[Cite as *State v. Evans*, 2010-Ohio-3545.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	

STATE OF OHIO	C.A. No. 09CA0049-M
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
JOSEPH R. EVANS	COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO
Appellant	CASE No. 08-CR-0536

DECISION AND JOURNAL ENTRY

Dated: August 2, 2010

WHITMORE, Judge.

{¶1} Defendant-Appellant, Joseph Evans, appeals from his convictions in the Medina County Court of Common Pleas. This Court affirms.

I

{¶2} On December 3, 2008, Evans was indicted on three counts of rape of a minor under the age of thirteen, in violation of R.C. 2907.02(A)(1)(b), a first-degree felony, and one count of pandering obscenity of a minor, in violation of R.C. 2907.321(A)(5), a fourth-degree felony, for offenses that occurred over a period of years between 2001–2005. The victim of the foregoing offenses was Evans' daughter, M.E., born on December 27, 1993. Evans pleaded not guilty to the charges at the time of his indictment. On July 8, 2009, Evans withdrew his plea of not guilty and entered a no contest plea to the pandering obscenity count. The remaining three counts were tried to a jury. The jury found Evans guilty of two counts of rape of a minor under the age of thirteen and one count of a lesser included offense of gross sexual imposition, in

violation of R.C. 2907.05. The trial court sentenced Evans to consecutive terms on all four counts, totaling twenty-two and one-half years in prison. Evans timely appealed and asserts three assignments of error for our review, some of which have been rearranged for ease of review.

II

Assignment of Error Number Two

> "DEFENDANT'S TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

{¶3} In his second assignment of error, Evans alleges that his trial counsel was ineffective because his counsel: (1) permitted him to enter a no contest plea to a charge where venue was improper; and (2) failed to object to the introduction of certain testimony from the social worker who evaluated the victim. We disagree.

{¶4} To prevail on his claim of ineffective assistance of counsel, Evans must meet the two-prong test established in *Strickland v. Washington* (1984), 466 U.S. 668, 687.

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687.

An appellate court need not analyze both prongs of the *Strickland* test if it finds that an appellant failed to prove either. *State v. Ray*, 9th Dist. No. 22459, 2005-Ohio-4941, at ¶10. In the context of a guilty plea, the defendant must demonstrate that there is a reasonable probability that, but for his counsel's error, he would not have pleaded guilty and would have insisted on going to trial.

Hill v. Lockhart (1985), 474 U.S. 52, 58-59. The same is true in the case of a plea of no contest. *State v. McCraw* (July 3, 1996), 9th Dist. No. 95CA006227, at *2.

{¶5} Evans argues that his counsel was deficient because he advised him to enter a no contest plea to the pandering charge. Evans asserts that the computers containing the obscene material were seized by police from his Akron residence and that the offense was alleged to have occurred at a time during which he resided in Summit County, not Medina County. By entering a plea of no contest, however, Evans admitted that the facts alleged in the indictment were true. Crim.R. 11(B)(2). Evans' indictment specifically stated that the offenses occurred in Medina County. Further, the trial court recited the facts alleged in the indictment on the record during Evans' plea hearing, which included a statement that the pandering offense had occurred in Medina County. Having admitted to the truth of those facts, even if Evans' counsel was deficient in his representation, Evans cannot point to any evidence in the record to support his claim that venue was improper. Accordingly, his argument lacks merit.

{¶6} Evans next argues that his counsel was ineffective for failing to object to the testimony of social worker Cathy Beckwith-Laube. He alleges that she was not qualified as medical personnel, so therefore her statements constituted hearsay and "merely served to bolster [the testimony] of [M.E.]" This Court has repeatedly stated that "trial counsel's failure to make objections is within the realm of trial tactics and does not establish ineffective assistance of counsel." *State v. Jones*, 9th Dist. No. 24469, 2010-Ohio-879, at ¶35, quoting *State v. Guenther*, 9th Dist. No. 05CA008663, 2006-Ohio-767, at ¶74. Furthermore, we have previously recognized the testimony of social workers falls well within the non-hearsay provision outlined in Evid.R. 803(4). *State v. Major*, 9th Dist. No. 21662, 2004-Ohio-1423, at ¶6-13; *In re Tardiff* (Dec. 3, 1997), 9th Dist. No. 18455, at *2-3. Beckwith-Laube, a licensed social worker since

