

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 14AP-383 (C.P.C. No. 10CR-5615)
Somnath Ganguly,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on March 10, 2015

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*Ron O'Brien*, Prosecuting Attorney, and *Michael P. Walton*,  
for appellee.

*Meeks & Thomas Co., LPA*, and *David H. Thomas*, for  
appellant.

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APPEAL from the Franklin County Court of Common Pleas

LUPER SCHUSTER, J.

{¶ 1} Defendant-appellant, Somnath Ganguly, appeals from a judgment entry of the Franklin County Court of Common Pleas finding Ganguly guilty, pursuant to guilty plea, of two counts of forgery and one count of tampering with records. For the following reasons, we affirm.

**I. Facts and Procedural History**

{¶ 2} On September 22, 2010, the State of Ohio, plaintiff-appellee, issued a nine-count indictment charging Ganguly with one count of theft, in violation of R.C. 2913.02, a second-degree felony; five counts of forgery, in violation of R.C. 2913.31, fifth-degree felonies; one count of tampering with records, in violation of R.C. 2913.42, a third-degree felony; one count of theft, in violation of R.C. 2913.02, a fourth-degree felony; and one count of forgery, in violation of R.C. 2913.31, a fourth-degree felony. All the charges

related to Ganguly's business relationship as a property manager for RIBA Properties, a rental property management company.

{¶ 3} At a plea hearing on April 2, 2013 at which Ganguly was represented by counsel, Ganguly entered a guilty plea to Counts 3 and 5, forgery, both felonies of the fifth degree, and to Count 7, tampering with records, a felony of the third degree. During the plea hearing, the prosecutor described the various ways Ganguly would take money from RIBA Properties: (1) he would write checks directly to himself or his wife; (2) he would write checks to third-parties and then forge the signature of the third party on the back of the check to endorse the checks over to his own company, RSS Properties, LLC ("RSS"); (3) he would take rent checks from tenants that were made payable to RIBA Properties and change them to be made payable to RSS; and (4) he would tell individual tenants to make their rent checks out directly to RSS. (April 2, 2013 Tr. 13-15.) As a result of Ganguly's guilty plea to three of the charges, the state dismissed the remainder of the charges against him, and the trial court ordered a presentence investigation.

{¶ 4} On April 4, 2013, before the trial court conducted a sentencing hearing, Ganguly filed a pro se "Defendant's Motion to Withdraw Plea Bargain Entered on April 2, 2013," and he subsequently filed a motion for leave to withdraw his guilty plea on May 3, 2013. Ganguly alleged in his motions that he had taken many prescription medications on the day he entered his plea and that those medications impaired his ability to make a knowing, voluntary, and intelligent waiver of his right to forgo a trial.

{¶ 5} The trial court conducted a hearing on June 13 and 25, 2013 on Ganguly's motion to withdraw his guilty plea. During the hearing, Ganguly presented the testimony of Dr. Nicomeves Sansait, a psychiatrist who has treated Ganguly for depression since April 2012. Dr. Sansait testified that Ganguly came to see him right after his plea hearing and that Ganguly "was not really doing well" at that time. (June 13, 2013 Tr. 11.) Dr. Sansait helped draft a letter to the court asking to withdraw Ganguly's newly entered plea due to concerns over Ganguly's mental state. On cross-examination, Dr. Sansait described the various medications that had been prescribed to Ganguly and stated that it was "unlikely" that the prescribed dose would have affected Ganguly's ability to make a decision. (June 13, 2013 Tr. 13.)

{¶ 6} Ganguly then testified and said he felt pressured by his attorney to sign the plea agreement even though he was uncomfortable entering a guilty plea to a third-degree felony. Ganguly said his attorney became very upset with him, slammed his hands on the table, and yelled at and threatened Ganguly. Ganguly said this experience caused him to have a panic attack. When he was outside the presence of his attorneys and before he entered the courtroom for the hearing, Ganguly said he took five pills of Ativan, when he is only supposed to take one, and he took additional blood pressure medication to try to calm down. Ganguly first said he had no memory of going through the plea colloquy or of even being in the courtroom for the hearing. He then said, however, that he "remember[ed] everything happened in the courtroom at that time." (June 13, 2013 Tr. 31.)

{¶ 7} The state then called Brandon Shroy, one of Ganguly's attorneys during the plea hearing. Shroy said that the details of the plea agreement, including that it contained a third-degree felony, were communicated to Ganguly prior to the April 2, 2013 hearing and that Ganguly "communicated to [his attorneys] that [the plea agreement] was acceptable." (June 13, 2013 Tr. 55.) The trial court then called Mark Collins, Ganguly's other attorney from the plea hearing. Collins said Ganguly was primarily concerned with how the court would handle the restitution amount. Collins said Ganguly understood the plea agreement, and he denied threatening Ganguly prior to the plea hearing, although he did agree he slammed his hands down on the table and accused Ganguly of lying.

{¶ 8} At the close of the hearing, the trial court denied Ganguly's motion to withdraw his guilty plea. The trial court noted the matter resolved to a question of credibility and concluded the state successfully showed Ganguly's motion to withdraw his plea was "an attempt to manipulate the system" and that the only basis for the motion was an attempt to delay the proceedings. (June 25, 2013 Tr. 33.) The trial court journalized its denial of Ganguly's motion to withdraw his guilty plea in a June 28, 2013 entry.

