

IN THE SUPREME COURT OF OHIO

08-0659

State of Ohio,	:	On Appeal from the Fifth District Court of Appeals
Plaintiff-Appellee,	:	
vs.	:	Appellate Court
Carl Fanaro,	:	Case No. 2006CA00168
Defendant-Appellant.	:	Trial Court Case No. 06-CR-00036

Memorandum In Support of Jurisdiction of Felony Conviction by Defendant-Appellant, Carl Fanaro

Appearances:

Andrew T. Sanderson, #0066327
 Attorney for the Appellant
 Burkett & Sanderson, Inc.
 21 West Church Street
 Suite 201
 Newark, Ohio 43055
 (740) 345-0417

Kenneth Oswalt
 Assistant Prosecuting Attorney
 Attorney for the Appellee
 20 South Second Street
 Fourth Floor
 Newark, Ohio 43055
 (740) 670-5255



21 WEST CHURCH ST.
 SUITE 201
 NEWARK, OHIO 43055
 PHONE/740-345-0417
 FAX/740-345-6677

18 WEST CHESTNUT ST.
 SUITE B
 LANCASTER, OHIO 43130
 PHONE/740-687-5645
 FAX/740-687-9321

ZANESVILLE, OHIO
 PHONE/740-452-9292

KRISTIN BURKETT
 ANDREW T. SANDERSON
 JILL M. COCHRAN
 ADRIENNE M. LARIMER
 ERIN J. MCNANEY

FILED
 APR 07 2008
 CLERK OF COURT
 SUPREME COURT OF OHIO

Table of Contents

Statement of Why Case Presents Issues of Great Public Interest and Involves a Substantial Constitutional Question _____ Page 1

Statement of the Case and Facts _____ Page 3

Argument _____ Page 9

Appellant's Sole Proposition of Law _____ Page 9
IN SENTENCING A FELONY DEFENDANT, THE OHIO AND UNITED STATES CONSTITUTIONS PRECLUDE THE TRIAL COURT FROM ENGAGING IN JUDICIAL FACT FINDING AS A VEHICLE TO REACH THE FINAL DISPOSITION OF THE CASE.

Conclusion _____ Page 15

Certificate of Service _____ Page 16

Appendix:

Opinion of the Licking County Court of Appeals, February 21, 2008

Judgment Entry of the Licking County Court of Appeal, February 21, 2008



21 WEST CHURCH ST.
SUITE 201
NEWARK, OHIO 43055
PHONE/740-345-0417
FAX/740-345-6677

18 WEST CHESTNUT ST.
SUITE B
ANCASTER, OHIO 43130
PHONE/740-687-5645
FAX/740-687-9321

ZANESVILLE, OHIO
PHONE/740-452-9292

KRISTIN BURKETT
ANDREW T. SANDERSON
JILL M. COCHRAN
DRIENNE M. LARIMER
ERIN J. MCNANEY

**Appellant's Statement of Why Case Presents Issues of Great Public Interest and
Involves a Substantial Constitutional Question and Why Leave to Appeal Should be
Granted**

The instant appeal involves a case that should be heard by this Honorable Court for a variety of reasons. First, this case is one that has undergone a great deal of public scrutiny and involves many citizens of the state of Ohio. Further, the sentence imposed is one that effectively imprisons an Ohio citizen for the rest of his life, simply put, given the sentence now challenged; it is highly unlikely that Mr. Fanaro will live to be released from prison. Finally, this case involves a substantial constitutional question that has been at the forefront of national, criminal law jurisprudence for some time – the manner in which sentences are to be constitutionally imposed in criminal prosecutions. For each of these reasons, the instant case is worthy of this Honorable Court's valuable time and limited resources and leave to appeal should be granted herein.

Mr. Fanaro appeals his conviction from a prosecution involving a total of one hundred and thirty-four (134) felony counts related to the sale of securities in the state of Ohio. Numerous "victims" were involved in the prosecution of this case and a massive amount of resources were expended to further the instant prosecution. The prosecution of Mr. Fanaro has garnered a great deal of interest from the public with numerous stories related to the prosecution appearing in several media outlets. *The Columbus Dispatch* ran four separate articles related to the prosecution of the instant case; January 26, 2006, October 28, 2006, December 19, 2006 and January 14, 2007. In the January 14, 2007, article, "Tough Judge Says He is Not Afraid to Do Things His Own Way," was particularly telling when it stated that the trial court felt that the sentence imposed "...was enough for a man who likely would die behind bars." Where the trial judge rides his



21 WEST CHURCH ST.
SUITE 201
NEWARK, OHIO 43055
PHONE/740-345-0417
FAX/740-345-6677

118 WEST CHESTNUT ST.
SUITE B
LANCASTER, OHIO 43130
PHONE/740-687-5645
FAX/740-687-9321

ZANESVILLE, OHIO
PHONE/740-452-9292

KRISTIN BURKETT
ANDREW T. SANDERSON
JILL M. COCHRAN
ADRIENNE M. LARIMER
ERIN J. MCNANEY

decision to impose a prison sentence as a vehicle for media quotes, the case is obviously one of great public interest.

In addition to the several articles reported in *The Columbus Dispatch*, the case was also the subject of an extensive article in Columbus CEO magazine wherein the chief prosecuting attorney was extensively quoted regarding the case and there were also many articles in *The Newark Advocate* over the course of the prosecution. All of this demonstrates that the public has a great deal of vested interest in the instant case.

Of greater import to the public -- although not as notably measurable -- is the sentence now at issue. As stated by the *Dispatch* and noted by the trial court, the sentence imposed upon Mr. Fanaro is effectively a life sentence. Mr. Fanaro is sixty-four (64) years old. He has no eligibility for judicial release or any other mechanism for a reduction in the stated nineteen year prison term. Surely the public has a great deal of interest in a case where a man is, in essence, sentenced to life in prison for property crimes.

The issues presented by the instant appeal are also those of great public interest. The sentencing of criminal defendants has become an issue of great public debate over the last several years. This Honorable Court has handed down several landmark decisions related to felony sentencing in Ohio and the issues related to the same continue to receive a great deal of attention from the general public and the bar. To describe the issues as being of great public interest would be an understatement.

In *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, this Honorable Court devoted resources to consider the propriety of prison sentences imposed for a violation of community control sanctions. In *Hernandez v. Kelley*, 2006-Ohio-126, this Court again



21 WEST CHURCH ST.
SUITE 201
NEWARK, OHIO 43055
PHONE/740-345-0417
FAX/740-345-6677

118 WEST CHESTNUT ST.
SUITE B
LANCASTER, OHIO 43130
PHONE/740-687-5645
FAX/740-687-9321

ZANESVILLE, OHIO
PHONE/740-452-9292

KRISTIN BURKETT
ANDREW T. SANDERSON
JILL M. COCHRAN
ADRIENNE M. LARIMER
ERIN J. MCNANEY

visited the issues related to the imposition of criminal sentences. In *Hernandez*, the Court summed up the public interest in such cases nicely:

The goal is what when the prosecutor, the defendant, and victims leave the courtroom following a sentencing hearing, they know precisely the nature and duration of restrictions that have been imposed by the trial court on the defendant's personal liberty. Confidence in and respect for the criminal-justice system flow from a belief that courts and officers of the courts perform their duties pursuant to established law.

