

[Cite as *State v. Saur*, 2011-Ohio-6662.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 10AP-1195
	:	(C.P.C. No. 10CR-03-1932)
Ronald Saur,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on December 22, 2011

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*Ron O'Brien*, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

*Yeura R. Venters*, Public Defender, and *John W. Keeling*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, Ronald Saur ("appellant"), appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas following appellant's plea of guilty to felonious assault. For the following reasons, we affirm that judgment.

**I. Facts and Procedural History**

{¶2} On March 26, 2010, appellant was indicted by the Franklin County Grand Jury for the offenses of kidnapping, felonious assault, and domestic violence. The case

was scheduled to go to trial on May 12, 2010. On that date, appellant requested the appointment of new counsel. The trial court appointed new counsel and the matter was continued several times. On October 18, 2010, appellant entered a plea of guilty to felonious assault. Pursuant to the plea arrangement, the other two offenses were dismissed.

{¶3} At the plea hearing, the State of Ohio set forth its factual basis for the plea. According to the facts as set forth at the plea hearing, on March 17, 2010, at approximately 2:00 a.m., appellant's wife, Laurie Kersting-Saur ("Laurie" or "victim" or "wife"), called the police due to an argument with appellant. The police responded, but because there had been no actual violence at that time, the police did not arrest anyone and only arranged for appellant to leave the apartment. A short time later, appellant returned to the apartment and became violent. Appellant threw a cell phone at Laurie and hit her in the mouth. During a two-hour period of time, appellant struck Laurie repeatedly. He forced her to take a shower and tied her up on the bed to stop her from running away.

{¶4} Laurie was eventually able to free herself, so she ran into the hallway. Appellant followed her and dragged her back into the apartment by her hair. A neighbor heard her screams in the hallway and called 911. Once she was inside the apartment again, appellant threw Laurie on the floor of the bedroom, sat on her chest, and held her down, covering her mouth and nose with his hand while choking her and stating he was going to kill her.

{¶5} When the police arrived, appellant was still in the apartment with Laurie. Appellant was arrested and Laurie was taken to Grant Hospital where she was admitted

for several days and treated for lacerations and bruises. While at the hospital, her eye was entirely swollen shut and she was examined for head injuries.

{¶6} The prosecutor also informed the court that just prior to this event, on March 16, 2010, appellant had been released from jail following an arrest for a negligent assault that occurred on March 7, 2010. The instant event occurred within hours of his release from jail.

{¶7} In response to the trial court's inquiry, counsel for appellant advised that he was stipulating to the facts only to the extent of the plea. (October 18, 2010 Tr. 13.)

{¶8} A pre-sentence investigation report ("PSI") was ordered and a sentencing hearing was held on November 29, 2010. In response to the trial court's inquiry, both counsel indicated they had reviewed the PSI. The State, citing to its sentencing memorandum filed November 15, 2010, argued the offense at issue went above and beyond the average felonious assault. The State provided the court with several exhibits consisting of color photographs depicting the victim's injuries and the apartment scene. The State also took issue with appellant's statement in the PSI indicating that he had "clocked" his wife, arguing this event involved much more than appellant punching her one time. The State characterized the incident as a severe beating. Again, the State reiterated that appellant had just been released from jail the day before this incident after he entered a plea to negligent assault following his arrest for domestic violence involving this same victim. The State also asked the trial court to consider the fact that appellant had been at the apartment earlier in the night, during which time a verbal altercation broke out, and after being asked to leave by the police, appellant returned a short-time later and the instant offense occurred.

{¶9} A victim impact statement was read into the record at the sentencing hearing. In her statement, Laurie provided details of the event which were in-line with the details provided by the prosecutor at the plea hearing. Laurie's statement reflected appellant had punched her in the face, sat on her chest, kicked her in the head and ribs, dragged her by her hair, pulled out clumps of her hair, and held a hand over her nose and mouth to suffocate her. Her statement also reflected ongoing physical injury, including poor vision and incapacitating pains in her head, as well as psychological and emotional harm.

{¶10} Appellant's trial counsel made a statement in mitigation at the sentencing hearing and also disputed some of the facts recited by the prosecutor. First, counsel stated appellant never denied that he hit Laurie. However, counsel submitted appellant did not attempt to tie her up or kidnap her. Furthermore, while appellant did not blame her for the event, counsel noted that Laurie had struck appellant in the head with a commercial stapler during the altercation. Appellant, through counsel, denied that the event lasted several hours. Trial counsel for appellant also characterized Laurie's injuries as "a pretty bad black eye." (November 29, 2010 Tr. 9.) Counsel further denied that it was the worst form of the offense.

