[Cite as *State v. Crawley*, 2010-Ohio-5098.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. Julie A. Edwards, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 2010-CA-00057
RICHARD CRAWLEY	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Stark County Court of Common Pleas, Case No. 2009CR-1854
JUDGMENT:	Affirmed in part; Reversed in part and Remanded
DATE OF JUDGMENT ENTRY:	October 18, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO PROSECUTING ATTORNEY BY: RENEE M. WATSON 110 Central Plaza South, Ste. 510 Canton, OH 44702	FREDRICK M. PITINII 1000 Chase Tower 101 Central Plaza South Canton, OH 44702

Gwin, J.

{¶1} Defendant-appellant Richard Crawley appeals the April 8, 2010 convictions and sentences in the Stark County Court of Common Pleas on one count of felonious assault a felony of the second degree in violation of R.C. 2903.11 with a repeat violent offender specification in violation of R.C. 2941.149, and one count of having weapons under disability, a felony of the third degree in violation of R.C. 2923.13. The plaintiff-appellee is the State of Ohio[1].

STATEMENT OF THE FACTS AND CASE

{¶2} In November 2009, Kathleen Jester lived with her fiancé appellant, and her sons, eighteen year-old Charles Hughes and fourteen year-old Zachary Hughes. Jester had also cared for her ailing mother in the home until she passed away in May 2009.

{¶3} On the morning of November 11, 2009 Jester returned home from work later than usual. This fact sparked an argument between her and appellant, who presumed Jester's tardiness meant she was cheating on him. As appellant's anger escalated, he began to beat Jester with his fists. Not stopping there, appellant grabbed a 4-footed cane previously used by Jester's mother and proceeded to viciously beat Jester with the cane.

{¶4} Jester attempted to protect her head with her hands. Appellant continued to beat Jester until she lost consciousness. He delivered blows so brutal that he broke the cane in half, caused two of the rubber feet to come off, and bent one of the legs.

[1] Appellant initially filed a direct appeal of his conviction in case number 2010-CA-0040. This Court dismissed that appeal on March 2, 2010 for lack of a final appealable order pursuant to the Ohio Supreme Court's decision in *State v. Baker* (2008), 119 Ohio St.3d 197. Thereafter, the trial court issued an amended sentencing entry on April 8, 2010, stating that a jury had convicted the Appellant. Appellant has timely appealed from that sentencing entry in the above-captioned case.

Appellant then left Jester on the floor unconscious and bleeding while he went out on the front porch to intercept Jester's son Zachary when he came home from school.

{¶5} When Zachary arrived home from school that day, he found appellant sitting on the porch. Appellant asked Zachary if he wanted to go for a ride and Zachary agreed. At one point Zachary became hungry. Appellant drove back to the house and went inside to get Zachary some chips while Zachary waited in the car. Appellant then decided they would drive to Warren to visit some relatives. Zachary did not think this odd because they frequently went to Warren to spend a day or two. Appellant mentioned nothing about Jester to Zachary and Zachary did not think anything was out of the ordinary.

{¶6} Later that day, appellant's cousin John Seay and his girlfriend Mirgonetta Ready stopped by Jester and appellant's home. Seay went into the house while Ready waited in the car. A few moments later, Seay came back out and asked Ready to come inside the house. When she did, Seay led her upstairs where she saw Jester lying on the floor either unconscious or dead. Jester's eyes were open, but she was just staring. When Ready tried to get information from Jester, Jester did not respond appropriately, but rather kept muttering, "I didn't do anything, I didn't do anything."

{¶7} Ready pulled back the blanket that was covering Jester and saw that she was naked but for a pair of panties that were down around her knees, and that her head and arms were bleeding. Ready told Seay to call for an ambulance. While they were waiting for help, Ready put some jogging pants and a top on Jester. She tried to talk to Jester, but she seemed to be going in and out of focus and was not responding appropriately to most of Ready's questions.

