[Cite as *State v. Shuster*, 2014-Ohio-3486.]

COURT OF APPEALS
MORGAN COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiffs-Appellees	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case Nos. 13AP0001 &13AP0002
	:	
MICHAEL SHANE SHUSTER	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Morgan County Court of Common Pleas, Case No. 12 CR 0008
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	August 6, 2014

APPEARANCES:

For Plaintiff-Appellee:

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Delaney, J.

{¶1} Appellant Michael Shane Shuster appeals from the May 22, 2013 Sentencing Entry and July 10, 2013 Journal Entry of the Morgan County Court of Common Pleas. Appellee is the state of Ohio.

{¶2} This appeal is consolidated: *State v. Shuster*, 5th Dist. Morgan No. 13AP0001 and 13AP0002.

FACTS AND PROCEDURAL HISTORY

{¶3} The following facts are adduced from the record of the trial which took place in April 2013 before the Morgan County Court of Common Pleas. Appellee's physical evidence at trial included a notebook containing, e.g., transcripts of law enforcement interviews with appellant, a forensic interviewer's interview of the victim, and letters written by appellant to the victim's mother.

Disclosure

{¶4} This case arose on March 5, 2012, when a high school student overheard the victim tell a friend she was being molested by her stepfather. The student told his parents, who called the school guidance counselor immediately. The guidance counselor brought the victim into her office and asked whether the allegation was true. The victim broke down crying uncontrollably and said yes, it was true, but she didn't want her mom to know and she didn't want to tell because the family would lose everything. The guidance counselor obtained more details from the victim and contacted Children's Services and the Morgan County Sheriff's Department.

{¶5} The victim was interviewed by law enforcement and a forensic interviewer at Nationwide Children's Hospital. The victim stated the sexual abuse began in 2006

when the family moved into a new home they built on South Street in Stockport, Ohio when she was 10 years old. The abuse occurred regularly in her bedroom; her stepfather touched her over and under her clothes, on her buttocks, breasts, and genitals. The abuse included digital penetration and sexual intercourse, meaning penetration of the vagina with the penis. The sexual assaults continued until the Monday before the victim disclosed. The victim stated her mother was unaware of the abuse.

{¶6} Sheriff's deputies told the victim's mother her daughter was being molested by her stepfather and the mother became physically ill. She told law enforcement she had no idea the abuse was taking place and never observed anything unusual about her husband's relationship with her daughter.

Appellant's Admissions

{¶7} Appellant is the victim's stepfather. He was first interviewed by the Morgan County Sheriff's Office on March 5, 2012 and waived his Miranda rights. In the first interview, deputies confronted appellant with the victim's allegations, including touching over and under the clothes and intercourse. Appellant stated he didn't want to accuse the victim of lying and admitted he intentionally touched the victim's breasts and genitals, but denied "sex." He stated he was trying to get "closer" with the victim as his stepchild because he is not her "blood father" and claimed there were only two incidents during which the contact occurred.

{¶8} Appellant was interviewed again on March 6, 2012 and waived his Miranda rights. Appellant was more forthcoming but claimed the victim initiated the sexual contact. He admitted placing his penis in the victim's vagina and that sexual

contact occurred on multiple occasions, maybe "a dozen times." He also admitted the victim told him to stop and he was aware she wanted him to stop, but he held her down and prevented her from getting away. While acknowledging penetration occurred, appellant insisted it was not "sex" because he did not ejaculate, that being the "bridge [he] did not want to cross."

{¶9} After his arrest appellant wrote a number of incriminating letters from jail to his wife, the victim's mother. The letters state, e.g., appellant and the victim were "caught up in evil" but no "extreme lines" were crossed; the "truth might hurt and be hard to accept;" he did not realize what the victim was "put[ting] into place" until it was too late and he thought they were "bonding." He stated "[he] knew what took place was wrong but it was not intentional it just happened (*sic*)" and he didn't know the law.

