

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2010-P-0021
JODI L. FETTY,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2009 CR 0489.

Judgment: Affirmed.

Victor V. Viglucci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Jacquenette S. Corgan, P.O. Box 2780, Akron, OH 44309 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Jodi Fetty, appeals from the Judgment Entry of the Portage County Court of Common Pleas, sentencing her to a total term of imprisonment of twenty-five years to life for Complicity to Murder, Aggravated Robbery, and Aggravated Burglary. For the following reasons, we affirm the decision of the trial court.

{¶2} On July 2, 2009, Fetty, Jonathan Dukes, and Cortez Oliver approached the home of Richard Lowther, after discussing a plan to steal items from Lowther's home. Darrell Dukes, the driver of the car all four parties were riding in, remained in the

car. After knocking on Lowther's front door, Fetty told Lowther that she was having car trouble and requested to use his phone. After Fetty entered the home to use the phone, Oliver approached Lowther on his front porch. At Oliver's trial, Fetty testified that while inside of Lowther's home, she heard a loud thud on the porch. Fetty then exited Lowther's home. Fetty testified that Oliver later stated that he "de-bowed" Lowther. Fetty testified that she believed this meant Oliver knocked Lowther down.

{¶3} Upon leaving Lowther's home, Fetty saw that Oliver had taken coins from the home. After dropping Jonathan off at his mother's home, Fetty, Oliver, and Darrell drove to a Giant Eagle store to cash in the coins, which were mostly quarters, at a Coinstar machine. Fetty testified that both she and Darrell told Oliver that doing so "was a dumb idea." Fetty testified that Darrell said to "take [the coins] to a coin collector." Fetty also stated that the coins might have "been worth more than Coinstar" would pay. Fetty entered the Giant Eagle, with the coins, around 3:30 a.m. She deposited the coins into the Coinstar machine, received a receipt, took the receipt to a cashier, and received \$164.54 in cash. While Fetty was inside the Giant Eagle, a security guard asked her questions about the coins and why she was cashing them in at 3:30 a.m. Subsequently, Fetty, Oliver, and Darrell were stopped by an officer in the Giant Eagle parking lot, who had received information through dispatch about the robbery that had occurred at Lowther's residence.

{¶4} Lowther subsequently died from the injuries sustained during the attack by Oliver.

{¶5} On August 17, 2009, Fetty was indicted by the Portage County Grand Jury on Complicity to Murder, in violation of R.C. 2923.03 and 2903.02(B); Aggravated

Burglary, in violation of R.C. 2911.11(A)(1) and (B); and Aggravated Robbery, in violation of R.C. 2911.01(A)(3).

{¶6} On December 18, 2009, Fetty signed a Written Plea of Guilty to all three charges in the indictment. Prior to this plea, Fetty had discussed a potential deal with the State. During the plea hearing, the State represented that it presented two alternatives to Fetty regarding a plea of guilty. First, which the State noted was “not really a plea agreement at all,” Fetty could “enter a guilty plea to the indictment as it stands with no recommendation or no promises from the State of Ohio.” The State noted that “any Defendant can do that at any time, walk before this Court and enter a plea to an indictment that’s been issued without input from the State.” The State then stated that the second option offered to Fetty was to plead guilty to each of the three counts of the indictment, with the State making a recommendation of ten years each, to run concurrently, on the Aggravated Robbery and Aggravated Burglary charges, and of fifteen years to life on Complicity to Murder, to run consecutive with the ten year sentence. The State finally stated that the defendant “intend[ed] to proceed with a plea of guilty to the indictment as it’s presented” and that Fetty would have “no promises from the State of Ohio, and no promises or recommendation[s] at the time of sentencing.”

{¶7} Fetty indicated to the court that she was rejecting the State’s offer of twenty-five years to life and that she would enter a plea of guilty to the charges and “rely on the presentence investigation and argue sentencing.” Fetty’s counsel indicated: “I believe that it’s [Fetty’s] position that she does not want to agree to essentially a twenty-five year to life term, that it is our position that we’re willing to cooperate with the State,

we're willing to testify at trial. We believe that when the facts come out at trial, or otherwise through her testimony, that there will be favorable information which the Court will be able to consider in its own sentencing, and we would further indicate to the Court that in declining this action, we also realize that we're opening ourselves up to that possibility and that we believe that's part of the consideration is that we believe that when there is no deal and she's looking at a recommendation from the Prosecutor that that will provide more honest testimony in a given trial and prohibit opposing counsel from saying well this is a deal."

