

IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

IN THE MATTER OF C.M.L. :
 :
 : C.A. CASE NO. 2010CA0002
 :
 : T.C. CASE NO. D-37006
 :
 : (Criminal Appeal From
 : Juvenile Court)
 :

.

O P I N I O N

Rendered on the 11th day of March, 2011.

.

Stephen K. Haller, Pros. Attorney; Elizabeth A. Ellis, Appellate
Counsel, Atty. Reg. No.0074332; Stephanie R. Hayden, Asst. Pros.,
Atty. Reg. No. 0082881, 61 Greene Street, Xenia, OH 45385
Attorneys for Plaintiff-Appellee

J. Allen Wilmes, Atty. Reg. No.0012093, 4428 N. Dixie Drive, Dayton,
OH 45414
Attorney for Defendant-Appellant

.

GRADY, P.J.:

{¶ 1} Defendant, CML, appeals from the juvenile court's
imposition of the adult portion of his serious youthful offender
disposition.

{¶ 2} On October 21, 2005, Defendant was charged in a nine

count complaint filed in juvenile court with being delinquent by reason of having committed numerous felony offenses, including burglary, tampering with evidence, aggravated burglary, aggravated robbery, felonious assault and escape. The State filed a motion pursuant to Juv.R. 30 to transfer the case to the General Division of the Common Pleas Court for prosecution of Defendant as an adult.

{¶3} During the pendency of the bindover proceedings, Defendant entered into a negotiated plea agreement. In exchange for the State's agreement to withdraw its bindover motion and to reduce the aggravated burglary charge to burglary, Defendant entered admissions/guilty pleas to all of the charges, with serious youthful offender specifications added to many of them. The trial court imposed a serious youthful offender disposition that included an indefinite commitment to the Department of Youth Services for a minimum period of five years up to Defendant's twenty-first birthday, as well as an adult portion of the sentence that included ten years in prison.

{¶4} On August 24, 2009, the State filed a motion to invoke the adult portion of Defendant's disposition based upon Defendant's persistent violent and disruptive behavior while in DYS custody.

Following hearings held on October 22 and December 7, 2009, the trial court on December 10, 2009, reduced the adult portion of Defendant's sentence from ten to eight years and then terminated the juvenile disposition and imposed the adult portion of

Defendant's sentence.

{¶ 5} Defendant timely appealed to this court.

FIRST ASSIGNMENT OF ERROR

{¶ 6} "THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT APPELLANT IS UNLIKELY TO BE REHABILITATED DURING THE REMAINING PERIOD OF JUVENILE JURISDICTION."

{¶ 7} R.C. 2152.14 provides, in relevant part:

{¶ 8} "(A) (1) The director of youth services may request the prosecuting attorney of the county in which is located the juvenile court that imposed a serious youthful offender dispositional sentence upon a person to file a motion with that juvenile court to invoke the adult portion of the dispositional sentence if all of the following apply to the person:

{¶ 9} "(a) The person is at least fourteen years of age.

{¶ 10} "(b) The person is in the institutional custody, or an escapee from the custody, of the department of youth services.

{¶ 11} "(c) The person is serving the juvenile portion of the serious youthful offender dispositional sentence.

{¶ 12} "(2) The motion shall state that there is reasonable cause to believe that either of the following misconduct has occurred and shall state that at least one incident of misconduct of that nature occurred after the person reached fourteen years of age:

{¶ 13} "(a) The person committed an act that is a violation of the rules of the institution and that could be charged as any felony or as a first degree misdemeanor offense of violence if committed by an adult.

{¶ 14} "(b) The person has engaged in conduct that creates a substantial risk to the safety or security of the institution, the community, or the victim.

{¶ 15} "** * *

{¶ 16} "(E) (1) The juvenile court may invoke the adult portion of a person's serious youthful offender dispositional sentence if the juvenile court finds all of the following on the record by clear and convincing evidence:

{¶ 17} "(a) The person is serving the juvenile portion of a serious youthful offender dispositional sentence.

{¶ 18} "(b) The person is at least fourteen years of age and has been admitted to a department of youth services facility, or criminal charges are pending against the person.

{¶ 19} "(c) The person engaged in the conduct or acts charged under division (A), (B), or (C) of this section, and the person's conduct demonstrates that the person is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction."

{¶ 20} Defendant does not deny that all of the prerequisites for imposing the adult portion of his serious youthful offender

sentence apply in this case. Defendant is eighteen years of age, is serving the juvenile portion of his serious youthful offender sentence, is in custody in a DYS facility, and has committed an act that could be charged as a felony offense of violence and/or has engaged in conduct that creates a substantial risk to the safety or security of the institution. R.C. 2152.14(A)(1) and (2). Defendant argues, however, that because the trial court failed to give proper weight to a number of matters, the court abused its discretion in finding by clear and convincing evidence that Defendant is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction.

{¶ 21} "'Abuse of discretion' has been defined as an attitude that is unreasonable, arbitrary or unconscionable. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87, 19 OBR 123, 126, 482 N.E.2d 1248, 1252. It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary.

