[Cite as *State v. Mack*, 2005-Ohio-6406.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

State of Ohio — Court of Appeals No. OT-05-004

Appellee — Trial Court No. 04-CR-151

v.

Frank J. Mack — **DECISION AND JUDGMENT ENTRY**

Appellant — Decided: December 2, 2005

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and
Lorrain R. Croy, Assistant Prosecuting Attorney, for appellee.

Judy A. Flood, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Frank Mack, appeals the January 25, 2005 judgment of the Ottawa County Court of Common Pleas which, following a guilty plea, sentenced appellant to 18 months of imprisonment for attempted gross sexual imposition, and 18 months of imprisonment for importuning; the sentences were ordered to be served consecutively. For the reasons that follow, we affirm the trial court's judgment.

{¶ 2} On November 3, 2004, following a waiver of indictment, appellant entered a guilty plea to an information charging him with importuning, in violation of R.C. 2907.07, a fourth degree felony, and attempted gross sexual imposition, in violation of R.C. 2907.05(A)(4), a fourth degree felony.

{¶ 3} On January 14, 2005, following the preparation of a pre-sentence investigation report, appellant's sentencing hearing was held. The trial court sentenced appellant to the maximum prison sentence of 18 months for each count in the information and ordered the sentences to be served consecutively. This appeal followed.

{¶ 4} Appellant now raises the following three assignments of error:

{¶ 5} "I. The trial court erred in imposing the maximum eighteen month prison term upon defendant-appellant for each charge in that it did not comply with the requirements of Ohio Revised Code sections 2929.11 et seq.

{¶ 6} "II. The trial court erred when it failed to properly advise defendant-appellant of the reasons for the imposition of the maximum sentence of eighteen months for each offense.

{¶ 7} "III. The trial court's imposition of consecutive sentences upon defendant-appellant was an abuse of discretion and contrary to law in that the offenses were of similar import."

{¶ 8} In appellant's first assignment of error, he contends that the trial court failed to make the necessary statutory findings prior to the imposition of his sentence. We first note that an offender who receives the maximum possible prison term for only one

offense has a statutory right to appeal the sentence. R.C. 2953.08(A)(1)(a). On review, an appellate court cannot reverse a felony sentence unless it finds, by clear and convincing evidence, that the record does not support the sentencing court's findings or that the sentence is otherwise contrary to law. R.C. 2953.08(G)(2)(a) and (b).

{¶ 9} Appellant was convicted of two fourth-degree felonies which each carry a potential prison term ranging from 6 to 18 months. See R.C. 2929.14(A)(4). In determining the appropriate sentence to impose, a sentencing judge must be mindful of 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(A). Pursuant to R.C. 2929.12(A), a court imposing a sentence for a felony "has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code." This discretion is guided by the factors in R.C. 2929.12(B) and (C), regarding the seriousness of the offender's conduct, R.C. 2929.12(D) and (E), regarding the likelihood of the offender's recidivism, and any other factors that the court finds relevant. However, in making the mandatory determinations pursuant to R.C. 2929.12, the trial court is not required to use specific language or make specific findings. *State v. Arnett*, 88 Ohio St.3d 208, 215, 2000-Ohio-302. In fact, a trial judge may satisfy his or her duty under R.C. 2929.12 with nothing more than a rote recitation that the applicable factors were considered. Id. Further, where the offense is a fourth or fifth degree felony, prior to the imposition of a prison term the trial court must determine whether any of the R.C. 2929.13(B)(1) factors apply.

{¶ 10} Finally, in order to sentence an offender to the maximum term of incarceration, a trial court must make certain findings pursuant to R.C. 2929.14(C). Specifically, "the record must reflect that the trial court imposed the maximum sentence based on the offender satisfying one of the listed criteria in R.C. 2929.14(C)." *State v. Edmonson*, 86 Ohio St.3d 324, 329, 1999-Ohio-110. Those criteria are: (1) the offender committed the worst from of the offense; (2) the offender poses the greatest likelihood of committing future crimes; (3) the offender is a major drug offender; and (4) the offender is a repeat violent offender. R.C. 2929.14(C).

{¶ 11} In the present case, at the sentencing hearing the trial court first indicated that it was "required to consider the overriding purposes for sentencing" and "fashion a penalty which will both protect the public and punish the offender." The court then stated that it examined the seriousness and recidivism factors. Regarding the seriousness factors, the court found that the victim suffered physical and mental harm; the harm was exacerbated by the victim's tender age of 11. The court further found that appellant's relationship with the victim (her stepfather) facilitated the offense. The court noted no less serious factors.

{¶ 12} Regarding recidivism, the court noted appellant's lengthy criminal record and the fact that appellant expressed no remorse; the court did note, however, that appellant claimed that he could not remember the incident. Under less likely to recidivate the court merely noted that appellant had no juvenile record.

