[Cite as *State v. Suggett*, 2021-Ohio-4641.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

DEBRA SUGGETT,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 21 MA 0032

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2019 CR 1077

BEFORE:
Gene Donofrio, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed in part, Reversed and Remanded in Part

Atty. Paul Gaines, Mahoning County Prosecutor, *Atty. Ralph Rivera, Atty. Edward Czopur,* Mahoning County Assistant Prosecutors, 21 W. Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. John McNally, IV, 100 Federal Street East, Suite 600, Youngstown, Ohio 44503, for Defendant-Appellant.

Dated:
December 29, 2021

Donofrio, J.

{¶1} Defendant-appellant, Debra Lynn Suggett (appellant), appeals from a Mahoning County Common Pleas Court judgment sentencing her to 90 days in jail after she pled guilty to an amended charge of first-degree misdemeanor child endangering.

{¶2} Since appellant ultimately entered a guilty plea to an amended charge of child endangering, few facts are presented. Appellant and the State of Ohio (appellee) both agree that appellant ran a private daycare or babysitting service out of her home and the minor victim, C.C., and his brother attended the daycare on November 12, 2019. When C.C. was brought home from daycare on that day, his parents noticed bruising on his buttocks and lower back. C.C. was two years, 11 months old, at the time of the alleged offense. Both parties further agree that C.C. made some kind of statement to his parents that he had urinated accidentally and appellant hit him as a result. The parents went to the police station that night. In appellant's November 13, 2019 voluntary handwritten statement to police, which was provided in discovery, she stated that "I put him [C.C.] down for a nap when he got up I got him out and I drop[sic] him and he hit a toy and hit the floor. He was playing under the work bench with other kids and they all were hitting and kicking and [C.C.] got hurt and has mother pick him up."

{¶3} After waiving a preliminary hearing and consenting to have her case bound over to the Mahoning County Grand Jury, appellant was indicted for endangering children under R.C. 2919.22(A) and R.C. 2919.22(E)(2)(c), a third-degree felony.

{¶4} On September 11, 2020, appellant, through counsel, filed a motion in limine to determine C.C.'s competence to testify as a witness. Appellant asserted that C.C. was presumed incompetent to testify because he was under the age of ten. Appellant noted C.C's age of two years, 11 months at the time that the offense occurred, and his present age of four years old.

{¶5} On January 8, 2021, the trial court issued a judgment entry stating that it held a competency hearing on January 6, 2021 and C.C. was competent to testify.

{¶6} Appellant entered a guilty plea on February 9, 2021 to an amended charge of first-degree misdemeanor child endangering and the court accepted the plea. Among other things, the plea agreement informed appellant that the maximum penalty she was facing was six months in jail and a $1,000.00 fine and she was prohibited from running a daycare facility.

{¶7} On the record at the March 23, 2021 sentencing hearing, the trial court sentenced appellant to 90 days in the Mahoning County Jail, with credit for one day served, five years of community control, no contact with unrelated children at her home, and no operation of a daycare of any sort. Tr. at 23. In its March 24, 2021 judgment entry, the court imposed a 180-day sentence in the Mahoning County Justice Center, with 90 days suspended and credit for one day served. The court also imposed 5 years of community control, imposed a no-contact order with unrelated children at her residence, and prohibited her from operating a daycare.

{¶8} Appellant filed a timely notice of appeal on March 25, 2021. This Court stayed execution of appellant's jail sentence pending a decision on her appeal.

{¶9} We take appellant's assignments of error out of order and address her second assignment of error first. In her second assignment of error, appellant asserts:

> THE TRIAL COURT'S JANUARY 8, 2021 JUDGMENT ENTRY FINDING THAT THE MINOR CHILD, C.C., WAS COMPETENT TO TESTIFY AS A WITNESS WAS CONTRARY TO LAW.