{¶8} The trial court engaged Fetty in a Crim.R. 11 colloquy, advising her of the rights she would give up by pleading guilty. The court then accepted Fetty's plea of guilty to all three counts and ordered a Presentence Investigation Report.

{¶9} Thereafter, Fetty testified as a witness for the State against Oliver and Jonathan Dukes at their separate trials.

{¶10} During her testimony, Fetty described the events that occurred on July 2, 2009. She also stated that she entered a plea of guilty to the charges in the indictment. When asked whether she rejected the offer of a deal from the prosecutor, Fetty stated that she "rejected the one they were offering." She also testified that there was no agreement between her and the State of Ohio regarding her potential sentence, and "no agreements with the State of Ohio whatsoever."

{¶11} On March 1, 2010, the trial court held a sentencing hearing. Fetty made a statement apologizing for her actions and their impact on the victim's family. Fetty's counsel argued that several mitigating circumstances existed in this case, including that Fetty was intoxicated, had been seeking treatment for drug addiction while in jail, and

that she had a limited criminal record. Fetty's counsel also stated that Fetty had not accepted a plea agreement from the State and had agreed to argue sentencing.

{¶12} The State made a sentencing recommendation that Fetty receive a sentence of fifteen years to life for Complicity to Murder, to run consecutive with concurrent terms of ten years each for Aggravated Burglary and Aggravated Robbery.

{¶13} The trial court found that Fetty did not show remorse until she knew she was going to go to prison. The trial court also stated that when Fetty took the coins to Giant Eagle, she essentially said "Oh, we should not have taken them in that day because we may have gotten more money if we would have taken them to a collector." The court indicated that this showed a lack of remorse.

{¶14} The trial court sentenced Fetty to a term of fifteen years to life for Complicity to Murder, to run consecutive to concurrent terms of ten years each for Aggravated Burglary and Aggravated Robbery, for a total term of twenty-five years to life.

{¶15} Fetty timely appeals and raises the following assignments of error:

{¶16} "[1.] Appellant Fetty's conviction should be reversed as a violation of due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and remanded to the trial court, because the State of Ohio breached its agreement not to make a recommendation as to her sentence if Fetty pled guilty to the indictment.

{¶17} "[2.] Appellant Fetty's sentence should be reversed because she was denied the effective assistance of counsel guaranteed [to] her by the Sixth Amendment to the United States Constitution at sentencing.

{¶18} “[3.] The trial court abused its discretion when it sentenced Fetty to serve 25 years to life in prison.”

{¶19} In her first assignment of error, Fetty argues that the State of Ohio breached its agreement with her regarding sentencing. Fetty asserts that the State promised it would not make a recommendation to the court regarding sentencing, in exchange for Fetty’s plea of guilty, but failed to keep this promise.

{¶20} The State argues that no plea agreement existed between the State and Fetty and, therefore, no breach occurred.

{¶21} A negotiated plea agreement is essentially a contract between the state and the defendant. *State v. Whiteman*, 11th Dist. No. 2001-P-0096, 2003-Ohio-2229, at ¶38. “[T]he terms of a given plea agreement must be ascertained before it can be determined whether a party breached the agreement.” *State v. Olivarez*, 11th Dist. No. 97-L-288, 1999 Ohio App. LEXIS 1434, at *8.

{¶22} In the present case, Fetty admits that trial counsel did not object when the State made a sentencing recommendation at the sentencing hearing. In failing to object to the State’s improper recommendation at a sentencing hearing, a defendant waives his rights to appeal the breach of a plea agreement and a plain error analysis is applicable. *State v. Dudas*, 11th Dist. Nos. 2006-L-267 and 2006-L-268, 2007-Ohio-6739, at ¶¶53-54. “Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” Crim.R. 52(B). An alleged error constitutes plain error only if the error is obvious and, but for the error, the outcome of the trial clearly would have been different. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, at ¶108 (citations omitted).

