[Cite as *State v. Druktenis*, 2011-Ohio-6519.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-A-0027**
- vs -	:	
MICHAEL DRUKTENIS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2009 CR 236.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelly M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Marie Lane, Ashtabula County Public Defender, Inc., 4817 State Road, Suite 202, Ashtabula, OH 44004-6927 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Michael Druktenis appeals from a judgment of the Ashtabula Court of Common Pleas which sentenced him to five years in prison for causing serious injury to his infant son. He claims the trial court abused its discretion in imposing the maximum sentence for his conviction of endangering children. After reviewing the record and pertinent law, we affirm the trial court's sentence.

{¶2} **Substantive Fact and Procedural History**

{¶3} Mr. Druktenis' three-month-old son suffered serious injuries while in his care. The circumstances surrounding the baby's extensive injuries are unclear. According to what Mr. Druktenis told law enforcement, the incident occurred while he was caring for both his two-and-half-year-old daughter and infant son. He took the baby outside because his daughter wanted to play in the yard. He strapped him in a child seat, and put the seat on the hood of his truck, so that he could feed him while watching his daughter. While playing with his daughter, "his coat got caught on [the baby's] chair and [the baby] fell onto the driveway." Mr. Druktenis checked him, and he seemed "just fine" and "just a little fussy."

{¶4} The next day, while Mr. Druktenis' mother was babysitting the baby, he started to have seizures. She took him to Ashtabula County Medical Center, and a CT scan indicated acute traumatic brain hemorrhage. The baby was then life-flighted to the Rainbow Babies and Children's Hospital, where he was diagnosed with Shaken Baby Syndrome. The scan showed bilateral retinal hemorrhaging, subdural hematoma, and "old injuries [that] were located with old blood on the brain."

{¶5} When asked by a detective why he did not seek immediate medical attention for his son, Mr. Druktenis stated he did not think the child was injured from the fall. However, he also stated, somewhat inconsistently, that he "had a guilty feeling from the beginning and he knew he should've acted differently for his son's sake."

{¶6} The state charged Mr. Druktenis with one count of felonious assault, in violation of R.C. 2903.11, a second degree felony. The state also charged him with one count of endangering children, specifically, abusing a child resulting in serious physical harm, in violation of R.C. 1919.22, also a second degree felony. Mr. Druktenis initially pled not guilty to these charges.

{¶7} Subsequently, under a plea bargain, Mr. Druktenis withdrew his guilty plea and entered an *Alford* plea[1] to one count of endangering children, in violation of R.C. 2919.22(A) and (E)(2)(c),[2] a felony of the third degree. The count of endangering children at issue involves "creating a substantial risk to the health or safety of the child," resulting in serious physical harm. It is, as indicated in the court's judgment entry accepting Mr. Druktenis' plea, a lesser included offense of endangering children by abusing a child resulting in serious physical harm, as was originally charged in the indictment. The parties did not agree on a sentence.

{¶8} After accepting his plea, the court ordered a presentence investigation ("PSI"). At the sentencing hearing, Mr. Druktenis' counsel advocated for community control sanctions for his offense, stressing that the baby's injury was a result of an accident, and that Mr. Druktenis' prior offenses had not involved physical injury to others.

{¶9} The prosecutor, on the other hand, urged the court to impose the maximum sentence of five years for the offense. The prosecutor recounted the baby's extensive injuries, and also reported that, according to a pediatric neurosurgeon, Dr. Cohen, it was impossible for the baby's injuries, as documented in his medical record, to have been caused by a fall from the hood of a vehicle. The prosecutor also noted the

[1] In an "*Alford* plea," a defendant pleads guilty yet maintains actual innocence of the charges. See *North Carolina v. Alford* (1970), 400 U.S. 25.

[2] We note that the judgment entry accepting the guilty plea shows "R.C. 2919.22(A)(E)(2)(c)" as the Revised Code section Mr. Druktenis pled guilty to, and that same section number is referred to throughout the entire file. However, an ampersand ("&") was apparently inadvertently omitted from the section number, as there is no subsection (A)(E)(2)(c) in R.C. 2919.22. Our review of R.C. 2919.22 in its entirety indicates the correct section number should have been "R.C. 2919.22(A) & (E)(2)(c)."

PSI reflected that Mr. Druktenis gave several different accounts of the incident to law enforcement, while never truly taking responsibility for what happened to his son.

{¶10} Mrs. Druktenis' wife, the baby's mother, who had been separated from her husband before the incident, told the court that, as a result of the incident, the baby is completely blind in one eye and bangs his head daily. She reported that it is a daily battle to care for the baby, because he requires countless medical appointments and physical, occupational, and speech therapy to deal with the injuries. Mr. Druktenis declined the opportunity to speak on his own behalf.

{¶11} The trial court imposed the maximum five-year sentence for a third degree felony. Prior to pronouncing the sentence, the court addressed Mr. Druktenis: "[B]ased upon the pre-sentence investigation report, the information that has been provided [here] in court, including the statements of counsel, it is my conclusion that community controls would be demeaning to the seriousness of your conduct in this case and would not be commensurate with that conduct. This is an extremely serious, serious matter, and certainly I mean it is clear that your attorney certainly did an outstanding benefit for you in being able to get the charge reduction considering the serious consequences to this little boy. In light of all of the circumstances, particularly the grievousness of the injury and so forth, I think that the recommendation of the State is more than fair under the circumstances."

