

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

ANTHONY M. LINZEY,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0041

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 18 CR 457

BEFORE:

Cheryl L. Waite, Carol Ann Robb, Judges and Judge Timothy P. Cannon, Judge of
the Eleventh District Court of Appeals, Sitting by Assignment.

JUDGMENT:

Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor and *Atty. Ralph M. Rivera*, Assistant
Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503,
for Plaintiff-Appellee

Atty. Louis M. DeFabio, 4822 Market Street, Suite 220, Youngstown, Ohio 44512, for Defendant-Appellant

Dated: December 14, 2020

WAITE, P.J.

{¶1} Appellant Anthony M. Linzey appeals a March 11, 2019 Mahoning County Court of Common Pleas judgment entry convicting him of gross sexual imposition. Appellant argues that the trial court improperly considered a statement made by the victim during a child witness competency evaluation when determining his sentence. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} This matter stems from an incident that occurred when Appellant was caring for his girlfriend's eight-year-old daughter. The girlfriend's aunt had custody of the child. However, on the date in question, the aunt took the child to visit her mother and left. At some point, the girlfriend also left the house, leaving the child with Appellant. There is some dispute whether Appellant's mother was present at the house.

{¶3} Sometime after the child was returned to the aunt, the child told her aunt that she had a secret but she would get in trouble if she told anyone. When pressed, she told her aunt that Appellant had asked her to perform a sexual act on him.

{¶4} According to Appellant, the child was running around the room when she tripped and fell. When she fell, Appellant claims that her hand landed on his groin area. He yelled at the child for running around, causing her to cry. The noise caused Appellant's mother, who he claims was inside the house, to enter the room and comfort the child.

{¶15} On June 7, 2018, Appellant was indicted on one count of gross sexual imposition, a felony of the third degree in violation of R.C. 2907.05(A)(4). On January 22, 2019, Appellant pleaded no contest to the sole offense as charged.

{¶16} On March 6, 2019, the trial court held a sentencing hearing. At the hearing, Appellant reiterated his version of the facts. During sentencing, the judge stated that he had spoken with the victim during a child witness competency evaluation, found her story to be credible, and did not find that Appellant was credible.

{¶17} The court sentenced Appellant to four years of incarceration, with credit for eight days served, and five years of mandatory postrelease control. Appellant was also designated a tier two sex offender. Appellant's trial counsel objected to the sentence and argued that the court was not permitted to consider the victim's statement when determining Appellant's sentence. The court overruled the objection. This timely appeal followed.

ASSIGNMENT OF ERROR

The trial court's sentence of four (4) years imprisonment was contrary to law because the trial court improperly made a finding that a victim was credible based upon her answers at a competency evaluation and relied upon that finding in imposing the sentence.

{¶18} Appellant argues that the trial court improperly considered statements made by the victim during a child witness competency evaluation when determining his sentence. Appellant argues that credibility should not be determined at the evaluation,

which is solely a mechanism to determine whether the witness is competent to provide testimony.

{¶9} In response, the state argues that a trial court has wide discretion in determining a defendant's sentence. Furthermore, the state points out that there is no law, statutory or case driven, that prohibits a court from considering statements made during a witness competency evaluation.

{¶10} An appellate court is permitted to review a felony sentence to determine if it is contrary to law. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1. Appellant solely takes issue with the trial court's consideration of the victim's statement and does not otherwise challenge his sentence.

{¶11} At the sentencing hearing, the trial court stated:

The case is very troubling, very disturbing, and I had an opportunity to speak with this young victim, eight years old. I found her to be extremely intelligent, bright, very articulate. She knows what happened to her, and I found her to be very credible. She offered during the competency evaluation that, you know, she knew the difference between right and wrong and what [Appellant] did to her was wrong, and we weren't there for that purpose, but she enunciated that during her competency examination, and I tried to avoid that and said we don't want to talk about that right now; let's move on. But obviously this is weighing on this little girl. I can't imagine that she made up an incident like this regardless of the circumstances, whether the mother was in the house, because she was very specific in the details that a little girl of eight years old, you know, would have no reference

to those particular details. So I found her testimony in that competency evaluation very compelling.

(3/6/20 Sentencing Hrg. Tr., pp. 17-18.)

{¶12} The record does not specifically show whether the court's statement was made merely in response to Appellant's recitation of the facts or was the basis for the court's determination as to the sentence. During his allocution, Appellant stated that he and the victim did not engage in a sexual activity. He maintained that the victim was running around the room when she tripped and fell, her hand landing on his groin area. When he chastised the victim for running around, his mother heard the noise and came running to the room to comfort the victim after her fall.

