[Cite as *State v. Gibson*, 2018-Ohio-4725.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

RONALD D. GIBSON,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 MA 0029

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 15 CR 1061

BEFORE:
Carol Ann Robb, Cheryl L. Waite, Kathleen Bartlett, Judges.

JUDGMENT:
Affirmed.

Atty. John P. Laczko LLC, 3685 Stutz Drive, Suite. 100, Canfield, Ohio 44406 for Appellant and

Atty. Paul Gains, Prosecutor, *Atty Ralph Rivera*, Assistant Prosecutor, Mahoning County Prosecutor's Office, 21 West Boardman St., Youngstown, Ohio 44503 for Appellee.

Dated: November 5, 2018

Robb, P.J.

{¶1} Defendant-Appellant Ronald Gibson appeals from his convictions entered in Mahoning County Common Pleas Court for voyeurism, gross sexual imposition, and sexual battery. The issues in this appeal are whether the Alford plea was entered into knowingly, intelligently, and voluntarily; and whether the sentences imposed, including the consecutive sentence, were contrary to law. For the reasons expressed below, the convictions are affirmed.

Statement of the Case

{¶2} Appellant was indicted for one count of voyeurism in violation of R.C. 2907.08(C)(E)(5), a fifth-degree felony; three counts of gross sexual imposition, violations of R.C. 2907.05(A)(4)(C)(2), (A)(1)(C)(1) and (A)(5)(C)(1), third and fourth-degree felonies; and two counts of rape, violations of R.C. 2907.02(A)(2)(B) and (A)(1)(c)(B), first-degree felonies. 10/22/15 Indictment. There were three separate victims and they were all underage. Victim 1 was the victim of the voyeurism count. Victim 2 was the victim of the third-degree gross sexual imposition count. Victim 3 was the victim of all other counts.

{¶3} Appellant requested discovery and waived his right to a speedy trial. 11/4/15 Request for Discovery; 12/2/15 Waive Speedy Trial. Appellant then moved for severance of the crimes based on the victims. 2/29/16 Motion. He argued the trying of all crimes together would destroy the presumption of innocence. 2/29/16 Motion. He asserted the acts alleged against him were not connected, they were not based on the same act or transaction, and there was no allegation the offenses were committed with the same modus operandi. 2/29/16 Motion. The state opposed the motion arguing the evidence was simple and direct, and the jury could determine what allegations went to what charges. 3/22/16 Motion. Agreeing with the state's argument, the trial court denied the motion to sever. 3/31/16 J.E.

{¶4} Plea negotiations occurred between the state and Appellant. The state moved to amend one of the rape charges to sexual battery and moved to dismiss the

remaining rape charge and two of the gross sexual imposition charges. 11/1/16 Plea. The state indicated it would recommend a seven year sentence. 11/1/16 Plea. The trial court granted the state's requests. 11/1/16 Plea. Appellant entered an Alford guilty plea to voyeurism in violation of R.C. 2907.08(C)(E)(5), a fifth-degree felony; gross sexual imposition in violation of R.C. 2907.05(A)(4)(C)(2), a third-degree felony; and sexual battery in violation of R.C. 2907.03(A)(5)(B), a third-degree felony. 11/1/16 Plea. After a plea colloquy, the trial court accepted the Alford guilty plea. 10/31/16 Plea Hearing Tr. 15.

{¶5} After hearing victim impact statements and considering felony sentencing statutes, the trial court sentenced Appellant to an aggregate 72 month sentence. 12/30/16 J.E. He received 8 months for voyeurism, 36 months for gross sexual imposition, and 36 months for sexual battery. 12/30/16 J.E. The sentences for voyeurism and gross sexual imposition were ordered to be served concurrently. 12/30/16 J.E. The sexual battery sentence was ordered to be served consecutive to the voyeurism/gross sexual imposition sentence. 12/30/16 J.E. Appellant was designated a Tier III sex offender and advised he was subject to five years of postrelease control. 12/30/16 J.E.

{¶6} Appellant filed a motion for delayed appeal. 2/13/17 Motion. We granted the motion on the basis that counsel was not appointed until after the expiration of the time to file an appeal. 3/24/17 J.E.

First Assignment of Error

"The trial court erred by accepting Appellant's Alford Plea when that plea was not entered knowingly, intelligently and voluntarily and therefore Appellant's conviction and sentence must be vacated."

