

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

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2011-L-004
KENNY LEWIS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 10 CR 000649.

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).

MARY JANE TRAPP, J.

{¶1} Kenny Lewis appeals from a judgment of the Lake County Court of Common Pleas Court which sentenced him to 40 years of imprisonment for his conviction of four counts of rape. The victim was his ex-girlfriend's daughter, and the rapes occurred during the seven years Mr. Lewis resided with the victim and her mother. Mr. Lewis claims the court erred in imposing maximum and consecutive sentences for his offenses. Applying the appropriate standard of review after *State v.*

Foster, 109 Ohio St.3d 1, 2006-Ohio-856, we affirm the sentence imposed by the trial court in this case.

{¶2} Substantive Facts and Procedural History

{¶3} Mr. Lewis, now 35, met the victim's mother when the victim was a year and a half old. He moved in with them a short time later, and lived with them intermittently for the next 12 years. He began engaging in sexual conduct with the victim around 2003, when the victim was eight years old. The sexual conduct, which included cunnilingus and felatio, digital penetration, and vaginal intercourse, continued until the victim was 14, when Mr. Lewis moved out of the house they shared and moved to New York in February 2010. By Mr. Lewis' own estimation, he engaged in sexual conduct with her twice a week.

{¶4} In May 2010, the victim, with the help of her mother and biological father, filed a rape report with the police. The police then recorded the victim's telephone conversations with Mr. Lewis, where they talked about their sexual relationship. Mr. Lewis also engaged in lengthy, sexually explicit conversations in an online chat room with a police detective disguised as the victim. Mr. Lewis was arrested when he returned to Cleveland intending to engage in further sexual conduct with the victim in a hotel.

{¶5} On November 10, 2010, Mr. Lewis pled guilty by way of information to four counts of rape, first-degree felonies in violation of R.C. 2907.02(A)(1)(b). On December 13, 2010, he was sentenced to the maximum term of ten years for each count, to run consecutively, for a total term of 40 years of imprisonment.

{¶6} Mr. Lewis appeals from his sentence, raising the following assignment of error:

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

{¶8} Mr. Lewis claims the trial court erred in sentencing him to the maximum and consecutive sentences for his conviction of four counts of rape. Specifically, he maintains that the trial court’s findings under R.C. 2929.12 were not supported by the record and that the court failed to give careful and substantial deliberation to the relevant statutory considerations.

{¶9} Reviewing Sentences Post *Foster*

{¶10} In *Foster*, the Supreme Court of Ohio held that in imposing maximum, consecutive sentences, a trial court is not required to make judicial fact-finding as mandated by the legislature in R.C. 2929.14. Subsequently, the Supreme Court of Ohio, in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, provided a two-step analysis for an appellate court to apply when reviewing felony sentences.

{¶11} First, the reviewing court 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 appellate court then reviews the trial court's decision under an abuse-of-discretion standard. *Id.* at ¶4.

{¶12} The first prong of the analysis instructs that “the appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence. 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.* at ¶14. The *Kalish* court explained that the applicable statutes to be applied by a trial court include the felony sentencing statutes R.C. 2929.11 and R.C.

2929.12, which are not fact-finding statutes like R.C. 2929.14. *Id.* at ¶17. Therefore, as part of its analysis of whether the sentence is “clearly and convincing contrary to law,” an appellate court must ensure that the trial court considered the purposes and principles of R.C. 2929.11 and the factors listed in R.C. 2929.12.

{¶13} If the first prong is satisfied, that is, the sentence is not “clearly and convincingly contrary to law,” the appellate court must then engage in the second prong of the analysis, which requires an appellate court to determine whether the trial court abused its discretion in selecting a sentence within the permissible statutory range. *Id.* at ¶17. The *Kalish* court explained the effect of R.C. 2929.11 and 2929.12 in this connection:

{¶14} “R.C. 2929.11 and 2929.12 *** are not fact-finding statutes like R.C. 2929.14. Instead, they serve as an overarching guide for [a] trial judge to consider in fashioning an appropriate sentence. In considering these statutes in light of *Foster*, the trial court has full discretion to determine whether the sentence satisfies the overriding purpose of Ohio’s sentencing structure. Moreover, R.C. 2929.12 explicitly permits trial courts to exercise their discretion in considering whether its sentence complies with the purposes of sentencing. It naturally follows, then, to review the actual term of imprisonment for an abuse of discretion.” *Kalish* at ¶17.

{¶15} Affirming the trial court’s sentence, the court in *Kalish* noted the trial court “gave careful and substantial deliberation to the relevant statutory considerations” and found nothing in the record to suggest the trial court’s decision was unreasonable, arbitrary, or unconscious.

{¶16} Applying *Kalish* Two-Step Analysis to Appellant’s Sentence

{¶17} On appeal, Mr. Lewis does not assert his sentence is contrary to law. Rather, he claims the trial court failed to give “careful and substantial deliberation to the relevant statutory considerations” regarding R.C. 2929.12 required by *Kalish*.

{¶18} R.C. 2929.12 requires a court to consider the seriousness and recidivism factors. It provides a nonexclusive list of factors relating to the seriousness of the offense and recidivism of the offender for the court to consider in imposing a sentence to meet objectives of felony sentencing.