Victim's Trial Testimony

{¶10} At trial the victim recounted incidents of abuse and approximate dates with the help of a scrapbook of her hunting achievements, dated by year and age. Appellant conditioned certain things the victim wanted, such as a new gun, a hunting trip, and a dog, on acts of abuse. Eventually the victim was old enough to try to get away from appellant but he held her down. Appellant asked her if she thought "it" was wrong and said without him her family would have nothing.

Appellant's Trial Testimony

{¶11} Appellant testified at trial and denied all sexual contact with the victim. He stated on one occasion he was in the victim's bedroom when she had an earache and she laid her head on his chest. He fell asleep and awoke to find the victim's hand in his shorts. He stated he did not place the victim's hand there. He denied making any

threats to kill the victim's dog. He said he was only trying to cooperate during his interviews with law enforcement and in trying to protect his family he allowed deputies to put words in his mouth. On cross examination, appellant acknowledged he demonstrated his penis going "up and down" instead of "in and out" on videotape and acknowledged he wrote the letters his wife read in court.

{¶12} A number of charges were dismissed pursuant to a Crim.R. 29(A) motion at trial because the victim was unable to recall certain time periods in the indictment. The following chart shows the charges submitted to the jury, the jury's findings, and the sentences of the trial court:

COUNT NO.	DATES OF OFFENSE	OFFENSE	R.C. SECTION	DEGREE	VERDICT	SENTENCE	CONSECUTIVE OR CONCURRENT
1	10/1/06-12/25/06	G.S.I. *(victim <13)*	2907.05(A)(4)	F3	Guilty	36 mos.	concurrent
4	6/1/07-8/31/07	G.S.I. *(victim <13)*	2907.05(A)(4)	F3	Guilty	Merged	N/A
5	6/1/07-8/31/07	Sex. Batt. stepparent *(victim <13)*	2907.03(A)(5)	F2	Guilty	Merged	N/A
6	6/1/07-8/31/07	Rape *(victim <13)*	2907.02(A)(1) (*sic*)	F1 w/ mandatory 25-to-life sentence	Guilty	25 years to life	consecutive
7	10/1/07-12/31/07	G.S.I. *(victim <13)*	2907.05(A)(4)	F3	Guilty	Merged	N/A
8	10/1/07-12/31/07	Sex. Batt. stepparent *(victim <13)*	2907.03(A)(5)	F2	Guilty	Merged	N/A
9	10/1/07-12/31/07	Rape *(victim <13)*	2907.02(A)(1) (*sic*)	F1 w/ mandatory 25-to-life sentence	Guilty	25 years to life	consecutive
13	9/1/08-11/30/08	G.S.I. *(victim <13)*	2907.05(A)(4)	F3	Guilty	Merged	N/A
14	9/1/08-11/30/08	Sex. Batt. stepparent *(victim <13)*	2907.03(A)(5)	F2	Guilty	Merged	N/A
15	9/1/08-11/30/08	Rape *(victim <13)*	2907.02(A)(1) (*sic*)	F1 w/ mandatory 25-to-life	Guilty	25 years to life	consecutive

				sentence			
16	9/1/09-11/30/09	G.S.I. *(force)*	2907.05(A)(1)	F4	Guilty	Merged	N/A
17	9/1/09-11/30/09	Sex. Batt. stepparent	2907.03(A)(5)	F3	Guilty	Merged	N/A
18	9/1/09-11/30/09	Rape *(force)*	2907.02(A)(2)	F1	Guilty	10 years	consecutive
19	10/1/10-11/30/10	G.S.I. *(force)*	2907.05(A)(1)	F4	Guilty	Merged	N/A
20	10/1/10-11/30/10	Sex. Batt. stepparent	2907.03(A)(5)	F3	Guilty	Merged	N/A
21	10/1/10-11/30/10	Rape *(force)*	2907.02(A)(2)	F1	Guilty	10 years	consecutive
25	5/1/11-6/30/11	G.S.I. *(force)*	2907.05(A)(1)	F4	Guilty	Merged	N/A
26	5/1/11-6/30/11	Sex. Batt. stepparent	2907.03(A)(5)	F3	Guilty	Merged	N/A
27	5/1/11-6/30/11	Rape *(force)*	2907.02(A)(2)	F1	Guilty	10 years	consecutive
28	12/26/11-1/23/12	G.S.I. *(force)*	2907.05(A)(1)	F4	Guilty	Merged	N/A
29	12/26/11-1/23/12	Sex. Batt. stepparent	2907.03(A)(5)	F3	Guilty	48 months	concurrent
30	12/26/11-1/23/12	Rape *(force)*	2907.02(A)(2)	F1	Not Guilty	N/A	N/A

