[Cite as *State v. Moore*, 2012-Ohio-3885.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-G-3027**
- vs -	:	
ROBERT L. MOORE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 10 C 000108.

Judgment: Affirmed in part, reversed in part, and remanded.

David P. Joyce, Geauga County Prosecutor, *Craig A. Swenson* and *Matthew J. Greenway*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Plaintiff-Appellee).

Paul A. Mancino, Jr., Mancino, Mancino, & Mancino, 75 Public Square, Suite 1016, Cleveland, OH 44113-2098; *Edward M. Mullin*, 24740 Cedar Road, Beachwood, OH 44122 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Robert L. Moore, was found guilty of unlawful sexual conduct with a minor, a felony of the third degree, in violation of R.C. 2907.04(A) and (B)(3). The trial court sentenced appellant to two years in prison with 44 days of credit for time served. Appellant was classified as a Tier II sex offender. Appellant now appeals his conviction.

{¶2} Appellant was indicted on two counts of unlawful sexual conduct with a minor. The indictment stems from two separate occasions: count one, where appellant showed the victim his penis; and count two, where appellant digitally penetrated the victim's vagina. After a trial to the judge, count one was dismissed. Therefore, the instant appeal relates only to the incident where appellant digitally penetrated the victim's vagina.

{¶3} In an interview with Investigator Mark Clark of the Geauga County Prosecutor's Officer, appellant acknowledged the inappropriate touching, and it was determined that the contact between appellant and the victim was consensual; however, the issue remained as to what age the victim was at the time of the incident. Appellant was 44 years old at the time.

{¶4} Testimony was elicited that the incident in question occurred in March 2003, but the victim did not report the incident until nearly seven years later. The victim stated that after the incident happened, she did not tell anyone because of the close relationship between her family and appellant's family. The families had been the closest of friends and she regarded appellant as a father figure. The victim's father testified that he and appellant had been best friends for nearly 21 years.

{¶5} Fearing the repercussions that could happen if she reported appellant's touching, she attempted to suppress her memory. It was not until a later encounter with appellant's daughter that the victim's memory was triggered, and she decided to report the event.

{¶6} The incident occurred when appellant, who would often provide rides for the victim, picked her up from gymnastics. The victim testified that when she was in the

car with appellant, he asked her if she wanted to know what an orgasm felt like. After numerous advances, appellant finally answered, "yes, fine." The victim went with appellant to her house, into the bathroom. The victim lowered her pants and appellant digitally penetrated the victim's vagina.

{¶7} Investigator Clark interviewed both appellant and the victim. Appellant voluntarily spoke with Investigator Clark and recalled numerous interactions between himself and the victim, one of which was the touching that occurred in the victim's bathroom. Investigator Clark testified that the activities between the victim and appellant were consensual. Yet, the crime that appellant was to be charged with was dependent upon the age of the victim at the time of the activity. He testified that his job in this instance is to provide "memory markers" to help the victim determine when the events took place. Establishing that receiving her driver's license was a significant event, the victim was able to determine that this incident occurred prior to her receiving her driver's license. Investigator Clark noted that it was "established that the event that took place where [appellant] digitally penetrated [the victim] inside of her home took place in her freshman year, in 2002-2003 school year." During this time period, the victim was 15 years of age.

{¶8} The trial court found appellant guilty and sentenced him to two years in prison. Appellant appealed.

{¶9} Appellant moved this court for a suspension of execution of sentence pending appeal, which was denied.

{¶10} As his first assignment of error, appellant alleges:

{¶11} "Defendant was denied due process of law when he was convicted and sentenced for a felony of the third degree when the court in its verdict did not make the finding elevating this offense from a misdemeanor to a felony offense."

{¶12} Appellant maintains the trial court's verdict was insufficient to convict him of a third-degree felony, as it did not make any finding other than stating appellant was found guilty as charged in count two of the indictment. Appellant argues that, as a result of this error, the maximum sentence he should have received was six months, instead of the two-year sentence imposed. This is the same argument appellant advanced in his motion to stay the execution of his two-year criminal sentence, filed in this court on August 8, 2011.

{¶13} To support this proposition on appeal and in his motion to stay execution, appellant cites to *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256. In *Pelfrey*, the Ohio Supreme Court addressed the following question:

> **{¶14}** Whether the trial court is required as a matter of law to include in the jury verdict form either the degree of the offense of which the defendant is convicted or to state that the aggravating element has been found by the jury when the verdict incorporates the language of the indictment, the evidence overwhelmingly shows the presence of the aggravating element, the jury verdict form incorporates the indictment and the defendant never raised the inadequacy of the jury verdict form at trial. *Id*. at ¶1.

