[Cite as *State v. Sprouse*, 2006-Ohio-7329.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 05AP-467 (C.P.C. No. 04CR-07-4423)
v.	:	(REGULAR CALENDAR)
James P. Sprouse,	:	
Defendant-Appellant.	:	

O P I N I O N

Rendered on August 17, 2006

Ron O'Brien, Prosecuting Attorney, and *Kimberly M. Bond*, for appellee.

Shaw & Miller, and *Mark J. Miller*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

PETREE, J.

{¶1} Defendant-appellant, James P. Sprouse, appeals from a judgment of the Franklin County Court of Common Pleas convicting him of two counts of rape and one count of kidnapping. For the following reasons, we affirm the judgment of the trial court.

{¶2} On July 2, 2004, defendant was indicted on two counts of rape, in violation of R.C. 2907.02, and one count of kidnapping, in violation of R.C. 2905.01. The indictment alleged that, on or about June 21, 2004, defendant compelled the victim to submit, by force or threat of force, to digital vaginal penetration and vaginal intercourse. The indictment also alleged that defendant, by force, threat, or deception, restrained the

victim for the purpose of engaging in sexual activity. Defendant was tried by jury in February 2005.

{¶3} As pertinent to this appeal, the state's evidence at trial indicated as follows. The victim worked as a dancer for an escort service, DGT Incorporated ("DGT"), which provides "nude erotic entertainment." (Tr. 335.) On June 21, 2004, defendant contacted DGT, requesting a dancer. The victim and her driver, James King, went to defendant's residence at 2534 Shrewsbury Rd. in Upper Arlington. The driver accompanied the victim into the house. The victim was not comfortable when they entered the house. The driver reviewed a document with defendant, which specified that there would be no touching and no sexual activity. Defendant signed the document and gave the driver the specified fee. After collecting the cash, the driver exited the house. The victim also explained to defendant the parameters of the entertainment, and explained that there was to be no touching and no sex.

{¶4} Defendant went into another room in the house and returned to the living room, where the victim was sitting on a couch. He sat on a chair and pulled out a gun. At trial, the victim described the gun as "a western gun." (Tr. 197.) Defendant pointed the gun at the victim and told her to go to the bedroom. In the bedroom, defendant put the gun in the victim's face and told her to lie down on the bed and that he would kill her. The victim struggled with defendant, and she tried to grab the gun. He again told her that he was going to kill her, and he would not let her leave. Defendant put his hands on her throat and started to strangle her, and he tried to punch her. He ripped off her underwear, digitally penetrated her vagina, and forced her to engage in vaginal intercourse. She

begged defendant to stop and to wear a condom, and she thought that he put on a condom.

{¶5} Mr. King, the driver, testified that, after he learned that the victim had not called the DGT office a second time pursuant to company procedure, he went to the door of the house and knocked. No one answered, and he went back to the car. He went to the door of the house again and knocked, but no one answered. He proceeded to walk toward the side of the house in an attempt to see inside; however, he could not see inside because the windows were covered. The driver began to walk toward his car when the victim, having been able to escape from defendant, ran out of the house and toward the car. According to the driver, when the victim ran out of the house, she was crying and acting hysterical. The driver testified that the victim said, "I just got fucking raped." (Tr. 283.) The victim and the driver left the area and went to a gas station, where they met and talked with the police. After talking with the police, the victim went to a hospital and was examined.

{¶6} Rebecca Tangeman, the owner of DGT, testified that she called defendant's residence five or six times when the victim was inside the house, and that she left messages two or three times. She was unable to speak with anyone at the residence. Her messages indicated that if she did not speak with someone she was going to call the police. Ms. Tangeman testified that, after she was unable to contact anyone by calling defendant's house, she called 911. A recording of the phone call to 911 was played at trial, and the call was transcribed in the record as follows:

911. What is your emergency?

I need the Upper Arlington Police.

Do do you have a (inaudible)?

Yes. I have an escort service. We have one of our drivers (inaudible). She said she wasn't comfortable. The driver can't get the guy to answer the door or the phone.

