[Cite as *State v. Archibald*, 2009-Ohio-5425.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-L-123**
- vs -	:	
CARL P. ARCHIBALD,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 05 CR 000734.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Paul R. LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Carl P. Archibald, appeals the sentence of the Lake County Court of Common Pleas on a jury verdict finding him guilty of rape, kidnapping, and sexual battery. At issue is whether appellant's sentence following this court's reversal in part and remand for resentencing in *State v. Archibald*, 11th Dist. Nos. 2006-L-047 and

2006-L-207, 2007-Ohio-4966 ("*Archibald I*"), pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, is constitutional. For the reasons that follow, we affirm.

{¶2} On April 29, 2005, appellant called the victim Christina Rusnak, his wife's girlfriend. He said he and his wife had been having marital problems and he needed to talk to someone. He asked Ms. Rusnak if she would meet with him at a local bar to talk. She agreed, but said she could only stay one-half hour. Appellant lured her to the house he was renting. He told her that his wife had kicked him out of their home and was refusing to talk to him. As he talked about his wife, appellant became increasingly agitated. After about one-half hour, Ms. Rusnak said she had to leave, and as she reached for her purse, appellant grabbed her. He took out a pair of handcuffs and, while Ms. Rusnak was struggling with him, he handcuffed her. She was screaming and appellant told her to shut up and that he had a gun.

{¶3} Appellant told Ms. Rusnak that she deserved this because it was her fault that his wife was cheating on him. He accused Ms. Rusnak of knowing his wife's paramour and said Ms. Rusnak should have told him about it. He then forced her to take various pills by physically putting them down her throat, and also forced her to ingest a powdery material that Ms. Rusnak believed was cocaine.

{¶4} Appellant took Ms. Rusnak into a bedroom and took off her clothes. He then forced her to perform oral sex on him, and took photographs of this activity with his cell phone. He said he was going to show them to his wife to get back at her for cheating on him.

{¶5} Appellant then grabbed Ms. Rusnak by her arms and lifted her up. He walked her backward toward the bed and pushed her on it while her hands were

handcuffed behind her back. He then proceeded to further rape her digitally, vaginally, and anally. She sustained numerous cuts, abrasions, and scratches to her wrists, lower back and buttocks from the handcuffs.

{¶6} Following a jury trial, appellant was found guilty of five counts of rape, felonies of the first degree, in violation of R.C. 2907.02(A)(2); two counts of kidnapping, felonies of the first degree, in violation of R.C. 2905.01(A)(2); and five counts of sexual battery, felonies of the third degree, in violation of R.C. 2907.03(A)(1). The trial court sentenced appellant to nine years in prison on each of the rape counts, each to run concurrently to the others, and four years on the first kidnapping charge, to run consecutively to the nine years imposed on the rape counts, for a total of 13 years in prison. The court found the second kidnapping count merged with the first, and that the sexual battery counts merged with the rape counts. The court also determined that appellant was a sexual predator.

{¶7} Appellant appealed his conviction, sexual predator classification, and sentence in *Archibald I*. This court affirmed appellant's conviction and predator classification, but reversed in part and remanded the case to the trial court for resentencing, holding: "[t]he trial court imposed a more-than-the-minimum, consecutive sentence and in so doing applied R.C. 2929.14(B), R.C. 2929.14(E)(4), and R.C. 2929.19(B)(2). Under *Foster*, these provisions are unconstitutional ***." *Archibald I*, supra, at ¶103.

{¶8} At the resentencing hearing, the trial court imposed the same sentence. Appellant now appeals and assigns the following five errors for our consideration:

{¶9} "[1.] The trial court erred when it sentenced the defendant-appellant to more-than-the-minimum prison terms in violation of the due process and ex post facto clauses of the Ohio and United States Constitutions.

{¶10} "[2.] The trial court erred when it sentenced the defendant-appellant to more-than-the-minimum prison terms in violation of defendant-appellant's right to due process.

{¶11} "[3.] The trial court erred when it sentenced the defendant-appellant to more-than-the-minimum prison terms based on the Ohio Supreme Court's severance of the offending provisions under *Foster*, which was an act in violation of the principle of separation of powers.

{¶12} "[4.] The trial court erred when it sentenced the defendant-appellant to more-than-the-minimum prison terms contrary to the rule of lenity.

{¶13} "[5.] The trial court erred when it sentenced the defendant-appellant to more-than-the-minimum prison terms contrary to the intent of the Ohio legislators."

{¶14} The arguments asserted by appellant in these assignments of error are interrelated and will therefore be considered together. They are identical to those arguments raised and rejected in numerous prior decisions of this court. See *State v. Green*, 11th Dist. Nos. 2005-A-0069 and 2005-A-0070, 2006-Ohio-6695; *State v. Elswick*, 11th Dist. No. 2006-L-075, 2006-Ohio-7011, at ¶30, discretionary appeal not allowed at 113 Ohio St.3d 1513, 2007-Ohio-2208, 2007 Ohio LEXIS 1175; *State v. Asbury*, 11th Dist. No. 2006-L-097, 2007-Ohio-1073, at ¶15; *State v. Anderson*, 11th Dist. No. 2006-L-142, 2007-Ohio-1062, at ¶15; *State v. Spicuzza*, 11th Dist. No. 2006-L-

141, 2007-Ohio-783, at ¶13-35; *State v. Dudas*, 11th Dist. Nos. 2006-L-267 and 2006-L-268, 2007-Ohio-6739, at ¶117-125.

{¶15} These same arguments have also been consistently rejected by other Ohio appellate districts and federal courts. See *State v. Gibson*, 10th Dist. No. 06AP-509, 2006-Ohio-6899; *State v. Moore*, 3d Dist. No. 1-06-51, 2006-Ohio-6860, at ¶9; *United States v. Portillo-Quezada* (C.A. 10, 2006), 469 F.3d 1345, 1354-1356, and the cases cited therein.

{¶16} For the reasons stated in the Opinion of this court, the assignments of error are without merit. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

COLLEEN MARY O'TOOLE, J.,

concur.