1989, testified that she has worked as a social worker at Children's Hospital Children At Risk Evaluation ("C.A.R.E.") Center for the past thirteen years. She met with M.E. based on a referral from Children's Services and interviewed M.E. to obtain a history from her before M.E. was examined by the nurse practitioner. Upon completing the interview, Beckwith-Laube informed the nurse practitioner of M.E.'s history to aid the nurse in performing her medical examination. In order to avoid having to repeatedly interview M.E. as to the offenses, personnel from Akron Police Department, Children's Services, and Victim Assistance were able to observe the interview from another room. The mere fact that others witnessed the interview between Beckwith-Laube and M.E., however, does not change the purpose of the interview or the nature of the medical information sought by Beckwith-Laube which was necessary to prepare other medical personnel to conduct a physical examination of M.E. Accordingly, we consider Evid.R. 803(4) wholly applicable to Beckwith-Laube's testimony, as it reflected statements that were made to her by M.E. for the purpose of medical diagnosis and treatment. Having failed to establish that his counsel's performance was in any way deficient, this Court need not address the matter of prejudice. *Ray* at ¶10. Accordingly, Evans' second assignment of error is not well taken.

Assignment of Error Number One

> "THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE JURY'S GUILTY VERDICTS, AND APPELLANT'S CONVICTION ON TWO COUNTS OF STATUTORY RAPE AND ONE COUNT OF GSI WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶7} In his first assignment of error, Evans alleges that there was insufficient evidence to support his convictions and that his convictions are against the manifest weight of the evidence. We disagree.

{¶8} In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks* (1991), 61 Ohio St.3d 259, 274. Furthermore:

> "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id. at paragraph two of the syllabus; see, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

"In essence, sufficiency is a test of adequacy." *Thompkins*, 78 Ohio St.3d at 386.

{¶9} Evans was convicted of rape under R.C. 2907.02(A)(1)(b), which makes it a violation to "engage in sexual conduct with another who is not the spouse of the offender *** when *** [t]he other person is less than thirteen years of age[.]" "Sexual conduct" is defined to include "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another." R.C. 2907.01(A). Evans was also convicted of gross sexual imposition under R.C. 2907.05, which prohibits "sexual contact with another, not the spouse of the offender *** when *** [t]he other person *** is less than thirteen years of age[.]" R.C. 2907.05(A)(4). "Sexual contact" is defined as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B).

{¶10} At trial, M.E. testified that her parents divorced when she was a toddler. After their divorce, her father maintained a home on Water Street in Wadsworth, Ohio, where he and

his girlfriend lived. Evans and his ex-wife shared parenting responsibilities for M.E. and her brother, A.E., so the children lived with Evans for six months each year. M.E. testified that, after Evans' girlfriend moved out of the Water Street house, Evans started to engage M.E. in various sexual activities. According to M.E., Evans had her sit on his lap, while the two were naked, so they could view pornographic images of naked women together on Evans' computer. While doing so, Evans would "play[] with himself" and rub his hands over M.E.'s breasts and vagina. Evans would sometimes touch his penis to M.E.'s vagina while they were sitting together at the computer. M.E. indicated this type of activity occurred more than ten times that she could recall. She further testified that Evans would have her sit on top of him on his bed while the two were naked such that her vagina was located on top of his penis and the two areas were "rubbed together." M.E. stated that on one occasion, Evans had her perform oral sex on him and that he ejaculated into her mouth. She indicated Evans touched her vagina with his hands and his mouth, but she did not believe that his hand or his tongue ever penetrated her vagina. M.E. stated she participated in these activities because she was "scared" of Evans and that Evans told her "not to tell anybody" about the things they did together. M.E. admitted she eventually told different people "bits and parts" of what had occurred between her and Evans, including her boyfriend, B.G., her friend, A.O., and eventually, her mother.

