[Cite as *State v. Herron*, 2020-Ohio-1620.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO, :

Plaintiff-Appellant, :

No. 108775

v. :

CLIFTON HERRON, :

Defendant-Appellee. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: April 23, 2020

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-19-637091-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Brandon Piteo, Assistant Prosecuting Attorney, *for appellee*.

Susan J. Moran, *for appellant*.

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Clifton Herron, brings the instant appeal challenging his sentence for felonious assault. Appellant argues that the trial court's six-year prison sentence is not supported by the record. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶ 2} This appeal pertains to an altercation between appellant and his girlfriend, J.T., on February 6, 2019. At the time, appellant and J.T. were living together in her apartment on Woodland Avenue in Cleveland, Ohio.

{¶ 3} Appellant, in a state of intoxication, asked J.T. for money. She refused, and appellant became violent. Appellant grabbed a knife and threatened to kill J.T. J.T. attempted to retrieve the knife from appellant, and a struggle ensued. During the struggle, J.T. sustained a puncture wound to her abdomen and cuts on her hand, shoulder, and throat.

{¶ 4} After J.T. disarmed appellant and threw the knife behind her bedroom door, she took a train to Tower City to report the incident to police. Appellant broke her cell phone, so she was not able to call 911 from the residence. Officers responded to the residence and arrested appellant.

{¶ 5} Appellant was charged for his involvement in the altercation. On February 19, 2019, a Cuyahoga County Grand Jury returned a three-count indictment charging appellant with (1) felonious assault, a second-degree felony in violation of R.C. 2903.11(A)(2); (2) felonious assault, a second-degree felony in violation of R.C. 2903.11(A)(1); and (3) domestic violence, a first-degree misdemeanor in violation of R.C. 2919.25(A). Appellant pled not guilty to the indictment during his February 22, 2019 arraignment.

{¶ 6} On May 28, 2019, appellant entered a plea of no contest to all three counts. Based on the evidence proffered by the state, the trial court found appellant

guilty on all three counts. The trial court referred appellant to the probation department for a presentence investigation report ("PSI"). The trial court also ordered screening to determine appellant's eligibility for placement in a community-based correctional facility.

{¶ 7} The trial court held a sentencing hearing on June 19, 2019. The parties agreed that all three counts merged for sentencing purposes. The state elected to sentence appellant on Count 1. The trial court imposed a prison sentence of six years.

{¶ 8} On July 10, 2019, appellant filed the instant appeal challenging the trial court's sentence. He assigns one error for review:

> I. The trial court erred in imposing a sentence which was not supported by the record.

II. Law and Analysis

{¶ 9} In his sole assignment of error, appellant argues that the six-year prison sentence imposed by the trial court is not supported by the record.

{¶ 10} This court reviews felony sentences under the standard set forth in R.C. 2953.08(G)(2), which provides that we may increase, reduce, modify a sentence, or vacate and remand for resentencing if we clearly and convincingly find that the record does not support the sentencing court's statutory findings, if applicable, or the sentence is contrary to law. A sentence is contrary to law if (1) the sentence falls outside the statutory range for the particular degree of offense, or (2) the trial court failed to consider the purposes and principles of felony sentencing set

forth in R.C. 2929.11 and the sentencing factors in R.C. 2929.12. *State v. McGowan*, 8th Dist. Cuyahoga No. 105806, 2018-Ohio-2930, ¶ 9.

{¶ 11} In *State v. Jones*, 2018-Ohio-498, 105 N.E.3d 702 (8th Dist.), this court, sitting en banc, held that, pursuant to *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 23, the scope of appellate review includes examining the record in order to determine if the record clearly and convincingly supports the trial court's findings regarding R.C. 2929.11 and 2929.12. If an appellate court finds, by clear and convincing evidence, that the record does not support the trial court's findings under R.C. 2929.11 and 2929.12, R.C. 2953.08(G)(2) requires the appellate court to modify or vacate the trial court's sentence. *Id*. at ¶ 9.

