[Cite as *State v. Evans*, 2021-Ohio-1411.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 109619
v.	:	
JOHN EVANS,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: April 22, 2021

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-19-645627-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Theodore Parran, III, Assistant Prosecuting Attorney, *for appellee*.

Christopher R. Fortunato, *for appellant*.

FRANK D. CELEBREZZE, JR., P.J.:

{¶ 1} Defendant-appellant John Evans brings this appeal challenging his 18-month prison sentence for domestic violence. Appellant argues that the trial court failed to make a sufficient finding that a maximum sentence was necessary and that the trial court improperly weighed the relevant sentencing factors under R.C.

2929.11 and 2929.12. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶ 2} The instant appeal pertains to appellant's involvement in an altercation with Joshalynn Claxton on November 1, 2019. Claxton is the mother of appellant's child. Appellant was intoxicated at the time of the altercation. Appellant began arguing with Claxton while she was speaking on the telephone. The argument escalated, and appellant "shoved [Claxton] into a wall and kicked her out of the room, which the child was in, and [appellant] was with that child for a couple of minutes[.]" (Tr. 21.)

{¶ 3} Appellant was charged for his involvement in the altercation. On November 12, 2019, in Cuyahoga C.P. No. CR-19-645627-A, a grand jury returned a three-count indictment charging appellant with (1) domestic violence, a fourth-degree felony in violation of R.C. 2919.25(A), with a furthermore clause alleging that appellant previously pled guilty to or was convicted of domestic violence in September 2012, in Cuyahoga C.P. No. CR-12-563575-A, (2) endangering children, a fourth-degree felony in violation of R.C. 2919.22(A), with a furthermore clause alleging that appellant was previously convicted of endangering children in September 2012 in CR-12-563575-A, and (3) domestic violence, a second-degree misdemeanor in violation of R.C. 2919.25(C), with a furthermore clause alleging that appellant previously pled guilty to or was convicted of domestic violence in

September 2012, in CR-12-563575-A. Appellant pled not guilty to the indictment during his November 15, 2019 arraignment.

{¶ 4} The parties reached a plea agreement. On December 23, 2019, appellant pled guilty to the domestic violence offense charged in Count 1, and an amended Count 2, attempted child endangering, a first-degree misdemeanor in violation of R.C. 2923.02 and 2919.22(A), without the furthermore clause. The domestic violence offense charged in Count 3 was dismissed.

{¶ 5} Appellant waived a presentence investigation report ("PSI"), and the trial court proceeded immediately to sentencing on December 23, 2019. The trial court imposed a prison term of 18 months (or 1.5 years): 18 months on Count 1, and 180 days (or 6 months) in jail on Count 2. The trial court ordered the counts to run concurrently with one another, and concurrently with appellant's two-year prison sentence in Cuyahoga C.P. CR-18-627470-A[1] that he was serving at the time of the December 23, 2019 sentencing hearing.

{¶ 6} On March 19, 2020, appellant filed the instant appeal, a motion for leave to file a delayed appeal, and a motion for appointment of appellate counsel. This court granted appellant's motion for leave on April 3, 2020, and appointed counsel to represent appellant.

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[1] On November 13, 2018, appellant pled guilty to discharging a firearm on or near prohibited premises with a one-year firearm specification and heaving weapons while under disability. The trial court sentenced appellant to a prison term of two years on December 20, 2018.

{¶ 7} On April 20, 2020, appellant filed a motion, pro se, to amend his notice of appeal to "include all cases to correct deficiencies." This court denied appellant's pro se motion because appellate counsel had already been appointed to represent him.

{¶ 8} The trial court issued a nunc pro tunc sentencing entry on September 11, 2020, pursuant to this court's September 4, 2020 sua sponte order, clarifying appellant's sentence on Count 1 was 18 months in prison, and appellant's sentence on Count 2 was 180 days "local incarceration (to be served at the institution)."

