[Cite as *State v. Schmiege*, 2015-Ohio-4029.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2015-L-020**
- vs -	:	
JONATHAN L. SCHMIEGE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas.
Case No. 14 CR 000459.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Karen A. Sheppert*, Assistant Prosecutor, Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Kenneth R. Hurley, 6058 Royalton Road, North Royalton, OH 44133; and *Mark Gusley*, 6600 Park Avenue, Cleveland, OH 44105 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Jonathan L. Schmiege, appeals the judgment of the Lake County Court of Common Pleas, sentencing him to life without parole to run consecutively to 22 years plus 30 months in prison after entering a plea of guilty to, inter alia, multiple counts of rape of his wife and two-year-old daughter. We affirm.

{¶2} Appellant was indicted on 44 counts, which included seven counts of rape; seven counts of kidnapping; one count of aggravated menacing; four counts of

endangering children; one count of domestic violence; eleven counts of illegal use of a minor in nudity-oriented material or performance; and thirteen counts of pandering sexually oriented matter involving a minor.

{¶3} Appellant pled guilty to one count of rape of his two-year old daughter; two counts of raping his wife; one count of endangering children; one count of illegal use of a minor in nudity oriented material or matter; and one count of pandering sexually oriented matters involving minors. In addition to his wife and two-year old being victims of his crimes, appellant's laptop and thumb-drive contained approximately 1,800 images of child pornography; the National Center for Missing and Exploited Children were able to identify 271 of the victims.

{¶4} The matter was referred to the Lake County Adult Probation Department for a presentence investigation and psychological report. In preparation for sentencing, the trial court reviewed the following: a 31-page presentence report, a 22-page comprehensive psychological report, and victim impact statements. In mitigation, the defense submitted a sentencing memorandum; a mitigation of penalty report prepared by a psychiatrist documenting appellant's sexual abuse as a child; a letter from appellant; 15 letters of support from appellant's family, friends, and interested persons; 10 pages of appellant's school records; a 4-page evaluation from appellant's childhood; court documents from 1992; and a 12-page excerpt from scripture provided by appellant in anticipation of a sermon.

{¶5} Appellant was sentenced to life without parole to run consecutively to 22 years plus 30 months in prison.

{¶6} On appeal, appellant assigns the following two errors for our review:

> [1.] The court erred in sentencing the defendant to consecutive prison terms because it did not find that the defendant's [sic] met the criteria set forth in Ohio Revised Code section 2929.14(C)(4).
>
> [2.] The court erred in sentencing the Defendant to life in prison without the possibility of parole for the rape of his daughter and in ordering consecutive sentences for the remaining offenses because the sentence was contrary to law in that the sentence constituted an abuse of discretion.

{¶7} In reviewing felony sentences, we apply the standard of review set forth in R.C. 2953.08. That statute directs the appellate court to "review the record, including the findings underlying the sentence," and to modify or vacate the sentence "if it clearly and convincingly finds * * * (a) [t]hat the record does not support the sentencing court's findings under division * * * (C)(4) of section 2929.14 * * * of the Revised Code * * * [or] (b) [t]hat the sentence is otherwise contrary to law." R.C. 2953.08(G)(2).

{¶8} When imposing consecutive sentences, the trial court must follow R.C. 2929.14(C)(4), which provides, in pertinent part:

> If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> * * *
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

{¶9} While a trial court has full discretion to impose any term of imprisonment within the statutory range, it must consider the sentencing purposes in R.C. 2929.11 and the guidelines contained in R.C. 2929.12. *State v. Ernest*, 11th Dist. Lake No. 2014-L-108, 2015-Ohio-2983, ¶66. The Supreme Court of Ohio has noted, however, that a "word-for-word recitation" of the language of the sentencing statutes is not required. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177*,* ¶29. "[A]s long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld." *Id.*

{¶10} Under his assignments of error, appellant contends the trial court failed to make the requisite findings under R.C. 2929.14(C)(4)(b). He further maintains the trial court failed to give adequate weight to certain mitigating factors, e.g., his genuine remorse and the fact that he was sexually abused as a child. Finally, he contends the trial court erred in concluding he could not be rehabilitated.

