[Cite as *State v. Chapdelaine*, 2010-Ohio-2683.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-166**
- vs -	:	
DANIEL R. CHAPDELAINE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 09 CR 000464.

Judgment: Affirmed.

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

R. Paul 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, Daniel R. Chapdelaine, appeals from the judgment of the Lake County Court of Common Pleas, sentencing him to an aggregate prison term of eight years. We affirm.

{¶2} On August 3, 2009, appellant, a previously designated Tier II sex offender, was indicted by the Lake County Grand Jury on the following seven charges: disseminating matter harmful to children (Count 1), in violation of R.C. 2907.31(A)(1), a felony of the fourth degree; public indecency (Count 2), in violation of R.C.

2907.09(A)(1), a misdemeanor of the second degree; aggravated burglary (Count 3), in violation of R.C. 2911.11(A)(1), a felony of the first degree; burglary (Count 4), in violation of R.C. 2911.12(A)(4), a felony of the fourth degree; menacing (Count 5), in violation of R.C. 2903.22(A), a misdemeanor of the fourth degree; public indecency (Count 6), in violation of R.C. 2907.09(A)(1), a misdemeanor of the second degree; and burglary (Count 7), in violation of R.C. 2911.12(A)(4), a felony of the fourth degree.

{¶3} On October 8, 2009, appellant pleaded guilty to Count 1, disseminating matter harmful to juveniles, a felony-four; Count 7, burglary, a felony-four; and a separate count of burglary, a felony-four, which was a lesser included offense of Count 3. During the plea hearing, the prosecutor set forth the following factual basis for the guilty pleas:

{¶4} As to count one, the prosecution maintained the evidence would have shown that, on June 17, 2009, appellant drove by two young girls spraying each other with a garden hose. Appellant stopped his vehicle and asked the two girls if they wanted a piece of gum to "lure them over." As the girls approached the vehicle, appellant pulled down his pants, exposing his genitalia. When one of the girls, a five-year-old, looked in the window, appellant asked her "what is this?" as he pointed to his genitals. He then drove away. Appellant, who was arrested based upon the girls' description of his person and his vehicle, admitted to exposing himself in the manner described above. Appellant was later charged with disseminating matter harmful to children.

{¶5} With respect to Count 3, the state maintained the evidence would show that on April 13, 2009, approximately two months before the incident described in Count

1, appellant knocked on the door of his neighbor, Marquerite Eckertson, and asked for a cigarette. Ms. Eckertson obliged and appellant asked if he could enter her home because "he wanted to ask her something else." Upon entry, appellant attempted to hug the woman. Ms. Eckertson stepped away and appellant described how he had watched her and fantasized about having sex with her. The woman demanded that appellant leave. Appellant began rubbing her arm and told her they were going to have sex. She refused and appellant repeated his sexual advancement, this time touching Ms. Eckertson's face. As the woman backed away, she dialed 9-1-1 on her cell phone. Appellant subsequently left the residence advising Ms. Eckertson not to tell anyone. Appellant was questioned about the episode. Although he acknowledged being at the woman's residence, he denied the woman's allegations. Appellant was eventually arrested for aggravated burglary.

{¶6} As to Count 7, the state asserted the evidence would have demonstrated that, on June 28, 2008, approximately ten months before the foregoing crime, appellant visited the residence of Tracey Triggs, the same residence in which Ms. Eckertson later resided. Ms. Triggs has a son and two daughters, a ten-year-old and a 16 year old who is autistic. On the date in question, Ms. Triggs took her son to summer school. When she returned home, some ten minutes later, her daughters advised her that appellant had came to her home and asked to "pick some cherries." Without being invited, appellant entered the home and hugged each of the girls. According to the 16 year old, the younger girl was wearing only a bra and underwear at the time appellant entered the home. Appellant left the home just prior to Ms. Triggs returning. Police were contacted,

the young women were interviewed, and appellant was eventually charged with burglary.

{¶7} After hearing the evidence read on record, appellant admitted in open court that the facts supporting each charge were true. He then entered a plea of guilty to each charge, which the trial court accepted. The court deferred sentencing for the purpose of ordering a presentence investigation and report.