{¶ 9} The matter then proceeded to the restitution phase, and the trial court conducted various restitution hearings beginning October 25, 2013 until March 7, 2014. Ganguly proceeded pro se for the restitution phase. At each of the five restitution hearings, Ganguly renewed his motion to withdraw his guilty plea, and the trial court denied his request each time.

{¶ 10} At an April 11, 2014 sentencing hearing, during which Ganguly was represented by counsel, the trial court imposed a term of imprisonment of one year for Count 3, forgery, a fifth-degree felony, followed by a five-year period of community control for Count 5, a fifth-degree felony forgery, and Count 7, a third-degree felony tampering with evidence. Additionally, the trial court ordered Ganguly to pay \$430,965.71 in restitution to RIBA Properties. The trial court then imposed a recognizance appeal bond in the amount of \$5,000.00 and determined the sentence would begin either at the expiration of the 30-day period for an appeal if Ganguly does not appeal or, if an appeal is filed, after the court of appeals reaches its decision. Ganguly timely appeals.

## **II. Assignments of Error**

{¶ 11} Ganguly assigns the following errors for our review:

[1.] The trial court abused its discretion and erred in overruling Appellant's motion for withdrawal of a guilty plea prior to sentencing.

[2.] The trial court erred in ordering Appellant to pay restitution in the amount of \$430,965.71, as this restitution order was not based on actual damage or loss caused by an offense, was not assessed for a proper "victim" of a crime, and was not authorized by R.C. 2929.18 or any other provision of Ohio law.

[3.] The trial court erred in sentencing Appellant to a term of imprisonment for a fifth-degree felony without making the proper findings under R.C. 2929.13.

## **III. First Assignment of Error – Withdrawal of Guilty Plea**

{¶ 12} In his first assignment of error, Ganguly argues the trial court erred in overruling his motion to withdraw his guilty plea.

{¶ 13} A criminal defendant may file a presentence motion to withdraw his guilty plea pursuant to Crim.R. 32.1. This court has repeatedly noted that such motions should be " 'freely and liberally granted.' " *State v. Zimmerman*, 10th Dist. No. 09AP-866, 2010-Ohio-4087, ¶ 11, quoting *State v. Xie*, 62 Ohio St.3d 521, 527 (1992); *State v. Davis*, 10th Dist. No. 07AP-356, 2008-Ohio-107, ¶ 15. Even before sentence is imposed, however, there is no absolute right to withdraw a plea. *Zimmerman* at ¶ 11. A defendant who seeks

to withdraw a guilty plea prior to sentencing must establish a reasonable and legitimate basis for the withdrawal of the plea. *Id.* The trial court must then hold a hearing to allow the defendant to make that showing. *State v. West*, 10th Dist. No. 11AP-548, 2012-Ohio-2078, ¶ 15. The decision to grant or deny a presentence motion to withdraw rests in the sound discretion of the trial court. *Id.*; *State v. Porter*, 10th Dist. No. 11AP-514, 2012-Ohio-940, ¶ 20. An abuse of discretion connotes a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 14} A trial court is not required to grant a presentence motion to withdraw a guilty plea. To determine whether a trial court abused its discretion in denying a presentence motion to withdraw a guilty plea, we look to a number of non-exhaustive factors, including: (1) any potential prejudice to the prosecution if the trial court vacated the plea; (2) whether highly competent counsel represented the defendant; (3) the extent of the Crim.R. 11 hearing before the defendant entered his plea; (4) whether the defendant received a full hearing on his motion to withdraw his plea; (5) whether the trial court fully and fairly considered the motion to withdraw the plea; (6) whether the defendant made the motion within a reasonable time; (7) whether the motion set forth specific reasons for the withdrawal; (8) whether the defendant understood the nature of the charges and possible penalties; and (9) whether the defendant may not have been guilty or had a complete defense to the crime. *State v. Harris*, 10th Dist. No. 09AP-1111, 2010-Ohio-4127, ¶ 25, citing *State v. Jones*, 10th Dist. No. 09AP-700, 2010-Ohio-903, ¶ 10, citing *State v. Fish*, 104 Ohio App.3d 236, 240 (1st Dist.1995). "Consideration of the factors is a balancing test, and no one factor is conclusive." *Zimmerman* at ¶ 13, citing *Fish* at 240.

{¶ 15} Ganguly presented the trial court with two main reasons for wanting to withdraw his guilty plea: (1) that he felt pressured by his counsel to take the plea agreement, and (2) that his anti-anxiety medication had such an affect on him as to prevent his plea from being knowingly, intelligently, and voluntarily made. Here, the trial court conducted a full hearing on Ganguly's motion. At the conclusion of that hearing, the trial court denied Ganguly's motion, concluding Ganguly was merely attempting to delay the proceedings and did not have a reasonable and legitimate basis for the withdrawal of his plea. We must use the balancing test outlined above to determine whether the trial

court abused its discretion in denying Ganguly's motion to withdraw his plea in light of his stated reasons.

{¶ 16} First, the record does not indicate any evidence of prejudice to the state "beyond the ordinary impact of any defendant's subsequent withdrawal of a guilty plea." *Harris* at ¶ 26.

