[Cite as *State v. Frye*, 2017-Ohio-7733.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Patricia A. Delaney, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 17CA5
	:	
MATTHEW FRYE, JR.	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas, Case No. 2016 CR 0502 R
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	September 18, 2017

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
GARY BISHOP RICHLAND CO. PROSECUTOR JOSEPH C. SNYDER 38 South Park St. Mansfield, OH 44902	JOHN C. O'DONNELL 10 West Newlon Place Mansfield, OH 44902

Delaney, P.J.

{¶1} Appellant Matthew Frye, Jr. appeals from the December 13, 2016 Sentencing Entry of the Richland County Court of Common Pleas. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} This case arose in July 2016 when the Richland County Sheriff's Office became aware of several burglaries in the northern part of the county. Stolen items included televisions, mowers, power tools, and guns Intelligence gathered by the Sheriff's Office indicated someone with the street name "Tiger" might be involved, and witnesses reported a white Ford Ranger with an extended cab and a "stocky bald white male" near the scene of some of the burglaries. The stolen items were believed to be "fenced," or sold for cash, in the Roseland area of Richland County.

{¶3} Coincidentally, on July 25, 2016, around 8:00 a.m., Ptl. Ryan Grimshaw traffic-stopped appellant, who was driving a white extended-cab Ford Ranger in Mansfield. The license plates on the truck did not match the vehicle. Grimshaw confiscated the plates and cited appellant for fictitious plates and driving without an operator's license. The traffic stop occurred a few hundred yards from the Bureau of Motor Vehicles, so Grimshaw left appellant standing near the truck and told him to walk to the B.M.V. to clear up the issues with his license plates and operator's license.

{¶4} Unbeknownst to Grimshaw, after he left, a surveillance camera in the parking lot of the Third Street Clinic nearby captured a white truck without license plates pull into the lot. Although the camera is too far away to identify the individual who exits the truck, the person visibly proceeds to remove a license plate from a car in the Clinic

lot. The plate was removed from a tan Cadillac belonging to Dr. John Cunningham, who works at the clinic. Dr. Cunningham didn't realize one of his plates was stolen until the police later asked him to come to the station to identify it. Dr. Cunningham recognized the stolen plate because he memorized his plate number: DGH 2825.

{¶5} Detective Sgt. Viars, the supervisor of the major crimes unit, asked detectives to look for a white Ford Ranger with an extended cab. Viars indicated the vehicle might be near a motel on Koogle Road. Det. Radio spotted a truck matching the given description on July 26, 2016. Radio watched the vehicle until the end of his shift that evening.

{¶6} On July 27, 2016, Viars began his shift by surveilling the truck at the location discovered by Radio. The truck had only one license plate bearing registration number DGH 2825, which came back to John Cunningham, a 79-year-old white male. (The plate had not yet been reported stolen.) Viars began to coordinate detectives in two additional unmarked vehicles to watch the truck, but in the meantime the truck drove away.

{¶7} Viars, Radio, and two other detectives trailed the white Ford Ranger in three separate unmarked cars. The truck proceeded westbound on State Route 30 and then pulled into a BP gas station. Viars noted the driver and sole occupant was a white male with a bald head and a goatee. Surveillance continued as the truck proceeded to Bowman Street. The truck now drove considerably slower than the posted speed limit and began pulling into and out of driveways. Viars suspected the driver was looking for an opportunity to burglarize a residence. As the truck pulled in and out of driveways, detectives were not able to maintain constant visual contact because they were trying not

to be spotted by the suspect. They drove past the driveways as the truck pulled in and had to double back.

{¶8} Finally, a detective advised Viars the truck seemed to have stopped in the driveway of 2447 Bowman without immediately pulling back out. Viars drove by the address and noticed nothing amiss, although he saw the truck, now empty, stopped in the driveway. Viars parked a short distance away and attempted to approach 2447 Bowman on foot to get a better look. Before he reached the house, he heard radio traffic indicating the truck was on the move again. The detectives estimated the driver had been at 2447 Bowman approximately 5 to 8 minutes.

