[Cite as *State v. Howdyshell*, 2009-Ohio-4238.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	William B. Hoffman, P.J.
	:	John W. Wise, J.
Plaintiff-Appellee	:	Julie A. Edwards, J.
	:	
-vs-	:	Case No. CT 2008-0040
	:	
	:	
MICHAEL S. HOWDYSHELL	:	O P I N I O N

Defendant-Appellant

CHARACTER OF PROCEEDING:	Criminal Appeal from Muskingum County Court of Common Pleas Case No. CR 2008-0088
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 19, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
D. MICHAEL HADDOX Prosecuting Attorney 27 North Fifth Street Zanesville, Ohio 43701	DAVID A. SAMS P.O. Box 40 West Jefferson, Ohio 43612

Edwards, J.

{¶1} Defendant-appellant, Michael Howdyshell, appeals his conviction and sentence from the Muskingum County Court of Common Pleas on one count of gross sexual imposition. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On April 3, 2008, the Muskingum County Grand Jury indicted appellant on three counts of rape (of a child less than 13 years of age) in violation of R.C. 2907.02(A)(1)(b), felonies of the first degree, and one count of gross sexual imposition (of a child less than 13 years of age) in violation of R.C. 2907.05(A)(4), a felony of the third degree. At his arraignment on April 9, 2008, appellant entered a plea of not guilty to the charges.

{¶3} Thereafter, on June 24, 2008, appellant entered a plea of guilty to the charge of gross sexual imposition. Pursuant to an Entry filed on July 31, 2008, the trial court granted the Prosecuting Attorney leave to enter a Nolle Prosequi as to the remaining counts. On the same day, the Prosecuting Attorney filed a Nolle Prosequi as to such counts.

{¶4} As memorialized in an Entry filed on July 31, 2008, appellant was sentenced to five years in prison.

{¶5} Appellant now raises the following assignments of error on appeal:

{¶6} "I. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS AS HIS PLEA WAS UNKNOWING, UNINTELLIGENT AND INVOLUNTARY.

{¶7} "II. THE DEFENDANT-APPELLANT'S CONVICTION IS VOID DUE TO A DEFECTIVE INDICTMENT.

{¶8} "III. DEFENDANT-APPELLANT'S SENTENCE IS CONTRARY TO LAW."

I

{¶9} Appellant, in his first assignment of error, argues that the trial court violated his constitutional right to due process because the trial court failed to advise appellant of his right to a unanimous jury. Appellant contends, therefore, that his plea was not knowingly, intelligently and voluntarily made.

{¶10} In *State v. Williams*, Muskingum App. No. No. CT2008-0001. 2008-Ohio-3903, the appellant argued in his sole assignment of error that his guilty plea was not voluntary, knowing, or intelligent because the trial court failed to inform him of his constitutional right to a unanimous jury verdict. In overruling the appellant's assignment, this Court held in relevant part, as follows: "In *State v. Ketterer,* 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, the Ohio Supreme Court reviewed a defendant's claim the trial court did not adequately inform him of his rights. *Ketterer* cited *State v. Jells* (1990), 53 Ohio St.3d 22, 559 N.E.2d 464, wherein paragraph one of the syllabus, the court held there was no requirement for a trial court to interrogate a defendant in order to determine whether he or she is fully apprised of the right to a jury trial. The *Ketterer* court explained the trial court was not required to specifically advise the defendant on the need for jury unanimity, *Ketterer,* supra at paragraph 68., citing *State v. Bays* (1999), 87 Ohio St.3d 15, 716 N.E.2d 1126, which in turn cited *United States v. Martin* (C.A.6 1983), 704 F.2d 267. In *Bays,* the Supreme Court held 'a defendant need not have a complete or technical understanding of the jury trial right in order to knowingly and intelligently waive it,' *Ketterer,* paragraph 68.

{¶11} "In *State v. Fitzpatrick,* 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 76, the Supreme Court held an accused need not be told the jury verdict must be unanimous in order to convict. Appellant asks us to find in his favor notwithstanding the Supreme Court precedent, but this court must apply Ohio law as directed by the Supreme Court. We have reviewed the record, and we find the trial court and the plea form adequately explained appellant's constitutional rights." Id at paragraphs 9-10. See also *State v. Imani*, Muskingum App. No. CT2008-0014, 2008-Ohio-4364.

{¶12} We find, based on the foregoing, that the trial court was not required to advise appellant of his right to a unanimous verdict.

{¶13} Appellant's first assignment of error is, therefore, overruled.