{¶ 17} The second factor, whether Ganguly was represented by highly competent counsel, requires closer examination. Though Ganguly does not expressly challenge the competency of his counsel, one of his stated reasons for wanting to withdraw his plea was that he felt "extreme pressure" from his counsel to take the plea agreement. (Ganguly's Brief, 12.) Certainly, this statement taken on its face would make the second factor weigh heavily in Ganguly's favor. However, the trial court was explicitly clear that "[t]his comes down to a question of credibility," and it did not find Ganguly to be credible at his plea withdrawal hearing. (June 25, 2013 Tr. 33.) The trial court had the opportunity to observe Ganguly at the Crim.R. 11 hearing when he initially entered his plea and then subsequently when he tried to withdraw his plea. Thus, the trial court was in the best position to determine Ganguly's motivation to enter his plea initially and his credibility at the subsequent plea withdrawal hearing. *State v. Burris*, 10th Dist. No. 13AP-238, 2013-Ohio-5108, ¶ 18; *State v. Watkins*, 10th Dist. No. 13AP-133, 2013-Ohio-5544, ¶ 11 (noting "the weight or significance that a trial court gives to any particular reason is within the discretion of the trial court").

{¶ 18} Ganguly emphasizes that his trial counsel admitted to slamming his hands down on the table, and that admission should support a finding that the trial court abused its discretion when it did not grant Ganguly's motion based on the pressure he felt from his attorney to take the plea. Indeed, the record indicates that Collins stated at the hearing that he slammed his hands down on the table when talking to Ganguly. The context of this incident, however, indicates that Collins said Ganguly was behaving in a difficult manor and was being "defiant." (June 25, 2013 Tr. 23.) Collins explained that he and his co-counsel had gone over the plea agreement with Ganguly in great detail, and Collins became frustrated with Ganguly when it appeared Ganguly was lying to him about having received a better plea agreement from a previous attorney. Collins strenuously denied threatening Ganguly or pressuring him to take the plea agreement, and instead

described Ganguly's behavior at the Crim.R. 11 hearing as "relaxed and more in tune to what he was doing." (June 25, 2013 Tr. 14.) Given that the trial court had the opportunity to hear the same event described from the perspective of both Ganguly and Collins, we cannot say the trial court abused its discretion in finding Collins' version of events to be more credible. Thus, as to the second factor in the balancing test, competent counsel represented Ganguly at his plea hearing, and this factor weighs against Ganguly's motion to withdraw.

{¶ 19} The third factor in the balancing test asks this court to look at the extent of the Crim.R. 11 hearing before Ganguly entered his plea. The record reflects the trial court conducted a comprehensive Crim.R. 11 hearing on April 2, 2013. Even Ganguly does not contest the thoroughness or adequacy of the Crim.R. 11 hearing; instead, he asserts outside factors should direct the court to grant his motion to withdraw his plea. Because the trial court fully and properly conducted the Crim.R. 11 hearing, the third factor also weighs against a finding that the trial court abused its discretion in denying Ganguly's motion to withdraw.

{¶ 20} Similarly, as to the fourth and fifth factors, Ganguly received a full hearing on his motion to withdraw his plea and the trial court fully and fairly considered the motion. The court conducted the hearing over two days, heard from four witnesses, and concluded that the ultimate issue was one of credibility. More specifically, the trial court concluded that, despite Ganguly's testimony to the contrary, Ganguly understood the details of the plea agreement prior to his Crim.R. 11 hearing and that Ganguly's motion to withdraw was nothing more than an attempt to delay the proceedings. "[T]he trial court is in the best position to evaluate both the motivation of the defendant in pleading guilty and the credibility and weight to be given to the reasons offered for seeking withdrawal of the plea." *Watkins* at ¶ 11, citing *State v. Prince*, 3d Dist. No. 2-12-07, 2012-Ohio-4111, ¶ 27. The trial court gave Ganguly a full opportunity to be heard on his motion and, after duly considering that motion, concluded Ganguly did not present a reasonable and legitimate basis for the withdrawal of his plea. Thus, the fourth and fifth factors also weigh against a finding that the trial court abused its discretion in denying Ganguly's motion.

{¶ 21} The sixth and seventh factors ask us to consider whether Ganguly made his motion within a reasonable time and whether he articulated specific reasons for the requested withdrawal. Ganguly filed his pro se motion to withdraw his plea two days after his Crim.R. 11 hearing, and he filed his motion with the assistance of counsel within one month of that time. He filed both motions before the court had conducted a sentencing hearing, and thus the sixth factor weighs in Ganguly's favor. Although Ganguly's motion set forth specific reasons for wanting to withdraw his plea, those reasons are still subject to the credibility determinations of the trial court. *Watkins* at ¶ 11. The trial court's conclusion that Ganguly lacked credibility lessens the impact of his stated reasons for seeking withdrawal, and the seventh factor therefore weighs against Ganguly.