{¶ 12} Although a trial court must consider the purposes and principles of felony sentencing under R.C. 2929.11 and the seriousness and recidivism factors under R.C. 2929.12, these are not fact-finding statutes. *State v. Franklin*, 8th Dist. Cuyahoga No. 107482, 2019-Ohio-3760, ¶ 41; *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶ 42. The trial court is not required to make any specific findings on the record regarding its consideration of the relevant R.C. 2929.11 and 2929.12 factors. *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 31.

{¶ 13} Unless a defendant affirmatively demonstrates otherwise, it is presumed that the trial court considered the appropriate factors in imposing its sentence. *State v. Jones*, 8th Dist. Cuyahoga No. 99759, 2014-Ohio-29, ¶ 13, citing

State v. Stevens, 1st Dist. Hamilton No. C-130278, 2013-Ohio-5218, ¶ 12. This court has held that a trial court's statement in its sentencing journal entry that it considered the required statutory factors, without more, is sufficient to fulfill its obligation under R.C. 2929.11 and 2929.12. *State v. Kamleh*, 8th Dist. Cuyahoga No. 97092, 2012-Ohio-2061, ¶ 61, citing *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 18.

{¶ 14} In the instant matter, in support of his argument that the six-year prison sentence is not supported by the record, appellant contends that he expressed genuine remorse and had no intention to harm J.T. Appellant argues that he was so intoxicated at the time that he had no recollection of the altercation and he never would have engaged in such conduct if he had not been under the influence.

{¶ 15} The trial court's six-year prison sentence for the felonious assault conviction on Count 1 is within the permissible statutory range under R.C. 2929.14(A)(1)(b). The trial court's sentence journal entry provides, in relevant part, "the court considered all required factors of the law. The court finds that prison is consistent with the purpose of R.C. 2929.11." Aside from this notation in its sentencing journal entry, the record reflects that the trial court did, in fact, consider both R.C. 2929.11 and 2929.12 before imposing appellant's sentence. The trial court specifically referenced the applicable sentencing factors under R.C. 2929.11 and 2929.12 during the sentencing hearing:

> In considering all the relevant seriousness and recidivism factors and ensuring that the public is protected from future crime and you are punished, I find that you're not amenable to community controlled

> sanctions. And I find what you did in this case is extremely serious, extremely violent.

(Tr. 59-60.) Accordingly, appellant has failed to affirmatively demonstrate that the trial court failed to consider the sentencing factors under R.C. 2929.11 and 2929.12. Furthermore, after review, we cannot conclude that the trial court's findings are clearly and convincingly not supported by the record.

{¶ 16} The record reflects that the trial court considered the information in appellant's PSI. The trial court indicated that it reviewed appellant's "very lengthy criminal history" that dated back to 1979. (Tr. 59.) Appellant's criminal history included multiple drug cases, multiple burglaries, a weapons offense, domestic battery, multiple assaults, multiple disorderly conduct offenses, an open container offense and numerous intoxication cases, and domestic violence in 2015.

{¶ 17} The trial court considered the statements made by defense counsel and the prosecutor. Defense counsel asserted that appellant had no memory of the incident "due to high levels of intoxication" and that appellant has a history of alcohol abuse. (Tr. 46-47.) Defense counsel also stated that appellant was truly remorseful and one of the reasons he decided to enter the no contest plea was to avoid putting the victim through a trial.

{¶ 18} The prosecutor addressed the trial court and emphasized that appellant has a "significant criminal history." (Tr. 56.) The prosecutor asserted that appellant failed to take advantage of the treatment opportunities he had in the past to address his substance abuse issues. Regarding the impact that appellant's actions

had on the victim, the prosecutor explained that J.T. was so frightened of appellant and the idea of being in the same room as him during the change of plea hearing. As a result, J.T. was unable to eat and vomited multiple times. The prosecutor emphasized that J.T. had to fight for her life during the February 6, 2019 incident, and that she was hospitalized for the puncture wound and cuts she sustained. The prosecutor requested the trial court to impose a prison term of at least six years.