{¶12} Mr. Druktenis now appeals, raising a single assignment of error:

{¶13} "The trial court abused its discretion when it imposed the maximum sentence."

{¶14} Mr. Druktenis maintains the maximum sentence was unduly harsh and not supported by the record. He claims, specifically, that the court sentenced him for "conduct far more severe than that for which he was actually convicted."

{¶15} R.C. 2919 ("Endangering children") states, in pertinent part:

{¶16} "(A) No person, who is the parent, guardian, custodian, person having custody or control, *** shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support. ***

{¶17} "(B) No person shall do any of the following to a child under eighteen years of age ***:

{¶18} "(1) Abuse the child;

{¶19} "***

{¶20} "(E) (1) Whoever violates this section is guilty of endangering children.

{¶21} "(2) If the offender violates division (A) or (B)(1) of this section, endangering children is one of the following ***:

{¶22} "(a) Except as otherwise provided in division (E)(2)(b), (c), or (d) of this section, a misdemeanor of the first degree;

{¶23} "(b) If the offender previously has been convicted of an offense under this section or of any offense involving neglect, abandonment, contributing to the delinquency of, or physical abuse of a child, except as otherwise provided in division (E)(2)(c) or (d) of this section, a felony of the fourth degree;

{¶24} "(c) If the violation is a violation of division (A) of this section and results in serious physical harm to the child involved, a felony of the third degree;

{¶25} "(d) If the violation is a violation of division (B)(1) of this section and results in serious physical harm to the child involved, a felony of the second degree."

{¶26} Thus, when a parent "abuses the child", and the abuse results in serious physical harm, the offense of endangering children is a second degree felony; when a parent "creates a substantial risk to the health or safety" of the child, and it results in serious physical harm to the child, the offense of endangering children is a felony of the third degree.

{¶27} Mr. Druktenis was initially charged with felonious assault, and endangering children in violation of R.C. 2919.22(B)(1) and (E)(2)(d), i.e., "abusing the child," which results in serious physical harm, a felony of second degree. Under the plea bargain, he pled guilty to a lesser-included charge: endangering children in violation of 2919.22(A) and (E)(2)(c), i.e., "creating a substantial risk to the health or safety of the child," resulting in serious physical harm.

{¶28} Mr. Druktenis claims that, although he pled guilty to and was convicted of endangering children in creating a substantial risk to the health or safety of a child resulting in serious bodily harm, a third degree felony, the trial court actually sentenced him for conduct originally alleged in the indictment, i.e., abusing the child resulting in serious bodily harm, a second degree felony.

{¶29} Our review of the record gives no indication that the trial court based its sentence on the offense of abusing a child resulting in serious physical harm as originally charged in the indictment. At sentencing, the prosecutor stated that the defendant was originally charged with felonious assault and endangering children, both second degree felonies, but, through a plea bargain, pled guilty to a reduced charge of "endangering children, a felony of the third degree." Mr. Druktenis' counsel similarly represented to the court that his client pled guilty to the offense of creating a substantial risk to the health or safety of a child, which resulted in serious physical harm.

Moreover, the court's judgment entry of sentence also stated that the defendant entered an *Alford* plea to one count of endangering children, in violation of R.C. 29119.22(A)&(E)(2)(c), a felony of the third degree and a lesser included offense of the offense charged in count two of the indictment.

{¶30} Thus, the record clearly reflects that the court imposed the sentence for the offense of endangering children by creating a substantial risk to the health or safety of the child, rather than for endangering children by abusing a child, as Mr. Druktenis claims.

{¶31} As to the issue of whether the trial court abused its discretion in imposing the maximum sentence, under *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, appellate courts, post *Foster*, apply a two-step approach in reviewing a sentence. First, the courts 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. Id. at ¶4. As part of its analysis of whether the sentence is "clearly and convincingly contrary to law," an appellate court must ensure that the trial court considered the purposes and principles of R.C. 2929.11, and the factors listed in R.C. 2929.12. If the first prong is satisfied, the appellate court then engages in the second prong of the analysis, which requires an appellate court to determine whether the trial court abused its discretion in selecting a sentence within the permissible statutory range. Id. at ¶17. An abuse of discretion is the trial court's "failure to exercise sound, reasonable, and legal decision-making." *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶32} Here, the record reflects that the trial court considered the requisite statutes and based its sentence on the record, which included oral statements, victim

impact statement, and the PSI. Therefore, its sentence was not "clearly and convincingly contrary to law." Furthermore, the five-year term is within the permissible statutory range for a third degree felony, which the court explained was warranted by the grievousness of the injuries suffered by the victim. It is within the sound discretion of the trial court to mete out a sentence as provided for by law and, after a review of the record, we do not find an abuse of that discretion by the trial court in this case. The assignment of error is without merit.

{¶33} The judgment of the Ashtabula Court of Common Pleas Court is affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDELL, J.,

concur.