{¶11} In addition, trial counsel for appellant cited to appellant's background, noting that he was 56-years old, had served six years in the army prior to being honorably discharged, held a degree in horticulture from The Ohio State University, and had operated his own nursery business in New Jersey for 23 years prior to filing for bankruptcy in 2007. Trial counsel also indicated appellant had a prior history of alcohol abuse but no history of violence outside of his relationship with Laurie and no prior felony convictions.

Counsel further argued the State's request for a sentence of at least six years was too severe and requested the trial court to consider judicial release.

{¶12} Appellant also made a statement on his own behalf in which he acknowledged he should not have hit his wife. He stated she was highly intoxicated. He further stated he tried to leave in his van, but because there was no gas in it and his wife had taken all of the money out of the bank account, he was unable to drive to his sister's house. As a result, he got into an argument with his wife.

{¶13} Next, the trial court addressed appellant. The trial court advised appellant he was "a coward" and stated "it is one of the worst forms I've seen. That woman didn't deserve anything that she got that night." (November 29, 2010 Tr. 15.) The trial court noted that appellant had just been released from jail for the same type of offense involving the same individual. The trial court sentenced appellant to a maximum sentence of eight years, awarded 265 days of jail credit, and imposed costs. The trial court further stated:

Mr. Saur, to be honest with you, I've been up here six years. I was a criminal defense lawyer for 22 years before that. That woman took a hell of a beating that night. That's why you got the maximum sentence. Nobody deserves to be treated like that, not even a dog.

(November 29, 2010 Tr. 16.)

{¶14} The trial court journalized the conviction and sentence by filing a judgment entry on December 1, 2010. This timely appeal now follows.

## **II. Assignments of Error**

{¶15} Appellant raises two assignments of error for our review:

ASSIGNMENT OF ERROR #1

APPELLANT'S SENTENCE WAS CONTRARY TO LAW AND CONSTITUTED AN ABUSE OF DISCRETION.

ASSIGNMENT OF ERROR #2

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 10, 16 OF THE OHIO CONSTITUTION.

**III. First Assignment of Error – Contrary to Law and an Abuse of Discretion**

{¶16} In his first assignment of error, appellant argues the trial court erred in imposing a maximum sentence, claiming the sentence imposed was contrary to law and an abuse of discretion. Appellant asserts this is because: (1) the trial court violated the conservation of resources principle set forth in R.C. 2929.13(A); (2) the trial court erred in making a factual finding that the offense at issue was "the worst form of the offense" following the Supreme Court of Ohio's severance of the sentencing statutes in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856; (3) the sentence violates principles of consistency and proportionality; (4) the trial court failed to properly consider or weigh the factors in R.C. 2929.12 and put too much emphasis on the victim's injuries; and (5) the trial court abused its discretion in failing to waive costs in this action.

**A. Standard of Review**

{¶17} We begin our analysis by discussing the applicable standard of review. Under R.C. 2953.08(G), an appellate court may modify a sentence or remand a case for resentencing if the court clearly and convincingly determines the sentence is contrary to law. *State v. Webb*, 10th Dist. No. 06AP-147, 2006-Ohio-4462, ¶11, citing *State v.*

*Maxwell*, 10th Dist. No. 02AP-1271, 2004-Ohio-5660; *State v. Vaughn*, 10th Dist. No. 09AP-73, 2009-Ohio-4970; *State v. Russell*, 10th Dist. No. 09AP-428, 2009-Ohio-6420. In post-*Foster* cases, we have held that R.C. 2953.08(G) requires us to continue to review felony sentences under the clearly and convincingly contrary to law standard. *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, ¶19; *Vaughn* at ¶12. "In applying the clear and convincing as contrary to law standard, we would 'look to the record to determine whether the sentencing court considered and properly applied the [non-excised] statutory guidelines and whether the sentence is otherwise contrary to law.'" *Burton* at ¶19, quoting *State v. Vickroy*, 4th Dist. No. 06CA4, 2006-Ohio-5461, ¶16.

{¶18} Following *Burton*, the Supreme Court of Ohio issued a plurality decision in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, finding appellate courts must apply a two-step approach when reviewing felony sentences. First, 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. If this is satisfied, then the appellate court reviews the decision to impose a term of imprisonment under the abuse of discretion standard. *Id.* at ¶26; *Vaughn* at ¶13; and *Russell* at ¶13.

