[Cite as *State v. Ballard*, 2009-Ohio-5472.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 08 CO 13
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
VERNON BALLARD,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 07CR215.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Attorney Robert Herron
Prosecuting Attorney
Attorney Timothy McNicol
Assistant Prosecuting Attorney
105 South Market Street
Lisbon, Ohio 44432

For Defendant-Appellant:

Attorney Doug King
91 West Taggart Street
P.O. Box 85
East Palestine, Ohio 44113

JUDGES:

Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: September 30, 2009

VUKOVICH, P.J.

¶{1} Defendant-appellant Vernon Ballard appeals his conviction and sentence entered in the Columbiana County Common Pleas Court after a jury found him guilty of failure to register as a sexually oriented offender. He raises eleven assignments of error on appeal, presenting arguments concerning speedy trial, amendment of the indictment during trial, relevancy of testimony, jury instructions, sufficiency and weight of the evidence, and sentencing. For the following reasons, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

¶{2} On May 18, 2008, appellant was arrested after police received a report that appellant had caused his sister's seven-year-old step-daughter to touch his penis. Appellant was indicted for gross sexual imposition. He was also indicted for failure to register as a sex offender in Columbiana County, the county in which he resides, in violation of R.C. 2950.04(A)(1), a third degree felony. The case was tried to a jury on February 11 and 12, 2008.

¶{3} Regarding the failure to register charge, appellant's sister testified at trial that appellant began staying at her residence in Columbiana County during the last week of January or the first week of February of 2007 and that he did not stay when he was not working. (Tr. 211). She estimated that appellant stayed at her house three to four nights in a row each week and then returned to Cleveland on the other nights. (Tr. 244).

¶{4} Her husband confirmed that appellant began staying at their house at the beginning of February 2007. (Tr. 188). He noted that appellant became employed by a local company one month after he began staying with them. (Tr. 198). He testified that appellant stayed at their house four to five nights a week before returning to Cleveland for the weekend. (Tr. 198-200). He noted that appellant received mail at their post office box, which was located at the post office across the street from their house. (Tr. 188, 250).

¶{5} Two pieces of mail from Sky Bank were admitted confirming that appellant received mail in Columbiana County. (Tr. 164, 302). The state also introduced paperwork showing that when appellant applied for a cash advance from a payday lending company on April 3, 2007, he reported that he had been living in

Columbiana County, Ohio for the past two months and that his prior address was located in Cleveland. (State's Exhibit No. 12). The lending company's employee testified as to what information appellant provided to her.

¶{6} The state also established that on April 6, 2007, appellant filed a change of address with the Columbiana County Clerk of Court's Title Office showing that he had moved from Cleveland to Columbiana County. He then registered his vehicle title in Columbiana County. (State's Exhibit No. 9). A government employee testified as to what information appellant provided to her. (Tr. 311, 313).

¶{7} Appellant testified that he lived in "three-quarter house" in Cleveland, which is a voluntary post-release placement run by a charity. (Tr. 349). He admitted that he had been intermittently staying at his sister's house in Columbiana County since January or February. (Tr. 355). He stated that he believed that as long as he returned to Cleveland every five days, then he did not need to register in Columbiana County. (Tr. 367). He also claimed that he only stayed at his sister's house a maximum of three days per week in order to avoid the drive to Cleveland after working four to five days per week in Columbiana County. (Tr. 400).

¶{8} The jury found appellant guilty of failure to register but not guilty of gross sexual imposition. The court sentenced him to a maximum sentence of five years in prison. The within timely appeal resulted.

ASSIGNMENT OF ERROR NUMBER ONE

¶{9} Appellant's first assignment of error contends:

¶{10} "DEFENDANT/APPELLANT WAS DENIED HIS RIGHT TO A SPEEDY TRIAL AS THE STATE OF OHIO FAILED TO BRING HIS CASE TO TRIAL WITHIN THE TIME REQUIREMENTS AS SET FORTH IN ARTICLE ONE, SECTION TEN OF THE CONSTITUTION OF OHIO, CODIFIED AT OHIO REVISED SECTION 2945.71."

¶{11} A person against whom a felony charge is pending must be brought to trial within two hundred seventy days after his arrest. R.C. 2945.71(C)(2). Time begins running the day after a defendant's arrest. See *State v. Turner*, 7th Dist. No. 93CA91, 2004-Ohio-1545, ¶ 23; R .C. 1.14; Crim.R. 45(A). A defendant is entitled to triple time if held in jail in lieu of bail on the pending charge. R.C. 2945.71(E).

¶{12} However, the three-for-one provision only applies if the defendant is solely being held on the pending charge, as opposed to being held on a parole holder

for instance. *State v. Brown* (1992), 64 Ohio St.3d 476, 479 (the existence of a valid parole holder prevents application of a triple-count); *State v. Martin* (1978), 56 Ohio St.3d 207, 211 (not held solely on pending charge if also held on parole hold); *State v. Davis* (June 30, 1999), 7th Dist. No. 98CA97 (a parole hold order prevents the triple count provision of R.C. 2945.71 from applying).