Hernandez v. Kelly, supra at paragraph 32. In *State v. Foster*, 2006-Ohio-856, this Honorable Court again visited the important issues related to the sentencing of felony offenders. This case presents yet another opportunity for this Honorable Court to encourage "confidence in and respect for the criminal justice system."

The constitutional issues related to the instant appeal are of equal importance to those related to the public's interest in the case and the sentencing of Mr. Fanaro. The manner in which the sentence was imposed, the nature of the sentence and the implications and statements of the trial court all raise constitutional questions that need to be addressed and deserve further consideration. Questions related to the constitutionality of the sentencing of felony offenders are at the forefront of Ohio and national law. From *State v. Foster*, 2006-Ohio-856, to *United States v. Booker* (2005), 543 U.S. 296 and *Blakely v. Washington* (2004), 542 U.S. 296, questions related to the constitutionality of judicial "fact finding" are key and worthy of continued consideration by this Honorable Court.

Mr. Fanaro received a sentence of nineteen years in prison. This sentence was reached by a trial court that participated in several media stories related to the case and engaged in a spirited bout of judicial fact finding prior to imposing sentence herein. Whether the trial court "went too far" is a question that deserves further consideration.



21 WEST CHURCH ST.
SUITE 201
NEWARK, OHIO 43055
PHONE/740-345-0417
FAX/740-345-6677

118 WEST CHESTNUT ST.
SUITE B
LANCASTER, OHIO 43130
PHONE/740-687-5645
FAX/740-687-9321

ZANESVILLE, OHIO
PHONE/740-452-9292

KRISTIN BURKETT
ANDREW T. SANDERSON
JILL M. COCHRAN
ADRIENNE M. LARIMER
ERIN J. MCNANEY

This case presents an excellent opportunity for this Honorable Court to further define and hone those rules and limitations expressed in *State v. Foster*, 2006-Ohio-856 in a forum that can provide meaningful and telling discussion against a backdrop of very real questions that impact the defendant, the general public and the bar in very real and tangible terms.

For each of these reasons, Mr. Fanaro maintains that this case presents both questions of substantial public interest and constitutional issues related to a felony prosecution that are worthy of review by this Honorable Court. Mr. Fanaro, therefore, respectfully requests that this Honorable Court extend its jurisdiction to grant him leave to appeal the decision of the Fifth District Court of Appeal to affirm and uphold his sentence herein.

Statement of the Case and Facts

Mr. Carl Fanaro was indicted on a total of one hundred and thirty-four (134) felony counts related to the sale of securities in the state of Ohio. Twenty-nine (29) of those counts alleged a violation of R.C. §1707.44(C)(1), the sale of unregistered securities. Twenty-nine (29) additional counts alleged further violations of R.C. §1707.44 in that Mr. Fanaro sold securities without the proper licensing. Seventeen (17) counts alleged §1707.44 violations through false representations made by Mr. Fanaro in the course of securities sales. Twenty-nine (29) more counts claimed that Mr. Fanaro violated §1707.44 through engaging in fraudulent practices in the sale of securities. Twenty-nine (29) other counts alleged violations of R.C. §2913.51: Receiving Stolen Property and, finally, the indictment alleged a single violation of R.C. §2923.32 wherein it was claimed Mr. Fanaro engaged in a pattern of corrupt activity. This final count was



21 WEST CHURCH ST.
SUITE 201
NEWARK, OHIO 43055
PHONE/740-345-0417
FAX/740-345-6677

118 WEST CHESTNUT ST.
SUITE B
LANCASTER, OHIO 43130
PHONE/740-687-5645
FAX/740-687-9321

ZANESVILLE, OHIO
PHONE/740-452-9292

KRISTIN BURKETT
ANDREW T. SANDERSON
JILL M. COCHRAN
ADRIENNE M. LARIMER
ERIN J. MCNANEY

an umbrella over the entire course of conduct which gave rise to the proceeding one hundred and thirty-three (133) counts of the indictment.

On February 24, 2006, Mr. Fanaro entered a Not Guilty plea in abstentia to each of the counts contained in the indictment. On October 16, 2006, a jury trial commenced in the matter and ended on October 27, 2006, resulting in guilty findings on ninety-nine (99) counts of the indictment. The government moved the court to dismiss eight counts of the indictment and the same was granted on October 31, 2006. The jury was unable to reach a unanimous verdict with respect to the remaining counts and, on November 6, 2006, the government requested that these counts be dismissed as well. The trial court granted this request and the balance of the charges was dismissed on November 8, 2006. Mr. Fanaro then appeared before the trial court on December 18, 2006, for the purposes of sentencing. At that time, the trial court ordered a total of nineteen (19) years in prison to be served. In reaching this sentence, the trial court ordered that a term of six months be served on the thirty-two (32) counts of the indictment which resulted in convictions for fifth degree felony offenses, each sentence to be served consecutive to one another and consecutive to the sentences imposed for the convictions in counts One, Six and Twenty-Six of the indictment. The court ordered sentences of one year on these three counts of the indictment and directed that they be served consecutive to one another and consecutive to the six-month sentences imposed for each of the fifth degree felony counts. The court ordered that all other sentences be run concurrently with one another and with the counts described above. In summary, the court ordered thirty-two (32) consecutive, six-month sentences for a total of sixteen (16) years to run consecutive with three one-year sentences for a total of nineteen (19) years.



21 WEST CHURCH ST.
SUITE 201
NEWARK, OHIO 43055
PHONE/740-345-0417
FAX/740-345-6677

18 WEST CHESTNUT ST.
SUITE B
LANCASTER, OHIO 43130
PHONE/740-687-5645
FAX/740-687-9321

ZANESVILLE, OHIO
PHONE/740-452-9292

KRISTIN BURKETT
ANDREW T. SANDERSON
JILL M. COCHRAN
ADRIENNE M. LARIMER
ERIN J. MCNANEY

At the time of sentencing, the trial court spoke of convictions in one hundred counts, "Mr. Fanaro was, I believe, found guilty of sixty-seven (67) third degree felonies and thirty-two (32) fifth degree felonies and one first degree felony." [Sentencing Tr. at 38.] It does not appear from a careful review of the record that this misstatement of the procedural posture of the case impacted the sentence imposed and the miscalculation of the number of counts is not reflected in the sentencing entry filed by the trial court which states that Mr. Fanaro was convicted of ninety-nine of the counts upon which the jury returned guilty verdicts. As such, this "clerical error" plays no role in the instant appeal.

Notice of Mr. Fanaro's intent to appeal his conviction and sentence was filed December 29, 2006. The Fifth District Court of Appeals affirmed the conviction and sentence by its entry dated February 21, 2008. This memorandum in support of jurisdiction now follows.