{¶23} In the present case, Fetty fails to show the existence of a plea agreement between her and the State. Fetty signed a Written Plea of Guilty, which makes no mention of a plea agreement and states that no promises have been made to secure Fetty's plea. See *Whiteman*, 2003-Ohio-2229, at ¶39 (appellate court questioned the existence of the alleged plea agreement because "[a]ppellant's signed guilty plea [did] not mention a plea agreement," the signed plea stated only that he was pleading guilty to the charge, and the plea provided that no promises were made to secure his guilty plea); *State v. Smith*, 11th Dist. No. 2004-P-0061, 2005-Ohio-4899, at ¶¶20-25 (although appellant asserted that the prosecutor promised not to make a recommendation to the parole board, the court found that these promises did not constitute an agreement, because neither the written plea agreement nor the written guilty plea referenced such promises and the written guilty plea stated that no additional promises were made to secure the guilty plea).

{¶24} Although the prosecutor made a statement during the plea hearing that Fetty would have "no promises from the State of Ohio, and no promises or recommendation[s] at the time of sentencing," this statement was not made as part of the plea negotiations, nor was it intended to be part of any deal between the parties. See *State v. Story*, 11th Dist. No. 2006-A-0085, 2007-Ohio-4959, at ¶44 (statements made by a prosecutor but not made part of a negotiated plea are not a binding contract on the prosecution).

{¶25} The statements of both Fetty and her counsel show that Fetty did not enter into any plea agreement with the State, nor did she ever believe that she had entered into such an agreement. During the plea hearing, Fetty's counsel stated that

“we believe that *when there is no deal and she’s looking at a recommendation from the Prosecutor* that that will provide more honest testimony in a given trial and prohibit opposing counsel from saying well this is a deal.” This indicates that Fetty’s counsel was aware that the State would make a recommendation at the sentencing hearing and that no deal had been reached. Similarly, the court asked if Fetty was rejecting the prosecutor’s offer and whether she was “going to rely on the presentence investigation and argue sentencing.” Fetty responded that she was going to do so. Additionally, during Fetty’s testimony, she stated that she had made no deals with the prosecution and that the State had made no promises to her. All of these statements indicate that there was no plea agreement between Fetty and the State.

{¶26} Based on the foregoing, we cannot find that there is plain error regarding the prosecutor’s statement at the sentencing hearing.

{¶27} The first assignment of error is without merit.

{¶28} In her second assignment of error, Fetty argues that she received ineffective assistance of counsel because trial counsel failed to object on several different occasions and also failed to present evidence at Fetty’s sentencing hearing.

{¶29} To reverse a conviction for ineffective assistance of counsel, the defendant must prove “(1) that counsel’s performance fell below an objective standard of reasonableness, and (2) that counsel’s deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding.” *State v. Madrigal*, 87 Ohio St.3d 378, 388-389, 2000-Ohio-448, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687-688. “In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel’s performance was reasonable

considering all the circumstances. *** Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 688-689. "There is a strong presumption that the attorney's performance was reasonable." *State v. Gotel*, 11th Dist. No. 2006-L-015, 2007-Ohio-888, at ¶10.

{¶30} If a deficiency in counsel's performance is found, the appellant must then show that prejudice resulted. *State v. Swick*, 11th Dist. No. 97-L-254, 2001-Ohio-8831, 2001 Ohio App. LEXIS 5857, at *5. "To warrant reversal, 'the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Stojetz*, 84 Ohio St.3d 452, 457, 1999-Ohio-464, citing *Strickland*, 466 U.S. at 694.

{¶31} Regarding Fetty's first argument, that trial counsel was deficient because he failed to object to the State's sentencing recommendation, we find that this argument fails, based on the foregoing analysis. Fetty is unable to show that there was an agreement that the State would not make a recommendation at the sentencing hearing. Therefore, trial counsel was not deficient in failing to object to the State's sentencing recommendation.

{¶32} Fetty next argues that defense counsel failed to object to or correct the trial court's misunderstanding and misrepresentation of Fetty's testimony, given during Oliver's trial. Fetty asserts that, during sentencing, the trial court incorrectly found that she showed no remorse. Specifically, Fetty asserts that the court was incorrect in stating that Fetty said, prior to cashing in the coins, that "we should not have taken them in that day because we may have gotten more money if we would have taken them to a collector."

