

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2009-L-023
MLADEN MUSA,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 08 CR 000433.

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).

Elizabeth Kelley, Elizabeth Kelley, L.P.A., Inc., 13940 Cedar Road, Suite 285, Cleveland, OH 44118-3204 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} This matter is submitted to this court on the record and the briefs of the parties. Appellant, Mladen Musa, appeals the judgment entered by the Lake County Court of Common Pleas. The trial court sentenced Musa to a five-year prison term for his convictions for gross sexual imposition.

{¶2} Musa engaged in incidents of sexual contact with a female relative over a period of several years. During the time period of these acts, Musa was approximately

14 to 18 years old, and the victim was approximately four to nine years old. These acts were not reported to authorities until years later, when Musa was 25 years old.

{¶3} A ten-count indictment was issued against Musa, charging him with five counts of rape, in violation of R.C. 2907.02(A)(1)(b) and first-degree felonies, and five counts of gross sexual imposition, in violation of R.C. 2907.05(A)(4).

{¶4} Musa pled guilty to five counts of gross sexual imposition. Upon recommendation of the state, the trial court dismissed the five counts of rape.

{¶5} Musa was sentenced to five years in prison on each of his convictions for gross sexual imposition. The trial court ordered these terms to be served concurrently, resulting in an aggregate prison term of five years.

{¶6} Musa raises the following assignment of error:

{¶7} “The trial court erred in sentencing the defendant-appellant to the maximum prison sentence.”

{¶8} After the *State v. Foster* decision, “[t]rial courts have full discretion to impose a prison sentence within the statutory range 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*, 109 Ohio St.3d 1, 2006-Ohio-856, at paragraph seven of the syllabus. The Supreme Court of Ohio, in a plurality opinion, has recently held that felony sentences are to be reviewed under a two-step process. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶26. The *Kalish* Court held:

{¶9} “First, [appellate courts] must examine the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the

trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." *Id.*

{¶10} "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157. (Citations omitted.)

{¶11} Musa acknowledges that the trial court adequately considered the factors contained in R.C. 2929.11 and 2929.12. He does not argue that the trial court's sentence was contrary to law. Instead, Musa argues that the trial court abused its discretion by imposing maximum prison terms.

{¶12} Initially, we note that Musa's five-year sentences are within the statutory range for a third-degree felony, pursuant to R.C. 2929.14(A)(3).

{¶13} Musa argues that the record does not demonstrate that he is likely to reoffend. Musa also argues that the psychological evaluations suggest that he has a low recidivism risk. We note that Jeffery Rindsberg, a licensed clinical psychologist who prepared a psychological report as part of the presentence investigation for the trial court, concluded that Musa's recidivism risk was low. This finding was based, in part, on the fact that Musa had no known instances of sexually offending behavior for the seven years after the conduct relating to the instant offenses terminated.

{¶14} Musa also argues that he had no prior offenses. While Musa did not have any prior convictions, we note the instant offenses were for ongoing contact, which occurred over a period of several years.

{¶15} Musa argues that he showed remorse for his conduct. We acknowledge that Musa apologized to the victim and accepted responsibility for his conduct.

However, while remorse is a relevant factor pursuant to R.C. 2929.12(E)(5), it is only one factor to be weighed in the trial court's ultimate determination. See, e.g., *State v. Goodnight*, 11th Dist. No. 2008-L-029, 2009-Ohio-2951, at ¶23-25.

{¶16} Musa argues that a long prison sentence is not necessary to protect the public because he will likely be deported after serving his prison term. At the sentencing hearing, when discussing Musa's reporting requirements as a Tier II sex offender, the trial court acknowledged the fact that Musa is not a United States citizen and that he may be subject to deportation after serving his prison sentence. However, Musa cites no case law for the proposition that a trial court should weigh the fact that there is a *possibility* that an offender will be deported after serving a prison term, thus limiting the possibility that the individual will commit future offenses in the United States.

{¶17} There were several factors that the trial court found pertaining to the seriousness of the instant offenses. The trial court noted the victim suffered psychological damage. The victim in this matter submitted a written letter, which was read into the record at Musa's sentencing hearing. Therein, the victim stated that she felt hurt, violated, sad, and angry as a result of Musa's actions. In addition, she reported suffering from depression and panic attacks. She stated that she had suicidal thoughts and engaged in drinking and cutting herself. As such, the record supports the trial court's finding. We note psychological harm suffered by the victim is an appropriate consideration for the trial court pursuant to R.C. 2929.12(B)(2). See, also, *State v. Hruby*, 6th Dist. No. OT-04-026, 2005-Ohio-3863, at ¶72.

{¶18} The trial court found that Musa's conduct was more serious due to the young age of the victim. Again, we emphasize that the victim was only four to nine

years old during the time period when the offenses occurred. This is a relevant factor pursuant to R.C. 2929.12(B)(1).

{¶19} Also, the trial court found that Musa's relationship with the victim facilitated the offense. As the victim's cousin, Musa had unsupervised access to the victim. The trial court appropriately considered this factor. R.C. 2929.12(B)(6). See, also, *State v. Hruby*, 2005-Ohio-3863, at ¶73-75.

{¶20} In conclusion, pursuant to R.C. 2929.12(A), the trial court was to consider both the seriousness of Musa's conduct, as well as his recidivism potential. On appeal, Musa focuses his argument on the recidivism factors, which he argues suggest a low likelihood of reoffending. However, as Musa acknowledges in his appellate brief, the "trial court was troubled with the seriousness factors." It is within the trial court's discretion to weigh the appropriate seriousness and recidivism factors and ultimately determine the weight to give each of those factors when conducting its balancing exercise.

{¶21} The state notes the trial court could have ordered the prison terms to be served consecutively, for an aggregate prison term of 25 years. Thus, while Musa objects to the trial court's imposition of maximum, concurrent sentences of five years, the trial court could have imposed a much longer aggregate sentence. Moreover, in his psychological evaluation, Musa admitted to engaging in at least one act of oral sex with the victim. If proven at trial, such an act would constitute sexual conduct and could have resulted in a significantly longer prison term if Musa were convicted of rape. See, e.g., *State v. Lyons*, 11th Dist. No. 2004-T-0035, 2005-Ohio-4649, at ¶37.

{¶22} The trial court did not abuse its discretion by imposing an aggregate five-year prison term.

{¶23} Musa's assignment of error is without merit.

{¶24} The judgment of the Lake County Court of Common Pleas is affirmed.

MARY JANE TRAPP, P.J.,

DIANE V. GRENDALL, J.,

concur.