ohio's serious youthful offender statutes?

FRENCH, J., SADLER, P.J., and BROWN, J.

By 
Jud.

JOHN W. KEELING
FRANKLIN CO PUBLIC DEFEND
373 SOUTH HIGH STREET
12TH FLOOR
COLUMBUS, OH 43215

A-1

ON COMPUTER 12

John W. Keeling, APD

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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CLERK OF COURTS

State of Ohio,

Plaintiff-Appellee,

v.

D.H.,

Defendant-Appellant.

No. 06AP-250
(C.P.C. No. 05CR04-2388)
(C.P.C. No. 04JU12-17636)

(REGULAR CALENDAR)

JOHN W. KEELING
FRANKLIN CO PUBLIC DEFEND
373 SOUTH HIGH STREET
12TH FLOOR
COLUMBUS, OH 43215

MEMORANDUM DECISION

Rendered on February 27, 2007

Ron O'Brien, Prosecuting Attorney, and *Katherine J. Press*,
for appellee.

Yeura R. Venters, Public Defender, and *John W. Keeling*, for
appellant.

ON MOTION TO CERTIFY

FRENCH, J.

{¶1} Defendant-appellant, D.H., has filed a motion to certify a conflict pursuant to Section 3(B)(4), Article IV, of the Ohio Constitution. A court of appeals must certify a conflict when its judgment "is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state[.]" Section 3(B)(4), Article IV, Ohio Constitution. Thus, "[f]or certification to be proper, there must be conflicting decisions.

between districts on a rule of law." (Emphasis omitted.) *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 598. In addition, "the asserted conflict *must* be 'upon the same question.'" (Emphasis sic.) *Id.* at 596, quoting Section 3(B)(4), Article IV, Ohio Constitution. Furthermore, "the alleged conflict must be on a rule of law—not facts." *Whitelock* at 596. Here, appellant contends that our opinion in *State v. D.H.*, Franklin App. No. 06AP-250, 2006-Ohio-6953, conflicts with the Third District Court of Appeals' decision in *In re Hill*, Allen App. No. 1-05-65, 2006-Ohio-2504.

{¶2} In *D.H.*, pursuant to the serious youthful offender statutes, the juvenile court imposed a blended juvenile/adult sentence on appellant's third-degree felony reckless homicide juvenile adjudication. *Id.* at ¶¶22-26. R.C. 2152.13(D)(2)(a) governs a juvenile court's discretion to impose a blended juvenile/adult sentence on a serious youthful offender and states, in pertinent part:

If a child is adjudicated a delinquent child for committing an act under circumstances that allow, but do not require, the juvenile court to impose on the child a serious youthful offender dispositional sentence under section 2152.11 of the Revised Code, all of the following apply:

(i) If the juvenile court on the record makes a finding that, given the nature and circumstances of the violation and the history of the child, the length of time, level of security, and types of programming and resources available in the juvenile system alone are not adequate to provide the juvenile court with a reasonable expectation that the purposes set forth in section 2152.01 of the Revised Code will be met, the juvenile court may impose upon the child a sentence available for the violation, as if the child were an adult, under Chapter 2929. of the Revised Code, except that the juvenile court shall not impose on the child a sentence of death or life imprisonment without parole.

{¶3} On the adult portion of the blended sentence in *D.H.*, the juvenile court imposed a single three-year prison sentence for appellant's third-degree felony reckless homicide, which is a sentence above the one-year minimum prison sentence authorized for adult sentences for third-degree felonies. *Id.* at ¶70. In imposing the non-minimum sentence for the reckless homicide, the juvenile court made findings under R.C. 2929.14(B) of Ohio's adult felony sentencing statutes. *Id.*

{¶4} On appeal in *D.H.*, we examined whether *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, implicated the juvenile court's findings under R.C. 2929.14(B). See *D.H.* at ¶69-73. *Foster* stems from *Blakely v. Washington* (2004), 542 U.S. 296, and *Apprendi v. New Jersey* (2000), 530 U.S. 466. In *Apprendi*, the United States Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. Otherwise, the sentence violates a defendant's right to a jury trial under the Sixth Amendment to the United States Constitution and Fourteenth Amendment due process guarantees. *Apprendi* at 476-478, 497. In *Blakely*, the United States Supreme Court defined "'statutory maximum' for *Apprendi* purposes" as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" (Emphasis sic.) *Blakely* at 2537. In *Foster*, the Ohio Supreme Court concluded that portions of Ohio's felony sentencing statutes violate the Sixth Amendment to the United States Constitution in the manner set forth in *Blakely*. *Foster* at ¶50-83. Specifically, the court stated that, under certain circumstances, the felony

sentencing statutes unconstitutionally require a trial court to make "specific findings before imposing a sentence beyond that presumed solely by a jury verdict or admission of a defendant." *Id.* at ¶54. Thus, in *Foster*, the Ohio Supreme Court severed from Ohio's felony sentencing laws the unconstitutional statutes, such as R.C. 2929.14(B). *Id.* at ¶99.

{¶5} In *D.H.*, the juvenile court imposed the blended juvenile/adult serious youthful offender sentence before *Foster* issued its decision on Ohio's adult felony sentencing statutes in R.C. Chapter 2929. *D.H.* at ¶71. Ultimately, in *D.H.*, we concluded that *Foster* did not implicate the juvenile court's R.C. 2929.14(B) findings because "*Blakely, Foster*, the Sixth Amendment to the United States Constitution, and Sections 5 and 10, Article I of the Ohio Constitution did not confer jury-trial rights on the R.C. 2929.14(B) findings that the juvenile court made when it imposed the adult portion of the serious-youthful-offender sentence" pursuant to R.C. 2152.13(D)(2)(a). *D.H.* at ¶73. As such, we concluded that "the juvenile court did not make the R.C. 2929.14(B) findings in violation of constitutional jury-trial rights articulated under the Sixth Amendment to the United States Constitution and Sections 5 and 10, Article I of the Ohio Constitution, or in contravention of *Blakely* and *Foster*." *D.H.* at ¶73.

{¶6} Conversely, in *In re Hill*, another pre-*Foster* sentencing case, the Third District Court of Appeals concluded that *Foster* implicated the findings that a juvenile court made under Ohio's adult felony sentencing statutes, including R.C. 2929.14(B), when the juvenile court imposed the adult portion of a blended juvenile/adult sentence on a serious youthful offender. *In re Hill* at ¶20-21. Thus, the appellate court concluded

that it "must vacate the sentence and remand this case to the [juvenile] court for further proceedings consistent with *Foster*." *In re Hill* at ¶21.

{¶7} Both *D.H.* and *In re Hill* examined the "same question," i.e., whether, in a pre-*Foster* sentencing, *Foster* implicated a juvenile court's findings under Ohio's adult felony sentencing laws, such as R.C. 2929.14(B), when the juvenile court imposed an adult sentence on a blended juvenile/adult serious youthful offender sentence. As noted above, in *D.H.*, we concluded that *Foster* did not implicate such findings. *D.H.* at ¶¶69-73. However, in *In re Hill*, the Third District Court of Appeals concluded otherwise that *Foster* did implicate such findings. *In re Hill* at ¶¶20-21. As such, in *D.H.*, we issued an opinion on a rule of law that conflicted with the Third District Court of Appeals' decision in *In re Hill*. Consequently, our opinion in *D.H.* is in conflict with *In re Hill* pursuant to *Whitelock* and Section 3(B)(4), Article IV of the Ohio Constitution.

{¶8} "[W]hen certifying a case as in conflict with the judgment of another court of appeals, either the journal entry or opinion of the court of appeals so certifying must clearly set forth the rule of law upon which the alleged conflict exists." *Whitelock* at 599.

Here, we certify the following issue under conflict:

Do constitutional jury trial rights, as articulated under the Sixth Amendment to the United States Constitution and Sections 5 and 10, Article I of the Ohio Constitution, and as applied to an adult felony sentencing in accordance with *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, and *Blakely v. Washington* (2004), 542 U.S. 296, also apply, in a pre-*Foster* sentencing, to findings that a juvenile court has made under Ohio's adult felony sentencing statutes when the juvenile court imposed the adult portion of a blended juvenile/adult sentence under R.C. 2152.13 of Ohio's serious youthful offender statutes?

{¶9} Therefore, based on the above, we grant appellant's motion to certify a conflict. As such, we instruct the clerk of the Tenth District Court of Appeals to certify the record of this case to the Ohio Supreme Court.

Motion to certify granted.

SADLER, P.J., and BROWN, J., concur.

[Cite as *State v. D.H.*, 2006-Ohio-6953.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, : No. 06AP-250
 : (C.P.C. No. 05CR04-2388)
 v. : (C.P.C. No. 04JU12-17636)
 :
 D.H., : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

O P I N I O N

Rendered on December 28, 2006

Ron O'Brien, Prosecuting Attorney, and *Katherine J. Press*,
for appellee.

Yeura R. Venters, Public Defender, and *John W. Keeling*, for
appellant.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations, Juvenile Branch.

FRENCH, J.

{¶1} Defendant-appellant, D.H., a juvenile, appeals from the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, wherein the juvenile court, pursuant to a jury trial, adjudicated appellant a delinquent having committed two counts of reckless homicide, a third-degree felony, with firearm specifications, in violation of R.C. 2903.041 and 2941.145, respectively.