To describe the trial in this matter as "cumbersome" would be a dramatic understatement. A total of thirty-one (31) witnesses presented testimony over the course of several days of trial. The evidence presented addressed a total of one hundred and twenty-seven counts. Two hundred and seventy (270) exhibits were admitted. That being said, the case can be boiled down to a repetitive series of allegations. In the interest of streamlining the presentation of facts for purposes of appeal, the testimony of the first "victim" is used to summarize the presentation of evidence and supplemented with the accounts of Mr. Fanaro and the chief investigator called on behalf of the government. The first victim's testimony was mirrored, to a large extent, by "victim" after "victim." What is argued below can be presented through the objections raised and preserved as continuing or not raised as the case may be within the testimony of the chief



21 WEST CHURCH ST.
SUITE 201
NEWARK, OHIO 43055
PHONE/740-345-0417
FAX/740-345-6677

118 WEST CHESTNUT ST.
SUITE B
LANCASTER, OHIO 43130
PHONE/740-687-5645
FAX/740-687-9321

ZANESVILLE, OHIO
PHONE/740-452-9292

KRISTIN BURKETT
ANDREW T. SANDERSON
JILL M. COCHRAN
ADRIENNE M. LARIMER
ERIN J. MCNANEY

investigator and the first victim. Where necessary and/or appropriate, additional references to the record are made and presented throughout the brief.

Each "victim" testified that they began a personal and professional relationship with Mr. Fanaro for the purposes of financial planning. Ms. Joyce Phipps was one such person. Ms. Phipps was a retired Licking County Sheriff's deputy. [Tr. V. I. at 290.] Ms. Phipps met Mr. Fanaro through her father. [Tr. V. I. at 292.] Ms. Phipps' father had engaged in some investments with Mr. Fanaro sometime during 2002. [Tr. V. I. at 292.] Ms. Phipps had expressed to Mr. Fanaro that she was interested in a "safe, secure" investment that would reduce the losses she had been previously experiencing with her investments. [Tr. V. I. at 294.] According to Ms. Phipps, she was assured by Mr. Fanaro that the money would be safe and secure and that she would not lose her money. [Tr. V. I. at 295.] Based on these representations and assurances, Ms. Phipps provided Mr. Fanaro with approximately \$14,000.00 to invest. [Tr. V. I. at 296.]

Sometime after the initial investment, Ms. Phipps received a check from a cable company. [Tr. V. I. at 297.] This check was a dividend for the investment she had made through Mr. Fanaro. [Tr. V. I. at 297.] Ms. Phipps believed that the investment was then sound and that she would continue to receive these checks on a regular basis. [Tr. V. I. at 297.] Ms. Phipps continued to receive distribution checks for a period of time, but eventually the checks stopped. [Tr. V. I. at 298-99.] At no time, did Ms. Phipps receive a private placement memorandum concerning her investment or the company. [Tr. V. I. at 299.] Nor did Ms. Phipps receive statements concerning her investments. [Tr. V. I. at 299.] According to Ms. Phipps, Mr. Fanaro repeatedly expressed to her that the investment was both safe and secure and an investment where the money in question



21 WEST CHURCH ST.
SUITE 201
NEWARK, OHIO 43055
PHONE/740-345-0417
FAX/740-345-6677

18 WEST CHESTNUT ST.
SUITE B
LANCASTER, OHIO 43130
PHONE/740-687-5645
FAX/740-687-9321

ZANESVILLE, OHIO
PHONE/740-452-9292

KRISTIN BURKETT
ANDREW T. SANDERSON
JILL M. COCHRAN
DRIENNE M. LARIMER
ERIN J. MCNANEY

could be withdrawn. [Tr. V. I. at 300.]

More than a year after the initial investment, Ms. Phipps received information concerning the investment. This information was different than what was represented by Mr. Fanaro. [Tr. V. I. at 301-02.] Specifically, the information identified the investment as both “long term” and “high risk.” [Tr. V. I. at 302.] Ms. Phipps testified that had she been provided with the information prior to making the investment, there was “no way” she would have made the investment in question. [Tr. V. I. at 302.] Additionally, Ms. Phipps learned that her money was no longer accessible. [Tr. V. I. at 303.] She maintained that she represented to Mr. Fanaro the importance of being able to withdraw her money should the need arise. “He advised me that I could get my money any time if I wanted to – ten cents or \$10.00 or \$100.00, I could withdraw my money at any time, and I could – I couldn’t.” [Tr. V. I. at 303.]

In total, Ms. Phipps received four distribution checks and then the money stopped coming back to her. [Tr. V. I. at 304.] Ms. Phipps was also receiving letter from the company in which her money had been invested stating that the company was no longer doing well and was struggling financially. [Tr. V. I. at 304.] For obvious reasons, Ms. Phipps became concerned with these developments and attempted to contact both the company and Mr. Fanaro. [Tr. V. I. at 304.] To quote Ms. Phipps, “but no more Carl. We couldn’t find Carl. No more calls from Carl.” [Tr. V. I. at 304.] At some point, Ms. Phipps was informed by the cable company that the business was failing and it was unlikely that she would receive her original investment back – much less additional distribution checks. [Tr. V. I. at 305.]

Each witness that testified provided a similar account of events. They met Mr.



21 WEST CHURCH ST.
SUITE 201
NEWARK, OHIO 43055
PHONE/740-345-0417
FAX/740-345-6677

18 WEST CHESTNUT ST.
SUITE B
LANCASTER, OHIO 43130
PHONE/740-687-5645
FAX/740-687-9321

ZANESVILLE, OHIO
PHONE/740-452-9292

KRISTIN BURKETT
ANDREW T. SANDERSON
JILL M. COCHRAN
ADRIENNE M. LARIMER
ERIN J. MCNANEY

Fanaro and expressed a desire to become involved in financial investing. They expressed a desire that their investment would be safe and secure and that they would not risk losing their money, that they provided Mr. Fanaro with money for investing and that they were assured that the investment would meet their expressed desires, would be safe, low risk and liquid. This money was then invested in a cable venture that paid them dividends or made distributions initially, but eventually stopped paying and their money was lost. The “victims” provided testimony that had they known the nature of the investment – that it was high risk and long term – they would not have invested their money. In total, the victims lost hundreds of thousands of dollars invested through Mr. Fanaro and invested due to representation made by Mr. Fanaro.

Mr. Fanaro was not licensed to sell securities in the state of Ohio. [Tr. V. I. at 165-66.] The investments themselves were not registered securities in the state of Ohio. [Tr. V. I. at 180-82.] What was also introduced in the course of the trial was that Mr. Fanaro had been engaged in other questionable business practices not related to the activities which formed the basis of the indictment. These practices resulted in the suspension of his securities license in Florida and a “cease and desist” order being issued with respect to activities in the state of Ohio. [Tr. V. I. at 166, 167-69, 177; State’s Exhibit 2, State’s Exhibit 4; Tr. V. V. at 1451-55.] Testimony concerning this was admitted, over the objection of trial counsel, in the course of the proceedings below.