¶{13} Moreover, the time is tolled by any period of delay necessitated by motion of defendant. R.C. 2945.72(E). As such, a motion to suppress tolls the time. *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658, ¶44. In fact, even a defendant's motion for discovery and for a bill of particulars tolls the time. *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, ¶18, 22-23, 26 (time tolled for seven days it took state to respond to request for discovery and bill of particulars). Notably, the state does not have an affirmative duty to show that such a motion diverted the prosecutor's attention or caused a delay in the proceedings before the time tolls. *State v. Sanchez*, 110 Ohio St.3d 274, 2006-Ohio-4478, ¶ 25. Rather, it is the filing of the motion itself that tolls the time for a reasonable period of time. Id.

¶{14} Here, appellant was brought to trial on the two hundred and seventieth day after his arrest. His motion for discovery and a bill of particulars tolled the time for the week it took the state to respond. His suppression motion tolled the time for approximately four months. Thus, appellant attempts to rely on the triple time provision on appeal as the record shows that he remained incarcerated from the time of arrest through trial.

¶{15} However, it was established at trial that appellant was on post-release control for his prior sexual offense and had a parole officer at the time of his arrest. The record also shows that he was being held in the Belmont County jail, rather than the Columbiana County jail, during much of the proceedings. Furthermore, at his bail hearing, appellant was provided release on his own recognizance. Thus, if he stayed in jail pending trial, it was almost certainly on other charges.

¶{16} Notably, appellant did not raise speedy trial issues below. This court has consistently held that a defendant's failure to file a motion to dismiss on speedy trial grounds constitutes a waiver of the issue on appeal. See, e.g., *State v. Turner* (2006), 168 Ohio App.3d 176, 2006-Ohio-3786, 858 N.E.2d 1249, ¶21; *State v. Trummer* (1996), 114 Ohio App.3d 456, 470-471 (speedy trial rights are not self-executing). The

defendant is also statutorily required to raise the issue by motion made at or prior to the commencement of trial. R.C. 2945.73(B). Due to this failure to raise speedy trial issues in the trial court, the state had no obligation to produce the parole holder. As such, appellant cannot rely on the triple time provision on appeal.

¶{17} Accordingly, there is no indication that the try-by date had passed. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER TWO

¶{18} Appellant's second assignment of error alleges:

¶{19} "THE TRIAL COURT ERRED IN GRANTING THE STATE OF OHIO'S MOTION TO AMEND THE INDICTMENT DURING THE TRIAL."

¶{20} A defendant who is required to register shall not fail to register personally with the sheriff of the county "within five days of the offender's coming into a county in which the offender resides or temporarily is domiciled for more than five days * * *." R.C. 2950.04(A)(1) (version in effect at time of appellant's May 18, 2007 offense, prior to Jan. 1, 2008 amendment). This provision thus contains two alternative ways of violating the registration law: failing to register in the county where the offender resides within five days of coming into the county and failing to register in the county where the offender is temporarily domiciled for more than five days.

¶{21} The indictment here contained both options. After the trial testimony showed that appellant did not stay at his sister's for more than five days in a row, the state decided to go forward only on the issue of whether appellant resided in Columbiana County. Thus, the state moved to amend the indictment to strike the temporary domicile option. (Tr. 306). The defense objected on the grounds that their main strategy was to show that he was temporarily domiciled in his sister's house but never for more than five days. (Tr. 306-307). The defense alternatively moved for a mistrial on the grounds that the case was prepared with this temporary domicile language in mind. The court granted the state's motion to amend the indictment to strike the following language: "or was temporarily domiciled for more than five days." (Tr. 307).

¶{22} Appellant now argues that this violated his rights under Crim.R. 7(D) as the court's action changed the substance of the indictment and prejudiced the defendant, requiring a discharge of the jury and a new trial. Crim.R. 7(D) provides:

¶{23} "The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. *If any amendment is made to the substance of the indictment*, information, or complaint, or to cure a variance between the indictment, information, or complaint and the proof, *the defendant is entitled to a discharge of the jury on the defendant's motion, if a jury has been impaneled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that the defendant's rights will be fully protected by proceeding with the trial,* or by a postponement thereof to a later day with the same or another jury. Where a jury is discharged under this division, jeopardy shall not attach to the offense charged in the amended indictment, information, or complaint. No action of the court in refusing a continuance or postponement under this division is reviewable except after motion to grant a new trial therefor is refused by the trial court, and no appeal based upon such action of the court shall be sustained nor reversal had unless, from consideration of the whole proceedings, the reviewing court finds that a failure of justice resulted." Crim.R. 7(D) (emphasis added).

¶{24} By eliminating the reference to temporary domicile, the state merely narrowed its available avenues of conviction. The state admitted that appellant had not violated this portion of the statute and decided to proceed solely under the residence alternative. The fact that appellant may have presented a successful defense to the temporary domicile alternative did not mean that he was prejudiced by the concession of the state and the elimination of this alternative from the jury's consideration. The indictment also contained the alternative of failing to register where he resided. Thus, whether the amendment occurred or not, the jury would still be required to find him not guilty of the residence option in order to acquit him.