{¶13} The counts were indicted in groups of three offenses based upon the time period in which they occurred, each group consisting of one count each of gross sexual imposition, sexual battery, and rape. The trial court determined in each group, the offenses of G.S.I. and sexual battery merged into the rape offense, therefore in each group appellant was sentenced only upon the rape conviction (with the exception of Count 1, in which group the counts of sexual battery and rape were dismissed). Counts 1 through 15 charged offenses against a child under the age of 13; Counts 16 through 30 were premised upon force and/or the fact the offender was the stepparent of the victim. The sentences for Counts 1 and 29 were ordered to be served concurrently with Counts 6, 9, 15, 18, 21, and 27, which were ordered to be served consecutively.

{¶14} Appellant was found to be a Tier III sex offender.

{¶15} Appellant raises six assignments of error:

ASSIGNMENTS OF ERROR

{¶16} "I. THE TRIAL COURT ERRED BY ENTERING CONVICTIONS AND IMPOSING SENTENCES THAT ARE NOT SUPPORTED BY THE JURY'S VERDICT."

{¶17} "II. THE TRIAL COURT ERRED BY RUNNING SENTENCES CONSECUTIVELY IN THE ENTRY WITHOUT FIRST ORDERING THEM TO RUN CONSECUTIVELY AT THE SENTENCING HEARING."

{¶18} "III. THE TRIAL COURT ERRED BY RELYING ON IMPROPER SENTENCING FACTORS."

{¶19} "IV. THE TRIAL COURT ERRED BY DENYING MR. SHUSTER'S MOTION FOR NEW TRIAL."

{¶20} "V. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY PROFFERING A POTENTIAL EXPERT WITNESS WHO WAS NOT SUFFICIENTLY PREPARED TO PROVIDE AN ADMISSIBLE PROFESSIONAL OPINION."

{¶21} "VI. THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE THAT WOULD IMPEACH THE CREDIBILITY OF A WITNESS."

ANALYSIS

I.

{¶22} In his first assignment of error, appellant argues the trial court's sentences are not supported by the jury verdicts and he must be convicted of the lowest level of offense upon the counts of rape and gross sexual imposition applicable to a child under the age of 13 (Counts 1, 4, 6, 7, 9, 13, and 15). We disagree.

{¶23} Appellant was indicted upon, convicted of, and sentenced upon two different categories of sex offenses: those which occurred when the victim was under the age of 13, and those which occurred after the victim was over the age of 13. Appellant challenges the jury verdicts and resulting sentences for rape and gross sexual imposition (G.S.I.) against a child under the age of 13.

Indictment and Verdict Forms: Rape of a Child Under 13

{¶24} In Counts 6, 9, and 15, appellant was charged by indictment with rape of a child under the age of 13. R.C. 2907.02(A)(1)(b) states: "No person shall engage in sexual conduct with another * * * when any of the following applies: [t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person."