{¶8} Canton Police Crime Scene Investigation Officer Joseph Mongold arrived at the scene as paramedics were loading Jester into the ambulance. He photographed her injuries and then proceeded to the house. He photographed the outside of the home at all points of entry and found no signs of forced entry. Inside, he went to the room where Jester had been found. He photographed pools of blood on the floor and blood splatter on the ceiling, walls and furniture.

{¶9} From the same room he collected bloody wet-wipes, a bloodstained blanket, pillowcase, sandal and a rag. From the trashcan in that room, he collected a pair of bloodstained sweat pants, and a blood-soaked string. Concealed under some clothing items in a cabinet in the same room Officer Mongold discovered the two pieces of the cane. He found one of the rubber feet from the cane under the cabinet.

{¶10} The next day Officer Mongold returned to the scene with other officers and a search warrant. In one of the upstairs bedrooms, a .22 caliber firearm was found under the bed. In the same room, Officer Mongold found mail addressed to appellant. In the washing machine downstairs, Officer Mongold removed clothing that had been washed, but appeared to be bloodstained. Officer Mongold took all the evidence he gathered back to the police department to be processed and sent items that needed testing to the Canton Stark County Crime Lab.

{¶11} Canton Police Sergeant Eric Risner was assigned to investigate Jester's assault. He went to the hospital to speak with Jester, but she was incoherent. He next made contact with Jester's neighbors and then went to McKinley High School. Sergeant Risner was concerned because Zachary could not be located and became further alarmed when Zachary was not found at school. Sergeant Risner and his partner

checked a few other addresses without success and then went back to the hospital to check on Jester. Her condition had not changed. About that time, Sergeant Risner received a call from Officer Mongold advising him of the discovery of the weapon in appellant's home. Because appellant was not permitted to possess a weapon due to a prior conviction, Sergeant Risner obtained a warrant for appellant's arrest for having a weapon while under a disability.

{¶12} Later that evening, Sergeant Risner obtained a cell phone number for appellant and called him. Appellant claimed he was in Erie, Pennsylvania and that he did not know the whereabouts of Zachary. While speaking with appellant, however, Sergeant Risner had other officers working with the FBI attempt to determine appellant’s location based on his cell phone signal. According to the information that was obtained, appellant was in Warren, Ohio. Sergeant Risner also located Zachary based on his cell phone signal and determined that Zachary was also in Warren, Ohio. Appellant, however, continued to deny Zachary was with him.

{¶13} Around 10:00 P.M., Sergeant Risner received a call from one of Jester's neighbors who reported that Zachary had just been dropped off at home. Sergeant Risner and his partner went to the home, met Zachary and took him to the police station. There they briefly spoke with Zachary. Zachary was not forthcoming with the officers. He claimed he had been at the park all day. Zachary was charged with obstructing official business. Zachary was taken to the Attention Center.

{¶14} In the meantime, appellant had called the station and said he was going to come in to talk to officers. Appellant did not appear, however, his car was located two and a half blocks away from the police station.

{¶15} The next day, Sergeant Risner went back to the hospital to speak with Jester. She was weak, heavily medicated and in pain. He was able to speak with her for only ten minutes and was unable to determine who assaulted her. Sergeant Risner went to the hospital to try again on November 16th, but found Jester had been discharged. He went to the Dueber Street address, but was told by Deshawn Burgess, a relative of appellant's that Jester was not home.

{¶16} On November 17th, Jester appeared at the police station and said she wanted to speak with Sergeant Risner. Detective Williams, however, spoke with Jester Jester was not happy speaking with Detective Williams who she felt was condescending and treated her poorly. She told Detective Williams, that she fell out of a chair when someone she could not identify hit her. Detective Williams became frustrated with Jester and terminated the interview. As Jester was leaving, Sergeant Riser intercepted her and spoke with her. Jester told Sergeant Risner that appellant caused her injuries. At trial, Jester admitted she had lied to Detective Williams and further testified that there was no doubt in her mind that appellant was responsible for her injuries.