¶{25} It clearly appears from the whole proceedings that the defendant's rights were fully protected by proceeding with the trial. A failure of justice has not occurred in this instance. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER THREE

¶{26} Appellant's third assignment of error provides:

¶{27} "THE TRIAL COURT ERRED IN PERMITTING THE TESTIMONY OF DEPUTY BRADLEY REGARDING THE LEGAL REQUIREMENTS OF THE DEFENDANT/ APPELLANT'S REGISTRATION OBLIGATIONS NOT RELEVANT TO THE INDICTMENT."

¶{28} The state called a sergeant from the Columbiana County Sheriff's Department, who was the record keeper for jail inmate records and the sheriff's designee for registering sexual offenders in the county. (Tr. 274). He testified that appellant failed to register in the county. He explained that one must register where they reside. (Tr. 274-275). He also mentioned that one must register where they work upon certain conditions. (Tr. 275).

¶{29} Appellant notes that, although he could have been, he was not indicted for failure to register where he works. Appellant thus concludes that the testimony that one must register where he works was irrelevant. He cites Evid.R. 403(A) and urges that the probative value of the testimony was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury.

¶{30} However, appellant failed to object to the sergeant's testimony at trial. As such, he waived any error. Evid.R. 103(A)(1) (in order to preserve error in admitting evidence, appellant must have objected and relayed the specific grounds for objection if not apparent from the context). This leaves us only with a potential plain error review. See Crim.R. 52(B).

¶{31} If an error was not brought to the attention of the trial court, the appellate court may recognize plain error if there existed an obvious error affecting such substantial rights that it was outcome determinative. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, ¶62. Recognition of plain error must be done with the utmost of care by the appellate court and only in exceptional circumstances where it is necessary to avoid a manifest miscarriage of justice. *State v. Hughbanks*, 99 Ohio St.3d 365, 2003-Ohio-4121, ¶39. Even so, plain error is a discretionary doctrine which may, but need not, be employed if warranted. Id. See, also, Crim.R. 52(B).

¶{32} Notably, the trial court instructed the jury that it could only find appellant guilty of failure to register if they found that he failed to register where he resided. (Tr. 451-452). The court did not instruct the jury that they could find him guilty if they found

that he failed to register where he worked. It is presumed that the jury followed the court's instructions. *State v. Coleman* (1999), 85 Ohio St.3d 129, 135-136; *State v. Loza* (1994), 71 Ohio St.3d 61, 75. Appellant's argument is based on mere conjecture.

¶{33} We conclude that appellant failed to meet his burden of demonstrating that the jury failed to follow the court's instructions. See *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶17 (appellant bears the burden of establishing that the outcome of the trial would have been different but for the error). Moreover, we cannot conclude that there existed exceptional circumstances or a manifest miscarriage of justice. As such, the court did not err in failing to sua sponte limit the sergeant's testimony. This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER FOUR

¶{34} Appellant's fourth assignment of error alleges:

¶{35} "THE TRIAL COURT'S INSTRUCTIONS ON THE OFFENSE OF FAILURE OF A SEXUALLY ORIENTED OFFENDER TO REGISTER WERE INCOMPLETE, MISLEADING, OR INCORRECT."

¶{36} The court instructed the jury:

¶{37} "Before you may find the Defendant guilty you must find that the State of Ohio has proved beyond a reasonable doubt that on or about May of 2007, and in Columbiana County, Ohio, the Defendant having pled guilty to, and having been sentenced for sexual battery on June 26th, 2002, to a term of imprisonment for three years, and having been released from prison, failed to register with the sheriff of Columbiana County within five days of coming into Columbiana County, in which he resided." (Tr. 451) (emphasis added to contested portion).

¶{38} Appellant complains that the above underlined language was not in the indictment, which indictment tracked the language of the R.C. 2950.40(A)(1) and referred only to appellant having been convicted or pled guilty to a sexually oriented offense that is not a registration exempt sexually oriented offense. Thus, he concludes that this additional language was an incorrect addition of elements.

¶{39} However, appellant failed to object to the jury instructions. Thus, he waived any error. Crim.R. 30(A) ("On appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury

retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection."). For all we know, defense counsel assisted in drafting the instruction, thus inviting any issue. Moreover, plain error is not apparent.

¶{40} In fact, appellant stipulated to a judgment entry establishing that he was convicted of sexual battery, the date of that conviction, and the sentence received. (Tr. 153). He agreed that he was subject to registration as a sexually oriented offender. His testimony also confirmed that he was subject to registration for his past offense and that he failed to register in Columbiana County. Essentially, the only disputed issue was whether appellant resided in Columbiana County.

¶{41} As such, the court's addition of case-specific particulars to its instruction was not plainly erroneous and was not prejudicial to appellant. As such, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER FIVE

¶{42} Appellant's fifth assignment of error contends:

¶{43} "COUNT TWO OF THE INDICTMENT RETURNED AGAINST DEFENDANT/ APPELLANT IS [A] NULLITY ON ITS FACE THAT FAILS TO ESTABLISH JURISDICTION OR CHARGE A CRIMINAL OFFENSE AND IS THEREFORE VOID."