{¶10} Appellant notes C.C.'s tender age of four at the time of the competency hearing and quotes R.C. 2317.01 and Evid. R. 601 as providing that all persons are competent as witnesses "except those of unsound mind and children under ten years of age * * *." She contends that the trial court failed to properly consider one of the factors set forth by the Ohio Supreme Court in *State v. Frazier*, 61 Ohio St.3d 247, 251, 574 N.E.2d 483 (1991) that courts must consider when determining a young child's competency to testify as a witness. Appellant asserts that the trial court did not properly consider whether C.C. could recollect observations about the facts about which he would testify and whether he could communicate what he observed at her house on the date of

the incident. Appellant also submits that the trial court's minimal questioning of C.C. about the incident also failed to fully fulfill this factor as well.

{¶11} Appellant also cites to our decision in *State v. Greenlee*, 7th Dist. Harrison No. 05-HA-576, 2006-Ohio-753, where we applied the *Frazier* factors and found that the trial court correctly determined that a child witness was incompetent to testify based on the child's inability to recollect and relate her impressions of any abuse she may have suffered. Appellant asserts that the same inability to recollect and relate impressions of any abuse applies to C.C. in this case.

{¶12} Appellee contends that appellant waived the right to challenge the rulings on C.C.'s competency when she entered her guilty plea. Appellee alternatively asserts that the trial court did not abuse its discretion by finding C.C. competent to testify because it held an extensive hearing and interviewed C.C. at length.

{¶13} We find that appellant waived the right to challenge the trial court's competency ruling by entering her guilty plea. "The plea of guilty is a complete admission of the defendant's guilt." Crim.R. 11(B)(1). "A valid guilty plea by a counseled defendant * * * generally waives the right to appeal all prior nonjurisdictional defects, including the denial of a motion to suppress." *State v. Beasley*, 152 Ohio St.3d 470, 2018-Ohio-16, 97 N.E.3d 474, ¶ 15, citing *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, ¶ 78*; State v. Obermiller*, 147 Ohio St.3d 175, 2016-Ohio-1594, 63 N.E.3d 93, ¶ 56. Thus, a defendant who "voluntarily, knowingly, and intelligently enters a guilty plea with the assistance of counsel 'may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.' " *Id*., quoting *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973).

{¶14} Appellant here does not dispute the validity of her guilty plea and does not challenge the jurisdiction of the court. Thus, she was waived her right to appeal the trial court's ruling on C.C.'s competency as a witness.

{¶15} In addition, the trial court's preliminary determination that C.C. was a competent witness is not a final, binding determination. *See State v. Martin*, 4th Dist. Pike No. 19CA900, 2020-Ohio-3216, ¶ 6 (by pleading guilty, defendant waived challenge to trial court's pretrial ruling that eight-year-old child victim was competent to testify as a

witness), citing *Kentucky v. Stincer*, 482 U.S. 730, 740, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987) ("although the preliminary determination of a witness' competency to testify is made at this hearing, the determination of competency is an ongoing one for the judge to make based on the witness' actual testimony at trial."); *State v. Fortune*, 6th Dist. Lucas No. L-04-1227, 2006-Ohio-1118, ¶ 48; *State v. Nasser,* 10th Dist. Franklin No. 02AP-1112, 2003-Ohio-5947, ¶ 45.

{¶16} For these reasons, we find that appellant waived her right to appeal this issue by pleading guilty.

{¶17} Even if we chose to address this assignment of error, the trial court did not abuse its discretion in finding C.C. to be a competent witness. R.C. 2317.01 provides in relevant part that:

> All persons are competent witnesses except those of unsound mind and children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.

The version of Evid. R. 601 in effect at the time of the trial court's January 6, 2021 determination provided, in relevant part, that:

> (A) General Rule. Every person is competent to be a witness except as otherwise provided in these rules.
>
> (B) Disqualification of Witness in General. A person is disqualified to testify as a witness when the court determines that the person is:
>
> (1) Incapable of expressing himself or herself concerning the matter as to be understood, either directly or through interpretation by one who can understand him or her; or
>
> (2) Incapable of understanding the duty of a witness to tell the truth.

{¶18} The standard of review for a trial court's competency determination is an abuse of discretion. *Frazier*, 61 Ohio St.3d 247, 250-251, 574 N.E.2d 483. In *Frazier*, the Ohio Supreme Court held that it is the trial court's duty to conduct a voir dire examination of a child under the age of ten in order to determine the child's competency to testify as a witness*. Id*. That court held that:

> In determining whether a child under ten is competen to testify, the trial court must take into consideration (1) the child's ability to receive accurate impressions of fact or to observe acts about which he or she will testify, (2) the child's ability to recollect those impressions or observations, (3) the child's ability to communicate what was observed, (4) the child's understanding of truth and falsity and (5) the child's appreciation of his or her responsibility to be truthful.