{¶9} Now the truck was moving fast, but due to miscommunication and attempts to avoid detection, the detectives lost sight of the truck. Unfortunately, they discovered the residence at 2447 Bowman had been broken into via the front door, which was now ajar and there were pry marks on the door frame. Deputies collected evidence including photos of the broken door frame and D.N.A. swabs of the door. The homeowners were notified and returned to discover two televisions were missing.

{¶10} Meanwhile, Detective Kilgore went to the apartments on Koogle Road in case the white Ford Ranger returned. About 10 minutes after Kilgore arrived, appellant arrived in the truck and Kilgore stopped him. Kilgore advised appellant he was a suspect in a burglary and planned to tow the truck. During the vehicle inventory, bolt cutters and gloves were found inside the cab of the truck, and a tire tool/pry bar was found in the bed of the truck. $110 in cash was discovered upon appellant's person.

{¶11} The tire tool/pry bar found in appellant's truck was compared to the pry marks on the door of 2447 Bowman; it appeared the marks were made by a similar tool.

Marks on the pry bar also matched paint from the door frame. D.N.A. found on the swabs from the door matched the D.N.A. standard taken from appellant.

{¶12} Appellant was charged by indictment as follows: Count I, burglary pursuant to R.C. 2911.12(A)(3), a felony of the third degree; Count II, possession of criminal tools pursuant to R.C. 2923.24(A), a felony of the fifth degree; Count III, theft pursuant to R.C. 2913.02(A)(1), a felony of the fifth degree; Count IV, criminal damaging pursuant to R.C. 2909/06(A)(1), a misdemeanor of the second degree; and Count V, receiving stolen property (motor vehicle license plates) pursuant to R.C. 2913.51(A), a felony of the fifth degree.

{¶13} Appellant entered pleas of not guilty and the matter proceeded to trial by jury. Appellant was found guilty as charged. The trial court found Counts I through IV merged for sentencing purposes. Appellant was sentenced to an aggregate prison term of 48 months.

{¶14} Appellant now appeals from the Sentencing Entry of the Richland County Court of Common Pleas dated December 13, 2016.

{¶15} Appellant raises five assignments of error:

ASSIGNMENTS OF ERROR

{¶16} "I. THE TRIAL COURT COMMITTED PLAIN ERROR IN ALLOWING OPINION TESTIMONY BY WITNESSES THAT WERE NOT EXPERTS."

{¶17} "II. THE TRIAL COURT COMMITTED PLAIN ERROR IN ALLOWING TESTIMONY OF PRIOR "BAD ACTS."

{¶18} "III. THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION."

{¶19} "IV. THE GUILTY VERDICT WAS AGAINST THE GREATER WEIGHT OF THE EVIDENCE."

{¶20} "V. THE TRIAL COURT ERRED IN IMPOSING THE MAXIMUM SENTENCE."

ANALYSIS

I.

{¶21} In his first assignment of error, appellant argues the trial court erred in allowing opinion testimony by non-expert witnesses. We disagree.

{¶22} The admission or exclusion of relevant evidence is a matter left to the sound discretion of the trial court. Absent an abuse of discretion resulting in material prejudice to the defendant, a reviewing court should be reluctant to interfere with a trial court's decision in this regard. *State v. Hymore*, 9 Ohio St.2d 122, 128, 224 N.E.2d 126 (1967).

{¶23} Evid.R. 701 affords the trial court considerable discretion in controlling the opinion testimony of lay witnesses. *State v. Harper,* 5th Dist. Licking No. 07 CA 151, 2008–Ohio–6926, ¶ 37*,* citing *City of Urbana ex rel. Newlin v. Downing,* 43 Ohio St.3d 109, 113, 539 N.E.2d 140 (1989) and *State v. Kehoe,* 133 Ohio App.3d 591, 603, 729 N.E.2d 431 (12th Dist.1999). "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Ohio Evid.