Argument

Appellant’s Sole Proposition of Law

THE TRIAL COURT COMMITTED HARMFUL ERROR IN SENTENCING THE DEFENDANT-APPELLANT TO A TERM OF NINETEEN (19) YEARS IMPRISONMENT THROUGH ENGAGING IN JUDICIAL FACT FINDING BELOW. [Sentencing Tr. Sentencing at 33-41.]

It is the position of Mr. Fanaro that the sentence imposed below was



21 WEST CHURCH ST.
SUITE 201
NEWARK, OHIO 43055
PHONE/740-345-0417
FAX/740-345-6677

118 WEST CHESTNUT ST.
SUITE B
LANCASTER, OHIO 43130
PHONE/740-687-5645
FAX/740-687-9321

ZANESVILLE, OHIO
PHONE/740-452-9292

KRISTIN BURKETT
ANDREW T. SANDERSON
JILL M. COCHRAN
ADRIENNE M. LARIMER
ERIN J. MCNANEY

unconstitutional as it involves fact finding by the trial court when the same was not made by a jury of his peers. As such, the trial court abused its discretion in sentencing Mr. Fanaro and the imposition of sentence by the trial court must now be reversed and the matter remanded for further proceedings. In support of this position, Mr. Fanaro relies heavily on the authority of *State v. Foster*, 2006-Ohio-856, and respectfully moves this Honorable Court to vacate his sentence.

In *Foster*, the Ohio Supreme Court conducted a comprehensive review of Ohio's criminal sentencing framework. The purpose of this review was to determine the constitutionality of Ohio's "presumption based" criminal sentencing structure in light of recent United States Supreme Court holdings regarding similar sentencing structures. See, generally, *United States v. Booker* (2005), 543 U.S. 296; *Blakely v. Washington* (2004), 542 U.S. 296. Putting much stock in the court's holding in *Blakely*, the Ohio Supreme Court determined:

Because R.C. §2929.14(B) and (C) and 2929.19(B)(2) require judicial factfinding before the imposition of a sentence greater than the maximum term authorized by a jury verdict or admission of the defendant, they are unconstitutional.

State v. Foster, 2006-Ohio-856, at syllabus paragraph one. The court went on to hold:

Trial courts have full discretion to impose a prison sentence within the statutory guidelines and are no longer required to make findings or give their reasons for imposing maximum, consecutive or more than the minimum sentences.

State v. Foster, 2006-Ohio-856, at syllabus paragraph seven. In essence, the court "scrapped" ten years of judicial rulings and holdings interpreting the requirements of Ohio's 1996 Sentencing Reform Act (Senate Bill II) and returned the judiciary to a system of nearly unfettered discretion. In so doing, much of what had been required by



21 WEST CHURCH ST.
SUITE 201
NEWARK, OHIO 43055
PHONE/740-345-0417
FAX/740-345-6677

118 WEST CHESTNUT ST.
SUITE B
LANCASTER, OHIO 43130
PHONE/740-687-5645
FAX/740-687-9321

ZANESVILLE, OHIO
PHONE/740-452-9292

KRISTIN BURKETT
ANDREW T. SANDERSON
JILL M. COCHRAN
ADRIENNE M. LARIMER
ERIN J. MCNANEY

previous holdings of this Honorable Court and the Ohio Supreme Court are no longer an issue.

In the pre-*Foster* world of criminal sentencing, it was incumbent upon the trial court to build a record prior to imposing sentences that ran afoul of the presumptions built into the criminal code. That is to say, before the trial court could impose consecutive sentences or sentences more than the minimum required by the Code or, with certain levels of offenses, a prison sanction at all, certain “findings” must be made by the court and the factual underpinnings for those findings identified. See, generally, *State v. Comer* (2003), 99 Ohio St.3d 463, 2003-Ohio-4165; *State v. Campbell*, 2005-Ohio-3980. If the trial court failed to make such findings or to identify facts in the record that supported its conclusion, the sentence was to be vacated and the matter remanded for resentencing. See, generally, *State v. Majors*, 2004-Ohio-4029; *State v. Thompson*, 2002-Ohio-4717. All of that has now changed.

A careful reading of *Foster* can only lead to the conclusion that if the trial court did what was required by holdings leading up to February 27, 2006, the date *Foster* was decided, it was acting contrary to the Ohio and United States constitutions. As such, if the trial court imposed a sentence under the “old” system requiring both findings and an identification in the facts in the record to support those findings, in the post-*Foster* world, the court has acted unconstitutionally and the sentence must be vacated. *Foster*, at paragraph 97. This remedy is only available with respect to certain aspects of the sentencing statute and only where judicial fact finding has occurred. Specifically, the imposition of a prison sanction for a fourth or fifth degree felony was held to be consistent with constitutional mandates as the “presumption” works in reverse, “the court



21 WEST CHURCH ST.
SUITE 201
NEWARK, OHIO 43055
PHONE/740-345-0417
FAX/740-345-6677

18 WEST CHESTNUT ST.
SUITE B
LANCASTER, OHIO 43130
PHONE/740-687-5645
FAX/740-687-9321

ZANESVILLE, OHIO
PHONE/740-452-9292

KRISTIN BURKETT
ANDREW T. SANDERSON
JILL M. COCHRAN
ADRIENNE M. LARIMER
ERIN J. MCNANEY

shall impose a prison sentence unless..." *Foster*, at paragraphs 69-70. In contrast, the imposition of consecutive sentences based on factual findings and determinations by the trial court would be unconstitutional and must be vacated. *Foster*, at paragraph 97, 103.

Taking all this, then, and applying it to the instant case, Mr. Fanaro maintains that the sentence imposed by the trial court does run aground upon the Ohio and United States constitutions and must be vacated. In the instant case, the trial court sentenced Mr. Fanaro on each of the counts in the indictment. Those sentences were ordered – in many cases - consecutive to each other. The end result being an imposed sentence of nineteen years for what amounted to a single, continuing course of conduct by Mr. Fanaro.

Taking these aspects of the sentence in turn, the imposition of consecutive sentences has clearly been found to be unconstitutional by the *Foster* court where such an imposition is based on judicial fact finding. *Foster*, at paragraph 67. As such, Mr. Fanaro maintains that the sentence imposed herein must be vacated and the matter remanded, but only if judicial "factfinding" can be identified in the record.

Prior to the imposition of sentence, the trial court stated, "Well Mr. Fanaro, the court has considered the purposes and principles of sentencing set out under Section 2929.11 of the Revised Code, as well as the seriousness and recidivism factors set out under Section 2929.12." [Sentencing Tr. at 33.] This passage alone shows that the trial court based its sentence on findings made outside the jury's guilty verdicts and indicates the very thing found unconstitutional by the court in *Foster*. That being said, it must be determined if the trial court did, in fact, rely upon fact finding that is prohibited by the Ohio and United States constitutions.