{¶2} The Franklin County Grand Jury indicted appellant on: (1) one count of murder with a firearm specification, in violation of R.C. 2903.02(A) and 2941.145 respectively; (2) one count of felony murder with a firearm specification, in violation of R.C. 2903.02(B) and 2941.145 respectively; (3) two counts of attempted murder with firearm specifications, in violation of R.C. 2923.02 (as it relates to R.C. 2903.02) and 2941.145, respectively; and (4) two counts of felonious assault with firearm specifications, in violation of R.C. 2903.11 and 2941.145, respectively. The charges stemmed from a December 27, 2004 incident. In particular, the murder and felony murder counts pertained to Kiera Harris' ("Kiera") death. Likewise, the attempted murder and felonious assault counts pertained to injuries sustained to Preston Smith ("Smith") and Brandon Russell ("Russell"). Additionally, each count specified that appellant, being 15 years old at the time of the offenses, used a firearm and, as such, was subject to a serious youthful offender sentence. A serious youthful offender is subject to a sentence prescribed under both juvenile and adult sentencing guidelines. See R.C. 2152.11 and 2152.13.

{¶3} Appellant's case was originally scheduled in the criminal division of the Franklin County Court of Common Pleas, which transferred the case to the juvenile division upon motion of plaintiff-appellee, the State of Ohio. The court recognized that, pursuant to R.C. 2152.13, serious youthful offender cases are tried in juvenile court. Thereafter, appellant invoked his jury trial rights provided under R.C. 2152.13(C)(1), which applies to juveniles being tried as a serious youthful offender.

{¶4} At trial, Smith testified to the following on appellee's behalf. On December 27, 2004, Christopher Harris ("Harris") called Smith on Smith's cell phone.

After the phone conversation, Smith and his friends drove to Harris' house to engage in a fistfight with Harris and his friends. Neither Smith nor his friends brought a firearm. Harris exited his home when Smith and his friends arrived. Harris was with a group of friends, including appellant. The fistfight began, and, during the fight, appellant "went up on the porch[.] * * * point[ed]" a firearm, and shot Smith in the leg. (Tr. at 148.)

{¶5} On cross-examination, Smith verified that, at the time of the December 27, 2004 incident, Harris was a high school freshman, Smith was a high school senior, and Smith's friends "were all either [Smith's] age or older[.]" (Tr. at 159.) Smith also testified on cross-examination that, before the fight, Kiera asked Smith and his friends if they had any firearms.

{¶6} Sean Black ("Black") testified to the following on appellee's behalf. Black was part of Smith's group that fought with Harris on December 27, 2004. During the incident, Kiera "ran up and said that nobody is going to jump her brother[.]" Harris. (Tr. at 211.) Ultimately, Black heard gunshots coming from a porch.

{¶7} Russell was also part of Smith's group and testified that, during the December 27, 2004 fight, he heard gunshots "coming from [a] house[.]" (Tr. at 231.) Russell also testified that, after hearing the gunshots, he noticed bullet holes in his clothes.

{¶8} Erick Golden ("Golden") was also part of Smith's group and testified to the following on appellee's behalf. During the December 27, 2004 incident, Kiera "said don't bring no guns." (Tr. at 280.) Golden responded: "[W]e don't have no guns." (Tr. at 281.) Ultimately, appellant started shooting from a porch.

{¶9} Keisha Harris ("Keisha") is the sister of Harris and Kiera. Keisha testified to the following on appellee's behalf. During the December 27, 2004 incident, Keisha was on her front porch with appellant when she heard gunshots. Thereafter, she noticed that Kiera had been injured. Later that night, appellant told Keisha that he shot one of the fight participants in the leg and told her not to tell anyone that he shot the firearm.

{¶10} Harris testified to the following on appellee's behalf. On December 27, 2004, Eric Green ("Green") called Harris on his cell phone and stated that Smith wanted to meet Harris to fight. Meanwhile, Harris asked appellant to come over to his house, and he obtained his father's firearm. Harris then gave appellant the firearm when appellant arrived. Thereafter, Smith and his friends arrived, and Smith told Harris to "come and fight." (Tr. at 358.) Harris did not want to fight because an unidentified person with Smith had a firearm. Nonetheless, Harris told Smith "to come by [his] house in the middle of the street if he wanted to fight[.]" (Tr. at 358.) Smith and his friends walked up to Harris, and Russell hit Harris. After a fight ensued, Harris heard gunshots. At the time, Harris saw appellant pointing the firearm "at the air." (Tr. at 361.) After the gunshots were fired, Harris ran back to his house. At the house, appellant gave the firearm to Harris' father. Later, Harris found Kiera injured outside the house. Also, on the night of the incident, Harris noticed that appellant's brother, Jordan, had a firearm and someone "threw it under" an automobile. (Tr. at 369.)

{¶11} Deputy Coroner Collie Trant testified that Kiera died from a gunshot that pierced her lungs, aorta, and "the tissues that surround the heart[.]" (Tr. at 412.) Dr. Trant also verified that only one bullet caused Kiera's wounds.

{¶12} Darius Edwards ("Edwards") testified that he spoke with appellant the night of the shooting. According to Edwards, appellant admitted that he shot "one of those other guys." (Tr. at 497.)

{¶13} Darius Schultz ("Schultz") testified to the following on appellee's behalf. On December 27, 2004, Schultz was at Harris' house, and Harris called Smith on "speaker phone." (Tr. at 514.) Harris stated: "I'm going to give you a chance to apologize and we can drop everything." (Tr. at 514.) Smith responded: "[N]o you got me f'd up" and hung up the phone. (Tr. at 514.) Thereafter, Smith called back and stated that he wanted to fight with Harris. Thus, Harris obtained his father's firearm and called appellant. Appellant then came to Harris' house. Ultimately, Smith and his friends arrived, and Schultz went outside with Harris and the other individuals with Harris, including appellant. While outside, appellant had the firearm that Harris previously obtained. Smith and his friends "tried to jump" Harris, and appellant stated: "[H]old up." (Tr. at 529.) Schultz then heard gunshots and, ultimately, ran to Harris' porch, where he found appellant with the firearm. While appellant and Schultz were on the porch, Smith and his friends ran toward the porch, and appellant shot the firearm. Schultz admitted that he initially told law enforcement that appellant did not shoot the firearm.

{¶14} Gary Wilgus from the Ohio Bureau of Criminal Investigation and Identification ("BCI") testified that, when he searched Harris' house after the incident, he found the firearm used during the incident. Wilgus testified that the firearm had "a slight vinegar smell." (Tr. at 640.) Next, Wilgus testified that his office tested the firearm for fingerprints, but his office found no "identifiable latent fingerprints on the gun." (Tr. at

641.) Wilgus also testified that the crime scene was "snowy" and that it is "difficult to preserve the integrity of" a "snowy" crime scene. (Tr. at 644.)

{¶15} Eric Green ("Green") testified to the following on appellee's behalf. Green was socializing with Harris and his friends on December 27, 2004. The individuals were at Green's house. Ultimately, Green drove Harris and his friends to Harris' house. Next, Green went to Golden's house. While Green was at Golden's house, some individuals made "a couple phone calls." (Tr. at 674.) Thereafter, the individuals at Golden's house went to Harris' neighborhood. While at Harris' neighborhood, Green heard gunshots and surmised that the shooting came from one firearm.

{¶16} Franklin County Sheriff Detective Drew McEvoy testified that he and other detectives interviewed appellant after the December 27, 2004 incident. The detectives recorded the interview. Appellee played the recording at trial, and the interview included the following statements:

[APPELLANT]: * * * I came outside, saw everybody all fighting and stuff, went back inside and got the gun –

DETECTIVE SCOTT: Where'd you get the gun from?

[APPELLANT]: * * * [U]nder [Harris'] mattress, but he * * * got it from out of his dad's car. * * *

* * *

[APPELLANT]: And I went back and got the gun. I came back outside. I saw everybody, I saw [Harris] getting jumped. I fired three shots. That's all I can remember. Everything was going so fast. * * * [M]aybe I did empty the clip more than I thought I was. Stuff was going by so fast. Maybe – I couldn't remember. I don't know.

DETECTIVE SCOTT: So you had a friend that was getting beat up.

[APPELLANT]: Yes, getting jumped.

DETECTIVE SCOTT: And you felt that the way to protect your friend was –

[APPELLANT]: Was to try [to] scare them away.

* * *

[APPELLANT]: * * * Then I shot and then they all ran. And then I * * * heard a shot and I hurried up and ran inside. * * *

(Tr. at 744-745.) During the interview, appellant also stated that he "fired toward the ground." (Tr. at 747.) Lastly, Detective McEvoy testified that law enforcement did not test appellant for gunshot residue because "[a]t the time that we developed him as a suspect we were probably seven hours from the shooting[.]" (Tr. at 760-761.)

{¶17} Daniel Davison from BCI testified to the following on appellee's behalf. Davison examined gunshot residue samples from Schultz's and Kiera's hands. Davison found no gunshot residue from Kiera's hands, but Davison found residue from Schultz's left hand. According to Davison, the presence of gunshot residue does not only come from the "hand of a person firing a gun[.]" but may be found "on anything in the vicinity" of a fired weapon. (Tr. at 483.)