{¶15} The Supreme Court held that "a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that

an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense." *Id*. at ¶14.

{¶16} This court has rejected appellant's argument. In a judgment denying appellant's motion for stay of execution of his sentence, we stated:

> **{¶17}** In the present case, unlike the defendant in *Pelfrey*, appellant waived a jury trial and tried his case to the court. The trial court's verdict and judgment of conviction stated that the trial court found appellant guilty of unlawful sexual conduct with a minor as charged in count two of the indictment. Count two of the indictment states that appellant violated R.C. 2907.04(A) and (B)(3), unlawful sexual conduct with a minor, a felony of the third degree. R.C. 2907.04(B)(3) specifies the aggravating circumstances leading to the third degree felony charge. Thus, based on the facts before us, appellant's reliance on *Pelfrey* for the assertion that the trial court's verdict was insufficient to convict him of a third-degree felony does not establish a compelling argument sufficient to establish he may prevail on appeal.

{¶18} Although appellant cites to additional authority in his appellate brief, none of the cases cited are applicable to a case tried to the court.

{¶19} Based on this court's reasoning above, appellant's first assignment of error is without merit.

{¶20} Appellant's second assigned error states:

{¶21} "Defendant was denied due process of law when the court denied defendant leave to file a motion to suppress."

{¶22} Appellant filed a motion to suppress on April 7, 2011, five days before trial. The trial court found appellant's motion to suppress untimely pursuant to Crim.R. 12(D). Crim.R. 12(B) and (C) provide that a motion to suppress shall be made within 35 days after arraignment or seven days before trial, whichever is earlier, and the court, in the interest of justice, may extend the time for making the motion. The decision as to whether to permit the untimely filing of a motion to suppress, under Crim.R. 12, will not be reversed on appeal absent a showing of an abuse of discretion. *Akron v. Milewski*, 21 Ohio App.3d 140, 142 (1985). An abuse of discretion is the trial court's "failure to exercise sound, reasonable, and legal decision-making." *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting *Black's Law Dictionary* 11 (8th Ed.2004).

{¶23} Here, appellant's motion was filed five days before the scheduled trial date. Although appellant's trial counsel argued that he had just received the transcripts in late March, it was acknowledged that counsel had an audio copy provided to him in December. In overruling appellant's request to proceed with his untimely motion to suppress, the trial court stated the following:

{¶24} Then the test is whether or not it is obviously the motion made out of rule to suppress the evidence as far as timeliness is concerned.

{¶25} So the test is whether justice should require that the motion be allowed to stand in any event, and to hear the motion.

{¶26} As a base line, the Court finds that Rule 12 of the Criminal Procedure requires that the Motion to Suppress be filed within 35 days of arraignment or seven days before trial, whichever is earlier.

{¶27} Now, the arraignment was September 27th of last year. So the deadline was some time in October of last year.

{¶28} There is a pretrial order that the court provides when pretrial is scheduled, and it does allow for motions to be filed before the pretrial.

{¶29} There was a pretrial conference on October 21 of 2010, and then another one on December 1 of 2010, such that the motion could have been timely filed at or before either of those dates.

{¶30} The Court finds that apparently the tapes were given to the defense by Christmas of last year.

{¶31} There was no extension sought within time to file a Motion To Suppress at that time.

{¶32} The Court recognizes that perhaps the defense had tactical reasons for not filing such a motion until the present time, but the Rule does not recognize those considerations.

{¶33} The transcripts, although they were provided on March 23rd of this year, apparently the transcripts are not any more accurate than what the tapes would display to an ordinary listener such that having the transcripts doesn't provide any further information to

allow for the parties to determine whether or not motions should be filed.

{¶34} The Court then finds that the filing of April 7th of this year, five days before trial, is untimely, and that the Motion to Suppress has then been waived, and the motion for leave to suppress that's implicit with the filing of the Motion to Suppress is denied.

{¶35} Based on the foregoing, we cannot say the trial court abused its discretion in refusing to consider appellant's motion to suppress, filed five days before trial, as it was filed untimely without justification.

{¶36} As an aside, we note that at oral argument the Geauga County Prosecutor acknowledged an office policy to engage differently in plea negotiations with defendants who exercise their right to file a motion to suppress. Although the propriety of such a policy is questionable, it is not one of appellant's assigned errors. Therefore, we will not address this policy on appeal.

