[Cite as *State v. Wells*, 2010-Ohio-3126.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Julie A. Edwards, P.J.
	:	William B. Hoffman, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 2009 CA 00168
	:	
	:	
LANCE D. WELLS	:	O P I N I O N

Defendant-Appellant

CHARACTER OF PROCEEDING:	Criminal Appeal from Stark County Court of Common Pleas Case No. 2009 CR 0540
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 28, 2010

APPEARANCES:

For Plaintiff-Appellee

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Edwards, P.J.

{¶1} Appellant, Lance Wells, appeals a judgment of the Stark County Common Pleas Court convicting him of aggravated burglary (R.C. 2911.11(A)(1)) and felonious assault (R.C. 2903.11(A)(1)). Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} Appellant and his girlfriend, Miranda Kent, knew Michael Martin for at least five years. Kent and appellant have two children. In January of 2009, when Martin prepared to file his income tax return, Kent asked Martin to claim her children and give her the money he received. After checking with his tax person to make sure this could be done, Martin claimed the children and gave Kent the $2,900.00 he received.

{¶3} Appellant became aware of the arrangement Kent had made with Martin and became convinced that Martin made off with the money he was supposed to give Kent. In late February or early March of 2009, appellant called Martin, demanding to know where the money was. Two days later, appellant called Martin again, accusing him of giving Kent only $1,100.00. Martin told appellant that he gave Kent all of the money.

{¶4} On March 18, 2009, at about 1:00 a.m., Martin was awakened by pounding at the door of his apartment. His Poodle-Bichon dog was barking. Martin went to the door and asked who was there. A man answered, “Lance.” Before Martin could open the door, the door was kicked open. Martin was hit by the door, then appellant came in and punched Martin twice. A second man was with appellant, but this man had a hood over his face and Martin could not identify him. After the second punch delivered by appellant, Martin remembered nothing.

{¶5} In an upstairs apartment, Tiffany Loudermilk was awakened by pounding and someone screaming, “Please don’t kill me.” She heard a second person say, “I’ve known you for five years, I can’t believe you did this,” and a third person say, “Come on, we need to go, we need to leave, we need to go.” Loudermilk called the police.

{¶6} Canton Police Officer Lamar Sharpe responded to the scene. The door was unlocked and opened a crack. Sharpe saw a lot of blood on the floor, and found Martin standing inside the apartment, covered in blood. Martin had difficulty speaking, but told police that he was beaten by two men, one of which he knew. He also said one of the men came in carrying a drinking glass, which he left behind. The inside of the apartment was littered with broken lamps and broken furniture.

{¶7} Martin was taken to Aultman Hospital, where he remained for five days. Martin suffered a broken collar bone, dislocated shoulder, broken nose, broken cheekbone and fractured shin. His dentures were broken into six pieces. At the hospital, Martin told police that appellant was the assailant and identified appellant from a photo array.

{¶8} Appellant provided a taped statement for police in which he initially claimed that he did not know Martin and did not know if Kent knew Martin. After being advised that Martin picked appellant out of a photo array and showed police where appellant lived, appellant told police that from what he heard on the streets, Martin might have “stole our kids social security cards and filed taxes with our shit.” Appellant told police that if Martin did steal his kids’ social security cards, “I’d of punished him man.”

{¶9} The drinking glass which Martin reported had been carried into the apartment by his assailants was taken to the Stark County Crime Lab for analysis. After testing, criminalist Michelle Foster concluded that appellant is a possible major contributor to the DNA from the rim of the glass, and the possibility of selecting another individual at random with the same DNA profile is 1 in 3708 billion.

{¶10} Appellant was indicted by the Stark County Grand Jury with one count of aggravated burglary and one count of felonious assault. While incarcerated awaiting trial, appellant made telephone calls to his mother and Kent, which were recorded. Appellant told his mother that his actions were for naught because he later realized that Kent received all the money she had coming to her from Martin.

