[Cite as *State v. Simmons*, 2015-Ohio-1594.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
ALLEN COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 1-14-45**

v.

TYRONNE L. SIMMONS, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Allen County Common Pleas Court
Trial Court No. CR2014 0149

Judgment Affirmed

Date of Decision: April 27, 2015

APPEARANCES:

Christopher R. Bucio **for Appellant**

Terri L. Kohlrieser **for Appellee**

WILLAMOWSKI, J.

{¶1} Defendant-appellant, Tyronne L. Simmons ("Simmons"), brings this appeal from the judgment of the Common Pleas Court of Allen County, Ohio, which accepted his plea of guilty and sentenced him to eight years in prison for one count of burglary, a felony of the second degree in violation of R.C. 2911.12(A)(1).[1] Simmons demands reversal due to alleged errors at sentencing. For the reasons that follow, we affirm the trial court's judgment.

{¶2} The facts of this case, as read into the record by the prosecution, indicate that on or about September 13, 2013, Simmons came to the house of the female victim in this case ("the Victim"), with whom he was in a relationship. The Victim felt like she needed to let Simmons in because " 'he's a forceful man so I felt like I had to do what he asked me to do because if I don't it's bad.' " (Tr. at 20., quoting what purported to be excerpts from the Victim's grand jury testimony.) Once Simmons was in the Victim's residence, he beat her and threatened to kill her. (*Id.*) As she tried to leave, Simmons chased the Victim down the street with a knife. (*Id.*)

{¶3} Two days later, on September 15, 2013, at about 5:30 in the morning, Simmons again came to the Victim's residence, "beating on the door." (Tr. at 21.) "He acted like he was going to kick in the door," and the Victim let him in to

[1] We note that in his brief on appeal, Simmons mistakenly cites the robbery statute, R.C. 2911.02(A)(2), and states that Simmons was found guilty of robbery. This error has no effect on the arguments on appeal or on our resolution of the case.

avoid damage to the door, "because she was in public housing." (*Id.*) Simmons "punched her up against the steps and started hitting on her." (*Id.*) At one point, Simmons demanded that the Victim discipline her four-year-old daughter. (*Id.*) Simmons "took off his belt and started to go for [the child]. And that's when [the Victim] jumped in the way of [the child] and he began to hit [the Victim] with the belt." (*Id.*) The Victim eventually went to a hospital to seek medical attention for the "bruises from head to toe, belt wounds all over her, a bruise on her chest the size of a softball"; she reported the incidents to the police. (Tr. at 22.)

{¶4} On April 17, 2014, the grand jury returned a four-count indictment against Simmons. Counts one and three charged Simmons with two separate instances of aggravated burglary, felonies of the first degree in violation of R.C. 2911.11(A)(1), each with a repeat violent offender specification. Counts two and four charged Simmons with two instances of abduction, felonies of the third degree in violation of R.C. 2905.02(A)(2). After initially pleading not guilty to all charges, Simmons entered a plea of guilty to an amended charge of burglary, a felony of the second degree in violation of R.C. 2911.12(A)(1), in count one. (R. at 71; *see* Tr. at 2.) In exchange, the State dismissed the repeat violent offender specification from count one, as well as the entirety of counts two, three, and four. (*Id.*)

{¶5} At the plea hearing the State indicated that the following was part of the plea negotiations:

> We will proceed to sentencing today with the State reserving the right to be heard as to sentencing, but not making a specific recommendation, such as he should go to prison or he should get community control or he should get X amount of years or that type of thing.
>
> However, we do want to be heard as to the sentencing guidelines, facts of the case, things of that nature, so the court can make the appropriate findings pursuant to 2929.01 et seq. And that's the entirety of the negotiations, Your Honor.

(Tr. at 2-3.) Both Simmons and his attorney attested that they understood the negotiations and there were no clarifications or additions regarding the plea. (Tr. at 3.)

{¶6} Before accepting the plea, the trial court instructed Simmons that the charge of burglary, a felony of the second degree, to which he was pleading, could result in a prison term that could be "between 2 and 8 years, 2 years up to 8." (Tr. at 7.) Simmons confirmed his understanding of the possible prison terms. (*Id.*) Further, the trial court stated,

> I want you to understand one other thing. It's a little bit different than what we often do at these pleas.
>
> Do you understand it's been my—it's been imparted to me, told me, that the parties, you included and Ms. Kohlrieser representing the State, want to proceed directly with sentencing today. Do you understand that?