{¶7} Appellant contends statements made by counsel during the plea hearing indicate Appellant's Alford plea was not entered into knowingly, intelligently, and voluntarily. The state disagrees.

{¶8} "An Alford plea is a guilty plea made in accordance with *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160 (1970), whereby the defendant pleads guilty but maintains that he did not commit the crime that he is pleading to. An Alford plea is 'merely a species of guilty plea' and is 'procedurally indistinguishable' from a guilty

plea." *State v. Phelps*, 7th Dist. No. 14 BE 17, 2015-Ohio-5288, ¶ 10. When an Alford plea is asserted, a more detailed Crim.R. 11 colloquy is required. *State v. Underwood*, 5th Dist. No. CT2017-0024, 2018-Ohio-730, ¶ 18; *State v. Johnson*, 8th Dist. No. 105424, 2018-Ohio-1387, ¶ 18 (trial court has a duty to make further inquiries to ensure the voluntariness of the Alford plea). Therefore, in addition to meeting the general requirements under Crim.R. 11(C), before accepting an Alford plea, the trial court must determine if: "(1) defendant's guilty plea was not the result of coercion, deception or intimidation; (2) counsel was present at the time of the plea; (3) counsel's advice was competent in light of the circumstances surrounding the indictment; (4) the plea was made with the understanding of the nature of the charges; and, (5) defendant was motivated either by a desire to seek a lesser penalty or a fear of the consequences of a jury trial, or both, the guilty plea has been voluntarily and intelligently made." *State v. Piacella*, 27 Ohio St.2d 92, 271 N.E.2d 852 (1971), syllabus. *See also State v. LaBooth*, 7th Dist. No. 15 MA 0044, 2017–Ohio–1262, ¶ 23. Also, before the trial court can accept an Alford plea, the state must show a basic factual framework for the charge and plea. *Underwood*; *State v. Woods*, 6th Dist. No. L-13-1181, 2014-Ohio-3960, ¶ 6.

{¶9} Our analysis begins with a review of the Crim.R. 11(C) advisements. These advisements are divided into constitutional rights and nonconstitutional rights.

{¶10} The constitutional rights are: 1) a jury trial; 2) confrontation of witnesses against him; 3) the compulsory process for obtaining witnesses in his favor; 4) the state must prove the defendant's guilt beyond a reasonable doubt at trial; and 5) the defendant cannot be compelled to testify against himself. Crim.R. 11(C)(2)(c); *State v. Veney*, 120 Ohio St.3d 176, 2008–Ohio–5200, 897 N.E.2d 621, ¶ 19–21. The trial court must strictly comply with these requirements; if it fails to strictly comply, then the defendant's plea is invalid. *Id*. at ¶ 31.

{¶11} The nonconstitutional advisements are: 1) the nature of the charges; 2) the maximum penalty involved, which includes, if applicable, an advisement on post-release control; 3) if applicable, that the defendant is not eligible for probation or the imposition of community control sanctions; and 4) after entering a guilty plea or a no contest plea, the court may proceed directly to judgment and sentencing. Crim.R. 11(C)(2)(a)(b); *Veney* at ¶ 10–13; *State v. Sarkozy*, 117 Ohio St.3d 86, 2008–Ohio–509,

423 N.E.2d 1224, ¶ 19–26, (post-release control is a nonconstitutional advisement). For the nonconstitutional rights, the trial court must substantially comply with Crim.R. 11's mandates. *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990). "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." *Veney* at ¶ 15, quoting *Nero* at 108.

{¶12} The record indicates the trial court's advisement on the constitutional rights strictly complied with Crim.R. 11(C)(2)(c). Appellant was informed and indicated he understood by entering an Alford plea he was waiving his right to a jury trial, his right to confront witnesses against him, his right to subpoena witnesses in his favor, his right to have the state prove beyond a reasonable doubt every element of the indicted offenses, and that he could not be compelled to testify against himself. 10/31/16 Plea Tr. 8–9.

{¶13} As to the nonconstitutional rights, the trial court's advisement substantially complied with Crim.R. 11. Appellant was advised of the charges, the maximum sentence, the maximum fine, postrelease control and that he was eligible for a community control sanction. 10/31/16 Plea Tr. 10-11, 14. The trial court also explained it could proceed immediately to sentencing. 10/31/16 Plea Tr. 10.