Okay. Hold on second. Are you still there, ma'am?

Yeah. I'm here, (inaudible).

What is the phone number?

868-8727.

Okay. That's not working so I'm going - - 868-8727?

Right.

What's the address the females at?

Twenty-five-thirty-four Shrewsbury.

Spell that for me.

S-H-R-E-W-S-B-U-R-Y.

Okay.

Wait a minute. Oh, he raped her. Oh, no.

Okay. Is she in Upper Arlington?

Yes. It's Upper Arlington. It's off of Fishinger Road.

Okay. What is your name?

My name, Rebecca.

I'm going to call them. If they have any questions I'll give them your phone number.

Okay. Thank you. Bye-bye.

(Tr. 349-350.) Ms. Tangeman described the victim as "hysterical" once she was able to talk to her. (See Tr. 351.)

{¶7} Detective Daniel Quigley, of the Upper Arlington Division of Police, testified that he interviewed the victim shortly after the crime and observed no visible physical injuries to her. He also participated in a thorough search of defendant's residence on Shrewsbury Rd. on June 22, 2004. During the search, a "pellet type gun" that looked like "a cowboy pistol" was discovered. (Tr. 388.) Detective Quigley testified that it was not a firearm. He testified that no latent fingerprints were found on the gun and no DNA or clothing of the victim was discovered in the search.

{¶8} Debra Zang, a nurse and expert in forensic sexual assault exams, examined the victim on June 22, 2004. Ms. Zang's examination of the victim revealed no physical injuries. However, Ms. Zang testified that every person's body is different as to when bruises appear. According to Ms. Zang, some people bruise immediately and it takes others several days to bruise. Additionally, Ms. Zang testified that 15 percent of victims of sexual assaults have genital injury and that in 85 percent of sexual assault cases there is no physical injury.

{¶9} Defendant testified that he did not rape the victim and did not use any force against her. He denied using the "BB gun" against the victim. Defendant testified that the BB gun had been in a bag for months and belonged to the son of an ex-girlfriend. He testified that he could not recall hearing the telephone ring when the victim was in his residence. According to defendant's testimony, he kept the ringer volume low because it was otherwise too loud.

{¶10} The jury found defendant guilty as charged. The trial court imposed a seven-year prison sentence on each count and ordered that the sentences be served concurrently. Defendant was found to be a sexually oriented offender.

{¶11} Defendant appeals and has set forth the following assignments of error:

> I. THE STATE OF OHIO PRESENTED INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION FOR RAPE AND KIDNAPPING, AND THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING THE APPELLANT[']S CRIMINAL RULE 29 MOTION FOR JUDGMENT OF ACQUITTAL.
>
> II. THE APPELLANT'S CONVICTIONS FOR RAPE AND KIDNAPPING WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
>
> III. THE TRIAL COURT ERRED BY ALLOWING THE JURY TO HEAR A TAPE RECORDING OF A 911 CALL.
>
> A. ANY PROBATIVE VALUE OF THE TAPE WAS SUBSTANTIALLY OUTWEIGHED BY ITS PREJUDICIAL EFFECT.
>
> B. STATEMENTS MADE ON THE TAPE WERE HEARSAY AND DID NOT FALL UNDER ANY OF THE HEARSAY EXCEPTIONS.
>
> C. THE STATE FAILED TO PROPERLY AUTHENTICATE THE TAPE AND ESTABLISH THE CHAIN OF CUSTODY.
>
> IV. THE STATE COMMITTED PROSECUTORIAL MISCONDUCT DURING THE REBUTTAL OF IT[S] CLOSING ARGUMENT BY INTRODUCING NEW MATERIAL THAT WAS NOT RAISED BY THE DEFENSE DURING ITS CLOSING ARGUMENT.