{¶18} During closing arguments, appellant's trial counsel argued that the evidence failed to "[put] that gun on [appellant]" and that "it doesn't even make sense that it was on him." (Tr. at 916.) Appellant's trial counsel also argued that law enforcement "never tried to find out if these kids could pick out the shooter. * * * And here we are 11 months later and now they are identifying that guy." (Tr. at 918-919.) Furthermore, appellant's trial counsel argued that no physical evidence linked appellant to the offenses, e.g., "[n]o gunshot residue, no prints, no nothing." (Tr. at 923.) Likewise,

appellant's trial counsel tried to discredit appellant's confession, noting: "[L]isten to the tape * * *. But then try and line it up with what happened, and you know what, it doesn't line up. None of it lines up. None of it makes sense." (Tr. at 932.) Appellant's trial counsel stated during closing arguments: "Are you comfortable beyond a reasonable doubt that [appellant] shot a gun? No." (Tr. at 932-933.)

{¶19} When the juvenile court issued its jury instructions, it instructed the jury on reckless homicide as lesser-included offenses to the murder and felony murder counts in regards to Kiera's death. The juvenile court noted that "[r]eckless homicide is defined as recklessly causing the death of another." (Tr. at 957.) The juvenile court also noted:

A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

(Tr. at 957.)

{¶20} Appellant's trial counsel requested no jury instructions on self-defense or defense of another. Appellant's trial counsel requested no jury instructions on the mental element of negligence as a comparative instruction to the mental element of recklessness, and did not request a jury instruction on negligent homicide as a lesser-included offense to murder and felony murder. In addition, the juvenile court did not provide any such instructions.

{¶21} The jury did not adjudicate appellant delinquent for the felony murder, murder, felonious assault, and attempted murder counts. However, the jury adjudicated the child to be a delinquent minor for having committed the offenses of reckless

homicide as lesser-included offenses to the felony murder and murder counts. Likewise, the jury found that appellant was 15 years old at the time of the incident. The jury also concluded that appellant had a firearm "on or about his person or under his control" and that appellant did "display, and/or brandish and/or indicate he possessed and/or used the firearm in the commission of the offense." Through such additional findings, the jury also adjudicated appellant delinquent on the accompanying firearm specifications and made appellant eligible for a blended adult/juvenile serious youthful offender sentence. R.C. 2152.11(A)(2), 2152.11(F)(2), and 2152.13.

{¶22} On February 8, 2006, the juvenile court held a sentencing hearing. As noted above, the juvenile court had authority to impose an adult sentence on appellant because appellant was tried as a serious youthful offender. See R.C. 2152.13. Due to the jury adjudicating appellant delinquent for reckless homicide, a third-degree felony, the imposition of the adult sentence was discretionary and not mandatory. See R.C. 2152.11(F).

{¶23} At the sentencing hearing, appellant's trial counsel argued against the juvenile court imposing a blended juvenile/adult serious youthful offender sentence. Specifically, appellant's trial counsel argued that "imposing such a sentence would be in violation of [appellant's] Fifth Amendment right, articulated under" *Blakely v. Washington* (2004), 542 U.S. 296. (Tr. at 1003.) Appellant's trial counsel then argued that, even if the juvenile court decided to impose a blended juvenile/adult serious youthful offender sentence, the juvenile court could not properly impose more than the minimum authorized prison sentence on the adult portion. In particular, appellant's trial counsel argued that the record does not support a non-minimum prison sentence, and

appellant's trial counsel also argued that "a maximum sentence, or even a non-minimum sentence would violate his right[s]." (Tr. at 1004.)

{¶24} The juvenile court then stated:

* * * I have the discretion to order a blended sentence on this reckless homicide because a firearm was used and the law requires me to use graduated actions and services to provide for the protection, care and mental and physical development of the child involved in this case. That is just part of the juvenile [serious youthful offender] statute. And I need to consider the circumstances and facts, the juvenile's history, the length of time level and juvenile history, and any adult sentence would be stayed or suspended pending any juvenile disposition.

* * * [Appellant] didn't have any real problems before this incident. He had no school suspensions, no drug or alcohol abuse, no prior mental treatment, no psychosis, according to the psychologist. * * *

* * *

For the felony, I can sentence him to a minimum of one to five years on the felony. The underlying felony and the underlying gun specification, three years. So the total could be four to eight years. And then of course I have to jump the bridge of what [appellant's trial counsel] wants, which is not to impose the serious youthful offender portion of the sentence at all, because it's now discretionary based on what the verdict was after the jury trial.

But one of the big factors is the seriousness of the offense. And * * * a firearm was used, and a little girl died. That is a big factor in the case.

* * * [B]ecause of the seriousness of this incident, I find that * * * the disposition should be that a serious youthful offender blended sentence should occur. * * *

(Tr. at 1010-1012.)

{¶25} In finding appellant a serious youthful offender, the juvenile court imposed an adult and juvenile sentence on appellant. As to the juvenile disposition, the juvenile A-17

court committed appellant to the legal custody of the Department of Youth Services for an indefinite term of six months and a maximum period not to exceed appellant's attainment of 21 years of age. As to the adult sentence for appellant's third-degree felony reckless homicide, the juvenile court imposed a single three-year prison sentence, which is above the one-year minimum prison sentence authorized for such felonies. See R.C. 2929.14(A). Likewise, the juvenile court imposed an additional single three-year prison sentence on the accompanying firearm specifications.

{¶26} In imposing a non-minimum sentence on the reckless homicide, the juvenile court made findings under R.C. 2929.14(B) of Ohio's felony sentencing guidelines. Specifically, the juvenile court stated:

The adult portion then I need to look at the one to five years, and the seriousness of the offense, and why I could do the minimum or maximum. And based on the seriousness of the offense, that the shortest sentence to me would demean the seriousness of [appellant's] conduct. Court will sentence [appellant] to three years on the reckless homicide F-3. * * *

(Tr. at 1013.) The juvenile court then issued a judgment entry noting that it found appellant to be a delinquent minor child having committed the offense of reckless homicide with firearm specifications. The juvenile court also reiterated the above-noted blended juvenile/adult serious youthful offender sentence.

{¶27} Appellant appeals, raising three assignments of error:

ASSIGNMENT OF ERROR NUMBER ONE

THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO PROPERLY INSTRUCT THE JURY ON THE LAW RELEVANT TO SELF-DEFENSE AND THE DEFENSE OF OTHERS WHEN THE FACTS WARRANTED SUCH INSTRUCTIONS. THE TRIAL COURT FURTHER ERRED WHEN IT FAILED TO INSTRUCT ON THE DEFINITION OF CRIMINALLY NEGLIGENT CONDUCT SO THAT THE

JURY COULD PROPERLY COMPARE AND CONTRAST THE MENTAL STATES OF RECKLESS AND NEGLIGENCE. THE DEFENDANT WAS ALSO DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO REQUEST THESE INSTRUCTIONS.

ASSIGNMENT OF ERROR TWO

THE TRIAL COURT ERRED WHEN IT IMPOSED AN ADULT SENTENCE UPON THE DEFENDANT BY MAKING PREDICATE FINDINGS THAT WERE CONSTITUTIONALLY IMPROPER FOR THE COURT TO MAKE UNDER *STATE V. FOSTER*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

ASSIGNMENT OF ERROR THREE

THE TRIAL COURT ERRED WHEN IT IMPOSED A SENTENCE GREATER THAN THE SHORTEST PRISON TERM AUTHORIZED FOR THE ADULT OFFENSE IN THE ABSENCE OF ANY FACTS, EITHER ADMITTED BY THE DEFENDANT OR FOUND BY A JURY, THAT WOULD HAVE ALLOWED THE TRIAL COURT TO DEPART FROM ITS OBLIGATION TO IMPOSE THE SHORTEST PRISON TERM UPON AN OFFENDER WHO HAD NEVER SERVED A PREVIOUS PRISON TERM PURSUANT TO R.C. 2929.14(B).

{¶28} In his first assignment of error, appellant contends that the juvenile court committed plain error by not providing a jury instruction on negligent homicide as a lesser-included offense to murder and felony murder, and, in general, by not providing a definition of the mental element of negligence as a comparative jury instruction with the mental element of recklessness. Appellant also claims that the juvenile court committed plain error by not providing jury instructions on self-defense and defense of another. Similarly, appellant contends that his trial counsel rendered ineffective assistance by not requesting the above-noted jury instructions. We disagree.

{¶29} As appellant recognizes, appellant's trial counsel did not request the above-noted jury instructions, and, thus, appellant has waived all but plain error on that issue. *State v. Coley* (2001), 93 Ohio St.3d 253, 266. 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." "By its very terms, the rule places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial." *State v. Barnes* (2002), 94 Ohio St.3d 21, 27. Under the plain error standard:

* * * First, there must be an error, *i.e.*, a deviation from a legal rule. * * * Second, the error must be plain. To be "plain" within the meaning of Crim.R. 52(B), an error must be an "obvious" defect in the trial proceedings. * * * Third, the error must have affected "substantial rights." We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial. * * *

Id.