{¶37} Appellant's second assignment of error is without merit.

{¶38} As his third assignment of error, appellant states:

{¶39} "Defendant was denied his rights under the Sixth Amendment when the court imposed a two year sentence based upon matters not alleged in the indictment nor in the court's verdict."

{¶40} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, the Ohio Supreme Court established a two-prong analysis for an appellate court reviewing a felony sentence. In the first step, we analyze whether the trial court "adhered to all applicable rules and statutes in imposing the sentence." *Id*. at ¶14. Next, we consider, with

reference to the guidelines set forth under R.C. 2929.11 and R.C. 2929.12, whether the trial court abused its discretion in imposing an appellant's sentence. *Id.* at ¶19.

{¶41} Appellant does not argue his sentence was contrary to law; rather, he asserts the trial court erred when it sentenced him to more than the minimum applicable to his case. We, therefore, only analyze the second prong of the *Kalish* analysis.

{¶42} R.C. 2929.12 provides a list of factors that the trial court "shall consider" when imposing a felony sentence. While the trial court is required to consider the R.C. 2929.12 factors, "the court is not required to 'use specific language or make specific findings on the record in order to evince the requisite consideration of the applicable seriousness and recidivism factors (of R.C. 2929.12.)'" *State v. Webb*, 11th Dist. No. 2003-L-078, 2004-Ohio-4198, ¶10, quoting *State v. Arnett*, 88 Ohio St.3d 208, 215 (2000).

{¶43} At sentencing, the trial court stated on record that it considered the overriding purposes and principles of felony sentencing generally set forth in R.C. Chapter 2929. The court noted that it had considered R.C. 2929.11.

{¶44} Appellant contends that the trial court erred in making the following statement on record at sentencing:

{¶45} "The Court finds the Defendant cultivated and encouraged the sexual dialogue with the victim over a period of time. And the particular incident that led to the conviction was culmination of a relationship gone awry due to the Defendant's conduct with a blameless 15 year old."

{¶46} In making the above statement, the trial court was considering R.C. 2929.12(B)(6)—the offender's relationship with the victim. Although appellant maintains

that the above finding was neither alleged in the indictment nor found by the trial court, the trial court was the finder of fact in this case. There was ample testimony relating to the close relationship of the families and the numerous sexual advances appellant made toward the victim.

{¶47} Next, appellant claims the trial court erred when it found that appellant demonstrated an "avowed lack of remorse" and an "unwillingness to take ownership of" the offense. Appellant maintains that if he expressed remorse at the sentencing hearing, he would have had to give up his Fifth Amendment right against self-incrimination. We do not agree. The statement indicates the trial court was considering R.C. 2929.12(E)(5)—whether the offender shows genuine remorse for the offense.

{¶48} We find no abuse by the trial court in imposing appellant's sentence. Thus, appellant's third assignment of error is without merit.

{¶49} Appellant's fourth assignment of error states:

{¶50} "Defendant was denied due process of law when the court overruled his motion for judgment of acquittal."

{¶51} When measuring the sufficiency of the evidence, an appellate court must consider whether the state set forth adequate evidence to sustain the jury's verdict as a matter of law. *Kent v. Kinsey*, 11th Dist. No. 2003-P-0056, 2004-Ohio-4699, ¶11, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). A verdict is supported by sufficient evidence when, after viewing the evidence most strongly in favor of the prosecution, there is substantial evidence upon which a jury could reasonably conclude that the state proved all elements of the offense beyond a reasonable doubt. *State v. Schaffer*, 127

Ohio App.3d 501, 503 (11th Dist.1998), citing *State v. Schlee*, 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, *14-15 (Dec. 23, 1994).

{¶52} Appellant challenges the legal sufficiency of the evidence to sustain his conviction of unlawful sexual contact with a minor, in violation of R.C. 2907.04(A). Appellant maintains the state failed to demonstrate (1) that the victim was under the age of 16 at the time of the event—digital vaginal penetration of the victim by appellant—and (2) that appellant knew the victim's age at the time of vaginal penetration.

{¶53} R.C. 2907.04(A) states: "No person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard."

{¶54} We first address whether there was sufficient evidence to demonstrate the victim was under the age of 16 at the time of the digital vaginal penetration. As stated by Investigator Clark, the age of the victim at the time of the incident determined whether this case was to be reviewed under unlawful sexual conduct with a minor, a felony of the third degree, or contributing to the unruliness of a minor, a misdemeanor of the first degree.

