[Cite as *State v. Brown*, 2015-Ohio-2897.]

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. 2014-L-075**
- vs -	:	
MATTHEW A. BROWN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 13 CR 000823.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel,* Assistant Prosecutor, Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

David L. Doughten, 4403 St. Clair Avenue, Cleveland, OH 44103-1125 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Matthew A. Brown, appeals his sentence in the Lake County Court of Common Pleas, following his guilty plea, to kidnapping and two counts of felonious assault. At issue is whether the trial court considered the guidelines for felony sentencing listed in R.C. 2929.11 and R.C. 2929.12 in imposing appellant's sentence. For the reasons that follow, we affirm.

{¶2} Appellant waived his right to indictment and pled guilty by way of information to kidnapping, a felony of the first degree, in violation of R.C. 2905.01(A)(3) (Count 1), and two counts of felonious assault, felonies of the second degree, in violation of R.C. 2903.11(A)(1) (Counts 2 and 3).

{¶3} The statement of facts that follows is derived from evidence presented at appellant's sentencing hearing. On Saturday, October 19, 2013, at 1:30 a.m., Lake County Sheriff's Deputy Allan Moon stopped appellant driving 105 mph in a posted 60 mph zone while he was traveling eastbound on Route 2 just west of Route 44. The deputy asked appellant why he was driving so fast. Appellant said he was going to the house of his girlfriend, Vikki Kifus, in Perry. He said Vikki did not answer her phone and he was concerned her ex-husband might be harming her. The deputy stated in his report that appellant did not appear to be under the influence of alcohol or narcotics. Appellant was cited for speeding and allowed to go on his way. While appellant was still on scene, two other deputies arrived, and Deputy Moon sent them to Vikki's house to determine if she needed assistance.

{¶4} The two deputies responded to Vikki's home at about the same time appellant arrived. Vikki said that she was fine and that appellant could stay, although she had not invited him. The deputies left at about 2:00 a.m.

{¶5} More than five and one-half hours later, at 7:40 a.m., Vikki called 911, reporting that she had fallen in the shower and sustained injury to her head and ribs. The dispatcher sent EMS to the residence. The dispatcher told Deputy Bachnicki that something did not seem right about the call because it was reported by the alleged fall victim. As a result, Deputy Bachnicki responded to Vikki's residence.

{¶6} Upon arrival, an ambulance was in the driveway. Deputy Bachnicki exited his cruiser and a paramedic told him the victim, Vikki Kifus, had taken a very brutal beating and there was no way she had fallen in the shower. The paramedic said Vikki had sustained the worst injuries he had ever seen on an assault victim.

{¶7} Deputy Bachnicki followed the paramedic in the house. Several other paramedics were standing around Vikki, who was sitting upright in a chair. Deputy Bachnicki saw appellant calmly sitting and silently watching the paramedics working on Vikki getting her ready to load her onto a cot. Her face was completely bloody and swollen. Both of her eyes were swollen shut. She had dripped blood on the front of her clothing all the way down to her feet. Her lower legs were extensively bruised and covered in blood. Based on these extensive, brutal injuries, Deputy Bachnicki concluded they were not caused by a fall in the shower.

{¶8} Deputy Bachnicki asked appellant to walk outside with him and he complied. Once outside, Deputy Bachnicki asked him what happened. Appellant said Vikki had fallen in the shower. He said she bruises easily and that is why her injuries were so extensive. Beginning with his traffic stop, appellant outlined the events leading to his arrival at Vikki's home that night. He said he stayed with her all night just sitting around and talking. He said that at about 4:00 a.m., Vikki decided to take a shower. He claimed that at some point he heard a loud "thud." He said he assumed she fell in the shower, but did not check on her. After waiting awhile, he saw she sustained serious injuries. He said he dried and dressed her. He admitted he saw she was seriously injured, but did not call for help. He said that after a long time, Vikki called 911. Deputy Bachnicki noticed appellant had scratches on his face, arms, and neck. He had blood

on his nose and there was blood on the toe area of his right shoe. In light of the extent of Vikki's injuries and the fact they were obviously not caused by a fall in her shower, Deputy Bachnicki arrested appellant.