{¶11} The case proceeded to jury trial in the Stark County Common Pleas Court. Appellant was convicted of both charges and sentenced to ten years incarceration for aggravated burglary and seven years incarceration for felonious assault, to be served consecutively, for an aggregate term of 17 years incarceration. Appellant assigns five errors on appeal:

{¶12} "I. THE EVIDENCE AT TRIAL WAS INSUFFICIENT TO SUPPORT A CONVICTION, AND THE JURY'S VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶13} "II. THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT TO CONSECUTIVE COUNTS OF INCARCERATION, IN VIOLATION OF O.R.C. 2941.25.

{¶14} "III. THE TRIAL COURT ERRED WHEN IT FAILED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF THEFT.

{¶15} "IV. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO APPELLANT'S CONSECUTIVE PRISON TERMS AT THE SENTENCING HEARING.

{¶16} "V. THE TRIAL COURT PLAINLY ERRED IN IMPOSING MAXIMUM PRISON TERMS FOR APPELLANT'S SEPARATE CONVICTIONS."

I

{¶17} In his first assignment of error, appellant argues that the judgment is against the manifest weight and sufficiency of the evidence. He specifically argues that the state failed to prove the element of trespass required for the aggravated burglary conviction because the lack of damage to the door raises a question of consent, as does the fact that appellant was "obviously provided a drink of some sort from the glass used so effectively by the prosecutor." He argues that the fact that he only struck Martin once, coupled with the evidence supporting the involvement of another unidentified party, fails to support the felonious assault conviction.

{¶18} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror and "in reviewing the entire record, 'weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in evidence the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 1997-Ohio-52, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶19} An appellate court's function when reviewing the sufficiency of the evidence is to determine whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St. 3d 259, paragraph two of the syllabus.

{¶20} Aggravated burglary is defined by R.C. 2911.11(A)(1):

{¶21} "(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

{¶22} The offender inflicts, or attempts or threatens to inflict physical harm on another;"

{¶23} Felonious assault is defined by R.C. 2903.11(A)(1):

{¶24} "(A) No person shall knowingly do either of the following:

{¶25} "(1) Cause serious physical harm to another or to another's unborn;"

{¶26} As to appellant's claim that the evidence did not support the element of trespass required to convict him of aggravated burglary, Martin testified that he was awakened by his dog barking and by someone pounding at his door at 1:00 a.m. When he started to unlock the door after appellant announced his presence, the door was pushed, shoved, or kicked open, striking Martin. Martin testified that he did not give appellant permission to be in his home, and did not invite him inside. Tr. 33. Further,

there is no evidence that the drink in the glass was given to appellant by Martin. Martin testified that one of the men carried the glass into the apartment. The judgment finding the element of trespass proven beyond a reasonable doubt is not against the manifest weight or sufficiency of the evidence.

{¶27} As to the felonious assault conviction, appellant argues that Martin can only remember appellant throwing two punches at him and therefore the evidence does not support the conviction. However, the statute does not require a certain number of punches to be thrown to support a conviction, it only requires a showing that the offender caused serious physical harm. After appellant struck Martin two times, Martin remembered nothing. The evidence presented at trial demonstrated that Martin suffered serious physical harm, as he spent five days in the hospital with a broken nose, broken cheekbone, broken collarbone, dislocated shoulder and fractured shin. Martin worked in a restaurant as a server, and after he returned to work he had to work in the kitchen for a period of time due to the appearance of his face following the beating. He testified that his face looked like he had been drug behind a truck, and people did not recognize him. There was sufficient evidence to prove that appellant committed felonious assault, and the jury's verdict is not against the manifest weight of the evidence.

{¶28} The convictions are not against the manifest weight or sufficiency of the evidence. The first assignment of error is overruled.

II

{¶29} Appellant argues that aggravated burglary and felonious assault are allied offenses of similar import, and therefore, the court erred in sentencing him consecutively.

{¶30} Appellant failed to raise this claim in the trial court. Appellant's failure to raise a claim that offenses are allied offenses of similar import in the trial court constitutes a waiver of the claimed error. *State v. Comen* (1990), 50 Ohio St.3d 206, 553 N.E.2d 640, 646. An error not raised in the trial court must be plain error in order for an appellate court to reverse. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804; Crim.R. 52(B). In order to prevail under a plain error analysis, appellant bears the burden of demonstrating that the outcome of the trial clearly would have been different but for the error. *Long*, supra. Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." Id. at paragraph three of the syllabus.

