[Cite as *State v. Smith*, 2012-Ohio-4644.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NOS. CA2012-02-017 CA2012-02-018
- vs -	:	O P I N I O N
	:	10/8/2012
JEFFREY SCOTT SMITH,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 11CR27761

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Stephan D. Madden, 810 Sycamore Street, 5th Floor, Cincinnati, Ohio 45202, for defendant-appellant

HENDRICKSON, P.J.

{¶ 1} Appellant, Jeffrey Scott Smith, appeals his conviction in the Warren County Court of Common Pleas for unlawful sexual conduct with a minor. For the reasons discussed below, we affirm appellant's conviction.

{¶ 2} On October 10, 2011, appellant was indicted on one count of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A), a fourth-degree felony. The indictment

and subsequent bill of particulars alleged that on June 16, 2011, appellant, who was at least 21 years of age at the time of the offense, engaged in vaginal intercourse with the 14-year-old victim, A.M., at A.M.'s home in Lebanon, Ohio.

{¶ 3} A two-day jury trial was held in February 2012. At trial, A.M. testified that she resides on June Marie Drive in Lebanon, Ohio. A.M. further testified she had met appellant on three different occasions. The first time she met appellant was on June 1, 2011, the day before her 14th birthday. A.M. stated that at this time she had been dating a 17-year-old boy, Seth. Seth's friend, Eric James, brought appellant to her house to "hang out." A.M. testified that James told her appellant was 21. A.M. also testified that while James and appellant were at her house on June 1, 2011, she talked about her upcoming birthday. A.M. specifically stated, "I told them that I was excited to be 14. I told them that I was excited for my party. * * * I told them I was excited to move up as a teenager and to be 14."

{¶ 4} A.M. testified she met appellant a second time while at the library with her mom. A.M. testified that she briefly talked with appellant at the library, but she did not invite him to her home or give him her cell phone number. She also stated that she has never texted appellant or shared messages with him on Facebook or Myspace.

{¶ 5} The third meeting with appellant occurred at A.M.'s house on June 16, 2011, after A.M.'s father left for work. She testified that appellant and his brother, Justin, knocked on her window and woke her up. A.M. stated that appellant and Justin wanted to come into her house and they would not leave. When A.M. opened the door to tell them to go away, they opened the outside door and entered the home. A.M. testified that the three of them "hung out," watching television in the living room. A.M. stated that she talked to appellant about her recent birthday party and showed him the items she received as birthday gifts, including a purple Kodak EasyShare camera. A.M. testified that at one point appellant asked

her when they were going to have sex, but she told him "no." A.M. testified that she eventually asked appellant and Justin to leave because she needed to shower. A.M. stated that when Justin and appellant refused to leave she left them alone in the living room and went to shower.

{¶ 6} A.M. testified that after showering she was getting dressed in her room when appellant threw open her bedroom door. At the time, A.M. was dressed only in a towel. A.M. stated that appellant pulled her out of her bedroom and into the bathroom, but then left her alone in the bathroom. When A.M. attempted to go back to her bedroom, she encountered appellant in the hallway. A.M. testified that she tried to get past appellant, but he pushed her, causing her to fall back and hit her head. Appellant then pulled her back into the bathroom. A.M. testified that appellant closed the bathroom door, locked the door, turned off the bathroom light, and pulled the towel off of her. According to A.M., appellant then pushed her to the ground, pulled off his own clothes, and penetrated her vagina with his fingers. A.M. told him to "get off," but appellant did not. A.M. testified appellant got on top of her and put his penis in her vagina. A.M. stated that appellant told her he would "pull out" because he did not want her to get pregnant. A.M. testified that when appellant ejaculated, he made a mess all over her and the towel. When he was finished, appellant put his clothes back on, told A.M. to get dressed, and went back out to A.M.'s living room.

{¶ 7} A.M. testified that she cleaned herself, got dressed, and went back into the living room. Appellant and Justin were still in the living room, and she told them they needed to leave. A.M. testified they left within five minutes. Shortly after they left, A.M. discovered her camera was missing. She suspected appellant had taken it, so she rode her bicycle down the street to catch up with him and ask him if he had the camera. Appellant told her

the camera was in her bedroom dresser drawer, but when A.M. went home to check the drawer, she was unable to locate the item.