{¶ 22} The eighth consideration looks to whether Ganguly understood the nature of the charges against him and the possible penalties. Although Ganguly suggested he took too much medication to be able to fully comprehend the plea proceedings and that he was surprised by the arrangements of the plea agreement, the trial court expressly noted that, considering all the testimony at the withdrawal hearing, "there was no surprise the morning of the plea" and that "Ganguly knew what the plea offer was before" his Crim.R. 11 hearing. (June 25, 2013 Tr. 33.) Additionally, when considering Ganguly's medication concerns, the trial court stated that Ganguly "behaved appropriately throughout the guilty plea" and did nothing during the plea hearing to indicate "there was any problem whatsoever." (June 25, 2013 Tr. 33.) The trial court also noted the testimony of Ganguly's psychiatrist did not support a conclusion that Ganguly would have been so incapacitated by the amount of medication he took that he would have been unable to comprehend or participate in the plea hearing. This factor depends heavily on factual issues and credibility determinations, and there is no indication the trial court abused its discretion in this regard. Accordingly, the eighth factor also weighs against Ganguly.

{¶ 23} Under the ninth and final consideration, we look to whether Ganguly had possible defenses to the charges against him. While Ganguly "strongly feels he is not guilty to the charges" against him, he does not assert any specific defenses to the charges. (Motion for Leave to Withdraw Guilty Plea.) Ganguly continues to assert his innocence on appeal, but again he does not articulate a specific basis suggesting he may not have



been guilty of these charges. Even if we conclude Ganguly's belief in his own innocence is enough to make the ninth factor weigh in his favor, the overwhelming majority of these nine factors weigh against Ganguly. We are mindful that many of these considerations turn on a question of Ganguly's credibility, and because the trial court was in the best position to observe Ganguly at his plea hearing and then to observe him again at the withdrawal hearing along with the other witnesses, we conclude the trial court did not abuse its discretion in denying Ganguly's motion to withdraw his plea. Accordingly, we overrule Ganguly's first assignment of error.

#### **IV. Second Assignment of Error – Restitution**

{¶ 24} In his second assignment of error, Ganguly argues the trial court erred in ordering him to pay restitution in the amount of \$430,965.71. More specifically, Ganguly asserts the state did not prove by competent, credible evidence that RIBA Properties suffered economic losses equivalent to the amount of restitution ordered, and that the trial court erred in basing the amount of restitution on conduct for which Ganguly was not convicted.

{¶ 25} R.C. 2929.18(A) authorizes a trial court that is imposing a sentence for a felony conviction to sentence the offender to a financial sanction or combination of financial sanctions authorized by law, including restitution. "A trial court has discretion to order restitution in an appropriate case and may base the amount it orders on a recommendation of the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information." *State v. Lalain*, 136 Ohio St.3d 248, 2013-Ohio-3093, paragraph one of the syllabus.

{¶ 26} "The amount of restitution ordered by a trial court must bear a reasonable relationship to the loss suffered." *State v. Norman*, 10th Dist. No. 12AP-505, 2013-Ohio-1908, ¶ 66, citing *State v. Blay*, 10th Dist. No. 10AP-247, 2010-Ohio-4749, ¶ 7. "An award of restitution is limited to the actual loss caused by the defendant's criminal conduct for which he [or she] was convicted, and there must be competent and credible evidence in the record from which the court may ascertain the amount of restitution to a reasonable degree of certainty." *Id.*, citing *Blay* at ¶ 7.

{¶ 27} We review a trial court's restitution order for an abuse of discretion. *State v. Jones*, 10th Dist. No. 14AP-80, 2014-Ohio-3740, ¶ 22, citing *Norman* at ¶ 67, citing

*State v. Whiting*, 2d Dist. No. 20168, 2004-Ohio-5284, ¶ 7. " 'A trial court abuses its discretion when it orders restitution in an amount that has not been determined to bear a reasonable relationship to the actual loss suffered as a result of the defendant's offense.' " *Id.*, quoting *State v. Aliane*, 10th Dist. No. 03AP-840, 2004-Ohio-3730, ¶ 15. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore* at 219.

{¶ 28} Here, Counts 3 and 5 of the indictment were both forgery charges. Count 3 related to check number 1147 from the checking account of RIBA Properties made payable to Kamal Sadoun in the amount of \$2,218 that Ganguly, through forgery, signed over to his RSS account. Count 5 related to check number 1199 from the checking account of RIBA Properties made payable to Josh Williams in the amount of \$1,801 that Ganguly, through forgery, signed over to his RSS account. Though Ganguly disputes his actual guilt of these counts, presenting evidence at the restitution hearings that Williams and Sadoun gave him permission to sign checks over to RSS in exchange for cash payments, Ganguly nonetheless entered a guilty plea to these charges, thereby admitting culpability. Crim.R. 11(B); *State v. Darks*, 10th Dist. No. 05AP-982, 2006-Ohio-3144, ¶ 11; *State v. Hastings*, 10th Dist. No. 98AP-421 (Dec. 15, 1998) (stating "[a] guilty plea entered knowingly, voluntarily, and intelligently is a complete admission of factual guilt").

{¶ 29} Ganguly additionally argues that RIBA Properties was not the proper victim of Counts 3 and 5 because RIBA Properties owed money to Sadoun and Williams for work they had performed. Ganguly asserts he eventually paid Sadoun and Williams what they were owed, so RIBA Properties cannot demonstrate actual loss. Again, however, Ganguly entered a guilty plea to these two forgery charges, effectively admitting that he deprived RIBA Properties of this money through forgery. Thus, the trial court had before it competent, credible evidence that the amount of restitution owed for Counts 3 and 5 was \$4,019, and that amount bears a reasonable relationship to the actual loss suffered.