R. 701. Lay opinion, inferences, impressions or conclusions are therefore admissible if they are those that a rational person would form on the basis of the observed facts and if they assist the jury in understanding the testimony or delineating a fact in issue. *Id*.

{¶24} Appellant argues two portions of testimony violate Evid.R. 701. First, Daphne Bowman, the evidence technician of the Richland County Sheriff's Office, testified the pry bar/tire tool found in the bed of appellant's truck is consistent with the pry marks on the door of the victims' residence. Second, Viars testified photos of the pry bar/tire tool showed "transfer marks" of paint consistent with the color of paint on the door frame of the residence. No objection was made to either statement.

{¶25} Appellant argues both statements invaded the province of the jury as finder of fact and constitute plain error. Neither officer was qualified as an expert witness, and neither testified as an expert. We find the two challenged statements are based directly upon what the officers learned in the course of the investigation. *State v. Moore*, 5th Dist. Coshocton No. 14CA0028, 2016-Ohio-828, ¶ 82. The witnesses' testimony was rationally based upon their investigation and both meet the requirements of Evid.R. 701. Id.

{¶26} Appellant cites our decision in *State v. Brennan*, 5th Dist. Licking No. 02-CA-00042, 2002-Ohio-5952, in which we found the testimony of a police officer as to the genuineness of a handwriting sample is generally not permitted by Evid.R. 901. This case does not involve a handwriting sample, which is specifically addressed by the Rules of Evidence. Moreover, our concern in *Brennan* was that a police officer testified conclusively handwriting samples "matched." In this case, Bowman testified the tool "appeared to be similar" in size and shape to the tool that made the pry marks, and Viars

referred to the color of the markings on the pry bar as "similar" to the color of the door. (T.II, 249, 314). Neither witness's testimony was conclusory or disallowed the jury to draw its own conclusions. This case is thus distinguishable from *Brennan*. See, *State v. Cooper*, 8th Dist. Cuyahoga No. 86437, 2006-Ohio-817, ¶ 11.

{¶27} Both officers testified as lay witnesses to opinions based upon their experience as police officers, their previous investigations of burglaries, and their perception of evidence at issue. Also, the testimony was helpful to determine facts in issue, therefore the testimony was properly admitted under Evid.R. 701. See, *State v. McKee*, 91 Ohio St.3d 292, 2001-Ohio-41, 744 N.E.2d 737.

{¶28} We further note the trial court instructed the jury it was the sole judge of the facts and the weight of the credibility of the evidence. The jury remained the ultimate factfinder in the case and the officers' opinions were not findings of fact or ultimate conclusions in the case. *State v. Greig*, 5th Dist. Stark No. 2014CA00012, 2014-Ohio-4063, ¶ 26. Juries are presumed to follow the instructions of the trial court. *Pang v. Minch,* 53 Ohio St.3d 186, 187, 559 N.E.2d 1313 (1990), paragraph four of the syllabus. Appellant has not pointed to any evidence in the record that the jury failed to do so in this case. *Greig*, supra.

{¶29} We have reviewed the trial evidence and note the following photos from appellee's exhibits: number 12, the gouge marks on the door; number 20, the "pry end" of the tool found in appellant's truck; and numbers 23, 24, and 25 showing the end of the tool placed against the gouge marks in the door frame, with a ruler for size comparison. The jury could examine these photos and easily conclude the pry tool fits the gouge marks to an uncanny degree. The jury was in the best position to weigh the credibility of the

witnesses and to resolve any inconsistencies, and had the opportunity to compare the evidence and draw its own conclusion. *State v. Elmore*, 5th Dist. Richland No. 16CA52, 2017-Ohio-1472, ¶ 45. Therefore, we find no reversible error and overrule the first assignment of error.

II.

{¶30} In his second assignment of error, appellant argues the trial court erred in permitting evidence of "prior bad acts." We disagree.