{¶12} Defendant, with leave of this court, has filed a supplemental assignment of error, which is as follows:

> THE TRIAL COURT ERRED BY IMPOSING A NON-MINIMUM SENTENCE WITHOUT SPECIFICALLY FINDING

> THE FACTORS SET FORTH IN OHIO REVISED CODE 2929.14(B).
>
> A. THE COURT FAILED TO MAKE THE REQUISITE FINDINGS IN ACCORDANCE WITH O.R.C. 2929.14(B)(2).
>
> B. ANY FINDINGS MADE TO IMPOSE A NON-MINIMUM SENTENCE WERE NOT SUPPORTED BY THE RECORD.

{¶13} By his first assignment of error, defendant argues that his convictions were not supported by sufficient evidence and the trial court erred in denying his Crim.R. 29(C) motion. By his second assignment of error, defendant argues that the convictions were against the manifest weight of the evidence. Because defendant's first and second assignments of error are interrelated, we will address them together.

{¶14} In determining the sufficiency of the evidence, an appellate court must "examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. Whether the evidence is legally sufficient to sustain a verdict is a question of law, not fact. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

{¶15} Crim.R. 29 provides that upon motion of a defendant or on its own motion, the court shall order the entry of a judgment of acquittal if the evidence is insufficient to sustain a conviction of such offense. Thus, the same standard of review that is applied to a challenge to the sufficiency of evidence is applied to a denial of a motion for acquittal pursuant to Crim.R. 29. *State v. Ready* (2001), 143 Ohio App.3d 748, 759.

{¶16} Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The trier of fact is in the best position to view the witnesses and observe their demeanor, gestures and voice inflections, and to use those observations in weighing the credibility of the testimony. *State v. Wright*, Franklin App. No. 03AP-470, 2004-Ohio-677, at ¶11.

{¶17} When assessing whether a conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and ultimately determine " 'whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.' " *Thompkins*, at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Furthermore, " '[t]he discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.' " Id.

{¶18} In this case, defendant was convicted on two counts of rape. R.C. 2907.02(A)(2) provides that "[n]o person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." "Sexual conduct" is defined in R.C. 2907.01(A) as:

> * * * vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex, and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

A person who violates R.C. 2907.02 has committed the crime of rape. R.C. 2907.02(B).

{¶19} Defendant was also convicted on one count of kidnapping. R.C. 2905.01(A) states, in relevant part, as follows:

> No person, by force, threat, or deception * * * shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:
>
> * * *
>
> (4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will[.]

A person who violates R.C. 2905.01 has committed the crime of kidnapping. R.C. 2905.01(C).

{¶20} Defendant argues that the state failed to present physical evidence to corroborate the testimony of the victim, and, therefore, the convictions were not supported by sufficient evidence. In support of that argument, defendant cites to the testimony of Detective Quigley, which, according to defendant, indicated that: (1) despite DNA testing, none of the victim's DNA was found on the tested items; (2) the victim's fingerprints were not found on the gun; (3) the search did not reveal any physical evidence that the victim was ever at defendant's residence; and (4) the detective did not observe any physical injuries on the victim. Additionally, defendant argues that his convictions were against the manifest weight of the evidence because the victim's testimony indicating that she was raped and kidnapped was not corroborated by physical evidence or another witness's testimony.

{¶21} Defendant's contentions that his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence are not

persuasive. As previously stated by this court, "not all rape victims exhibit signs of physical injury." *State v. Reinhardt*, Franklin App. No. 04AP-116, 2004-Ohio-6443, at ¶29. Moreover, "[t]here is no requirement, statutory or otherwise, that a rape victim's testimony must be corroborated as a condition precedent to conviction. * * * It is well settled that the testimony of a rape victim, if believed, is sufficient to support each element of rape." (Citations omitted.) Id.

{¶22} In this case, the only two persons present in the house at the time of critical import testified at trial—defendant and the victim. The jury heard conflicting accounts of what occurred in defendant's residence on June 21, 2004. Thus, in reaching its verdicts in this case, the jury was required to weigh the credibility of the testimony given by defendant and the victim. It was within the province of the jury to believe the testimony of the victim as to what occurred on June 21, 2004, at defendant's residence. See *DeHass*, supra.