{¶9} Lt. Sherwood arrived on scene and Deputy Bachnicki asked him to try to get some information from Vikki, who at that time was in the ambulance in the driveway. Lt. Sherwood asked her what happened. Due to her injuries, she could barely speak beyond mumbled sentence fragments. At first she said she fell in the shower. Her severe injuries indicated otherwise so the lieutenant asked her again and she said, "fight." When asked who she was in a fight with, she said appellant, but asked the officer not to tell appellant that she said anything. Vikki was then transported to Madison Medical Center.

{¶10} Deputy Bachnicki returned to the residence to make sure no one else was inside, as he learned that Vikki has three small children. Inside he saw evidence of a struggle in the dining room and kitchen. One of the legs of the dining room table had been broken off and the table was pushed back. There was broken glass all over the floor in the dining room and the adjoining kitchen. Also in the kitchen the deputy saw drops of blood and blood smears on the floor. There were several drops and splatters of blood on the kitchen countertops and drawers. Appellant's bloody footprint was found on the kitchen floor. Vikki's bloody handprint was found on the door leading to the attached garage, indicating she tried to escape. Clumps of Vikki's hair were found on the floor in the kitchen, living room, dining room, and her bedroom. Vikki's blood was found in her bedroom on the bed sheet and pillow.

{¶11} Deputy Bachnicki also checked the bathroom. There was no steam or water on the floor, and he thus discounted the claim that Vikki had recently taken a shower. Also, there was no blood in the shower, refuting the claim that Vikki was injured while taking a shower.

{¶12} Due to the extent of Vikki's injuries, a Lifeflight helicopter was ordered to take her to MetroHealth Hospital in Cleveland. While waiting for Lifeflight, Deputy Svagerko was assigned to obtain more information from Vikki at Madison Medical Center. At that time Vikki was moaning and complaining of pain mostly to her chest and stomach. She was in such great pain she could only speak in short mumbles. She said she was punched and kicked by "someone." At first she denied that appellant did this, but after hospital staff pressed her further asking who did this, she said appellant. She said she dated him for about one year and broke up with him about one month ago. She was hesitant to explain how she was injured. She said she was afraid of appellant and that he is very mean. She said she is afraid he would retaliate against her family if she testified against him. Subsequently, Lifeflight transported Vikki to MetroHealth.

{¶13} Sheriff's Detective Randy Woodruff met with Vikki at MetroHealth. She said that after the deputies left her house at about 2:00 a.m., she and appellant went inside the house. He was very angry with her because she did not answer his phone calls that night. She said appellant told her to lock the door to her house and she did. He began yelling at her. He bashed the back of her head on the kitchen floor. He repeatedly hit and kicked her. He stepped on her throat and choked her. She said he struck her many times. She said the assault took place in the kitchen, living room, and her bedroom. She said she kept trying to get away from him, and appellant pulled her

from room to room by her hair. She tried to call 911 earlier, but appellant prevented her from using her phone. She passed out several times. Each time she did, he would stop hitting her. Then, once she regained consciousness, he would start beating her again.

{¶14} When Vikki arrived at MetroHealth, she was badly bruised. Her face was extremely swollen and most of her face was severely bruised. She had bruises behind her right ear, on her right arm, on the right side of her back, and on her right leg. She had severe multiple deep purple bruises to her left shoulder, arm, and breast. She had bruises and lacerations to her left leg. She had bruises and cuts to her neck and chest. She had surgery on her left eye during which sutures were applied to hold her eyeball in place. Her chin was badly bruised. Both of her nostrils were caked with dry blood. Her front upper teeth were damaged.

{¶15} Appellant caused Vikki to sustain multiple severe injuries, including the extensive loss of blood that required several transfusions, hearing loss, bleeding of the brain, a concussion, a left orbital fracture, a nasal bone fracture, a lacerated liver and spleen, a crushed rib cage, and 13 fractured ribs.

{¶16} Appellant terrorized appellant for more than five hours between 2:00 a.m. and 7:40 a.m. He threatened to kill her, her ex-husband, and her three young children. He threatened her with a knife in the kitchen; threatened to sexually assault her; and prevented her from escaping when she tried to run out of the house.

{¶17} Vicki Kifus testified that appellant was angry with her because she broke up with him one month before this beating. She broke up with him because he destroyed her two cell phones in a violent rage. At that time he was angry that she went out of town to visit her girlfriend. With respect to the night in question, Vikki said that

after the deputies left her home, appellant went into a rage and wrapped his hands around her neck choking her. He punched and kicked her and pulled large clumps of hair out of her head many times. He tore her shirt off. She screamed and cried and begged him to stop, but he ignored her pleas.