{¶ 30} Ganguly also entered a guilty plea to Count 7 of the indictment, tampering with records. The indictment specified that "the value of the data involved in the offense of the loss to the victim is one hundred thousand dollars (\$100,000.00) or more." (Indictment, 4.) Again, Ganguly maintains his actual innocence of this charge, but he is

constrained by his guilty plea which operates as a complete admission of the charge as stated. *Hastings*.

{¶ 31} As to the amount of restitution assessed for Count 7, Ganguly argues the trial court based this amount on all of the charges in the indictment instead of limiting the amount to the conduct contained specifically in Count 7. In general, a sentencing court cannot order an offender to pay restitution damages attributed to an offense for which the offender was charged but not convicted. *State v. Strickland*, 10th Dist. No. 08AP-164, 2008-Ohio-5968, ¶ 11, citing *State v. Williams*, 3d Dist. No. 8-03-25, 2004-Ohio-2801, ¶ 23; *State v. Hooks*, 135 Ohio App.3d 746, 749 (10th Dist.2000). Thus, "as a general rule, restitution is limited to the economic loss caused by the illegal conduct for which the defendant was convicted." *Strickland* at ¶ 11, citing *Hooks* at 749.

{¶ 32} Though we agree with Ganguly generally that a trial court should not impose restitution for charges dismissed as a result of a plea agreement, a review of the record indicates that is not what happened here. The express language of Count 7 of the indictment indicates Ganguly admitted to causing at least \$100,000.00 worth of loss to RIBA Properties. Ultimately, the trial court settled on a total restitution award of \$430,965.71. Less the \$4,019.00 attributed to Counts 3 and 5, the trial court assessed \$426,946.71 in restitution for Count 7. To reach that figure, the trial court conducted five separate restitution hearings over the course of six months.

{¶ 33} In its effort to demonstrate the loss caused by Ganguly's conduct related to Count 7, the state presented the testimony of two witnesses: Sergeant Bond of the Economic Crimes Unit of the Columbus Police Department, and Swaraj Chakrabarti, a managing member of RIBA Properties. Sergeant Bond testified about his investigation into the matter and his determination that RIBA Properties had suffered an economic loss of \$509,384.98. Sergeant Bond explained that he initially received copies of several checks from Chakrabarti and then used those checks to subpoena bank records from Chakrabarti's account, RIBA Properties' accounts, and Ganguly's accounts. The state introduced into evidence a spreadsheet, state's exhibit No. 1, containing every instance of "questionable expenses, the forged checks, the rent checks that were taken directly by [Ganguly]," including the checks written to Ganguly himself, to his wife, to RSS, to vendors that could not be verified, forged checks deposited into the RSS account, and

checks written directly from tenants. (Oct. 25, 2013 Tr. 12.) Using that spreadsheet, Sergeant Bond added up these amounts to arrive at a total loss of \$509,384.98. On cross-examination, Sergeant Bond stated Ganguly was not willing to cooperate with his investigation into the actual amount of loss and that, from the information he gathered, he did not agree that Ganguly incurred expenses on behalf of RIBA Properties.

{¶ 34} Chakrabarti testified regarding the general nature of Ganguly's conduct and how Chakrabarti came to discover it. Chakrabarti explained that he worked with Sergeant Bond to come up with the total amount of proposed restitution, and he also explained that he came up with his own figure of \$524,000.00 in economic loss that differed slightly from Sergeant Bond's total figure because he included an additional transaction. Ultimately, Chakrabarti agreed that the \$509,384.98 contained in state's exhibit No. 1, and the same number Sergeant Bond testified to, was the correct amount of restitution owed to RIBA Properties.

{¶ 35} Sergeant Bond and Chakrabarti testified at the first of the restitution hearings; Ganguly used the remaining four hearings to try to dispute the state's proposed restitution amount. Ganguly introduced hundreds of pages of exhibits, again maintained his actual innocence of the charges, and suggested both that he incurred actual expenses on behalf of RIBA Properties and that his work for the company during the relevant timeframe actually increased the overall value of RIBA Properties.

{¶ 36} Ultimately, the trial court considered the voluminous transcript and the many exhibits and determined that some exclusions were necessary from the state's proposed restitution amount of \$509,384.98. The trial court excluded five transactions from state's exhibit No. 1, totaling \$7,510.38, finding the testimony at the hearings indicated that there was not competent, credible evidence that Ganguly had misappropriated the full amount of the checks contained in those five instances. The trial court also subtracted from the figure in state's exhibit No. 1 a total of \$70,908.89 concerning mortgage payments that were inappropriately included in the state's total amount. Based on all of the evidence at the five-part hearing, the trial court determined the total amount of restitution owed by Ganguly was \$430,965.71. This amount includes the \$4,019.00 from the checks in Counts 3 and 5.

{¶ 37} We conclude the trial court did not abuse its discretion in determining the amount of restitution. The trial court did not simply defer to the state's evidence, as Ganguly suggests, but, instead, considered each of the many transactions to determine which ones reflected Ganguly's criminal conduct and which ones were not appropriate to include in the final award. The trial court sorted through all of these figures and determined it had competent, credible evidence to impose a total restitution amount of \$430,965.71. That amount bears a reasonable relationship to the actual loss suffered by RIBA Properties as it relates to Ganguly's convicted conduct in Counts 3, 5 and 7. Accordingly, we overrule Ganguly's second assignment of error.

