[Cite as *State v. Kittelson,* 2016-Ohio-8430.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
		CASE NO. 2016-L-062
- vs -	:	
MARK R. KITTELSON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 2015 CR 000719.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel,* Assistant Prosecutor, Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Gregory S. Robey, Robey & Robey, 14402 Granger Road, Cleveland, OH 44137 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Mark R. Kittelson, appeals his convictions and sentences for Unlawful Sexual Conduct with a Minor and Attempted Unlawful Sexual Conduct with a Minor. The issues before this court are whether the Criminal Rule 11(C) plea colloquy requires the trial court to advise a defendant that a bench warrant may be used to secure compulsory process, that a defendant is entitled to a jury instruction regarding self-incrimination, and that a defendant waives his right to a bench trial by

pleading guilty; whether a court may consider the facts underlying the indictment rather than just the plea agreement in sentencing a defendant; whether a court may impose consecutive sentences based on two instances of sexual conduct; and whether trial counsel is constitutionally ineffective for failing to object to the court's personal characterization of the defendant. For the following reasons, we affirm the convictions and sentences.

{¶2} On November 13, 2015, the Lake County Grand Jury returned an Indictment, charging Kittelson with two counts of Unlawful Sexual Conduct with a Minor, felonies of the third degree in violation of R.C. 2907.04(A).

{¶3} On December 4, 2015, Kittelson waived his right to be present at arraignment and entered a plea of "Not Guilty" to all charges.

{¶4} On April 1, 2016, Kittelson entered a Written Plea of Guilty to Unlawful Sexual Conduct with a Minor as charged in Count 1 of the Indictment, and a lesser included offense of Count 2, Attempted Unlawful Sexual Conduct with a Minor, a felony of the fourth degree in violation of R.C. 2907.04(A) and 2923.02.

{¶5} At the change of plea hearing, the State made the following proffer of what the evidence would have shown had the case proceeded to trial:

> [T]he State would have brought forth evidence demonstrating as to Count 1 that on or between June 30th, July 1st, 2012, in Willoughby, Lake County, Ohio, the defendant Mark Kittelson, who is 18 years or older, his date of birth is March 30th of 1971, did engage in sexual conduct with a minor female victim who is 13 years of age at the time, date of birth 9-18-1998 * * *.

> [W]ith respect to Count 2 in this matter the State would have brought forth evidence that had the conduct be[en] successful the defendant on or between March 1st and March 31st, 2014, in Painesville Township, Lake County, Ohio, * * * did engage in sexual conduct with the minor female victim who was 15 at the time * * *.
>
> [W]hat happened on these occasions was this, the defendant had a long standing relationship with the victim's family. The victim's father and the defendant were friends and he had known the victim for quite some time. On these occasions, the one that occurred in Willoughby, the young lady was permitted to stay at the defendant's home after an event at a yacht club and as a result of her presence at the home he did engage in sexual conduct with her that involved digital and/or vaginal penial penetration at that time.
>
> With respect to Count 2 the defendant went to the home where the victim lived with her family, found the victim home alone and began engaging in conduct that if successful would have resulted in vaginal penetration or vaginal intercourse with the victim at that time.

{¶6} On May 16, 2016, a sentencing hearing was held. At the conclusion of the hearing, the trial court ordered Kittelson to serve consecutive prison terms of four years on Count 1 and eighteen months on Count 2 for an aggregate prison term of five and a half years. The court ordered Kittelson to pay all court costs and all costs of

prosecution. The court notified Kittelson that post release control was mandatory for five years and that he would have to register as a Tier II Sex Offender.

{¶7} On May 19, 2016, a written Judgment Entry of Sentence was journalized.

{¶8} On June 15, 2016, Kittelson filed a Notice of Appeal. On appeal, Kittelson raises the following assignments of error:

{¶9} "[1.] Whether the trial court erred[/]failed to strictly comply with Criminal Rule 11, when it failed to fully advise Appellant of the waiver of his constitutional right of compulsory process, his constitutional right against self incrimination, and his waiver of his rights to a bench trial."

{¶10} "[2.] Whether the trial court erred by imposing a prison term, instead of a community control sanction, that is not supported by the record."

{¶11} "[3.] Whether the trial court erred when it imposed consecutive sentences that are not supported by the record."