{¶11} M.E. also recalled that when she showered in the basement of Evans' Akron home, she would sometimes see a red light in a gap where the ceiling and the wall met, which she thought was unusual. M.E. indicated that, while at the Akron address, Evans would take pictures of her on his cell phone while she wearing only her "bra and underwear." Evans told her he was photographing her in order to show her "how [her] underwear [was] supposed to fit."

{¶12} Based on the foregoing testimony from M.E., we conclude that there was sufficient evidence which, if believed, could have permitted a jury to find Evans guilty of rape based on M.E.'s testimony that on two occasions Evans engaged in oral sex with her when she was under the age of thirteen. M.E.'s testimony also provides sufficient evidence that Evans had sexual contact with her while she was under the age of thirteen, given her statements that Evans repeatedly touched her breasts and vagina and required she fondle his penis. Moreover, this Court has repeatedly held that "'[i]n sex offense cases, *** the testimony of the victim, if believed, is sufficient to support a conviction, even without further corroboration.'" *State v. Melendez*, 9th Dist. No. 08CA009477, 2009-Ohio-4425, at ¶15, quoting *State v. Willard*, 9th Dist. No. 05CA0096-M, 2006-Ohio-5071, at ¶11. Consequently, Evans' assertion that there was insufficient evidence to support his rape and gross sexual imposition convictions lacks merit.

{¶13} In determining whether a conviction is against the manifest weight of the evidence an appellate court:

> "[M]ust review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *Thompkins*, 78 Ohio St.3d at 387. Further, when reversing a conviction on the basis that the conviction was against the manifest weight of the evidence, the appellate court sits as the "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. Id. Therefore, this Court's "discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily

against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *Otten*, 33 Ohio App.3d at 340.

{¶14} On appeal, Evans claims that M.E. was a troubled child who was angry with him because he disapproved of her appearance and her friends. Evans argues that there was no "corroborating physical evidence or eyewitnesses" to M.E.'s rape allegations. Evans attacks M.E.'s credibility, essentially arguing that M.E. fabricated the sexual allegations against him in retaliation for Evans having turned over to police sexually explicit letters M.E. had written to twenty-one year old Mark Endly, a man who was living with her and her mother at the time. As a result of further investigation initiated by the letters Evans gave to police, Endly was convicted and incarcerated based on his conduct with someone other than M.E. Evans similarly attacks his ex-wife's credibility and motives related to the allegations against him.

{¶15} At trial, M.E. admitted that she had written "inappropriate" letters of a sexual nature to Endly while he was living with her and her mother. Despite M.E. writing in the letters that she and Endly had a sexual relationship, she testified that he was only "a friend." M.E. admitted that she told her mother about Evans' conduct shortly after Evans found the letters that M.E. wrote to Endly, turned them over to police, and demanded Endly move out of her mother's house. M.E. denied, however, that she was making up the allegations against Evans based on those recent events. Upon cross examination, M.E. acknowledged that Endly was "in jail" at the time of Evans' trial as a result of her father having turned her letters over to police. M.E. further admitted that at different points in the past she had been on medication for anxiety and depression and that she sometimes would get "so stressed" that she could not function. M.E. stated she was made fun of at school not because she wore black clothes and had black hair, but because of the people she hung out with and because she stuttered.

{¶16} Several other witnesses testified at trial as well. M.E.'s mother, Rachell Noe, testified that Evans lived on Water Street in Wadsworth at about the time M.E. started into first grade. In February 2008, M.E. told Noe that her father had "touched her in places that he shouldn't have." Noe did not ask her any details at the time, but instead, had M.E. call Children's Services to report what had happened. Based on the information M.E. told Children's Services, Noe realized the seriousness of the accusations and contacted police in Akron and Wadsworth, where she thought the offenses had occurred.

{¶17} Noe further testified that when she was married to Evans, he would frequently purchase underwear for her to wear and that there were times when she found her worn underwear in places where she had not left them, such as her car or in the living room. At times, Noe also found Evans using her worn underwear to masturbate in the couple's bedroom and bathroom.

