

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

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2009-12-081
 :
 - vs - : OPINION
 : 9/27/2010
 :
 PATRICK C. HENRY, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2009CR0501

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 North Third Street, Batavia, Ohio 45103, for plaintiff-appellee

R. Daniel Hannon, Clermont County Public Defender, Robert F. Benintendi, 10 South Third Street, Batavia, Ohio 45103, for defendant-appellant

BRESSLER, J.

{¶1} Defendant-appellant, Patrick C. Henry, appeals his sentence following his convictions in the Clermont County Court of Common Pleas for theft and three counts of receiving stolen property.

{¶2} On October 15, 2009, appellant entered guilty pleas to three felony offenses of receiving stolen property in violation of R.C. 2913.51(A), and one misdemeanor offense of theft in violation of R.C. 2913.02(A)(1). At the sentencing hearing, the trial court imposed 12-month prison terms for each felony offense, to be

served consecutively, and one 180-day term for the misdemeanor, to be served concurrently with the felony sentences. The trial court imposed no fines, but imposed court costs and restitution amounts as follows: \$32 to Brittany Watkins; \$160 to Kroger; \$454 to Allison Dearborn; \$220 to Cincinnati Federal Police Credit Union; \$109.67 to United Dairy Farmers; \$171.75 to Sarah Woodruff; and \$824.46 to Biggs. Appellant appeals his sentence and raises three assignments of error.

{¶13} Assignment of Error No. 1:

{¶14} "THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING APPELLANT TO THE MAXIMUM TERM OF IMPRISONMENT ON THREE COUNTS OF RECEIVING STOLEN PROPERTY."

{¶15} Assignment of Error No. 2:

{¶16} "THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO CONSECUTIVE PRISON TERMS AS THE RECORD DOES NOT SUPPORT SUCH A SENTENCE."

{¶17} In his first and second assignments of error, appellant challenges his sentence as being excessive and unsupported by the record. Appellant maintains his sentence fails to achieve the overriding purposes of felony sentencing.

{¶18} "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." *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶100. "In applying *Foster* * * * appellate courts must apply 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 shall be reviewed under an abuse-of-discretion

standard." *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶4.

{¶9} A sentence is not clearly and convincingly contrary to law where the trial court "consider[s] the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12, * * * properly applie[s] postrelease control, and * * * sentence[s] * * * within the permissible range." *Id.* at ¶18. In addition, so long as the trial court gives "careful and substantial deliberation to the relevant statutory considerations" the court's sentencing decision is not an abuse of discretion. *Id.* at ¶20.

{¶10} After reviewing the record, we find appellant's sentence is not clearly and convincingly contrary to law. At the sentencing hearing, the trial court expressly stated that it considered the purposes and principles of sentencing under R.C. 2929.11, 2929.12, and 2929.13. The court sentenced appellant to three consecutive prison terms of 12 months each, which is within the permissible statutory range for a fifth-degree felony. See R.C. 2929.14(A)(5). Further, the court properly advised appellant that he could be subject to three years of postrelease control and explained the consequences of violating the terms of postrelease control. See R.C. 2967.28(C).

{¶11} In addition, we find that the trial court did not abuse its discretion in ordering appellant to serve three consecutive, 12-month terms of imprisonment. It is evident from the record that the trial court gave careful and substantial deliberation to the relevant statutory considerations. The court noted appellant's criminal history, including at least three previous felony convictions and at least five previous periods of incarceration. The court also considered statements made by appellant, appellant's family, and the victims. We find nothing in the record to indicate that the trial court's decision is unreasonable, arbitrary, or unconscionable.

{¶12} Appellant's first and second assignments of error are overruled.

{¶13} Assignment of Error No. 3:

{¶14} "THE TRIAL COURT ERRED IN ORDERING APPELLANT TO PAY RESTITUTION."

{¶15} In his third assignment of error, appellant argues the trial court abused its discretion in ordering appellant to pay restitution to the victims. Appellant argues the trial court failed to adequately address appellant's present and future ability to pay the amounts ordered.