{¶14} As for the additional Alford plea requirements, the record also indicates those requirements were met. Appellant informed the court his plea was not made under threat and his reason for entering the plea was to limit his possible penalty. 10/31/16 Tr. 6, 12. Originally, Appellant was indicted for two counts of first-degree felony rape, three counts of gross sexual imposition, which were third and fourth degree felonies, and voyeurism, a fifth-degree felony. He pled to sexual battery, a third-degree felony; gross sexual imposition, a third-degree felony; and voyeurism, a fifth-degree felony. This case involved alleged sexual misconduct with three minors. It is clear from the record Appellant understood the charges and the allegations against him. At the outset of the plea hearing, Appellant, through counsel, stipulated there were sufficient facts to satisfy the elements of each pled to crime. 10/21/16 Tr. 4-5. Counsel's advice was competent in light of the circumstances surrounding the indictment and plea

agreement, and Appellant stated on the record he was satisfied with counsel's representation. 10/31/16 Plea Tr. 8.

{¶15} Despite meeting the above requirements, Appellant contends the plea was not intelligently, voluntarily, and knowingly made because he did not understand the effect of the Alford plea. Appellant asserts neither he nor counsel understood what issues could be appealed after an Alford plea was entered. He cites the following statement by counsel:

> In an Alford plea of guilty in this case, Your Honor, the defendant understands that the legal sufficiency of the plea is exactly the same as if it were a complete admission of the factual basis. It, A, results in a finding of guilt; it, B, results in an eventual sentencing hearing where the Court will impose the sentencing it deems appropriate; and, C, it results in a complete forfeiture of any right to appeal, except two possibilities; one, ineffective assistance of counsel; and two, mistakes at sentencing.

10/31/16 Plea Tr. 6-7.

{¶16} "An Alford plea is 'a species of a guilty plea, which, in effect, waives a defendant's right to raise most issues on appeal.'" *State v. Gilmer*, 6th Dist. No. L–12–1079, 2013–Ohio–3055, ¶ 6, quoting *State v. Ware*, 6th Dist. No. L–08–1050, 2008–Ohio–6944, ¶ 12. *See also State v. Darks*, 10th Dist. No. 05AP–982, 2006–Ohio–3144, ¶ 14, quoting *State v. Carter*, 124 Ohio App.3d 423, 429 (2d Dist.1997). Appellant is correct, a guilty plea waives the right to allege ineffective assistance of counsel except to the extent Appellant asserts that his plea was not knowing and voluntary. *State v. Kelly*, 7th Dist. No. 08CO23, 2009-Ohio-1509, ¶ 11. The statement made by counsel does not demonstrate a misunderstanding of this proposition of law. While counsel might not have stated the nuances for the rule when there is a guilty plea, counsel's statement does not indicate he was unaware of the nuances.

{¶17} As for Appellant's understanding of the effect of an Alford plea, he seems to assert he was not aware he would not be able to appeal the severance ruling.

{¶18} A guilty plea does waive the right to challenge the denial of Crim.R. 14 motion to sever. *State v. Wolfe*, 6th Dist. No. WD-14-022, 2015-Ohio-564, ¶ 15; *State v.*

Bennett, 9th Dist. No. 12CA010286, 2014–Ohio–160, ¶ 9; *State v. Patterson*, 5th Dist. No. 2003CA00135, 2004-Ohio-1569, ¶ 13. Therefore, Appellant is correct that the Alford plea waived his right to appeal the ruling on the severance motion. However, nothing in the record suggests Appellant did not understand that the Alford plea waived his right to appeal that issue. Counsel does reference the ruling as a reason for entering the Alford plea; he indicated there is a high probability of conviction because of the nature of the charges, there are multiple accusers, and the trial court denied the severance motion. 10/31/16 Plea Tr. 6. However, no statement made by counsel suggests counsel or Appellant believed the issue would still be appealable even though Appellant was entering an Alford plea. 10/31/16 Tr. 6.

{¶19} Possibly, Appellant is attempting to argue he was unaware of his inability to appeal the severance ruling and counsel was ineffective for not telling him this prior to him entering the plea and had he known he would not have entered an Alford plea. In order to establish a claim of ineffective assistance of counsel Appellant must establish: (1) the counsel's performance was deficient or unreasonable under the circumstances; and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). To establish prejudice when ineffective assistance of counsel relates to a guilty plea, a defendant must show there is a reasonable probability that but for counsel's deficient or unreasonable performance the defendant would not have pled guilty. *State v. Xie*, 62 Ohio St.3d 521, 524 (1992), citing *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366 (1985). Appellant cannot satisfy these elements.

