**[Cite as *State v. Ligon*, 2010-Ohio-2054.]**

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

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| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | CASE NO. CA2009-09-056 |
| | : | O P I N I O N |
| - vs - | | 5/10/2010 |
| | : | |
| JUSTIN D. LIGON, | : | |
| Defendant-Appellant. | : | |

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2008 CR 00455

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 North Third Street, Batavia, Ohio 45103-3033, for plaintiff-appellee

R. Daniel Hannon, Clermont County Public Defender, Robert F. Benintendi, 10 South Third Street, Batavia, Ohio 45103, for defendant-appellant

**BRESSLER, J.**

**{¶1}** Defendant-appellant, Justin D. Ligon, appeals his convictions in the Clermont County Court of Common Pleas for felonious assault and child endangerment. For the reasons outlined below, we affirm.

**{¶2}** On December 25, 2007, appellant picked up his 21-month-old son, S.M., from

the child's mother's house near Piccadilly Square in Cincinnati. Appellant brought S.M. to the apartment that he shared with his girlfriend, Kari Elliot, to spend several nights with appellant over the holiday season. Two days later, on December 27, 2007, appellant told Elliot that while he slept, S.M. discovered a tube of Desitin cream and smeared it across his body. Elliot testified that appellant sounded "pretty upset" over the mess that S.M. had created, and that although Elliot could not remember appellant's exact words, she recalled that he told her that S.M. had either "fallen out of bed or that [appellant] pushed him out of bed." When Elliot arrived home later that evening, she discovered that the side of S.M.'s face was bruised and somewhat swollen. The next day, Elliot discovered that the swelling and bruising on S.M.'s face and neck had gotten considerably worse. As a result, S.M. was admitted to Cincinnati Children's Hospital Medical Center, where he was diagnosed with a fractured jaw, severe swelling and discoloration of his eyes and scalp, bruising on his ears and neck, and another oddly shaped bruise on his buttock. Appellant denied abusing S.M., claiming that the injuries occurred when he left S.M. unattended in the bathtub for several minutes the night before.

**{¶3}** Appellant was indicted on one count each of felonious assault in violation of R.C. 2903.11(A)(1), a second-degree felony, child endangering in violation of R.C. 2919.22(B)(1), a second-degree felony, and child endangering in violation of R.C. 2919.22(A), a third-degree felony.

**{¶4}** Following a four-day jury trial, appellant was convicted on all three counts. The trial court merged counts two and three because the offenses arose from "the same conduct against the same victim." The state elected to merge the charge of child endangerment set forth in count three into the charge in count two for purposes of conviction and sentencing. Thereafter, the trial court sentenced appellant to concurrent five-year prison terms for counts one and two. Appellant timely appealed, raising three assignments of error.

**{¶5}** Assignment of Error No. 1:

**{¶6}** "THE TRIAL COURT ERRED IN REJECTING THE PLEA AGREEMENT ENTERED INTO BETWEEN THE STATE OF OHIO AND THE DEFENDANT."

**{¶7}** Prior to trial, the parties reached a plea agreement, in which appellant agreed to plead guilty to count three (child endangering in violation of R.C. 2919.22[A]), in exchange for the dismissal of counts one and two. However, after reviewing the allegations and potential evidence to be presented at trial, the trial court rejected the parties' negotiated plea agreement.

**{¶8}** We begin by noting that the decision to accept or reject a plea bargain rests within the sound discretion of the trial court. *State v. Fowler*, Clermont App. No. CA2009-06-031, 2010-Ohio-49, ¶16; *State v. Underwood*, 124 Ohio St.3d 365, 371, 2010-Ohio-1; Crim.R. 11(C)(2) ("In felony cases the court may refuse to accept a plea of guilty or a plea of no contest"). A decision rejecting a plea bargain, however, should be accompanied by the trial court's reasons, absent facts and circumstances that "speak so eloquently that no statement by the judge is required." See *Akron v. Ragsdale* (1978), 61 Ohio App.2d 107, 109. In fact, it is the trial court's responsibility to evaluate plea agreements, and it is free to reject them whenever the facts do not support the prosecutor's decision to dismiss or reduce the charges, when the prosecutor's reasons for the plea are not substantial, or when the plea is not compatible with the public interest. See, e.g., *United States v. Hastings* (E.D.Ark.1977), 447 F.Supp. 534, 536-537; *State v. Menucci* (C.P. 1986), 33 Ohio Misc.2d 15, 20 ("for any human reason deemed salutary by any Ohio judge which is not based on personal enmity, hostility, passionate prejudice, or unreasonable bias * * * he or she may refuse to accept a plea of guilty or no contest; or any such plea presented as a result of a plea bargain and be upheld in such refusal[.]").