{¶17} As a result of the attack, Jester suffered two broken wrists and a left ulna fracture. Two surgeries were required to repair the fractures, during which plates and pins were placed to hold Jester's wrists together. Her arms are scarred from the procedure. Jester further required stitches to close two head wounds and a wound on the front of her lower left leg.

{¶18} Before trial appellant waived his right to a jury trial for the repeat violent offender specification.' The jury heard evidence on the remaining counts of the indictment and ultimately found appellant guilty as charged. The court found him guilty

of the repeat violent offender specification. At a later sentencing hearing, the court sentenced appellant to eight years for felonious assault, ten years for the repeat violent offender specification and five years for having a weapon under disability. Appellant was ordered to serve his sentences consecutively for a total prison term of 23 years.

{¶19} Appellant timely appealed and submits the following three assignments of error for our consideration:

{¶20} "I. THE TRIAL COURT'S FINDING OF GUILT IS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

{¶21} "II. THE APPELLANT'S SENTENCE IS VOID BECAUSE THE TRIAL COURT IMPROPERLY JOURNALIZED THE APPELLANT'S TIME ON POST RELEASE CONTROL AND THEN IMPROPERLY ATTEMPTED TO CORRECT THE ERROR.

{¶22} "III. THE TRIAL COURT ERRED IN IMPOSING CONSECUTIVE AND MAXIMUM SENTENCES WITHOUT ADEQUATE JUSTIFICATION."

I.

{¶23} In his first assignment of error, appellant maintains that his convictions are against the sufficiency of the evidence and against the manifest weight of the evidence[2]. We disagree.

{¶24} Specifically, appellant argues, "In the instant case, it is against the manifest weight and sufficiency of the evidence that appellant caused the physical harm to Jester. First, the accusing witnesses were unreliable with a history of providing

[2] Appellant does not challenge his conviction for Having a Weapon While Under a Disability or the repeat violent offender specification as being against the sufficiency of the evidence under this Assignment of Error.

multiple accounts and a motive to lie. Second, the physical evidence was insufficient to support a conviction."[3]

{¶25} The function of an appellate court on review is to assess the sufficiency of the evidence "to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. In making this determination, a reviewing court must view the evidence in the light most favorable to the prosecution. Id.*; State v. Feliciano* (1996), 115 Ohio App.3d 646, 652, 685 N.E.2d 1307, 1310- 1311.

{¶26} While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest-weight challenge questions whether the state has met its burden of persuasion. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390, 678 N.E.2d 541, 548-549 (Cook, J., concurring). In making this determination, we do not view the evidence in the light most favorable to the prosecution. Instead, we must "review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, 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." *State v. Thompkins*, supra, 78 Ohio St.3d at 387. (Quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720-721). Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins,* supra. In *State v. Thompkins*, supra the Ohio Supreme Court further held "[t]o reverse a judgment of a

[3] We note appellant has failed to number the pages of his brief in this Court. See, App.R. 16; 19.

trial court on the basis that the judgment is not sustained by sufficient evidence, only a concurring majority of a panel of a court of appeals reviewing the judgment is necessary." 78 Ohio St.3d 380 at paragraph three of the syllabus.

{¶27} The elements of felonious assault are set forth in R .C. 2903.11, which provides in pertinent part:

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

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

{¶30} "(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance***."

{¶31} "Serious physical harm to persons" as defined in R.C. 2901.01(A) (5) means any of the following in pertinent part:

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

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

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

{¶35} R.C. 2901.22 defines "knowingly" as follows:

{¶36} "(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶37} Whether a person acts knowingly can only be determined, absent a defendant's admission, from all the surrounding facts and circumstances, including the

doing of the act itself." *State v. Huff* (2001), 145 Ohio App.3d 555, 563, 763 N.E.2d 695. (Footnote omitted.) Thus, "[t]he test for whether a defendant acted knowingly is a subjective one, but it is decided on objective criteria." *State v. McDaniel* (May 1, 1998), Montgomery App. No. 16221, (citing *State v. Elliott* (1995), 104 Ohio App.3d 812, 663 N.E.2d 412).