{¶19} Thus, under the plurality opinion set forth in *Kalish*, once an appellate court has determined the sentence is not contrary to law, it then must consider the sentencing court's post-*Foster* application of R.C. 2929.11 and 2929.12. *Vaughn* at ¶14; *Russell* at ¶13. R.C. 2929.11 and 2929.12 are not factfinding statutes. They serve as an "overarching guide" for a trial judge to consider in imposing an appropriate sentence. *Kalish* at ¶17. Consequently, *Foster* provided trial courts with "full discretion to determine

whether the sentence satisfies the overriding purpose of Ohio's sentencing structure." *Kalish* at ¶17. Furthermore, because R.C. 2929.12 allows the trial court to "exercise its discretion in considering whether its sentence complies with the purposes of sentencing[.]" the *Kalish* court concluded an appellate court's review of the actual term of incarceration should be under an abuse of discretion standard. *Kalish* at ¶17.

{¶20} Whether we apply the two-step analysis set forth in *Kalish* or simply the contrary to law standard used in *Burton*, we find the trial court did not err in sentencing appellant to a maximum period of incarceration.

{¶21} It is significant to note that appellant did not raise these arguments in the trial court. As a result, we may reverse appellant's sentence only if the sentence imposed rises to the level of plain error. Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." We notice plain error " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus. Plain error is not present unless, but for the error complained of, the outcome would have been different. *Long* at paragraph two of the syllabus; *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, ¶78.

{¶22} As set forth more fully below, we find no error, plain or otherwise, in the trial court's imposition of a maximum sentence.

## **B. Conservation of Resources**

{¶23} Appellant argues the imposition of an eight-year prison term violates the conservation principle set forth in former R.C. 2929.13(A), which provided, "[t]he sentence

shall not impose an unnecessary burden on state or local government resources."<sup>1</sup> Assuming, for the sake of argument, that this provision would still be applicable to appellant's sentence as imposed in 2010, we find appellant's argument on this issue fails.

{¶24} In *Burton*, we held, that although resource burdens are relevant sentencing considerations under R.C. 2929.13(A), a sentencing court is not required to elevate resource conservation above seriousness and recidivism factors. *Id.* at ¶39. Quoting *State v. Wolfe*, 7th Dist. No. 03 CO 45, 2004-Ohio-3044, ¶17 and *State v. Vlahopoulos*, 154 Ohio App.3d 450, 2003-Ohio-5070, ¶5, we found in *Burton* at ¶39 " 'The court must also consider the benefit to society in assuring that an offender will not be free to reoffend. Many people sleep better at night knowing that certain offenders are incarcerated. They would no doubt consider a lengthy incarceration worth the cost of housing those offenders.' "

{¶25} Here, appellant was released from jail just hours before the instant offense occurred. The prior offense was an offense of violence involving the same victim, who was subsequently beaten to the point that she required hospitalization for several days. Appellant had also been removed from the residence by the police shortly before the instant offense occurred, thus providing him with the opportunity to extricate himself from the situation; yet he returned and committed this offense. Therefore, we reject appellant's claim that a lengthy prison sentence constitutes an "unnecessary burden" on government resources pursuant to R.C. 2929.13(A).

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<sup>1</sup> The 2011 amendments to the sentencing statutes, which became effective September 30, 2011, have deleted this sentence.

### C. Worst Form of the Offense

{¶26} Appellant contends his sentence is clearly and convincingly contrary to law as a result of the trial court's explicit "worst form of the offense" finding, arguing that such a finding is unlawful pursuant to *Foster*, which severed R.C. 2929.14(C)<sup>2</sup> from the sentencing statutes. Appellant argues the trial court erred by applying, relying upon, and making factual findings pursuant to this unconstitutional, severed statutory provision.

{¶27} We do not find that the circumstances here amount to impermissible fact-finding. It was not improper for the trial judge to comment that this particular beating was the worst domestic violence-related felonious assault he had seen during his time as a practicing attorney and as a judge. While sentencing courts are no longer required to engage in judicial factfinding in order to impose maximum sentences pursuant to *Foster*, it was not error for the trial court to casually comment in this manner when there is no indication that the trial court relied upon the severed portion of the sentencing statute.