Id. at 251, citing generally, Annotation (1988), Witnesses: Child Competency Statutes, 60 A.L.R.4th 369 and *State v. Kirk*, 42 Ohio App.3d 93, 536 N.E.2d 391 (1987).

{¶19} In *State v. Greenlee*, 7th Dist. Harrison No. 05-HA-576, 2006-Ohio-753, ¶ 31, we found that the trial court did not abuse its discretion when it determined that a child witness was not competent to testify. We applied *Frazier* and gave deference to the trial court's finding that that the child was not able to recollect and relate her impressions of any abuse that she had suffered. *Id*. The trial court had reviewed a videotaped statement by the child to the family services agency and found that her statements to the court as to any abuse suffered were completely different from those the child provided to the family services agency. *Id.* at ¶ 27-28. The court also found that the child's statements as to whether she was coached on testifying and who had abused her rendered her incompetent to testify. We found that the trial court was in the best position to determine who was competent to testify. *Id*. We further held that the evidence supported the court's decision to find that while the child understood truth and falsity, and had the ability to receive accurate impressions of fact and observations and to recall them, she was not able to recall and relate her impressions of any abuse that she suffered. *Id.*

{¶20} Applying *Frazier* to the instant case, the trial court did not abuse its discretion by finding that C.C. was competent to testify as a witness. Appellant challenges only the trial court's finding that C.C. was able to recollect or remember what he was going to testify to in court, that is, the abuse he suffered by appellant.

{¶21} At the end of the trial court's initial questioning of C.C., appellant's counsel stated that the trial court had not covered the issue of whether C.C. could recollect or remember what he was going to testify about in court. Tr. at 25. Counsel stated that based on *Greenlee*, the trial court needed to question C.C. about what he recollected

about the incident and whether he remembered being hurt or abused. *Id.* The trial court stated that it was uncertain of whether that was necessary because C.C.'s answers would constitute testimony about what occurred, and while they would be recorded, they would not be under oath and could therefore present issues at trial. Tr. at 26-27. The prosecution also contended that it would be inappropriate for the court to question C.C. about such matters before trial. *Id*. at 27. A discussion was had off of the record and when back on the record, the trial court stated that while it thought that the competency hearing had concluded, defense counsel wanted the court to question C.C. specifically about the abuse alleged in the indictment. *Id.* at 28-29. The court stated that it was reluctant to do so because it believed its job in determining a minor's competency as a witness was to determine whether the minor was competent to testify by evaluating if he can recall things that happened and relate them accurately, or if the child understood the importance of telling the truth as opposed to making things up or saying what others told them to say. *Id*. at 29.

{¶22} The trial court concluded that it should not question C.C. about the alleged abuse by appellant because it would be "eliciting testimony about the ultimate issue in question, which is whether or not the defendant committed abuse." Tr. at 29. The court noted that defense counsel then presented the *Greenlee* case to the court and the court interpreted that case to mean that a minor child could be competent to testify generally, but "it's the job of the trial court to examine further to see whether or not that minor child is competent to testify about the alleged incident that occurred." *Id.* at 30. The trial court explained that the questioning per *Greenlee* should only be to determine whether any outside influences existed to influence the child or who had spoken to him about the incident. Tr. at 30-31. The prosecution objected to further questioning, and agreed that by asking C.C. to respond to questions about what happened at appellant's house, the court would be eliciting testimony concerning the ultimate issue in the case. *Id*.

{¶23} The court then decided that it would bring C.C. back into the courtroom and question him, but the questions would be "confined to whether or not, number one, he recollects anything that happened about that, not getting into what happened; and number two, whether or not anyone told him or talked to him about it, and, if so, what they said." Tr. at 32. The court asked C.C. questions as to whether he remembered being at

appellant's house and he repeatedly said no. Tr. at 33-34. C.C. related that when his parents went to work, he would stay at his aunt's house. *Id*. He also remembered going to his grandmother's house during the day. *Id*. at 37. The court asked C.C. three or four times if he remembered staying anywhere else, and he said he did not remember doing so. *Id*. at 36-41.