{¶38} In the case at bar, Jester testified that on the morning of November 11, 2009, in an upstairs room of her home, appellant became angry with her and first struck her in the chest with his fists. He then grabbed a cane that belonged to Jester's mother and proceeded to viciously beat her with it. Jester testified that she put up her hands in an attempt to protect her head and asked appellant to stop, but he continued beating her until she lost consciousness. When she woke up in the hospital, she was in a great deal of pain. As a result of the beating, Jester suffered two broken wrists and a left ulna fracture. During her four-day stay in the hospital, two surgeries were performed to repair the fractures, during which plates and pins were placed to hold her wrists together. Her arms are scarred from the procedure. Jester further required stitches to close two head wounds and a wound on the front of her lower left leg. Finally, she testified that there was no doubt in her mind that appellant was the person responsible for her injuries.

{¶39} The jury could have reasonably concluded from Ms. Jester's testimony that she had suffered some temporary, substantial incapacity [R.C. 2901.01(A) (5) (c)] or that she had suffered acute pain of such duration as to result in substantial suffering [R.C. 2901.01(A) (5) (e)]. Accordingly, the State presented sufficient evidence that the victim suffered "serious physical harm." R.C. 2901.01(A) (5).

{¶40} Viewing the evidence in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that appellant had committed the crime of felonious assault. We hold, therefore, that the state met its burden of production regarding each element of that crime and, accordingly, there was sufficient evidence to support appellant's conviction.

{¶41} "A fundamental premise of our criminal trial system is that 'the *jury* is the lie detector.' *United States v. Barnard,* 490 F.2d 907, 912 (C.A.9 1973) (emphasis added), cert. denied, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974). Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.' *Aetna Life Ins. Co. v. Ward,* 140 U.S. 76, 88, 11 S.Ct. 720, 724-725, 35 L.Ed. 371 (1891)". *United States v. Scheffer* (1997), 523 U.S. 303, 313, 118 S.Ct. 1261, 1266-1267.

{¶42} Appellant cross-examined the witnesses and argued that he did not inflict serious physical harm. Appellant argued that the victim was unreliable with a history of providing multiple accounts and a motive to lie. Appellant further argued that the identity of the assailant was not proven beyond a reasonable doubt because, besides Jester and appellant, there was a third contributor of DNA on the cane that was never identified and a fingerprint on a piece of mail that was never identified

{¶43} The weight to be given to the evidence and the credibility of the witnesses are issues for the Trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881.

{¶44} The jury was free to accept or reject any and all of the evidence offered by the appellant and the state and assess the witness's credibility. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence". *State v. Craig* (Mar. 23, 2000), Franklin App. No. 99AP-739, citing *State v. Nivens* (May 28, 1996), Franklin App. No. 95APA09-1236 Indeed, the jurors need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver,* Franklin App. No. 02AP-604, 2003- Ohio-958, at ¶ 21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.; *State v. Burke,* Franklin App. No. 02AP-1238, 2003-Ohio-2889, citing *State v. Caldwell* (1992), 79 Ohio App.3d 667, 607 N.E.2d 1096. Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks* (1991), 61 Ohio St. 3d 259, 574 N.E. 2d 492.

{¶45} After reviewing the evidence, we cannot say that this is one of the exceptional cases where the evidence weighs heavily against the convictions. The jury did not create a manifest injustice by concluding that appellant was guilty of the crimes charged in the indictment. The jury heard the witnesses, evaluated the evidence, and was convinced of appellant's guilt.

{¶46} We conclude the Trier of fact, in resolving the conflicts in the evidence, did not create a manifest injustice requiring a new trial.

{¶47} Appellant's first assignment of error is overruled.

II.

{¶48} In his second assignment of error, appellant argues he is entitled to a re-sentencing hearing because the court improperly journalized his post-release control and then improperly utilized a *nunc pro tunc* entry to correct the error. We agree.

{¶49} The trial court sentenced appellant for felonious assault, a felony of the second degree, and having weapons under disability, a felony of the third degree.