{¶ 8} A.M. then called her father, and told him that while she was in the shower, she thought someone had broken in and stolen her camera. A.M. testified that she did not tell her father about appellant's presence or the sexual encounter that took place in the bathroom because she was scared that she would get into trouble. A.M. explained that she was not allowed to have people at the house when her father was at work.

{¶ 9} A.M. testified that her father called the police and Officer Timothy Cooper, a police officer with the city of Lebanon, responded. A.M. testified that she told Cooper that she believed appellant entered her house and stole her camera while she was in the shower. A.M. explained that she thought it was appellant because he had stolen coins from her father on a previous occasion. A.M. testified that although Cooper indicated he did not believe she was giving him the "whole story," she completed a written statement for the police, which did not mention the sexual encounter.

{¶ 10} A.M. testified that later that evening she told her mother and grandparents about the sexual encounter with appellant. The following day, June 17, 2011, Cooper arrived to take her statement again. A.M. testified that after she told Cooper that appellant had digitally penetrated her and had vaginal intercourse with her, she went to the hospital to be examined. A.M. testified that the hospital took her underwear as evidence.

{¶ 11} Officer Cooper testified on behalf of the state. He stated that he responded to A.M.'s home on June Marie Drive in Warren County, Ohio on June 16, 2011. Cooper testified that upon arriving at the home, he took two statements from A.M. He explained that A.M.'s grandfather had been present for the initial statement, but not the second statement.

{¶ 12} Cooper testified that A.M. initially claimed that after she got out of the shower she discovered two open pop cans on the coffee table in the living room that had previously not been there. This concerned A.M. so she looked around the house and discovered that her purple camera and a house key were missing. Cooper testified that A.M. provided him with appellant's name as a possible suspect, and she gave a description of appellant. A.M. described appellant as a white male wearing a striped shirt and blue jeans with red shorts underneath. Cooper stated that he was familiar with appellant as he had "previous encounters" with appellant and knew appellant was 21 years of age.

{¶ 13} Cooper testified that he had concerns about A.M.'s initial statement because she was able to describe appellant and his attire although she purportedly had not seen appellant as she was in the shower when the theft occurred. After A.M.'s grandfather left the room, A.M. admitted that she had not been completely honest in her first statement. A.M. revised her statement by telling Cooper that she had woken up to find appellant and his brother outside her house. A.M. explained that she had denied appellant's request to enter her home because she had to get ready for the day. When A.M. got out of the shower, she saw the open pop cans in the living room and believed appellant and Justin had entered the home while she was showering. Cooper testified that A.M. did not mention having a sexual encounter with appellant when giving her statements.

{¶ 14} Cooper stated that he investigated the reported theft and located A.M.'s camera at a pawn shop in Lebanon. The store's owners were unable to identify the individual who pawned the camera. While investigating A.M.'s theft claim, Cooper received two phone calls from A.M.'s father. During these phone calls, A.M.'s father explained that A.M. had not given Cooper the "complete story" because he believed appellant and A.M. had sex.

{¶ 15} Cooper testified that he re-interviewed A.M. on June 17, 2011. At this time, A.M. told Cooper that when she woke up on June 16, 2011, appellant and Justin were at her door. A.M. allowed the brothers into the residence and the three sat around watching television and eating breakfast. A.M. told Cooper that she eventually asked appellant and Justin to leave so that she could get ready for the day, but they wanted to stay and watch television while she showered. A.M. told Cooper that after she showered, she encountered appellant in the hallway. Cooper testified that A.M. told him about falling in the hallway and about the sexual encounter that took place in the bathroom. A.M. indicated to Cooper that she had cried during the sexual encounter and had told appellant to stop. A.M. told Cooper that after the sexual encounter with appellant she "hung out" with appellant and Justin for 10 to 15 minutes before the men left. A.M. then told Cooper about discovering her camera missing and riding her bike to catch up with appellant to ask if he had taken it.