{¶24} The court went off of the record with counsel and when returning to the record, the court questioned C.C., this time asking him if he remembered being over "Miss Debbie's with [J], the twins?" Tr. at 42. C.C. responded, "[y]es." *Id.* When the court asked C.C. how long ago this was and what the other twin's name was, C.C. did not know. *Id*. C.C. stated that he remembered staying with appellant and remembered the name of one of the twins, but he did not remember the other twin's name. *Id* at 44. C.C. also stated that no one ever talked to him about what happened at appellant's home, but when the court asked if the police had spoken to him, he responded, "[y]es." *Id*. When the court asked if anyone ever told him what he should say or should not say about what happened, the following took place on the record:

{¶25} THE COURT: Did anyone ever tell you what you should say or shouldn't say?

MINOR CHILD C.C.: Yeah, but when I - -

THE COURT: You what?

MINOR CHILD C.C.: When I was little, I went there for ten years.

THE COURT: Oh, when you were little you - -

MINOR CHILD C.C.: Went there for ten years.

THE COURT: Okay. All right.

MINOR CHILD C.C.: And we had an old fort night when I was little.

Tr. at 43-45. A discussion ensued and then the court asked:

THE COURT: Okay. Did you stay over Miss Debbie's very much, do you remember?

MINOR CHILD C.C.: No.

THE COURT: No? Do you remember what her house looked like?

MINOR CHILD C.C.: No.

THE COURT: No? Do you remember when you would stay there did you

- - were you downstairs or upstairs, do you remember that?
MINOR CHILD C.C.: I was - - I was downstairs.
THE COURT: Okay. And then who was there? Do you remember how many kids were there besides you?
MINOR CHILD C.C.: No.
THE COURT: No? We talked about the twins.
MINOR CHILD C.C.: But - - but I looked at the picture, and I saw it was green, a green; and it was green, so I didn't know what it was.
THE COURT: What picture?
MINOR CHILD C.C.: I don't know. I thought it was a green picture.
THE COURT: Oh.
MINOR CHILD C.C.: But it is.
THE COURT: Who showed you the picture?
MINOR CHILD C.C.: Miss Debbie did.
THE COURT: Miss Debbie, okay. All right.
MINOR CHILD C.C.: But she thought it was red, but it was green.
THE COURT: Oh, okay. Did you tell her you thought it was red or did you tell her you thought it was green? Do you remember?
MINOR CHILD C.C.: No.
THE COURT: No? How old were the twins? Do you remember that? Were they about your age? Were they younger or older?
MINOR CHILD C.C.: They was young and I was little because I was super sad because she was yelling at me - -
THE COURT: Oh, okay. And - -
MINOR CHILD C.C.: And she pushed me by the door.
THE COURT: Okay. Did anyone talk to you about like what you should tell me or anyone about what happened there? It's okay.
MINOR CHILD C.C.: No.
THE COURT: No? Okay. Is everything you are telling me from what you remember in your head?
MINOR CHILD C.C.: No.

THE COURT: No? Where else - -

MINOR CHILD C.C.: But - - but I was in mommy's belly when I was little.

Tr. at 44-50. The dialogue then shifted to how tall C.C. was going to be, how tall his dad and his brother were, and his family. *Id.* at 50. The court concluded its questioning. *Id.*

{¶26} Following the hearing, the court stated on the record that it had held a hearing and questioned C.C., and then questioned him again at defense counsel's request. Tr. at 51. The court explained that preliminarily, it was satisfied that C.C. was competent because he talked about his family, Christmas, his brother, corrected the court on occasion, and recounted different experiences that had occurred. *Id*. at 52-53. The court noted that defense counsel provided a copy of *Greenlee* and asserted that the competency determination goes beyond general competency and required competency about the matter at issue in the case. *Id*. at 53.