{¶25} Rape is a felony of the first degree but the victim's age may be an aggravating factor which implicates mandatory sentencing. R.C. 2907.02(B) states in pertinent part: "Whoever violates this section is guilty of rape, a felony of the first degree. * * * *. Except as otherwise provided in this division * * * an offender under division (A)(1)(b) of this section shall be sentenced to a prison term or term of life imprisonment pursuant to division 2971.03 of the Revised Code. * * * *." R.C. 2971.03(A)(3)(d)(i) states in pertinent part:

> Nothwithstanding [other sections regarding sentencing], the court shall impose a sentence upon a person who is convicted of * * *a violent sex offense and who also is convicted of * * *a sexually violent predator specification that was included in the indictment * * * as follows:

> (d) Except as otherwise provided in division (A)(4) of this section, if the offense for which the sentence is being imposed is rape for which a term of life imprisonment is not imposed under division (A)(2) [forcible rape of a child under 10] of this section * * *it shall impose an indefinite prison term as follows:
>
> (i) If the rape is committed on or after January 2, 2007, in violation of division (A)(1)(b) of the Revised Code, it shall impose an indefinite prison term consisting of a minimum term of twenty-five years and a maximum term of life imprisonment.

{¶26} Counts 6, 9, and 15 of the indictment state: "on or about or between [applicable dates] in Morgan County, Ohio did engage in sexual conduct with another who is not the spouse of the offender, and the other person is less than thirteen years of age, whether or not the offender know (*sic*) the age of the other person, in violation of Section 2907.02(A)(1) [*sic*] R.C. Rape, subject to the penalties set forth in Sections 2907.02(B) and 2971.03 R.C., and against the peace and dignity of the State of Ohio[.]"

{¶27} The verdict forms for Counts 6, 9, and 15 state: "We, the jury, find the defendant guilty of rape," signed by twelve jurors.

Indictment and Verdict Forms: G.S.I. against a Child Under 13

{¶28} In Counts 1, 4, 7, and 13, appellant was indicted upon charges of G.S.I. against a child under the age of 13. R.C. 2907.05(A)(4) states in pertinent part: "No person shall have sexual contact with another * * * when any of the following applies: [t]he other person * * * is less than thirteen years of age, whether or not the offender knows the age of that person."

{¶29} G.S.I. committed in violation of division (A)(4) is a felony of the third degree and there is a presumption prison will be imposed. R.C. 2907.05(C)(2).

{¶30} Counts 1, 4, 7, and 13 of the indictment state: "on or about [applicable dates] in Morgan County, Ohio, did have sexual contact with another, not the spouse of the offender, and the other person is less than thirteen years of age whether or not the offender know (*sic*) the age of that person, in violation of Section 2907.05(A)(4) R.C. (Gross Sexual Imposition) a felony of the third degree and against the peace and dignity of the State of Ohio[.]"

{¶31} The verdict forms for Counts 1, 4, 7, and 13 state: "We, the jury, find the defendant guilty of gross sexual imposition," signed by twelve jurors.

Rape and G.S.I. of a Child Under 13 Do Not Implicate R.C. 2945.75 and Pelfrey

{¶32} Appellant argues the verdict forms described supra are insufficient. When additional elements enhance the degree of an offense, the additional element must be included in the indictment and jury verdict. R.C. 2945.75(A) states:

> When the presence of one or more additional elements makes an offense one of more serious degree:
>
> (1) The affidavit, complaint, indictment, or information either shall state the degree of the offense which the accused is alleged to have committed, or shall allege such additional element or elements. Otherwise, such affidavit, complaint, indictment, or information is effective to charge only the least degree of the offense.

> (2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.

{¶33} In *State v. Pelfrey*, the Ohio Supreme Court determined pursuant to the clear language of R.C. 2945.75, a verdict form signed by a jury must include either the degree of 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. 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735, syllabus. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged. R.C. 2945.75(A)(2).

{¶34} R.C. 2907.02(A)(1)(b), rape of a child under 13, is a felony of the first degree regardless of any enhancing factor. Appellant was indicted upon rape of a child under 13 and the jury was instructed upon rape of a child under 13; the jury's only alternatives with regard to Counts 6, 9, and 15 were to convict appellant of rape of a child under 13 or to acquit him. The jury found him guilty of those counts. R.C. 2907.02(A)(1)(b) does not implicate R.C. 2945.75(A)(2) because a conviction under this statute is always a felony of the first degree. These convictions similarly do not implicate *Pelfrey* because there is no aggravating element raising the offense to one of a higher degree.