{¶11} At the sentencing hearing, the trial court made the following findings prior to imposing sentence:

> The court has considered the record, the oral statements made, the victim impact statements, pre-sentence report, comprehensive psychological evaluation, the mitigation and sentencing material provided by the defendant, my conference in chambers with counsel and Probation, and the statement of the defendant and the defendant's counsel.
>
> The Court has also considered the overriding purposes of felony sentencing pursuant to Revised Code [Sec.] 2929.11, which are to protect the public from future crime by this offender and others similarly minded and to punish this offender using the minimum sanctions that the Court determines accomplish the purposes without imposing an unnecessary burden on state or local governmental resources.

I have considered the need for incapacitation, deterrents, rehabilitation and restitution. I've considered the separate recommendations of the parties.

I have reasonably calculated this sentence to achieve the two overriding purposes of felony sentencing, to be commensurate with and not demeaning to the seriousness of this offender's conduct and its impact on the victims and on society and to be consistent with sentences imposed for similar crimes committed by similar offenders.

In using my discretion to determine the most effective way to comply with the purposes and principles of sentencing, I have considered all relevant factors, including the seriousness and the recidivism factors set forth in Revised Code [Sec.] 2929.12. In that regard, the victim's age, the little girl, being two years old, the little boy, being five years old at the time, exacerbated the harm here. Of course, the little girl is the victim in count one [i.e. rape]. The little girl and the boy are victims in count fourteen [i.e. endangering children]. All of these victims suffered serious psychological harm. [His wife] suffered, in addition, serious physical harm.

The victims, based upon the victim impact statements provided, as to counts twenty-one and twenty-five [i.e. illegal use of a minor in nudity-oriented material or performance and pandering sexually oriented matter involving a minor, respectively], the eight victims that were identified in the child pornography found on defendant's media, suffered serious psychological harm, and, of course the defendant's conduct in compiling, trading, paying for the child pornography perpetuates the harm done to these children and creates a market for victimizing other children.

The defendant held a position of trust, the father, the protector, and the offense relates to this position. He held a position of confidence with his wife. He had a duty of protection, and these offenses relate to that position. Those factors make these offenses more serious. The record is replete with unspeakable acts of depravity. This defendant took extreme pleasure from the victims' extreme pain.

There are no factors making these offenses less serious. In fact, as to each of these counts, the defendant committed the worst form of the offense.

In terms of recidivism, the defendant has no previous criminal history and delinquency adjudications, no criminal record

> whatsoever. The Court is not naïve enough to believe that the defendant's first rape, or first three rapes, are the ones here, so I can't say he's lived a law-abiding life for a significant number of years. The victim impact statement provided by [his wife] shows that the abuse, the endangering, has occurred over a number of years.
>
> The Court can speak to remorse. The Court finds no genuine remorse.
>
> The Court finds that rehabilitation is not possible here. The defendant is broken and he cannot be fixed. The defendant cannot be rehabilitated. The Court finds that, based upon the evidence, the defendant poses the greatest likelihood of committing future crimes of this nature.
>
> A prison sentence is needed to protect the public from future crime. A minimum sentence, as requested, would demean the seriousness of the offender's conduct. Consecutive sentences are necessary to protect the public and to punish this offender. Consecutive sentences would not be disproportionate to his conduct and the danger he poses, and the harm here was undoubtedly so great or unusual that a single term would not adequately reflect the seriousness of his conduct.

After making the foregoing findings, the court proceeded to enter its sentence.

{¶12} Appellant first asserts the court erred in failing to find that at least two of the multiple offenses were committed as part of one or more courses of conduct, as required by R.C. 2929.14(C)(4)(b). Appellant is correct that the court did not expressly make this statement during the sentencing hearing. Still, the court referenced the various crimes to which appellant pleaded guilty multiple times prior to imposing sentence. These references demonstrate appellant's multiple crimes were committed as part of one or more courses of conduct. As discussed above, a court need not engage in a "word-for-word" recitation of the statutory language. *See Bonnell*, *supra*, at ¶29. We therefore conclude that the court's repeated references to the several, discrete rapes, the pandering charge, the illegal use of a minor in nudity-oriented material or

performance charge, as well as the child endangering charge were sufficient to meet the mandate of the statute. Accordingly, appellant's contention is without merit.