{¶27} The court recounted what had occurred when C.C. did not know who Miss Suggett or Debbie was, and noted that it went off the record thereafter to speak with counsel about what might cause C.C. to recall or relate to that experience. Tr. at 53. The court explained that counsel suggested speaking of "Miss Debbie" and the twins. *Id.* The court recounted that it went back on the record and mentioned those names, and they jogged C.C.'s memory. *Id*. at 53-54. The Court then stated:

> The court did not push the matter, but he did start to talk a little bit about Miss Debbie and that she yelled at him, and I believe even he said she may have pushed him into a door. It became apparent in observing his appearance, his demeanor, his facial expression, that it was a painful incident to recount, and I did not push it any further. I was satisfied at that point that it was a memory that he not want to remember too much. He may or may not. It didn't seem to me like he wanted to talk about.

Tr. at 54. The court then held that:

> So I do find that he can tell the truth and recount incidents, recount experiences, that he understands the importance of telling the truth versus a lie, and that he does have memory of that day, and it's independent of any other coaching, any direction, anything other than his own experience in the matter. And while, you know, it may not be a pleasant thing or an

> easy thing for him to talk about in the courtroom, I believe he can do that, and a jury can then decide the level of reliability with which he might recount anything that may or may not have occurred. So I do find he is competent to testify * * *.

Tr. at 54-55. The court issued a judgment entry indicating that it held a competency hearing to determine C.C.'s competency and found him to be a competent witness.

{¶28} We find that the trial court did not abuse its discretion. The trial court was in the best position to observe C.C., and even though only four years old, he recalled appellant yelling at and hitting him while at her daycare. He recalled this incident and related it to the court when prompted with questions and names that he understood. While he did not provide great detail, the court explained that it did not push C.C. because it appeared by his demeanor and facial expressions that it hurt him to discuss the incident any further.

{¶29} Appellant cites to our decision in *Greenlee* for support that the court erred by finding C.C. to be a competent witness, but that case is distinguishable. The trial court in that case pointed to many issues that led it to conclude that the child could not recollect or relate her impressions of any abuse that she suffered. The court noted that it had reviewed a videotape of the child's statements to the family services agency about the abuse suffered and her statements were "completely different" than those given to the court. *Greenlee*, 2006-Ohio-753, ¶ 27-28. The court further noted that when asked whether anyone had spoken to her about going to court, the child stated that her mother, grandmother, and another person had spoken to her about what to say, and she was told to say that her "papap" hurt her. *Id*. The court further indicated that the child also stated that the "guy next door" hurt her. *Id.* at ¶ 29. The court also explained that when it brought up "papap", the child became less responsive and changed the subject. *Id*. The trial court noted that it pressed the child about whether she remembered being hurt, and she either said nothing or said she did not know. *Id*. The court also noted that the child related that she did not remember being hurt, where she was hurt, or talking to anybody about it. *Id*.

{¶30} These facts and findings by the trial court are very different than those in the instant case. Here, there was no mention of any other possible perpetrator, no inconsistent statements, and no conduct or statement by C.C. that would lead the court

to conclude that he could not recollect or relate his impressions about any abuse he had suffered. The fact that it took C.C. some time to respond or remember the incident does not necessarily lead to a contrary conclusion, since C.C. was only four years old and did respond once the court mentioned names that jogged his memory. Consistent with *Greenlee*, however, we find that the trial court was in the best position to determine whether C.C. was competent to testify and the evidence supports the decision to find that he was able to recall and relate his impressions of the harm that he suffered. *Id*.

{¶31} Appellant also contends in this assignment of error that the trial court violated R.C. 2317.01 when it held C.C.'s competency hearing in the courtroom. Appellant asserts that R.C. 2317.01 requires that the court hold a competency hearing for a child in "an office or hearing room" and not in the courtroom. Appellant indicates that she objected on the record during the hearing, and the court proceeded with the hearing in violation of Evid. R. 601 and R.C. 2317.01.

{¶32} The assertion is without merit. Defense counsel raised this issue after the court's initial questioning of C.C. Tr. at 22-24. Further, when the issue was raised, the court indicated that it held the hearing in the courtroom due to COVID-19 precautions and so that masks could be removed safely so that everyone could be heard and observed. *Id*. at 23-23. The court also explained that it wanted to observe the impact of the courtroom on the child's statements and wanted the child to become familiar with the courtroom setting. *Id.* at 23.