{¶35} We have previously applied this rationale to convictions under R.C. 2907.05(A)(4), G.S.I. against a victim under the age of 13, and we follow our precedent in the instant case. *State v. Nethers*, 5th Dist. Licking No. 07 CA 78, 2008-Ohio-2679, ¶

57. Specifically, we found R.C. 2907.05(A)(4) contains all necessary elements of the offense, is a felony of the third degree, and requires no additional elements or circumstances "over and above the elements of the offense set forth [in] R.C. 2907.05(A)(4) that enhance the penalty for the conviction." Id.

{¶36} In so finding, we followed the Tenth District Court of Appeals and cited that Court's decision in *State v. Kepiro*, 10th Dist. Franklin No. 06AP-1302, 2007-Ohio-4593, ¶ 29-34 [*Pelfrey* does not control because the statute at issue prohibited a single type of conduct which could be punished in different ways depending upon attendant circumstances, unlike R.C. 2907.05 which describes five different types of conduct, each with a separate penalty]. See also, *State v. Vance*, 2nd Dist. Montgomery No. 16322, unreported, 1997 WL 736496 (Nov. 26, 1997) [*Pelfrey* does not control because the victim's age is an essential element, not an additional element].

{¶37} This rationale has since been applied to rape of a child under 13 pursuant to R.C. 2907.02(A)(1)(b) in *State v. Randles*, 9th Dist. Summit No. 26629, 2013-Ohio-4681, ¶ 8, appeal not allowed, 138 Ohio St.3d 1436, 2014-Ohio-889, 4 N.E.2d 1052 [if the jury did not believe defendant engaged in sexual conduct with a victim under the age of 13, result would have been acquittal, thus jury's verdict necessarily included a finding the victim's age is less than 13]. See also, *State v. Jones*, 4th Dist. Adams No. 13CA960, 2013-Ohio-5889 [*Pelfrey* not applicable to R.C. 2921.36(A)(2), illegal conveyance into detention facility]; *State v. Poling*, 11th Dist. Trumbull No. 88-T-4112, unreported, 1991 WL 84229 (May 17, 1991) [R.C. 2945.75(A)(2) inapplicable to abuse of a corpse pursuant to R.C. 2927.01 because two types are not distinguishable by one additional element].

{¶38} We therefore find the jury verdict forms as to Counts 1, 4, 7, and 13 (G.S.I. against a child under the age of 13) and Counts 6, 9, and 15 (rape of a child under 13) are not deficient and sufficiently find appellant guilty of the offenses as charged and as convicted by the trial court. Appellant's first assignment of error is overruled.

II.

{¶39} In his second assignment of error, appellant argues the trial court improperly ordered the sentences on Counts 6, 9, 15, 18, 21, and 27 (rape) to be served consecutively. We disagree.

{¶40} O.R.C. 2929.14(C) states:

> (4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to Section 2929.16, 2929.17 or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) The harm caused by the multiple offenses was so great or unusual that no single prison terms for any of the offenses

committed as part of a single course of conduct adequately reflects' the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶41} 2011 Am.Sub.H.B. No. 86, which became effective on September 30, 2011, revived the language provided in former R.C. 2929.14(E) and moved it to R.C. 2929.14(C)(4). The revisions to the felony sentencing statutes under 2011 Am.Sub.H.B. No. 86 now require a trial court to make specific findings when imposing consecutive sentences.