{¶30} We first address appellant's claim that the juvenile court committed plain error by not issuing a self-defense jury instruction. In order for a defendant to establish self-defense against danger of death or great bodily harm, he must prove by a preponderance of the evidence: (1) that he was not at fault in creating the situation giving rise to the altercation; (2) that he had a bona fide belief that he was in immediate danger of bodily harm and that his only means of escape from such danger was the use of force; and (3) that he did not violate any duty to retreat or to avoid the danger. *State v. Jackson* (1986), 22 Ohio St.3d 281, 284; *State v. Griffin*, Montgomery App. No. 20681, 2005-Ohio-3698, at ¶18. In contrast, to establish self-defense against non-deadly force, the defendant must establish: (1) that the defendant was not at fault in

creating the situation giving rise to the altercation; and (2) that he had reasonable grounds to believe and an honest belief, even though mistaken, that he was in imminent danger of bodily harm and his only means to protect himself from such danger was by the use of force not likely to cause death or great bodily harm. *State v. Hansen*, Athens App. No. 01CA15, 2002-Ohio-6135, at ¶24; *Griffin* at ¶18.

{¶31} As indicated above, self-defense includes a "subjective * * * consideration of whether the defendant had an honest belief that he was" in danger. *State v. Robinson* (1999), 132 Ohio App.3d 830, 837. Here, appellant confessed that he shot the firearm because a group of men were harming Harris, and appellant "felt that the way to protect" Harris "[w]as to try [to] scare [the group] away" by shooting the firearm. (Tr. at 745.) Thus, by his admission, appellant did not act in self-defense when discharging the firearm, and the juvenile court did not commit plain error when it failed to provide a self-defense jury instruction.

{¶32} Furthermore, we conclude that the juvenile court did not commit plain error when it failed to provide an instruction on defense of another. Defense of another is a variation of self-defense. *State v. Moss*, Franklin App. No. 05AP-610, 2006-Ohio-1647, at ¶13. Under certain circumstances, an individual may use appropriate force to defend another. *Id.* However, "one who intervenes to help a stranger stands in the shoes of the person whom he is aiding, and if the person aided is the one at fault, then the intervenor is not justified in his use of force[.]" *State v. Wenger* (1979), 58 Ohio St.2d 336, 340; *Moss* at ¶13; see, also, *Ellis v. State* (1992), 64 Ohio St.3d 391, 394, citing *Wenger* at 339-340 (recognizing that "one who uses force to intervene in a conflict on behalf of another may not invoke a privilege of self-defense if the person defended was the

aggressor in the conflict"). (Emphasis omitted.) Moreover, in *State v. Smith*, Washington App. No. 02CA75, 2003-Ohio-1712, at ¶11, the Fourth District Court of Appeals held that an individual is not entitled to claim defense of another in regards to a physical altercation if the person being defended voluntarily entered the physical altercation.

{¶33} Here, Harris voluntarily entered the December 27, 2004 physical altercation and, pursuant to *Smith*, appellant was not entitled to claim defense of another. Specifically, Harris testified that, although he did not want to fight, he nonetheless exited his home and told Smith "to come by [his] house in the middle of the street if he wanted to fight[.]" (Tr. at 358.) Additionally, in light of Harris exiting his home and making such a statement, we find it significant that Harris also had appellant come over to his home before the fight.

{¶34} We also reject appellant's contention that the juvenile court committed plain error when it failed to provide a jury instruction on negligent homicide as a lesser-included offense to murder and felony murder. We conclude as such because negligent homicide is not a lesser-included offense to murder or felony murder. See *State v. Koss* (1990), 49 Ohio St.3d 213, 219; *State v. Brundage*, Hamilton App. No. C-030632, 2004-Ohio-6436, at ¶8.

{¶35} In addition, we reject appellant's contention that the juvenile court committed plain error by not providing a definition of the mental element of negligence as a comparative jury instruction with the mental element of recklessness, which, as noted above, is the mental state for reckless homicide, the crime for which the jury adjudicated appellant delinquent. Appellant asserts that such an instruction would have allowed the jury to compare the definition of negligence against the definition of

recklessness. Through such an argument, appellant is essentially maintaining that the jury might have acquitted appellant had it determined that appellant acted negligently and not recklessly, given that appellant was not charged with any crimes containing the negligent mental element, i.e., negligent homicide.

{¶36} We have previously recognized the benefits of providing, under certain circumstances, a jury instruction that compares definitions of mental elements, even though one of the mental elements does not pertain to the charges in the case. See *City of Columbus v. Akins* (Sept. 27, 1984), Franklin App. No. 83AP-977. However, *Akins* does not automatically require such instructions on comparative mental elements, and such comparative instructions may not be needed in cases where the provided instructions are adequate. See *State v. Courtright* (Sept. 2, 1986), Franklin App. No. 86AP-34; *State v. Montgomery* (Sept. 26, 2000), Franklin App. No. 99AP-1198. Here, pursuant to *Courtright* and *Montgomery*, we note that the juvenile court's jury instruction on recklessness tracked the statutory definition, and we conclude that the instruction adequately allowed the jury to consider the elements of reckless homicide. Accordingly, we determine that a comparative instruction on negligence was not warranted.

{¶37} Next, we address appellant's claim that his trial counsel rendered ineffective assistance by not requesting the above-noted jury instructions. The United States Supreme Court established a two-pronged test for ineffective assistance of counsel. *Strickland v. Washington* (1984), 466 U.S. 668. First, the defendant must show that counsel's performance was outside the range of professionally competent assistance and, therefore, deficient. *Id.* at 687. Second, the defendant must show that counsel's deficient performance prejudiced the defense and deprived the defendant of a

fair trial. *Id.* A defendant establishes prejudice if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

{¶38} A properly licensed attorney is presumed competent. *State v. Samatar*, 152 Ohio App.3d 311, 2003-Ohio-1639, at ¶88, citing *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 301. Moreover, there is " 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]' " *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, quoting *Strickland* at 689. In matters regarding trial strategy, we will generally defer to defense counsel's judgment. *State v. Carter* (1995), 72 Ohio St.3d 545, 558; see, also, *State v. Carpenter* (1996), 116 Ohio App.3d 615, 626, citing *Bradley* at 144 (holding that we are to "presume that a broad range of choices, perhaps even disastrous ones, are made on the basis of tactical decisions and do not constitute ineffective assistance"). We will only reverse on trial strategy grounds if defense counsel's trial strategy deviated from the standard of reasonableness. *State v. Burgins* (1988), 44 Ohio App.3d 158, 160; *State v. Newsome*, Ashtabula App. No. 2003-A-0076, 2005-Ohio-3775, at ¶8.

{¶39} Here, we conclude that appellant's trial counsel's failure to request the above-noted jury instructions did not constitute ineffective assistance. See *Strickland* at 687, 694. First, we find that reasonable trial strategy supports appellant's trial counsel's decision not to request a jury instruction on self-defense or defense of another. Appellant's trial counsel argued that the evidence failed to establish that appellant shot the firearm that caused Kiera's death. As noted above, self-defense, and concomitantly

the related defense of another, serve as a " 'justification for admitted conduct.' " See *City of Columbus v. Peoples*, Franklin App. No. 05AP-247, 2006-Ohio-1718, at ¶46. Such defenses "[represent] more than a 'denial or contradiction of evidence which the prosecution has offered as proof of an essential element of the crime charged[.]'" *Id.*, quoting *State v. Poole* (1973), 33 Ohio St.2d 18, 19. Rather, self-defense and defense of another "[admit] the facts claimed by the prosecution and then rel[y] on independent facts or circumstances which the defendant claims exempt him from liability." (Emphasis omitted.) *Peoples* at ¶46. Thus, it would have been " 'logically and legally inconsistent' " for appellant's trial counsel to assert for appellant both self-defense and defense of another while also arguing that appellant did not shoot the firearm that caused Kiera's death. See *Peoples* at ¶48, quoting *State v. Powell* (Sept. 29, 1997), Ross App. No. 96CA2257. Similarly, we recognize the above-noted record support for appellant's trial counsel's defense and, therefore, we have no cause to second-guess appellant's trial counsel's strategy to forgo self-defense and defense of another arguments and instead argue that the evidence failed to establish that appellant shot the firearm that caused Kiera's death. See *Carter* at 558; *Carpenter* at 626, citing *Bradley* at 144.

{¶40} Next, we note that it would have been futile for appellant's trial counsel to request a jury instruction on negligent homicide as a lesser-included offense to murder or felony murder, given that we have stated above that negligent homicide is not a lesser-included offense to such crimes. See *Koss* at 219; *Brundage* at ¶8. Thus, appellant's trial counsel was not ineffective for failing to make such a futile request. See *State v. Jones* (June 13, 2000), Franklin App. No. 99AP-704. Similarly, we find that appellant's trial counsel was not ineffective for failing to request a jury instruction on the

mental element of negligence as a comparative instruction to the mental element of recklessness, given our above conclusion that such an instruction was not warranted.

See *Jones*.

{¶41} Again, we conclude that the juvenile court did not commit plain error by not providing the above-noted jury instructions, and we conclude that appellant's trial counsel did not render ineffective assistance by failing to request the above-noted jury instructions. As such, we overrule appellant's first assignment of error.

