[Cite as *State v. Napper*, 2012-Ohio-3859.]

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

State of Ohio — Court of Appeals No. L-11-1079

Appellee — Trial Court No. CR0201003214

v.

Nathaniel Napper — **DECISION AND JUDGMENT**

Appellant — Decided: August 24, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Bruce J. Sorg, Assistant Prosecuting Attorney, for appellee.

Tim A. Dugan, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This case is before the court on appeal from the March 16, 2011 judgment of the Lucas County Court of Common Pleas which, following a plea of no contest, found appellant, Nathaniel Napper, guilty of one count of endangering children, Count 2 of the indictment, in violation of R.C. 2919.22(B)(2) and (E)(1) and (3), a felony of the second

degree, and sentenced him to a prison term of six years.[1] On appeal, appellant raises the following sole assignment of error, "The trial court abused its discretion in sentencing appellant to a prison term of six years."

{¶ 2} According to the prosecutor's statement, on December 3, 2010, appellant's four-month-old son was brought to the Toledo Hospital by ambulance with possible life-threatening injuries. The infant had bleeding on the brain, bruising to his left eye, shoulder and forearm, and his face was swollen.

{¶ 3} The infant's mother told police that the family went to bed around midnight and that the infant was in his crib. At approximately 2:00 a.m., the mother heard noise from the living room which sounded like someone pounding on the door. She investigated the noise, but no one was at the door. Appellant, however, was lying on the couch, appearing to be asleep, with the infant on his chest. She picked up the baby to return him to his crib and noticed that his eyes and lips were swollen and he did not appear to be breathing properly. She asked appellant what had happened and he indicated that "possibly the baby had fallen off his chest and landed on the floor." The mother wanted to call 911, but appellant disagreed and stated that he would give the infant CPR instead.

{¶ 4} Appellant was interviewed and denied any involvement, but later told Detective Jeff Clark that the baby repeatedly woke up crying and that he could not get

[1] Count 1 of the indictment, felonious assault, in violation of R.C. 2903.11(A)(1), a felony of the second degree, was dismissed by nolle prosequi as part of the plea agreement.

him to stop. Appellant stated that he became frustrated, blacked out, and lost it. Appellant stated that he laid the infant on the couch and "smacked him two or three times, tops." The prosecutor stated that the attending doctor would have testified that the infant's injuries were consistent with being hit in the manner described by appellant.

{¶ 5} In addition to the external bodily bruises and swelling, the infant suffered a skull fracture and bleeding on the brain. There was also evidence of a prior bleeding on the brain in the same location as the injury inflicted by appellant. The mother stated that the infant was developmentally delayed by approximately two and one-half months as a result of his injuries, the left side of his body was weaker than his right, and his head was misshapen after surgery, causing him to need to wear a helmet. Counsel for appellant argued that there was no evidence concerning how much developmental delay was caused by the prior injury and the injury for which appellant was found responsible.

{¶ 6} R.C. 2919.22(B)(2), endangering children, prohibits any person from torturing or cruelly abusing a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age. If the violation "results in serious physical harm to the child involved," the offense is elevated to a felony of the second degree. R.C. 2919.22(E)(1) and (3). Appellant's potential term of incarceration for a second degree felony was two, three, four, five, six, seven, or eight years. R.C. 2929.14(A)(2).

{¶ 7} At the sentencing hearing, the court stated that it had afforded appellant his rights pursuant to Crim.R. 32, considered the record, oral statements, the victim impact

statement by the mother, and the presentence report. The court also stated that it "balanced the principles and purposes of sentencing as required under R.C. 2929.11 and the seriousness and recidivism factors as required by R.C. 2929.12." Appellant's counsel pointed out to the court that this was appellant's first felony offense. Appellant stated remorse for his actions and apologized to the families and parties. The court noted that appellant had received parenting classes and should have exercised control when the baby was crying, but was unable to do so, and "lost it." As such, the trial court stated, "you have to be responsible for what occurred that day. You are a young man, you will come out of prison, you will likely see children, have children. You have got to understand that this is a change that has to be for you to understand no matter the ramifications." The court then sentenced appellant to six years of imprisonment, more than the minimum.

{¶ 8} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 26, the Ohio Supreme Court set forth the standard for reviewing trial court sentencing decisions after *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. Appellate courts "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." *Kalish* at ¶ 4. Once the first prong of the standard is satisfied, "the trial court's decision shall be reviewed under an abuse-of-discretion standard." *Id.* Thus, the trial court's sentence will not be overturned absent a finding that it was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). It appears that the Ohio Supreme Court intended to

implicitly overrule its prior holding in *City of Toledo v. Reasonover*, 5 Ohio St.2d 22, 213 N.E.2d 179 (1965), paragraph one of the syllabus, followed in *State v. Hill*, 70 Ohio St.3d 25, 29, 635 N.E.2d 1248 (1994), that the appellate court will generally not consider whether the trial court abused its discretion in sentencing "* * * when the sentence is authorized by statute and is within the statutory limits." *State v. Robbins*, 6th Dist. No. WM-10-018, 2011-Ohio-4141, ¶ 6.

{¶ 9} In this case, we find that there is no arguable merit to a claim that appellant's sentence is clearly and convincingly contrary to law. The trial court expressly stated that it considered the principles and purposes of sentencing under R.C. 2929.11, balanced the seriousness and recidivism factors, as required by R.C. 2929.12, and it imposed a sentence within the statutory range. Following *Kalish*, we must next consider whether the trial court abused its discretion by imposing more than the minimum sentence upon a first-time offender. *State v. Rossback*, 6th Dist. No. L-09-1300, 2011-Ohio-281, ¶ 86.

{¶ 10} The provision of R.C. 2929.14(B), which required that the minimum sentence be imposed unless the court found certain factors existed to support a harsher sentence, was extracted from the statute by *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856, ¶ 99. Therefore, there is no longer a preference for imposing the minimum sentence for first-time offenders. *State v. Robbins*, 6th Dist. No. WM-10-018, 2011-Ohio-4141, ¶ 8. Thus, we must consider whether there were facts in the record on which the trial court could have based its decision to impose more than the minimum sentence.

{¶ 11} In this case, appellant repeatedly struck his four-month-old infant son, resulting in serious physical harm to the child, which, in part, may be permanent in nature. Prior to the events of this crime, appellant received parenting classes concerning how to care for an infant. The trial court seemed concerned with the fact that, even though he received counseling and education in parenting, appellant nevertheless lost control and struck the infant to make him stop crying. Appellant's strikes were so hard that the infant was placed in critical condition and stayed in the hospital several weeks. Despite education in parenting, it appears that appellant failed to understand his need to protect his children and not cause them harm. We, therefore, find that an extended prison term, beyond the minimum provided by law, satisfies the overriding purposes of felony sentencing by protecting the public from future crime, punishing appellant, and rehabilitating him. We also find that a prison term of six years acknowledges the seriousness of the offense and acts to keep appellant from repeating his crimes. The additional years may give appellant the time to reflect upon the importance of his role as father and the reverence he must show children in his care in the future, for their protection and safety.

{¶ 12} Accordingly, we find that the trial court did not abuse its discretion in sentencing appellant to more than the minimum sentence allowed by law. Appellant's sole assignment of error is therefore found not well-taken.

{¶ 13} On consideration whereof, this court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Lucas County Court of

Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

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.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
CONCUR.
JUDGE