{¶50} R.C. 2929.14(F) (1) provides that if a court imposes a prison term for a felony, the sentence shall include a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment. R.C. 2929.19(B)(3) requires that the sentencing court notify the offender that the offender will be supervised under R.C. 2967.28 after the offender leaves prison.

{¶51} The Supreme Court of Ohio has interpreted these provisions as requiring a trial court to give notice of post-release control both at the sentencing hearing and by incorporating it into the sentencing entry. *State v. Jordan,* 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, paragraph one of the syllabus. The trial court must do so regardless of whether the term of post-release control is mandatory or discretionary. Id. at paragraph two of the syllabus; *Hernandez v. Kelly,* 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301, ¶ 18.

{¶52} Under Section 2967.28(B) of the Ohio Revised Code, "[e]ach sentence to a prison term for a felony of the first degree [or] ... felony of the second degree ... shall include a requirement that the offender be subject to a period of post-release control ... after the offender's release from imprisonment." For a felony of the first degree, the period is five years. R.C. 2967.28(B)(1). "For a felony of the second degree that is not a

felony sex offense," the period is three years. R.C. 2967.28(B)(2). Under Section 2967.28(C), "[a]ny sentence to a prison term for a felony of the third, fourth, or fifth degree ... shall include a requirement that the offender be subject to a period of post-release control of up to three years ..., if the parole board ... determines that a period of post-release control is necessary for that offender."

{¶53} "If an offender is subject to more than one period of post-release control, the period of post-release control for all of the sentences shall be the period of post-release control that expires last, as determined by the parole board or court." R.C. 2967.28(F)(4)(c).

{¶54} During the sentencing hearing, the trial court advised appellant concerning post-release control as follows,

{¶55} “He would also be subject to a mandatory post-release control. This being a felony of the second degree, he would be placed on mandatory post-release control for a period of three years.” (T., Feb. 10, 2010 at 14).

{¶56} The trial court did not orally advise appellant at the February 10, 2010 sentencing hearing concerning post-release control for the felony of the third degree, having a weapon while under a disability.

{¶57} The original sentencing entry filed February 17, 2010 contains the following provisions concerning post-release control,

{¶58} “Upon release from prison, the Defendant is ordered to serve a mandatory period of five (5) years of post-release control, pursuant to R.C. 2967.28(B).

{¶59} “* * *

{¶60} "Upon release from prison, the Defendant is ordered to serve an optional period of up to three (3) years of post-release control at the discretion of the Parole Board, pursuant to R.C. 2967.28(B)."[4]

{¶61} Thus, the judgment entry incorrectly advised appellant that he was subject to a mandatory five-year period of post-release control for the felonious assault charge, and, for the first time, advised appellant of the optional three-year period of post-release control for the having weapon while under a disability charge.

{¶62} In the case at bar, the trial court originally sentenced appellant on February 10, 2010 after the effective date of R.C. 2929.191.

{¶63} "[W]ith R.C. 2929.191, the General Assembly has now provided a statutory remedy to correct a failure to properly impose post-release control. Effective July 11, 2006, R.C. 2929.191 establishes a procedure to remedy a sentence that fails to properly impose a term of post-release control. It applies to offenders who have not yet been released from prison and who fall into at least one of three categories: those who did not receive notice at the sentencing hearing that they would be subject to post-release control, those who did not receive notice that the parole board could impose a prison term for a violation of post-release control, or those who did not have both of these statutorily mandated notices incorporated into their sentencing entries. R.C. 2929.191(A) and (B). For those offenders, R.C. 2929.191 provides that trial courts may, after conducting a hearing with notice to the offender, the prosecuting attorney, and the Department of Rehabilitation and Correction, correct an original judgment of conviction

[4] Concerning the felony of the third degree, Having Weapons While Under a Disability, we note the trial court's entry also recites that "This period of post-release control was imposed as part of Defendant's criminal sentence at the sentencing hearing, pursuant to R.C. 2929.19." However, we are unable to find any reference to post-release control for the third degree felony in the sentencing transcript.

by placing on the journal of the court a nunc pro tunc entry that includes a statement that the offender will be supervised under R.C. 2967.28 after the offender leaves prison and that the parole board may impose a prison term of up to one-half of the stated prison term originally imposed if the offender violates post release control." *State v. Singleton*, 124 Ohio St.3d 173, 179, 920 N.E.2d 958, 963, 2009-Ohio-6434 at ¶ 23.

