[Cite as *State v. Whitman*, 2012-Ohio-3025.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-L-131**
- vs -	:	
RUSSELL WHITMAN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 11 CR 000093.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee,* Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Christine M. Tibaldi, 38109 Euclid Avenue, Willoughby, OH 44094 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Russell Whitman, appeals from the judgment on sentence entered by the Lake County Court of Common Pleas. At issue is whether the trial court erred in sentencing appellant to the maximum term of imprisonment after he plead guilty to felony-three aggravated theft. For the reasons discussed in this opinion, we affirm the trial court's judgment.

{¶2} The record indicates that, between January of 2008 and July of 2010, appellant, acting in conjunction with his wife, Gina Whitman, stole between $250,000 and $320,000 from the company at which they were both employed. Appellant was ultimately indicted on the following charges: Count 1, aggravated theft, in violation of R.C. 2913.02(A)(2), a felony of the third degree; Count 2, aggravated theft, in violation of R.C. 2913.02(A)(3), a felony of the third degree; Count 3, breaking and entering, in violation of R.C. 2911.13(A), a felony of the fifth degree; and Count 4, engaging a pattern of corrupt activity, in violation of R.C. 2923.32(A)(1), a felony of the first degree. The state subsequently filed a pleading purporting to place appellant on notice that he could be held criminally culpable as either the principal or a complicitor regarding Counts 1, 2, and 3.

{¶3} Appellant initially entered a plea of "not guilty" to all charges, which he later withdrew, entering a plea of "guilty" to Count 1. The trial court nolled the remaining counts. The trial court deferred sentencing and ordered a presentence investigation report, victim impact statement, and a drug and alcohol evaluation. Meanwhile, appellant was released on bond. Appellant's bond was revoked, however, after his urine screen tested positive for cocaine.

{¶4} On September 6, 2011, the matter came on for sentencing. During the proceedings, the parties jointly recommended a three-year term of imprisonment. The trial court, however, declined to accept the recommendation and sentenced appellant to a maximum term of five years. The court additionally ordered appellant to pay restitution to the victims in the amount of $285,767.48, an amount based upon the losses sustained by the company as calculated by the company's owner and an

admission by appellant's wife regarding the amount stolen from the company. Appellant subsequently moved the court to reduce the sentence. The trial court did not expressly rule on the motion but, by its silence, the motion was presumptively overruled. This appeal follows.

{¶5} Appellant assigns the following two, interrelated errors for our review:

{¶6} "[1.] The imposition of a maximum sentence is against the manifest weight of the evidence and contrary to the Law by only looking at the aggravating factors in R.C. 2929.12.

{¶7} "[2.] The imposition of a maximum sentence is against the manifest weight of the evidence and contrary to the Law by finding appellant committed the worst form of the crime."

{¶8} Because appellant's two assignments of error contest the trial court's imposition of sentence, we shall address them together. Appellant preliminarily argues the trial court abused its discretion in sentencing him to the maximum term of imprisonment when it found appellant committed the worst form of the offense, but failed to consider appellant's purportedly low likelihood to reoffend by balancing the factors set forth under R.C. 2929.12(D) and (E). We do not agree.

{¶9} Initially, certain legal principles upon which appellant relies in his brief presume the trial court was required to make certain factual findings as preconditions for imposing the maximum sentence. Nearly six years ago, however, the Ohio Supreme Court, in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ruled that such mandatory judicial fact finding violated a defendant's Sixth Amendment right to a jury trial. The court subsequently severed the offending provisions from Ohio's felony sentencing

code. Since *Foster*, "trial 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 * * * or more than the minimum sentences." *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶37.[1] Thus, appellant's suggestion that the trial court was required to make specific findings before imposing the maximum penalty is erroneous.