**{¶9}** That said, this court clearly recognizes the value in the plea negotiation process where the prosecution enters into meaningful and good faith plea negotiations with defense

counsel. However, "the final judgment on whether a plea bargain shall be accepted must rest with the trial judge." *In re Disqualification of Mitrovich v. Lundgren* (1990), 74 Ohio St.3d 1219, 1220; *Menucci* at *20. The trial court must exercise "sound discretion" prior to departing from or rejecting the prosecutor's recommendations, and we recognize that there may be instances where the trial judge could exercise that authority erroneously. See, e.g., *Hastings*, 447 F.Supp. 534. In either case, an appellate court generally reviews a trial court's rejection of a plea agreement under an abuse of discretion standard. *State v. Keyes*, Meigs App. No. 05CA16, 2006-Ohio-5032, ¶8. An abuse of discretion is more than an error of law or judgment; an abuse of discretion connotes that the trial court's decision was arbitrary, unreasonable or unconscionable. See *State v. Bates*, Butler App. No. CA2009-06-174, 2010-Ohio-1723, ¶15.

**{¶10}** In the case at bar, the trial court gave ample reasoning to support its decision to reject the plea agreement. The court began by stating that "[t]he law is the Court has discretion to refuse to accept a plea agreement. The Court can't do that willy-nilly * * * if it is questioned why the Court is refusing, the Court needs to state what the facts are that are the basis of the refusal[.]" The court also recognized the seriousness of the allegations involved and stated that there were factual issues surrounding the alleged abuse that required resolution by a jury. The court stated that it routinely rejected plea agreements that permitted the accused to plead to an offense that was not "plausible under the facts." The court further bolstered its reasoning by stating that it did not "think that justice [was] served by allowing the plea * * * at this point."

**{¶11}** Upon review of the record, we see no reason to disturb the trial court's decision to reject the negotiated plea between the parties. The trial court did not abuse its discretion in determining that the plea agreement was unacceptable. We believe that the trial judge acted within the bounds of reasonable discretion and in the public interest in rejecting the

plea bargain. Further, the trial court fulfilled its responsibility to ensure that justice was not sacrificed for the sake of expediency. Neither public interest nor justice would have been served had the trial court accepted this plea agreement, when it was at such variance with the alleged facts. Accordingly, appellant's first assignment of error is overruled.

**{¶12}** Assignment of Error No. 2:

**{¶13}** "THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING APPELLANT TO A FIVE (5) YEAR TERM OF IMPRISONMENT."

**{¶14}** In his second assignment of error, appellant argues that his five-year concurrent prison sentence is excessive because his criminal history is not serious enough to warrant the court's finding that "[a]ppellant was likely to commit future crime."

**{¶15}** Appellate review of felony sentencing is controlled by the two-step procedure outlined by the Ohio Supreme Court in *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912. Under *Kalish,* this court must first examine the trial court's sentence to determine if "the sentence is clearly and convincingly contrary to law," and then, if the first prong is satisfied, this court must review the sentence for an abuse of discretion. Id. at ¶4; *Bates*, 2010-Ohio-1723.

**{¶16}** Appellant concedes that his sentence is not clearly and convincingly contrary to law, since it was within the statutory limits. However, appellant argues that his prior "run-ins" with law enforcement were not serious enough to warrant a "high recidivism" finding.

**{¶17}** As previously stated, an abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Bates*, 2010-Ohio-1723 at ¶15; *State v. Hunt*, Butler App. No. CA2009-07-184, 2010-Ohio-1099, ¶6.

**{¶18}** After a careful review of the record, we find no abuse of discretion by the trial court in its sentencing decision. We find that the trial court gave "careful and substantial

deliberation to the relevant statutory considerations." *Kalish*, 2008-Ohio-4912 at ¶20. Specifically, the court stated that as to counts one and two, it considered "the record, oral statements, victim impact statement, and pre-sentence report, as well as the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and has balanced the seriousness and recidivism factors under Ohio Revised Code 2929.12." See *State v. Wright,* Warren App. No. CA2008-03-039, 2008-Ohio-6765, ¶57. The court also stated that as to count one, appellant's conduct was more serious than that normally constituting the offense of felonious assault because the injuries were inflicted on a very young child. Regarding the likelihood of recidivism, the court found that appellant previously failed to comply with his probation terms in another case, and that he had an active warrant for a DUI offense at the time the present offense was committed.

**{¶19}** In addition, the record demonstrates that the trial court properly applied mandatory postrelease control and sentenced appellant to a prison term falling squarely within the statutory range for the offenses in question. See R.C. 2967.28(B)(2); *Hunt*, 2010-Ohio-1099; *State v. Plummer,* Butler App. Nos. CA2009-06-148, CA2009-06-151, CA2009-06-154, 2010-Ohio-849, ¶23; *Kalish*, 2008-Ohio-4912 at ¶18. In sum, the record is devoid of any evidence indicating that the court acted unreasonably, arbitrarily or unconscionably in imposing concurrent five-year prison sentences. See *Bates*, 2010-Ohio-1723 at ¶23. Therefore, appellant's second assignment of error is overruled.

