

{¶3} On October 13, 2000, appellant was babysitting Pamela Bledsoe's children, three-year-old Austin and one-year-old Devin, when he placed water on the stove to boil. He then took Devin outside so he could smoke a cigarette and left Austin on the couch to watch television. Several minutes later, appellant heard Austin cry out. Appellant went back inside to find Austin in the kitchen covered with water, and the pan and water on the floor. Appellant removed Austin's wet clothes and then placed him on the couch to continue watching television. Appellant did not take Austin to the hospital but waited until Pamela returned home approximately three hours later. When Pamela returned home, Austin was in distress and she immediately took him to the hospital. Austin was subsequently diagnosed with second degree burns over forty percent of his body, including his face, ears, stomach, lower groin area, and from both mid-thighs to the bottoms of both feet. In addition, it is noteworthy that both of Austin's legs, from the mid-thigh areas to his feet, showed circumferential burns; that is, burns all the way around his legs. Austin was flown by helicopter to the burn unit of a hospital in Toledo, Ohio, where he remained in critical condition for approximately one month. As a result of the accident, Austin underwent three skin graft operations and suffered permanent injuries.

{¶4} On November 3, 2000, appellant was indicted and charged with two counts of child endangerment in violation of R.C.

2919.22(B)(1) and (B)(2), second and third degree felonies respectively. Subsequently, appellant pled guilty to a reduced charge of child endangerment with serious physical harm in violation of R.C. 2919.22(A), a third degree felony, and the second count of child endangerment was dismissed. Thereafter, on May 30, 2001, the case proceeded to a sentencing hearing at which appellant gave a statement. In addition, the court stated that it had considered the presentence investigation report and the victim impact statement, which was prepared by Austin's father. In his statement to the court, appellant stated that he was sorry for what had happened but excused his failure to seek medical attention for Austin on the fact that Pamela had told him not to call anybody, answer the phone or answer the door. At that time, Pamela and her husband were separated and, according to appellant, Pamela feared that her husband would take the children. Appellant made no other statement regarding his behavior, his failure to seek medical attention for Austin or his failure to attend to Austin himself.

{¶5} The court then sentenced appellant to a three year term of imprisonment, a mid-range sentence for the commission of a third degree felony. Appellant now challenges that sentence on appeal, asserting that it is contrary to law.

{¶6} At the outset, we note that a defendant who pleads guilty to a third degree felony may appeal a prison sentence that was imposed on the ground that the sentence is contrary to law. R.C.

2953.08(A)(4). In reviewing such an appeal, the appellate court may increase, reduce or otherwise modify the sentence or may vacate the sentence and remand the matter for resentencing where it is established by clear and convincing evidence that the sentence is contrary to law. R.C. 2953.08(G)(2). Clear and convincing evidence is "that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established." Cross v. Ledford (1954), 161 Ohio St. 469, 477.

{¶7} R.C. 2929.14(A) provides that the sentencing range for a third degree felony is one, two, three, four or five years imprisonment. The sentencing guidelines in R.C. 2929.12(C), however, do not provide a presumption of either a prison sentence or community control for third degree felonies. In deciding whether to impose a prison sentence for a third degree felony, the trial court is directed by R.C. 2929.13(C) to comply with the purposes and principles of sentencing under R.C. 2929.11 and the seriousness and recidivism factors defined in R.C. 2929.12.

{¶8} R.C. 2929.11(A) states that "[t]he overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender." To achieve these purposes, R.C. 2929.11(A) further directs that "the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime,

rehabilitating the offender, and making restitution to the victim of the offense, the public or both." In addition to the overriding purposes of felony sentencing stated, R.C. 2929.11(B) provides that a sentence imposed for a felony shall be:

{¶9} "*** 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."

{¶10} Pursuant to these provisions, the trial court did find in its judgment entry of sentence that it had considered the principles and purposes of sentencing in sentencing appellant to a three year term of incarceration.

{¶11} In reviewing the factors that made the offense more serious than conduct normally constituting child endangerment with serious physical harm, the court specifically found pursuant to R.C. 2929.12(B) that the physical and mental injury suffered by Austin was exacerbated by his young age, that he suffered extremely serious physical, psychological and economic harm, that his physical and psychological injuries were permanent and that appellant's relationship with Austin facilitated the offense because appellant had been placed in a position of trust. The court did not find any factors under R.C. 2929.12(C) that would make the offense less serious. With regard to the recidivism factors, the court noted that appellant had a minimal criminal record of two OMVIs and one falsification conviction, none of which

were felonies. Accordingly, the court balanced the seriousness and recidivism factors in deciding whether to impose a prison term for appellant's third degree felony offense.

{¶12} Appellant, however, had never before served a prison term.

As such, and because the court chose to impose a term in excess of the minimum term possible for a third degree felony, the court was required to comply with R.C. 2929.14(B), which reads in relevant part:

{¶13} "*** if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender and if the offender previously has not served a prison term, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless the court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others."

{¶14} Pursuant to this requirement, the court expressly found at the sentencing hearing and in the judgment entry of sentence that the shortest prison term would demean the seriousness of appellant's conduct and would not adequately protect the public from future crime by appellant. Appellant specifically challenges these findings on the ground that they are not supported by the record.

{¶15} Appellant had no prior felony convictions and had a minimal criminal record which the trial court acknowledged. Nevertheless, the court also found that the shortest prison term

would demean the seriousness of appellant's conduct. This finding is supported by the record. Appellant is a forty-two year old man.

After it became apparent to him the Austin had been burned, he removed Austin's clothing and placed him in front of the television. Appellant took no steps to administer first aid to the child or to seek medical attention. It is also noteworthy that Austin's medical reports, included in the presentence investigation report, place doubt on appellant's explanation of the source of the burns. In particular, two medical professionals defined Austin's leg burns as submersion burns rather than splatter burns. Finally, the extent of Austin's injuries supports the trial court's finding that the shortest prison term would demean the seriousness of appellant's conduct. Austin suffered second degree burns over forty percent of his body, was hospitalized in intensive care for approximately one month, was placed on a respirator, required blood transfusions, underwent three skin graft operations, and could have died. In addition, his scars are permanent.

{¶16} Accordingly, because the trial court complied with the applicable sentencing statutes, and because the sentence was supported by clear and convincing evidence, we cannot find that appellant's sentence was contrary to law. The sole assignment of error is, therefore, not well-taken.

{¶17} On consideration whereof, the court finds that appellant was not prejudiced or prevented from having a fair trial and the

judgment of the Erie County Court of Common Pleas is affirmed.
Court costs of this appeal are assessed to appellant.

JUDGMENT AFFIRMED.

Peter M. Handwork, J.

JUDGE

Melvin L. Resnick, J.

JUDGE

Mark L. Pietrykowski, P.J.
CONCUR.

JUDGE