{¶ 16} Cooper testified that he did not observe injuries to A.M.'s head from where she fell and struck it in the hallway. He further testified that after taking A.M.'s statement on June 17, 2011, he collected physical evidence from A.M.'s house, including the towel she used and the clothing she wore after showering.

{¶ 17} Lebanon Detective Sergeant Mark Allen also testified on behalf of the state. He testified that he instructed Cooper to have A.M. taken to the hospital to have an examination and rape kit completed. Allen explained that during this examination, a specially trained nurse collected fluids from within A.M.'s vagina and around her anus and mouth and collected her clothing as evidence. Allen testified that after he processed the evidence obtained in A.M.'s rape kit, he had the rape kit sent to Miami Valley Regional Crime Laboratory (Miami Valley) for testing.

{¶ 18} Allen also testified that he interviewed appellant about the sexual encounter A.M. reported. Appellant admitted he knew A.M. and he and his brother had been at her house on June 16, 2011, but he denied having any sexual contact with A.M., saying that she was "too young." When asked how old A.M. was, appellant said he "didn't know" but she "might be 16 [or] 17." According to Allen, appellant denied the possibility of his DNA being found on A.M. as he "didn't leave anything up there." Appellant also told Allen that his semen "absolutely" would not be found in A.M.'s home. Allen testified that he obtained a sample of appellant's DNA to compare with evidence collected from A.M.'s home and evidence contained in the rape kit.

{¶ 19} Mary Cicco, a forensic scientist at Miami Valley, testified as an expert in serology and DNA analysis. Cicco testified that she received A.M.'s rape kit, which included vaginal swabs, rectal swabs, oral swabs, A.M.'s underwear, and fingernail scrapings. Cicco examined the vaginal swabs and underwear for the presence of semen. The vaginal swab tested negative for the presence of semen, but the crotch of A.M.'s underwear tested positive for the presence of semen. Cicco testified that she did a DNA analysis on the crotch of the underwear and found a mixed DNA profile. Cicco explained that a mixed DNA profile contains DNA from more than one person. Cicco stated that that the mixed DNA profile contained a mixture of DNA from both A.M. and appellant, and, therefore, neither appellant nor A.M. could be excluded as a source of the mixed DNA. Cicco explained that the probability of finding this exact mixed DNA profile within the general population would be 1 to 3 billion.

{¶ 20} James, a family friend of the appellant, was the only witness to testify on behalf of the defense. James testified that he and appellant had visited A.M.'s home on one

occasion. James testified that during this visit, A.M. did not mention her upcoming birthday or her age.

{¶ 21} On February 28, 2012, the jury found appellant guilty of unlawful sexual conduct with a minor. The jury specifically found that appellant was four or more years older than the minor at the time of the sexual conduct. Appellant was sentenced to a term of 18 months in prison and was designated a Tier II sex offender. Appellant now appeals his conviction and sentence, raising three assignments of error. For ease of discussion, we will address appellant's assignments of error out of order.

{¶ 22} Assignment of Error No. 2:

{¶ 23} THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN OVERRULING APPELLANT'S MOTION FOR ACQUITTAL PURSUANT TO RULE 29 OF THE OHIO RULES OF CRIMINAL PROCEDURE MADE AT THE CONCLUSION OF THE STATE'S CASE.

{¶ 24} In appellant's second assignment of error, he argues that the trial court erred when it denied his Crim.R. 29 motion for an acquittal because proper venue was not established to prosecute him in Warren County, Ohio. Appellant contends "[n]o State witness, including the alleged victim and investigating officer, testified to any venue."

{¶ 25} When reviewing the trial court's denial of a motion for acquittal under Crim.R. 29, this court applies the same test as it would in reviewing a challenge based upon the sufficiency of the evidence to support a conviction. *State v. Hubbard*, 12th Dist. No. CA2006-10-248, 2008-Ohio-3379, ¶ 10. "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." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶ 26} Pursuant to R.C. 2901.12(A), venue lies in any jurisdiction in which the offense or any element of the offense was committed. "Although it is not a material element of the offense charged, venue is a fact which must be proved in criminal prosecutions unless it is waived by the defendant." *State v. Headley*, 6 Ohio St.3d 475, 477 (1983). "[I]t is not essential that the venue of the crime be proved in express terms, provided it be established by all the facts and circumstances, beyond a reasonable doubt, that the crime was committed in the county and state as alleged in the affidavit." *State v. Behanan*, 12th Dist. No. CA2009-10-266, 2010-Ohio-4403, ¶ 19, citing *State v. Chintalapalli*, 88 Ohio St.3d 43, 45 (2000). As long as there is a sufficient nexus between the defendant and the county of the trial, venue is satisfied. *Chintalapalli* at 45.