{¶13} In our review of the record, it appears that the trial court's statement was in response to Appellant's version of the incident, which the court clearly found lacking in credibility. The judge stated that the victim seemed credible because of her clear recollection of the facts and because a child that age would not ordinarily have knowledge of the acts she described. Regardless, it is apparent that the court found Appellant's version of the incident incredible.

{¶14} To the extent that the court considered the victim's statement during sentencing, there is no statute or caselaw that prohibits a court from taking into consideration the statement of the child-victim during a witness competency hearing. Appellant tries to analogize several other situations, citing to cases holding that a court cannot consider an element of the offense when determining a sentence. See *State v. Stroud*, 7th Dist. Mahoning No. 07 MA 91, 2008-Ohio-3187; *State v. Smith*, 8th Dist. Cuyahoga No. 85245, 2005-Ohio-3836; *State v. Polizzi*, 11th Dist. Lake Nos. 2018-L-063,

2018-L-064, 2019-Ohio-2505. Appellant cites to caselaw holding that a trial court cannot consider a defendant's silence at trial when determining a sentence. See *State v. Glass*, 8th Dist. Cuyahoga No. 83950, 2004-Ohio-4495. He also cites to law holding that a trial court cannot rely on its belief that the commission of multiple crimes should result in consecutive sentences, which was not a consideration under the statute in effect at that time. See *State v. Bunch*, 7th Dist. Mahoning No. 02 CA 196, 2005-Ohio-3309.

{¶15} We note that in *Stroud*, we held that consideration of an element of the offense is improper only if the court does not explain how such consideration rises to such a level that it represents more than an element of the offense. *Id.* at ¶ 52. If simply an element of a crime, this element “is present in every case where a court is sentencing an offender for a [stated crime] and highlighting this fact does not show why this particular case is a more serious form of that offense.” *Id.* Hence, in order to use the element in sentencing, the court must enumerate something more than the mere existence of the element. Regardless, the cases cited by Appellant apply to specific issues not present in this case, and none are analogous to the narrow issue currently on appeal.

{¶16} As noted by the state, a trial court has a great deal of discretion when determining a sentence.

It is well established that sentencing courts may consider arrests and even prior allegations that did not result in conviction before imposing sentence. *State v. Hutton*, 53 Ohio St.3d 36, 43, 559 N.E.2d 432 (1990). A sentencing court may take into consideration the circumstances of the offense for which the defendant has been indicted, even if the negotiated plea is at odds with the indicted elements. *State v. Starkey*, 7th Dist. No. 06 MA 110, 2007-

Ohio-6702, ¶ 17. In sentencing, the court can review the indictment, bill of particulars, victim's statements in court, trial testimony if a trial was held, and any presentence investigation report. See R.C. 2929.19(B)(1). * * *

* * * Moreover, "(c)ourts have consistently held that evidence of other crimes, including crimes that never result in criminal charges being pursued, or criminal charges that are dismissed as a result of a plea bargain, may be considered at sentencing." *Starkey* at ¶ 17.

State v. Patton, 7th Dist. Mahoning No. 19 MA 0033, 2020-Ohio-937, ¶ 7.

{¶17} Here, the victim appeared before the trial court during her competency evaluation hearing. While a determination about credibility was not the specific purpose of this hearing, it was tangential. The court was given an opportunity to speak with the victim, observe her demeanor, and determine whether she was credible. There is no law prohibiting a trial court from considering a victim's credibility based on statements made during a witness competency hearing or any other hearing, particularly where the court had an opportunity to interact with the victim face to face and observe her demeanor. Such consideration is akin to a victim impact statement or a witness' in-court testimony, both of which are appropriate considerations during sentencing.

{¶18} The sentence in this matter fell within the statutory range and Appellant was not ordered to serve the maximum sentence for his crime. The trial court focused on Appellant's lengthy criminal history, including: several misdemeanors, multiple disorderly conduct charges, multiple burglary charges, theft, menacing by stalking, and violation of a protection order. (3/6/19 Sentencing Hrg. Tr., p. 19.) The court also noted that

Appellant had previously served a prison term. The court considered a victim impact statement given by the child’s aunt. The court also noted the “heinous” nature of the act and the long-term effect the acts could have on the child, who was undergoing counseling at the time of sentencing. (3/6/19 Sentencing Hrg. Tr., p. 19.) The court also expressly considered the relevant sentencing statutes. Thus, this record shows that Appellant’s sentence is not contrary to law.

{¶19} As such, Appellant’s sole assignment of error is without merit and is overruled.

Conclusion

{¶20} Appellant argues that the trial court improperly considered a statement made by the victim during a child witness competency evaluation when determining his sentence. For the reasons provided, Appellant’s arguments are without merit and the judgment of the trial court is affirmed.

Robb, J., concurs.

Cannon, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is 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.