### **V. Third Assignment of Error — Sentence**

{¶ 38} In his third and final assignment of error, Ganguly argues the trial court erred when it sentenced him to a term of imprisonment for Count 3 without first making the proper findings under R.C. 2929.13. Ganguly argues, pursuant to R.C. 2929.13(B)(1)(a), that the trial court could only sentence him to a term of imprisonment for a fifth-degree felony if the trial court first analyzed the four statutory factors listed in R.C. 2929.13(B)(1)(a)(i) through (iv), and the trial court failed to do so here.

{¶ 39} An appellate court will not reverse a trial court's sentencing decision unless the evidence is clear and convincing that either the record does not support the sentence or that the sentence is contrary to law. *State v. Chandler*, 10th Dist. No. 04AP-895, 2005-Ohio-1961, ¶ 10, citing *State v. Maxwell*, 10th Dist. No. 02AP-1271, 2004-Ohio-5660, ¶ 27, citing *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, ¶ 10. " 'In determining whether a sentence is contrary to law, an appellate court reviews the record to determine whether the trial court considered the appropriate factors, made the required findings, gave the necessary reasons for its findings, and properly applied the statutory guidelines.' " *Id.*, quoting *Maxwell* at ¶ 27, citing *State v. Altalla*, 10th Dist. No. 03AP-1127, 2004-Ohio-4226, ¶ 7. "We are also cognizant of the two-step standard of review set forth by a plurality [opinion] of the Supreme Court of Ohio in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, which asks (1) whether the trial court adhered to all applicable rules and statutes in imposing the sentence, and (2) whether a sentence within the permissible statutory range constitutes an abuse of discretion." *State v. Murphy*, 10th Dist. No. 12AP-952, 2013-Ohio-5599, ¶ 12.

{¶ 40} As the state notes, Ganguly did not object to the imposition of a term of imprisonment at the sentencing hearing, so our review is limited to plain error. Crim.R. 52(B); *State v. Price*, 10th Dist. No. 13AP-1085, 2014-Ohio-4065, ¶ 7. An appellate court recognizes plain error with the utmost caution, under exceptional circumstances, and only to prevent a miscarriage of justice. *State v. Pilgrim*, 184 Ohio App.3d 675, 2009-Ohio-5357, ¶ 58 (10th Dist.), citing *State v. Saleh*, 10th Dist. No. 07AP-431, 2009-Ohio-1542, ¶ 68.

{¶ 41} For an error to be a "plain error" under Crim.R. 52(B), it must satisfy three prongs: (1) there must be an error, meaning a deviation from a legal rule, (2) the error must be "plain," meaning an "obvious" defect in the trial proceedings, and (3) the error must have affected the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002).

{¶ 42} Ganguly bases his argument on R.C. 2929.13(B)(1)(a), which provides:

Except as provided in division (B)(1)(b) of this section, if an offender is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence or that is a qualifying assault offense, the court shall sentence the offender to a community control sanction of at least one year's duration if all of the following apply:

\* \* \*

(ii) The most serious charge against the offender at the time of sentencing is a felony of the fourth or fifth degree.

{¶ 43} According to Ganguly, the trial court was required to sentence him to community control under R.C. 2929.13(B)(1)(a) unless the trial court specifically considers the factors enumerated in R.C. 2929.13(B)(1)(b). R.C. 2929.13(B)(1)(a)(ii) expressly provides that the preference for community control applies only if "[t]he most serious charge against the offender at the time of sentencing is a felony of the fourth or fifth degree." Here, Ganguly also faced sentencing for a third-degree felony at the time of sentencing. Ganguly's reliance on *State v. Massien*, 125 Ohio St.3d 204, 2010-Ohio-1864, is misplaced. In *Massien* there is no indication that the defendant was convicted of anything more serious than a fourth-degree felony. Accordingly, R.C. 2929.13(B)(1)(a)(ii) did not limit community control as a sanction as it does here.

{¶ 44} Based on the plain language of the statute, because (B)(1) does not apply, "in determining whether to impose a prison term as a sanction for a felony of the fourth or fifth degree, the sentencing court shall comply with the purposes and principles of sentencing under [R.C. 2929.11] and with [R.C. 2929.12]." R.C. 2929.13(B)(2). *See also State v. Thompson*, 6th Dist. No. S-11-052, 2013-Ohio-1594, ¶ 51 (stating that because appellant also faced sentencing for three second-degree felonies, R.C. 2929.13(B)(1)(a)(ii) rendered appellant ineligible for mandatory community control).

{¶ 45} As R.C. 2929.13(B)(2) directs, we look to whether appellant's sentence followed the appropriate statutory guidelines outlined in R.C. 2929.11 and 2929.12. Here, the trial court's judgment entry states it "has considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12." (Judgment Entry, 2.) Such language in the judgment entry belies a claim that the trial court failed to consider the purposes and principles of sentencing. *Murphy* at ¶ 13, citing *State v. Reeves*, 10th Dist. No. 09AP-493, 2010-Ohio-4018, ¶ 16; *State v. Peterson*, 10th Dist. No. 12AP-646, 2013-Ohio-1807, ¶ 31. Additionally, Ganguly has not made a showing that the trial court failed to properly consider the statutory purposes and factors contained in R.C. 2929.11 and 2929.12 as Ganguly limits his argument to the trial court's alleged failures under R.C. 2929.13(B)(1)(a). *See, e.g., Murphy* at ¶ 13, citing *State v. McMichael*, 10th Dist. No. 11AP-1042, 2012-Ohio-3166, ¶ 42.