¶{44} Appellant believes that he was erroneously indicted under R.C. 2950.04(A)(1), which *currently* deals with the obligation to register in the county of conviction prior to being transferred to serve a prison sentence. He suggests that the state meant to charge him with R.C. 2950.04(A)(2)(a), which *currently* deals with the obligation to register where one resides within three days of coming into the county.

¶{45} However, appellant is mistakenly reading the current version of the statute, effective January 1, 2008, which reorganized the statute and altered certain provisions (such as shortening the time to register from five days to three days). As appellant's offense was committed in the Spring of 2007, such current version is inapplicable. See, e.g., *State v. Bartrum*, 121 Ohio St.3d 148, 2009-Ohio355, ¶6, 19 (reiterating well-established law that only version in effect at the time of the offense is relevant).

¶{46} Under the version effective at the time of the offense, R.C. 2950.04(A)(1) dealt with failure to register where one resides within five days of coming into the

county. See Amend. Notes to R.C. 2950.04 (explaining how the changes within 2007 S 10 had a January 1, 2008 effective date). See, also, *State v. Fitzgerald*, 8th Dist No. 86443, 2006-Ohio-6575, ¶34 (which contains a quote of the prior statutory language). Appellant's indictment tracked the statutory language from the proper version of the statute. Consequently, appellant's argument is misguided, and this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER SIX

¶{47} Appellant's sixth assignment of error provides:

¶{48} "THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT/APPELLANT'S CRIMINAL RULE 29 MOTION FOR JUDGMENT OF ACQUITTAL; ALTERNATIVELY, THE DEFENDANT/APPELLANT'S CONVICTION IS BASED UPON INSUFFICIENT EVIDENCE AND THEREFORE MUST BE REVERSED."

¶{49} Sufficiency of the evidence is a legal question dealing with adequacy. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. It is the standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the jury verdict. *State v. Smith* (1997), 80 Ohio St.3d 89, 113. Thus, an appellate court reviews the denial of a Crim.R. 29 motion for acquittal using the same standard that an appellate court uses to review a sufficiency of the evidence claim. *State v. Carter* (1995), 72 Ohio St.3d 545, 553; *State v. Mayas* (Dec. 6, 2000), 7th Dist. No. 98JE14.

¶{50} In reviewing a sufficiency of the evidence argument, the appellate court views the evidence in the light most favorable to the prosecution. A conviction cannot be reversed on this ground unless the court determines no rational trier of fact could have found that the elements of the offense were proven beyond a reasonable doubt. *State v. Goff* (1998), 82 Ohio St.3d 123, 138. In other words, the evidence is sufficient if, after viewing the evidence in the light most favorable to the state, reasonable minds can reach different conclusions as to whether each element has been proven beyond a reasonable doubt. *Carter*, 72 Ohio St.3d at 553; *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 263.

¶{51} Appellant argues that there is insufficient evidence that he resided in Columbiana County because he returned to Cleveland each week. Appellant's

brother-in-law testified that appellant had been staying at his residence in Columbiana County four to five nights per week for over three months prior to his arrest. (Tr. 188, 198-200). Leaving for the weekend does not bar a finding that one resides in a county. See, e.g., *State v. Sommerfield*, 3d Dist. No. 14-07-09, 2007-Ohio-6427, ¶15 (one can have more than one residence).

¶{52} Notably, the reason why appellant began staying at his sister's residence was unrelated to a job. Rather, appellant disclosed to his brother-in-law that he needed a place to stay because he had separated from his girlfriend, *notwithstanding his alleged residence in a three-quarter house in Cleveland*. (Tr. 197). A month later, he obtained employment in Columbiana County, a convenient location near his sister's house. Furthermore, he kept clothes, a recliner and an air mattress at his sister's residence.

¶{53} Evidence was also presented showing that appellant held himself out as residing in Columbiana County. He received mail from his bank at his sister's post office box across the street from their residence. In early April of 2007, he signed a loan application stating that he had resided in Columbiana County for two months and that Cleveland was his prior address. At the same time, he filed a change of address with a government agency stating that his current address was Columbiana County and his former address was in Cleveland. He then registered his vehicle title in Columbiana County.

¶{54} Viewing all of the evidence in the light most favorable to the prosecution, a rational person could find that appellant had been residing in Columbiana County for more than five days at the time of his arrest. As such, this assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER SEVEN

¶{55} Appellant's seventh assignment of error states:

¶{56} "THE DEFENDANT/APPELLANT'S CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

¶{57} Weight of the evidence concerns the greater amount of credible evidence to support one side over the other. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. Weight is not a question of mathematics but depends on its effect in inducing belief. Id. The reviewing court examines the entire record, weighs the

evidence and all reasonable inferences, considers the credibility of witnesses and determines whether the trier of fact clearly lost its way in resolving conflicts in the evidence and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. Id. The appellate court's discretionary power to sit as the thirteenth juror and grant a new trial on these grounds should be exercised only in the exceptional case where the evidence weighs heavily against the conviction. Id. at 387-388. In fact, after a criminal jury trial, reversal on weight cannot occur without a unanimous appellate court. Id. at 389, citing Section 3(B)(3), Article IV of the Ohio Constitution.