{¶42} We next address appellant's second assignment of error, which concerns his blended juvenile/adult sentence for reckless homicide with a firearm specification. As noted above, upon adjudicating appellant delinquent on reckless homicide, the jury also found that appellant was 15 years old at the time of the incident, that appellant had a firearm "on or about his person or under his control[.]" and that appellant did "display, and/or brandish and/or indicate he possessed and/or used the firearm in the commission of the offense." Through such additional findings, the jury made appellant eligible for a serious youthful offender sentence. R.C. 2152.11(A)(2), 2152.11(F)(2), and 2152.13. A serious youthful offender is subject to a sentence prescribed under both juvenile and adult sentencing guidelines. See R.C. 2152.11 and 2152.13. Due to appellant's delinquency adjudication for reckless homicide, a third-degree felony, the imposition of the adult sentence was discretionary, not mandatory. See R.C. 2152.11(F). R.C. 2152.13(D)(2)(a) governs a juvenile court's discretion to impose a blended juvenile/adult sentence on a serious youthful offender and states:

If a child is adjudicated a delinquent child for committing an act under circumstances that allow, but do not require, the juvenile court to impose on the child a serious youthful

offender dispositional sentence under section 2152.11 of the Revised Code, all of the following apply:

(i) If the juvenile court on the record makes a finding that, given the nature and circumstances of the violation and the history of the child, the length of time, level of security, and types of programming and resources available in the juvenile system alone are not adequate to provide the juvenile court with a reasonable expectation that the purposes set forth in section 2152.01 of the Revised Code will be met, the juvenile court may impose upon the child a sentence available for the violation, as if the child were an adult, under Chapter 2929. of the Revised Code, except that the juvenile court shall not impose on the child a sentence of death or life imprisonment without parole.

(ii) If a sentence is imposed under division (D)(2)(a)(i) of this section, the juvenile court also shall impose upon the child one or more traditional juvenile dispositions under sections 2152.16, 2152.19, and 2152.20 and, if applicable, section 2152.17 of the Revised Code.

Further, under R.C. 2152.13(D)(2)(a)(iii):

(iii) The juvenile court shall stay the adult portion of the serious youthful offender dispositional sentence pending the successful completion of the traditional juvenile dispositions imposed.

{¶43} R.C. 2152.01, referenced in R.C. 2152.13(D)(2)(a), establishes the purposes for juvenile dispositions and states, in pertinent part:

(A) The overriding purposes for dispositions under this chapter are to provide for the care, protection, and mental and physical development of children subject to this chapter, protect the public interest and safety, hold the offender accountable for the offender's actions, restore the victim, and rehabilitate the offender. * * *

{¶44} Thus, R.C. 2152.13(D)(2)(a) sets out a two-tiered approach once a minor is adjudicated delinquent under circumstances that allow, but do not require, a blended juvenile/adult serious youthful offender sentence: (1) the court must make findings that

the juvenile sentence is not adequate to meet the purposes in R.C. 2152.01; and (2) if the court makes those findings, then the court may impose an adult sentence.

{¶45} After exercising its discretion to impose a blended juvenile/adult sentence on a serious youthful offender, "[t]he juvenile court shall stay the adult portion of the serious youthful offender dispositional sentence pending the successful completion of the traditional juvenile dispositions imposed." R.C. 2152.13(D)(2)(a)(iii). However, under R.C. 2152.14(E), the juvenile court may later invoke the adult portion of a serious youthful offender sentence on a juvenile if, after a hearing, the juvenile court finds on record by clear and convincing evidence that: (1) the juvenile is serving the juvenile portion of a serious youthful offender dispositional sentence; and (2) the juvenile is at least 14 years of age and has been admitted to a department of youth services facility, or criminal charges are pending against the juvenile. Additionally, to invoke the adult sentence under R.C. 2152.14(E), the juvenile court must find on record by clear and convincing evidence either of the following: (1) the juvenile, after reaching 14 years of age and while in custody of a department of youth services' facility, violated rules of the facility by committing any felony or a first-degree misdemeanor offense of violence; (2) the juvenile, after reaching 14 years of age and while in custody of a department of youth services' facility, engaged in conduct that creates a substantial risk to the safety or security of the facility, the community or the victim; (3) the juvenile, while on community control or parole, violated a condition of the community control or parole by committing any felony or a first-degree misdemeanor offense of violence; or (4) the juvenile, while on community control or parole, engaged in conduct that creates a substantial risk to the safety or security of the community or of the victim. Lastly, to

invoke the adult sentence under R.C. 2152.14(E), in addition to the above factors, the juvenile court must find that the juvenile's conduct demonstrates that he or she is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction. The juvenile court "may modify the adult sentence the court invokes to consist of any lesser prison term that could be imposed for the offense and, in addition to the prison term or in lieu of the prison term if the prison term was not mandatory, any community control sanction that the [juvenile] was eligible to receive at sentencing." R.C. 2152.14(E)(2).

{¶46} Here, in challenging the juvenile court's decision to impose the blended juvenile/adult sentence, appellant first contends that the juvenile court failed to specify on the record all of the requisite findings under R.C. 2152.13(D)(2)(a)(i), i.e.:

* * * [G]iven the nature and circumstances of the violation and the history of the child, the length of time, level of security, and types of programming and resources available in the juvenile system alone are not adequate to provide the juvenile court with a reasonable expectation that the purposes set forth in section 2152.01 of the Revised Code will be met * * *.

According to appellant, the juvenile court found that appellant committed a serious offense, that appellant used a firearm, and that someone died from appellant's actions. Nonetheless, appellant argues, the juvenile court did not find, pursuant to R.C. 2152.13(D)(2)(a)(i), that "the length of time, level of security, and types of programming and resources available in the juvenile system alone are not adequate to provide the juvenile court with a reasonable expectation that the purposes set forth in section 2152.01 of the Revised Code will be met[.]"

{¶47} However, in finding that a blended juvenile/adult sentence was warranted, the juvenile court mentioned at the sentencing hearing its responsibility to impose a

sentence that will "provide for the protection, care and mental and physical development" of appellant, which are dispositional purposes under R.C. 2152.01 and, thus, factors for consideration under R.C. 2152.13(D)(2)(a). (Tr. at 1010.) The juvenile court also mentioned its consideration of other factors under R.C. 2152.13(D)(2)(a), i.e., "the length of time[,] level and juvenile history," and, as appellant acknowledges, the juvenile court recognized the seriousness of appellant's offense. (Tr. at 1010.) As such, we conclude that the juvenile court referenced the requisite factors to impose a blended juvenile/adult sentence pursuant to R.C. 2152.13(D)(2)(a).

{¶48} Alternatively, appellant asserts that the juvenile court imposed the blended juvenile/adult sentence after making findings under R.C. 2152.13(D)(2)(a) in violation of constitutional jury trial principles and in contravention of *Blakely* and *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

{¶49} The Sixth Amendment to the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]" Under the Fourteenth Amendment, the Sixth Amendment is applicable to the states. *Duncan v. Louisiana* (1968), 391 U.S. 145, 148.

{¶50} "It was not anticipated that jury rights may be implicated in sentencing until *Apprendi v. New Jersey* [2000], 530 U.S. 466[.]" *Foster* at ¶3. In *Apprendi*, the United States Supreme Court examined New Jersey's hate-crime statute, which allowed an enhanced sentence if the judge found by a preponderance of the evidence that racial bias was a motive for the offense. *Id.* at 468-469. The trial court imposed such an enhanced sentence against a defendant's conviction for second-degree felony unlawful possession of a bomb. *Id.* at 468-471. In imposing the enhanced sentence, the trial

court found by a preponderance of the evidence that the defendant had a racial bias in committing the unlawful possession of a bomb offense. *Id.* at 471. The enhanced sentence exceeded the ten-year maximum sentence allotted for non-enhanced second-degree felonies. *Id.* at 468-469, 471. The United States Supreme Court concluded that the defendant's sentence violated Sixth Amendment jury trial principles and stated that, in accordance with the Sixth Amendment, the jury, rather than a judge, must find all facts essential to punishment. *Id.* at 490, 497.

{¶51} Specifically, the United States Supreme Court stated:

* * * The question whether [the defendant] had a constitutional right to have a jury find * * * bias on the basis of proof beyond a reasonable doubt is starkly presented.

Our answer to that question was foreshadowed by our opinion in *Jones v. United States* [(1999), 526 U.S. 227], construing a federal statute. We there noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 243, n. 6, 119 S.Ct. 1215. The Fourteenth Amendment commands the same answer in this case involving a state statute.

Apprendi at 476-475.

{¶52} The United States Supreme Court then ultimately concluded:

In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.
* * *

Apprendi at 490.

{¶53} "In *Blakely* * * *, the *Apprendi* rule was broadened." *Foster* at ¶5. In *Blakely*, a defendant pled guilty in Washington state court to second-degree kidnapping involving domestic violence and use of a firearm, a felony carrying a ten-year maximum prison penalty. *Blakely* at 298-299. However, other sentencing provisions specified a standard range of 49 to 53 months for second-degree felony kidnapping with a firearm. *Id.* at 299. Yet, a judge may impose a sentence above the standard range upon finding " 'substantial and compelling reasons justifying an exceptional sentence.' " *Id.*, quoting Wash.Rev.Code Ann. 9.94A.120(2).

{¶54} In *Blakely*, the trial court imposed a prison term of 90 months, after making a finding that the defendant acted with " 'deliberate cruelty,' " one of the statutorily enumerated grounds that justified an exceptional sentence. *Id.* at 300, quoting Wash.Rev.Code Ann. 9.94A.390(2)(h)(iii). The United States Supreme Court held that the defendant's sentence violated his Sixth Amendment right to a jury trial because a jury did not find the facts that permitted the enhanced sentence. *Id.* at 304-305. Although the prosecution argued that the trial court had not violated *Apprendi* because the statutory maximum was ten years, the United States Supreme Court held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* * * * In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (Emphasis sic.) *Blakely* at 303-304. In so concluding, the court made no exception for whether the "determined facts *require* a sentence enhancement or merely *allow* it[.]" (Emphasis sic.) *Blakely* at 305, fn. 8.