{¶10} Post-*Foster*, appellate courts review a felony sentence under the test announced in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. In *Kalish*, the Ohio Supreme Court established a two-step analysis for considering the propriety of a felony sentence. Under the first step, an appellate court considers whether the trial court "adhered to all applicable rules and statutes in imposing the sentence." *Id.* at 25. "As a pure legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G)." *Id.* Next, a reviewing court considers, with reference to the general principles of felony sentencing and the seriousness and recidivism factors set forth in R.C. 2929.11 and 2929.12, whether the trial court abused its discretion in selecting the defendant's sentence. *Id.* at 27.

{¶11} With respect to the first prong of *Kalish*, the Supreme Court did not provide specific guidance regarding the "laws and rules" an appellate court must consider to ensure sentencing clearly and convincingly conforms with Ohio law. *State*

1. *Foster* also found mandating judicial factfinding as a precondition for imposing consecutive sentences was unconstitutional and severed R.C. 2929.14(E)(4), the subsection codifying that mandate. In *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, however, the court held that the Sixth Amendment is not violated by legislation requiring trial judges to engage in judicial factfinding prior to imposing consecutive sentences. *Id.* at paragraph one of the syllabus, following *Oregon v. Ice*, 555 U.S. 160 (2009). Despite this conclusion, the court in *Hodge* determined that its holding did not operate to revive the severed statutory subsections. *Id.* at paragraph two of the syllabus.

v. Burrell, 11th Dist. No. 2009-P-0033, 2010-Ohio-6059, ¶17. Thus, "if a sentence falls within the statutory range for the felony of which a defendant is convicted, it will be upheld as clearly and convincingly consistent with the law." *State v. Kozel*, 11th Dist. No. 2011-L-044, 2011-Ohio-4306, ¶5. "If the sentence is within the purview of the applicable 'laws and rules,' we then consider whether the trial court acted within its discretion in fashioning the sentence at issue." *Id.*

{¶12} This court has held that, while a trial court must consider the seriousness and recidivism factors set forth under R.C. 2929.12, it is not required to make factual findings pursuant to those factors. *See e.g. State v. ONeill*, 11th Dist. No. 2010-P-0041, 2011-Ohio-2202, ¶34. In fact, absent some evidence to the contrary, a reviewing court will presume all statutory standards were met even if the record is silent. *See e.g. State v. Kish*, 11th Dist. No. 2010-L-138, 2011-Ohio-4172, ¶8. In this case, the trial court met its obligations under the law.

{¶13} At the hearing, the trial court acknowledged it had considered "all relevant factors including the seriousness and recidivism factors set forth in Revised Code 2929.12." The court also noted that "the defendant has going for him a relatively minor criminal record in the distant past." The court's observations demonstrate it considered appellant's likelihood to reoffend. And, given its comments about his past record, it appears the trial court was not particularly concerned about appellant's likelihood to reoffend. This does not imply, however, the trial court abused its discretion in imposing the maximum term of imprisonment.

{¶14} Although one of the overriding purposes of felony sentencing is to protect the public from future crime by the offender, punishing the offender is of coequal

importance. *See* R.C. 2929.11. To this end, the trial court underscored that appellant's plea afforded him the benefit of the felony-one corrupt activity charge being dismissed. The court then underscored the following:

> **{¶15}** And this was part of an organized criminal activity nonetheless. Serious economic harm was visited upon the victim, with long range repercussions. The court considers that an extreme amount of damage was done. It's unbelievable that all this money could have been used to put drugs up the nose by two people. I've also considered the Defendant's ability to pay restitution pursuant to 2929.18. The court cannot go along with the joint recommendation, based upon the extreme amount of damage that was done here, based upon other cases of this sort coming through this court.

{¶16} While, in this case, appellant's minimal criminal record arguably lessened the likelihood of him committing future offenses, the record demonstrates appellant assisted in the theft of over $250,000 from a family member. The court, after considering the relevant factors, determined the details of the crime and the significant economic damages caused by the theft justified the maximum sentence. We cannot conclude the court's judgment was unreasonable.[2]

{¶17} Next, appellant contends the trial court abused its discretion in sentencing him to the maximum term of imprisonment because he was only partially (if not less) responsible for the theft than his wife. And his wife, who pleaded guilty to felony-one

2. This position is reinforced by the trial judge's response to defense counsel's post-sentence objection to the maximum prison term. Upon objection, the trial judge emphasized that, in his view, the crime was "the worst form of the offense." The judge defended this conclusion by pointing out that the "extreme amount of damage * * * far exceeds the $100,000.00 threshold for an aggravated theft."

engaging in corrupt activity, received a lower, four-year prison term for her involvement. Again, we do not agree.