{¶18} Vikki said that, now, when her three young children see her disfigured face, the scars, and missing teeth that appellant caused, they believe it is their fault. They are all in counseling to help them deal with their guilt. She said appellant's beating has had and will continue to have devastating, long-term psychological effects on them. Her children sleep with her every night because they are terrified of appellant. Vikki said her ordeal has also had an unimaginable affect on her parents. She asked the court to imagine the anguish they go through every day and will experience for the rest of their lives seeing their daughter so severely beaten and knowing what appellant did to her that night.

{¶19} Vikki testified appellant tried to intimidate her boasting that he will sleep very well in his prison cell, knowing that someday he will get out. She lives in constant fear of him because she knows each day is one day closer to his release. She said her torment and anguish will never stop and asked the court for justice so he can never harm her again.

{¶20} The state recommended that appellant serve 24 years in prison.

{¶21} Several of appellant's friends, relatives, and fellow inmates testified and wrote letters on his behalf asking the court for lenience in imposing sentence. Appellant's counsel asked that appellant be placed on community control. Appellant spoke on his own behalf, apologizing for his actions. When the court asked him why he

did this, appellant said that he does not remember beating Vikki, but that he did it because he was under the influence of alcohol and his medication at the time.

{¶22} The court stated it considered the purposes and principles of felony sentencing in R.C. 2929.11 and the seriousness and recidivism factors in R.C. 2929.12. In considering the factors making the offense more serious, the court said Vikki suffered serious physical and psychological harm. The court noted this was a severe, sustained, repeated, brutal beating and that Vikki's injuries were so severe she had to be Lifeflighted to Metro. The court commented on the unusual brutality of Vikki's beating:

> **{¶23}** The Court has had many felonious assault cases, and many kidnapping cases over the years. And this was a prolonged kidnapping. It was a prolonged and repeated assault of a severe nature. The fact that it stopped when she was unconscious and started up again when she regained consciousness indicates to the Court that the Defendant wanted his victim to feel the beating.

{¶24} Further, the court said that appellant's relationship with Vikki facilitated this offense and that in committing it, appellant was motivated by prejudice based on gender. The court noted there were no factors making the offense less serious.

{¶25} With respect to the recidivism factors, the court found that appellant's stated remorse was not genuine and that he has a prior criminal history. Appellant was convicted of assault in 1990. The court said that in that prior case, appellant beat his girlfriend, although he had not consumed alcohol or medication at that time, thus debunking appellant's excuse that he beat Vikki because he was under the influence.

{¶26} The court found that in the circumstances of this case, the presumption in favor of a prison sentence, which exists for each of the current offenses pursuant to R.C. 2929.13(D), was not overcome.

{¶27} The court sentenced appellant on Count 1, kidnapping, to ten years in prison; on Count 2, felonious assault, to seven years, and on Count 3, felonious assault, to seven years, each term to be served consecutively to the others, for a total of 24 years in prison.

{¶28} Appellant appeals his sentence, asserting the following for his sole assignment of error:

{¶29} "The appellant's sentence of 24 years is contrary to law as the trial court failed to follow the statutory guidelines in implementing that sentence."

{¶30} Post-H.B. 86, in reviewing whether the trial court's findings are supported by the record and whether a sentence is otherwise contrary to law, this court applies the standard set forth under R.C. 2953.08(G)(2). *State v. Moore,* 11th Dist. Geauga No. 2014-G-3183, 2014-Ohio-5182, ¶29. That statutory provision provides:

> **{¶31}** The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard of review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

{¶32} (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant; [or]

{¶33} (b) That the sentence is otherwise contrary to law.

{¶34} The Supreme Court of Ohio in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, held that R.C. 2929.11 and R.C. 2929.12 do not mandate judicial fact-finding. *Foster* at ¶42. Rather, "[*t*]*he court is merely to 'consider' the statutory factors*." (Emphasis added.) *Id*. Thus, in sentencing a defendant for a felony, "a court is merely required to 'consider' the purposes and principles of sentencing in R.C. 2929.11 and the statutory * * * factors set forth in R.C. 2929.12." *State v. Lloyd*, 11th Dist. Lake No. 2006-L-185, 2007-Ohio-3013, ¶44. The trial court satisfies its obligation to consider the seriousness and recidivism factors in R.C. 2929.12 by stating that it considered them. *State v. Whitman*, 11th Dist. Lake No. 2011-L-131, 2012-Ohio-3025, ¶12-13; *State v. DeNiro*, 11th Dist. Lake Nos. 2012-L-121 and 2012-L-122, 2013-Ohio-2826, ¶26-27.