{¶31} R.C. 2941.25 defines allied offenses of similar import:

{¶32} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶33} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶34} In *State v. Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699, 1999-Ohio-291, the Ohio Supreme Court held that offenses were of similar import if the offenses "correspond to such a degree that the commission of one crime will result in the commission of the other." Id. The *Rance* court further held that courts should compare the statutory elements in the abstract, which would produce clear legal lines capable of application in particular cases. Id. at 636. If the elements of the crime so correspond that the offenses are of similar import, the defendant may be convicted of both only if the offenses were committed separately or with a separate animus. Id. at 638-39.

{¶35} However, in 2008 the court clarified *Rance*, because the test as set forth in *Rance* had produced inconsistent, unreasonable and, at times, absurd results. *State v. Cabrales*, 118 Ohio St.3d 54, 59, 886 N.E.2d 181, 2008-Ohio-1625. In *Cabrales*, the court held that, in determining whether offenses are of similar import pursuant to 2941.25(A), courts are required to compare the elements of the offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Id. at syllabus 1. "Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in the commission of the other, then the offenses are allied offenses of similar import." Id. The court then proceeds to the second part of the two-tiered test and determines whether the two crimes were committed separately or with a separate animus. Id. at 57, citing *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117.

{¶36} The *Cabrales* court noted that Ohio courts had misinterpreted *Rance* as requiring a "strict textual comparison," finding offenses to be of similar import only when

all the elements of the compared offenses coincide exactly. Id. at 59. The Eighth Appellate District has described the *Cabrales* clarification as a "holistic" or "pragmatic" approach, given the Supreme Court's concern that *Rance* had abandoned common sense and logic in favor of strict textual comparison. *State v. Williams*, Cuyahoga No. 89726, 2008-Ohio-5286, ¶ 31, citing *State v. Sutton*, Cuyahoga App. No. 90172, 2008-Ohio-3677. This court has referred to the *Cabrales* test as a "common sense approach." *State v. Varney*, Perry App. No. 08-CA-3, 2009-Ohio-207, ¶ 23.

{¶37} The Ohio Supreme Court revisited the issue of allied offenses of similar import in *State v. Brown*, 119 Ohio St.3d 447, 895 N.E.2d 149, 2008-Ohio-4569. The court first found that aggravated assault in violation of R.C. 2903.12(A)(1) and (A)(2) are not allied offenses of similar import when comparing the elements under *Cabrales*, but did not end the analysis there. The court went on to note that the tests for allied offenses of similar import are rules of statutory construction designed to determine legislative intent. Id. at 454. The court concluded that while the two-tiered test for determining whether offenses constitute allied offenses of similar import is helpful in construing legislative intent, it is not necessary to resort to that test when the intent of the legislature is clear from the language of the statute. Id. In the past, the court had looked to the societal interests protected by the relevant statutes in determining whether two offenses constitute allied offenses. Id., citing *State v. Mitchell* (1983), 6 Ohio St.3d 416. The court concluded in *Brown* that the subdivisions of the aggravated assault statute set forth two different forms of the same offense, in each of which the legislature manifested its intent to serve the same interest of preventing physical harm to persons, and were therefore allied offenses. Id. at 455.

{¶38} The Ohio Supreme Court again addressed this issue in *State v. Winn*, 2009-Ohio-1059. In *Winn*, the court considered whether kidnapping and aggravated robbery are allied offenses of similar import. The court compared the elements of each in the abstract. The elements for kidnapping, R.C. 2905.01(A)(2), are the restraint, by force, threat, or deception, of the liberty of another to facilitate the commission of any felony, and the elements for aggravated robbery, R.C. 2911.01(A)(1), are having a deadly weapon on or about the offender's person or under the offender's control and either displaying it, brandishing it, indicating that the offender has it, or using it in attempting to commit or in committing a theft offense. The court found that in comparing the elements, it is difficult to see how the presence of a weapon, which has been shown or used, or whose possession has been made known to the victim during the commission of a theft offense, does not at the same time forcibly restrain the liberty of another. Id. at ¶ 21. Accordingly, the court found that the two offenses are so similar that the commission of one necessarily results in the commission of the other, citing *Cabrales*, supra. Id. The court held, "We would be hard pressed to find any offenses allied if we had to find that there is no conceivable situation in which one crime can be committed without the other." Id. at ¶ 24.