{¶ 9} In this appeal, appellant challenges his 18-month sentence for domestic violence. He assigns one error for review:

> I. The trial court abused its discretion when it sentenced appellant to a maximum term for a plea of guilty to felony domestic violence.

II. Law and Analysis

{¶ 10} In his sole assignment of error, appellant argues that the trial court abused its discretion in imposing a prison term of 18 months for his domestic violence conviction, a felony of the fourth degree. He does not challenge the trial court's sentence of 180 days in jail for his endangering children conviction, or two-year prison sentence in CR-18-627470-A.

{¶ 11} As an initial matter, we note that this court does not review felony sentencing for an abuse of discretion. R.C. 2953.08(G)(2) prohibits an appellate court from applying the abuse-of-discretion standard when reviewing a felony

sentence. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 22, citing R.C. 2953.08(G)(2); *State v. Bush*, 8th Dist. Cuyahoga No. 106392, 2018-Ohio-4213, ¶ 24.

{¶ 12} Appellate review of felony sentences is governed by R.C. 2953.08(G)(2), which states that "an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *Marcum* at ¶ 1, 21.

> A sentence is not clearly and convincingly contrary to law "where the trial court considers the purposes and principles of sentencing under R.C. 2929.11 as well as the seriousness and recidivism factors listed in R.C. 2929.12, properly applies post-release control, and sentences a defendant within the permissible statutory range."

State v. Thompson, 8th Dist. Cuyahoga No. 105785, 2018-Ohio-1393, ¶ 7, quoting *State v. A.H.*, 8th Dist. Cuyahoga No. 98622, 2013-Ohio-2525, ¶ 10.

{¶ 13} The record must indicate that the trial court considered all relevant factors required by R.C. 2929.11 and 2929.12, but the trial court has no obligation to state reasons to support its findings. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus.

{¶ 14} After reviewing the record, we find that appellant's 18-month sentence for his domestic violence conviction is not clearly and convincingly contrary to law.

{¶ 15} R.C. 2929.14(A)(4), governing sentencing for fourth-degree felonies, provides, "[f]or a felony of the fourth degree, the prison term shall be a definite term of six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen,

seventeen, or eighteen months." The trial court's 18-month sentence for appellant's fourth-degree felony domestic violence conviction is within the permissible statutory range under R.C. 2929.14(A)(4).

{¶ 16} Appellant appears to argue that the trial court's sentencing journal entry "does not offer sufficient findings for a maximum sentence." Appellant further contends that "the [c]ourt made no findings that a maximum term was necessary for an appropriate sentence[.]" Appellant's argument is misplaced.

{¶ 17} As noted above, trial courts are required to consider the sentencing factors set forth in R.C. 2929.11 and 2929.12.

> Trial courts, however, *are not required to make factual findings on the record under R.C. 2929.11 or 2929.12 before imposing the maximum sentence.* [*State v. Kronenberg*, 8th Dist. Cuyahoga No. 101403, 2015-Ohio-1020,] ¶ 27. In fact, "[c]onsideration of the factors is presumed unless the defendant affirmatively shows otherwise." *State v. Seith*, 8th Dist. Cuyahoga No. 104510, 2016-Ohio-8302, ¶ 12, citing *State v. Keith*, 8th Dist. Cuyahoga Nos. 103413 and 103414, 2016-Ohio-5234. "[T]his court has consistently recognized that a trial court's statement in the journal entry that it considered the required statutory factors, without more, is sufficient to fulfill its obligations under the sentencing statutes." *Kronenberg* at ¶ 27, citing *State v. Wright*, 8th Dist. Cuyahoga No. 100283, 2014-Ohio-3321.

(Emphasis added.) *State v. Gohagan*, 8th Dist. Cuyahoga No. 107948, 2019-Ohio-4070, ¶ 21; *see also State v. Martin*, 2d Dist. Clark No. 2014-CA-69, 2015-Ohio-697, ¶ 8, citing *State v. Walker*, 2d Dist. Montgomery No. 25741, 2014-Ohio-1287, ¶ 17-19 ("a maximum sentence is not contrary to law when it is within the statutory range and the trial court considered the statutory principles and purposes of sentencing as well as the statutory seriousness and recidivism factors").