{¶23} The victim's testimony, if believed, established the essential elements of the crimes for which defendant was convicted. The victim testified that defendant pointed a gun at her and ordered her to go to one of the bedrooms in the house. She testified that defendant told her that he was going to kill her, ordered her to lie down on the bed, and did not let her leave. She further testified that defendant put his hands on her throat and started to strangle her, ripped off her underwear and digitally penetrated her vagina, and forced her to engage in vaginal intercourse.

{¶24} Upon our examination of the evidence in a light most favorable to the prosecution, we find sufficient evidence to support defendant's convictions for two counts of rape and one count of kidnapping. Because there was sufficient evidence to support

his convictions, the trial court did not err in overruling defendant's motion for acquittal pursuant to Crim.R. 29. Furthermore, upon our thorough review of the record, we find no indication that the jury lost its way or created a manifest miscarriage of justice in convicting defendant of two counts of rape and one count of kidnapping. This is not a case where the evidence weighs heavily against defendant's convictions.

{¶25} Accordingly, we overrule defendant's first and second assignments of error.

{¶26} In his third assignment of error, defendant argues that the trial court erred in allowing the jury to hear the audiotape recording of the 911 phone call. Specifically, defendant argues that any probative value of the tape was substantially outweighed by its prejudicial effect, that the statements made on the tape were hearsay, and that the tape was not properly authenticated. Additionally, defendant summarily argues that the state failed to establish the chain of custody.

{¶27} At trial, defense counsel objected to the admissibility of the tape, arguing that it had not been properly authenticated "by personnel, including the 911 technician," and that its probative value was outweighed by its prejudicial effect. (Tr. 344.) Despite defense counsel's objection, the tape was played for the jury. Before the tape was played, the trial court gave the following instruction:

> Ladies and gentlemen, at this time, they're going to play a tape for you. There's an issue part way through. Earlier I explained to you about hearsay witnesses. This is going to be the case of somebody saying something else on the type [sic]. You're not to take that for the truth of the matter asserted or whether it occurred. It's just there so you can hear the chain of events that occurred. * * *

(Tr. 348.)

{¶28} At the end of trial, the trial court did not admit the tape into evidence because it found that the "keeper of that record" had not authenticated the tape. (Tr. 451.)

{¶29} After the record had been certified and filed in this court, defendant filed a motion to correct the record. In support of said motion, defendant argued that the transcription of the audio recording of the 911 phone call contained significant omissions that required correction. On July 15, 2005, this court denied the motion to correct the record but noted that the court would listen to the 911 audiotape during determination of this appeal. The record, as initially certified and filed in this court on June 22, 2005, did not include the 911 audiotape. Thus, on July 26, 2005, defendant filed a motion to supplement the record with the 911 audiotape, and on August 8, 2005, this court granted said motion.

{¶30} Defendant has raised the issue of whether the audiotape was properly authenticated at trial. Evid.R. 901(A) provides as follows: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Thus, the requirement of authentication is satisfied when a proponent presents foundational evidence or testimony from which a rational jury may determine that the evidence is what its proponent claims it to be. *Andrews v. Riser Foods, Inc.* (Oct. 16, 1997), Cuyahoga App. No. 71658; *Hall v. Johnson* (1993), 90 Ohio App.3d 451; and *State v. Isley* (June 26, 1996), Summit App. No. 17485. "The proponent need not offer conclusive evidence as a foundation but must merely offer sufficient evidence to allow the question as to authenticity or genuineness to reach the jury." Id.

{¶31} Even though the trial court allowed the recording of the 911 call to be played for the jury, it did not admit the tape into evidence at the conclusion of trial on the basis that the tape had not been authenticated. Despite the trial court's refusal to admit the 911 audiotape into evidence at the conclusion of trial, the record demonstrates that sufficient evidence was presented at trial to support the finding that the recording on the tape was what the state claimed it to be—a recording of the 911 phone call initiated by DGT owner Ms. Tangeman on June 21, 2004. See Evid.R. 901. Ms. Tangeman identified her voice on the recording that was played at trial. She testified that the recording was a fair and accurate copy of her phone call to 911 on June 21, 2004. Therefore, defendant's argument that the state failed to properly authenticate the 911 audiotape is unpersuasive, as the requirement of authentication as a condition precedent to admissibility was satisfied. See Evid.R. 901(A).