{¶31} First, we disagree with appellant's characterization of the record. Appellant's argument is premised on his assertions that Viars suspected appellant in other burglaries in which items were "fenced" in Roseland, and Detective Kilgore testified appellant "was suspected in other burglaries." We have reviewed the record as cited by appellant and note neither officer definitively stated *appellant* was a suspect in other burglaries; both officers spoke generally of a spate of burglaries in the county, both noted no suspect was identified, and both testified a white Ford Ranger with an extended-cab was seen in the area of some of the burglaries. The evidence appellant challenges is thus general background information establishing why investigators were looking for a white Ford Ranger, and why they surveilled appellant when they observed him driving a vehicle matching that description.

{¶32} Evid. R. 404(B) states: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In *State v. Broom*, 40 Ohio St.3d 277, 533 N.E.2d 682 (1988), the Supreme

Court held in addition to those reasons listed in the Rule, evidence of other bad acts may be admissible to prove identity.

{¶33} In the instant case, the challenged evidence is not 'other acts' by appellant, but background of the investigation. Testimony concerning police investigations is generally admissible even though it may involve descriptions of the accused's prior actions provided the probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Evid.R. 403(A); *State v. Williams*, 115 Ohio App.3d 24, 44, 684 N.E.2d 358 (11th Dist.1996); *State v. Parson*, 67 Ohio App.3d 201, 207, 586 N.E.2d 244 (8th Dist.1990).

{¶34} The testimony regarding the other burglaries was properly admitted because it was an extension of the Richland County Sheriff's Office investigation and the impetus for investigating appellant. *State v. Proctor*, 8th Dist. Cuyahoga No. 85976, 2005-Ohio-5990, ¶ 11. We find these statements were offered merely to explain police investigative behavior. *State v. Trent*, 5th Dist. Stark No. 2004CA00360, 2005-Ohio-5793, ¶ 18, citing *State v. Bailey,* 8th Dist. Cuyahoga No. 81498, 2003–Ohio–1834 at ¶ 27–28; see also, *State v. Niles*, 5th Dist. Muskingum No. CT2003–0018, 2004-Ohio-119, ¶ 17 [evidence not admitted to show other bad acts but to connect package to appellant]; *State v. Green*, 3rd Dist. Union No. 14-2000-26, 2001-Ohio-2197 [evidence was admitted not to prove the defendant's character, but to establish a *modus operandi* and to explain to the jury how the investigation into break-ins led to appellant]. The evidence offered to explain the police investigation was not unfairly prejudicial. Id.

{¶35} Appellant's second assignment of error is overruled.

III.

{¶36} In his third assignment of error, appellant argues he received ineffective assistance of counsel. We disagree.

{¶37} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that trial counsel acted incompetently. *See*, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). In assessing such claims, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689, citing *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158 (1955). "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland,* 466 U.S. at 689. The question is whether counsel acted "outside the wide range of professionally competent assistance." *Id.* at 690.

{¶38} Even if a defendant shows that counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this "actual prejudice" prong, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694.

{¶39} Appellant argues he received ineffective assistance on three bases: defense trial counsel should have objected to the "improper opinion evidence" of Bowman and Viars, filed a motion in limine to restrict admission of "other acts evidence," and called a witness at trial who would have testified that appellant was looking for his lost dog on

July 27, 2016, to explain why he was pulling in and out of driveways on Bowman Road. Regarding appellant's first two claims, we have already determined in our discussion supra that the witnesses did not offer improper opinion evidence and the evidence of other burglaries was not "other acts evidence" which should have been excluded. Thus defense trial counsel was not ineffective on either of those bases.