{¶33} R.C. 2317.01 sets forth the general rules for witness competency and specifically provides that:

> In a hearing in an abuse, neglect, or dependency case, any examination made by the court to determine whether a child is a competent witness shall be conducted by the court in an office or room other than a courtroom or hearing room, shall be conducted in the presence of only those individuals considered necessary by the court for the conduct of the examination or the well-being of the child, and shall be conducted with a court reporter present. The court may allow the prosecutor, guardian ad litem, or attorney for any party to submit questions for use by the court in determining whether the child is a competent witness.

{¶34} A plain reading of this part of the statute indicates that the court must conduct an examination of a child in a room other than the courtroom only "[i]n a hearing in an abuse, neglect, or dependency case." There is no requirement that the trial court conduct a child competency hearing in any other case. Further, no version of Evid. R. 601 mentions a court having to hold such a competency hearing outside of the courtroom.

{¶35} Consequently, we find that the latter part of R.C. 2317.01 does not apply in the instant case, Evid. R. 601 contains no such restriction, and the court was free to hold the competency hearing in the courtroom.

{¶36} Accordingly, appellant's second assignment of error is without merit and is overruled.

{¶37} In appellant's first assignment of error, she asserts:

> THE TRIAL COURT'S SENTENCING OF DEFENDANT-APPELLANT DEBRA LYNN SUGGETT TO 90 DAYS IN THE MAHONING COUNTY JAIL CONSTITUTES AN ABUSE OF DISCRETION.

Appellant argues that the trial court abused its discretion by sentencing her to 90 days in jail because it failed to adhere to the principles of misdemeanor sentencing under R.C. 2929.21. She reviews the factors that a court must consider in arriving at an appropriate misdemeanor sentence and applies them to her case. She states that C.C. slipped out of her hands when she lifted him up to change his clothes, fell to the ground, and hit his back on a toy shopping cart. She indicates that she did not notice any bruising on C.C., he played throughout the day without complaint, and he never indicated that he was in pain or discomfort. Appellant further notes that she is a 66-year old woman who ran a babysitting business for 31 years to support her family and she has no prior criminal record. She indicates that no evidence exists which predicts that she would commit any future offense, that she is a danger to others, or that there was prior or repeated similar behavior. Appellant also submits that she complied with her bond terms, which included not operating a babysitting business.

{¶38} Appellee responds that appellant's sentence is not an abuse of discretion because it was within the 180-day maximum allowable for a first-degree misdemeanor. Appellee agrees that the court must consider the factors under R.C. 2929.22(B)(1) when

sentencing on a misdemeanor and concludes that the court in this case did so and extensively discussed them on the record.

{¶39} The overriding purposes of misdemeanor sentencing are to punish the offender and to protect the public from future crime by the offender and others. R.C. 2929.21(A). In order to achieve these purposes, the sentencing court shall consider the impact of the offense on the victim, the need to change the offender's behavior, the need to rehabilitate the offender, and the desire to make restitution to the victim and/or the public. *Id*. A misdemeanor sentence shall be reasonably calculated to achieve the two overriding purposes of misdemeanor sentencing set forth above, 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 offenses committed by similar offenders. R.C. 2929.21(B).

{¶40} In rendering a misdemeanor sentence, the trial court must consider the factors set out in R.C. 2929.22(B)(1). The factors include the nature and circumstances of the offense; the offender's criminal record; whether there is a substantial risk the offender is a danger to others; whether the victim's youth, age, disability, or other factor made the victim particularly vulnerable to the offense or made the impact of the offense more serious; likelihood of recidivism; any emotional, mental, or physical injuries traceable to military service that contributed to the offense; and the offender's military service record. R.C. 2929.22(B)(1)(a)–(g).

{¶41} While the better practice is for the trial court to state on the record that it considered the statutory factors, R.C. 2929.22(B) does not require the court to do so. *Id.* at ¶ 37, citing *State v. Lundberg*, 2d Dist. No. 2278, 2009–Ohio–1641, ¶ 21. Thus, when the trial court's sentence is within the statutory limit, an appellate court is to presume that the trial court followed the standards and considered the factors in R.C. 2929.22 absent a showing to the contrary. *Id*., citing *State v. Bodnar*, 7th Dist. No. 12–MA–77, 2013–Ohio–1115, ¶ 20.