**{¶20}** Assignment of Error No. 3:

**{¶21}** "THE JURY VERDICT OF GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

**{¶22}** Appellant argues that his convictions were against the manifest weight of the evidence. Specifically, appellant argues that the state failed to prove, beyond a reasonable doubt, that appellant (1) "knowingly caused serious physical harm to [S.M.]," and (2) "[abused

S.M.] resulting in serious physical harm." Appellant argues that because he "never waivered from his account of what happened" and "continually denied having hurt [S.M.]," the jury could not have reasonably found guilt.

**{¶23}** A manifest weight challenge "concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other; weight is not a question of mathematics, but depends on its effect in inducing belief." *State v. Craycraft*, Clermont App. Nos. CA2009-02-013, CA2009-02-014, 2010-Ohio-596, ¶71, quoting *State v. Ghee*, Madison App. No. CA2008-08-017, 2009-Ohio-2630, ¶9. To determine whether a conviction is against the manifest weight of the evidence, an appellate court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. Id. When reviewing the evidence, an appellate court must be mindful that the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact. Id.

**{¶24}** As previously stated, appellant was convicted of one count of felonious assault in violation of R.C. 2903.11(A)(1). This statute provides, in pertinent part: "No person shall knowingly * * * [c]ause serious harm to another[.]" Appellant was also convicted of one count of child endangering in violation of R.C. 2919.22(B)(1), which provides, in pertinent part: "No person shall do any of the following to a child under eighteen years of age * * *: [a]buse the child[.]" The child endangering count was accompanied by a specification that appellant had caused S.M. serious physical harm. See R.C. 2919.22(E)(2)(d). Appellant's brief does not specifically challenge any of the elements of either offense.

**{¶25}** At trial, the state presented expert testimony from Dr. Kathi Makoroff, a pediatrician at Cincinnati Children's Hospital, who evaluates children for physical and sexual

abuse. Dr. Makoroff first examined S.M. on December 28, 2007. At the time, S.M. was approximately 21 months old. On December 28, Dr. Makoroff obtained S.M.'s family history and performed a physical examination on S.M., during which time he was inconsolably "fussy." Dr. Makoroff testified that neither appellant nor S.M.'s mother provided a history of any accidents or injuries prior to the night of December 27, 2007.

**{¶26}** The state also presented photographs depicting S.M.'s injuries. The photographs revealed bruising behind S.M.'s ears that extended onto the ears themselves and onto the back of his neck. In addition, S.M.'s eyes were discolored and severely swollen, and he had "diffused swelling over his entire scalp." X-rays further revealed that S.M. had a fracture in his right lower jaw.

**{¶27}** Dr. Makoroff concluded, to a reasonable degree of medical certainty, that S.M.'s injuries resulted from child abuse. She opined that appellant's account of the evening, where S.M. allegedly fell out of the bathtub, could not have caused all of S.M.'s injuries, particularly those to his ears, jaw and scalp. Specifically, Dr. Makoroff stated that S.M. had "at least 3 injuries to his head. He had the scalp swelling, which in my experience comes from a pulling of the hair or the pulling of the ears [so that] the scalp is pulled away from the skull bone underneath creating that diffuse swelling * * * a household fall would not cause the diffuse swelling that [S.M.] had." She continued, stating that S.M. "certainly couldn't fall once and bruise both of the backs of [his] ears and [his] jaw. He would have had to impact at least three times for that. And then he had to have some mechanism to cause the scalp to be pulled away from the skull." Without a "significant history of accidental trauma," which neither parent provided, Dr. Makoroff concluded that the majority of S.M.'s injuries resulted from child abuse.

**{¶28}** After a careful review of the record, we conclude that appellant's convictions are not against the manifest weight of the evidence. As the above demonstrates, there is a large

amount of credible circumstantial evidence to support a finding that appellant knowingly caused S.M.'s injuries. Although appellant claims that he did not intentionally injure S.M., and that the injuries occurred when S.M. fell in the bathtub, there is a significant amount of evidence that speaks to the contrary. Appellant's seemingly innocent explanation for S.M.'s injuries was not credible in view of Dr. Makoroff's testimony. The jury was free to, and did, reject appellant's explanation. We find that the jury did not lose its way in finding appellant guilty of felonious assault and child endangering. See, generally, *Craycraft*, 2010-Ohio-596 (appellant's convictions for felonious assault, child endangering and domestic violence were not against the manifest weight of the evidence where the doctor opined that the child "being pulled off of the couch by the dog should not have caused" the child's injuries, which included a bruised head and face, and a subdural hematoma).

**{¶29}** Appellant's third and final assignment of error is overruled.

**{¶30}** Judgment affirmed.

YOUNG, P.J., and RINGLAND, J., concur.

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