{¶39} Having found the offenses to be of similar import under the *Cabrales* test, the Ohio Supreme Court in *Winn* did not consider the societal interests underlying the statutes to determine legislative intent, and determined legislative intent solely by applying R.C. 2941.25. The *Winn* court stated that, in Ohio, we discern legislative intent on this issue by applying R.C. 2941.25, as the statute is a "clear indication of the

General Assembly's intent to permit cumulative sentencing for the commission of certain offenses." Id. at ¶ 6.

{¶40} Recently, the Ohio Supreme Court again applied the *Cabrales* test in *State v. Williams*, 2010-Ohio-147. The court first looked at the elements of attempted felony murder, which required that the offender engage in conduct which, if successful, would result in the death of another as a proximate result of committing or attempting to commit an offense of violence. Because felonious assault is an offense of violence, the court concluded that felonious assault and attempted felony murder are allied offenses. Id. at ¶23. The court then considered whether attempted murder, defined as engaging in conduct which if successful would result in purposely causing the death of another, and felonious assault, defined as causing or attempting to cause physical harm by means of a deadly weapon, are allied offenses. While the elements considered in the abstract do not align exactly, the court concluded that when the defendant in that case attempted to cause harm with a deadly weapon, he also engaged in conduct which, if successful, would have resulted in the death of a victim, and the offenses were therefore allied. Id. at ¶26. The court then went on to consider whether the offenses were committed with a separate animus. Id. at ¶27.

{¶41} In the instant case, appellant was convicted of aggravated burglary and felonious assault. Aggravated burglary is defined by R.C. 2911.11(A)(1):

{¶42} "(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or

separately occupied portion of the structure any criminal offense, if any of the following apply:

{¶43} The offender inflicts, or attempts or threatens to inflict physical harm on another;"

{¶44} Felonious assault is defined by R.C. 2903.11(A)(1):

{¶45} "(A) No person shall knowingly do either of the following:

{¶46} "(1) Cause serious physical harm to another or to another's unborn;"

{¶47} The state cites *State v. Johnson*, Delaware App. No. 06CAA070050, 2006-Ohio-4994, in which this Court found that felonious assault and aggravated burglary are not allied offenses of similar import. In *Johnson*, we cited *State v. Jackson* (1985), 21 Ohio App.3d 157, 159, 487 N.E.2d 585, 587, in which the 8th District Court of Appeals found that the offenses were not allied because felonious assault is an offense against another's person, while aggravated burglary is an offense against property. However, both of these cases predate *Cabrales* and subsequent decisions from the Ohio Supreme Court attempting to clarify the allied offense test as set forth in *Cabrales*.

{¶48} The 2nd District Court of Appeals considered the above-cited statutes under the *Cabrales* test in *State v. Barker*, 183 Ohio App.3d 414, 917 N.E.2d 324, 2009-Ohio-3511. The court compared the elements of the two offenses in the abstract, without considering the evidence in the case, and found that the commission of one of these two offenses does not necessarily result in commission of the other. Id. at ¶31. Aggravated burglary requires trespass into an occupied structure with purpose to commit some criminal offense, while felonious assault has no such requirement. Id. at ¶32. Felonious assault requires the actual infliction of serious physical harm, while

aggravated burglary requires the infliction, attempt to inflict, or the threat to commit physical harm. Id. The court therefore concluded that the offenses are not allied and the defendant could be convicted of both. Id.

{¶49} We concur with the reasoning of the *Barker* court. The elements are not so similar that the commission of one offense necessarily results in the commission of the other.

{¶50} The second assignment of error is overruled.

III

{¶51} While appellant states in his assignment of error that the court erred in failing to instruct the jury on the lesser-included offense of theft, the argument contained in the body of his brief argues only that the court erred in failing to instruct the jury on the lesser included offense of assault. Because there was no evidence of theft and appellant makes no argument concerning theft, we address only his claim that the court should have instructed the jury on assault.