{¶42} An appellate court reviews a misdemeanor sentence for abuse of discretion. *State v. Tribble*, 7th Dist. No. 16 MA 0009, 2017–Ohio–4425, ¶ 24; R.C. 2929.22. Abuse of discretion connotes more than an error of law or of judgment; it implies

that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶43} This assignment of error is without merit. Although the court was not required to do so, it thoroughly discussed the misdemeanor sentencing factors on the record. The trial court then indicated in its judgment entry that it had considered the misdemeanor sentencing factors, even though the court was not required to enumerate or discuss those factors on the record or in the judgment entry. Moreover, R.C. 2929.24(A)(1) provides that a misdemeanor of the first degree is punishable by not more than 180 days in jail. Appellant's sentence was within this limit. The trial court therefore did not abuse its discretion because the sentence was within the allowable sentencing range.

{¶44} However, the trial court's sentence in its judgment entry is different than the sentence that the trial court imposed at the sentencing hearing. In its March 24, 2021 judgment entry, the court imposed a sentence of "one hundred eighty days (180) days in the Mahoning County Justice Center, with credit for (1)[sic] previously served, with ninety (90) days suspended." At the March 23, 2021 sentencing hearing, the court acknowledged that the maximum sentence that could be imposed was six months, but found that the maximum sentence was not necessary. The court sentenced appellant "to 90 days in the Mahoning County Jail." Tr. at 23. While both sentences achieve the same result in that appellant has to serve 90 (89 with one day credit) days in jail, the judgment entry reflects a 180-day sentence, with 90 days suspended. The sentence imposed at the hearing was 90 days in jail.

{¶45} A trial court cannot impose a sentence in its sentencing entry that differs from that which it imposed at the sentencing hearing. *State v. Vaughn*, 8th Dist. Cuyahoga No. 103330, 2016-Ohio-3320, ¶ 18. " 'Because the defendant's presence is required when the court imposes sentence, the trial court errs when its judgment entry of sentence differs from the sentence that it announced at the sentencing hearing in the defendant's presence.' " *Id.*, quoting *State v. Patrick*, 4th Dist. Lawrence No. 12CA16, 2013-Ohio-3821, ¶ 10.

{¶46} Here, in its judgment entry, the trial court imposed 180 days with 90 days suspended, while at the sentencing hearing, the trial court imposed a 90-day jail

sentence. Crim.R. 36 allows a trial court to correct "[c]lerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission * * * at any time." Thus, a trial court may use a nunc pro tunc entry to correct a mistake in a judgment or another part of the record. *State v. Spears*, 8th Dist. Cuyahoga No. 94089, 2010-Ohio-2229, ¶ 10. However, a nunc pro tunc order is limited to memorializing what the trial court actually did at an earlier point in time, such as correcting an order that fails to reflect the trial court's true action. *Id.*, citing *State v. Gruelich*, 61 Ohio App.3d 22, 24, 572 N.E.2d 132 (9th Dist.1988).

{¶47} The issue in this case is whether the court intended to impose the 180-day sentence with 90 days suspended, or whether it actually intended the 90-day sentence it imposed at the hearing. Consequently, the judgment entry must be corrected to reflect the trial court's true action.

{¶48} Accordingly, we remand the instant case for the trial court to either issue a nunc pro tunc entry reflecting the sentence that it imposed at the sentencing hearing in appellant's presence, or schedule a new sentencing hearing, with appellant present, to impose any other sentence.

{¶49} For the above reasons, we affirm in part and remand in part the trial court's judgment. We overrule appellant's first and second assignments of error as without merit, but we remand this case for the trial court to either issue a nunc pro tunc entry reflecting the sentence it imposed at the sentencing hearing, or schedule a new sentencing hearing with appellant present.

Waite, J., concurs.
Robb, 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 in part and reversed and remanded in part to the trial court to either issue a nunc pro tunc entry reflecting the sentence it imposed at the sentencing hearing, or schedule a new sentencing hearing with appellant present. Costs to be 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.