{¶35} Appellant concedes on appeal that he should be sentenced to a "significant term of incarceration" and that the trial court did not err in "finding consecutive sentencing to be appropriate" and in "identifying factors favoring a prison term." Rather, appellant argues his sentence was contrary to law because the court erred in considering the seriousness and recidivism factors in R.C. 2929.12. First, appellant argues the court's comment that his crimes were gender-based was not supported by the facts. R.C. 2929.12(B)(8) provides that one of the factors making the

offense more serious is that in committing the offense, the offender was motivated by prejudice based on gender.

{¶36} In support of this conclusion, the trial court referenced appellant's conviction in 1990 for assault against his then-girlfriend under similar circumstances. The court noted that appellant's prior conviction and the present case are appellant's only convictions. The court said his history shows appellant is not likely to reoffend *unless* a woman ends their relationship, in which case appellant *is likely to reoffend*.

{¶37} The court's comment that this offense was gender-based finds support in Dr. Rindsberg's psychological evaluation, which is in the record. Dr. Rindsberg noted in his report that appellant was previously charged with abduction and pled guilty to assault in 1990. Dr. Rindsberg said that at that time appellant was in a relationship with a previous girlfriend. Appellant visited her at her residence and found a letter among her belongings from another boyfriend. Appellant went into a rage and beat her with a belt. Dr. Rindsberg opined there is an interaction between appellant's relationships with women and violence. Dr. Rindsberg said that appellant's history suggests "major problems with his impulse control" when his relationships with women end. He said that, "[t]his puts females he is with *at particular risk* when those relationships are over." (Emphasis added.) Dr. Rindsberg found it significant that, although appellant told the deputies he was going to Vikki's house to protect her, as soon as the deputies left, he severely beat her. Dr. Rindsberg concluded, "[i]t is the way appellant interacts with people, particularly women at the end of relationships," that caused him to commit the instant offense.

{¶38} Appellant also argues his sentence is contrary to law because the trial court did not give weight to any of the factors in R.C. 2929.12 making an offender's conduct *less serious.* However, R.C. 2929.12 provides the court is only required to consider these factors; it is not required to give them any particular weight or emphasis. *State v. DelManzo*, 11th Dist. Lake No. 2007-L-218, 2008-Ohio-5856, ¶23. Here, by stating at the sentencing hearing and in its judgment entry that it considered the seriousness and recidivism factors in R.C. 2929.12, the trial court met its duty to consider those factors. *Whitman, supra; DeNiro, supra*. Further, by stating at the sentencing hearing that there were no factors making the offense *less serious*, the court obviously considered those factors before deciding that none of them applied here. We also note that appellant has failed to identify which of the four factors in R.C. 2929.12(C) that make an offense less serious allegedly applies here. For this reason alone, this argument lacks merit.

{¶39} Further, appellant argues the trial court erred in stating that appellant showed no genuine remorse for his crimes, which is one of the recidivism factors.

{¶40} Under R.C. 2929.12, the trial court is required to consider whether the defendant shows genuine remorse for the offense. However, the court is not required to believe that the defendant is remorseful simply because such statements were made at the sentencing hearing. *State v. Davis*, 11th Dist. Lake Nos. 2003-L-027, 2003-L-028, 2004-Ohio-2076, ¶29. Since the trial court is in the best position to assess the credibility of witnesses, it follows that the determination of whether appellant's expression of remorse was genuine is best left to that court. *Id.*

{¶41} Here, the trial court stated that appellant's expression of remorse was not genuine because the court did not believe appellant's excuse for his violent attack on Vikki, i.e., he beat her because he was under the influence of alcohol and his medication. In support, the court noted that appellant acted rationally (albeit criminally) while he was with the deputies before the assault and again while he was with them after Vikki called 911, but, between these two time frames, he severely beat Vikki for more than five hours allegedly with no memory of it. The court said that it did not believe such aberrant behavior could come and go for no apparent reason and that appellant gave this excuse so he would not have to explain his conduct. Thus, the court found that appellant's alleged substance abuse did not play a significant role in causing him to punish Vikki that night.