{¶40} Regarding appellant's third example of alleged ineffective assistance, we note this issue was raised at sentencing when appellant made a pro se motion for new trial on the basis of ineffective assistance of trial counsel. Appellant argued trial counsel should have called a homeowner he spoke to on Bowman Road on the day of the break-in as a witness, because the homeowner could have established the reason for appellant's peculiar behavior driving slowly up the street, pulling into driveways and back out again. At the sentencing hearing, defense trial counsel responded that he did in fact locate that homeowner, subpoenaed the person as a witness, and interviewed the person prior to calling them as a witness at trial. Upon the conclusion of the interview, however, defense trial counsel concluded calling the homeowner as a witness would not serve appellant's best interests. The person was present, ready, and willing to testify, but counsel concluded the testimony would not be helpful to appellant's defense.

{¶41} Appellant's argument here, that the homeowner's testimony would have been exculpatory, is belied by defense trial counsel's strategic decision not to call the homeowner. Evidently the testimony would not have been favorable to appellant because defense trial counsel made a strategic decision not to call the homeowner as a witness. Tactical or strategic trial decisions, even if ultimately unsuccessful, do not generally

constitute ineffective assistance. *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995).

{¶42} We find appellant did not receive ineffective assistance of counsel and his third assignment of error is overruled.

IV.

{¶43} In his fourth assignment of error, appellant argues summarily his convictions are against the manifest weight and sufficiency of the evidence. We disagree.

{¶44} Appellant was found guilty of burglary, possession of criminal tools, theft, criminal damaging, and receiving stolen property. We note appellant admitted possession of the stolen license plate at trial, so our discussion of this assignment of error will address appellant's convictions upon Counts I through IV.

{¶45} Appellant argues no one witnessed him enter the victims' residence; he was not found in possession of the stolen televisions; and "[t]he D.N.A. evidence was not definitive." We note that the police officers observed appellant in the driveway of the victims' residence within minutes of the burglary; appellant was found in possession of the type of tool that effectuated the forced entry into the residence; and appellant's D.N.A. was found on the door of the victims' residence. (At sentencing, appellant acknowledged his D.N.A. could have been on the doorway because he purportedly knocked on the door looking for a lost dog.) It is reasonable to infer from the evidence at trial that appellant broke into the house.

{¶46} Appellee's case against appellant was circumstantial, but it was strong nevertheless. The elements of an offense may be established by direct evidence, circumstantial evidence, or both. *State v. Durr*, 58 Ohio St.3d 86, 92, 568 N.E.2d 674

(1991). Circumstantial evidence is defined as "[t]estimony not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions are drawn, showing indirectly the facts sought proved. * * *." *State v. Nicely*, 39 Ohio St.3d 147, 150, 529 N.E.2d 1236 (1988), quoting Black's Law Dictionary (5th Ed.1979) 221. Circumstantial and direct evidence are of equal evidentiary value. *State v. Jenks*, 61 Ohio St.3d 259, 272, 574 N.E.2d 492 (1991).

{¶47} Further, we disagree with appellant's characterization of the D.N.A. evidence as "inconclusive." The evidence technician testified that the likelihood of the D.N.A. on the door belonging to someone other than appellant was one in 100,000, compelling evidence in addition to appellee's other circumstantial evidence. The jury as the trier of fact was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the trier of fact 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. Johnson*, 5th Dist. Stark No. 2014CA00189, 2015-Ohio-3113, 41 N.E.3d 104, ¶ 61, citing *State v. Nivens,* 10th Dist. Franklin No. 95APA09–1236, 1996 WL 284714 (May 28, 1996). The jury need not believe all of a witness' testimony, but may accept only portions of it as true. *Id*.

{¶48} Appellant's convictions are not against the manifest weight of the evidence. The fourth assignment of error is overruled.

V.

{¶49} In his fifth assignment of error, appellant argues the trial court erred in imposing a maximum sentence. We disagree.