{¶20} An appellant claiming error in the trial court's refusal to allow separate trial under Crim.R. 14 has the burden of affirmatively showing his rights were prejudiced. *State v. Torres*, 66 Ohio St.2d 340, 421 N.E.2d 1288 (1981), syllabus. Appellant must show the court abused its discretion in refusing to separate the charges for trial. *Id*. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶21} There are two ways the state can rebut a claim of prejudice. *State v. Lott*, 51 Ohio St.3d 160, 163, 555 N.E.2d 293 (1990). First, it can show that evidence of the

other offenses would have been admissible "under the 'other acts' portion of Evid.R. 404(B), if the [separate] offenses had been severed for trial." *Id*. Alternatively, the state can "show that evidence of each crime joined at trial is simple and direct." *Id*.

{¶22} In this instance, the state admitted it could not meet the other acts standard. Instead it argued the evidence was simple and direct. The trial court agreed. That decision does not appear to be an abuse of discretion. The Ohio Supreme Court has repeatedly stated that "the jury is believed capable of segregating the proof on multiple charges when the evidence of each of the charges is uncomplicated." *State v. Brooks*, 44 Ohio St.3d 185, 193, 542 N.E.2d 636 (1989). Evidence is simple and direct when it is apparent that the jury is not confused as to which evidence proved which act. *State v. Harris*, 7th Dist. No. 13 MA 37, 2015–Ohio–2686, ¶ 30, citing *State v. Coley*, 93 Ohio St.3d 253, 259, 754 N.E.2d 1129 (2001).

{¶23} Here, there were three victims. Victim 3 was the victim of four of the charges in the original indictment. It was alleged Appellant encouraged her to use intoxicating substances and when she was intoxicated that is when the alleged sexual misconduct occurred. The other two victims did not claim the involvement of intoxicating substances. The victim of the voyeurism, Victim 1, was recorded going to the bathroom. Victim 2 was touched inappropriately over her clothing. The instances as explained by the prosecutor are simple and direct. A jury would be able to segregate the evidence for each of the charges and victims.

{¶24} Therefore, the trial court's ruling was correct. Accordingly, given the plea deal and the unlikelihood of successfully arguing that the trial court decided the severance issue incorrectly, advising Appellant to enter into an Alford plea did not constitute deficient performance. Furthermore, there is nothing in the record to suggest Appellant would not have entered the plea had it been crystal clear the severance issue could not be appealed.

{¶25} This assignment of error is meritless.

Second Assignment of Error

"The trial court erred in sentencing Appellant and imposing consecutive terms of incarceration pursuant to Alford Pleas without making the statutorily required findings."

{¶26} "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." R.C. 2953.08(G)(2)(a) and (b). A sentencing court must consider the purposes and principles of sentencing in accordance with R.C. 2929.11; the seriousness and recidivism factors set forth in R.C. 2929.12; and the appropriate consecutive sentence requirements enumerated in R.C. 2929.14(C)(4).

{¶27} In arguing the sentence is contrary to law, Appellant discussed both the sentence imposed and the imposition of a consecutive sentence.

{¶28} Starting with the sentences imposed, Appellant received thirty-six months for the sexual battery and the gross sexual imposition convictions. Both are third-degree felonies and these are not the maximum sentences for these crimes. R.C. 2929.14(A)(3)(a). Appellant received an 8 month sentence for fifth-degree felony voyeurism, which is also not the maximum sentence allowed by law. R.C. 2929.14(A)(5). At the sentencing hearing and in the judgment entry the trial court noted that it considered R.C. 2929.11 and R.C. 2929.12 in determining the appropriate sentences. 12/29/16 Sentencing Tr. 24; 12/30/16 J.E. Those statutes state the purposes and principles of sentencing and set forth a nonexclusive list of recidivism and seriousness factors. While the trial court did not discuss each of the recidivism and seriousness factors, it is not required to do so. *State v. McCourt*, 7th Dist. Mahoning No. 16 MA 0144, 2017-Ohio-9371, ¶ 9 (Trial court is required to consider the statutory factors, but it is not required to discuss those factors on the record or even state that they were considered.). However, it is noted the trial court did acknowledge Appellant has no prior felony record. Considering the indicted crimes, the crime plead to, Appellant's lack of a felony record, and the facts stated on the record, the sentence imposed for each crime was not clearly and convincingly contrary to law.