{¶ 27} A review of the record reveals that the facts and circumstances in evidence are sufficient to demonstrate that venue properly lay in Warren County. The victim in this case testified that appellant digitally penetrated her and had vaginal intercourse with her in her residential bathroom. She further testified that she lives on June Marie Drive in Lebanon, Ohio. Officer Cooper testified that A.M.'s residence on June Marie Drive is located in Warren County, Ohio. This testimony established a sufficient nexus between the crime and Warren County, Ohio.

{¶ 28} Accordingly, the trial court did not err in denying appellant's Crim.R. 29 motion for acquittal based upon improper venue. Appellant's second assignment of error is overruled.

{¶ 29} Assignment of Error No. 1:

{¶ 30} APPELLANT'S CONVICTION WAS BASED ON INSUFFICIENT EVIDENCE AND WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 31} In his first assignment of error, appellant argues his conviction for unlawful sexual conduct with a minor was not supported by sufficient evidence and was against the manifest weight of the evidence. Appellant contends that the state failed to prove the necessary elements to sustain his conviction. Specifically, appellant argues that the state failed to present evidence establishing that A.M. was not his spouse at the time the sexual conduct occurred and that he knew A.M. was less than 16 years of age at the time the sexual conduct took place, or that he was otherwise reckless in that regard. Appellant also argues that his conviction was against the manifest weight of the evidence because the state's chief witness, A.M., was an "absolute liar" whose "statements and actions were not consistent with a so-called victim." Appellant contends A.M.'s testimony could not have been found credible. Finally, appellant argues that the state failed to prove venue.

{¶ 32} When reviewing the sufficiency of the evidence underlying a criminal conviction, an appellate court examines the evidence in order to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Paul*, 12th Dist. No. CA2011-10-026, 2012-Ohio-3205, ¶ 9. Therefore, "[t]he 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." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶ 33} A manifest weight of the evidence challenge examines the "inclination of the greater amount of credible evidence, offered at a trial, to support one side of the issue rather than the other." *State v. Barnett*, 12th Dist. No. CA2011-09-177, 2012-Ohio-2372, ¶ 14. To determine whether a conviction is against the manifest weight of the evidence, the reviewing court must look at the entire record, weigh the evidence and all reasonable inferences,

consider the credibility of the witnesses, and determine whether in resolving the 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. Graham*, 12th Dist. No. CA2008-07-095, 2009-Ohio-2814, ¶ 66. In reviewing the evidence, an appellate court must be mindful that the jury, as the original trier of fact, was in the best position to judge the credibility of witnesses and determine the weight to be given to the evidence. *State v. Blankenburg*, 197 Ohio App.3d 201, 2012-Ohio-1289, ¶ 114 (12th Dist.). "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Id.*, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). Furthermore, "[a] unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required to reverse a judgment on the weight of the evidence in a jury trial." *Id.*, citing *Thompkins* at 389.

{¶ 34} "Because sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency." *State v. Hart*, 12th Dist. No. CA2011-03-008, 2012-Ohio-1896, ¶ 43, citing *Graham* at ¶ 67. Accordingly, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency. *Id.*

{¶ 35} Appellant was convicted of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A), which provides:

> No person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard.

{¶ 36} "Sexual conduct" includes vaginal intercourse or "the insertion, however slight, of any part of the body * * * into the vaginal * * * opening of another." R.C. 2907.01(A). "A

person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B). "A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist." R.C. 2901.22(C).

{¶ 37} After review of the record, we cannot say the trier of fact clearly lost its way and created such a manifest miscarriage of justice that appellant's conviction must be reversed. The state presented testimony and evidence from which the jury could have found the essential elements of unlawful sexual conduct with a minor proven beyond a reasonable doubt.