Throughout the imposition of sentence by the trial court, the court continually



21 WEST CHURCH ST.
SUITE 201
NEWARK, OHIO 43055
PHONE/740-345-0417
FAX/740-345-6677

18 WEST CHESTNUT ST.
SUITE B
ANCASTER, OHIO 43130
PHONE/740-687-5645
FAX/740-687-9321

ZANESVILLE, OHIO
PHONE/740-452-9292

KRISTIN BURKETT
ANDREW T. SANDERSON
JILL M. COCHRAN
DRIENNE M. LARIMER
ERIN J. MCNANEY

pointed to facts not decided by the jury. Specifically, the trial court pointed to Mr. Fanaro having his license to sell securities suspended in Florida. [Sentencing Tr. at 35.] Further, the trial court pointed to Mr. Fanaro being the subject of an unrelated “cease and desist” order in Ohio in 2003. [Sentencing Tr. at 35.] These factual determinations were clearly part of the reason that the nineteen year sentence was imposed herein. [Sentencing Tr. at 35.] The trial court also made factual determinations regarding the similarity of the “victims” involved in the case. [Sentencing Tr. at 35-36.] The trial court found “telling” the “collateral type of damage or damage done to other people” in determining the appropriate sentence. [Sentencing Tr. at 37.] The court identified “grooming” behavior by Mr. Fanaro, analogizing Mr. Fanaro’s crimes to those of a sexual predator. [Sentencing Tr. at 37.] The court made findings regarding the “shame” felt by the “victims” and allowed this determination to play a role in its conclusions with respect to the sentencing of Mr. Fanaro. [Sentencing Tr. at 37.] None of these determinations were conclusions reached by the jury in returning its verdicts herein.

The determinations by the jury were limited to the indictments placed before them and were limited to the guilt of Mr. Fanaro on ninety-nine separate counts. The jury was not asked to make a determination regarding the nature of the “victims” or the nature of their loss. The jury was not asked to consider the collateral damage suffered by the “victims” in the case. The jury was not asked to make findings regarding the “recidivism and seriousness factors set out under Section 2929.12.” Nor was the jury called upon to determine if, in fact, Mr. Fanaro’s license to sell securities had been suspended by the state of Florida. The jury reached no verdict concerning the factual determination that Mr. Fanaro had been subjected to a 2003 cease and desist order in the state of Ohio



21 WEST CHURCH ST.
SUITE 201
NEWARK, OHIO 43055
PHONE/740-345-0417
FAX/740-345-6677

18 WEST CHESTNUT ST.
SUITE B
LANCASTER, OHIO 43130
PHONE/740-687-5645
FAX/740-687-9321

ZANESVILLE, OHIO
PHONE/740-452-9292

KRISTIN BURKETT
ANDREW T. SANDERSON
JILL M. COCHRAN
DRIENNE M. LARIMER
ERIN J. MCNANEY

related to the sale of other securities not part of the indictment in this case. There was no testimony or evidence presented, much less a jury finding, related to the grooming behaviors of sexual predators or their similarity to the type of activity at issue herein. Simply put, the jury did not reach these issues and made no factual finding related to the same.

The trial court, in contrast, clearly states these findings on the record and clearly bases its sentence upon these findings. [Sentencing Tr. at 38.] Further support for this conclusion is found in the sentencing entry of the trial court which states, “**For the reasons stated on the record**, and after consideration of the factors under Ohio Revised Code Section 2929.12, **the Court also finds** that prison is consistent with the purposes of Ohio Revised Code Section 2929.11, and that the defendant is not amenable to an available community control sanction.” Judgment Entry, December 20, 2006, emphasis added. Those “reasons stated on the record” are the judicial fact findings presented above and are well beyond the determinations made by the jury in returning the Guilty verdicts herein.

In light of all this, it must be concluded that the trial court engaged in judicial fact finding. This fact finding included facts that were not subject to jury consideration related to Mr. Fanaro’s past (prior license suspension, cease and desist order), the nature of the activity which led to the convictions (sexual predator “grooming” of victims) and the nature of the victims. The result of this judicial fact finding is clear – Mr. Fanaro received a sentence nearly twice as long as that imposed upon his co-defendant, William Mayes. Mr. Mayes was charged in connection with the same investment scheme as that which resulted in the nineteen year sentence imposed upon Mr. Fanaro. Mr. Mayes, in



21 WEST CHURCH ST.
SUITE 201
NEWARK, OHIO 43055
PHONE/740-345-0417
FAX/740-345-6677

18 WEST CHESTNUT ST.
SUITE B
ANCASTER, OHIO 43130
PHONE/740-687-5645
FAX/740-687-9321

ZANESVILLE, OHIO
PHONE/740-452-9292

KRISTIN BURKETT
ANDREW T. SANDERSON
JILL M. COCHRAN
DRIENNE M. LARIMER
ERIN J. MCNANEY

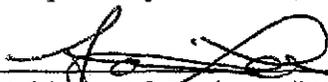
contrast, was sentenced to a period of nine years and six months in prison. See, *State v. William Mayes*, Licking County Common Pleas Case Number 2006-CR-338 and 2007-CR-139. Given the nature of the sentences imposed, Mr. Mayes would be eligible for judicial release after serving five years of his sentence whereas Mr. Fanaro has been effectively sentenced to a mandatory term of nineteen years in prison with no eligibility for judicial release. Given the "mirrored" nature of the co-defendant's cases, the only explanation for such a dramatic difference in the sentences imposed must be found in the judicial fact finding described above.

In light of all this and consistent with the holding of *Foster*, it must be concluded that the sentence imposed below is unconstitutional and must be vacated as void.

Conclusion

For each of the foregoing reasons, Mr. Fanaro respectfully requests that the sentence imposed be vacated. The trial court engaged in judicial fact finding to determine that a nineteen year sentence was appropriate, when Mr. Fanaro's co-defendant was sentenced to a term of less than ten years. The trial court failed to adequately consider the allied nature of the convictions and failed to conduct any analysis of merger prior to imposing a mandatory term of nineteen year in prison.

Respectfully submitted,


Adrienne M. Larimer, #0079837 FOR
Andrew T. Sanderson, #0066327
Attorney for the Appellant



11 WEST CHURCH ST.
SUITE 201
NEWARK, OHIO 43055
PHONE/740-345-0417
FAX/740-345-6677

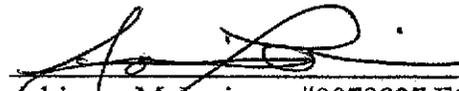
3 WEST CHESTNUT ST.
SUITE B
NCASTER, OHIO 43130
PHONE/740-687-5645
FAX/740-687-9321

ZANESVILLE, OHIO
PHONE/740-452-9292

KRISTIN BURKETT
DREW T. SANDERSON
JILL M. COCHRAN
ADRIENNE M. LARIMER
ERIN J. MCNANEY

Certificate of Service

I hereby certify that a copy of the foregoing document was served on Mr. Kenneth Oswald, Assistant County Prosecuting Attorney, by hand delivery to his mailbox at the Licking County Common Pleas Courthouse, Newark, Ohio, on this 7th day of April, 2008.