{¶8} On November 9, 2009, appellant was sentenced to serve a prison term of 18 months on Count 1, five years on Count 3, and 18 months on Count 7, to be served consecutively, for an aggregate term of eight years. He now appeals his sentence assigning the following error for this court's consideration:

{¶9} "The trial court erred by sentencing the defendant-appellant to the maximum, consecutive term of imprisonment."

{¶10} Appellant argues the trial court abused its discretion in sentencing him to the stated prison term because its findings were not supported by the record and it failed to give due consideration to relevant statutory factors.

{¶11} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio held that trial courts have discretion to impose a sentence within the statutory range without the need for findings of fact with respect to maximum sentences, consecutive sentences, or sentences greater than the minimum. Id. at paragraph seven of the syllabus and ¶99.

{¶12} Since *Foster*, the Supreme Court has established a two-step analysis for an appellate court reviewing a felony sentence. See *State v. Kalish*, 120 Ohio St.3d 23, 28, 2008-Ohio-4912. In the first step, we consider whether the trial court "adhered to all

applicable rules and statutes in imposing the sentence." Id. at 25. "As a purely legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G)." Id. Next, we consider, with reference to the general principles of felony sentencing and the seriousness and recidivism factors set forth in Sections 2929.11 and 2929.12, whether the trial court abused its discretion in selecting the defendant's sentence. See id. at 27.

{¶13} Here, appellant does not claim his sentence was imposed contrary to law. Rather, he asserts the trial court failed to give careful and substantial deliberation to the relevant statutory considerations set forth under R.C. 2929.12.

{¶14} Before we begin our discussion, it is necessary to point out that courts across the state have concluded that R.C. 2929.12 neither requires a sentencing court to discuss the statutory criteria on record nor even state on the record that it has considered them. See *State v. Ditto*, 3d Dist. No. 12-09-08, 2010-Ohio-1503, at ¶4; *State v. Sharp*, 10th Dist. No. 05AP-809, 2006-Ohio-3448, at ¶4; *State v. Gant*, 7th Dist. No. 04-MA-252, 2006-Ohio-1469, ¶60; *State v. Hughes*, 6th Dist. No. WD-05-024, 2005-Ohio-6405, ¶7; *State v. McAdams*, 162 Ohio App.3d 318, 320, 2005-Ohio-3895; *State v. Arnett*, 88 Ohio St.3d 208, 215, 2000-Ohio-302. In fact, the Court in *Kalish* noted that where a sentencing court does not memorialize on record that it considered the factors, a presumption arises that the factors were properly considered. Id. at 27, f.n. 4. By implication, as long as there is some indication that the factors were considered, a reviewing court is bound to uphold the sentence.

{¶15} With this narrow standard of review in mind, appellant first contends the trial court gave inadequate weight to the fact that appellant "did not cause or expect to

cause physical harm to any person or property." See R.C. 2929.12(C)(3). Appellant argues that, while his conduct was inappropriate, he neither caused nor intended to cause any physical harm.

{¶16} At the sentencing hearing, defense counsel argued that, while the crimes to which appellant pleaded guilty were onerous, appellant did not intend to cause his victims any real harm. With respect to the burglary situations, counsel observed "*** there was nothing that stopped [appellant] from doing more than he did. He wasn't there to do more than he did. That's why more didn't happen. *** That wasn't his intention." However, the record indicates appellant knew his behavior "scared the heck out of the victims." Moreover, during an open-court victim impact statement, Ms. Eckertson emphasized the emotional strain and fear she still has as a result of the episode which led to appellant's aggravated burglary charge. Finally, the court stated on record that it had considered the comments of counsel for both sides, appellant's statements, the victim impact statements, the entire record, including the PSI, and all relevant statutory considerations. With respect to the statutory factors, the court pointed out:

{¶17} "*** for all three cases, this Court finds serious psychological harm that's been suffered by the victims, continues to be suffered by the victims. As to Count One, Disseminating Matter Harmful to Juveniles, as well as Count Seven, Burglary, which involved children, the Court finds the injury in those two cases was exacerbated due to the physical age of the victims, being five years old, five years old as to Count one. Count Seven, the victims were ten and 16. However, the 16 year old was autistic. The

Court will find due to her mental condition the injury was exacerbated due to those factors."