{¶18} Noe stated that she took M.E. to Akron Children's Hospital for evaluation and had her meet with a counselor two or three times. Noe indicated that she had tried to arrange for more counseling sessions beyond the first two M.E. attended, but discontinued the counseling once her car broke down and because, in her opinion, M.E. "was doing fine" and did not need ongoing counseling. On cross examination, when Evans presented Noe with a copy of the counselor's letter stating Noe had "not contacted" the counselor's office to set up any future appointments beyond the initial two, Noe indicated she must have been "mistake[n]" about her attempts to reschedule M.E.'s therapy given the number of appointments that she had to attend to at that time.

{¶19} Upon cross examination, Noe also admitted that she had permitted her friend, Endly, and his girlfriend, to live in her Akron residence for a period of time while M.E. and

M.E.'s brother were residing there. She further admitted that Endly was now incarcerated for unlawful sexual conduct with a minor as a result of the police investigation of M.E.'s letters. According to Noe, M.E. "still says nothing happened between [M.E. and Endly]" but Noe added that once Endly was convicted based on his conduct with a different girl about M.E.'s age, she found M.E.'s assertion that "nothing happened" between the two to be "doubtful." In doing so, Noe acknowledged that she thought M.E. may have lied to her about the lack any sexual relationship between M.E. and Endly given what was discussed in M.E.'s letters and Endly's subsequent conviction for a sexual offense.

{¶20} M.E.'s brother, A.E., testified that he had seen naked images of his sister on Evans' computer once when he was looking for something on it. When he found the pictures, he also found a video of M.E., in which she was naked and taking a shower in the basement bathroom of Evans' home. A.E. recognized the shower head and the curtain in the video as the same ones Evans had in his basement bathroom. A.E. further testified that the computer on which he viewed both the photographs and video had a clear panel on one of the sides.

{¶21} Detective Daniel Boyd, a Wadsworth detective with nineteen years experience, testified that Noe informed him of M.E.'s report that Evans had sexually abused her. Detective Boyd interviewed M.E. in early March 2008, at which point she relayed events consistent with what she had testified to at trial, including accounts of oral sex and fondling between M.E. and Evans, and Evans photographing M.E. in her undergarments. Additionally, Detective Boyd recalled M.E. stating Evans had digitally penetrated her and that once she had found her father behind the cab of his truck masturbating.

{¶22} Detective Boyd verified that Evans lived at his Water Street address in Wadsworth from January 2001 to some point in 2005, but that Evans had since moved to Akron.

At the time of M.E.'s report about Evans' conduct, Detective Boyd obtained a search warrant for three computers in Evans' Akron home, none of which were admitted at trial. Based on information Detective Boyd received from the Akron Police Department, he later got another search warrant for a different Akron address. Upon searching the second address, Detective Boyd found the computer that matched the description A.E. gave Detective Boyd as to the computer with the clear panel on which he had seen images of his sister. A.E. confirmed for police that the computer they had seized was the one on which he saw the images of his sister. As part of his investigation, Detective Boyd also contacted M.E.'s friend, B.G., and M.E.'s youth group leader, Tonya Dougherty, who confirmed that M.E. had at one point in time informed them about portions of Evans' conduct.

{¶23} Erica Moore, a computer forensic specialist from the Bureau of Criminal Identification and Investigation, testified that the data on Evans' computer had been professionally overwritten, which in essence "wiped [it] clean" and prevented her from recovering any data that he might have deleted from the computer's hard drive. Moore admitted, however, that such software can be purchased in most electronics stores and would be appropriately used if a person wished to resell, or even discard, his computer so that other people would be unable to retrieve any of the data once stored on it.

{¶24} Cathy Beckwith-Laube, a social worker at the Children's Hospital C.A.R.E. Center, testified that during her interview with M.E., M.E. told her that she had been performing various sexual activities with Evans since the age of three. M.E. recounted to Beckwith-Laube a series of events that had occurred between the time she was three to fourteen years old which included Evans: photographing M.E. in her undergarments with his cell phone; touching her breasts and genital areas with his hands and penis; requiring she fellate him; having M.E. sit in

his lap in front of the computer and view naked pictures of women; and masturbating in front of her. M.E. suspected Evans also took her underwear at times because she would find it hidden in different places around the house. M.E. told Beckwith-Laube that it was difficult for her to discuss the things she and Evans did in the past, but that it was "stressing her out" now.