¶{58} This strict test acknowledges that credibility is generally the province of the trier of fact, who sits in the best position to assess the weight of the evidence and credibility of the witnesses, whose gestures, voice inflections, and demeanor the trier of fact can personally observe. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231. See, also, *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. Where there are two fairly reasonable views or explanations, we do not choose which one we prefer. *State v. Gore* (1999), 131 Ohio App.3d 197, 201. Rather, we defer to the trier of fact unless the evidence weighs so heavily against conviction that we are compelled to intervene. See id.

¶{59} Appellant testified that he stayed at his sister's only two to three days per week. (Tr. 400). However, his credibility on this issue is suspect. His sister testified that he stayed three to four days per week. (Tr. 244). His brother-in-law testified that he stayed four to five nights a week. (Tr. 198-200). It is the jury's right to find this testimony the most credible.

¶{60} In fact, appellant stated that he stayed at his sister's because he worked long hours four to five days per week and the drive to Cleveland was long. (Tr. 400). He also suggested that he spent time at his sister's house on his days off because he mentioned that he exercised visitation with his children at his sister's on the days he did not work. (Tr. 356).

¶{61} As aforementioned, appellant disclosed to this brother-in-law that he needed a place to stay because he separated from his girlfriend. The jury could infer that he did not really reside at the three-quarter house for released inmates in

Cleveland or he would not need a place to stay merely because of a fight with a girlfriend.

¶{62} Notably, this occurred before he had obtained any employment in Columbiana County. Moreover, although he was not charged with failure to register where he was employed, the fact that he sought out and obtained employment in Columbiana County is relevant to an evaluation of where he resided, especially in a case where the defendant stays at his sister's house in Columbiana County more days than not.

¶{63} In addition, appellant kept clothes, an air mattress, and a recliner at his sister's house. Although one could argue that this does not sound like much, he may not have belongings of much more substance, especially considering that his alleged other residence is a three-quarter house, which one could find that he rarely visits.

¶{64} Finally, although appellant tried to rationalize why he held himself out as residing in Columbiana County by essentially admitting that he lied on the loan application and to the title department, a jury could find that these acts show his acknowledgement that he resided in Columbiana County. Similarly, although he says he only received mail at his sister's post office box because he feared mail theft, the jury could easily conclude that he received mail at his sister's box (which is located across the street from her house) because he lived there.

¶{65} We cannot say that the jury clearly lost its way in determining that appellant resided in Columbiana County. This assignment of error is without merit.

ASSIGNMENTS OF ERROR NUMBERS EIGHT AND NINE

¶{66} Appellant's eighth and ninth assignments of error, which will be addressed together, assert:

¶{67} "THE TRIAL COURT ERRED IN IMPOSING THE MAXIMUM SENTENCE ON DEFENDANT/APPELLANT."

¶{68} "DEFENDANT/APELLANT'S SENTENCE IS CONTRARY TO LAW AS IT DOES NOT SERVE THE OVERRIDING PURPOSES AND PRINCIPLES OF SENTENCING AS EXPRESSED IN ORD 2929.11."

¶{69} Appellant argues that the court erred and abused its discretion in imposing a maximum sentence of five years in prison. Initially, he contends that although *Foster* held that findings and reasons for maximum sentences are no longer

constitutionally valid, the sentencing court remains bound by "legislative policy" stating that maximum sentences are only for the worst forms of the offense. He makes similar arguments regarding the court's decision to deviate from a minimum sentence. However, *Foster* specifically *severed and excised in their entirety* R.C. 2929.14(B), regarding deviation from a minimum sentence, and R.C. 2929.14(C), regarding imposition of a maximum sentence. *State v. Foste*r, 109 Ohio St.3d 1, 2006-Ohio-856, ¶97.

¶{70} Next, appellant alleges that a maximum sentence is not necessary to protect the public or punish him and that the sentence is not commensurate with his conduct. Appellant essentially argues that the record contains no evidence that his conduct is serious or that he is likely to commit future crimes. He also states that the court erred in failing to create a record susceptible to appellate review.

¶{71} The court must consider the principles and purposes of sentencing in R.C. 2929.11 and the seriousness and recidivism factors in R.C. 2929.12. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶38. As appellant acknowledges, the sentencing court need not make findings regarding these statutes. This court recently reiterated that a silent record raises the rebuttable presumption that the sentencing court considered the statutory sentencing criteria. *State v. James*, 7th Dist. No.07CO47, 2009-Ohio-4392, ¶50, citing *State v. Adams* (1988), 37 Ohio St.3d 295 and applying footnote from *Kalish*, 120 Ohio St.3d 23. Only if the record affirmatively shows that the trial court failed to consider the principles and purposes of sentencing will a sentence be reversed on this basis, unless the sentence is strikingly inconsistent with relevant considerations. Id.

¶{72} The record does not affirmatively show that the court refused to consider the proper principles and factors. Nor is the sentence strikingly inconsistent with the pertinent considerations. As will be set forth below, there is a plethora of evidence and numerous rational bases for weighing the seriousness of the offense and the likelihood of recidivism in favor of a maximum sentence.

¶{73} First, regarding the failure to register offense, it seems prudent to point out that the legislature chose to assign this offense the status of a third degree felony. We do not concern ourselves with judging whether this offense is more serious than other third degree felonies. Rather, the focus is on whether appellant's conduct in

failing to register is more serious than conduct normally constituting this offense. See R.C. 2929.12(B).