{¶55} Since appellant's sentencing, the Ohio Supreme Court decided the applicability of *Blakely* to Ohio's felony sentencing laws in *Foster*. In *Foster*, the Ohio Supreme Court concluded that portions of Ohio's felony sentencing statutes violate the Sixth Amendment to the United States Constitution in the manner set forth in *Blakely*. *Foster* at ¶50-83. Specifically, the court stated that, under certain circumstances, the felony sentencing statutes require a trial court to make "specific findings before imposing a sentence beyond that presumed solely by a jury verdict or admission of a defendant." *Id.* at ¶54. Accordingly, in *Foster*, the Ohio Supreme Court severed the unconstitutional statutes from Ohio's felony sentencing laws. *Id.* at ¶99. The Ohio Supreme Court then concluded that cases pending on direct review "must be remanded to trial courts for new sentencing hearings[.]" *Id.* at ¶104.

{¶56} In *State v. Draughon*, Franklin App. No. 05AP-860, 2006-Ohio-2445, at ¶7, we acknowledged the "broad language the Supreme Court of Ohio used in *Foster* when it ordered resentencing for all cases pending on direct review." However, we concluded that "a defendant who did not assert a *Blakely* challenge in the trial court waives that challenge and is not entitled to a resentencing hearing based on *Foster*." *Id.* In so concluding, we "consider[ed] the language used in *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, the case that *Foster* relied on in arriving at" its decision to sever the unconstitutional statutes from Ohio's felony sentencing laws. *Draughon* at ¶7. "In *Booker*, the United States Supreme Court applied *Blakely* to the Federal Sentencing Guidelines. The *Booker* Court applied its holding to all cases on direct review." *Draughon* at ¶7. However, the *Booker* court "expected reviewing courts to apply 'ordinary prudential doctrines,' such as waiver * * * to determine whether to

remand a case for a new sentencing." *Draughon* at ¶7, quoting *Booker* at 268. "Thus, in accordance with the well-settled doctrine of waiver of constitutional challenges, and the language in *Booker*, we [held] that a *Blakely* challenge is waived by a defendant sentenced after *Blakely* if it was not raised in the trial court." *Draughon* at ¶8.

{¶57} Here, appellee contends that appellant waived the argument that the Sixth Amendment jury trial right enunciated in *Blakely* and *Foster* precluded the juvenile court from making findings under R.C. 2152.13(D)(2)(a). Appellee notes that appellant's trial counsel instead argued to the juvenile court that appellant's *Fifth* Amendment rights "articulated under" *Blakely* precluded the juvenile court from making R.C. 2152.13(D)(2)(a) findings.

{¶58} A party waives error on appeal when the party "could have called, but did not call, to the trial court's attention" error that "could have been avoided or corrected by the trial court." *State v. Williams* (1977), 51 Ohio St.2d 112, paragraph one of the syllabus, modified on other grounds, *State v. Gillard* (1988), 40 Ohio St.3d 226. Here, although appellant's trial counsel referenced appellant's Fifth Amendment rights when arguing against the juvenile court making R.C. 2152.13(D)(2)(a) findings, appellant's trial counsel also essentially advised the juvenile court to adhere to *Blakely*, a case grounded in Sixth Amendment jury trial principles. In this regard, under *Williams*, we cannot say that appellant's trial counsel waived the argument that appellant brings on appeal, i.e., that *Blakely*, a case grounded in Sixth Amendment jury trial principles, precluded the juvenile court from making R.C. 2152.13(D)(2)(a) findings. We therefore examine appellant's claim whether the juvenile court imposed the blended juvenile/adult sentence after making findings under R.C. 2152.13(D)(2)(a) in violation of jury trial

principles afforded by the Sixth Amendment and in contravention of *Blakely* and, as recognized after appellant's sentencing, *Foster*.

{¶59} Under Ohio law, a juvenile subject to a serious youthful offender blended juvenile/adult sentence is entitled to a jury trial in juvenile court. See R.C. 2152.13(C)(1). However, we note that, in *McKeiver v. Pennsylvania* (1970), 403 U.S. 528, 545, the United States Supreme Court held in a plurality opinion that "trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement" under the Sixth Amendment. In doing so, while acknowledging the disappointments within the juvenile court system, the United States Supreme Court recognized that the juvenile system was established "[i]n theory" to "be helpful and rehabilitative rather than punitive." *Id.* at 544, fn. 5, quoting President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime (1967), 7-9 ("Task Force Report"). The United States Supreme Court also recognized that, "[i]n theory the [juvenile] court's operations could justifiably be informal, its findings and decisions made without observing ordinary procedural safeguards, because it would act only in the best interest of the child." *McKeiver* at 544, quoting Task Force Report at 9. Likewise, the court recognized that "[w]hat should distinguish the juvenile from criminal courts is greater emphasis on rehabilitation, not exclusive preoccupation with it." *McKeiver* at 546, fn. 6, quoting Task Force Report at 9. In examining the nature of the juvenile court system, the United States Supreme Court concluded that "[t]here is a possibility, at least, that the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an

intimate, informal protective proceeding." *McKeiver* at 545. Similarly, the court concluded that "[i]f the jury trial were to be injected into the juvenile court system as a matter of right, it would bring with it into that system the traditional delay, the formality, and the clamor of the adversary system[.]" *Id.* at 550. Lastly, the court did recognize that "[i]f, in its wisdom, any State feels the jury trial is desirable in all cases, or in certain kinds, there appears to be no impediment to its installing a system embracing that feature. That, however, is the State's privilege and not its obligation." *Id.* at 547; see, also, *In re Anderson* (2001), 92 Ohio St.3d 63, 66 (recognizing that *McKeiver* declined to mandate jury trial rights in juvenile proceedings); see, also, *In re Cundiff* (Jan. 13, 2000), Franklin App. No. 99AP-364 (reiterating that *McKeiver* held that " 'trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement' ").

{¶60} In *United States ex rel Murray v. Owens* (C.A.2, 1972), 465 F.2d 289, 292, the United States Court of Appeals for the Second Circuit analyzed *McKeiver* and stated that "the conclusion is inescapable that the Supreme Court in no way implied that jury trials were constitutionally required if the ultimate disposition following an adjudication of delinquency was the same as for older offenders." The court also stated that the United States Supreme Court's rationale for not providing a Sixth Amendment right to a jury trial in juvenile proceedings "is not altered by whether the juvenile once adjudged a delinquent, is committed to a juvenile or an adult facility." *Id.*

{¶61} Thus, in accordance with *Owens*, whether the Sixth Amendment jury trial right as applied in *Blakeley* applies to R.C. 2152.13(D)(2)(a) findings is not determined by the serious youthful offender's potential adult sentence. Similarly, as *McKeiver* suggests, the provision in R.C. 2152.13(C)(1) that provides a jury trial right in a serious

youthful offender case is, itself, irrelevant to whether the Sixth Amendment as applied in *Blakely* imposes such jury trial rights to R.C. 2152.13(D)(2)(a) findings. See *McKeiver* at 547.

{¶62} Rather, we initially note that a juvenile tried as a serious youthful offender is under the jurisdiction of the juvenile court, which, in contrast to criminal courts, according to *McKeiver*, places a greater emphasis on rehabilitation rather than punishment. See *McKeiver* at 546, fn. 6. The serious youthful offender statutes do not obviate the juvenile court's focus on rehabilitation rather than punishment. As an example, before actually requiring a juvenile to serve the adult sentence, after previously pronouncing such a sentence at the sentencing hearing, the juvenile court must determine, in pertinent part, that the juvenile is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction. See R.C. 2152.14(E). Likewise, R.C. 2152.01 emphasizes that the "overriding purposes" for juvenile court dispositions are, in pertinent part, "to provide for the care, protection, and mental and physical development of children" and to "rehabilitate the offender[.]" and, under R.C. 2152.13(D)(2)(a), the juvenile court must consider such "overriding purposes" when initially deciding at the sentencing hearing whether to impose a blended juvenile/adult sentence on a serious youthful offender. To be sure, R.C. 2152.01 also notes that the "overriding purposes" for juvenile dispositions are to "protect the public interest and safety, hold the offender accountable for the offender's actions [and] restore the victim[.]" However, such other factors merely confirm *McKeiver's* recognition that the juvenile court places " 'emphasis on rehabilitation' " but " 'not exclusive preoccupation with it.' " See *McKeiver* at 546, fn. 6, quoting Task Force Report at 9. Accordingly, given that appellant was tried in juvenile

court, which, in contrast to the criminal court system, emphasizes rehabilitation over punishment, and given that the serious youthful offender statutes, including R.C. 2152.13(D)(2)(a), do not obviate the distinct rehabilitative aspects of the juvenile court system, we conclude that, pursuant to *McKeiver*, the Sixth Amendment as applied in *Blakely*, a case grounded in Sixth Amendment principles, does not confer jury trial rights on R.C. 2152.13(D)(2)(a) findings.

{¶63} In so concluding, we emphasize that *Blakely* "showed no intention * * * to overrule [the United States Supreme Court's] well-established holding that the [Sixth Amendment] right to a jury does not attach to the traditional juvenile justice system." *State v. Meade* (Wash.App. 2005), 129 Wash.App. 918, 925-926, citing *McKeiver*. "*Blakely* did not alter long-standing rules regarding when the right to a jury attaches; it merely broadened and delineated the scope of that right once it does attach." *Meade* at 926.