{¶ 46} Further, our independent review of the record indicates the trial court properly considered the statutory factors and guidelines in R.C. 2929.11 and 2929.12 before imposing Ganguly's sentence. At the sentencing hearing, the trial court stated it agreed with the victims in this case that Ganguly had been "working [the] system" and delaying the proceedings for his own benefit. (Apr. 11, 2014 Tr. 31.) The trial court also stated it did not find Ganguly to be a credible person. The trial court then acknowledged it needed to temper those findings with the fact that Ganguly did not have a prior record. The hearing transcript indicates the trial court considered many factors to determine a sentence that would address both the seriousness of the crimes and the harm to the victims, as well as the mitigating factors that weighed in Ganguly's favor. Therefore, we find the trial court's sentence complied with R.C. 2929.11 and 2929.12.

{¶ 47} Additionally, to the extent Ganguly suggests his sentence is contrary to law for the trial court's failure to use "magic language" in considering the factors listed in R.C. 2929.13(B)(1)(a), Ganguly points to no authority suggesting any such magic language is required. Instead, where the record is clear that R.C. 2929.13(B)(1)(a)(ii) precluded the imposition of mandatory community control, and the trial court then appropriately sentenced Ganguly under R.C. 2929.13(B)(2), we find no error in Ganguly's sentence. We overrule Ganguly's third and final assignment of error.

## **VI. Disposition**

{¶ 48} Based on the forgoing reasons, the trial court did not abuse its discretion in denying Ganguly's motion to withdraw his guilty plea, did not err in determining the amount of restitution, and did not plainly err in imposing a term of imprisonment as part of Ganguly's sentence. Having overruled Ganguly's three assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BROWN, P.J., concurs.  
BRUNNER, J., concurs separately.

BRUNNER, J., concurring separately.

{¶ 49} I concur with the decision of the majority on the first and second assignments of error with no further comment. As to the third assignment of error, concerning sentencing, I respectfully concur with the majority in judgment only, offering the following concurring decision on the felony sentencing issues raised on appeal.

{¶ 50} In his third and final assignment of error, Ganguly argues the trial court erred when it sentenced him to a term of imprisonment for Count 3 without first making the proper findings under R.C. 2929.13. Ganguly argues, pursuant to R.C. 2929.13(B)(1)(a), that the trial court could only sentence him to a term of imprisonment for a fifth-degree felony if the trial court first analyzed the four statutory factors listed in R.C. 2929.13(B)(1)(a)(i) through (iv), and the trial court failed to do so here.

{¶ 51} An appellate court will not reverse a trial court's sentencing decision unless the evidence is clear and convincing that either the record does not support the sentence or that the sentence is contrary to law. *State v. Chandler*, 10th Dist. No. 04AP-895, 2005-Ohio-1961, ¶ 10, citing *State v. Maxwell*, 10th Dist. No. 02AP-1271, 2004-Ohio-5660,



¶ 27, citing *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, ¶ 10. " 'In determining whether a sentence is contrary to law, an appellate court reviews the record to determine whether the trial court considered the appropriate factors, made the required findings, gave the necessary reasons for its findings, and properly applied the statutory guidelines.' " *Id.*, quoting *Maxwell* at ¶ 27, citing *State v. Altalla*, 10th Dist. No. 03AP-1127, 2004-Ohio-4226, ¶ 7. "We are also cognizant of the two-step standard of review set forth by a plurality [opinion] of the Supreme Court of Ohio in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, which asks (1) whether the trial court adhered to all applicable rules and statutes in imposing the sentence, and (2) whether a sentence within the permissible statutory range constitutes an abuse of discretion." *State v. Murphy*, 10th Dist. No. 12AP-952, 2013-Ohio-5599, ¶ 12.

{¶ 52} As the state notes, Ganguly did not object to the imposition of a term of imprisonment at the sentencing hearing, so our review is limited to plain error. Crim.R. 52(B); *State v. Price*, 10th Dist. No. 13AP-1085, 2014-Ohio-4065, ¶ 7. An appellate court recognizes plain error with the utmost caution, under exceptional circumstances, and only to prevent a miscarriage of justice. *State v. Pilgrim*, 184 Ohio App.3d 675, 2009-Ohio-5357, ¶ 58 (10th Dist.), citing *State v. Saleh*, 10th Dist. No. 07AP-431, 2009-Ohio-1542, ¶ 68.

{¶ 53} For an error to be a "plain error" under Crim.R. 52(B), it must satisfy three prongs: (1) there must be an error, meaning a deviation from a legal rule, (2) the error must be "plain," meaning an "obvious" defect in the trial proceedings, and (3) the error must have affected the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002).