¶{74} On this topic, appellant's conduct can be seen as devious and conniving. He essentially devised a plan to maintain registration in Cuyahoga County, where a charity was allowing him stay, but was actually residing and working in Columbiana County. In order to avoid the temporary domicile provision, he allegedly never stayed in Columbiana County for more than five days. However, this does not avoid the residence provision, which one could find that he clearly established in Columbiana County.

¶{75} That is to say, he informed a payday advance company that he lived in Columbiana County and that Cuyahoga County was his former address. He filed a change of address with a government agency stating that Columbiana County was his current address and that Cuyahoga County was his former address in order to register his vehicle title in Columbiana County. Sky Bank sent his bank statements to Columbiana County. He also received all his other mail at the post office across the street from his sister's house in Columbiana County. He had clothes and furniture in his sister's Columbiana County residence as well.

¶{76} He testified that he stayed a maximum of three days in Columbiana. However, as aforementioned, his testimony on this subject can be seen as lacking credibility. In fact, one can find that he caught himself in a lie on this topic at trial. He stated that he only stayed at his sister's when he worked. Then, he disclosed that he would take his children to his sister's house in order to exercise visitation on his days off. Realizing that he just contradicted his statement that he returned to Cleveland on his days off, he added, "Or--this was before I working." (Tr. 356). In any event, his brother-in-law testified that appellant stayed at their house four to five nights a week for more than three months prior to the arrest. The brother-in-law's testimony can be viewed as credible.

¶{77} Moreover, it was not a matter of being a few days late registering. Instead, it had been months. Clearly, appellant had no intent to ever register in Columbiana County. It can be concluded that he hoped to maintain his charade of living in Cuyahoga County as long as he could in order to avoid registering where he spent the majority of his time. It is rational to conclude that he specifically intended to

avoid detection and disclosure in Columbiana County. These are all factors tending to make appellant's conduct more serious than conduct normally constituting the offense. See R.C. 2929.12(B) (any other relevant factor).

¶{78} These circumstances also establish that none of the listed factors that can show that an offender's conduct was less serious are present. See R.C. 2929.12(C)(1)-(4). For nearly four months, appellant resided in a neighborhood that was unaware of his status as a sexually oriented offender. The police were not able to ensure that no schools were within the prohibited distance from his residence. All of the neighbors and the affected community can be considered victims of this offense.

¶{79} In addition, appellant also violated the portion of the registration statute dealing with registering where one is employed. See R.C. 2950.04(A)(1). Although appellant was not charged with this portion of the statute, the sentencing court could consider whether his conduct was twice as violative due to his failure to register in Columbiana County because he not only resided but also worked in such county. Furthermore, the trial court could consider the fact that appellant had to be tazered at least three times because he was struggling with police during his arrest, which could be considered resisting arrest for purposes of discerning appellant's character at sentencing. (Tr. 160; Supp.Tr. 6-7).

¶{80} This leads to another line of reasoning involving many well-established sentencing principles. Obviously, a sentencing judge is perfectly entitled to rely on the trial transcript in evaluating the defendant, his character, and the nature and circumstances of the offense. *State v. Clay*, 7th Dist. No. 08MA2, 2009-Ohio-1204, ¶176. In fact, the sentencing judge can take into account facts introduced at trial relating to other charges, *even ones of which the defendant has just been acquitted*. *United States v. Watts* (1997), 519 U.S. 148; *State v. Wiles* (1991), 59 Ohio St.3d 71, 78; *State v. Donald*, 7th Dist. No. 08MA154, 2009-Ohio-4638, ¶42-44.

¶{81} The sentencing court can also consider the truthfulness of the defendant's testimony at trial and can evaluate the defendant's demeanor at trial which can allude to credibility and character. *State v. O'Dell* (1989), 45 Ohio St.3d 140, 147-148. Finally, the sentencing court can consider inadmissible evidence, including information that had been suppressed prior to trial. See *State v. Barker* (1978), 53 Ohio St.2d 135, 150-151 (sentencing court can consider information that would have

been inadmissible at trial); *State v. Horkey* (Mar. 31, 1995), 6th Dist. No. OT-94-38 (sentencing court can consider suppressed breath test results). See, also, Evid.R. 101(C)(3) (Rules of Evidence do not apply to sentencing).

¶{82} Thus, regardless of the fact that appellant was acquitted of gross sexual imposition, the trial court was permitted to consider the trial testimony surrounding this offense. His seven-year-old step-niece accused him of touching her leg and making her touch his penis over his underwear. His sister confirmed that he had removed his pants because they were wet. She also revealed that she saw movement under the blanket in the child's and appellant's lap area. She testified that when she removed her step-daughter from his lap, he pulled the child back and begged that she be permitted to sleep with him.

¶{83} As we have pointed out, the standard of proof in the criminal trial was proof beyond a reasonable doubt, but this standard does not apply to sentencing. *Donald*, 7th Dist. No. 08MA154 at ¶45, citing *Watts*, 519 U.S. at 155. Thus, merely because a jury found that appellant's guilt of molesting his step-niece was not established beyond a reasonable doubt did not mean that the trial court could not consider the accusations in determining his likelihood of recommitting crimes or in evaluating his credibility.