{¶28} Appellant relies on several cases from other appellate districts to support his position a maximum sentence was imposed following findings related to the worst form of the offense under R.C. 2929.14(C). See, for example, *State v. Taylor*, 6th Dist. No. OT-09-018, 2011-Ohio-359, ¶46; *State v. Adams*, 4th Dist. No. 04CA2959, 2009-Ohio-6491, ¶11; and *State v. Profanchik*, 7th Dist. No. 06-MA-143, 2007-Ohio-6430, ¶25. However, we find these cases to be distinguishable from the instant case. This is because the sentencing courts in those cases specifically relied upon and/or specifically cited to the

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<sup>2</sup> R.C. 2929.14(C) permitted the longer prison term authorized for the offense only for offenders who committed the worst forms of the offense, who posed the greatest likelihood of committing future crimes, and upon certain major drug offenders and certain repeat violent offenders.

severed sentencing provisions in their oral pronouncements at the sentencing hearing and/or in their journal entries. That is not the case in the matter currently before us.

{¶29} Notably, in *Profanchik*, the Seventh District cited to its earlier decision in *State v. Moore*, 7th Dist. No. 06 MA 60, 2007-Ohio-1574, and determined that "a trial court is free to consider any factors it finds relevant in sentencing a defendant regardless of whether the factors were previously contained in the now-excised statutory sections" but it is error to "expressly cite to and rely upon a statutory provision that was specifically found to be unconstitutional by the Ohio Supreme Court." *Profanchik* at ¶19. We too have previously found a sentencing court is free to consider any relevant factors in sentencing an offender, including those found in the now-excised provisions of the sentencing statutes. See *State v. Carse*, 10th Dist. No. 09AP-932, 2010-Ohio-4513, ¶63-64.

{¶30} In *Carse*, the trial court stated during the sentencing hearing that it had considered the purposes and principles of sentencing. It then further stated: "I find that this is the most serious offense, and I'm not required to make these findings any more due to the *Foster* case, but without question if any case cries out for the maximum sentence, this does." *Id.* at ¶63. As a result, the defendant in *Carse* argued his sentence was void because the trial court improperly relied on R.C. 2929.14(C) after *Foster* severed that provision from the statute as unconstitutional. *Carse* cited to *Adams* and *Profanchik* as authority to support his position. However, we rejected his characterization that the trial court had relied upon the severed provision, as there was nothing in the judgment entry indicating he was sentenced "pursuant to" R.C. 2929.14(C). We further determined the trial court's statement during the hearing demonstrated it understood *Foster* no longer required it to make the finding under R.C. 2929.14(C) before imposing the maximum

sentence. Additionally, we found courts may consider a variety of factors in imposing a sentence within the permissible statutory range.

{¶31} In the instant case, like in *Carse*, there is nothing in the judgment entry which indicates the trial court sentenced appellant "pursuant to" R.C. 2929.14(C). The judgment entry states the trial court "has weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and R.C. 2929.14." (Judgment Entry, at 1.) Furthermore, the trial court's sentencing entry in the instant case reflects the court's awareness of and compliance with *Foster*, stating as follows: "After imposing sentence, the Court stated its reasons as required by R.C. 2929.19 and consistent with *State v. Foster*, 2006-Ohio-856." (Judgment Entry, at 1.) Thus, it is evident that the trial court was aware of the implications of the *Foster* case. See also *State v. Amos*, 7th Dist. No. 07 BE 22, 2008-Ohio-7138, ¶33 (a trial court may rely upon factors enumerated in the statutory provisions severed by *Foster*, but it may not cite them as controlling authority); and *State v. Haslam*, 7th Dist. No. 08 MO 3, 2009-Ohio-1663, ¶13 (it is not error to merely refer to the sentencing factors found within the now-severed provisions of R.C. 2929.14 or to use language which might be found in them; the trial court must explicitly state that it is sentencing the offender pursuant to one of the now-severed provisions of R.C. 2929.14 in order for his sentence to be in error).

#### **D. Consistency and Proportionality**

{¶32} Appellant submits his eight-year maximum sentence was neither proportional nor consistent pursuant to R.C. 2929.11(B) and therefore it was contrary to law and constituted an abuse of discretion. Appellant asserts the trial court failed to even consider the proportionality and consistency provisions under R.C. 2929.11(B) and that his

sentence violates both R.C. 2929.11(B) and 2929.12. Appellant cites to a plethora of cases and argues the sentences imposed in those cases support his position that the sentence imposed in the instant case is inconsistent and overly harsh under the circumstances.