{¶18} Rather than going to trial on the indictment, which included a felony-one engaging in a pattern of corrupt activity, appellant pleaded guilty to aggravated theft, a felony of the third degree. Appellant's plea agreement demonstrates he was advised that, in accepting its terms, the court could impose the maximum term of five years imprisonment and be subject to restitution or civil liability for his role in the theft. Appellant was not forced to enter the plea and had the right to take the matter to trial where he could have submitted evidence of either his non-involvement or his purportedly minimal involvement in the crimes for which he was charged. Instead, he entered the plea voluntarily, thereby waiving any right to defend against the factual allegations upon which the charge was premised. In doing so, appellant accepted legal responsibility for a felony-three crime and submitted himself to the court's discretion to sentence him accordingly. Regardless of appellant's exhortations that the court should have imposed a lower sentence, the court was not obligated to do so. The court's sentence was within the scope of the law and, given the circumstances of the case, cannot be considered arbitrary or unreasonable.

{¶19} Moreover, Mrs. Whitman's plea agreement and her ultimate sentence has no bearing on appellant's case. Nothing from the record in that case was introduced for the trial judge's consideration in this case. The trial court possessed the discretion to sentence appellant to five years in this case. And, irrespective of what occurred in Mrs. Whitman's case, we hold the court did not act unreasonably in the current matter.

{¶20} Finally, appellant suggests the trial court's restitution order was inappropriate. We do not agree.

{¶21} Initially, appellant did not object to the restitution order or seek a hearing on that issue to dispute the amount. If a defendant does not object to the court's imposition of restitution at the sentencing hearing or request a hearing in order to dispute the order, the issue is waived on appeal save plain error. *State v. Ford*, 9th Dist. No. 26073, 2012-Ohio-1327, ¶7; *see also State v. Bernadine*, 11th Dist. No. 2010-P-0056, 2011-Ohio-4023, ¶26. A claimed error is plain error only if it is obvious, and "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph two of the syllabus.

{¶22} The transcript of proceedings demonstrates that the trial court's restitution order was premised upon the victim's calculation of loss ($323,277.41), derived from the company's financial records, as discussed in the PSI, as well as Mrs. Whitman's admission that the amount stolen was between $250,000 and $300,000. At the sentencing hearing appellant stated he did not know the exact amount, but he did not believe the amount was $323,277.41. Although a transcription of his presentence interview indicated appellant believed that the amount was between $50,000 and $60,000, he did not specify any such figure in open court. He merely asserted his belief that it was lower than "320 thousand." In the end, the trial court imposed a restitution order of $285,767.48, a number lower than the victim's calculation. Appellant did not object to this amount or request a hearing in order to dispute the issue.

{¶23} The trial court's restitution order was premised upon financial information submitted by the victim and the admission of appellant's co-defendant. The amount was

therefore derived from reasonable and verifiable sources. Moreover, although the court expressed concern regarding appellant's ability to repay, the court discussed the importance of restitution with appellant, who insisted the money "would be paid back * * * eventually." The court further inquired into appellant's past employment and wages at the sentencing hearing and the PSI included information regarding appellant's employment history. Finally, on record, the court stated it had considered appellant's present and future ability to pay restitution as required by R.C. 2929.19(B)(5). Viewing the record in its entirety, we perceive no error in the restitution order at issue or the manner in which it was imposed.

{¶24} Appellant's two assignments of error are without merit.

{¶25} For the reasons discussed in this opinion, the sentence entered by the Lake County Court of Common Pleas is hereby affirmed.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.