{¶64} The Supreme Court further noted, "R.C. 2929.191(C) prescribes the type of hearing that must occur to make such a correction to a judgment entry "[o]n and after the effective date of this section." The hearing contemplated by R.C. 2929.191(C) and the correction contemplated by R.C. 2929.191(A) and (B) pertain only to the flawed imposition of post-release control. R.C. 2929.191 does not address the remainder of an offender's sentence. Thus, the General Assembly appears to have intended to leave undisturbed the sanctions imposed upon the offender that are unaffected by the court's failure to properly impose post-release control at the original sentencing." *State v. Singleton*, supra 124 Ohio St.3d at 179-180, 920 N.E.2d at 964, 2009-Ohio-6434 at ¶ 24.

{¶65} In *Singleton*, the Court recognized that the legislature's enactment of R.C. 2929.191 altered its case law characterization of a sentencing lacking post-release control as a nullity and provided a mechanism to correct the defect in sentences imposed after the effective date of the statute by adding post release control any time prior to the defendant's release from prison. *Singleton* at 180-181, 920 N.E.2d at 964-965, 2009-Ohio-6434 at ¶ 26-27.

{¶66} In the case at bar, the trial court did not properly impose post-release control when it originally sentenced appellant. First, at the sentencing hearing, the trial

court failed to advise appellant of the optional period of up to three (3) years of post-release control at the discretion of the Parole Board for the felony of the third degree. Additionally, the trial court's Judgment Entry incorrectly advised appellant that he was subject to a mandatory five-year period of post-release control for the felony of the second degree.

{¶67} The trial court attempted to remedy the error by placing a "Nunc Pro Tunc Judgment Entry" in the file on April 1, 2010 correcting the period of post-release control for the felony of the second degree from a mandatory five years to a mandatory three years.

{¶68} R.C. 2929.191 sets forth a procedure for the trial court to correct a judgment of conviction when the trial court, either at the sentencing hearing or in the final judgment, failed to properly notify a defendant about the requisite post-release control. Under that statute, the trial court must conduct a hearing *before it can file* a *nunc pro tunc* correction to the judgment of conviction. R.C. 2929.191(C) details how such a hearing must be conducted. It provides:

{¶69} "(C) On and after the effective date of this section, a court that wishes to prepare and issue a correction to a judgment of conviction of a type described in division (A)(1) or (B)(1) of this section shall not issue the correction until after the court has conducted a hearing in accordance with this division. Before a court holds a hearing pursuant to this division, the court shall provide notice of the date, time, place, and purpose of the hearing to the offender who is the subject of the hearing, the prosecuting attorney of the county, and the department of rehabilitation and correction. The offender has the right to be physically present at the hearing, except that, upon the court's own

motion or the motion of the offender or the prosecuting attorney, the court may permit the offender to appear at the hearing by video conferencing equipment if available and compatible. An appearance by video conferencing equipment pursuant to this division has the same force and effect as if the offender were physically present at the hearing. At the hearing, the offender and the prosecuting attorney may make a statement as to whether the court should issue a correction to the judgment of conviction."

{¶70} In *State v. Fry*, 125 Ohio St.3d 163, 926 N.E.2d 1239, 2010-Ohio-1017, the Ohio Supreme Court noted that Fry's sentencing occurred after the effective date of R.C. 2929.191. The Court observed, "In addition to his capital crimes, Fry was convicted of third-degree domestic violence, tampering with evidence, intimidation of a crime victim or witness, and menacing by stalking. Based on his convictions, he is subject to post-release control for a mandatory term of three years. R.C. 2967.28(B)(3). *Fry's sentencing entry, however, imposed ten years of post release control*, in the event that he is released from prison. This notification failed to comply with the mandate of R.C. 2967.28(B)(3). Accordingly, Fry must be resentenced pursuant to R.C. 2929.191 to the correct term of post release control." Id. at 199, 926 N.E.2d at 1277-1278, 2010-Ohio-1017 at ¶ 214. (Emphasis Added). (Footnotes omitted).