{¶42} We have previously found the import of these revisions is the trial court must, again, make the required findings in compliance with *State v. Comer*, 99 Ohio St.3d 463, 2003–Ohio–4165; in other words, the findings must be made on the record at the sentencing hearing prior to imposition of consecutive sentences. *State v. Troutt*, 5th Dist. Muskingum No. CT2013-0042, 2014-Ohio-1705, ¶ 14, citing *State v. Williams*, 5th Dist. Stark No. 2013CA00189, 2013-Ohio-3448; *State v. Reynolds*, 5th Dist. Fairfield No. 12 CA 7, 2012-Ohio-5956, ¶ 15, appeal not allowed, 135 Ohio St.3d1415, 2013-Ohio-1622, 986 N.E.2d 30. See also, *State v. Bever*, 4th Dist. Washington No. 31CA21, 2014-Ohio-600, ¶ 22; *State v. Wilson*, 8th Dist. Cuyahoga No. 97827, 2012-Ohio-4159, ¶ 13; *State v. Stamper*, 12th Dist. Butler No. CA2012-08-166, 2013-Ohio-5669, ¶25.

{¶43} The Ohio Supreme Court recently addressed the requirements for imposing consecutive sentences in a comprehensive fashion, finding a trial court must make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and

incorporate its findings into its sentencing entry; the trial court has no obligation to state reasons to support its findings. *State v. Bonnell*, --- N.E.3d ----, 2014-Ohio-3177, syllabus. The Court further explained "a word-for-word recitation of the language of the statute is not required, and as long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld." Id. at ¶ 29. We find the trial court engaged in the correct analysis and the findings are fully supported by the record in the instant case. The record must clearly demonstrate consecutive sentences are not only appropriate, but are also clearly supported by the record. *State v. Conrad*, 5th Dist. Fairfield No. 13 CA 18, 2014–Ohio–1757, ¶ 22.

{¶44} We have specified the findings now required for imposition of consecutive sentences:

> In other words, in reviewing the record we must be convinced the trial court imposed consecutive sentences because it had found consecutive sentences were necessary to protect the public or to punish the offender, they are not disproportionate to the seriousness of his conduct and the danger the offender poses to the public. In addition, in reviewing the record we must be convinced that the trial court found the offender's history of criminal conduct demonstrated consecutive sentences were necessary to protect the public from future crime, or the offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to

> section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense, or at least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct. R.C. 2929.14(C)(4).
>
> *State v. Williams*, 5th Dist. Stark No. 2013CA00189, 2013-Ohio-3448, ¶ 25.

{¶45} Appellant does not challenge the adequacy of the trial court's findings; instead, he argues the trial court did not impose consecutive sentences on the record at the hearing and only did so in the sentencing entry. We disagree with appellant's characterization of the record.

{¶46} At the sentencing hearing, the trial court observed that although this course of conduct only recently came to light, the fact that appellant offended against his stepdaughter for so long militates against him being a "law-abiding citizen;" the trial court found appellant expressed no remorse; many factors indicate these were serious offenses, including the age of the victim and the psychological harm involved; appellant held a position of public trust; and his relationship with the victim facilitated the offense.

{¶47} Then the trial court stated the following:

> * * *.

Now, the Court is being asked by the State to impose consecutive sentences. The defendant wants concurrent sentences.

While this state provides that the Court may require the offender to serve prison terms consecutively if consecutive service is necessary to protect the public from future crime or to punish the offender, and it's not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and at least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm cause by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct. And the Court finds that under that criteria, consecutive sentences would be appropriate.

Mr. Shuster, you're a dangerous man. I listened to the testimony, and you have an ability to fly below the radar. I don't know when this course of conduct—or let me say this—when the plan was hatched. As I say, I heard the testimony, and I struggled. Did this start back when you chose your mate because she had a young daughter? Did—was it furthered when you built the house and decided that, well, we only need to soundproof two rooms?

> Anybody who takes advantage of a young person this way is dangerous.
>
> The Court will order that the sentence imposed for gross sexual imposition and the sentences imposed for sexual battery may be served concurrently with each other, and they will be served concurrently with the other sentences herein imposed.
>
> **The sentences for the three counts of rape involving the individual under the age of 13 will be served consecutively. And the sentences imposed for rape after she turned 13, those three will also be served consecutively.** (Emphasis added.)
>
> * * *.
>
> (T. 14-16).