II

{¶14} Appellant, in his second assignment of error, argues that his conviction for gross sexual imposition in violation of R.C. 2907.05(A)(4) was void due to a defective indictment. Appellant specifically contends that under *State v. Colon,* 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 ("Colon I"), his conviction for gross sexual imposition in violation of R.C. 2907.05(A)(4) should be vacated because the indictment did not reference the requisite mental state for such offense. We disagree.

{¶15} As is stated above, appellant was convicted of gross sexual imposition in violation of R.C. 2907.05(A)(4). Such section states, in relevant part, that: "(A) No person shall have sexual contact with another when any of the following applies:…(4) The other person,…is less than thirteen years of age, whether or not the offender knows the age of that person." This is essentially the same language as contained in the indictment.

{¶16} R.C. 2907.01(B) defines sexual contact as meaning "any touching of any erogenous zone of another… for the purpose of sexually arousing or gratifying either person."

{¶17} As an initial matter, we note that there is a conflict between districts over whether or not gross sexual imposition in violation of R.C. 2907.05(A)(4) is a strict liability offense. See *State v. York*, Wood App. No. WD-03-017, 2003-Ohio-7249 (holding that gross sexual imposition involving someone under the age of thirteen is a strict liability offense). See, in contrast, *In re: Williams* (Dec. 22, 2000), Hamilton App. Nos. C-990841, C-990892, 2000 WL 1867467 at Fn. 1 (holding that R.C. 2907.05(A)(4) is not a strict liability offense.) The court, in *Williams*, stated in Fn. 1, in relevant part as follows: "R.C. 2907.05(A)(4) does not specify a culpable mental state. However, R.C. 2907.01(B), by defining 'sexual contact' as a 'touching * * * for the purpose of sexual[ ] arous[al] or gratif[ication],' supplies the culpable mental state for a conviction under R.C. 2907.05(A)(4)." We agree that gross sexual imposition requires proof that the sexual contact be done with purpose of sexual arousal or gratification and, therefore, that it is not a strict liability offense.

{¶18} In *Colon I*, the Ohio Supreme Court held that when an indictment fails to charge a mens rea element of a crime, the error is structural and the defendant's failure to raise such defect in the trial court did not waive appellate review of the error.

{¶19} As this Court noted in *State v. Vance,* Ashland App. No. 2007-COA-035, 2008-Ohio-4763, the Supreme Court reconsidered *State v. Colon* ("*Colon I*") in *State v. Colon* ("*Colon II*"), 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169. In *Colon II,* the Court held, in relevant part, as follows :

{¶20} "Applying structural-error analysis to a defective indictment is appropriate only in rare cases, such as *Colon I,* in which multiple errors at the trial follow the defective indictment. In *Colon I,* the error in the indictment led to errors that 'permeate[d] the trial from beginning to end and put into question the reliability of the trial court in serving its function as a vehicle for determination of guilt or innocence.' *Id.* at ¶ 23, 885 N.E.2d 917, citing *State v. Perry,* 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, at ¶ 17. Seldom will a defective indictment have this effect, and therefore, in most defective indictment cases, the court may analyze the error pursuant to Crim.R. 52(B) plain-error analysis." *Id.* at ¶ 8. The Court noted the multiple errors that occurred in *Colon I:*

{¶21} "As we stated in *Colon I,* the defect in the defendant's indictment was not the only error that had occurred: the defective indictment resulted in several other violations of the defendant's rights. 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, ¶ 29. In *Colon I,* we concluded that there was no evidence to show that the defendant had notice that recklessness was an element of the crime of robbery, nor was there evidence that the state argued that the defendant's conduct was reckless. *Id.* at ¶ 30, 885 N.E.2d 917. Further, the trial court did not include recklessness as an element of the crime when it instructed the jury. *Id.* at ¶ 31, 885 N.E.2d 917. In closing argument, the prosecuting attorney treated robbery as a strict-liability offense. *Id". Colon II* at ¶ 6. See also, *Vance,* supra at ¶ 51-53.

{¶22} In the case sub judice, the trial court accepted appellant's guilty plea to gross sexual imposition. There was no jury impaneled and therefore, no argument was made as to the requisite mental state. Nor was a jury improperly instructed. Appellant

was represented by retained counsel and, with the assistance of counsel, entered into a negotiated plea. Pursuant to that negotiated plea, appellee agreed to nolle the remaining three counts of the indictment charging appellant with rape and to make no suggestion as to sentencing. Appellant did not object and therefore failed to preserve his claim that the indictment against him was constitutionally defective. See, *State v. Ellis,* Guernsey App. No.2007-CA-46, 2008-Ohio-7002 at paragraph 26. See also *State v. Johnson,* Stark App. No. 2008-CA-00110, 2009-Ohio-105.