{¶25} Donna Abbott, a nurse practitioner with Children's Hospital C.A.R.E. Center, testified that she conducted a physical examination of M.E. which was normal. She indicated she did not expect to see any unusual or abnormal findings, however, given that amount of time that had passed since the incidents reported by M.E. had occurred. She further stated that, had she seen M.E. closer when the incidents had occurred, she still would not have expected to see any physical findings given the nature of the sexual contact. During the examination, M.E. indicated she was currently depressed, so Abbott sent M.E. to the hospital where she underwent a psychiatric evaluation and was subsequently admitted to the psychiatric unit.

{¶26} Elena Aslanides, a professional counselor at Child Guidance and Family Solutions in Akron testified that she met with M.E. two times for counseling. According to Aslanides, M.E.'s symptoms were indicative of post traumatic stress disorder and non specific mood disorder. M.E. placed "a lot of guilt on herself" but still loved her dad. Aslanides agreed that, if M.E.'s allegations were true, the most important thing to do to help her would be to treat her through ongoing therapy, which M.E.'s mother arranged only two times before she discontinued the sessions. Consequently, Aslanides admitted her diagnosis is "somewhat tentative" and clarified that her job is to work through whatever issues M.E. has and to teach M.E. coping skills to deal with those issues, not to determine that sexual abuse did or did not occur.

{¶27} M.E.'s former boyfriend, B.G., testified that while they were dating in the fall of 2007, M.E. told him that her father had "molested" her and "made her put her hand down his pants" on more than one occasion. The youth group leader at M.E.'s church, Tonya Dougherty, testified that when the group was discussing signs and forms of sexual abuse at the end of one of their meetings in the fall of 2007, M.E. "put her head near her knees and started crying" in front of the other girls at the meeting. After the meeting, when Dougherty was taking M.E. home, she asked M.E. why she had reacted that way during the meeting. Initially, M.E. did not want to talk about it, but later stated that "her dad had done some things [to her] that she didn't like." M.E. did not specify what had occurred, but later shared with Dougherty that Evans had her try on "underclothes" to show him "how they fit." Dougherty did not report these conversations to anyone or investigate their validity, but instead advised M.E. that if something happened that was "bad," M.E. needed to inform an adult such as a police officer, teacher, counselor, or her mother.

{¶28} Tiffany Fowler-Borrero, Evans' girlfriend while he lived at the Water Street residence and the mother of one of his children, testified that a few times she found Evans in the bedroom masturbating in front of the computer after he woke up in the morning.

{¶29} In his defense, Evans presented Detective Jerry Gachett, a detective for the Akron Police Department's Juvenile Division. Detective Gachett testified that on February 29, 2008, he interviewed Evans and M.E. with respect to a report he had received from Evans vis-à-vis M.E.'s letters to Endly. Detective Gachett started his investigation, which included referring the matter to Children's Services. Shortly after he began his investigation, Detective Gachett spoke with Detective Boyd from Wadsworth and learned that M.E. had told her mother that Evans had

sexually assaulted her. Detective Gachett confirmed that his office never filed any charges against Endly as a result of M.E.'s letters to him.

{¶30} Despite Evans' challenges to the credibility of both M.E. and Noe, this Court has repeatedly stated that such matters are best determined by the trial court, as it has the opportunity to "to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *State v. Abel*, 9th Dist. No. 08CA009506, 2009-Ohio-2516, at ¶15, quoting *State v. Cremeans*, 9th Dist. No. 22009, 2005-Ohio-261, at ¶6. Moreover, this Court will not reverse the trial court's verdict in a manifest weight challenge "simply because the trier of fact chose to believe the State's witness[.]" *State v. Crowe*, 9th Dist. No. 04CA0098-M, 2005-Ohio-4082, at ¶22. To the extent Evans claims that M.E.'s testimony was uncorroborated by any other evidence, we again note that a victim's testimony in the case of a sex offense does not require corroboration. *Melendez* at ¶15. Furthermore, the record reveals that M.E. had shared various allegations of Evans' conduct with different people at different points in time. M.E.'s revelation of sexual abuse to both her boyfriend and her youth group coordinator occurred in the fall of 2007, well before Evans found M.E.'s letters to Endly and reported him to the police in February 2008. The counselor that met with M.E. indicated her symptoms were consistent with sexual abuse, as did the nurse practitioner who examined her. Evans' ex-wife and ex-girlfriend also testified that Evans' sexual activities with M.E. were consistent with their experiences with him as well. Finally, A.E. testified he had seen images of M.E. on Evans' computer, consistent with M.E.'s testimony that Evans frequently photographed her and she recalled seeing a red light in the ceiling while she showered. Based on the testimony adduced at trial, we do not consider this the exceptional case in which the evidence weighs heavily against Evans' convictions. See *Martin*, 20 Ohio App.3d