{¶33} Fetty's counsel was not deficient in failing to object to the trial court's statement regarding this issue. Although Fetty did not actually make the statement that "we should not have taken them in that day because we may have gotten more money if we would have taken them to a collector," she made several statements during her testimony that related to the value of the coins. She stated that it was a "dumb idea" to take the coins in to Coinstar and also stated that the coins "might have been worth more than Coinstar." Therefore, although the court did not quote Fetty's statements exactly as they had been made, the court essentially summarized Fetty's statements that the value of the coins was important. Such statements could reasonably be construed to show a lack of remorse. Although the wording used by the court was not precisely the same as Fetty's, counsel's failure to object was not unreasonable.

{¶34} Even if Fetty's trial counsel's failure to object was unreasonable, it did not cause prejudice to Fetty. There is other evidence in the record that Fetty believed Oliver should have traded the coins. As discussed previously, the record reflects several statements made by Fetty that shows she was concerned with the value of the coins. Such statements led to the trial court's conclusion that Fetty lacked remorse.

{¶35} Finally, Fetty argues that trial counsel was deficient because he failed to present mitigation evidence and testimony at Fetty's sentencing hearing.

{¶36} However, Fetty's counsel made multiple arguments asserting factors that could mitigate Fetty's sentence. Counsel requested that the court take into consideration that Fetty testified against both Jonathan Dukes and Oliver at their trials. Counsel also informed the court of Fetty's participation in drug rehabilitation programs in jail and introduced related evidence. Counsel addressed that Fetty was intoxicated at

the time of the crime and informed the court of Fetty's desire to write a book to discuss the dangers related to drug use. He also pointed out that Fetty had a limited criminal record and a low risk of recidivism. Therefore, Fetty's counsel did present sufficient evidence and argument at the sentencing hearing demonstrating he was not ineffective. See *State v. Porter*, 11th Dist. No. 2006-P-0079, 2008-Ohio-1779, at ¶35 (where defense counsel noted during the sentencing hearing that the defendant "had a minimal criminal history, that the underlying crime was committed in a jealous rage, and that [defendant's] conduct was 'completely out of character,'" counsel was not ineffective for failure to present evidence of mitigating circumstances).

{¶37} Additionally, Fetty's counsel was not required to present any witnesses during the sentencing hearing. The decision to call a witness is "within the rubric of trial strategy and will not be second-guessed by a reviewing court." *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, at ¶125 (citation omitted). "Hence, where the decision not to call a witness is debatable, it does not constitute ineffective assistance of counsel." *State v. Harco*, 11th Dist. No. 2005-A-0077, 2006-Ohio-3408, at ¶37 (citation omitted). Trial counsel presented arguments in favor of Fetty that did not require testimony, such as her lack of a criminal record and her willingness to testify against the other defendants in the case. Additionally, when asserting that Fetty was participating in drug programs at the jail, counsel presented documentation necessary to prove such participation. In the present case, Fetty fails to show that counsel was ineffective by failing to present testimony during the sentencing hearing.

{¶38} Fetty finally argues that the doctrine of cumulative error applies to the errors made by trial counsel.

{¶39} The Supreme Court of Ohio has recognized the doctrine of cumulative error. *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, at ¶48 (citation omitted). “Pursuant to this doctrine, a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal.” *State v. Garner*, 74 Ohio St.3d 49, 64, 1995-Ohio-168. This doctrine does not apply when the reviewing court has failed to find “multiple instances of harmless error.” *Id.*; *State v. Trimble*, 11th Dist. No. 2007-P-0098, 2008-Ohio-6409, at ¶112.

{¶40} In this matter, we have not found multiple instances of error by trial counsel. Therefore, Fetty’s argument regarding cumulative error is inapplicable.

{¶41} The second assignment of error is without merit.

{¶42} In her third assignment of error, Fetty argues that the trial court abused its discretion during sentencing by misapplying R.C. 2929.12, misapprehending Fetty’s testimony, and finding her unremorseful.

{¶43} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court held that “[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.” *Id.* at paragraph seven of the syllabus. In light of *Foster*, this court has held that the trial court has full discretion to sentence within the statutory ranges. *State v. Weaver*, 11th Dist. No. 2006-L-113, 2007-Ohio-1644, at ¶33; *State v. Martin*, 11th Dist. No. 2006-L-191, 2007-Ohio-2579, at ¶19; *State v. Sanders*, 11th Dist. No. 2006-L-222, 2007-Ohio-3207, at ¶18.