{¶ 19} The trial court considered the statements made by appellant. Appellant maintained that he never intended to hurt J.T. and that he had tried to help her with her substance abuse issues. Appellant had also been battling alcohol and drug addiction. Appellant completed a detox program at Harbor Lights and was involved in Y-Haven, a transitional housing and treatment program. He left the transitional program to try and help J.T., who also had a substance abuse issue and was using drugs and alcohol at the time. Shortly after returning to her apartment, appellant relapsed. Appellant acknowledged at sentencing that he needs help for his alcohol and drug issues.

{¶ 20} The trial court stressed the serious nature of appellant's actions: "you told the victim you were going to kill her. You had a knife. You motioned towards the victim and then she tried to take the knife from you. There was a struggle over the knife and you stabbed her several times in her abdominal area and [she] received cuts on her hand." (Tr. 53.) In response, appellant asserted, "[b]ut this is alcohol, your Honor. This is not me." (Tr. 53.) The trial court emphasized that appellant has a "very, very, very long history of alcohol-related crimes" and that he failed to

take advantage of the multiple opportunities he had in the past to address his alcohol issue. (Tr. 54.)

{¶ 21} Although the victim did not address the court during the sentencing hearing, the trial court considered the statements provided by J.T. during the change of plea hearing. (Tr. 41-44.) J.T. asserted that the February 6, 2019 altercation was not the first time appellant became violent with her. She explained that appellant was violent with her throughout their entire relationship:

> [Appellant] cut me here on these fingers. I got a puncture wound; he stuck me in the stomach with a knife. He did this some years ago and they had to amputate my pinkie finger. He knocked me into the wall; you know, I had big lumps on the back of my head. That's why I wear this scarf because I got a bald spot in the back, back here. He's very, very violent when he gets under the influence of drugs and alcohol.

(Tr. 42.)

{¶ 22} Regarding the altercation that occurred on February 6, 2019, J.T. explained that appellant was intoxicated and he repeatedly asked her for money so he could get more drugs or alcohol. When she refused to give him cash or her debit card, appellant began attacking her with a knife. J.T. asserted that she wanted appellant to pay for his actions.

{¶ 23} Finally, appellant appears to argue that the trial court's finding that the facts in this case are "very serious" and appellant's actions during the altercation were "extremely serious, extremely violent" are not supported by the record because the victim's injuries were not life threatening, she was not hospitalized, and she only sustained one puncture wound to her abdomen. Appellant specifically takes issue

with the trial court's statements that he "stabbed [J.T.] several times" and "[m]ultiple times you stabbed her[.]" (Tr. 53, 56.) Appellant argues that these statements mischaracterized the evidence because J.T. only reported sustaining a single puncture wound to the abdomen.

{¶ 24} Initially, appellant presumes that the trial court's statements that he stabbed J.T. multiple times were in reference to the puncture wounds J.T. sustained to her abdomen. The trial court may have been referencing the multiple cuts that J.T. sustained on her hand, shoulder, and throat. Nevertheless, the trial court's six-year sentence is not contrary to law or unsupported by the record merely because appellant only punctured J.T.'s abdomen one time, rather than several times, with the knife. The single puncture wound to J.T.'s abdomen could easily have been fatal.

{¶ 25} Appellant concedes that the trial court "made a record of the reason for the [six-year] sentence[.]" Appellant's brief at 3. He does not argue, much less demonstrate, that the trial court failed to consider the sentencing factors under R.C. 2929.11 and 2929.12. Rather, appellant appears to disagree with the weight the trial court afforded to the applicable sentencing factors. Appellant's sentence is not contrary to law merely because he disagrees with the way in which the trial court weighed the applicable sentencing factors in crafting an appropriate sentence. *See State v. Frazier*, 2017-Ohio-8307, 98 N.E.3d 1291, ¶ 28 (8th Dist.).

{¶ 26} For all of the foregoing reasons, we find that the trial court's six-year prison sentence is not contrary to law. The trial court's sentence is within the permissible statutory range, and the trial court considered the sentencing factors

under R.C. 2929.11 and 2929.12. Appellant has failed to demonstrate by clear and convincing evidence that the record does not support the six-year prison sentence or that the sentence is contrary to law. Accordingly, appellant's sole assignment of error is overruled.

{¶ 27} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

EILEEN T. GALLAGHER, A.J., and
MICHELLE J. SHEEHAN, J., CONCUR