¶{84} Additionally, although he established that a felony drug charge had been dismissed, the undisputed arrest for such offense is a permissible sentencing consideration. And, he did not dispute that his criminal history contained several misdemeanors. (Tr. 463). Most importantly regarding his criminal history, a 2002 judgment entry was entered into the record showing that appellant pled guilty (in a negotiated plea) to sexual battery, a third degree felony due to the plea to division (A)(5) of R.C. 2907.03. (State's Exhibit 10). Related to this prior conviction, appellant admitted to the police that the victim of that offense was only fifteen at the time. (Suppressed Statement at 16). As can be seen from appellant's date of birth, he was twenty-eight at the time that he had sex with his fifteen-year-old victim, a person over whom he appeared to have been acting "in loco parentis". See R.C. 2907.02(A)(5).

¶{85} This criminal history is pertinent to considerations of criminal recidivism under R.C. 2929.12(D)(2) and shows under R.C. 2929.12(D)(3) that he has not responded favorably to sanctions previously imposed. The record also establishes

that he was still on post-release control for that offense when he committed the current offense. (Tr. 353; State's Exhibit 10). This is another factor under R.C. 2929.12(D)(1) that makes recidivism more likely. Plus, there is no indication that appellant shows genuine remorse for the offense, a pertinent recidivism factor under R.C. 2929.12(D)(5). He did not show remorse when testifying at trial. Nor did he show remorse while exercising his right to allocution at sentencing.

¶{86} There are no pertinent factors indicating that the offender is not likely to commit future crimes. See R.C. 2929.12(E). To the contrary, the circumstances appear likely to recur as he seems determined to avoid registration in the place where he spends most of his time, he would have avoided detection but for the gross sexual imposition allegations by a seven-year-old who trusted him, he has another sister willing to malign a seven-year-old in order to defend him, and he essentially accused the seven-year-old alleged molestation victim of attempted murder in order to promote an aura of instability about her.

¶{87} In conclusion, the trial court had full discretion to impose a sentence in the statutory range, and it did so. See *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶100. The sentence the trial court chose here is not strikingly inconsistent with the applicable sentencing factors, and thus, appellant has failed to rebut the presumption that the trial court considered the pertinent statutory provisions. See *State v. James*, 7th Dist. No. 07CO47, 2009-Ohio-4392, ¶50. In accordance, the trial court's decision to impose a maximum sentence did not constitute an abuse of discretion and was not otherwise contrary to law. See *State v. Kalish*, 120 Ohio St.3d 23, 2009-Ohio-4912, ¶26. For all of the above reasons, these assignments of error are overruled.

ASSIGNMENT OR ERROR NUMBER TEN

¶{88} Appellant's tenth assignment of error posits:

¶{89} "THE TRIAL COURT'S IMPOSITION OF THE MAXIMUM SENTENCE IN THE PRESENT CASE IS CONTRARY TO LAW AND/OR VIOLATES THE MANDATES OF ORC 2929.13(A)."

¶{90} Appellant believes that the maximum prison sentence violates the premise in R.C. 2929.13(A) that the court shall not impose a sentence that imposes an unnecessary burden on local government resources. He also contends that the

sentencing court was required to make a finding that the sentence did not impose such an unnecessary burden on resources.

¶{91} As to the latter argument, there is no requirement that the court make findings regarding the burden to government resources. *State v. Clay*, 7th Dist. No. 08MA2, 2009-Ohio-1204, ¶182, citing *State v. Wolfe*, 7th Dist. No. 03CO45, 2004-Ohio-3044, ¶15.

¶{92} As to the former argument, a sentencing court need not elevate resource conservation above the principles and purposes of sentencing. See id. The relevant premise in R.C. 2929.13(A) entails weighing the cost to the government with the benefit that society derives from an offender's incarceration. See *State v. Johnson*, 7th Dist. No. 08-MA-118, 2009-Ohio-2959, ¶27 (incarcerating an elderly or sick individual may entail more than normal costs).

¶{93} Based upon our analysis in the assignments of error numbers eight and nine, we cannot find that the benefit to society of appellant being incarcerated for five years outweighs the burden on government resources. Hence, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER ELEVEN

¶{94} Appellant's eleventh and final assignment of error argues:

¶{95} "DEFENDANT/APPELLANT WAS DENIED A FAIR TRIAL DUE TO THE CUMULATIVE EFFECT OF THE ERRORS AS SET FORTH HEREIN."

¶{96} The plain error doctrine allows the reviewing court to reverse a conviction where it finds that two or more errors, individually found to be harmless, have a combined effect of depriving the defendant of the constitutional right to fair trial. *State v. DeMarco* (1987), 31 Ohio St.3d 191, 196-197. However, where the appellate court does not find more than one harmless error, the doctrine is inapplicable. *State v. Garner* (1995), 74 Ohio St.3d 49, 64. As we have not found multiple instances of harmless error, we cannot find cumulative error.