(Tr. at 16-17.) Simmons responded, "Yes, sir." (Tr. at 17.) The trial court continued,

> Do you also understand that that means I will not be getting a pre-sentence investigation report but it also—I've taken a look at prior

> pre-sentence reports that are in existence with regard to your history and record. Do you understand that?

(*Id.*) Simmons again responded, "Yes, sir." (*Id.*) After additional discussion, the trial court accepted Simmons's guilty plea, finding that it was knowing, voluntary, and intelligent. (Tr. at 18-19.)

{¶7} The trial court then proceeded to the sentencing hearing, during which the State described the circumstances of the two incidents that resulted in the charges at issue. Additionally, the State referred to the Victim's grand jury testimony, in which she talked about "a number of incidents that happened after he was released in November, * * * . Specifically, on December 23rd, February 15th, February 16th, and March 19th multiple incidences of him coming to her house, coming to a friend's house, throwing a rock through her window, flattening her tires." (Tr. at 22-23.) The State referred to "some phone calls" between Simmons and the Victim, in which the Victim talked about the effect Simmons's violence had on her and her children. (Tr. at 24.) The State additionally indicated that the Victim "was mentally harmed" as a result; "she suffered serious mental harm. She also suffered serious physical harm." (Tr. at 25-26.)

{¶8} The State indicated that there was "absolutely nothing to mitigate his conduct" and referred to "a prior history of criminal behavior" by Simmons. (Tr. at 27.) It included: 1994 conviction for aggravated trafficking; 1997 conviction for having weapons under disability; 2001 conviction for "complicity to

aggravated arson, complicity to involuntary manslaughter, complicity to aggravated assault," which resulted in "an aggregate 10 year sentence." (*Id.*) The State commented that Simmons had "not been out of prison all that long" and that he already committed additional offenses on September 13 and 15, 2013, which indicated recidivism and showed that he had "not been rehabilitated to a satisfactory degree." (Tr. at 28.) The State further commented that Simmons had "done more time in prison than [he had] done not committing crimes." (Tr. at 28.)

{¶9} Simmons's counsel made a statement, requesting a four-year prison sentence. (Tr. at 34-35.) Simmons then spoke on his own behalf. (Tr. at 35-37.) The trial court addressed Simmons, expressing "certain frustrations that we get with people who continue to come back and back and back to this court." (Tr. at 39.) The trial court referred to "the prior pre-sentence investigation," which included Simmons's two juvenile convictions from 1991; a conviction in 1994 for aggravated trafficking in drugs, which resulted in a two-year sentence; and a conviction in 1996 for having a weapon under disability, which resulted in "an additional 18 months." (Tr. at 40.) The trial court then referred to "one of the tragedies of all time of Allen County what's known as the Leland Avenue fire, an aggravated complicity in aggravated arson, complicity in aggravated robbery with a specification and * * * complicity in * * * 5 counts of involuntary manslaughter. The death of 5 people." (Tr. at 39-40.)

{¶10} After taking "all things into consideration that's proper under the appropriate statutes," the trial court sentenced Simmons to eight years in prison. (Tr. at 42-47.) The sentencing entry specifically listed the factors that the trial court considered under R.C. 2929.12 in reaching its decision that the eight-year prison term was appropriate and "consistent with the purposes and principles of sentencing set forth in R.C. 2929.11." (R. at 71, J. Entry of Conviction and Sentencing at 3-4.) Those factors included:

> R.C. 2929.12(B): All of the following apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is **more serious** than conduct normally constituting the offense:
>
> - The victim of the offense suffered serious physical harm as a result of the offense;
> - The offender's relationship with the victim facilitated the offense.
>
> R.C. 2929.12(D): All of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is **likely to commit future crimes:**
>
> - The defendant has previously been adjudicated a delinquent child and has a history of criminal conduct;
> - The defendant has not been rehabilitated to a satisfactory degree after being adjudicated a delinquent child;
> - The defendant has not responded favorably to sanctions previously imposed for criminal convictions;
> - The defendant shows no genuine remorse for the offense – only 4 years where crime has not been a part of his life and Defendant was not incarcerated.