{¶55} Appellant argues that in the victim's initial interview with Investigator Clark, she stated she "could have been like either early 16, I would say the earliest like in my early years being 16." Appellant maintains that "[t]he age element of this offense only became relevant when [the victim] learned that age was an element of the offense when she spoke to the prosecutor on the day before the commencement of trial."

{¶56} The trial court heard testimony from the victim, her father, Officer Valerio, and Investigator Clark. On direct examination, the victim testified the incident occurred in March 2003, which made her 15 years of age. The victim stated that she was 100 percent sure of her age at the time of the incident, as she was able to recall that she did not have her driver's license; appellant gave her a ride home that day from her gymnastics' fundraiser. She noted March 2003 would have been the only spring that she did not have her driver's license while she was in high school, thus requiring a ride from appellant. She was able to describe both the clothing that she and appellant wore at the time of the incident.

{¶57} Under the facts presented, the trial court could have found, beyond a reasonable doubt, that at the time appellant digitally penetrated her vagina, the victim was 15 years of age.

{¶58} Next, appellant argues that he did not know the age of the victim nor was he reckless in that regard. R.C. 2907.04(A) includes a "reckless" standard with respect to a defendant's knowledge of the age of the juvenile.

> **{¶59}** A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist. R.C. 2901.22(C).

{¶60} Both the victim and her father testified that appellant had been a family friend for nearly 21 years, seven of them being after the incident in question. Appellant and the victim's family were neighbors. The victim's father stated that he and appellant had the "closest possible friendship between males." Appellant was a trusted friend; appellant provided transportation for his children when the victim's father was out of town. The victim testified that she viewed appellant as a "father figure, someone [she] respected and looked up to * * * and obeyed." Testimony was elicited that appellant had two daughters. There was testimony that the victim and one of appellant's daughters were close in age, as the victim testified that she and appellant's daughter were best friends in elementary school and through middle school.

{¶61} Appellant has failed to demonstrate that the trial court erred in overruling his motion for judgment of acquittal. Accordingly, appellant's fourth assignment of error is without merit.

{¶62} Appellant's fifth assignment of error states:

{¶63} "Defendant is entitled to a new trial as judgment was against the manifest weight of the evidence."

{¶64} To determine whether a verdict is against the manifest weight of the evidence, a reviewing court must consider the weight of the evidence, including the credibility of the witnesses and all reasonable inferences, to determine "whether the jury lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997).

{¶65} Under this assigned error, appellant reiterates the same two arguments he made with respect to the sufficiency of the evidence. Again, appellant states that in the victim's initial interview, she stated that she was 16 years of age at the time of the incident at issue. As we stated above, that interview, when read in its entirety, demonstrates that appellant was 15 years of age when the event occurred. Further, this court recognizes that in weighing the evidence submitted at a criminal trial, an appellate court must defer to the factual findings of the trier-of-fact regarding the weight to be given the evidence and credibility of the witnesses. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus.

{¶66} Appellant's fifth assignment of error is without merit.

{¶67} Under his sixth assignment of error, appellant maintains:

{¶68} "Defendant was denied effective assistance of counsel."

{¶69} In order to prevail on an ineffective assistance of counsel claim, appellant must demonstrate that trial counsel's performance fell below an objective standard of reasonable representation, and there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph two of the syllabus, adopting the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). If a claim can be disposed of by showing a lack of sufficient prejudice, there is no need to consider the first prong, i.e., whether trial counsel's performance was deficient. *Id*. at 142, citing *Strickland* at 695-696. There is a general presumption that trial counsel's conduct is within the broad range of professional assistance. *Id*. at 142-143.

{¶70} Furthermore, decisions on strategy and trial tactics are generally granted a wide latitude of professional judgment, and it is not the duty of a reviewing court to analyze the trial counsel's legal tactics and maneuvers. *State v. Gau*, 11th Dist. No. 2005-A-0082, 2006-Ohio-6531, ¶35, citing *Strickland* at 689. Debatable trial tactics and strategies do not constitute ineffective assistance of counsel. *State v. Phillips*, 74 Ohio St.3d 72, 85 (1995).

{¶71} Appellant argues that defense counsel failed to file a timely motion to suppress, failed to object to the admission of the recorded statement of the victim, improperly questioned Investigator Clark about the victim's statement, and failed to object to portions of Investigator Clark's testimony.

