[Cite as *State v. A.F.*, 2021-Ohio-1886.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO, :

Plaintiff-Appellee, : No. 109936

v. :

A.F., :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 3, 2021

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-19-639209-A

Appearances:

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

Susan J. Moran, *for appellant*.

LARRY A. JONES, SR., P.J.:

{¶ 1} Defendant-appellant, A.F., appeals from his five-year maximum sentence that was imposed after he pleaded guilty to an amended count of rape, that being sexual battery, a felony of the third degree. For the reasons that follow, we affirm.

Procedural and Factual History

{¶ 2} In 2019, the defendant was charged in a three-count indictment of rape with a sexually violent predator specification, kidnapping with a sexual motivation specification and a sexually violent predator specification, and endangering children. After negotiations with the state of Ohio, the defendant pleaded guilty to an amended charge of the rape count, that being sexual battery, a felony of the third degree. The victim was the defendant's daughter, who was five years old at the time of the offense.

{¶ 3} The record demonstrates that the offense came to light after the victim spent the weekend with the defendant, and when the victim's mother came to pick her up the victim did not have any underwear on. The defendant's sister, who spoke at the sentencing hearing, contended that the reason the victim was not wearing underwear was because she had a "diaper rash." The assistant prosecuting attorney admitted that the victim did suffer from diaper rash, but contended that the victim was able to explain that something inappropriate had happened to her.

{¶ 4} Specifically, the victim explained to a nurse and social worker that the defendant had applied diaper rash cream, but she made a clear distinction between him applying the cream on her rash and when he put his "front part" in her "back part." Further, the victim disclosed to school officials that "daddy touches my bottom with his front part." The victim also stated that the defendant

touched her breast while this occurred, and the defendant asked her to squat down while she was watching Tinker Bell.

{¶ 5} A rape kit was completed as part of the investigation. The defendant's DNA was found on the front part of the victim's underwear; the DNA was a nonsperm fraction. Children and Family Services also investigated the matter and found the allegation was substantiated.

The Sentencing Hearing

{¶ 6} At sentencing, the assistant prosecuting attorney read a letter from the victim's mother to the court. The mother wrote "that a five-year sentence is nowhere near long enough for the acts committed against her daughter." The mother further expressed that her daughter, who was then seven years old, was going to have to live with the consequences of the defendant's actions for the rest of her life.

{¶ 7} As mentioned, the defendant's sister addressed the court on the defendant's behalf. She told the court that the defendant had been the child's custodial parent because her mother had abandoned her and had only recently returned. The sister lived with the defendant, and told the court that she frequently had discussions with the victim about "bad touching" and the victim never revealed any inappropriate conduct toward her by the defendant.

{¶ 8} The trial court stated "before imposing sentence the Court notes for the record, that I have considered the record, the oral statements made here today, the presentence investigation report, the plea negotiations, and the letter that the

victim's mother provided to the Court." The trial court further stated that it was required to

> formulat[e] its decision based upon the overriding principles and purposes of felony sentencing, namely to protect the public from future crime by you and to punish you using the minimum sanctions that the Court determines accomplishes those purposes without imposing an unnecessary burden on the state or local government.

(Tr. 48.)

{¶ 9} The trial court stated "I have considered the need for incapacitation, deterrence and rehabilitation. I've considered the seriousness and recidivism factors relevant to the offense and this offender." The trial court acknowledged that the defendant's sister "loves you very much," but it found that "what happened in this case [is] the most serious of the sexual battery cases." The trial court stated "I have to consider the facts and the circumstances surrounding this incident, the age of the victim, the relation to the Defendant, and those are all things that I am considering." The court noted that the defendant took responsibility for his actions, but also looked at his criminal history, which included a prior sex offense. When considering the defendant's sentence, the court ensured that the sentence imposed would not demean the seriousness of the offense, the impact on the victim, and would be consistent with other similar offenses committed by like offenders. The court again noted that the defendant took responsibility for his actions, but the court found a prison sanction to be consistent with the principles and purposes of felony sentencing. The court then imposed a five-year prison term, which was the maximum sentence. *See* R.C. 2929.13(A)(3)(a).