{¶48} Appellant points only to the final statement regarding consecutive sentences for rape and argues the trial court meant the two sets of three offenses were to be served consecutively, not that each of the six total offenses are to be served consecutively. We find that when viewed in the context of the entire sentencing, and not in a vacuum as appellant has presented, the trial court did impose consecutive sentences upon each count of rape at the sentencing hearing.

{¶49} Appellant's second assignment of error is overruled.

III.

{¶50} In his third assignment of error, appellant argues the trial court relied upon improper sentencing factors, including his position of public trust, the victim's age, and his relationship to the victim. We disagree.

{¶51} In *State v. Kalish*, 120 Ohio St.3d 23, 896 N.E.2d 124, 2008–Ohio–4912, the Ohio Supreme Court established a two-step procedure for reviewing a felony sentence. The first step is to "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." *Kalish* at ¶ 4. If the first step is satisfied, the second step requires the trial court's decision be reviewed under an abuse-of-discretion standard. Id. We have recognized that "[w]here the record lacks sufficient data to justify the sentence, the court may well abuse its discretion by imposing that sentence without a suitable explanation." *State v. Firouzmandi*, 5th Dist. Licking No.2006–CA–41, 2006–Ohio–5823, ¶ 52.

{¶52} We note R.C. 2929.12 requires the trial court to consider seriousness and recidivism factors, including those cited by the trial court as excerpted in our discussion of appellant's second assignment of error. The trial court properly found, in light of the victim's age, the psychological harm she suffered, and the fact that the abuse was facilitated by the familial relationship are proper considerations pursuant to R.C. 2929.12(B). We disagree with appellant's assertion that his position as mayor played no role in the case; the victim's reluctance to disclose was due in part to the possibility of her family "losing everything" and appellant cited his public support in his letters to his wife from jail.

{¶53} The trial court in fact made an exhaustive analysis of the aggravating and mitigating factors in this case. "The Code does not specify that the sentencing judge must use specific language or make specific findings on the record in order to evince the requisite consideration of the applicable seriousness and recidivism factors." *State*

v. Arnett, 88 Ohio St.3d 208, 215, 2000 -Ohio- 302, 724 N.E.2d 793, citing R.C. 2929.12. Moreover, the Ohio Supreme Court has held "the individual decisionmaker has the discretion to determine the weight to assign a particular statutory factor." Id. at 215-216, citing *State v. Fox*, 69 Ohio St.3d 183, 193, 631 N.E.2d 124 (1994).

{¶54} The sentence of the trial court is not clearly and convincingly contrary to law. We further find the trial court's sentence is not unreasonably, arbitrary, or unconscionable.

{¶55} Appellant's third assignment of error is overruled.

IV.

{¶56} In his fourth assignment of error, appellant argues the trial court erred in overruling his motion for new trial. We find the trial court was without jurisdiction to rule on the motion for new trial.

{¶57} Appellant filed the motion for new trial after he filed the notice of appeal. When a case has been appealed, the trial court retains all jurisdiction not inconsistent with the reviewing court's jurisdiction to reverse, modify or affirm the judgment. *Cramer v. Fairfield Med. Ctr.*, 5th Dist. Fairfield No. 2007 CA 62, 2008-Ohio-6706, ¶ 17, citing *State ex rel. Fire Marshal v. Curl*, 87 Ohio St.3d 568, 570, 2000-Ohio-248, 722 N.E.2d 73. A motion for a new trial is inconsistent with a notice of appeal of the judgment sought to be retried. *Powell v. Turner*, 16 Ohio App.3d 404, 405, 476 N.E.2d 368 (11th Dist.1984), citing *Majnaric v. Majnaric*, 46 Ohio App.2d 157, 347 N.E.2d 552 (9th Dist.1975), paragraph one of the syllabus. Therefore, a defendant's filing of a notice of appeal divests the trial court of jurisdiction to consider a motion for a new trial. *State v.*

Kenney, 8th Dist. Cuyahoga No. 81752, 2003-Ohio-2046, ¶ 58, appeal not allowed, 99 Ohio St.3d 1546, 2003-Ohio-4671, 795 N.E.2d 684.