{¶72} First, we address defense counsel's failure to file a timely motion to suppress. As previously stated, defense counsel filed a motion to suppress five days before trial. On the record, defense counsel stated that he did not file a motion to suppress earlier, in part due to the state's position that the "offer and plea bargain would have been off the table if the motion was filed." Further, defense counsel stated that he "needed time to discuss with his client and family the merits or lack thereof of a plea bargain, and it took to this point to really decide whether a suppression motion would be filed."

{¶73} Further, the record is not clear that any such motion would have been found to have merit. That is typically the case in a direct appeal where a claim of ineffective assistance is difficult to assess. This claim is more properly presented in a postconviction relief proceeding where testimony regarding counsel's strategy and the relative merits, or lack thereof, of the motion could be properly presented.

{¶74} We also do not find ineffective assistance of counsel with respect to defense counsel's treatment of the recorded statement of the victim. Defense counsel, at the beginning of trial, stipulated to the admission of the audio recording of the victim and appellant. Appellant has not overcome the presumption that stipulating to the admission of recorded statements may be considered sound trial strategy.

{¶75} Appellant claims that defense counsel's failure to object to portions of Investigator Clark's testimony rises to the level of ineffective assistance of counsel. "[F]ailure to object is within the realm of trial tactics and, therefore, does not definitively establish deficient performance by counsel." *State v. Gray*, 2d Dist. No. 20980, 2007-Ohio-4549, ¶20. Although the record does not disclose the reason why defense counsel did not object to portions of Investigator Clark's testimony, the failure to object did not rise to the level of ineffective assistance of counsel.

{¶76} During trial, Investigator Clark, on numerous occasions, referred to the conversation he had with the victim. Again, the issue was the age of the victim at the time of the digital penetration. On direct examination, Investigator Clark noted the importance of the victim's age and testified that he has to be sure of "when and how old [the victim] was at the time these offenses occurred." Investigator Clark then began to testify that from the interview with appellant, it was clear that he "really was not sure." While appellant maintains it was error for Investigator Clark to testify regarding the victim's age, he was merely reiterating the audio transcript, which had been stipulated into evidence by defense counsel.

{¶77} Investigator Clark then stated that based on the "family history of knowing somebody and being close family friends for 21 years and not having any clue of how

old your best friend's child was just didn't seem to fly with me." He, therefore, testified that he established the age of the victim by interviewing her. Appellant argues the testimony of Investigator Clark was an improper credibility assessment by a witness.

{¶78} While it may have been improper for Investigator Clark to assess the credibility of appellant, we cannot say there is a reasonable probability that the outcome would have been different had defense counsel objected. There was ample testimony in the record regarding the age of the victim at the time of this occurrence, including the testimony of the victim that she was "100 percent certain" that she was 15 years old at the time. Moreover, both of Investigator Clark's interviews with appellant and the victim were stipulated to by defense counsel.

{¶79} Having reviewed the record before us, we cannot conclude his trial counsel's performance fell below an objective standard of reasonable representation or that there is a reasonable probability that, but for the alleged deficient performance, the outcome of the trial would have been different. His sixth assignment of error is overruled.

{¶80} Appellant's seventh assignment of error states:

{¶81} "Defendant was denied due process of law when the court imposed costs but failed to fully advise defendant concerning payment of court costs."

{¶82} R.C. 2947.23(A)(1)(a) states that, at the time the sentence is imposed, the court "shall notify" the defendant that if he fails to pay court costs or make timely payments under a payment schedule, the court "may" order the defendant to perform community service. Recently, the Ohio Supreme Court held:

{¶83} A sentencing court's failure to inform an offender, as required by R.C. 2947.23(A)(1), that community service could be imposed if the offender fails to pay the costs of prosecution or court costs presents an issue ripe for review even though the record does not show that the offender has failed to pay such costs or that the trial court has ordered the offender to perform community service as a result of the failure to pay. *State v. Smith*, 131 Ohio St.3d 297, 2012-Ohio-781, syllabus.

{¶84} The mandate of the Ohio Supreme Court is clear. The failure to notify must be reviewed at this time. Here, the record demonstrates the trial court failed to comply with the mandate of R.C. 2947.23(A)(1)(a)—appellant was not provided notification of the consequences of failing to pay costs during his sentencing. Accordingly, we remand the case to the trial court for a limited hearing on court costs.

{¶85} Appellant's seventh assignment of error is with merit.

{¶86} Based on the opinion of this court, the judgment of the Geauga County Court of Common Pleas is hereby affirmed in part and reversed in part. This matter is remanded to the trial court to inform appellant of the consequences of not paying court costs.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.