(Emphasis sic.) (*Id.*)

{¶11} Simmons now appeals raising two assignments of error for our review.

Assignments of Error

I. The trial court was not justified in imposing a maximum sentence when the trial judge did not have a pre-sentence investigation and relied on the Defendant's prior record.

II. Mr. Simmons was prejudiced by the prosecution when they spoke in an adversarial manner against the Defendant during sentencing when the prosecutor agreed to not oppose any sentencing request prior to the Defendant agreeing to plead guilty.

Analysis

{¶12} We address the assignments of error together. In the first assignment of error, Simmons complains that without a presentence investigation, the trial court should not have relied on his prior convictions in imposing the maximum sentence. In the second assignment of error, he criticizes the State for speaking "in an adversarial manner" when he "assumed that the State would stay silent." (App't Br. at 5-6.)

{¶13} In addition to the fact that Simmons expressly agreed to proceed with sentencing without a new presentence investigation and agreed to the State's "right to be heard as to sentencing," we note that Simmons did not object in the trial court to the alleged errors of which he now complains. Consequently, he has forfeited all but plain error on appeal. *See State v. Sexton*, 3d Dist. Union No. 14-13-25, 2015-Ohio-934, ¶ 85 (the defendant's failure to object to alleged errors at

sentencing resulted in forfeiture of the errors on appeal subject to the plain error exception only); *State v. Hartley*, 3d Dist. Hancock No. 5-14-04, 2014-Ohio-4536, ¶ 9 (failure to object to the alleged breach of the plea agreement in the trial court resulted in forfeiture of "all but plain error on appeal"), citing *State v. McGinnis*, 3d Dist. Van Wert No. 15-08-07, 2008-Ohio-5825, ¶ 8.

{¶14} The standard of review under plain error "is a strict one." *State v. Murphy*, 91 Ohio St.3d 516, 532, 747 N.E.2d 765 (2001).

> "[A]n alleged error 'does not constitute a plain error or defect under Crim.R. 52(B) unless, but for the error, the outcome of the trial clearly would have been otherwise.' " We have warned that the plain error rule is not to be invoked lightly. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice."

Id., quoting *State v. Campbell*, 69 Ohio St.3d 38, 41, 630 N.E.2d 339 (1994), and *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraphs two and three of the syllabus. Under the plain error standard, "the *defendant* bears the burden of demonstrating that a plain error affected his substantial rights" and "[e]ven if the defendant satisfies this burden, an appellate court has discretion to disregard the error and should correct it only to 'prevent a manifest miscarriage of justice.' " (Emphasis sic.) *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E .2d 643, ¶ 14, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002), and *Long*, 53 Ohio St.2d 91, at paragraph three of the syllabus. "Even constitutional rights 'may be lost as finally as any others by a failure to assert them

at the proper time.' " *Murphy* at 532, quoting *State v. Childs*, 14 Ohio St.2d 56, 62, 236 N.E.2d 545 (1968).

{¶15} Here, Simmons does not even allege that a plain error occurred. The Ohio Supreme Court has recently refused to engage in a plain error analysis where the defendant did not make any attempt to demonstrate plain error on appeal. *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 20-21. Therefore, under the benchmark provided by the Ohio Supreme Court that "[n]otice of plain error * * * is to be taken with the utmost caution," *Murphy* at 532, and that the defendant carries the burden "of demonstrating that a plain error affected his substantial rights," *Perry* at ¶ 14, we choose not to proceed on plain error analysis. We note, however, that no manifest miscarriage of justice is apparent from the record as a result of the alleged errors. Simmons's sentence falls within the statutory limit; it was appropriate based on his extensive prior criminal record; and it is supported by the sentencing factors of R.C. 2929.12, which the trial court expressly cited in its judgment entry.

{¶16} For all of the forgoing reasons, we overrule the first and second assignments of error.

Conclusion

{¶17} Having reviewed the arguments, the briefs, and the record in this case, we find no error prejudicial to Appellant in the particulars assigned and

argued. The judgment of the Common Pleas Court of Allen County, Ohio is therefore affirmed.

Judgment Affirmed

ROGERS, P.J. and PRESTON, J., concur.

/jlr