{¶33} Using the cited cases, appellant argues the offenders who received maximum sentences for felonious assault convictions in those cases all had long criminal histories (unlike himself) and inflicted much greater pain and suffering on their victims than he did. Because he is not a hardened criminal, and because the circumstances here are less egregious and did not involve multiple stabbings, brain damage, permanent disability, multiple bone fractures, lost organs, or near bleeding to death, as was the situation in the cases he cited, Laurie's injuries were not commensurate with the injuries of those victims, and therefore a maximum sentence was not warranted. Appellant also cites to numerous cases in which the felonious assault victims sustained much more serious injuries than the victim in the instant case, yet those offenders received sentences which were *less than* the maximum sentence. Based upon all of this, appellant submits his sentence was not proportional to the nature of the crime.

{¶34} The consistency and proportionality requirement set forth in R.C. 2929.11(B) requires trial courts to impose punishment and sentencing that is consistent with that imposed for similar crimes committed by similar offenders. Specifically, R.C. 2929.11(B) provides:

A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and

consistent with sentences imposed for similar crimes committed by similar offenders.

{¶35} Furthermore, under R.C. 2929.12, a court imposing a sentence upon a felony offender has the discretion to determine the most effective way to comply with the purposes and principles of sentencing. See R.C. 2929.12(A). Consequently, the court must consider the factors set forth in divisions (B) and (C) relating to the seriousness of the offender's conduct, as well as the factors set forth in divisions (D) and (E) relating to the likelihood of recidivism, along with any other relevant factors. R.C. 2929.12(A).

{¶36} "Pursuant to R.C. 2929.11(B), a felony sentence shall be 'consistent with the sentences imposed for similar crimes committed by similar offenders.' " *State v. Hayes*, 10th Dist. No. 08AP-233, 2009-Ohio-1100, ¶8. " 'Consistency, however, does not necessarily mean uniformity. Instead, consistency aims at similar sentences. Accordingly, consistency accepts divergence within a range of sentences and takes into consideration a trial court's discretion to weigh relevant statutory factors. \* \* \* Although offenses may be similar, distinguishing factors may justify dissimilar sentences.' " *Id.*, quoting *State v. Battle*, 10th Dist. No. 06AP-863, 2007-Ohio-1845, ¶24.

{¶37} As a result, a consistent sentence is not achieved from a case-by-case comparison, but by the trial court's proper application of the statutory sentencing guidelines. *Hayes* at ¶9, citing *State v. Hall*, 179 Ohio App.3d 727, 2008-Ohio-6228, ¶10. A sentencing court is not required to make a comparison of the current case to previous cases, but is required to appropriately apply the statutory sentencing guidelines in order to maintain consistency. *State v. Holloman*, 10th Dist. No. 07AP-875, 2008-Ohio-2650, ¶19, citing *State v. Kalish*, 11th Dist. No. 2006-L-093, 2007-Ohio-3850, ¶18. Thus, in order to

demonstrate that a sentence is inconsistent, an offender cannot simply present other cases in which an individual convicted of the same offense received a lesser sentence. *Hayes* at ¶10, citing *Battle* at ¶23. See also *State v. Quine*, 9th Dist. No. 20968, 2002-Ohio-6987, ¶13 ("Appellant cannot establish, either at trial or on appeal, that his sentence is contrary to law because of inconsistency by providing the appropriate court with evidence of other cases that show similarly situated offenders have received different sentences than did he.").

{¶38} Instead, a defendant claiming inconsistent sentencing must show the trial court failed to properly consider the statutory sentencing factors and guidelines in R.C. 2929.11 and 2929.12. *Hayes* at ¶10; *Holloman* at ¶19. In order to demonstrate inconsistency, the appellant must point to facts and circumstances within the record which demonstrate the sentencing court's failure to properly consider the relevant factors. *State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664, ¶10, citing *State v. Todd*, 10th Dist. No. 06AP-1208, 2007-Ohio-4307, ¶15. Therefore, in applying the contrary to law standard, we must determine whether the trial court properly considered and applied the appropriate statutory guidelines and whether the sentence is otherwise contrary to law. *Franklin* at ¶10.

{¶39} Here, the sentencing judgment entry states in relevant part as follows:

The Court has considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12. In addition, the Court has weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and R.C. 2929.14. The Court further finds that a prison term **is not** mandatory pursuant to R.C. 2929.13(F).

\* \* \*

After imposing sentence, the Court stated its reasons as required by R.C. 2929.19 and consistent with *State v. Foster*, 2006-Ohio-856.