{¶ 22} "A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue *de novo*, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result." *AAAA Enterprises, Inc. V. River Place*

Community Redevelopment (1990), 50 Ohio St.3d 157, 161.

{¶ 23} Clear and convincing evidence is "[t]hat measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal. Where the degree of proof required to sustain an issue must be clear and convincing, a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof." *Cross v. Ledford* (1954), 161 Ohio St. 469, 477.

{¶ 24} Defendant identifies a number of matters to which he claims the court did not give sufficient weight: the juvenile court still had jurisdiction over Defendant for three more years; young people often grow and mature between the ages of eighteen and twenty-one; Defendant may be the victim of unsolicited attacks for refusing to join a gang, and the resulting conflicts were not always his fault; Defendant did far better when institutionalized at Indian River (minimum security) rather than Ohio River Valley (maximum security) because of more program offerings and fewer gangs; and Defendant has learned to think before he acts and accepts the consequences for his negative behavior. Defendant claims that had the court given proper weight to those matters, it could not

have found, by clear and convincing evidence that Defendant is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction.

{¶ 25} Defendant also complains that the trial court acted arbitrarily when it excluded the testimony of a witness Defendant wished to offer. Hearings on the State's request to impose the adult portion of Defendant's sentence were held on October 22 and December 7, 2009. As its final witness on December 7, Defendant called Donna Lewis. The State objected to the witness's testimony because her name was not on the list of witnesses the Defendant provided. Defendant's attorney explained that the witness had only recently come forward, that she is a family member of one of the victims of the offenses Defendant committed, and that "she would like to say something nice about him." (T. 132-133). The trial court sustained the State's objection.

{¶ 26} Juv.R. 24(A)(1) requires a party to provide, on request, "[t]he names and last known addresses of each witness to the occurrence that forms the basis of the charge or offense." Juv.R. 24(B) authorizes the court to order discovery that has been refused. Juv.R. 24(C) states:

{¶ 27} "Failure to comply. If at any time during the course of the proceedings it is brought to the attention of the court that a person has failed to comply with an order issued pursuant to this rule, the court may grant a continuance, prohibit the person

from introducing in evidence the material not disclosed or enter such other order as it deems just under the circumstances."

{¶ 28} The record does not reflect that the court had ordered discovery of the name and address of the witness which Defendant failed to disclose. The court's authority to exclude the testimony of a witness whose name and address a party has not disclosed is not necessarily limited to that circumstance; the court has the inherent power to control the course of proceedings before it. The exercise of that power is subject to Juv.R. 1(B), which provides that the Juvenile Rules "shall be liberally construed so as . . . to effect the just determination of every juvenile court proceeding by ensuring the parties a fair hearing and the enforcement of their constitutional and other legal rights."

{¶ 29} Even were we to find that Defendant's contention has merit, we could not grant him relief on the error he assigns. Evid.R. 103 provides:

{¶ 30} "(A) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and * * *

{¶ 31} "(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Offer of proof is not necessary if evidence is excluded during cross-examination."

{¶ 32} An offer of proof must demonstrate the substance of the evidence the court excluded. Weissenberger's Ohio Evidence Treatise (2010 Ed.) §103.21. An offer of proof is unnecessary if the substance of the excluded evidence is apparent from the context within which the question was asked. *In re Walker*, 162 Ohio App.3d 303, 2005-Ohio-3773. In either event, the record must demonstrate that in excluding the evidence the court violated the substantial rights of the party asking to present it.

{¶ 33} Counsel's explanation that the witness "would like to say something nice about" Defendant fails to portray the substance of the evidence the witness would offer. Nether were any questions asked of the witness that would demonstrate the substance of her testimony. Therefore, per Evid.R. 103, Defendant may not assign error on appeal predicated on the juvenile court's ruling excluding the testimony of Donna Lewis.

{¶ 34} The critical finding the court is required to make in order to impose the adult portion of a serious youthful offender's sentence is that the offender "is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction." R.C. 2152.14(E)(1)(c). That determination must be made from the totality of the circumstances, including the extent and nature of the offenses which resulted in the juvenile's serious youthful offender classification. In the present case, that included CML's conduct in burglarizing four different homes, as well as assaulting

and robbing an eighty-three year old man, which resulted in serious physical harm to that victim.

{¶ 35} The trial court heard evidence detailing Defendant's numerous rules violations while in the juvenile institution, including gang involvement and numerous assaults on other youth and staff members. Defendant has over one hundred and twenty incidents/rules violations. One incident involved Defendant's beating another youth so severely he had to be hospitalized. Another incident involved Defendant's assault on a corrections officer, Jerry Howes, which resulted in Defendant's pleading guilty to a fourth degree felony offense of violence, assault on a corrections officer.

{¶ 36} Howes testified that Defendant is continually involved in fights and that his violent behavior poses a substantial risk to the safety and security of the institution. Alisha Bailey, unit manager for the Ohio River Valley Juvenile Correctional Institution, testified that despite Defendant's participation in the various rehabilitative programs offered by the institution, his assaultive, disruptive behavior continues, he is consistently the aggressor in these situations, and the institution has no further programs to offer Defendant.