{¶71} Accordingly, we are bound to find that appellant's judgment entry must be corrected in accordance with R.C. 2929.191, including having a hearing using the procedures set forth in R.C. 2929.191(C).

{¶72} Accordingly, appellant's second assignment of error is sustained.

III.

{¶73} In his final assignment of error, appellant first argues, that when the trial court, sentenced him to maximum and consecutive sentences it inappropriately engaged in judicial fact-finding, thereby violating his constitutional rights. Second, appellant maintains that the court failed to consider the purposes and principles of felony sentencing under R.C. 2929.11 and the seriousness and recidivism factors under R.C. 2929.12 when it imposed maximum consecutive sentences. We disagree.

{¶74} We first note there is no constitutional right to an appellate review of a criminal sentence. *Moffitt v. Ross* (1974), 417 U.S. 600, 610-11, 94 S.Ct. 2437, 2444, 41 L.Ed.2d 341; *McKane v. Durston* (1894), 152 U.S. 684, 687, 14 S.Ct. 913. 917; *State v. Smith* (1997), 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668; *State v. Firouzmandi*, Licking App. No. 2006-CA-41, 2006-Ohio-5823. An individual has no substantive right to a particular sentence within the range authorized by statute. *Gardner v. Florida* (1977), 430 U.S. 349, 358, 97 S.Ct. 1197, 1204-1205, 51 L.Ed.2d 393; *State v. Goggans*, Delaware App. No. 2006-CA-07-0051, 2007-Ohio-1433 at ¶ 28. In other words “[t]he sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction ... It is not the duration or severity of this sentence that renders it constitutionally invalid ....“ *Townsend v. Burke* (1948), 334 U.S. 736, 741, 68 S.Ct. 1252, 1255, 92 L.Ed. 1690.

{¶75} In a plurality opinion, the Supreme Court of Ohio established a two-step procedure for reviewing a felony sentence. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. The first step is to "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." *Kalish* at ¶ 4. If this first step "is satisfied," the second step requires the trial court's decision be "reviewed under an abuse-of-discretion standard." Id.

{¶76} As a plurality opinion, *Kalish* is of limited precedential value. See *Kraly v. Vannewkirk (*1994), 69 Ohio St.3d 627, 633, 635 N.E.2d 323 (characterizing prior case as "of questionable precedential value inasmuch as it was a plurality opinion which failed to receive the requisite support of four justices of this court in order to constitute controlling law"). See, *State v. Franklin* (2009), 182 Ohio App.3d 410, 912 N.E.2d 1197, 2009-Ohio-2664 at ¶ 8. "Whether *Kalish* actually clarifies the issue is open to debate. The opinion carries no syllabus and only three justices concurred in the decision. A fourth concurred in judgment only and three justices dissented." *State v. Ross*, 4th Dist. No. 08CA872, 2009-Ohio-877, at note 2; *State v. Welch*, Washington App. No. 08CA29, 2009-Ohio-2655 at ¶ 6.

{¶77} Nevertheless, until the Supreme Court of Ohio provides further guidance on the issue, we will continue to apply *Kalish* to appeals involving felony sentencing. *State v. Welch,* supra; *State v. Reed*, Cuyahoga App. No. 91767, 2009-Ohio-2264 at note 2.

{¶78} In the first step of our analysis, we review whether the sentence is contrary to law. In the case at bar, appellant was convicted of on one count of felonious assault a felony of the second degree in violation of R.C. 2903.11 with a repeat violent offender specification in violation of R.C. 2941.149, and one count of having weapons under disability, a felony of the third degree in violation of R.C. 2923.13.

{¶79} For a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years. Appellant was sentenced to eight years.