(Judgment Entry, at 1.)

{¶40} We have previously held that similar language in the trial court's judgment entry defeats a claim that the trial court failed to consider the purposes and principles of felony sentencing as set forth in R.C. 2929.11 and 2929.12. See *State v. Daniel*, 10th Dist. No. 05AP-564, 2006-Ohio-4627, ¶50; *State v. Braxton*, 10th Dist. No. 04AP-725, 2005-Ohio-2198, ¶27; *State v. Sharp*, 10th Dist. No. 05AP-809, 2006-Ohio-3448, ¶6. Thus, this statement satisfies the consistency requirement under R.C. 2929.11(B). See *Franklin* at ¶14. Consequently, appellant's sentence is not clearly and convincingly contrary to law under either *Kalish* or *Burton*.

{¶41} In addition, based upon the facts and circumstances at issue in this case, the trial court's sentence was not an abuse of discretion. It clearly falls within the applicable range of sentences for this type of violation. The trial court considered the PSI, statements from the prosecution and defense counsel, as well as the victim impact statement and a statement from appellant himself. Furthermore, the trial court explained its reasoning during the sentencing hearing. Immediately before imposing sentence, the trial court had the following exchange with appellant:

The Court: Well, basically it wasn't a self-defense situation, okay? You could have walked down the road. You shouldn't even have went and got her. I'm sorry.

\* \* \*

The Court: And then to compound it with State's Exhibit 1 [photograph of victim] - -

The [Appellant]: Right.

The Court: - - State's Exhibit 5, 6 [photographs of victim], I mean, you just waled on her that night.

The [Appellant]: Yes, sir.

The Court: I mean, you were just a coward. And I'm sorry. You know, it is one of the worst forms I've seen. That woman didn't deserve anything that she got that night.

Because of that, I do think it's the worst form of the crime, especially when you just got out of jail for the very same offense, the domestic violence, maybe not to that extent, but you just had to hover over her and hit her. Just to say you hit her once isn't making it. I do find it's the worst form. It will be an eight-year sentence.

(November 29, 2010 Tr. 14-15.)

{¶42} These circumstances would support a sentence imposing a maximum period of incarceration, and therefore, we find appellant's sentence was neither contrary to law nor an abuse of discretion as it relates to the proportionality and consistency requirement set forth in R.C. 2929.11(B).

#### **E. Sentencing Factors in R.C. 2929.12**

{¶43} Appellant further argues the trial court failed to properly consider or weigh the sentencing factors set forth in R.C. 2929.12, claiming the trial court placed too much weight on considering the victim's injuries. Appellant asserts the trial court failed to consider or weigh factors such as inducement, provocation, and mitigation, arguing the victim was highly intoxicated during the incident and she also struck appellant on the head with a commercial stapler during the altercation. Appellant argues this failure constitutes a sentence that is contrary to law and an abuse of discretion.

{¶44} The failure to indicate at the sentencing hearing that the trial court has considered the factors in R.C. 2929.11 and 2929.12 does not automatically require reversal. *State v. Reed*, 10th Dist. No. 09AP-1163, 2010-Ohio-5819, ¶8. "When the trial court does not put on the record its consideration of R.C. 2929.11 and 2929.12, it is presumed that the trial court gave proper consideration to those statutes." *Id.*, citing *Kalish* at ¶18, fn. 4. "A trial court's rote recitation that it has considered applicable factors satisfies the court's duty to follow the relevant statutes in sentencing an offender." *State v. Easley*, 10th Dist. No. 08AP-755, 2009-Ohio-2984, ¶19 (citations omitted). "The Code does not specify that the sentencing judge must use specific language or make specific findings on the record in order to evince the requisite consideration of the applicable seriousness and recidivism factors." *State v. Arnett*, 88 Ohio St.3d 208, 215, 2000-Ohio-302.

{¶45} Here, the trial court's December 1, 2010 judgment entry states it has considered the purposes and principles of sentencing as set forth in R.C. 2929.11, as well as the factors set forth in R.C. 2929.12. (Judgment Entry, at 1.) We have previously found that such language in the judgment entry defeats a claim that the trial court failed to consider the purposes and principles of sentencing. *State v. Reeves*, 10th Dist. No. 09AP-493, 2010-Ohio-4018, ¶16.