{¶12} "[4.] Whether Appellant was denied the effective assistance of counsel at the plea hearing, when counsel failed to object to the incomplete recitation of constitutional rights at the plea hearing; and to improper characterizations of Appellant at the sentencing hearing, by the trial court."

{¶13} In the first assignment of error, Kittelson contends that the trial court failed to strictly comply with Criminal Rule 11 when advising him of the constitutional rights he would be waiving by entering a guilty plea.

{¶14} "To assure that a plea is made in a knowing, voluntary and intelligent manner, the trial court must follow the mandates of Crim.R. 11(C), which identifies both constitutional and non-constitutional requirements for accepting a plea of guilty or no

contest." *State v. Knox*, 2d Dist. Montgomery No. 25774, 2015-Ohio-4198, ¶ 9. The "failure to adequately inform a defendant of his constitutional rights would invalidate a guilty plea under a presumption that it was entered involuntarily and unknowingly." *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12; *State v. Ballard*, 66 Ohio St.2d 473, 478, 423 N.E.2d 115 (1981).

{¶15} "Before accepting a guilty or no-contest plea, the court must * * * notify the defendant of the constitutional rights listed in Crim.R. 11(C)(2)(c)." *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 13. The court has the duty of "[i]nforming the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself." Crim.R. 11(C)(2)(c).

{¶16} "When a trial court fails to strictly comply with this duty, the defendant's plea is invalid." *Veney* at syllabus.

{¶17} Although "the preferred method of informing a criminal defendant of his or her constitutional rights during the plea colloquy is to use the language contained in Crim.R. 11(C)," such literal compliance is not mandatory. *State v. Barker*, 129 Ohio St.3d 472, 2011-Ohio-4130, 953 N.E.2d 826, ¶ 14. "Failure to use the exact language contained in Crim.R. 11(C), in informing a criminal defendant of his constitutional right to a trial and the constitutional rights related to such trial, including the right to trial by jury, is not grounds for vacating a plea as long as the record shows that the trial court

explained these rights in a manner reasonably intelligible to that defendant." *Ballard*, 66 Ohio St.2d 473, 423 N.E.2d 115, at paragraph two of the syllabus.

{¶18} Kittelson argues that the trial court's plea colloquy concerning the waiver of his constitutional rights was deficient in three respects.

{¶19} First, "the court failed to accurately advise Appellant that he was waiving his right to compulsory process" by not "advis[ing] Appellant that a *bench warrant* could be issued for non-appearing witnesses." Appellant's brief at 7-8.

{¶20} At the change of plea hearing, the trial court advised Kittelson as follows regarding compulsory process: "You would also have the right at trial to bring in witnesses to court to testify on your behalf if you wanted to. If those witnesses did not want to come to court I can issue an order called a subpoena which would force them to come here and testify * * *." This advisement fully and strictly complies with the requirements of Criminal Rule 11(C).

{¶21} Initially, the Rule does not require specific mention that a bench warrant or even that a subpoena may issue to compel a witness' appearance on the defendant's behalf. Kittelson cites no authority supporting such a requirement.

{¶22} In *State v. Barker*, the Ohio Supreme Court held that "[a] trial court complies with Crim.R. 11(C)(2)(c) when its explanation of the constitutional right to compulsory process of witnesses is described to the defendant during the plea colloquy as the 'right to call witnesses to speak on your behalf.'" *Barker*, 129 Ohio St.3d 472, 2011-Ohio-4130, 953 N.E.2d 826, at paragraph one of the syllabus. In so holding, the Court noted that the word "call," as commonly understood in everyday parlance, encompassed the meaning "to compel someone's appearance." *Id.* at ¶ 18.

{¶23} In the present case, Kittelson was advised that he could "bring in" witnesses on his behalf and that the court could "force them to come." These words convey the same substantive meaning in everyday parlance as "to compel someone's appearance" and thus explained the right to compulsory process to Kittelson in a reasonably intelligible manner.

{¶24} Second, Kittelson asserts that "the trial court failed to *specifically* advise Appellant of his right to have the *jury advised* that any failure to testify may not be used against him." Appellant's brief at 8.