{¶32} As to defendant's argument that the state failed to establish the tape's chain of custody, we note that this court recently addressed a similar argument in a case involving the playing of telephone tapes at trial. In *State v. Simms*, Franklin App. No. 05AP-806, 2006-Ohio-2960, at ¶36, this court stated that "as a general matter, 'the state [is] not required to prove a perfect, unbroken chain of custody.' " Id., quoting *State v. Keene* (1998), 81 Ohio St.3d 646, 662. This court further observed that "[the defendant's] 'chain of custody' argument [was] better suited to evidence that cannot be readily identified, or could be despoiled, altered, or subject to tampering. Even where there is a possibility of contamination, that possibility goes to the weight to be given the evidence, not its admissibility." *Simms*, at ¶36, citing *State v. McGuire* (1997), 80 Ohio St.3d 390, 402-404. In *Simms*, this court found "not the slightest hint that the tape recordings were

subjected to alteration or tampering." Id. Just as in *Simms*, nothing in this case suggests that the tape recording of the 911 phone call had been subjected to alteration or tampering. Considering the foregoing, we find defendant's chain of custody argument unpersuasive.

{¶33} Defendant further argues that statements on the audio recording were hearsay and did not fall under any of the hearsay exceptions. Insofar as the recording contained inadmissible hearsay, we observe that the trial court provided the jury with a limiting instruction addressing the issue of hearsay. The trial court instructed the jury that the audiotape contained hearsay and that they were "not to take that for the truth of the matter asserted or whether it occurred." (Tr. 348.) The jury is presumed to have followed the trial court's limiting instructions. *State v. Raglin* (1998), 83 Ohio St.3d 253, 264.

{¶34} Defendant contends that the limiting instruction was insufficient because the tape risked confusing or misleading the jury, to the prejudice of his fundamental rights, because the statements were so "inflammatory." (Defendant's merit brief, at 7.) Defendant further argues that a person, who was not identified, made statements in the background of the 911 audio recording, "making this portion of the tape minimally probative, yet highly prejudicial." Id. According to defendant, the unverified voice on the tape screamed "he fucking raped me!" Id. We find these arguments to be unpersuasive.

{¶35} After carefully listening to the recording of the 911 call, we find that the person in the background states "he fucking raped her," not "he fucking raped me!" Although no one at trial specifically identified the person's voice in the background on the audio recording, it would have been reasonable for the jury to conclude that the background statement was made by Kara Lewis, considering the testimony at trial

indicating that she was the only person, other than Ms. Tangeman, at the DGT office when Ms. Tangeman made the call to 911. Additionally, Ms. Tangeman's statement, which was self-identified at trial, repeated the allegation made by the person in the background of the recording. In response to "he fucking raped her," Ms. Tangeman stated, "Oh, he raped her. Oh, no." (Tr. 350.) Moreover, we note that Mr. King testified at trial that the victim said, "I just got fucking raped," immediately after she exited defendant's residence.

{¶36} Furthermore, the audio recording demonstrated the sequence of events and the concern at the DGT office regarding the victim's situation. It was undisputed at trial that, after leaving defendant's residence, the victim immediately reported to other DGT personnel that she had been raped. It was also undisputed that defendant and the victim were the only persons inside defendant's residence at the time of the reported rape. The audio recording demonstrated that Ms. Tangeman, the owner of DGT, was on the phone with the 911 operator when she learned that the victim had reported that defendant raped her. Statements on the 911 audiotape essentially echoed the victim's allegation that defendant raped her.

{¶37} Considering the foregoing, we cannot conclude that the playing of the 911 audiotape constituted reversible error. Accordingly, we overrule defendant's third assignment of error.