{¶46} Furthermore, in considering the factors set forth in R.C. 2929.12, the trial court has the discretion "to determine the weight to assign a particular statutory factor." *Arnett* at 215, citing *State v. Fox* (1994), 69 Ohio St.3d 183, 193. In addition to considering the seriousness and recidivism factors, the trial court is permitted to consider any other factors which are relevant to achieving the purposes and principles of

sentencing. See R.C. 2929.12(A). Still, there is no requirement that the sentencing court make "findings" pursuant to R.C. 2929.11 or 2929.12 on the record at the hearing. *Reed* at ¶64.

{¶47} In the case sub judice, appellant claims the trial court put too much weight on the victim's "significant bruising and battering" and failed to properly weigh other factors, such as the victim's intoxicated state and appellant's mitigation. However, the trial court was not required to believe appellant's assertion that he just "clocked" her, implying that he only struck her one time, particularly given the extent of her injuries. It is evident that the trial court was impacted by the extent of the victim's injuries and the context within which the injuries were inflicted during that particular time period, as well as by the seriousness of appellant's conduct. Those are considerations which are well within the trial court's exercise of its discretion. Appellant's disagreement with the trial court's justification for the sentence is not grounds for reversal here.

{¶48} Therefore, we find the trial court properly considered the purposes and principles of sentencing set forth in R.C. 2929.11, as well as the applicable factors set forth in R.C. 2929.12, along with any other relevant factors and circumstances. While appellant may disagree with the weight given to these factors by the trial judge, appellant's sentence was within the applicable statutory range for a felony of the second degree and therefore, we have no basis for concluding that it is contrary to law. Similarly, the trial court's sentence cannot be said to be an abuse of discretion given the circumstances here. See *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219 (an abuse of discretion "implies that the court's attitude is unreasonable, arbitrary or unconscionable.").

## F. Costs

{¶49} Finally, appellant argues the trial court abused its discretion in failing to waive the court costs associated with this action, given the loss of his business and his indigency status. Appellant submits he has no means to pay any costs in prison, and it is unreasonable to subject him to such costs in addition to imposing a maximum sentence. We disagree.

{¶50} R.C. 2947.23 requires the assessment of court costs as part of a criminal sentence imposed against all criminal defendants, even if the defendant is indigent. *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, ¶8. Waiver of costs assessed against indigent defendants is permissible, but not required. *Id.* at ¶14. In *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, paragraph two of the syllabus, the Supreme Court of Ohio held that a motion by an indigent criminal defendant to waive payment of costs must be made at the time of the sentencing hearing. "If the defendant makes such a motion, then the issue is preserved for appeal and will be reviewed under an abuse-of-discretion standard. Otherwise, the issue is waived and costs are res judicata." *Id.* at ¶23. Limited statutory authority exists for the waiver of payment of costs if the defendant is indigent. See R.C. 2949.092.

{¶51} Here, appellant's counsel made an oral motion at the sentencing hearing, pursuant to *State v. Clevenger*, 114 Ohio St.3d 258, 2007-Ohio-4006, requesting that appellant's court costs be waived due to his indigency status. The trial court denied the motion, but because it was raised at the time of sentencing, it has been preserved for appeal.

{¶52} Nevertheless, we find nothing in the record to suggest that the trial court abused its discretion in denying the motion to waive the payment of costs and appellant has cited little to support this claim, other than claiming he has no means to pay while in prison and/or that it is unreasonable to subject him to both a maximum sentence and court costs. This does not amount to an abuse of discretion.

### **G. Summary**

{¶53} Accordingly, for all of the reasons cited above, we overrule appellant's first assignment of error.

### **IV. Second Assignment of Error – Ineffective Assistance of Counsel**

{¶54} In his second assignment of error, appellant claims he was denied the effective assistance of counsel. Appellant argues his trial counsel failed to make any of the objections raised in his first assignment of error, namely that counsel should have objected: (1) on conservation grounds; (2) on the basis of an illegal post-*Foster* "worst form of the offender" finding; (3) on consistency and proportionality grounds; and (4) on abusiveness grounds relating to the failure to properly consider the various sentencing factors. Appellant further submits his trial counsel should have filed an affidavit of indigency in order to avoid the ultimate imposition of court costs in the sentencing entry. Finally, appellant argues his trial counsel should have objected immediately after the sentence was imposed and asked the trial court to reconsider its sentence by providing the court with specific cases in which similar crimes were given lesser sentences. Appellant asserts that if his trial counsel had done these things, the results of the proceedings would have been different. We disagree.