{¶25} At the change of plea hearing, the trial court advised Kittelson as follows regarding self-incrimination: "You would also have the right to testify at trial if you wanted to but you also have the right not to testify if you don't want to. That decision is solely yours to make and nobody can make that decision for you * * *. If you decide not to testify at trial do you understand that your silence could not be used against you and nobody can comment on your silence at trial?"

{¶26} Again, Kittelson is faulting the trial court for not advising him of what the Rule does not require him to be advised. In other words, Criminal Rule 11(C) does not require a court to advise a defendant that he is entitled to a jury instruction regarding the exercise of his right to remain silent, but merely that a defendant cannot be compelled to testify against himself.

{¶27} This court has previously rejected the argument that anything more is required. *State v. McKee*, 11th Dist. Trumbull No. 97-T-0036, 1998 Ohio App. LEXIS 2767, 8 (June 19, 1998): "Our review of Crim.R 11(C)(2)(c) and our research * * * revealed no additional requirement that the court inform a defendant that his silence

cannot be used against him. The court in this case advised appellant he could not be forced to testify against himself. This is all that is required by Crim.R. 11." *Accord State v. Porterfield*, 11th Dist. Trumbull No. 2002-T-0045, 2004-Ohio-520, ¶ 59, *rev'd on other grounds*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690 ("[w]e now reaffirm our previous holding from *McKee* and reiterate that a trial court is not obligated to go beyond the language of Crim.R. 11(C)(2)(c), to include an explanation that a defendant's silence cannot be used against him or her"); *State v. Williams*, 10th Dist. Franklin No. 13AP-723, 2014-Ohio-846, ¶ 10-11 (finding strict compliance with Crim.R. 11(C)(2)(c) although the trial court "did not advise [the defendant] the jury would be instructed not to hold his decision not to testify against him").

{¶28} Third, Kittelson argues that "the trial court failed to specifically advise Appellant that he was waiving his right to a bench trial."

{¶29} At the change of plea hearing, the trial court advised Kittelson as follows regarding the right to trial: "Do you understand you have a right to have a trial either to me as the judge or to a jury of twelve Lake County citizens?"

{¶30} Contrary to Kittelson's position, he was advised of his right to a bench trial, despite the fact that the trial court is under no obligation to advise him of that right. *State v. Acosta*, 6th Dist. Wood No. WD-15-066, 2016-Ohio-5698, ¶ 14 ("Crim.R. 11(C)(2)(a) does not require the court to inform the defendant that a guilty plea will result in the waiver of a right to a bench trial"). Moreover, in the Written Plea of Guilty, Kittelson acknowledged that "this plea means I give up my right * * * [t]o a jury trial or court trial." *Barker*, 129 Ohio St.3d 472, 2011-Ohio-4130, 953 N.E.2d 826, at ¶ 25 ("an alleged ambiguity during a Crim.R. 11 oral plea colloquy may be clarified by reference

to other portions of the record, including the written plea, in determining whether the defendant was fully informed of the right in question").

{¶31} The first assignment of error is without merit.

{¶32} In the second and third assignments of error, Kittelson challenges the trial court's imposition of an aggregate five and a half year prison term, consisting of consecutive four-year and eighteen-month sentences.

{¶33} "The court hearing an appeal [of a felony sentence] shall review the record, including the findings underlying the sentence or modification given by the sentencing court." R.C. 2953.08(G)(2). "The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing * * * if it clearly and convincingly finds * * * [t]hat the record does not support the sentencing court's findings under division * * * (C)(4) of section 2929.14, or * * * [t]hat the sentence is otherwise contrary to law." *Id.*

{¶34} Where the sentence imposed does "not require the findings that R.C. 2953.08(G) specifically addresses * * *, it is fully consistent for appellate courts to review those sentences that are imposed solely after consideration of the factors in R.C. 2929.11 and 2929.12 under a standard that is equally deferential to the sentencing court." *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 23. "That is, an appellate court may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence." *Id.*

{¶35} Under the second assignment of error, Kittelson takes exception with the trial court's decision to impose a prison sentence instead of community control sanctions based on a flawed consideration of the sentencing factors.

{¶36} For Count 1 of the Indictment (Unlawful Sexual Conduct with a Minor), "a felony of the third degree that is a violation of section * * * 2907.04 * * * of the Revised Code * * *, the prison term shall be twelve, eighteen, twenty-four, thirty, thirty-six, forty-two, forty-eight, fifty-four, or sixty months." R.C. 2929.14(A)(3)(a). For Count 2 of the Indictment (Attempted Unlawful Sexual Conduct with a Minor), "a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months." R.C. 2929.14(A)(4).