{¶23} Accordingly, this is not a case where the omission in the complaint permeated the trial from beginning to end and put into question the reliability of the trial court in serving its function as a vehicle for determination of guilt or innocence. *Ellis,* supra at paragraph 27. Therefore, this Court may analyze the error in this case pursuant to the Crim.R. 52(B) plain-error analysis, see *Johnson*, supra at paragraph 43.

{¶24} Crim.R. 52(B) provides that, "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus. In order to find plain error under Crim. R. 52(B), it must be determined, but for the error, the outcome of the trial clearly would have been otherwise. *Id.* at paragraph two of the syllabus. Even if the defendant satisfies this burden, an appellate court has discretion to disregard the error and should correct it only to "'prevent a manifest miscarriage of justice.'" *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240,

quoting *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus.

{¶25} Under the circumstances of the case sub judice, there is nothing in the record to show that the appellant was prejudiced. Appellant received what he had agreed upon in exchange for his plea of guilty. As negotiated by the parties, appellee dismissed the rape counts and stood silent as to sentencing. We find any error in the indictment was harmless beyond a reasonable doubt. See *Johnson,* supra. See also, *State v. Palacios,* Franklin App. No. 08AP-669, 2009-Ohio-1187, citing *Johnson*, supra.

{¶26} Appellant's second assignment of error is, therefore, overruled.

III

{¶27} Appellant, in his third assignment of error, argues that his sentence is contrary to law because the trial court, in imposing the maximum and in excess of the minimum sentence, did not make the findings required by R.C. 2929.14(C) and 2929.14(B)(1) and (2). We disagree.

{¶28} Recently in *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Ohio Supreme Court reviewed its decision in *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470 as it relates to the remaining sentencing statutes and appellate review of felony sentencing.

{¶29} In *Kalish,* the Court discussed the affect of the *Foster* decision on felony sentencing. The Court stated that, in *Foster,* the Ohio Supreme Court severed the judicial fact-finding portions of R.C. 2929.14, holding that “trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than

the minimum sentences." *Kalish* at paragraphs 1 and 11, citing *Foster* at paragraph 100, See also, *State v. Payne,* 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306. "Thus, a record after *Foster* may be silent as to the judicial findings that appellate courts were originally meant to review under 2953.08(G)(2)." *Kalish* at paragraph 12. However, although *Foster* eliminated mandatory judicial fact finding, it left intact R.C. 2929.11 and 2929.12, and the trial court must still consider these statutes. *Kalish* at paragraph 13. See also *State v. Mathis,* 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1.

{¶30} The Supreme Court held, in *Kalish,* that the trial court's sentencing decision was not contrary to law. "The trial court expressly stated that it considered the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12. Moreover, it properly applied post release control, and the sentence was within the permissible range. Accordingly, the sentence is not clearly and convincingly contrary to law." *Kalish* at paragraph 18. The Court further held that the trial court "gave careful and substantial deliberation to the relevant statutory considerations" and that there was "nothing in the record to suggest that the court's decision was unreasonable, arbitrary, or unconscionable". *Kalish* at paragraph 20.

{¶31} Thus, contrary to appellant's argument, the trial court, in sentencing, is not required to make findings for imposing the maximum and/or more than the minimum sentence. The trial court is, however, required to consider the factors listed in R.C. 2929.11 and 2929.12. In the case sub judice, the trial court, in its July 31, 2008, Entry indicated that it had considered "the principles and purposes of sentencing under Revised Code [Section] 2929.11 and its balance of seriousness and recidivism factors under Ohio Revised Code [Section] 2929.12."

{¶32} Appellant's third assignment of error is, therefore, overruled.

{¶33} Accordingly, the judgment of the Muskingum County Court of Common Pleas is affirmed.

By: Edwards, J.

Hoffman, P.J. and

Wise, J. concur

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JUDGES

JAE/d0805

[Cite as *State v. Howdyshell*, 2009-Ohio-4238.]

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
MICHAEL S. HOWDYSHELL	:	
Defendant-Appellant	:	CASE NO. CT 2008-0040

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Muskingum County Court of Common Pleas is affirmed. Costs assessed to appellant.

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JUDGES