at 175; see, also, *Otten*, 33 Ohio App.3d at 340. Because, Evans' convictions are not against the manifest weight of the evidence, his first assignment of error lacks merit.

Assignment of Error Number Three

> "THE TRIAL COURT ERRED BY IMPOSING CONSECUTIVE PRISON TERMS UPON APPELLANT CONTRARY TO R.C. 2929.14(B) AND (E)(4), WHERE DEFENDANT-APPELLANT HAD NO PRIOR FELONY RECORD AND HAD NOT PREVIOUSLY SERVED A PRISON SENTENCE."

{¶31} In his third assignment of error, Evans argues that the trial court failed to properly consider the felony sentencing factors and erred in sentencing him to consecutive prison terms for his convictions because he has no prior felony record and has not served a prison term. We disagree.

{¶32} In *State v. Foster*, the Supreme Court found that Ohio's sentencing structure was unconstitutional to the extent that it required judicial fact-finding. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, paragraphs one through seven of the syllabus. As a result, the Court excised the portions of the sentencing statutes it found to offend the Sixth Amendment and thereby granted full discretion to trial court judges to sentence defendants within the bounds prescribed by statute. See id. See, also, *State v. Dudukovich*, 9th Dist. No. 05CA008729, 2006-Ohio-1309, at ¶19. The Supreme Court later held that:

> "In applying *Foster* to the existing statutes, 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, at ¶4.

Our review of the record reveals that Evans' sentences were within the applicable rules and statutes and were not contrary to law, as his sentences for each offense fell within the ranges set forth in R.C. 2929.14(A). Consequently, we review Evans' sentences under an abuse of

discretion standard. Id. An abuse of discretion implies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶33} The sentencing transcript reveals that the trial court properly considered the felony sentencing factors, specifically the age of the victim at the time of the offenses, the duration of time over which Evans committed the offenses, nature of the parent-child relationship that was violated as a result of Evans' ongoing sexual abuse, as well as the associated effect the abuse had on M.E.'s brother, A.E. Accordingly, the trial court did not abuse its discretion in sentencing Evans to consecutive prison terms.

{¶34} Evans further suggests that under *Oregon v. Ice* (2009), 555 U.S. ---, 129 S.Ct. 711, "*Foster* may no longer be good law binding upon Ohio courts and must be revisited." This Court has previously held that "[u]nless and until the Ohio Supreme Court revisits and reverses its holding in *Foster*, we are bound to follow the law as it currently stands[,]" which would permit a trial court to impose consecutive prison sentences without the need for judicial fact-finding. *State v. Nieves*, 9th Dist. No. 08CA009500, 2009-Ohio-6374, at ¶52. Accord *State v. Miller*, 6th Dist. No. L-08-1314, 2009-Ohio-3908, at ¶18; *State v. Sheline*, 8th Dist. No. 92877, 2010-Ohio-2458, at ¶9; *State v. Franklin*, 10th Dist. No. 08AP-900, 2009-Ohio-2664, at ¶18; *State v. Dunaway*, 12th Dist. Nos. CA2009-05-141 & CA2009-06-164, 2010-Ohio-2304, at ¶90. Accordingly, Evans' argument is not well taken. Evans' third assignment of error is overruled.

III

{¶35} Evans' three assignments of error are overruled. The judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

MOORE, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

JOSEPH F. SALZGEBER, Attorney at Law, for Appellant.

DEAN HOLMAN, Prosecuting Attorney, and RUSSELL A. HOPKINS, Assistant Prosecuting Attorney, for Appellee.