{¶ 10} Defendant's trial counsel objected to the maximum sentence, and asked the court to reconsider, taking into account that the defendant took responsibility for his actions. The court stated that it did take that into consideration, which was reflected in the court crediting him his time spent on house arrest.

Law and Analysis

{¶ 11} The defendant's sole assignment of error reads: "The trial court erroneously imposed a sentence which was not supported by the record."

{¶ 12} R.C. 2953.08(G)(2) states that when reviewing felony sentences, an "appellate court's standard for review is not whether the sentencing court abused its discretion." Rather, the statute states that if we "clearly and convincingly" find that (1) "the record does not support the sentencing court's findings under" certain sentencing provisions not at issue in this case, or that (2) "the sentence is otherwise contrary to law," then we "may increase, reduce, or otherwise modify a sentence * * * or [we] may vacate the sentence and remand the matter to the sentencing court for resentencing." *Id.*

{¶ 13} In imposing a sentence for a felony, the trial court is to consider the sentencing purposes set forth in R.C. 2929.11. R.C. 2929.11 provides that a sentence imposed for a felony shall be guided by the overriding purposes of "protect[ing] the public from future crime by the offender and others and punish[ing] the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or

local government resources." Further, R.C. 2929.11(B) provides that a sentence shall be "reasonably calculated" to achieve those overriding purposes "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."

{¶ 14} In determining the most effective way to comply with the purposes and principles set forth in R.C. 2929.11, the sentencing court must consider the seriousness and recidivism factors enumerated in R.C. 2929.12. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, ¶ 38. The seriousness factors are enumerated in R.C. 2929.12(B) and (C) that include factors such as the physical or mental harm suffered by the victim. The recidivism factors are enumerated in R.C. 2929.12(D) and (E) that include factors such as the defendant's criminal history. R.C. 2929.11 and 2929.12, however, do not require a trial court to make any specific factual findings on the record. *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 31. Furthermore, consideration of R.C. 2929.11 and 2929.12 are presumed unless the defendant affirmatively shows the trial court fails to do so. *State v. White*, 8th Dist. Cuyahoga No. 103474, 2016-Ohio-2638, ¶ 8. The Ohio Supreme Court recently reaffirmed this position in *State v. Jones*, Slip Opinion No. 2020-Ohio-6729.

{¶ 15} The *Jones* Court held that R.C. 2953.08(G)(2) does not permit the appellate court to modify or vacate a sentence based on the lack of support in the record for the trial court's findings under R.C. 2929.11 and 2929.12. *Id.* at ¶ 29.

The *Jones* Court also explained that R.C. 2953.08(G)(2) does not provide a basis for an appellate court to modify or vacate a sentence if it concludes that the record as a whole does not support the sentence under R.C. 2929.11 and 2929.12. *Id.* at ¶ 30-31. Additionally, the court rejected the notion that an appellate court's determination that the record does not support a sentence can be "equate[d] to a determination that the sentence is 'otherwise contrary to law' as that term is used in R.C. 2953.08(G)(2)(b)." *Id.* at ¶ 32. Nothing in R.C. 2953.08(G)(2) permits an appellate court to independently weigh the evidence in the record and substitute its judgment for that of the trial court concerning the sentence that best reflects compliance with R.C. 2929.11 and 2929.12. R.C. 2953.08(G)(2) does not permit a reviewing court to conduct a "freestanding inquiry." *Id.* at ¶ 42.

{¶ 16} The defendant's sentence for his third-degree felony offense is within the statutory range. The record reflects the trial court considered the purposes and principles of felony sentencing in R.C. 2929.11 and the sentencing factors in R.C. 2929.12. Although the defendant contends that his maximum sentence is not supported by the record and is contrary to law, we note that under the current sentencing law, the trial court need not make any findings or analyze specific factors to support a maximum sentence. *State v. Holly*, 8th Dist. Cuyahoga No. 102764, 2015-Ohio-4771, ¶ 12. Under the limited review we are afforded as we have described above, we have no authority to reverse or modify the defendant's sentence.

{¶ 17} In light of the above, the defendant's sole assignment of error is without merit.

{¶ 18} 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.

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LARRY A. JONES, SR., PRESIDING JUDGE

EILEEN A. GALLAGHER, J., and
MARY EILEEN KILBANE, J., CONCUR