{¶64} Next, we acknowledge that *Foster* applied *Blakely* to invoke Sixth Amendment jury trial rights to Ohio's adult felony sentencing guidelines. See *Foster* at ¶¶50-83. For the reasons noted above, we also conclude that *Foster's* application of the Sixth Amendment jury trial rights to Ohio's adult felony sentencing guidelines has no bearing on the juvenile court's authority to make findings under R.C. 2152.13(D)(2)(a) when deciding whether to impose a blended juvenile/adult sentence on a serious youthful offender.

{¶65} For the purposes of complete and logical analysis extending from the above Sixth Amendment jury trial considerations, we next address the applicability of Section 5, Article I of the Ohio Constitution, which states that the "right of trial by jury

shall be inviolate," and Section 10, Article I of the Ohio Constitution, which provides for the right to "speedy public trial by an impartial jury[.]" These sections preserve for an accused " 'all essential and distinguishing features of the trial by jury' known to the common law in Ohio." *Foster* at ¶2, quoting *Work v. State* (1853), 2 Ohio St. 296, syllabus. *Foster*, which was issued after appellant's sentencing, cited to such Ohio constitutional jury trial rights in its decision on the applicability of constitutional jury trial rights to Ohio's adult felony sentencing statutes. *Foster* at ¶2; see, also, *State v. Brooks*, Mahoning App. No. 05MA31, 2006-Ohio-4610, at ¶44 (noting that "the *Foster* decision was also based upon Ohio constitutional law dealing with the jury trial right").

{¶66} The Ohio Supreme Court has previously held that the Ohio Constitution does not provide the right to a jury trial in juvenile delinquency proceedings. *In re Agler* (1969), 19 Ohio St.2d 70, 77-78. In *Agler*, the Ohio Supreme Court noted that, at the time, juveniles adjudicated delinquent in juvenile court were detained in facilities separate from adult facilities. *Id.* at 73. While the serious youthful offender statutes no longer provide such a distinction, we note that *Agler* declined to extend Ohio constitutional jury trial rights to juvenile delinquency proceedings upon recognizing that juvenile proceedings are "noncriminal," and upon recognizing the "individualized, remedial nature" of juvenile court adjudications. *Id.* at 78-79. As noted above, the serious youthful offender statutes do not obviate such rehabilitative-focused aspects of the juvenile court system. Accordingly, pursuant to *Agler*, we conclude that *Foster's* application of Sections 5 and 10, Article I of the Ohio Constitution to the adult felony sentencing statutes has no bearing on the juvenile court's authority to make findings

under R.C. 2152.13(D)(2)(a) when deciding whether to impose a blended juvenile/adult sentence on a serious youthful offender.

{¶67} Therefore, based on the above, we conclude that the juvenile court did not make the R.C. 2152.13(D)(2)(a) findings in violation of appellant's constitutional jury trial rights articulated under the Sixth Amendment to the United States Constitution and Sections 5 and 10, Article I of the Ohio Constitution, or in contravention of *Blakely* and *Foster*. In so concluding, we note that appellant does not raise the implications of the statutory jury trial right that R.C. 2152.13(C)(1) affords serious youthful offender cases. Thus, we do not analyze whether R.C. 2152.13(C)(1) implicates the juvenile court's authority to make the R.C. 2152.13(D)(2)(a) findings. Rather, based on the issues that appellant has presented, our decision here is solely based on an analysis of R.C. 2152.13(D)(2)(a) findings and a conclusion that such findings are not implicated by jury trial rights established in the Sixth Amendment to the United States Constitution and Sections 5 and 10, Article I of the Ohio Constitution, as well as the application of such jury trial rights in *Blakely* and *Foster*.

{¶68} Accordingly, having rejected appellant's alternative arguments above, we determine that the juvenile court did not err when it imposed a blended juvenile/adult sentence on appellant upon making R.C. 2152.13(D)(2)(a) findings. As such, we overrule appellant's second assignment of error.

{¶69} Appellant's third assignment of error concerns the adult portion of the blended juvenile/adult sentence for his third-degree felony reckless homicide delinquency adjudication. As noted above, R.C. 2152.13(D)(2)(a) governs the juvenile

court's discretion to impose an adult sentence on a serious youthful offender and states, in pertinent part:

(i) If the juvenile court on the record makes a finding that, given the nature and circumstances of the violation and the history of the child, the length of time, level of security, and types of programming and resources available in the juvenile system alone are not adequate to provide the juvenile court with a reasonable expectation that the purposes set forth in section 2152.01 of the Revised Code will be met, the juvenile court may impose upon the child a sentence available for the violation, as if the child were an adult, under Chapter 2929. of the Revised Code, except that the juvenile court shall not impose on the child a sentence of death or life imprisonment without parole.

{¶70} Here, the juvenile court imposed a single three-year prison sentence for appellant's third-degree felony reckless homicide, which is a sentence above the one-year minimum prison sentence authorized for adult sentences on third-degree felonies. See R.C. 2929.14(A). In imposing the non-minimum sentence on the reckless homicide, the juvenile court made findings under R.C. 2929.14(B) of Ohio's adult felony sentencing statutes. Appellant argues that the juvenile court imposed such a sentence in violation of jury trial principles afforded by the Sixth Amendment and in contravention of *Blakely* and *Foster*. In *Foster*, the Ohio Supreme Court applied *Blakely* and concluded that R.C. 2929.14(B) violated Ohio and federal constitutional jury trial principles. See *Foster* at ¶61. The Ohio Supreme Court then severed R.C. 2929.14(B) from the adult felony sentencing statutes. *Foster* at ¶99.

{¶71} Initially, we note that appellant's third assignment of error poses a question that applies to the adult part of serious youthful offender sentences, like appellant's, imposed before *Foster* severed unconstitutional portions of Ohio's adult

felony sentencing statutes in R.C. Chapter 2929. As such, we only address adult sentences on serious youthful offender sentences imposed pre-*Foster*.

{¶72} Here, the adult felony sentencing statutes did not directly authorize the juvenile court to impose the adult sentence on appellant. Rather, as noted above, the authority stemmed from R.C. 2152.13(D)(2)(a) of the serious youthful offender statutes, which referred the juvenile court to the adult felony sentencing statutes. Ultimately, the juvenile court still imposed the blended juvenile/adult serious youthful offender sentence under the dictates of R.C. 2152.13(D)(2)(a) and, overall, the serious youthful offender provisions, which, as noted above, do not obviate the juvenile court's focus on rehabilitation rather than punishment. Thus, although the juvenile court was imposing an adult sentence on appellant, it was doing so under the rehabilitative confines of the juvenile system and the serious youthful offender statutes. As further demonstration of this rehabilitative focus, we reiterate that, before the juvenile court would actually make appellant serve the adult portion of the sentence, the juvenile court would have to determine, pursuant to R.C. 2152.14(E) of the serious youthful offender statutes, in pertinent part, that appellant is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction.

{¶73} Thus, it necessarily follows from our above analysis in appellant's second assignment of error that *Blakely*, *Foster*, the Sixth Amendment to the United States Constitution, and Sections 5 and 10, Article I of the Ohio Constitution, did not confer jury trial rights on the R.C. 2929.14(B) findings that the juvenile court made when it imposed the adult portion of the serious youthful offender sentence. As such, we conclude that the juvenile court did not make the R.C. 2929.14(B) findings in violation of constitutional

jury trial rights articulated under the Sixth Amendment to the United States Constitution and Sections 5 and 10, Article I of the Ohio Constitution, or in contravention of *Blakely* and *Foster*. In so concluding, we reiterate that, based on the issues appellant presented, we do not analyze whether R.C. 2152.13(C)(1) implicated the juvenile court's R.C. 2929.14(B) findings. Accordingly, based on the above, we overrule appellant's third assignment of error.

{¶74} In summary, we overrule appellant's first, second, and third assignments of error. Consequently, we affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

Judgment affirmed.

BROWN and SADLER, JJ., concur.

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
ALLEN COUNTY**

IN THE MATTER OF:

CASE NUMBER 1-05-65

DOMINIQUE DASHAWN HILL

ALLEGED DELINQUENT CHILD

OPINION

APPELLANT

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Juvenile Division.

JUDGMENT: Judgment affirmed in part, sentence vacated and cause remanded.

DATE OF JUDGMENT ENTRY: May 22, 2006

ATTORNEYS:

**MARIA SANTO
Attorney at Law
Reg. #0039762
124 S. Metcalf Street
Lima, OH 45801
For Appellant.**

**TERRI L. KOHLRIESER
Assistant Prosecuting Attorney
Reg. #0073982
204 North Main Street
Lima, OH 45801
For Appellee.**

CUPP, J.

{¶1} Defendant-appellant, Dominique DeShawn Hill (hereinafter “Hill”), appeals the judgment of the Allen County Court of Common Pleas, Juvenile Division, denying his motion for a new trial. Hill also appeals the sentence imposed by the trial court.