{¶ 37} Jeff Gaskin, a social worker at Ohio River Valley Juvenile Correctional Institute, testified that Defendant knows right from wrong, but he usually does not go more than one week

without having disciplinary problems and/or rules violations.

{¶ 38} In view of this evidence, no abuse of discretion on the part of the trial court in imposing the adult portion of Defendant's serious youthful offender sentence, pursuant to R.C. 2152.14, is demonstrated.

{¶ 39} Defendant's first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 40} "THE TRIAL COURT'S RULING AND JUDGMENT HEREIN WAS CONTRARY TO LAW."

{¶ 41} Defendant argues that even though the trial court made all of the findings required by R.C. 2152.14(E)(1) in order to impose the adult portion of Defendant's serious youthful offender sentence, the court nevertheless failed to indicate in its December 10, 2009 Judgment Entry that in making those findings it applied the "clear and convincing evidence" standard required by R.C. 2152.14(E)(1). Accordingly, Defendant argues that the trial court's judgment is contrary to law and must be reversed.

{¶ 42} The State acknowledges that pursuant to R.C. 2152.14(E)(1) the trial court is required to apply a clear and convincing evidence standard in making the findings required to invoke the adult portion of a serious youthful offender sentence.

The State argues, however, that where, as here, there is no evidence showing that the trial court applied an incorrect standard of proof, there is a presumption that the trial court applied the

correct legal standard. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197.

{¶ 43} In *State v. Dyer* (June 30, 1995), Montgomery App. No. 14812, we observed:

{¶ 44} "In the absence of anything in the record to demonstrate prejudicial error, this court must presume the regularity and validity of the trial court's proceedings and affirm its judgment. *Davis v. Ballard* (April 26, 1995), Montgomery App. No. 14443, unreported. *State v. Willets* (July 27, 1994), Montgomery App. No. 14357, unreported. *Columbus v. Hodge* (1987), 37 Ohio App.3d 68. It is settled law that the appellant bears the burden of showing error by reference to matters in the record, and where such matters are omitted from the record the reviewing court has nothing to pass upon and has no choice but to presume the validity of the trial court's proceedings and affirm. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199."

{¶ 45} Our review of this record fails to substantiate Defendant's claim that the trial court did not apply the correct clear and convincing evidence standard in making the findings required by R.C. 2152.14(E)(1) in order to invoke the adult portion of Defendant's serious youthful offender sentence. After reviewing the evidence presented at the hearing in this matter, it is obvious that clear and convincing evidence exists to support the findings the trial court made pursuant to R.C. 2152.14(E)(1).

Furthermore, there is nothing in this record that demonstrates that the trial court applied another legal standard in making its findings. In other words, this record does not exemplify Defendant's claimed error. Under those circumstances, we must presume the regularity and validity of the trial court's proceedings and affirm its judgment. *Dyer*.

{¶ 46} Defendant's second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 47} "WHEN A TRIAL COURT NEGLECTS TO IMPOSE A TERM OF POSTRELEASE CONTROL, THE SENTENCE IS VOID AND THE CASE MUST BE REMANDED FOR RESENTENCING."

{¶ 48} In a separate assignment of error in its appellate brief, the State, without having filed any notice of cross-appeal pursuant to App.R. 3(C), raises an issue not presented by Defendant. The State argues that the trial court's sentence of imprisonment does not include the mandatory period of post release control that applies, and therefore this matter must be remanded to the trial court for a new sentencing hearing. We disagree.

{¶ 49} Defendant was found delinquent by reason of having committed several felony offenses, including aggravated robbery, which is a felony of the first degree. R.C. 2911.01(A)(3), (C).

Having been found delinquent/guilty of aggravated robbery, a five year period of postrelease control is mandatory in this case. R.C. 2967.28(B)(1). A review of the trial court's March 21, 2006,

Judgment Entry imposing the serious youthful offender sentence, and the court's December 10, 2009 Judgment Entry invoking the adult portion of Defendant's serious youthful offender sentence, reveals that in both judgment entries the trial court stated that it had advised Defendant that following his release from prison he may serve a five year period of postrelease control. Furthermore, in both judgment entries the trial court properly advised Defendant of the consequences of violating postrelease control.

{¶ 50} Although the trial court's sentence in this case includes a notification about postrelease control requirements, that notification is incorrect, to the extent it indicates that the five year period of post release control is discretionary, rather than mandatory. We will therefore modify the judgment of conviction pursuant to R.C. 2953.08(G)(2), to instead impose the five year period of post release control mandated by R.C. 2967.28(B)(1). *State v. Fischer*, ___ Ohio St.3d ___, 2010-Ohio-6238, ¶29. As modified, the judgment will be affirmed.

FAIN, J. And FROELICH, J., concur.

Copies mailed to:

Elizabeth A. Ellis, Esq.
Stephanie R. Hayden, Esq.
J. Allen Wilmes, Esq.

Hon. Robert W. Hutcheson