{¶29} As to consecutive sentences, R.C. 2929.14(C)(4) requires three findings: that consecutive sentences are 1) necessary to protect the public from future crime or to punish the defendant; 2) not disproportionate to the seriousness of the defendant's conduct and the danger the defendant poses to the public; and 3) one of three alternative findings set out in subsections: a) the defendant was under post-release control, specified statutory community control, or awaiting trial/sentencing; b) the offenses were committed during a course of conduct and the harm was so great/unusual that a single term does not reflect the seriousness of the defendant's conduct; or c) the defendant's criminal history demonstrates the need to protect the public from future crime by the defendant. R.C. 2929.14(C)(4).

{¶30} The findings supporting consecutive sentences must be made both at the sentencing hearing and in the entry. *State v. Bonnell*, 140 Ohio St.3d 209, 2014–Ohio–3177, 16 N.E.3d 659, ¶ 37. But a trial court is not required to state reasons supporting its findings or use magic or talismanic words, so long as it is apparent the court conducted the proper analysis. *State v. Jones*, 7th Dist. No. 13 MA 101, 2014–Ohio–2248, ¶ 6; *see also Bonnell* at ¶ 37. We may liberally review the entire sentencing transcript to discern whether the trial court made the requisite findings. *Bonnell* at ¶ 29.

{¶31} At sentencing, the trial court stated:

> The court finds consecutive sentences are necessary to protect the defendant and that they are not disproportionate to the seriousness of the conduct and the danger that the defendant poses. The court also finds that the harm was so great or unusual that the single term does not adequately reflect the seriousness of the conduct.

12/29/16 Tr. 25.

{¶32} In the first sentence, the trial court does state consecutive sentences are necessary to protect the defendant instead of stating consecutive sentences are necessary to protect the public. Considering the entire record, this appears to be a mere misstatement and that the trial court really meant to state the sentence was necessary to protect the public. The judgment entry uses the correct language and the statements made prior to the statement about a prison sentence being necessary and

Appellant was not amendable to community control, allow this court to glean from the record that the trial court was determining consecutive sentences were necessary to protect the public, not to protect the defendant. 12/30/16 J.E.; 12/29/16 Tr. 23-25.

{¶33} The second sentence of the trial court's analysis quoted above does not use the phrase "course of conduct." As aforementioned "course of conduct" is part subsection (b) of one of the potential findings required for the third finding under R.C. 2929.14(C)(4)(a)-(c). It is that at least two of the offenses were committed as part of one or more courses of conduct and the harm caused by the multiple offenses was so great or unusual that a single term does not reflect the seriousness of the defendant's conduct. R.C. 2929.14(C)(4)(b). Although the trial court did not use all the words used in the statute when it made the harm great or unusual at the sentencing hearing, the trial court's use of the remainder of that finding indicates it was considering it a course of conduct. Furthermore, the record clearly indicates there were three victims with multiple incidents of sexual misconduct. Specific facts of this case and the relationship of the victims to Appellant also indicate it was a course of conduct. Therefore, it can be gleaned from the record that the trial court was finding it a course of conduct.

{¶34} The trial court also made the required findings in the judgment entry:

> The Court finds in this matter consecutive sentences are necessary to protect the public from future crime and to punish the offender and; that consecutive sentences are not disproportionate to the seriousness of the Defendant's conduct and to the danger the Defendant poses to the public and; that the offenses committed by the Defendant were part of a course of conduct that no single prison term for any of the offenses committed as part of the course of conduct adequately reflects the seriousness of Defendant's conduct.

12/30/16 J.E.

{¶35} Counsel does admit the trial court made the statutory findings in the judgment entry. However, counsel creatively argues the trial court's "bare bones" use of the statutorily required language is not sufficient to comply with R.C. 2929.14(C)(4). We disagree. While we have repeatedly stated magic or talismanic words are not required,

we have also implicitly advised that tracking the language of the statute is ideal. In some instance, the record could indicate regurgitating the statute might not indicate the trial court considered the factors appropriately. However, given the record in this instance, it can be gleaned that the trial court did appropriately consider the factors and the use of the "bare bones" statutory language was sufficient.

{¶36} Given the record, the arguments lack merit. This assignment of error is meritless.

Conclusion

{¶37} Both assignments of error lack merit. The convictions are affirmed.

Waite, J., concurs.

Bartlett, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.