{¶2} At 11:44 p.m. on December 10, 2004, police officers went to the home of Debra Henderson (hereinafter “Henderson”) to investigate a potential domestic violence situation. Henderson had become involved in an argument with her twelve year old daughter Miranda about an eighteen year old male named Aaron Long (hereinafter “Aaron”). Aaron and his friend Brice Johnson (hereinafter “Brice”) had been at the Henderson home shooting pool earlier that day but had left before the police were called. According to Officer Robert Sarchet of the Lima Police Department (hereinafter “Officer Sarchet”), no injuries were reported or observed by the police during their visit at this time and no arrests were made.

{¶3} After the police left Henderson’s home, Aaron, Brice, and two black males that Henderson did not know, stopped by the house. According to Henderson, Aaron said that he had stopped by the home to make sure everything was okay “because if it wasn’t, he might have to get his pistol out”. Henderson noticed that the two black males were not wearing any coats which she thought

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was odd given that it was early December and it was cold outside. Henderson called police dispatch and asked the dispatcher to have the police officers stop by her house so that she could tell the officers about the visit.

{¶4} Officer Sarchet arrived at Henderson's home on December 11, 2004, at 1:06 a.m. When he arrived at the Henderson home that second time, Officer Sarchet looked through a crack in a curtain on the front door and saw a black male inside Henderson's home. The black male was later identified as Hill. Officer Sarchet then knocked on the door and yelled "police". Officer Sarchet watched Hill open the curtain. According to Officer Sarchet, he yelled "Police" again but Hill did not answer the door. Officer Sarchet said that it sounded like Hill was running through the home. Then Henderson came running out the door exclaiming to Officer Sarchet that she had been raped and that the assailant was still in the house.

{¶5} Shortly thereafter, additional officers arrived at the house including a K-9 unit. Hill was determined to be in the basement. Officer Sarchet yelled for Hill to either come out of the basement or the officers would send the police dog down to get him. Hill exited the basement and was arrested.

{¶6} At the time of his arrest, Hill was thirteen years old. Later, Henderson discovered that Hill had stolen money from her purse. Hill was subsequently indicted as a serious youthful offender for aggravated burglary, a

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violation of R.C. 2911.11(A)(1) and a first degree felony; and four counts of forcible rape, violations of R.C. 2907.02(A)(2) and first degree felonies.

{¶7} On March 21, 2005, Hill's jury trial commenced. The jury found Hill guilty of aggravated burglary, and of the two counts of rape which concerned vaginal and anal rape. However, the jury found Hill not guilty on the two remaining counts of rape which concerned fellatio and inserting an object into the vagina.

{¶8} On May 25, 2005, Hill's mother, Kim Williams (hereinafter "Williams"), requested that Hill have new counsel appointed. Williams argued that Hill's trial counsel failed to investigate information that Williams had received from women incarcerated with Henderson at the Allen County Jail. The trial court denied Williams' request.

{¶9} The trial court held a sentencing hearing on August 5, 2005. Hill was ordered committed to the Ohio Department of Youth Services for a minimum period of one year for the aggravated burglary and a minimum period of three years for each of the two rape convictions. The time was ordered to be served consecutively, which resulted in a total minimum commitment of seven years. The trial court also sentenced Hill to an adult sentence of three years imprisonment for aggravated burglary and six years imprisonment for each of the

two rape convictions, to be served consecutively, for a total of fifteen years imprisonment. The trial court then stayed the adult portion of the sentence.

{¶10} On July 22, 2005, Hill filed a motion for new trial under Criminal Rule 33(A)(6) based on newly discovered evidence. The evidence in question consisted of the deposition testimony of Charlotte Gunn (aka Charlotte Tucker) (hereinafter “Gunn”), and the affidavits of Gay White (hereinafter “White”) and Schakia Yates (hereinafter “Yates”). According to Gunn, White, and Yates, they were all in the Allen County Jail with Henderson on or about February 2, 2005. Gunn, White, and Yates state that they heard Henderson say that she was not raped, that she alleged she was raped because she had given alcohol to minors and had consensual sex with a minor, and that she sustained her injuries from a physical fight with her daughter earlier that day. The trial court denied the motion for a new trial.

{¶11} It is from the trial court’s denial of the motion for a new trial and imposition of sentence, that Hill appeals setting forth two assignments of error for our review.

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT COMMITTED AN ERROR OF LAW IN DENYING THE MOTION FOR A NEW TRIAL.

{¶12} As a basis for his argument that the trial court erred in denying his motion for a new trial, Hill asserts that the criteria have been met for the granting

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of a motion for a new trial based on newly discovered evidence set forth by the Ohio Supreme Court in *State v. Petro* (1947), 148 Ohio St. 505, 36 O.O. 165, 76 N.E.2d 370.

{¶13} A trial court's decision whether "to grant or deny a motion for a new trial on the basis of newly discovered evidence is within the sound discretion of the trial court and, absent an abuse of discretion, that decision will not be disturbed." *State v. Hawkins* (1993), 66 Ohio St. 3d 339, 350, 612 N.E.2d 1227, citing *State v. Williams* (1975), 43 Ohio St.2d 88, 72 O.O.2d 49, 330 N.E.2d 891. Abuse of discretion implies that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140.

{¶14} The Ohio Supreme Court has held that in order "[t]o warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence." *Petro*, 148 Ohio St. 505, syllabus; *Hawkins*, 66 Ohio St. 3d at 350.

{¶15} The trial court found that Charlotte Gunn told Williams about the evidence in question some time during the third week of February, 2005. The trial court further found that, after learning of Gunn's information, the exercise of due diligence would have resulted in the discovery of White and Yates.

{¶16} Hill argues that the information was discovered after the trial. Hill maintains that Williams was approached by Gunn on March 27, 2005, and that Williams contacted Hill's counsel that day. Consequently, Hill argues that the evidence was newly discovered.

{¶17} After reviewing the record, we find that there is competent, credible evidence to support the trial court's finding that Gunn provided Williams with the information prior to Hill's trial. In her deposition, Gunn stated that she contacted Williams and told her about Henderson's statement following a visitation at the Juvenile Detention Center. The prosecution presented evidence that Gunn and Williams were both present at the juvenile detention center on January 20, 2005; February 20, 2005; and March 1, 2005. Moreover, Gunn stated she was in jail in early February for a ten-day jail sentence and that she told Williams the information about a week after she got out of jail. Consequently, there is evidence to support the trial court's finding that Williams had the information prior to Hill's trial which started on March 21, 2005. Furthermore, given Gunn's information that Henderson made the statements while at the Allen County Jail, Hill would

have been able to find White and Yates before his trial with the exercise of due diligence. Consequently, the trial court did not err when it found that the second and third prong of the *Petro* test had not been met.

{¶18} Hill maintains that because the jury did not believe Henderson regarding two of the rape counts, the additional evidence combined with his own testimony of the events creates a strong probability of a different trial result. We find that the argument lacks merit.

{¶19} Assuming *arguendo* that the evidence in dispute had been discovered after the trial, the evidence does not disclose a strong probability of a different result. The fact that Hill was acquitted on two counts of rape and that he testified at trial regarding the events does not create a strong probability of a different result, especially given the prosecution's presentation of two video taped interviews in which Hill confesses to hitting Henderson, raping Henderson vaginally and anally, and stealing money from Henderson's purse. The prosecution also presented numerous photographs of Henderson's bruises. Further, Officer Sarchet testified that the first time he was at the Henderson home that evening he did not notice any injuries to Henderson. Since the first, second, and third prongs of the *Petro* test have not been met, Hill's first assignment of error is overruled.

ASSIGNMENT OF ERROR NO. II

THE SENTENCE OF THE TRIAL COURT IS CONTRARY TO LAW.

{¶20} In his second assignment of error, Hill argues that the adult portion of his sentence is contrary to law since the trial court could not make the factual findings to impose more than the minimum sentence. Hill further argues, in a supplemental brief, that under the Ohio Supreme Court's recent decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, this case must be remanded to the trial court for a new sentencing hearing.

{¶21} In *Foster*, the Ohio Supreme Court held portions of Ohio's sentencing framework unconstitutional. *Id.* Specifically, the Ohio Supreme Court held R.C. 2929.14(B) and 2929.14(E)(4) unconstitutional. *Id.* at paragraphs one and three of the syllabus. Since Hill was sentenced to more than the minimum and consecutive sentences under statutes found unconstitutional by the Ohio Supreme Court, we must vacate the sentence and remand this case to the trial court for further proceedings consistent with *Foster*. See *Id.* at ¶¶ 103-104.

{¶22} The judgment of the Allen County Common Pleas Court, Juvenile Division, denying Hill's motion for a new trial is affirmed; however, pursuant to

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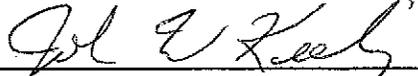
Foster, we vacate Hill's sentence and remand the matter for further proceedings consistent with *Foster*.

***Judgment Affirmed in Part,
Sentence Vacated and Cause Remanded.***

BRYANT, P.J., and SHAW, J., concur.

PROOF OF SERVICE

I certify that a copy of this notice was served upon **Katherine J. Press**, Assistant Franklin County Prosecutor, 373 South High Street, 13th Floor, Columbus, Ohio 43215, by hand delivery on Friday, March 16, 2007, and that a copy of this notice was mailed by regular U.S. mail to **Katherine Hunt Federle** and **Jason A. Macke**, Counsel for The Justice for Children Project, at the Ohio State University Moritz College of Law, 55 West 12th Avenue, Columbus, Ohio, 43210, on Friday, March 16, 2007.



John W. Keeling 0014860
Counsel for Defendant-Appellant