{¶58} The trial court's ruling on the motion for new trial is void for lack of jurisdiction. Appellant's fourth assignment of error is dismissed.

V.

{¶59} In his fifth assignment of error, appellant contends he received ineffective assistance of counsel because the expert witness proffered by the defense was not sufficiently prepared to testify for the purpose for which appellant called him to testify. We disagree.

{¶60} Dr. Daniel Davis evaluated appellant in connection with his motion for competency evaluation and found appellant to be competent. At trial, defense trial counsel stated Dr. Davis would be called for the purpose of testifying to "how stressors could be related to his ability to respond to external stimuli like questions." In other words, defense trial counsel wanted Dr. Davis to testify to appellant's suggestibility during questioning by law enforcement. During a voir dire of the doctor, he readily admitted his report was based solely upon an evaluation of appellant's competency; he never reviewed the interviews during which appellant made inculpatory statements and would have used different techniques and instruments to evaluate appellant's suggestibility if he had been asked to testify on that issue. The trial court therefore did not permit Dr. Davis to testify.

{¶61} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that trial counsel acted incompetently. *See*, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). In assessing such

claims, “a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Id.* at 689, citing *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158 (1955). “There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” *Strickland,* 466 U.S. at 689. The question is whether counsel acted “outside the wide range of professionally competent assistance.” *Id.* at 690.

{¶62} Even if a defendant shows that counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this “actual prejudice” prong, the defendant must show that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland,* 466 U.S. at 694.

{¶63} Appellant argues defense trial counsel was ineffective for submitting a proposed expert witness who could not provide an admissible expert opinion. It is evident Dr. Davis could provide an admissible opinion as to appellant’s competency, albeit one not in appellant’s interest, but could not opine as to appellant’s alleged suggestibility during law enforcement interviews. We decline to find counsel was ineffective because appellant has failed to demonstrate actual prejudice.

{¶64} From the record of the voir dire, it appears Dr. Davis was never asked to evaluate appellant for the purpose appellant intended to use him at trial. We decline to speculate on what the outcome of such an evaluation would have been. Instead, it is

evident from the overwhelming evidence in this case that Dr. Davis' expert opinion would not have resulted in a different outcome.

{¶65} Appellant's fifth assignment of error is overruled.

VI.

{¶66} In his sixth assignment of error, appellant argues the trial court erred in excluding certain evidence that would have impeached the credibility of the victim. We disagree.

{¶67} First, we note no proffer was made of the evidence excluded at trial. Now, appellant contends the excluded evidence would have established the victim's "history of excessive sexual activity and dishonesty regarding that history." (Merit Brief of Appellant, 15). We review the admission or exclusion of evidence for an abuse of discretion. Absent an abuse of discretion resulting in material prejudice to the defendant, a reviewing court should be reluctant to interfere with a trial court's decision in this regard. *State v. Hymore*, 9 Ohio St.2d 122, 128, 224 N.E.2d 126 (1967).

{¶68} We will not speculate what this evidence might have consisted of; based solely upon appellant's contention here, the admission of such evidence would clearly violate Ohio's rape shield law, which excludes reputation, opinion, and specific-acts evidence of a victim's alleged sexual history unless an exception applies. R.C. 2907.02(D); R.C. 2907.05(E).

{¶69} Appellant's summary argument does not include any exception under which such evidence would be relevant or admissible. The trial court did not abuse its discretion in excluding this evidence.

{¶70} Appellant's sixth assignment of error is overruled.

CONCLUSION

{¶71} Appellant's six assignments of error are overruled and the judgment of the Morgan County Court of Common Pleas is affirmed.

By: Delaney, J. and

Farmer, P.J.

Wise, J., concur.