{¶ 18} Appellant argues that the trial court "made insufficient findings that community control would not be a sufficient penalty and that the same would demean the seriousness of the crime committed requiring incarceration." Appellant's argument is misplaced.

{¶ 19} As an initial matter, the trial court was not required to make an explicit, formal factual finding, pursuant to R.C. 2929.11, that a community control sanction was not a sufficient penalty or would demean the seriousness of appellant's conduct. The trial court's original sentencing journal entry, filed on December 23, 2019, and the nunc pro tunc sentencing entry filed by the trial court on September 11, 2020, provide, in relevant part, "[t]he court considered all required factors of the law. The court finds that prison is consistent with the purpose of R.C. 2929.11." Because the trial court found that a prison sentence was consistent with the purposes of R.C. 2929.11, the trial court necessarily found that a community control sanction was not.

{¶ 20} Furthermore, in addressing the trial court at sentencing, defense counsel stated, "[w]e are not asking for community control sanctions. [Appellant] was found recently not to be amenable to [community control] based on a violation of prior community control. We would ask for a prison sentence, something short of the maximum period[.]" (Tr. 19.) Defense counsel waived a PSI and requested that the trial court proceed immediately to sentencing. (Tr. 16.) Had a PSI been prepared, it would have been another factor for the trial court to consider in imposing appellant's sentence. The PSI would have contained, among other things,

appellant's complete criminal history, details about appellant's history of substance abuse, and appellant's risk of reoffending.

{¶ 21} Appellant does not present an assignment of error in this appeal challenging trial counsel's performance. By waiving a PSI, conceding that a community control sanction was not an appropriate sentence, and specifically requesting a prison term that was short of the 18-month maximum, defense counsel arguably invited any error regarding the trial court's imposition of a prison sentence rather than a community control sanction.

> Under the invited error doctrine, "a party is not entitled to take advantage of an error that he himself invited or induced." *State v. Doss*, 8th Dist. [Cuyahoga] No. 84433, 2005-Ohio-775, ¶ 5, quoting *State ex rel. Kline v. Carroll*, 96 Ohio St.3d 404, 2002-Ohio-4849, 775 N.E.2d 517, ¶ 27; *State ex rel. V Cos. v. Marshall*, 81 Ohio St.3d 467, 471, 692 N.E.2d 198 (1998). The doctrine precludes a defendant from making "an affirmative and apparent strategic decision at trial" and then complaining on appeal that the result of that decision constitutes reversible error. *Doss* at ¶ 7, quoting *United States v. Jernigan*, 341 F.3d 1273, 1290 (11th Cir.2003). The doctrine applies when defense counsel is "actively responsible" for the trial court's error. *State v. Campbell*, 90 Ohio St.3d 320, 324, 738 N.E.2d 1178 [(2000)].

State v. Benitez, 8th Dist. Cuyahoga No. 98930, 2013-Ohio-2334, ¶ 21.

{¶ 22} After reviewing the record, we find that the trial court fulfilled its obligation to consider the purposes and principles of sentencing under R.C. 2929.11, and the seriousness and recidivism factors under R.C. 2929.12 in imposing appellant's sentence. As noted above, the trial court sentencing entries provide, in relevant part, "[t]he 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 these

notations in the trial court's sentencing entries, the record reflects that the trial court did, in fact, consider the relevant factors under R.C. 2929.11 and 2929.12 in imposing its sentence.

{¶ 23} At the beginning of the sentencing hearing, the trial court stated, "I will consider the purposes and principles of felony sentencing under Ohio Revised Code Section 2929.11, as well as the seriousness and recidivism factors under 2929.12[.]" (Tr. 17-18.) The trial court considered the statements from defense counsel and the prosecution.