{¶13} Appellant next asserts the trial court failed to give adequate weight to his genuine remorse. We do not agree.

{¶14} Even though appellant expressed his remorse and apologized for his crimes during his allocution, the trial court was not obligated to accept his representations. In light of the calculated, self-serving nature of his crimes over an extended period of time, the court could have reasonably concluded appellant's post hoc statements were not genuine. This court has noted "a reviewing court must defer to the trial court as to whether a defendant's remarks are indicative of genuine remorse because it is in the best position to make that determination." *State v. Dudley*, 11th Dist. Lake No. 2009-L-019, 2009-Ohio-5064, ¶22. Given the circumstances of this case, we do not question the trial court's evaluation of appellant's sincerity.

{¶15} Appellant next claims the trial court failed to give sufficient weight to the abuse he suffered as a child. Again, we do not agree.

{¶16} The record at sentencing was replete with information relating to appellant's upbringing and the traumas he experienced as a child. Moreover, the trial court stated, on record, it considered

> defendant's sentencing memorandum, a mitigation of penalty report by Dr. Courtney Toburger [sp], dated January 15, 2014, for the defendant, a seven-page letter from the defendant, fifteen letters in support of the defendant from family, friends and interested persons, ten pages of school records pertaining to the defendant, the four-page report of Dr. Mark Everson, dated October 10, 1985, pertaining to defendant, court documents from the Superior Court of the State of Alaska, in 1992, and twelve pages of excerpts from scripture provided by the defendant in anticipation of a sermon.

{¶17} The court was aware of and considered all information received in mitigation, including materials relating to appellant's troubled upbringing. The trial court nevertheless determined that these points did not make his offenses less serious; indeed, the court stated, "as to each of these counts, the defendant committed the worst form of the offense." We see no basis for suggesting the trial court abused its discretion.

{¶18} Finally, appellant seizes on the trial court's statement that he is "broken and he cannot be fixed"; appellant maintains it was unreasonable for the court to conclude that rehabilitation is impossible. We do not agree.

{¶19} The trial court's findings on this point, given the facts underlying appellant's indictment and the other information the court possessed relating to his crimes, personal history, and deviant proclivities, represent inferences that the court, within its discretion, could reasonably draw. Appellant was indicted on 44 counts, most of which were premised upon severely aberrant sexual conduct involving minors, including the rape of his 2-year-old biological daughter. And the facts underlying the multiple rapes of his wife were not only bizarre but perverse and violent. Given these objective facts, the court possessed a reasonable foundation for its observation that appellant is not amenable to rehabilitation. We therefore conclude the trial court did not err in commenting upon the impossibility of rehabilitation.

{¶20} The trial court's sentence was within the appropriate statutory range and consistent with the law and purposes of Ohio's Felony Sentencing. Accordingly, appellant's assignments of error are without merit.

{¶21} For the above reasons, we conclude appellant's sentence was not clearly and convincingly contrary to law.

{¶22} The judgment of the Lake County Court of Common Pleas is hereby affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs with a Concurring Opinion.

COLLEEN MARY O'TOOLE, J., concurs with a Concurring Opinion.

{¶23} I concur with the majority to affirm the judgment of the trial court. The record establishes the trial judge made the requisite R.C. 2929.14(C) findings, gave adequate weight to various mitigating factors, and properly concluded appellant could not be rehabilitated.

{¶24} As stated in the majority opinion, appellant held a position of trust and confidence. Appellant committed heinous crimes that were sexually perverse and violent against two family victims, his wife and his two-year-old daughter. In addition, appellant's laptop and thumb-drive contained approximately 1,800 images of child pornography and almost 300 other victims were identified. Many victims suffered serious psychological harm. The record is replete with unspeakable acts of depravity. Appellant took extreme pleasure from his victims' extreme pain. The facts presented establish appellant is not amenable to rehabilitation.

{¶25} Based on the foregoing, I agree with the trial judge sentencing appellant to life without parole, as such a sentence is justified in this case. It is this humble writer's opinion, however, that consecutively sentencing appellant, as well, seems redundant given the fact that he is serving a life sentence without parole.

{¶26} I concur.