

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 15AP-449 (C.P.C. No. 12CR-06-3224)
Daniel J. Fisher,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

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D E C I S I O N

Rendered on November 19, 2015

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*Ron O'Brien*, Prosecuting Attorney, *Valerie Swanson* and *Michael Walton*, for appellant.

*Taft Stettinius & Hollister LLP*, *David H. Thomas* and *Kathryn S. Wallrabenstein*, for appellee.

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APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} This is the third time the State of Ohio has appealed from the granting of community control for Daniel J. Fisher following his conviction for felonious assault. The state assigns a single error for our review:

DEFENDANT'S SENTENCE IS ILLEGAL BECAUSE THE RECORD CANNOT SUPPORT A FINDING THAT DEFENDANT'S CONDUCT WAS LESS SERIOUS THAN CONDUCT NORMALLY CONSTITUTING THE OFFENSE OF FELONIOUS ASSAULT AS A SECOND-DEGREE FELONY.

{¶ 2} The parties agree that our standard of review is whether or not the record clearly and convincingly does not support the trial court's findings. We cannot say the

record contains no support for the trial court's granting of community control. We therefore affirm the trial court's findings and granting of community control.

{¶ 3} Fisher caused serious physical harm to an innocent victim previously unknown to him. He caused the harm while in a blackout induced by his drug abuse. The trial court found there were substantial grounds to mitigate Fisher's conduct under the circumstances.

{¶ 4} A felonious assault which is the product of drug addiction can be, but does not have to be, viewed by a trial court as a less serious form of the offense than, for instance, a felonious assault which is the product of pure malice toward the victim. The drug addiction can be cured to the extent the addict goes into and maintains recovery. Pure malice is less readily curable.

{¶ 5} We do not minimize the harm caused to the victim here. However, we cannot find that the trial court's findings clearly and convincingly were against the information in the record. The physical harm caused was not the product of malice but the product of what can legitimately be viewed as a disease.

{¶ 6} We overrule the single assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BROWN, P.J., concurs.  
DORRIAN, J., concurs in judgment only.

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