Adrienne M. Larimer, #0079837 FOR
Andrew T. Sanderson, #0066327
Attorney for the Appellant



21 WEST CHURCH ST.
SUITE 201
NEWARK, OHIO 43055
PHONE/740-345-0417
FAX/740-345-6677

8 WEST CHESTNUT ST.
SUITE B
LANCASTER, OHIO 43130
PHONE/740-687-5645
FAX/740-687-9321

ZANESVILLE, OHIO
PHONE/740-452-9292

KRISTIN BURKETT
ANDREW T. SANDERSON
JILL M. COCHRAN
ADRIENNE M. LARIMER
ERIN J. MCNANEY

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FILED
SEP 21 AM 8
CLERK OF COURT
OF APPEALS
LICKING COUNTY, OH
GARY H. MILLER

STATE OF OHIO

Plaintiff-Appellee

-vs-

CARL FANARO

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 2006CA00168

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to appellant.

John A. Edwards

Mark J. [Signature]

Patricia A. [Signature]

JUDGES

RECEIVED
SEP 21 2006
CLERK OF COURT
LICKING COUNTY, OH

Edwards, J.

{¶1} Defendant-appellant, Carl Fanaro, appeals his conviction and sentences from the Licking County Court of Common Pleas on ninety eight counts of securities violations and one count of engaging in a pattern of corrupt activity. Plaintiff-appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} On January 27, 2006, the Licking County Grand Jury returned a one hundred and thirty four (134) felony count indictment against the appellant. The indictment included violations of R.C. 1707.44 for the sale of unregistered securities, the sale of securities without a license and false representation in the sale of securities. The indictment also included violations of R.C. 2913.51 for receiving stolen property and one count of engaging in a pattern of corrupt activity in violation of 2923.32(A)(1).

{¶3} On February 24, 2006, the appellant entered a not guilty plea in abstentia to the charges in the indictment.

{¶4} On October 16, 2006, the matter proceeded to trial. Prior to the presentation of evidence the state moved to dismiss eight (8) counts in the indictment.¹ On October 27, 2006, the jury found appellant guilty of ninety-nine (99) counts in the indictment.² The jury was unable to reach a unanimous verdict on the remaining counts for receiving stolen property. Appellant was found guilty of having committed thirty-two

¹ The State dismissed counts, 92, 93, 94, 95, 113, 114, 115, and 116.

² The convictions included as follows: twenty seven (27) counts of sales of unregistered securities, in violation of R.C. 1707.44(C)(1); twenty seven (27) counts of sales of securities without a license in violation of R.C. 1707.44(A)(1); twenty seven (27) counts of fraudulent practices in the sale of securities, in violation of R.C. 1707.44(G); seventeen (17) counts of false representation in the sale of securities, in violation of R.C. 1707.44(B)(4); one count of engaging in a pattern of corrupt activity, in violation of R.C. 2923.32(A)(1).

(32) fifth degree felonies, sixty six (66) third degree felonies and one (1) first degree felony. Sentencing was deferred pending a pre-sentence investigation.

{15} On November 6, 2006, the State moved to voluntarily dismiss the remaining twenty seven (27) counts for receiving stolen property. On November 8, 2006, the State's motion to dismiss was granted.

{16} On December 18, 2006, appellant appeared for sentencing. The trial court sentenced appellant to serve six months on each of the thirty two (32) fifth degree felonies and further ordered these sentences to run consecutively to each other for a total of sixteen (16) years. The trial court also ordered appellant to serve one (1) year on three (3) of the third degree felonies (counts one, six and twenty-six) to run consecutively to each other for a total of three (3) years. The trial court further ordered appellant to serve a five (5) year sentence for the first degree felony conviction for engaging in a pattern of corrupt activity. Finally the trial court ordered the fifth degree (16 year) and third degree felony (3 year) sentences to run consecutively to each other and all other sentences to run concurrently for a total aggregate sentence of nineteen (19) years. Appellant was further ordered to pay restitution and the costs of the action. The fines were waived.

{17} It is from this conviction and sentence, that appellant now appeals setting forth the following assignments of error:

{18} "1. THE TRIAL COURT COMMITTED HARMFUL ERROR IN SENTENCING THE DEFENDANT-APPELLANT TO A TERM OF NINETEEN (19) YEARS OF IMPRISONMENT THROUGH ENGAGING IN JUDICIAL FACT FINDING BELOW.

{¶9} "II. THE TRIAL COURT COMMITTED HARMFUL ERROR IN SENTENCING THE DEFENDANT-APPELLANT TO A TERM OF NINETEEN (19) YEARS OF IMPRISONMENT DUE TO THE FAILURE OF THE TRIAL COURT TO MERGE THE SEVERAL, CONSECUTIVE COUNTS FOR PURPOSES OF SENTENCING.

{¶10} "III. THE TRIAL COURT COMMITTED CONTINUING ERROR BY ALLOWING THE INTRODUCTION OF PREJUDICIAL EVIDENCE THROUGHOUT THE COURSE OF THE TRIAL."

I

{¶11} In the first assignment of error, appellant argues that the trial court engaged in judicial fact finding prior to the imposition of appellant's nineteen (19) year sentence in violation of *Blakely v. Washington* (2005), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 and *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E.2d 470. We disagree.

{¶12} Under the Ohio law, and in accordance with the *Foster* decision, the trial court is vested with discretion to impose a prison term within an applicable statutory range. *State v. Mathis*, 109 Ohio St. 3d 54, 2006-Ohio-855, 846 N.E.2d1. However, in exercising its discretion the court remains guided by the legislation designed to establish uniformity, and must "carefully consider the statutes that apply to every felony case [including] R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12, which provides guidance in considering factors relating to the seriousness of the offense and recidivism of the offender [and] statutes that are specific to the case

itself." *State v. Mathis*, 109 Ohio St. 3d at 62.³ The fact that the trial judge explained his reasons for imposing a particular sentence, on the record, cannot transform a sentence within the range provided by statute into a constitutionally infirm sentence on the grounds that the statements constitute impermissible 'judicial fact-finding.'" *State v. Goggans*, Delaware App. No. 2006-CA-07-0051, 2007-Ohio-1433, at paragraph 29.

{¶13} In this case, the applicable statutory sentencing ranges are as follows: for a first degree felony the court may impose a three, four, five, six, seven, eight, nine or ten year sentence. For a third degree felony the court may impose a one, two, three, four or five year sentence; and, for a fifth degree felony the court may impose a six, seven, eight, nine, ten, eleven, or twelve month sentence. Furthermore, "if an offender is sentenced to multiple prison terms, the court is not barred from requiring those terms to be served consecutively." *State v. Foster*, 109 Ohio St. 3d at 31.