{¶ 38} The state presented testimony from both A.M. and Officer Cooper that appellant was 21 on June 16, 2011, when he engaged in sexual conduct with the victim. A.M. testified that appellant digitally penetrated her vagina and placed his penis inside her vagina. A.M.'s testimony was corroborated by the semen and DNA evidence found on the crotch of A.M.'s underwear. Cicco testified that the mixed DNA profile developed from the crotch of A.M.'s underwear contained a mixture of DNA from both A.M. and appellant. From such testimony, the jury was entitled to determine that appellant was more than 18 years old when he engaged in sexual conduct with A.M.

{¶ 39} Furthermore, the state presented evidence from which the jury could have determined that A.M. was not appellant's spouse. Although the state failed to affirmatively ask A.M. whether she was the spouse of the offender, there was sufficient circumstantial evidence presented which allowed the jury to determine that appellant and the victim were not married. *See State v. Rafferty*, 12th Dist. No. CA85-06-022, 1985 WL 4790, *1 (Dec. 30, 1985) (finding that circumstantial evidence can be used to prove that the victim was not the spouse of the offender). The victim testified that she lived at home with her parents. A.M.

testified that she had only met appellant on three occasions and had never called, texted, or sent Facebook or Myspace messages to the appellant. Further, A.M. did not describe appellant as her husband; instead she characterized appellant as a guy she met through her boyfriend's friend. From such testimony, the jury was entitled to determine that A.M. was not appellant's spouse.

{¶ 40} The state also presented evidence that appellant engaged in sexual conduct with A.M. with knowledge that she was only 14 years old, or, at the very least, with reckless indifference to her age. A.M. testified that on June 1, 2011, she told appellant that she was excited about her upcoming birthday party. A.M. testified that she told appellant that she was "excited to be 14" and "was excited to move up as a teenager and to be 14." These statements gave appellant knowledge of A.M.'s age.

{¶ 41} Even if the jury were to discredit A.M.'s testimony that she told appellant about her upcoming birthday party and her age, evidence was presented that allowed the jury to determine that appellant was reckless in engaging in sexual conduct with A.M. without determining her age. Appellant admitted to Detective Allen that he "didn't know" A.M.'s age but knew she was "too young" for any sexual contact. Although appellant speculated A.M.'s age to be 16 or 17, he perversely disregarded a known risk that she was in fact younger. *See, e.g., State v. Young*, 8th Dist. No. 85224, 2005-Ohio-3584; *State v. Hahn*, 5th Dist. No. 02CA22, 2003-Ohio-788.

{¶ 42} Based on the foregoing we find that there was credible evidence that appellant engaged in unlawful sexual conduct with a minor. The jury weighed the evidence and came to the conclusion, beyond a reasonable doubt, that appellant engaged in sexual conduct with A.M. when he knew A.M. was 13 years of age or older but less than 16 years of age, or he was reckless in that regard. Although appellant argues that A.M. is an "absolute liar" whose

testimony should not have been believed, we find that the jury, as the trier of fact, was in the best position to judge her credibility and determine what weight to give to her testimony. *See Blankenburg*, 197 Ohio App.3d 201, 2012-Ohio-1289 at ¶ 114. We find no indication that the jury lost its way or created a manifest miscarriage of justice in finding appellant guilty of unlawful sexual conduct with a minor. Thus, appellant's conviction is not against the manifest weight of the evidence. Having found appellant's conviction was not against the manifest weight of the evidence, it necessarily follows that the evidence was sufficient to support his conviction.

{¶ 43} Furthermore, contrary to appellant's contention that the state failed to prove venue, the evidence presented by the state at trial was sufficient to prove venue beyond a reasonable doubt. As discussed above, both A.M.'s and Officer Cooper's testimony indicate the offense was committed at A.M.'s home on June Marie Drive in Lebanon, Warren County, Ohio.

{¶ 44} Appellant's first assignment of error is therefore overruled.