{¶ 54} Ganguly bases his argument on R.C. 2929.13(B)(1)(a), which provides:

Except as provided in division (B)(1)(b) of this section, if an offender is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence or that is a qualifying assault offense, the court shall sentence the offender to a community control sanction of at least one year's duration if all of the following apply:

\* \* \*

(ii) The most serious charge against the offender at the time of sentencing is a felony of the fourth or fifth degree.

{¶ 55} According to Ganguly, the trial court was required to sentence him to community control under R.C. 2929.13(B)(1)(a), unless the trial court specifically considered the factors enumerated in R.C. 2929.13(B)(1)(b). R.C. 2929.13(B)(1)(a)(ii) expressly provides that mandatory community control applies only if "[t]he most serious charge against the offender at the time of sentencing is a felony of the fourth or fifth degree." Ganguly also faced sentencing for a third-degree felony. Ganguly relies on *State v. Massien*, 125 Ohio St.3d 204, 2010-Ohio-1864, to support his argument, but without sufficient basis. In *Massien* there is no indication that the defendant was convicted of anything more serious than a fourth-degree felony at the time of sentencing. Based on the plain language of the statute, community control is not mandatory for Ganguly. *See also State v. Thompson*, 6th Dist. No. S-11-052, 2013-Ohio-1594, ¶ 51 (stating that because the appellant also faced sentencing for three second-degree felonies, R.C. 2929.13(B)(1)(a)(ii) rendered appellant ineligible for mandatory community control).

{¶ 56} Ganguly also argues that the trial court should have discussed or made findings on the record concerning the factors set forth in R.C. 2929.13(B)(1)(b) when using its discretion to sentence him to prison for a fifth-degree felony.<sup>1</sup> There is no requirement for the making of findings for a sentence imposed under this section such as there is for division (D)(2) of this section when an offender convicted of a first or second-degree felony is not sentenced to prison.

{¶ 57} Rather, R.C. 2929.13(B)(2) requires that, "in determining whether to impose a prison term as a sanction for a felony of the fourth or fifth degree, the sentencing court shall comply with the purposes and principles of sentencing under [R.C. 2929.11] and with [R.C. 2929.12]." In determining whether there was plain error in Ganguly's sentencing, we are obliged to review the sentence as R.C. 2929.13(B)(2) directs, whether

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<sup>1</sup> Applicable factors under R.C. 2929.13(B)(1)(b) are:

(viii) The offender held a public office or position of trust, and the offense related to that office or position; the offender's position obliged the offender to prevent the offense or to bring those committing it to justice; or the offender's professional reputation or position facilitated the offense or was likely to influence the future conduct of others.

(ix) The offender committed the offense for hire or as part of an organized criminal activity.

appellant's sentence was appropriately rendered under statutory guidelines outlined in R.C. 2929.11<sup>2</sup> and 2929.12.<sup>3</sup>

{¶ 58} Here, the trial court's judgment entry specifically indicates the trial court "has considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12." (Judgment Entry, 2.) "R.C. 2929.11 and 2929.12 \* \* \* are not fact-finding statutes like R.C. 2929.14." (Footnote deleted.) *Kalish* at ¶ 17. This court has previously held that such language in the judgment entry does not support a claim that the trial court failed to consider the purposes and principles of sentencing. *Murphy* at ¶ 13, citing *State v. Reeves*, 10th Dist. No. 09AP-493, 2010-Ohio-4018, ¶ 16; *State v. Peterson*, 10th Dist. No. 12AP-646, 2013-Ohio-1807, ¶ 31. Further, Ganguly has not made a showing that the trial court failed to properly consider the statutory purposes and factors contained in R.C. 2929.11 and 2929.12 when Ganguly limits his argument to the trial court's alleged failures under R.C. 2929.13(B)(1)(a). *See, e.g., Murphy* at ¶ 13, citing *State v. McMichael*, 10th Dist. No. 11AP-1042, 2012-Ohio-3166, ¶ 42.

{¶ 59} Our review of the record indicates the trial court throughout the various hearings, which included a civil trial for the same activities, considered a myriad of factors to determine a sentence that would address both the seriousness of the crimes and the harm to the victims, as well as the mitigating factors that weighed in Ganguly's favor. On this basis, I would find, as explained above, that the trial court's sentence complied with the purposes of felony sentencing set forth in R.C. 2929.11 and properly took into

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<sup>2</sup> The overriding purposes of felony sentencing, as contained in R.C. 2929.11(A) are "to protect the public from future crime by the offender and others and to punish the offender *using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources.*" (Emphasis added.) The statute further requires that, to achieve those purposes, "the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both." Division (B) of R.C. 2929.11 further guides that, "[a] sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with 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."

<sup>3</sup> R.C. 2929.12(A) requires that, "a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct, the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism."

consideration the relevant factors set forth in R.C. 2929.12. To the extent Ganguly suggests his sentence is contrary to law for the trial court's failure to use "magic language" in considering the factors listed in R.C. 2929.13(B)(1)(a), the requirement of specific "findings" are limited to particularized situations expressly contained in R.C. 2929.13 and 2929.14.

{¶ 60} The trial court appropriately sentenced Ganguly under R.C. 2929.13(B)(2), followed the purposes of felony sentencing contained in R.C. 2929.11, and considered the sentencing factors contained in R.C. 2929.12. On this basis, I would find no error in Ganguly's sentence and overrule Ganguly's third and final assignment of error.

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