{¶38} Defendant argues in his fourth assignment of error that the state committed prosecutorial misconduct during its rebuttal closing argument. According to defendant, the prosecutor addressed "new material rather than responding to defense counsel's closing argument." (Defendant's merit brief, at 10.) We observe that defendant did not

object to statements made by the prosecutor during rebuttal closing argument. Therefore, as to that issue, he has waived all but plain error. *State v. Long* (1978), 53 Ohio St.2d 91.

{¶39} The test for prosecutorial misconduct is whether remarks were improper and, if so, whether those remarks prejudicially affected substantial rights of the accused. *State v. Smith* (1984), 14 Ohio St.3d 13. The touchstone of the analysis is the fairness of the trial and not the culpability of the prosecutor. *Smith v. Phillips* (1982), 455 U.S. 209, 102 S.Ct. 940.

{¶40} Defendant asserts that the state, in rebuttal closing argument, referred to topics not addressed by the defense during closing argument. In support of his argument, defendant cites to the state's references to phone calls to defendant's residence and to the victim's ability to describe the gun. Defendant argues that, in closing argument, his counsel "never asserted that phone calls had not been made to the Appellant's house" and did not address the "ability of the alleged victim to describe the gun." (Defendant's reply brief, at 5.) Thus, according to defendant, it was improper for the prosecutor to address these specific issues in the state's rebuttal closing argument.

{¶41} Defendant's counsel, in closing argument, challenged the level of "concern" exhibited on June 21, 2004, by those who testified at trial. He stated, "If they were really concerned that night, the door was unlocked. * * * If they were so concerned don't you think someone would have tried the lock?" (Tr. 509-510.) In the rebuttal closing argument, the prosecutor attempted to discredit the defendant's testimony that he did not hear any telephone calls by referring to the number of calls to the residence. In addition to disputing the defendant's testimony regarding whether he heard the phone ring, the

number of calls from DGT to defendant's residence could be viewed as demonstrating the concern of DGT personnel that night regarding the victim's safety. Thus, the prosecutor's reference to the phone calls was not improper.

{¶42} Defendant's assertion that the issue of the victim's ability to describe the gun was not addressed by his counsel during closing argument is not supported by the record. During closing argument, defense counsel stated, in part, as follows: "Let's talk about the BB gun. Well, let me tell you about that. She really couldn't describe the gun too well, although she claimed that the gun was close to her, it was pointed at her face. Could she tell you the color of the gun? No." (Tr. 508.) Thus, defense counsel specifically addressed the victim's ability to describe the gun, essentially characterizing her description as deficient. As such, it certainly was not improper for the prosecutor to address the victim's ability to describe the gun.

{¶43} Therefore, we overrule defendant's fourth assignment of error.

{¶44} By his supplemental assignment of error, defendant alleges that the trial court erred in imposing a non-minimum sentence. Specifically, defendant argues that the trial court failed to make the requisite findings pursuant to R.C. 2929.14(B) to support its imposition of non-minimum sentences. Notably, however, defendant did not challenge the constitutionality of R.C. 2929.14(B) in the trial court and has not raised the issue in this appeal.

{¶45} During the pendency of this action, the Supreme Court of Ohio released *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, wherein the court found portions of Ohio's felony sentencing scheme, including R.C. 2929.14(B), unconstitutional. The *Foster* court held that R.C. 2929.14(B) required judicial fact-finding in violation of the Sixth

Amendment's right to jury trial. Id. at paragraph one of the syllabus. The *Foster* court severed R.C. 2929.14(B) from the sentencing statutes. Id. at ¶99. Pursuant to *Foster*, "[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.

{¶46} In effect, defendant argues that the trial court erred by not following a sentencing statute that has since been declared unconstitutional. See *State v. Stewart*, Franklin App. No. 05AP-1073, 2006-Ohio-3310, at ¶14. This court has declined to remand cases for new sentencing hearings under these circumstances. See id. at ¶15; *State v. Mosley*, Franklin App. No. 05AP-701, 2006-Ohio-3102.

{¶47} Based on the foregoing, we overrule defendant's supplemental assignment of error.

{¶48} Having overruled all of defendant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and FRENCH, JJ., concur.

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