{¶ 45} Assignment of Error No. 3:

{¶ 46} THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING APPELLANT TO THE MAXIMUM TERM OF IMPRISONMENT ON ONE COUNT OF UNLAWFUL SEXUAL CONDUCT WITH A MINOR.

{¶ 47} In his third assignment of error appellant argues that the trial court abused its discretion when it sentenced him to 18 months in prison. Appellant contends that "[h]ad the court gone through each specific factor in O.R.C. 2929.12, it would have sentenced him to less time in the Department of Corrections."

{¶ 48} In reviewing felony sentences, appellate courts must apply a two-prong test. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 4. First, the appellate court 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." *State v. Wiggins*, 12th Dist. No. CA2009-09-119, 2010-Ohio-5959, ¶ 7, citing *Kalish* at ¶ 4. A sentence is not clearly and convincingly contrary to law where the trial court considers the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12, properly applies postrelease control, and sentences appellant within the permissible range. *State v. Elliott*, 12th Dist. No. CA2009-03-020, 2009-Ohio-5926, ¶ 10; *Kalish* at ¶ 18. If the sentence satisfies the first prong, "the trial court's decision shall be reviewed under an abuse-of-discretion standard." *State v. Paul*, 12th Dist. No. CA 2011-10-026, 2012-Ohio-3205, ¶ 27. An abuse of discretion constitutes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Id.* As to sentencing, a trial court does not abuse its discretion as long as careful and substantial deliberation is given to the relevant statutory considerations. *State v. Bishop*, 12th Dist. CA2010-08-054, 2011-Ohio-3429, ¶ 15.

{¶ 49} Although appellant's assignment of error relates to the second prong of the *Kalish* test, this court will briefly review appellant's sentence for compliance with the applicable rules and statutes.

{¶ 50} The trial court sentenced appellant to 18 months imprisonment for unlawful sexual conduct with a minor, a fourth-degree felony. Although this was the maximum sentence allowed, the sentence still fell within the applicable statutory range according to R.C. 2929.14. Moreover, the trial court's judgment entry of sentence clearly indicates that the court considered the purposes and principles of sentencing pursuant to R.C. 2929.11 and the seriousness and recidivism factors listed in R.C. 2929.12. Further, the record indicates

that the trial court properly advised appellant of the applicable postrelease control issues. Accordingly, appellant's sentence is not clearly and convincingly contrary to law.

{¶ 51} As the first prong of the *Kalish* test is satisfied, we now turn to the second prong, whether the trial court abused its discretion in imposing the sentence. The factors listed in R.C. 2929.12 "serve as an overreaching guide for trial judges to consider in fashioning an appropriate sentence." *Kalish* at ¶ 17. "The fact that the trial court chose to weigh the various sentencing factors differently than how appellant would weigh them is not sufficient to establish an abuse of discretion." *State v. Kirchoff*, 12th Dist. Nos. CA2010-12-104, CA2010-12-105, 2011-Ohio-4718, ¶ 13.

{¶ 52} The trial court specifically stated in the judgment entry of sentence: "The Court has considered the record, oral statements, any victim impact statement and presentence report prepared, as well as the principles and purposes of sentencing under R.C. §2929.11, and has balanced the seriousness and recidivism factors under R.C. §2929.12." At the sentencing hearing, the trial court noted it considered the presentence report as well as appellant's extensive criminal record. Appellant has been convicted of numerous offenses since reaching adulthood, including falsification, aggravated menacing, theft, contributing to the delinquency of a minor, and arson. The trial court also noted that appellant had numerous probation violations and committed this offense only weeks after his probation on the arson charge terminated. Furthermore, the record reflects that appellant did not take responsibility for engaging in sexual conduct with the minor victim, who was seven years his junior. Although appellant indicated, "I understand what I did," he attempted to excuse his actions by saying that he "really felt that girl was 16 years-old."

{¶ 53} Based on the foregoing, we find that the trial court gave careful and substantial deliberation to the relevant statutory considerations before sentencing appellant. We

therefore cannot say that the trial court abused its discretion in sentencing appellant to the maximum term of imprisonment.

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

{¶ 55} Judgment affirmed.

PIPER and YOUNG, JJ., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.