

[Cite as *State v. Dunn*, 2010-Ohio-760.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Julie A. Edwards, P.J.
	:	William B. Hoffman, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 09 COA 016
	:	
DALLAS L. DUNN	:	<u>OPINION</u>
	:	
Defendant-Appellant	:	

CHARACTER OF PROCEEDING: Criminal Appeal from Ashland County
Court of Common Pleas Case No.
09 CRI 012

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: March 1, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Edwards, P.J.

{¶1} Defendant-appellant, Dallas Dunn, appeals his conviction and sentence from the Ashland County Court of Common Pleas on one count each of intimidation of a victim, assault and possessing criminal tools. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On January 30, 2009, John Myers and Trent Hitchcock sent numerous text messages to victims Anthony Stevens and Dylan Weiler urging them to come over to John Myers' house for a party. When the two arrived at the house, they were told to lock the door behind them. After Stevens and Weiler discovered that appellant and appellant's friends were also in the house, they decided to sit down on the couch for a few minutes before leaving because they were concerned about the reputations of appellant and his friends.

{¶3} When the victims sat down on the couch, appellant positioned himself behind them and then appellant's brother and a friend began slapping and hitting them and asking the victims for money. Dylan Weiler's cell phone and car keys were taken from him. At one point, Weiler was told that they could not leave unless he agreed to put boxing gloves on and box appellant. Appellant and Weiler then began fighting. During the fight, which was videotaped, appellant repeatedly struck Dylan Weiler on the head while Weiler covered his head in an attempt to protect himself. Appellant's brother then put on the gloves and began striking Weiler. Another person present at the scene then beat on Stevens while wearing the boxing gloves.

{¶4} At one point, appellant punched Anthony Stevens multiple times on the side of his head, causing a perforated eardrum.

{¶5} After the keys and cell phone were returned to them, Stevens and Weiler headed for the door. Appellant then ran towards Weiler and punched him in the mouth, knocking out three of his teeth. The victims were not to report the incident to the police or it would get much worse.

{¶6} On February 27, 2009, a Bill of Information was filed charging appellant with one count of assault in violation of R.C. 2903.13(A), a misdemeanor of the first degree, one count of possessing criminal tools (boxing gloves) in violation of R.C. 2923.24(A), a felony of the fifth degree, and one count of intimidation of a victim in a criminal case in violation of R.C. 2921.04(B), a felony of the third degree. On March 2, 2009, appellant pleaded guilty to the three counts in the Bill of Information. The trial court ordered a pre-sentence investigation.

{¶7} As memorialized in a Judgment Entry filed on April 27, 2009, appellant was sentenced to 180 days in jail on the charge of assault, one year in prison on the charge of possessing criminal tools and four years in prison on the charge of intimidation. The trial court ordered that the sentences be served concurrently. The trial court also ordered that appellant pay restitution to Dylan Weiler in the amount of \$3,121.83 and to Anthony Stevens in the amount of \$247.00.

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

{¶9} "I. THE TRIAL COURT COMMITTED ERROR AS A MATTER OF LAW WHEN IT IMPOSED A SENTENCE OF FOUR YEARS FOR THE OFFENSE OF INTIMIDATION.

{¶10} "II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT IMPOSED A FOUR YEAR SENTENCE ON DALLAS DUNN, A FIRST TIME FELON.

{¶11} “III. MR. DUNN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY DID NOT PRESENT EVIDENCE AT THE SENTENCING HEARING.

{¶12} “IV. THE TRIAL COURT ERRED WHEN IT ORDERED RESTITUTION FOR EXPENSES NOT CAUSED BY ANY OFFENSE WITH WHICH MR. DUNN WAS CHARGED OR CONVICTED.”

I, II

{¶13} Appellant, in his first two assignments of error, argues that the trial court erred when it imposed a four year prison sentence on appellant for the offense of intimidation. Appellant specifically contends, in his first assignment of error, that such sentence was contrary to law and, in his second assignment of error, that the trial court abused its discretion in imposing such sentence.

{¶14} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Ohio Supreme Court held that, in reviewing felony sentences, the appellate courts must use a two-step approach. “First, they must examine the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court’s decision in imposing the term of imprisonment shall be reviewed under an abuse of discretion standard.” *Kalish* at paragraph 4; *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

{¶15} The Supreme Court held, in *Kalish*, that the trial court’s sentencing decision was not contrary to law because “[T]he 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.” *Kalish* at paragraph 18. The Court further held that the trial court “gave careful and substantial deliberation to the relevant statutory considerations” and there was “nothing in the record to suggest that the court’s decision was unreasonable, arbitrary, or unconscionable”. *Kalish* at paragraph 20.

{¶16} In the case sub judice, appellant pleaded guilty to intimidation of a victim, a felony of the third degree which was punishable by one, two, three, four or five years in prison under R.C. 2929.14(A)(3). Appellant was sentenced to a term of four years in prison, which was less than the maximum sentence. Appellant’s sentence, therefore, was within the range provided in R.C. 2929.14(A)(3). Appellant also was advised by the trial court of post-release control. Furthermore, the trial court stated in the sentencing judgment that it had considered the pre-sentence investigation report and the information furnished by the parties, as well as the principles and purposes of sentencing under R.C. 2929.11. Therefore, the sentence imposed for intimidation was not contrary to law.