¶{97} Moreover, where a defendant received a fair trial, errors are not prejudicial by "sheer weight of numbers." *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, ¶261 (finding no cumulative error in a capital case). Thus, even if we had found that the sergeant's testimony and the instruction adding specifics were

objectionable, they could not constitute cumulative error as appellant was not deprived of a fair trial. This assignment of error is without merit.

¶{98} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Donofrio, J., concurs.
Waite, J., concurs in part; dissents in part; see concurring in part, dissenting in part opinion.

Waite, J., concurring in part; dissenting in part.

¶{99} Although I concur with the majority opinion that Appellant's conviction for failure to register as a sexually oriented offender should be affirmed, I believe that the trial court abused its discretion when it imposed the maximum sentence in this case.

¶{100} The trial court proceeded to sentencing immediately after dismissing the jury. Appellant's counsel deferred to the trial court on sentencing. (Tr., p. 462.) The state argued in favor of the maximum sentence, and claimed that the conviction in this case constituted Appellant's third felony conviction. The prosecutor stated, "[i]f I recall he also had a felony Trafficking in Drugs offense, along with several other misdemeanor offenses." (Tr., p. 463.)

¶{101} The trial court asked Appellant, "is there anything you would like to say," and Appellant responded, "[y]es, the drug charge was thrown out of court, because the State couldn't produce witnesses, or evidence." (Tr., p. 463.) The trial court replied, "Defendant is sentenced to five years in the Lorain Correctional Institution and ordered to pay the costs of this action." (Tr., p. 463.)

¶{102} Subsections (B) and (D) of R.C. 2929.12 list the aggravating factors that a trial court must consider when imposing a sentence on a criminal defendant. R.C. 2929.12(B) reads in its entirety:

¶{103} "The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as

indicating that the offender's conduct is more serious than conduct normally constituting the offense:

¶{104} "(1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.

¶{105} "(2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.

¶{106} "(3) The offender held a public office or position of trust in the community, and the offense related to that office or position.

¶{107} "(4) The offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to justice.

¶{108} "(5) The offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others.

¶{109} "(6) The offender's relationship with the victim facilitated the offense.

¶{110} "(7) The offender committed the offense for hire or as a part of an organized criminal activity.

¶{111} "(8) In committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion.

¶{112} "(9) If the offense is a violation of section 2919.25 or a violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code involving a person who was a family or household member at the time of the violation, the offender committed the offense in the vicinity of one or more children who are not victims of the offense, and the offender or the victim of the offense is a parent, guardian, custodian, or person in loco parentis of one or more of those children."

¶{113} None of the factors listed in R.C. 2929.12(B) are applicable in the case sub judice.

¶{114} R.C. 2929.12(D) reads, in its entirety:

¶{115} "The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is likely to commit future crimes:

¶{116} "(1) At the time of committing the offense, the offender was under release from confinement before trial or sentencing, under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or under post-release control pursuant to section 2967.28 or any other provision of the Revised Code for an earlier offense or had been unfavorably terminated from post-release control for a prior offense pursuant to division (B) of section 2967.16 or section 2929.141 of the Revised Code.

¶{117} "(2) The offender previously was adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has a history of criminal convictions.

¶{118} "(3) The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has not responded favorably to sanctions previously imposed for criminal convictions.

¶{119} "(4) The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse.

¶{120} "(5) The offender shows no genuine remorse for the offense."

¶{121} I agree with the majority that the only factors listed in R.C. 2929.12 that are present in this case are Appellant's failure to respond favorably to previously imposed criminal sanctions ((D)(3)) and his failure to show genuine remorse ((D)(5)). Of course, every offender who violates the registration statute can be characterized as failing to respond to previously imposed criminal sanctions. Moreover, Appellant's failure to express remorse undoubtedly stems from his lack of opportunity, since his allocution consisted entirely of his corrections to the record. These corrections were necessitated by the state's incorrect assessment of his criminal history.

¶{122} The majority opinion also cites a number of additional factors, including Appellant's indicted and unindicted conduct and his testimony in court, to conclude that the trial court's sentence is not strikingly inconsistent with relevant considerations.

However, these factors do not demonstrate that the trial court considered the factors listed in R.C. 2929.12 prior to imposing sentence.

¶{123} Admittedly, a trial court need not cite to specific aggravating factors when imposing a maximum sentence in most cases because those factors will be obvious from the record. Where, as here, the trial court relies exclusively on a record that that does not include facts establishing the factors listed in R.C. 2929.12, I can only conclude that the trial court has acted unreasonably and arbitrarily in imposing the maximum sentence; thus, the sentence does appear "strikingly inconsistent" with the applicable factors. *State v. James*, 7th Dist. No 07 CO 47, 2009-Ohio-4392, ¶50.

¶{124} The three dissenting justices in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, observed that, "[e]ven though, except for downward departures, mandatory fact-finding is gone, a court may still, and usually will, create a record explaining why a particular sentence was selected." Id. at ¶58. The majority opinion in this case encourages a trial court to do just the opposite, that is, to create a silent record and then rely on the reviewing court to cull the record for any potential explanation for the sentence. Such a rule permits the trial court to entirely circumvent appellate review of sentencing for abuse of discretion. For the foregoing reasons, I respectfully dissent.