{¶44} “In applying *Foster* to the existing statutes, appellate courts must apply a two-step approach. First, they 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 shall be reviewed under an abuse-of-discretion standard.” *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶4.

{¶45} A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. “The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender.” R.C. 2929.11(A). A court imposing a sentence for a felony “has discretion to determine the most effective way to comply with the purposes and principles of sentencing.” R.C. 2929.12(A). “In the exercise of this discretion, a court ‘shall consider’ the non-exclusive list of seriousness and recidivism factors set forth in R.C. 2929.12(B), (C), (D), and (E).” *Sanders*, 2007-Ohio-3207, at ¶15.

{¶46} There is no “mandate” for the sentencing court to engage in any factual finding under these statutes. Rather, “[t]he court is merely to ‘consider’ the statutory factors.” *Foster*, 2006-Ohio-856, at ¶42. Post-*Foster*, this court has adopted the holding of the Ohio Supreme Court in *State v. Adams* (1988), 37 Ohio St.3d 295, that “[a] silent record raises the presumption that a trial court considered the factors contained in R.C. 2929.12.” *State v. Masterson*, 11th Dist. No. 2009-P-0064, 2010-Ohio-4939, at ¶12, citing *Adams*, 37 Ohio St.3d 295, at paragraph three of the syllabus. See, also, *State v. Bokisa*, 8th Dist. No. 95293, 2011-Ohio-845, at ¶11, citing *Kalish*, 2008-Ohio-4912, at ¶18, fn. 4 (“[i]n *Kalish*, the Supreme Court also made clear that

even after *Foster*, ‘where the trial court does not put on the record its consideration of R.C. 2929.11 and 2929.12, it is presumed that the trial court gave proper consideration to those statutes.’”)

{¶47} In this case, the trial court did not explicitly state that it considered the factors found in R.C. 2929.11 and 2929.12, with the exception of the court’s statement that its sentence was “due to the seriousness of [the] crime and to protect the public.” However, it is presumed that the court did consider those factors. Fetty does not present any evidence to rebut that presumption.

{¶48} In addition, each of Fetty’s sentences falls within the prescribed range for the degree of felony committed. The penalty of ten years for Aggravated Robbery and Aggravated Burglary falls within the prescribed range for a felony of the first degree, which is between three and ten years. R.C. 2929.14(A)(1). Regarding Complicity to Murder, R.C. 2929.02 states that “whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life.” The court sentenced Fetty to such a term of fifteen years to life on the Complicity to Murder charge.

{¶49} Fetty argues that the trial court abused its discretion during sentencing because of its misinterpretation of her testimony regarding the value of the coins. However, as indicated previously, Fetty did testify as to the value of the coins. Therefore, the court did not abuse its discretion in finding that Fetty showed a lack of remorse. Additionally, there is no indication that the trial court considered only Fetty’s lack of remorse, but instead, we presume that the court took into consideration all factors when it sentenced Fetty.

{¶50} Therefore, the trial court did not abuse its discretion in imposing a total sentence of twenty-five years to life.

{¶51} The third assignment of error is without merit.

{¶52} We note that Fetty, in a Notice of Supplemental Authority, raised the issue of whether the charges against her should have been considered allied offenses and cited *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314. Fetty failed to raise the issue of allied offenses at any level, including in her appellate brief. Neither party has presented supplemental briefs as to this issue. Therefore, we decline to address this argument. See *State v. Gore*, 6th Dist. No. L-05-1242, 2006-Ohio-5622, ¶15 (disregarding sentencing issue raised in defendant's reply brief because issue was not raised in assignment of error); *Akron v. Wendell* (1990), 70 Ohio App.3d 35, 46 ("we need not address these issues as they are not separately set forth as assignments of error"); *Dublin v. Clark*, 10th Dist. Nos. 05AP-431 and 05AP-450, 2005-Ohio-5926, at ¶5, fn 2 (declining to consider issue raised by appellant that was not raised in an assignment of error).

{¶53} For the foregoing reasons, the judgment of the Portage County Court of Common Pleas, sentencing Fetty to a total prison term of twenty-five years to life, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.