{¶17} Appellant maintains that the trial court improperly considered the facts relating to the assault when it imposed sentence with respect to the charge of intimidation. Appellant specifically cites to *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245 in support of his argument. The issue before the Ohio Supreme Court in *Saxon* was whether an appellate court could modify or vacate the entire multiple-offense sentence when a defendant assigned as error the sentence as to only one or more of those offenses but not the entire multiple-offense sentence. The Ohio Supreme

Court held that it could not. In holding that the “sentencing package doctrine”¹ has no application to Ohio sentencing laws, the court noted that Ohio’s felony-sentencing scheme was designed to have the judge focus on only one offense at a time and that there was no provision in R.C. 2929.14(A)(2) for grouping offenses together and imposing a single “lump” sentence for multiple felonies. The court, in *Saxon*, noted that under Ohio law, a judge must consider each offense individually and impose a separate sentence for each offense. In the case sub judice, the trial court did not group all offenses together and impose a “lump” sentence, but rather imposed a separate sentence for each offense.

{¶18} We concur with the trial court that it was entitled to consider the “entire picture.” We note that “[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no[t] ... required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences.” *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at paragraph seven of the syllabus. We note that the victims were told when they were leaving the house, right after Dylan Weiler’s teeth had been knocked out, that it would get worse if they contacted the police. In other words, it was not error for the trial court to consider the seriousness of the victim’s injuries from the assault in determining the seriousness of the intimidation charge because the intimidation language used by appellant references these injuries.

{¶19} Appellant also maintains that the trial court abused its discretion in imposing a four year sentence. Appellant notes that he has no prior previous adult

¹ Such federal doctrine requires a court to consider the sanctions imposed on multiple-offenses as the components of a single comprehensive sentencing plan. *Saxon*, at ¶ 5.

record and that he had a single juvenile adjudication for criminal mischief. Appellant also notes that he expressed remorse for his actions.

{¶20} In order to find an abuse of discretion, we must find that the trial court's attitude was unreasonably, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. Upon our review of the record, we cannot say that the trial court abused its discretion in imposing a four year sentence for intimidation. While appellant stresses that he expressed remorse, the trial court, which had watched part of the videotape of the incident, indicated that it had not seen "a great deal of remorse" out of appellant, who continued to deny his involvement. Transcript of April 20, 2009, hearing at 75. Significantly, appellant was the only adult involved in this offense since his accomplices and the victims were all minors. Moreover, appellant's prior juvenile adjudication for criminal mischief in 2006 resulted after appellant built explosives out of household chemicals and threw the same on a lawn of another juvenile. In such case, appellant was ordered to perform 40 hours of community control and ordered to pay restitution. Finally, as noted by the trial court on the record, appellant, who was drinking on the night in question, had used drugs and alcohol in the past.

{¶21} Based on the foregoing, and in light of the fact that the victims in this case suffered serious physical injuries, we find that the trial court's imposition of a four year prison sentence for intimidation was not arbitrary, unconscionable or unreasonable.

{¶22} Appellant's first and second assignments of error are, therefore, overruled.

III

{¶23} Appellant, in his third assignment of error, contends that his trial court was ineffective in failing to present evidence at the sentencing hearing.

{¶24} The standard of review of an ineffective assistance of counsel claim is well established. Pursuant to *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 673, in order to prevail on such a claim, the appellant must demonstrate both (1) deficient performance, and (2) resulting prejudice, i.e., errors on the part of counsel of a nature so serious that there exists a reasonable probability that, in the absence of those errors, the result of the trial court would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

{¶25} First, we must determine whether counsel's assistance was ineffective, i.e., whether counsel's performance fell below an objective standard of reasonable representation and whether counsel violated any of his or her essential duties to the client. If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. As stated above, this requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different. *Id.* Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of 343, reasonable professional assistance. *State v. Sallie*, 81 Ohio St.3d 673, 675, 1998-Ohio- 343, 693 N.E.2d 267.

{¶26} Upon our review of the record, we cannot say that trial counsel was ineffective. Throughout the sentencing hearing, trial counsel challenged the State's version of events and also asked the trial court to consider letters that were sent to the

trial court by appellant's family and friends. Appellant's version of events was, therefore, before the trial court. Counsel also noted that appellant had voluntarily signed up for counseling. While appellant argues that trial counsel was ineffective in failing to present witnesses on appellant's behalf, there is no evidence in the record as to what such witnesses would have said. In short, we cannot say that the outcome of the sentencing would have been different had trial counsel presented witnesses.

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

IV

{¶28} Appellant, in his fourth assignment of error, maintains that the trial court erred in ordering appellant to pay restitution to the victims for the out-of-pocket expenses that they incurred in their medical treatment. We disagree.

{¶29} R.C. 2929.28(A)(1) states, in relevant part, as follows: "If the court imposes restitution, the court shall determine the amount of restitution to be paid by the offender. If the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense."

{¶30} While appellant does not dispute that the victims suffered economic loss as a result of the injuries that occurred on January 30, 2009, he argues that there is no evidence that the assault with which he was charged and convicted of was the "direct and proximate result" of their losses. However, appellant entered a plea of guilty to the

assault charge, i.e to knowingly causing or attempting to cause physical harm to the victims. At the sentencing hearing, the victims' family members testified as to the physical and economic harm suffered by the victims. There was evidence that both victims in this case actually suffered serious physical harm. While Anthony Stevens suffered from a perforated eardrum, Dylan Weiler had three teeth knocked out and, as a result has had to undergo extensive dental work. The trial court, in sentencing appellant, stated that while there was a dispute as to whether or not appellant had punched Anthony Stevens in the ear or Dylan Weiler in the mouth, "you have admitted the offense of assault, and although you continue to deny those acts, the facts in evidence would support that you are the individual that committed those offenses." Transcript of April 20, 2009 hearing at 73.

{¶31} Based on the foregoing, appellant's fourth assignment of error is overruled.

{¶32} Accordingly, the judgment of the Ashland County Court of Common Pleas is affirmed.

By: Edwards, P.J.

Hoffman, J. and

Delaney, J. concur

s/Julie A. Edwards

s/William B. Hoffman

s/Patricia A. Delaney

JUDGES