{¶19} Furthermore, this court has long noted that, although a trial court is required to consider the seriousness and recidivism factors in R.C. 2929.12, the court does not need to make specific findings on the record in order to evince the requisite consideration of all applicable seriousness and recidivism factors. *State v. Blake*, 11th Dist. No. 2003-L-196, 2005-Ohio-686, ¶16. See, also, *State v. Lewis*, 11th Dist. No. 2006-L-224, 2007-Ohio-3014, ¶24; *State v. Rady*, 11th Dist. No. 2006-L-213, 2007-Ohio-1551, ¶46. *Kalish* does not change this principle.

{¶20} In the instant case, before imposing the maximum, consecutive sentences on Mr. Lewis for his conviction of four counts of rape, the trial court explained at great length its consideration of the seriousness and recidivism factors under R.C. 2929.12.

{¶21} Regarding the seriousness of Mr. Lewis’ conduct, the court emphasized the young age of the victim; the grave psychological injury suffered not just by the victim but also by her family members; Mr. Lewis’ use of his position as a father figure to commit the offenses; the length of the history of the sexual abuse; and his supplying alcohol and displaying of pornography to the victim. Regarding recidivism, the trial court mentioned Mr. Lewis’ prior criminal convictions, and noted his return to Cleveland for the purpose of engaging in further sexual conduct with the victim. Although the

psychological evaluation concluded Mr. Lewis is a pedophile with a low-risk to reoffend, that is but one factor to be considered, and the trial court rightly balanced it against other enumerated statutory factors.

{¶22} Despite the record clearly reflecting the trial court's thorough consideration of the statutory factors, Mr. Lewis also complains that the trial court did not give appropriate consideration and weight to the genuine remorse he expressed. He points to the apology he made to the victim and her family both in the presentence investigation and at his sentencing hearing, and to his desire for treatment for his pedophilia.

{¶23} Regarding a defendant's expression of remorse, this court has always held that a reviewing court must defer to the trial court as to whether the defendant's remarks are indicative of genuine remorse, because the trial court is in the best position to make that determination. *State v. Dudley*, 11th Dist. No. 2009-L-019, 2009-Ohio-5064, ¶22; *State v. Stewart*, 11th Dist. No. 2008-L-112, 2009-Ohio-921, ¶30; *State v. Eckliffe*, 11th Dist. No. 2001-L-015, 2002-Ohio-7136, ¶32.

{¶24} Here, we will not second-guess the trial court's finding of a lack of genuine remorse by Mr. Lewis. The record shows he minimized his responsibility and fault by claiming the young victim initiated the sexual conduct. The lengthy history of sexual abuse ended only when Mr. Lewis moved out of the victim's home; further inappropriate sexual conduct was thwarted only because he was arrested by the police. Indeed, the circumstances of the case remind us of the saying: "Remorse goes to sleep during a prosperous period and wakes up in adversity." *State v. Brown*, 11th Dist. No. 2008-152, 2009-Ohio-2189, ¶2, quoting Jean-Jacques Rousseau, *Confessions* II. The trial court

did not give much weight to Mr. Lewis' expression of remorse after the sexual abuse came to light, and we defer to the trial court for that assessment.

{¶25} Finally, Mr. Lewis claims his 40-year sentence is disproportionate to his criminal behavior because his crime involved only one victim and no physical force. We first note that proportionality is one of the overriding principles of felony sentencing under R.C. 2929.11, whereas Mr. Lewis raises this claim while challenging the trial court's alleged failure to carefully consider the statutory factors under R.C. 2929.12. With this clarification, we turn to R.C. 2929.11(A), which sets forth the overriding purposes of felony sentencing, i.e., "to protect the public from future crime by the offender and others and to punish the offender." To achieve these purposes, R.C. 2929.11(B) provides that a felony sentence must be "commensurate and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders." R.C. 2929.11(B).

{¶26} This court has stated that "a proper and circumspect application of the sentencing guidelines acts to ensure proportionality and consistency under R.C. 2929.11(B)." *State v. Marker*, 11th Dist. No.2006-P-0014, 2007-Ohio-3379, ¶34, citing *State v. Swiderski*, 11th Dist. No. 2004-L-112, 2005-Ohio-6705, ¶58. "Therefore, to the extent the trial court considered and applied the necessary statutory provisions, a sentence shall be deemed consistent and proportionate to those imposed for similar crimes." *Id.*

{¶27} At the sentencing hearing, the trial court, in addressing the proportionality argument made by Mr. Lewis, stated it had balanced all the requisite factors and taken into consideration the sentences imposed in other cases. Discussing the circumstances

of Mr. Lewis' offenses, the court emphasized that Mr. Lewis, a father figure to the victim, began molesting her, repeatedly and frequently, at the very young age of eight. In the trial court's words, "[t]he facts in this case are just about as horrendous as you can get."

{¶28} Felony sentences should be proportionate to the severity of the offense committed, so as not to "shock the sense of justice in the community." *State v. Chaffin* (1972), 30 Ohio St.2d 13, 17, quoting *McDougle v. Maxwell* (1964), 1 Ohio St.2d 68, 70. Reviewing the record as a whole, we conclude the trial court considered and applied the necessary statutory provisions and we defer to its determination that Mr. Lewis' sentence is proportionate to the severity of his offenses.

{¶29} Our review of the sentencing hearing transcript reflects the trial court gave careful and substantial consideration to the relevant statutory factors, and applied them to the particular circumstances of this case. The sentence fashioned by the court was within the statutory range and the record contains evidence going to the seriousness and recidivism factors pursuant to R.C. 2929.12. Based on the record before us, we cannot say the trial court's sentence was unreasonable, arbitrary, or unconscionable. The assignment of error is without merit.

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

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.