{¶37} "If in sentencing an offender for a felony the court is not required to impose a prison term, a mandatory prison term, or a term of life imprisonment upon the offender, the court may directly impose a sentence that consists of one or more community control sanctions authorized pursuant to section 2929.16 [residential sanctions], 2929.17 [nonresidential sanctions], or 2929.18 [financial sanctions; restitution; reimbursements] of the Revised Code." R.C. 2929.15(A)(1).

{¶38} The overriding purposes of felony sentencing in Ohio "are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources." R.C. 2929.11(A). "A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct

and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders." R.C. 2929.11(B).

{¶39} It is well-recognized that a sentencing court "has discretion to determine the most effective way to comply with the purposes and principles of sentencing." R.C. 2929.12(A).

> In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct, the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism, and the factors set forth in division (F) of this section pertaining to the offender's service in the armed forces of the United States and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

Id.

{¶40} The Ohio Supreme Court has described a sentencing court's discretion as "full discretion to impose a prison sentence within the statutory range." *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, paragraph three of the syllabus. "[T]he trial court is not obligated, in the exercise of its discretion, to give any particular weight or consideration to any sentencing factor." *State v. Holin*, 174 Ohio App.3d 1, 2007-Ohio-6255, 880 N.E.2d 515, ¶ 34 (11th Dist.2007).

{¶41} In sentencing Kittelson, the trial court stated that it had duly considered the purposes and principles of felony sentencing. With respect to the seriousness and

recidivism factors, the court noted: the seriousness of Kittelson's conduct was "exacerbated by the age of the victim and that being 13 on the first occasion, 15 on the second occasion [R.C. 2929.12(B)(1)]"; the victim "suffered serious physical and psychological harm as a result of both incidents [R.C. 2929.12(B)(2)]"; and Kittelson's "relationship with the victim facilitated this offense [R.C. 2929.12(B)(6)]." The court did not find any R.C. 2929.12(C) factors present indicating that Kittelson's conduct was less serious than conduct normally constituting the offense.

{¶42} With respect to recidivism, the trial court noted that Kittelson showed no remorse [R.C. 2929.12(D)(5)]. The court did recognize the following factors indicating that recidivism was less likely: Kittelson had "no prior delinquency adjudications or convictions and * * * led a law-abiding life for a significant number of years [R.C. 2929.12(E)(1) and (3)]"; and the results of a sex offender risk assessment (Static-99R) performed on Kittelson indicated "a low likelihood of recidivism."

{¶43} Kittelson notes, contrary to the trial court's findings, that the victim did not suffer any physical harm and that this should have been recognized as a factor making his conduct less serious. Kittelson also maintains he demonstrated genuine remorse. Lastly, he faults the court for not recognizing a number of mitigating factors: he was actively participating in counseling; he has worked at the same job for over twenty-two years to support his wife and children; he was physically, psychologically, and sexually abused by his own father; and he endured the trauma of losing a daughter to accidental death and his home to fire. Appellant's brief at 12-13.

{¶44} Assuming, arguendo, that Kittelson's criticisms of the trial court's consideration of the seriousness and recidivism had merit, they do not establish by clear

and convincing evidence that the record does not support the sentence. As noted above, the court need not give equal weight or consideration to the sentencing factors. In the present case, the court emphasized that Kittelson gave contradictory accounts of what occurred between him and the victim to the court, to the police, and to the psychologists who evaluated him for the presentence report. These accounts also varied from the impression created by Kittelson in a recorded conversation between him and the victim. The court clearly felt that Kittelson's lack of honesty about his conduct, as distinct from merely being sorry for harming the victim, rendered him unamenable to community control sanctions.