{¶16} Initially, we note that the state argues appellant forfeited the right to present this argument on appeal by failing to object to the trial court's restitution order. However, this court has held this argument to be unpersuasive, as "R.C. 2929.19(B)(6) imposes a legislative mandate with which trial courts must comply. * * * While criminal defendants may waive their own rights, they cannot waive a mandatory duty imposed on trial courts." (Internal citations omitted.) *State v. Moore*, Butler App. No. CA2006-09-242, 2007-Ohio-3472, ¶8, quoting *State v. Slater*, Scioto App. No. 01 CA2806, 2002-Ohio-5343, ¶10.

{¶17} R.C. 2929.18(A) authorizes trial courts to impose financial sanctions on felony offenders. This includes ordering the offender to pay restitution to the victim, or the victim's survivor, "in an amount based on the victim's economic loss." R.C. 2929.18(A)(1). Before a trial court may impose a financial sanction, however, the court must consider the offender's present and future ability to pay the financial sanction. R.C. 2929.19(B)(6).

{¶18} "[T]here are no express factors that must be taken into consideration or findings regarding the offender's ability to pay that must be made on the record." *State v. Martin*, 140 Ohio App.3d 326, 338, 2000-Ohio-1942. There must be some evidence in the record, however, to show that the trial court acted in accordance with the legislative mandate. See *State v. Adkins* (2001), 144 Ohio App.3d 633, 647.

{¶19} We have consistently held that compliance with R.C. 2929.19(B)(6) can be shown through the trial court's use of a Presentence Investigation Report (PSI), which often provides financial and personal information, in order to aid the court in making its determination. *State v. Humes*, Clermont App. No. CA2009-10-057, 2010-Ohio-2173, ¶27; *State v. Patterson*, Warren App. No. CA2005-08-088, 2006-Ohio-2133, ¶21; *State v. Dandridge*, Butler App. No. CA2003-12-330, 2005-Ohio-1077, ¶6; *State v. Back*, Butler App. No. CA2003-01-011, 2003-Ohio-5985, ¶21. We note, however, that reference to a PSI is not the only means by which a trial court may comply with R.C. 2929.19(B)(6). See, e.g., *Martin* at 327; *State v. Culver*, 160 Ohio App.3d 172, 826, 2005-Ohio-1359, ¶59 (inquiries made at the sentencing hearing regarding present employment, employment history, the ability to maintain employment, and assets); *State v. Sillett*, Butler App. No. CA2000-10-205, 2002-Ohio-2596.

{¶20} We find that the information before the trial court, in the form of statements made by appellant and the trial court, and the court's reference to the PSI in the sentencing hearing and journal entry, indicates that the court complied with R.C. 2929.19(B)(6) before ordering restitution. See *Humes*, 2010-Ohio-2173, ¶29; *State v. Simms*, Clermont App. No. CA2009-02-005, 2009-Ohio-5440, ¶12-13.

{¶21} While appellant has not contested the amount of restitution he was ordered to pay, we notice that appellant was ordered to pay a specific amount of restitution exceeding the value of the property set forth in the definition of a misdemeanor theft offense. See *State v. Miller*, Butler App. No. CA2007-11-295, 2008-Ohio-5661, ¶9-11. The state concedes that appellant's misdemeanor theft conviction was solely based on his conduct with respect to Biggs, and appellant was ordered to pay \$824.46 in restitution to Biggs. However, for a person to be convicted of misdemeanor theft, the value of the property or services deprived must be less than

\$500. See R.C. 2913.02(B)(2).

{¶22} As this court has previously recognized, "restitution can only be ordered for those acts that constitute the crime for which the defendant has been convicted and sentenced." *State v. Smith*, Butler App. No. CA2004-11-275, 2005-Ohio-6551, ¶25, citing *State v. Hafer*, 144 Ohio App.3d 345, 348, 2001-Ohio-2412. Since appellant was convicted of misdemeanor theft, the amount of restitution to be paid to the victim of the offense cannot exceed \$500. *Miller* at ¶11. Accordingly, we vacate the restitution award to Biggs and remand this matter to the trial court for further proceedings in accordance with this opinion.

{¶23} Appellant's third assignment of error is overruled in part and sustained in part.

{¶24} The judgment of the trial court is affirmed in part, reversed in part, and remanded.

YOUNG, P.J., and POWELL, J., concur.