{¶14} Prior to the imposition of sentence the trial court informed the parties that the maximum possible sentence which could be imposed by the trial court was 377 years. The trial court further stated, "the court has considered the purposes and principles of sentences set out under Section 2929.11 of the Ohio Revised Code, as well as the seriousness and recidivism factors set out under Section 2929.12." Transcript of sentencing proceeding at pages 33 and 34, hereinafter T.S. at ____). The trial court found that the evidence established that the appellant victimized older, retired, financially unsophisticated people whom he groomed with personal charm to

³ For example, guided by the overriding purposes of felony sentencing the court can sentence in order to "protect the public from future crime by the offender" and "to punish the offender." R.C. 2929.11(A). "The court can also consider, inter alia, whether the victim suffered serious psychological and economic harm as a result of the offense, whether the offenders' occupation or profession obliged the offender to prevent the offense, and whether the offender's relationship with the victim facilitated the offense. R.C. 2929.12(B).

invest their small life savings in risky, long term, securities. The court further found that appellant's activities had a vast effect on the victims' emotional and financial security. T.S. 33-36. The trial court then proceeded to impose a minimum six month sentence on each of the thirty-two third degree felonies and a minimum one year sentence on three, third degree felonies, to run consecutively to each other, and concurrently to all other counts, for an aggregate nineteen (19) year sentence.

{¶15} We note that appellant discusses an alleged disparity between appellant's sentence and the sentence imposed for a co-conspirator. We decline to consider these arguments as they involve matters outside the record in this case. However, we find that the record establishes that the appellant did not receive the possible maximum consecutive sentence of 377 years, and that the sentence imposed was not only the minimum for each charged count within the statutory ranges, but, was also in compliance with *Foster*. Furthermore, pursuant to *Goggans* we do not find that the statements made by the trial court transform the sentence into a constitutionally infirm sentence on the grounds that the statements constitute impermissible judicial fact finding.

{¶16} Accordingly, we hereby overrule appellant's first assignment of error.

ii

{¶17} In the second assignment of error appellant argues that the trial court erred in entering a judgment of conviction and sentence where the charged security violations were allied offenses of similar import. We disagree.

{¶18} R.C. 2941.25 (A) governs allied offenses and provides as follows:

{¶19} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one."

{¶20} In *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699, the Ohio Supreme Court established a two-part test for determining whether multiple offenses are allied offenses of similar import. The test requires a reviewing court to first compare the elements of the offenses in the abstract to determine whether the elements correspond to such a degree that the commission of one crime will necessarily result in the commission of the other. Then, if the elements do so correspond, the offenses are allied offenses of similar import and the defendant may only be convicted of and sentenced for both offenses if he committed the crimes separately or with a separate animus. *State v. Rance*, 85 Ohio St. 3d at 638-639.

{¶21} In this case, appellant was convicted of the sales of securities without a license in violation of R.C. 1707.44(A)(1); making false representations in the sale of securities in violation of R.C. 1707.44(B)(4); selling unregistered securities in violation of R.C. 1707.44(C)(1); securities fraud in violation of R.C. 1707.44(G); and engaging in a pattern of corrupt activity in violation of R.C. 2923.32. The language of the charging statutes are as follows:

{¶22} R.C. 1707.44(A)(1) [unlicensed dealer] states that, "[n]o person shall engage in any act or practice that violates division (A), (B), or (C) of section 1707.14 of the Revised Code, and no salesperson shall sell securities in this state without being licensed pursuant to section 1707.16 of the Revised Code. R.C. 1707.44(B)(4) [false representations in the sale of securities] states that, "[n]o person shall knowingly make

or cause to be made any false representation concerning a material and relevant fact, in any oral statement or in any prospectus, circular, description, application, or written statement, for any of the following purposes:***(4) Selling any security in this state."

{¶23} R.C. 1707.44(C)(1) [sale of unregistered securities] states that, "[n]o person shall knowingly sell, cause to be sold, offer for sale, or cause to be offered for sale, any security which comes under the following descriptions: (1) Is not exempt under section 1707.02 of the Revised Code, nor the subject matter of one of the transactions exempted in section 1707.03, 1707.04 or 1707.34 of the Revised Code, has not been registered by coordination or qualification, and is not the subject matter of a transaction that has been registered by description."

{¶24} R.C. 1707.44(G) [securities fraud] states, "[n]o person in purchasing or selling securities shall knowingly engage in any act or practice that is, in this chapter, declared illegal, defined as fraudulent, or prohibited. A violation of this section is a second degree felony."

{¶25} R.C. 2923.32.(A)(1) [engaging in a pattern of corrupt activity] states that, "[n]o person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity or the collection of an unlawful debt." Corrupt activity is defined in R.C. 2923.31(I) and includes engaging in conduct constituting a violation of divisions (B), (C)(4), (D), (E), or (F) of R.C. 1707.44.

{¶26} In comparing the statutes, R.C.1707.44(A)(1) prohibits the sale of securities by an unlicensed person, R.C. 1707.44(C)(1) prohibits the sale of unregistered securities, R.C.1707.44(B)(4) prohibits affirmative misrepresentations in

the sale of securities, R.C. 1707.44(G) prohibits both affirmative misrepresentations and fraudulent non-disclosures in the sale of securities (i.e. material omissions)⁴ and, R.C. 2923.32(A)(1) prohibits a pattern of conduct in the unlawful sale of securities. Pursuant to the threshold analysis under *Rance*, we find that, in an abstract comparison, these security violations and the charge of engaging in a pattern of corrupt activity do not correspond to such a degree that the commission of one crime will necessarily result in the commission of the other. Therefore, we find that the charges are not allied offenses of similar import.

{¶27} Accordingly, appellant's second assignment of error is not well taken and is hereby overruled.

III

{¶28} In the third assignment of error appellant argues that the trial court abused its discretion in permitting the introduction of other acts evidence pursuant to Civ.R.404(B). Specifically, appellant argues that the trial court erred in admitting evidence that appellant's Florida securities license had been suspended in the 1980's and that the Ohio Securities Commission had issued a "cease and desist" order. We disagree.

{¶29} In a criminal case where the defendant alleges that it was prejudicial error to allow the jury to consider certain evidence, the reviewing court must first determine if it was error to permit the jury to consider the evidence and, if so, whether such error was prejudicial or harmless. *State v. Davis* (1975), 44 Ohio App.2d 335, 338 N.E.2d

⁴ "R.C. 1707.44(G) prohibits not only affirmative misrepresentation, but also fraudulent non-disclosure where there is a duty to disclose." *State v. Warner* (1990), 55 Ohio St.3d 31, 584 N.E. 2d 18. See also, R.C. 1707.01(J) for the definition of "fraud."

793. An appellate court may disregard error occurring in a criminal proceeding if the error is harmless or non-prejudicial, in the sense that it could not be said to have affected the outcome of the proceeding. *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222.