{¶18} The facts of this case are such that appellant did not cause any specific physical harm to any of his victims. The record is not so clear, however, what appellant's ultimate intentions were when he committed the crimes to which he pleaded guilty, particularly the burglary charges. We recognize the court observed on record that there were "[n]o factors present indicating the offenses are less serious." Still, we believe the emotional or psychological harm appellant inflicted on his victims would be sufficient to militate against giving any significant weight to the fact that appellant did not cause his victim's physical harm. We therefore hold the court acted well within its discretion in ruling appellant's purported intentions and the absence of physical harm did not render appellant's actions less serious.

{¶19} Next, appellant asserts the court failed to give adequate weight to the severity of his intoxication when he exposed himself to the five year old victim.[1] Appellant alleges the alcohol and drug induced stupor in which he placed himself should have rendered his behavior less serious and indicate a lower likelihood of recidivism.

{¶20} Appellant has a history of drug and alcohol abuse which he recognizes is a tremendous problem. He also has a lengthy criminal history including a prior conviction for voyeurism which led to his classification as a Tier II sex offender. And, not only was appellant drunk and high at the time of the crime, he was also operating a motor vehicle.

1. In his version of the offense, appellant stated that just prior to exposing himself, he consumed a fifth of vodka and smoked $50.00 worth of crack. He stated he had no way of explaining his actions but "was quite high and very intoxicated and should not have been drinking."

In light of these facts, we cannot fathom how the extent of appellant's intoxication would operate to make his action less serious or indicate he would be less likely to commit crimes in the future. To the contrary, appellant conceded he should not have been drinking on the day of the crime; regardless of this awareness, he became highly intoxicated, made the dangerous choice to get behind the wheel of a motor vehicle, and eventually displayed his genitals to a young girl. In the context of this case, appellant's intoxication would not operate to mitigate the severity of his crime or indicate he would be less likely to recidivate. The trial court did not abuse its discretion when it apparently drew the same conclusion.

{¶21} Appellant next asserts the trial court failed to adequately consider the fact that appellant, in committing the crimes to which he pleaded guilty, could have committed far worse crimes, but refrained. That appellant only committed two burglaries and disseminated matter harmful to children when he could have, given the available opportunity, raped or killed his victims does not make the charged conduct less serious or decrease the likelihood that he would commit future crimes. To hold otherwise would suggest that, at some level, appellant should be lauded for his actions or applauded for exercising some restraint over his criminal impulses. The circumstances of appellant's behavior were sufficiently serious to merit criminal charges; the fact that appellant could have caused additional harm to his victims does not lessen the severity of his criminal conduct nor does it indicate appellant will not commit crimes of similar or greater magnitude in the future.

{¶22} Finally, appellant argues the trial court failed to give appropriate weight to the genuine remorse expressed by appellant. Although appellant stated in his PSI that

he felt remorse and indicated a desire to obtain treatment for his various problems, he also stated he exposed himself because he was intoxicated, a condition in which he voluntarily placed himself. Regardless, the trial court had the discretion to weigh appellant's representations as it saw fit. On record, the court commented:

{¶23} "[Appellant] has a lengthy, lengthy history of criminal convictions as well as juvenile adjudications dating back to I believe it was 1982 if my memory serves me correctly. Here as a juvenile in 1982, began [as] an adult in 1984 and has just continued now for 25 straight years. He has not responded favorably to previously imposed sanctions. Been on probation again before in the past, has had multiple violations filed in the past. He has demonstrated a pattern of alcohol and drug abuse he claims has some connection to the offense, has not gotten treatment for those issues."

{¶24} It appears the court concluded appellant's long history of criminal conduct and his inability to respond favorably to previous sanctions outweighed appellant's expressions of remorse. Such a decision is well within the trial court's discretion and cannot be considered arbitrary or unreasonable.

{¶25} The trial court's sentence was within the statutory range for the crimes to which he pleaded guilty. The record indicates the court considered all necessary statutory provisions in arriving at its sentence. Accordingly, we hold the trial court did not abuse its discretion in imposing the sentence it selected.

{¶26} Appellant's assignment of error is overruled.

{¶27} For the reasons discussed above, the judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.