{¶52} Appellant failed to request such an instruction at trial; therefore, waiving all but plain error, i.e. but for the error, the outcome of the trial clearly would have been otherwise. See, *State v. Goodwin,* 84 Ohio St.3d 331, 347, 703 N.E.2d 1251, 1999-Ohio-356; *State v. Underwood* (1983), 3 Ohio St.3d 12, 444 N.E.2d 1332.

{¶53} An instruction on a lesser-included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser-included offense. *State v. Thomas* (1988), 40 Ohio St.3d 213, 533 N.E.2d 286.

{¶54} Assault is defined by R.C. 2903.13(A):

{¶55} "No person shall knowingly cause or attempt to cause physical harm to another or to another's unborn."

{¶56} As noted above, felonious assault is defined as knowingly causing or attempting to cause serious physical harm. Serious physical harm is defined by R.C. 2901.01(5):

{¶57} "(5) "Serious physical harm to persons" means any of the following:

{¶58} "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

{¶59} "(b) Any physical harm that carries a substantial risk of death;

{¶60} "(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

{¶61} "(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

{¶62} "(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain."

{¶63} The evidence of serious physical harm in this case was overwhelming. The evidence presented at trial demonstrated that Martin spent five days in the hospital with a broken nose, broken cheekbone, broken collarbone, dislocated shoulder and fractured shin. Martin worked in a restaurant as a server, and after he returned to work he had to work in the kitchen for a period of time due to the appearance of his face following the beating. He testified that his face looked like he had been drug behind a truck, and people did not recognize him. While Martin remembers nothing after appellant punched him twice, there is no evidence in the record to support appellant's argument that the serious physical harm was inflicted by the man who entered the apartment with him, rather than by appellant. The court's failure to sua sponte instruct the jury on assault is not plain error.

{¶64} The third assignment of error is overruled.

IV

{¶65} In his fourth assignment of error, appellant alleges that counsel was ineffective for failing to object to consecutive sentences. However, in the body of his argument, appellant only argues that counsel was ineffective for failing to request an instruction on assault. We shall address both arguments.

{¶66} A properly licensed attorney is presumed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 524 N.E.2d 476. Therefore, in order to prevail on a claim of ineffective assistance of counsel, appellant must show counsel's performance fell below an objective standard of reasonable representation and but for counsel's error, the result of the proceedings would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d

136. In other words, appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Id.

{¶67} As we discussed in Assignment of Error II above, aggravated burglary and felonious assault are not allied offenses of similar import. Appellant therefore cannot demonstrate that counsel was ineffective for failing to object to consecutive sentences, because there is not a reasonable probability of a change in the outcome had counsel objected.

{¶68} In Assignment of Error III, we concluded that the evidence presented at trial did not support an acquittal of felonious assault and a conviction of assault, and therefore an instruction on assault need not have been given by the trial court. Appellant cannot demonstrate that had counsel requested such instruction, the court would have given the instruction and he would have been acquitted of felonious assault and convicted only of assault. Further, in Ohio, there is a presumption that the failure to request a lesser-included offense instruction constitutes a matter of trial strategy and does not by itself establish ineffective assistance of counsel. *State v. Riley*, Franklin App. No. 06AP-P1091, 2007-Ohio-4409, ¶5, citing *State v. Griffie* (1996), 74 Ohio St.3d 332.

{¶69} The fourth assignment of error is overruled.

V

{¶70} In his fifth assignment of error, appellant argues that the court erred in imposing the maximum prison term of ten years for aggravated burglary.[1]

[1] Appellant was sentenced to seven years for felonious assault, for which the maximum sentence is eight years. R.C. 2929.14(A)(2).

{¶71} R.C. 2929.14(C) provides in pertinent part:

{¶72} "[T]he court imposing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense pursuant to division (A) of this section only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders under division (D)(3) of this section, and upon certain repeat violent offenders in accordance with division (D)(2) of this section."

{¶73} R.C. 2929.14(C)'s requirement that the trial court make specific findings in support of a maximum sentence was found unconstitutional by the Ohio Supreme Court in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶63-64. In *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Ohio Supreme Court reviewed its decision in *Foster* as it relates to the remaining sentencing statutes and appellate review of felony sentencing.