{¶45} Kittelson also feels that his sentence was "based upon the impermissible factors of the court's personal belief that Appellant engaged in sexual *intercourse* with the victim on two occasions." Appellant's brief at 11. Contrary to Kittelson's position, the court's belief was not impermissible or otherwise improper. According to the victim's account of the events, which was supported by the recorded conversation, Kittelson did engage in intercourse with the victim. What is more, the court is entitled to consider the victim's version of events as reported in a presentence report despite the offender's plea to a lesser charge. *State v. Bowser*, 186 Ohio App.3d 162, 2010-Ohio-951, 926 N.E.2d 714, ¶ 15 ("it is well-established in Ohio law that the court may consider information beyond that strictly related to the conviction offense"); *State v. Mayor*, 7th Dist. Mahoning No. 07 MA 177, 2008-Ohio-7011, ¶ 17 ("the sentencing court can consider the circumstances of the offense for which the defendant was indicted, even if he negotiated a plea at odds with the indicted elements"); *compare* R.C. 2929.19(B)(1) ("[a]t the sentencing hearing, the court, before imposing sentence, shall consider the

record, any information presented at the hearing by any person pursuant to division (A) of this section, and, if one was prepared, the presentence investigation report made pursuant to section 2951.03 of the Revised Code or Criminal Rule 32.2, and any victim impact statement made pursuant to section 2947.051 of the Revised Code.").

{¶46} The second assignment of error is without merit.

{¶47} In the third assignment of error, Kittelson contends that the record does not support the imposition of consecutive sentences.

{¶48} In order to impose consecutive sentences in the present case, the trial court was required to find that "[a]t 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)(b).

{¶49} Kittelson contends that the charges cannot constitute a course of conduct because they occurred two years apart and that there is no evidence in the record of harm warranting consecutive sentences. We disagree.

{¶50} The two offenses at issue were committed against the same victim and were made possible by Kittelson's exploitation of his friendship with the victim's family. Kittelson essentially committed the same crime in the same way on two occasions thus supporting the trial court's finding of a course of conduct. As to the harm caused by the offenses, the record amply demonstrates the effect they had on the victim. In the recorded conversation with Kittelson, the victim complained to him that it was her "first time" and a "life-changing night." At the sentencing hearing, the victim's mother advised

the court that the victim has been diagnosed with PTSD and that counseling has become part of the family's "weekly regimen." The record adequately supports the trial court's finding. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus ("[i]n order to impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry, but it has no obligation to state reasons to support its findings").

{¶51} The third assignment of error is without merit.

{¶52} In the fourth and final assignment of error, Kittelson contends that the trial counsel was constitutionally ineffective for "fail[ing] to object to the incomplete recitation of constitutional rights at the plea hearing" and "improper characterizations of Appellant at the sentencing hearing by the trial court." Appellant's brief at 14.

{¶53} To reverse a conviction for ineffective assistance of counsel, the defendant must prove "(1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding." *State v. Madrigal*, 87 Ohio St.3d 378, 388-389, 721 N.E.2d 52 (2000), citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶54} With respect to the change of plea hearing, the trial court strictly complied with Criminal Rule 11(C) in informing Kittelson of his constitutional rights as explained under the first assignment of error. Accordingly, trial counsel was not ineffective.

{¶55} With respect to the sentencing hearing, Kittelson contends that trial counsel should have objected when the trial court expressed its belief that he had

engaged in sexual intercourse with the victim and when the court characterized him as "detached from reality," "blaming others," and responding like "a fifth grader." We find no error. As to the court's belief that Kittelson had engaged in intercourse, the record supports that belief and it was proper for the court to take that belief into account when sentencing Kittelson as explained under the second assignment of error.

{¶56} Likewise, there was nothing improper about the trial court's characterization of Kittelson that merited objection from trial counsel. This court has held that "it is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing." (Citations omitted.) *State v. Brown*, 11th Dist. Geauga No. 2003-G-2504, 2004-Ohio-1843, ¶ 35. The court's comments in the present case were a valid expression of the court's personal judgment of the defendant. *See State v. Jones*, 8th Dist. Cuyahoga No. 104189, 2016-Ohio-5712, ¶ 28-30 (trial counsel was not ineffective for failing to object to the trial court's characterization of the defendant as an "animal," a "base human," and a "frontal lobe deficient client").

{¶57} The fourth assignment of error is without merit.

{¶58} For the foregoing reasons, Kittelson's convictions for Unlawful Sexual Conduct with a Minor and Attempted Unlawful Sexual Conduct with a Minor and aggregate five and a half year sentence are affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, P.J.,

COLLEEN MARY O'TOOLE, J.,

concur.