

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2009-06-158
 :
 - vs - : OPINION
 : 3/1/2010
 :
 JAMES BRITTON FITZHUGH, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2008-09-1607

Robin N. Piper III, Butler County Prosecuting Attorney, Michael A. Oster, Jr.,
Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for
plaintiff-appellee

Fred S. Miller, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

POWELL, J.

{¶1} Defendant-appellant, James Britton Fitzhugh, appeals his prison term imposed by the Butler County Court of Common Pleas. We affirm the judgment for the reasons outlined below.

{¶2} Appellant was found guilty in a bench trial of two second-degree felony counts of endangering children for separate incidents in which appellant abused a 21-month-old child in his care, where such conduct resulted in serious physical harm to the

child. The trial court sentenced appellant to a prison term of five years on the first count and for eight years on the second count, to be served consecutively.

{¶13} The trial court indicated at sentencing that it considered the record before it and the sentencing purposes, principles, and factors of R.C. 2929.11, R.C. 2929.12, and R.C. 2929.13. The trial court noted that there were questions regarding the status of Ohio's felony sentencing law after *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711, and felt it important to "state the basis" for the imposition of consecutive sentences. The trial court stated that it "finds that consecutive sentences are necessary to protect the public and punish the offender and are not disproportionate to the offenses and to the harm cause, [sic] and further that the harm caused to this child was so great that a single sentence would not adequately serve the purposes and principles of sentencing."

{¶14} Appellant now appeals his sentence, presenting a single assignment of error for our review.

{¶15} Assignment of Error:

{¶16} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT IMPOSED CONSECUTIVE SENTENCES ON HIM."

{¶17} Appellant states in his issue presented for review that the trial court engaged in "improper fact finding" when it decided to impose consecutive sentences after "making certain findings which supposedly justify those consecutive sentences."

{¶18} First, we note that appellant failed to object to the imposition of consecutive sentences at the trial level. When a party forfeits an objection in the trial court, reviewing courts may notice only plain errors or defects affecting substantial rights. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶15; Crim.R. 52(B). An error does not rise to the level of a plain error unless, but for the error, the outcome of

the trial would have been different. *Id.* at ¶17.

{¶9} Appellant also argues that this court should reconsider its holding in *State v. Lewis*, Warren App. Nos. CA2009-02-012, CA2009-02-016, 2009-Ohio-4684. In *Lewis*, this court upheld the imposition of consecutive sentences under the authority of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 (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).

{¶10} We will first address appellant's argument that we revisit our holding in *Lewis*. The *Lewis* case was this court's first opportunity to address challenges to *Foster* by *Oregon v. Ice*, wherein the Supreme Court found that the Sixth Amendment to the Constitution did not inhibit states [specifically the state of Oregon] from assigning to judges findings of fact necessary to impose consecutive sentences for multiple offenses.

{¶11} The appellant in *Lewis* argued that because *Ice* invalidated the *Foster* court's reasoning regarding judicial fact-finding, and the Ohio General Assembly re-enacted the applicable statutes after *Foster*, those statutes were again valid and should have been applied before consecutive sentences were imposed.

{¶12} In the case at bar, appellant likewise argues that *Ice* invalidated a portion of the Ohio Supreme Court decision in *Foster* that severed as unconstitutional sections of Ohio's sentencing code for consecutive sentences.

{¶13} This court said in *Lewis* that: "The United States Supreme Court did not expressly overrule *Foster* in the *Ice* decision. While a re-examination of Ohio's sentencing statutes might be appropriate in light of the decision in *Ice*, such a re-examination can only be performed by the Ohio Supreme Court." * * * "Unless or until

Foster is reversed or overruled, we are required to follow the law and decisions of the Ohio Supreme Court." * * * "Several appellate courts have considered the application of *Ice* to *Foster* and have reached similar conclusions." *Lewis* at ¶10. [Internal citations omitted].

{¶14} We see no reason to revisit these issues and decline appellant's invitation to reconsider our position in *Lewis*. See, also, *State v. Montgomery*, Clermont App. No. CA2009-01-004, 2009-Ohio-5073, ¶9.

{¶15} We further refuse to overturn appellant's consecutive sentence because the trial court made certain findings.

{¶16} The Ohio Supreme Court's decision in *Foster* did not prevent the trial court from imposing consecutive sentences, but merely took away a judge's duty to make findings before doing so. *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, ¶33, 35 (trial court now has the discretion and inherent authority to determine whether a prison sentence within the statutory range shall run consecutively or concurrently).

{¶17} This court previously reversed a sentence where a trial court stated findings similar to the language of excised portions of the sentencing statutes, but we did so because the trial court specifically stated in its sentencing entry that it relied upon and listed a subsection of the statute that had been severed by the Ohio Supreme Court. See *State v. James*, Clermont App. No. CA2008-04-037, 2009-Ohio-1453, ¶29-30, citing *State v. Profanchik*, Mahoning App. No. 06-MA-143, 2007-Ohio-6430 (trial court's express cite of an excised statute called into question whether the trial court followed the requirements of *Foster*, when trial court specifically cites to and relies on excised statute, judgment entry is in violation of *Foster* holding).

{¶18} "*Foster* did not prevent sentencing judges from considering any relevant sentencing factors, even sentencing factors that may have been listed in the statutes

that were declared unconstitutional." *James* at ¶24, quoting *State v. Thomas*, Mahoning App. No. 06 MA 185, 2008-Ohio-1176, ¶15. *Foster* only eliminated the statutory requirement of judicial fact-finding as a prerequisite to imposing certain types of sentences. *Thomas*; *James*.

{¶19} The record in the case at bar demonstrates no plain error in the sentence imposed. It does not appear that the trial court independently applied severed portions of Ohio's sentencing statutes, but was clarifying its "basis" for the imposition of consecutive sentences and utilized some of the language of an excised statutory subsection. Compare *James*, 2009-Ohio-1453 at ¶25-30.

{¶20} In determining the sentence to impose, the trial court noted the degree of harm to the child victim and the seriousness of the offenses, and was, in fact, obligated to consider those issues to comply with its consideration of the purposes and principles of R.C. 2929.11 and R.C. 2929.12. See R.C. 2929.11 (sentence imposed shall be reasonably calculated to protect public from future crime by offender and to punish offender commensurate with and not demeaning to seriousness of the conduct and impact on victim); see R.C. 2929.12 (court shall consider factors indicating offender's conduct is more serious than conduct normally constituting offense, including that victim suffered serious physical harm and that offender's relationship to victim facilitated the offense).

{¶21} After careful review, we find that the trial court considered the appropriate law and imposed a sentence within the applicable statutory range, and therefore, appellant's sentence is not clearly and convincingly contrary to law and, the trial court did not abuse its discretion in imposing the sentence. See *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶15-19; *Montgomery*, 2009-Ohio-5073 at ¶12; R.C. 2929.14(A)(2) (for a felony of the second degree, the prison term shall be two, three,

four, five, six, seven, or eight years).

{¶22} Appellant's arguments are not well taken and his single assignment of error is overruled.

{¶23} Judgment affirmed.

YOUNG, P.J., and RINGLAND, J., concur.