{¶74} In *Kalish*, the Court discussed the affect of the *Foster* decision on felony sentencing. The Court stated that, in *Foster*, the Ohio Supreme Court severed the judicial fact-finding portions of R.C. 2929.14, holding that "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, consecutive, or more than the minimum sentences." *Kalish* at paragraphs 1 and 11, citing *Foster* at paragraph 100, See also, *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306. "Thus, a record after *Foster* may be silent as to the judicial findings that appellate courts were originally meant to review under 2953.08(G)(2)." *Kalish* at paragraph 12. However, although *Foster* eliminated mandatory judicial fact finding, it left intact R.C. 2929.11 and

2929.12, and the trial court must still consider these statutes. *Kalish* at paragraph 13, see also *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1.[2]

{¶75} "Thus, despite the fact that R.C. 2953.08(G)(2) refers to the excised judicial fact-finding portions of the sentencing scheme, an appellate court remains precluded from using an abuse-of-discretion standard of review when initially reviewing a defendant's sentence. Instead, the appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence. As a purely 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)." *Kalish* at paragraph 14.

{¶76} Therefore, *Kalish* holds that, in reviewing felony sentences and applying *Foster* to the remaining sentencing statutes, the appellate courts must use a two-step approach. "First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment shall be reviewed under an abuse of discretion standard." *Kalish* at paragraph 4, *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

{¶77} The sentence appellant received was within the permissible statutory range, and the court stated in its judgment that it had considered the principles and purposes of sentencing under R.C. 2929.11, and balanced the seriousness and

[2] "[P]ursuant to R.C. 2929.11(A), a trial court must be guided by the overriding purposes of felony sentencing, which are 'to protect the public from future crime by the offender and others and to punish the offender. The court must also consider the seriousness and recidivism factors under R.C. 2929.12." *State v. Murray,* Lake App. No. 2007-L-098, 2007-Ohio-6733, paragraph 18, citing R.C. 2929.11(A).

recidivism factors under R.C. 2929.12. The sentence was not clearly and convincingly contrary to law.

{¶78} Further, appellant has not demonstrated that the court abused its discretion in imposing the maximum sentence. The court noted that it had reviewed appellant's prior record. Tr. 219. Appellant's prior record revealed numerous prior convictions, including seven prior assault convictions. Appellant's record included multiple convictions of carrying a concealed weapon, criminal trespass, receiving stolen property, drug abuse, disorderly conduct and possession of cocaine. The record of the sentencing hearing reflects that appellant had only been released from the county jail for four weeks after serving a sentence for assault when he committed the instant offenses.

{¶79} The court further noted the heinous nature of the offenses and expressed displeasure with appellant for continuing to deny at the sentencing hearing that he had committed the instant crimes, particularly as he had previously admitted his involvement in phone calls from the jail:

{¶80} "And I would say, first of all, for purposes of the record, I find it incredible that you would say you didn't do the offense - - there is not anybody that could have sat through this trial and not said that you were guilty, including yourself. I mean, you even said it on the phone calls that came out of the jail.

{¶81} "You'd have been better in my eyes, today, if you'd of come in said, Look, I flipped out; I thought he had ripped off my girl friend and I went over because I thought she had been ripped off of some money and things got out of hand.

{¶82} "So to still tell me that you weren't there is just incredible to me.

{¶83} "The prior record the Court has reviewed.

{¶84} "The court also would indicate that in looking at the appropriate factors in the State of Ohio for sentencing, ah, that this is a very serious offense. This is one of the worst felonious assaults that I've seen in a long time and it's an absolute home invasion, just - - and the law says that we are to punish you and to deter you and others from committing future crime." Tr. 218-219.

{¶85} The court did not abuse its discretion in imposing the maximum sentence on appellant. The fifth assignment of error is overruled.

{¶86} The judgment of the Stark County Common Pleas Court is affirmed.

By: Edwards, P.J.

Hoffman, J. and

Delaney, J. concur

s/Julie A. Edwards

s/William B. Hoffman

s/Patricia A. Delaney

JUDGES

JAE/r0419

[Cite as *State v. Wells*, 2010-Ohio-3126.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
LANCE D. WELLS	:	
Defendant-Appellant	:	CASE NO. 2009 CA 00168

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to appellant.

s/Julie A. Edwards

s/William B. Hoffman

s/Patricia A. Delaney

JUDGES