{¶30} In this case, during the course of the trial the jury heard the testimony of the following victim-investors or relatives of deceased victims: Joyce Phipps, Sondra Soward, Alice Ceisil, Lola Phillips, Richard Price, Theresa Wygant, Ralph Redduck, Donald Betts, Richard Pickering, Connison Wilson, Lorraine Rataiczak, Richard Woodyard, Keith Emmons, Vicki West, Cletus Sorg, and Elmer Pletcher.

{¶31} Each of the victims had a similar profile and testified to a pattern of activity regarding the appellant's sale of securities and the resulting securities violations. Each of the victims were retired, between the ages of 60 and 90 years of age, high school graduates, with a moderate retirement income, modest savings and little or no investment or financial expertise.

{¶32} Each victim was initially contacted by the appellant for the purposes of estate and financial planning. Some victims sought to exclude their assets from probate. Other victims sought to protect their assets for disabled or ailing relatives. Richard Pickering testified that he sought to establish safe investments to be placed in trust to assure financial security for his adult son with Downs Syndrome. T.11.742.

{¶33} During the course of the ongoing "professional" relationship the appellant provided each victim with a business card and personal resume. The resume included false information regarding the appellant's training, education, ongoing certifications,

and experience.⁵ Sandra Soward testified that the appellant represented himself as a paralegal and a financial planner. T.I.368. Keith Emmons testified that appellant helped him obtain a power of attorney for the purpose of investing his ninety-eight year old mother's money and that he personally invested money. Mr. Emmons testified that the appellant's resume was "impressive" and "very influencing". T.III. 924.

{¶34} The victims each testified that the appellant gained their trust. Theresa Wygant, an eighty-two year old widow, testified that she trusted the appellant completely and "I just needed someone to help me". T.II. 636 and 637.

{¶35} The appellant advised the victims that he could provide them with immediate opportunities to invest in cable companies. The appellant further advised the victims that the investments were low risk with a guaranteed 10 percent, tax free monthly dividend, and the investors would have the ability to withdraw or transfer the invested funds. Joyce Phipps testified, "He advised me that I could get my money any time if I wanted ten cents or \$10.00 or \$100.00, I could withdraw my money at any time, and I couldn't-I couldn't." T.I. 303.

{¶36} During the course of the transactions, the appellant asked the victims to sign either blank documents or to sign documents without any explanation of the terms. Richard Pickering testified that he signed the documents without reading them because "I trusted him." T.III.741.

{¶37} The appellant failed to disclose that the investments were being made in a limited partnership. Investors were misled into believing that they were purchasing

⁵ He admittedly, misrepresented that he held a bachelor of arts degree from the University of Maine in 1985, that he was a paralegal for the law firm of Hendrix and Associates, that he was a certified senior advisor, that he was a certified financial planner with experience at Merrill Lynch, and that he was a certified estate counselor. Transcript of Proceedings, Volume VI at pages 1721-1727.

stock in cable companies. Ralph Redduck, 90 years of age, contacted the appellant to set up a living trust for his invalid adult son who was confined to a wheelchair. Mr. Redduck testified that the appellant never explained that the investment was in a limited partnership or the high level risk involved. T.II (Part 2). 659 and 665. The majority of the victims testified that they believed they were purchasing stock in cable companies. Connison Wilson testified, "I thought I was buying stock." T.VIII.766. Sandra Sowards testified, "we were under the impression we were actually buying stock into a cable company." T.I.384. Donald Betts testified, "He [appellant] said everybody bought cable or used cable so there wouldn't be no risk involved." T.II. 703.

{¶38} Satisfied with the appellant's representations regarding the investment profiles, influenced by appellant's false credentials, and finding appellant trustworthy, the victims individually wrote checks or wired money to either Cable-Tex, Americable V, or Cable Unlimited, Inc. and invested sums in amounts ranging from approximately fourteen thousand to one hundred thousand dollars. Pursuant to the testimony presented, in total the victims invested more than five hundred thousand dollars between the years of 2002 and 2004.

{¶39} The evidence established that prior to accepting the investments, the appellant failed to provide the victims with private placement memorandums. Private Placement Memorandums ("PPM") are generally provided to investors prior to accepting money. The PPM sets forth the investment profile for the cable companies. The PPM manuals for the companies involved in these instances, explained that the investments were being made in a "speculative", long term (25 year), high risk limited partnership and that invested money could not be withdrawn or returned to the investor.

In all cases, the victims received the PPM months after the investment had been made and their investment had been squandered. Vicky West testified that she invested twenty-thousand dollars in 2002, received the PPM in 2004, and was "devastated". She testified that she had invested all her savings and had no retirement pension. T.III. 957 and 959. Each victim testified that if the PPM had been available prior to the investment, they would not have taken a long term, high risk, especially at their ages and during their retirement years. Joyce Phipps testified that had she been provided with the information prior to making the investment, there was "no way" she would have invested. T. I. 303.

{¶40} After the initial lump sum investment, each victim received, (what they believed to be), distribution checks. The amount of the distribution checks were nominal compared to their investments. Eventually they received a letter on cable company letterhead, signed by a general partner, stating that due to computer problems they would not be receiving monthly distributions. Eventually, they each learned, through correspondence, that the cable companies would no longer be making payments and that their investments were terminated without any reimbursement. Alice Ciesil testified that she never recovered her investments of forty thousand, twenty thousand and fifty-five thousand dollars. T.II.481. Lola Phillips testified that she received a letter that no further checks would be received. T.II.555.

{¶41} Attorney Robert Hendrix, an attorney who accepted referrals from AARP and who worked with the appellant to meet clients and prepare estate planning documents, testified that he learned that the appellant was misrepresenting himself as a paralegal, advised appellant to stop, and terminated the relationship. T.III.989.

{¶42} Richard Distelhorst, a CPA who prepares tax returns for cable companies testified that the victims, as limited partners, never received "dividends" or interest on their investments. He stated that the victims actually received partial returns of their own capital investments, i.e. they received their own money. That was the reason it was tax free. T.IV.1217.

{¶43} Sheldon Safko, an attorney employed by the Enforcement Section of the Division of Securities testified that if a person is purchasing a limited partnership, they are purchasing a security according to Ohio law. He further testified that in order to sell a security, you must have a license from the Division of Securities. He testified that the appellant was never licensed in the State of Ohio. T.I.165-166. Furthermore, he testified that securities, such as limited partnerships, must be registered or fall under an exemption. In this case, the security sales were neither exempted nor registered. T.I.180-182.

{¶44} Based upon the evidence presented, we find that, even assuming arguendo that the trial court erred in permitting the introduction of other acts evidence, there was overwhelming evidence to support the conviction. Therefore, the error would be harmless and non-prejudicial.

Licking County App. Case No. 2006CA00168

15

{¶145} Accordingly, appellant's third assignment of error is not well taken and is hereby overruled.

{¶146} The Judgment of the Licking County Court of Common Pleas is hereby affirmed.

By: Edwards, J.
Farmer, P.J. and
Delaney, J. concur

Julie A. Edwards
Mark P. Farmer
Patricia A. Delaney

JUDGES

JAE/1129