{¶42} The court's comments regarding appellant's lack of remorse were supported by Dr. Rindsberg's report. Dr. Rindsberg found it was unlikely that appellant's alleged substance abuse that night led to a blackout, as appellant told him, during which he beat Vikki. The doctor said it was "highly unlikely that appellant's blackout would have occurred within seconds after officers left and continued throughout the period of the assault of the victim and then dissipated when officers and EMS were called at 7:00 a.m. that morning. * * * There is no logical reason for his blackout to have begun and ended at those periods of time, if in fact, he did 'blackout.'" Dr. Rindsberg concluded that appellant did *not* experience a blackout that caused him to commit this offense. Further, Dr. Rindsberg said that, although appellant alleges he is remorseful for what he did, he never asked about Vikki's condition.

{¶43} Because the trial court observed appellant, it was in the best position to assess his demeanor and sincerity regarding his remorse for the offense. We cannot say the court erred in concluding that appellant's stated remorse was not genuine.

{¶44} Further, appellant argues the trial court erred in not giving weight to the factors in R.C. 2929.12(E) indicating an offender is *not likely to reoffend*. However, as noted above, the court expressly stated it considered the seriousness and recidivism factors in R.C. 2929.12. In so stating, the court met its obligation to consider these factors. *Whitman, supra; DeNiro, supra.* Moreover, the court in fact expressly considered these factors and found they did not apply here, e.g., the court noted: (1) that appellant *has* a criminal history; (2) that the circumstances involved here *are likely to recur* if a women ends a relationship with him; and (3) that appellant *does not show* genuine remorse. R.C. 2929.12(E)(2)(4) and (5).

{¶45} Appellant's sentence was not clearly and convincingly contrary to law.

{¶46} For the reasons stated in this opinion, appellant's assignment of error lacks merit and is overruled. It is the order and judgment of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J., concurs in judgment only,

COLLEEN MARY O'TOOLE, J., concurs with a Concurring Opinion.

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COLLEEN MARY O'TOOLE, J., concurs with a Concurring Opinion.

{¶47} I concur with the majority to affirm the judgment of the trial court as the record in this case demonstrates that appellant's heinous conduct more than justifies the lengthy sentence he received. However, I write separately with respect to appellant's sole assignment of error.

{¶48} Appellant contends that the trial court erred by not following statutory guidelines when implementing his sentence of 24 years in prison. Appellant argues that the court's finding at sentencing that his crimes were gender-based is not supported by the record.

{¶49} When determining the seriousness of appellant's crimes for purposes of sentencing, the trial court applied R.C. 2929.12(B)(8), which outlines that the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion. In this case the trial court found that appellant was motivated by prejudice based upon the gender of his victim (female). Essentially, a finding under R.C. 2929.12(B)(8) is a finding that the acts committed constitute a hate crime.

{¶50} A hate crime is one in which the victim was selected based on some immutable characteristic: in this case, her gender. Ohio's hate crime statute focuses on crimes committed with a bias motivated by race, religion, or national origin. These offenses fall into the category of "ethnic intimidation" and are punishable as a misdemeanor in the third degree. R.C. 2927.12. A hate crime, as defined by New York state law, is committed when the person against whom the offense is committed is intentionally selected "because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability, or sexual

orientation of a person, regardless of whether the belief or perception is correct." NY CLS Penal § 485.05 (2015). Similarly, 42 U.S.C.A. § 13981, defines a gender-based crime as a "crime of violence motivated by gender." In other words, a crime that is committed on the basis of gender or due to an animus based on the victim's gender.

{¶51} However, this writer does not feel that the crimes committed by appellant qualify as a hate crime or a gender-based crime. The victim was not selected by appellant due to her gender. She was "selected" as a function of unfortunately being involved in a relationship with appellant. As such there is insufficient evidence in the record to find that appellant was motivated by gender-bias.

{¶52} Although the trial court erred in concluding that R.C. 2929.12(B)(8) applied to appellant's case, the error was harmless. R.C. 2929.12(B)(6) provides more than ample support for the trial court's finding that appellant's crime was one of the worst of its kind.