{¶55} In Ohio, a properly licensed attorney is presumed competent. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 301. Therefore, the burden of showing ineffective assistance of counsel is on the party asserting it. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie* (1998), 81 Ohio St.3d 673, 675. Additionally, in fairly assessing counsel's performance, there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶101.

{¶56} Trial strategy and even debatable trial tactics do not establish ineffective assistance of counsel. *Id.* at ¶111. A reviewing court must be "highly deferential to counsel's performance and will not second-guess trial strategy decisions." *State v. Tibbetts*, 92 Ohio St.3d 146, 166-67, 2001-Ohio-132. Strategic choices made after substantial investigation "will seldom if ever" be found wanting. *Strickland v. Washington* (1984), 466 U.S. 686, 681, 104 S.Ct. 2052, 2061.

{¶57} "[T]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied on as having produced a just result." *Id.* at 686, 104 S.Ct. at 2064. In order to succeed on a claim of ineffective assistance of counsel, appellant must satisfy a two-prong test. First, he must demonstrate that his trial counsel's performance was deficient. *Id.* at 687, 104 S.Ct. at 2064. This requires a showing that his counsel committed errors which were "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* If he can show deficient performance, he must next demonstrate that he was prejudiced by the deficient performance. *Id.* To

show prejudice, he must establish there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one sufficient to erode confidence in the outcome. *Id.* at 694, 104 S.Ct. at 2068.

{¶58} When a claim of ineffective assistance of counsel is based upon counsel's failure to file or make a particular motion, the defendant must show that the motion had a reasonable probability of success. *State v. Barbour* (May 6, 2008), 10th Dist. No. 07AP-841, ¶14, citing *State v. Adkins*, 161 Ohio App.3d 114, 2005-Ohio-2577, ¶14; *State v. Boddie*, 10th Dist. No. 10AP-687, 2011-Ohio-3309, ¶10; and *State v. Ryan*, 10th Dist. No. 08AP-481, 2009-Ohio-3235, ¶81.

{¶59} Based upon our analysis of appellant's first assignment of error, in which we addressed the issues of conservation of resources, the "worst form of the offense" finding, consistency and proportionality, consideration of the factors in R.C. 2929.12, and the imposition of court costs, we find nothing in the record to suggest that appellant's trial counsel was ineffective.

{¶60} Appellant himself, after requesting and being provided with a new attorney, reported to the trial court that he was satisfied with his representation and that his new attorney had done an "excellent" job. (October 18, 2010 Tr. 11.) The trial judge also remarked at the sentencing hearing that appellant's trial counsel had "fought hard for him" and that he "had a very tough job." (November 29, 2011 Tr. 15.)

{¶61} Additionally, there is nothing to suggest that, had appellant's trial counsel made the motions or raised the objections appellant now desires to be made, there was a

reasonable probability appellant would have been successful in getting those objections or motions sustained.

{¶62} For example, even if we analyzed appellant's conservation argument using a standard less than plain error, appellant does not have a reasonable probability of prevailing, given the violence involved in this offense and its close proximity to a previous incident of violence. As for the trial court's consideration of the sentencing factors in R.C. 2929.11 and 2929.12, it is readily apparent that proper consideration was given, as set forth in our analysis of appellant's first assignment of error. Regarding counsel's failure to file an affidavit of indigency to avoid the imposition of court costs, the transcript indicates the trial court had, in essence, already made up its mind on that issue, and such a determination was within its discretion. Furthermore, the "worst form of the offense" reference was not an unconstitutional finding, so an objection to that reference would have likely had no impact.

{¶63} The focus of appellant's argument here, however, is on the consistency and proportionality requirement and the fact that trial counsel did not object immediately after imposition of a maximum sentence and/or that trial counsel had not armed himself with the cases cited in appellant's brief. Appellant seems to believe that, had he done so, the trial court would have reduced its sentence. However, given the trial court's apparent view of the circumstances of this case, such a reduction was highly unlikely. Moreover, simply citing to those cases would not prove appellant's assertion that the sentence was inconsistent, as set forth in our analysis of the first assignment of error. Therefore, appellant lacks a reasonable probability of success on these grounds. As for the impact

such an objection would have had on our review of this case, we find there is not a reasonable probability the objection would have changed the outcome of the proceedings.

{¶64} Accordingly, we overrule appellant's second assignment of error.

**V. Conclusion**

{¶65} In conclusion, we overrule appellant's first and second assignments of error.

The judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

BRYANT, P.J., and TYACK, J., concur.

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