{¶50} We review felony sentences using the standard of review set forth in R.C. 2953.08. *State v. Bell*, 5th Dist. Muskingum No. CT2016–0049, 2017-Ohio-1531, --N.E.3d--, ¶ 8, citing *State v. Marcum,* 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 22; *State v. Howell,* 5th Dist. Stark No. 2015CA00004, 2015-Ohio-4049, 2015 WL 5722820, ¶ 31. R.C. 2953.08(G)(2) provides we may either increase, reduce, modify, or vacate a sentence and remand for resentencing where we clearly and convincingly find that **either** the record does not support the sentencing court's findings under R.C. 2929.13(B) or (D), 2929.14(B)(2)(e) or (C)(4), or 2929.20(I), **or** the sentence is otherwise contrary to law. (Emphasis added). See also, *State v. Bonnell,* 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 28.

{¶51} Clear and convincing evidence is that evidence "which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford,* 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. See also, *In re Adoption of Holcomb,* 18 Ohio St.3d 361, 481 N.E.2d 613 (1985). "Where the degree of proof required to sustain an issue must be clear and convincing, a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof." *Cross,* 161 Ohio St. at 477, 120 N.E.2d 118.

{¶52} Appellant argues the record does not support the imposition of a maximum sentence because there were no aggravating circumstances present and the only prior criminal history cited by the trial court was from 2008. A trial court's imposition of a maximum prison term for a felony conviction is not contrary to law as long as the sentence is within the statutory range for the offense, and the court considers both the purposes

and principles of felony sentencing set forth in R.C. 2929.11 and the seriousness and recidivism factors set forth R.C. 2929.12. *Bell*, supra, ¶ 30, citing *State v. Keith*, 8th Dist. Cuyahoga Nos. 103413 and 103414, 2016-Ohio-5234, 2016 WL 4141260, ¶ 10, 16. R.C. 2929.11(A) governs the purposes and principles of felony sentencing and provides that a sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing, which are (1) to protect the public from future crime by the offender and others, and (2) to punish the offender using the minimum sanctions that the court determines will accomplish those purposes. Further, the sentence imposed shall be "commensurate with and not demeaning to the seriousness of the offender's conduct and its impact on the victim, and consistent with sentences imposed for similar crimes by similar offenders." R.C. 2929.11(B). R.C. 2929.12 sets forth the seriousness and recidivism factors for the sentencing court to consider in determining the most effective way to comply with the purposes and principles of sentencing set forth in R.C. 2929.11. The statute provides a non-exhaustive list of factors a trial court must consider when determining the seriousness of the offense and the likelihood that the offender will commit future offenses.

{¶53} In *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the court discussed the effect of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470 decision on felony sentencing. The court stated that in *Foster* the 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*, 5th Dist. Licking No. 2006-CA-41, 2006-Ohio-5823, 2006 WL 3185175. "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.

{¶54} In the instant case, the trial court heard arguments from appellee and defense trial counsel and listened to appellant's statement. We have reviewed the record of the sentencing hearing and find the trial court considered all relevant factors, including the psychological and economic harm to the victims, the organized criminal activity involved in disposing of the stolen televisions, and appellant's "lengthy criminal record." Contrary to appellant's assertion here, we note the trial court mentioned appellant's convictions from 2008, 2004, and 1998, which the trial court described as "multiple, multiple convictions" establishing appellant "hasn't responded favorably to previously imposed sanctions." (T. III, 410).

{¶55} Accordingly, the trial court considered the purposes and principles of sentencing as well as the factors that the court must consider when determining an appropriate sentence. The trial court has no obligation to state reasons to support its findings. Nor is it required to give a talismanic incantation of the words of the statute, provided that the necessary findings can be found in the record and are incorporated into the sentencing entry. *Bell*, supra, at ¶ 40.

{¶56} 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 and advised appellant regarding post-release control. Upon a thorough review, we find the record clearly and convincing supports the sentence imposed by the trial court.

{¶57} Appellant's fifth assignment of error is overruled.

CONCLUSION

{¶58} Appellant's five assignments of error are overruled and the judgment of the Richland County Court of Common Pleas is affirmed.

By: Delaney, P.J.,

Wise, John, J. and

Baldwin, J., concur.