{¶ 24} Defense counsel asserted that appellant accepted full responsibility for his actions. Defense counsel acknowledged that appellant has "a bit of a prior record. It is largely drug and weapons-related[.]" (Tr. 19.) Defense counsel conceded that a community control sanction would not be appropriate, and explained that appellant "was found recently not to be amenable to [community control] based on a violation of a prior community control." (Tr. 19.) Nevertheless, defense counsel requested a prison term that was "short of the maximum[.]"

{¶ 25} The state asserted that during the altercation for which appellant was charged, appellant shoved the victim into a wall and kicked her out of a room that the child was in. The state informed the trial court that the victim "wants [appellant] to receive AA counseling and other forms of counseling to get him help." (Tr. 21.)

{¶ 26} In order to determine an appropriate sentence, the trial court provided appellant with an opportunity to address the court. Appellant apologized for letting things "get out of hand" during the altercation. He acknowledged that he

had been drinking and asserted that he was going to participate in AA and parenting programming to better himself and prevent this from happening again. Appellant confirmed to the trial court that he intended to abstain from drinking from that day forward.

{¶ 27} Following the statements made by defense counsel, appellant, and the state, the trial court confirmed again that it "considered the purposes and principles of felony sentencing under [R.C.] 2929.11 and the seriousness and recidivism factors under 2929.12." (Tr. 21.) The trial court considered appellant's history of criminal convictions, and explained, "I do see a lot of the cases do have some association with drugs and perhaps alcohol. They do tend to go into more violent-type crimes." (Tr. 22.) The trial court emphasized that appellant's actions during the November 1, 2019 altercation constituted "repeat behavior." Appellant's criminal history included prior domestic violence and endangering children convictions in September 2012, in CR-12-563575-A.

{¶ 28} Finally, appellant appears to dispute the trial court's balancing of the relevant sentencing factors. This court is not permitted to substitute its judgment for the judgment of the trial court. *State v. Franklin*, 8th Dist. Cuyahoga No. 107482, 2019-Ohio-3760, ¶ 47. Nor is this court authorized to reweigh the applicable factors under R.C. 2929.11 and 2929.12. *Id.*

{¶ 29} As this court has previously explained,

> "'The weight to be given to any one sentencing factor is purely discretionary and rests with the trial court.'" *State v. Price*, 8th Dist. Cuyahoga No. 104341, 2017-Ohio-533, ¶ 20, quoting *State v. Ongert*,

> 8th Dist. Cuyahoga No. 103208, 2016-Ohio-1543, ¶ 10, citing *State v. Torres*, 8th Dist. Cuyahoga No. 101769, 2015-Ohio-2038, ¶ 11. A lawful sentence "'cannot be deemed contrary to law because a defendant disagrees with the trial court's discretion to individually weigh the sentencing factors. As long as the trial court considered all sentencing factors, the sentence is not contrary to law and the appellate inquiry ends.'" *Price* at *id.*, quoting *Ongert* at ¶ 12.

State v. Bailey, 8th Dist. Cuyahoga No. 107216, 2019-Ohio-1242, ¶ 15.

{¶ 30} Based on the foregoing analysis, appellant's sentence is not contrary to law merely because he disagrees with the weight the trial court afforded to the applicable sentencing factors. The record reflects that the trial court considered the relevant sentencing factors under R.C. 2929.11 and 2929.12 in determining an appropriate sentence.

{¶ 31} For all of the foregoing reasons, appellant's sole assignment of error is overruled. Appellant's maximum 18-month prison sentence for his domestic violence conviction is not contrary to law.

{¶ 32} 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. The defendant's conviction having been affirmed, any bail pending is terminated. Case remanded to the trial court for execution of sentence.

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

FRANK D. CELEBREZZE, JR., PRESIDING JUDGE

MICHELLE J. SHEEHAN, J., and
EMANUELLA D. GROVES, J., CONCUR