{¶ 13} The court then turned to the nine factors listed under R.C. 2929.13 to determine whether a prison sanction was required. The court found two factors: (1) that appellant caused physical harm to the victim and (2) that the crimes were sex offenses. The court then sentenced appellant to the maximum sentence for each charge, finding that, under R.C. 2929.14(C), appellant committed the worst form of the offenses and had the greatest likelihood for recidivism.

{¶ 14} Based on our review of the sentencing hearing, we find that the trial court properly followed the sentencing guidelines and made the necessary findings when sentencing appellant. Appellant's first assignment of error is not well-taken.

{¶ 15} Appellant's second assignment of error asserts that the trial court failed to state its reasons for imposing the maximum sentence for each charge. In addition to the above quoted requirements, if the sentencing court imposes a maximum prison term for a single offense pursuant to R.C. 2929.14(C), it must set forth its reasons for doing so. See *State v. Moore*, 142 Ohio App.3d 593, 597, 2001-Ohio-2376, citing *Edmonson*, supra, at 326; R.C. 2929.19(B)(2)(d). Those reasons must be stated at the sentencing hearing. *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, paragraph two of the syllabus.

{¶ 16} In this case, the trial court noted that because it was imposing a maximum sentence it was required to state its reasons for doing so. The judge then stated: "I incorporate by reference to all the various findings and factors which I have articulated throughout this hearing today." Appellant contends that the court's act of incorporating,

by reference, previous statements was inadequate to comply with R.C. 2929.19(B)(2)(d). We disagree.

{¶ 17} In *State v. Neighbor*, 6th Dist. No. OT-04-005, 2005-Ohio-924, this court determined that the trial court complied with R.C. 2929.19(B)(2)(d) when it incorporated, by reference, the findings and factors previously stated at the sentencing hearing. In reaching this conclusion, we reviewed the entire sentencing hearing transcript and the presentence investigation report which was reviewed by the court. Id. at ¶ 36.

{¶ 18} As in *Neighbor*, we have carefully reviewed the sentencing hearing transcript and the materials that the court had prior to sentencing. Based on the foregoing, we find that the trial court sufficiently stated its reasons for imposing a maximum sentence. Appellant's second assignment of error is not well-taken.

{¶ 19} Appellant's third and final assignment of error disputes the trial court's imposition of consecutive sentences; appellant argues that the offenses were of similar import. The issue of allied offenses was not raised in the trial court and, therefore, our review shall proceed under the plain error analysis. See Crim.R. 52(B); *State v. Fields* (1994), 97 Ohio App.3d 337, 344. Plain error is an obvious error or defect in the trial court proceedings, affecting substantial rights, which, "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of the syllabus.

{¶ 20} Regarding allied offenses of similar import, R.C. 2941.25(A) provides: "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."

{¶ 21} In *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, the Supreme Court of Ohio, overruling *Newark v. Vazirani* (1990), 48 Ohio St.3d 81, set forth the following test for determining whether certain offenses are allied offenses of similar import:

{¶ 22} "If the elements of the crimes "'correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import.'" [*State v. Jones* (1997), 78 Ohio St.3d 12,] 13, 676 N.E.2d at 81, quoting *Blakenship*, 38 Ohio St.3d at 117, 526 N.E.2d 816, 817. If the elements do not so correspond, the offenses are of dissimilar import and the court's inquiry ends--the multiple convictions are permitted. R.C. 2941.25(B). See, also, *State v. Mughni* (1987), 33 Ohio St.3d 65, 68, 514 N.E.2d 870, 873." Id. at 636.

{¶ 23} Examining the facts in this case, we note that the offenses charged did arise from the same course of conduct; however, keeping in mind the standard set forth in *Rance***,** we must now determine whether the offenses of which appellant was convicted may be considered allied offenses of similar import. In the instant case, appellant was convicted of attempted gross sexual imposition, R.C. 2923.02, the attempt statute, and R.C. 2907.05(A)(4), the underlying offense of gross sexual imposition, and importuning, in violation of R.C. 2907.07(A).

{¶ 24} R.C. 2923.02(A) defines the offense of attempt as:

{¶ 25} "No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."

{¶ 26} The relevant sections of R.C. 2907.05, gross sexual imposition, provide:

{¶ 27} "(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

{¶ 28} "* * *

{¶ 29} "(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person."

{¶ 30} Finally, the elements of importuning are:

{¶ 31} "No person shall solicit a person who is less than thirteen years of age to engage in sexual activity with the offender, whether or not the offender knows the age of such person." R.C. 2907.07(A).

{¶ 32} After careful review of the elements of both offenses, we must conclude that they are not allied offenses of similar import. Importuning requires that an individual solicit sexual activity; this element is not required under attempted gross sexual imposition. Accordingly we conclude that the offenses are not allied offenses of similar import. Appellant's third assignment of error is not well-taken.

{¶ 33} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Ottawa County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Ottawa County.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
CONCUR.
JUDGE