{¶80} For a violation of a felony of the third degree, the potential sentence that a court can impose is one, two, three, four or five years. Appellant was sentenced to a term of five years.

{¶81} Upon review, we find that the trial court's sentencing on the charges complies with applicable rules and sentencing statutes. The sentence was within the statutory sentencing range. Furthermore, the record reflects that the trial court considered the purposes and principles of sentencing and the seriousness and recidivism factors as required in Sections 2929.11 and 2929.12 of the Ohio Revised Code. Therefore, the sentence is not clearly and convincingly contrary to law.

{¶82} Having determined that the sentence is not contrary to law we must now review the sentence pursuant to an abuse of discretion standard. *Kalish* at ¶ 4; *State v. Firouzmandi,* supra at ¶ 40. In reviewing the record, we find that the trial court gave careful and substantial deliberation to the relevant statutory considerations.

{¶83} In this case, the trial court noted appellant’s lengthy criminal history, dating back to 1987. Appellant’s was previously convicted of felonious assault. Further he was convicted of domestic violence involving the same victim as in the case at bar.

{¶84} 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 ¶ 1 and 11, citing *Foster* at ¶100, See also, *State v. Payne,* 114 Ohio St. 3d 502, 2007-Ohio-4642, 873 N.E. 2d 306; *State v. Firouzmandi,* Licking App. No. 2006-CA-41, 2006-Ohio-5823.

{¶85} "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 ¶ 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 ¶13, see also *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1; *State v. Firouzmandi,* supra at ¶ 29.

{¶86} There is no evidence in the record that the judge acted unreasonably by, for example, selecting the sentence arbitrarily, basing the sentence on impermissible factors, failing to consider pertinent factors, or giving an unreasonable amount of weight to any pertinent factor. We find nothing in the record of appellant's case to suggest that his sentence was based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment. *State v. Firouzmandi*, supra at ¶ 43.

{¶87} It appears to this Court that the trial court's statements at the sentencing hearing were guided by the overriding purposes of felony sentencing to protect the public from future crime by the offender and others and to punish the offender. R.C. 2929.11.

{¶88} Based on the transcript of the sentencing hearing and the subsequent judgment entry, this Court cannot find that the trial court acted unreasonably, arbitrarily, or unconscionably, or that the trial court violated appellant's rights to due process under the Ohio and United States Constitutions in its sentencing appellant. Further, the

sentence in this case is not so grossly disproportionate to the offense as to shock the sense of justice in the community.

{¶89} Appellant's third assignment of error is overruled.

{¶90} Accordingly, the judgment of the Stark County Court of Common Pleas is affirmed, in part and reversed, in part. This case is remanded to the trial court for further proceedings in accord with the law and consistent with this opinion.

By Gwin, J., and

Wise, J., concur

Edwards, P.J., concurs

separately

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. JOHN W. WISE

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EDWARDS, P.J., CONCURRING OPINION

{¶91} I concur with the majority as to the disposition of all three assignments of error. I concur with the majority as to the analysis of the first and second assignments of error.

{¶92} I disagree with the analysis of the majority as to the third assignment of error. The majority finds that the sentence is not clearly and convincingly contrary to law. I find that the sentence is clearly and convincingly contrary to law as to the problems discussed in the second assignment of error. I do agree with the majority, though, that the rest of the sentence is not clearly and convincingly contrary to law. And, since the law now provides a procedure to use to amend a sentence in order to correct problems with the statement of Post Release Control sanctions, I still concur with the majority as to its disposition of the third assignment of error because the appellant primarily challenged the consecutive and maximum nature of the sentence.

[Cite as *State v. Crawley*, 2010-Ohio-5098.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
RICHARD CRAWLEY	:	
Defendant-Appellant	:	CASE NO. 2010-CA-00057

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Stark County Court of Common Pleas is affirmed, in part and reversed, in part. This case is remanded to the trial court for further proceedings in accord with the law and consistent with this opinion. Cost to be divided equally between the parties.

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. JOHN W. WISE