[Cite as *State v. Persinger*, 2009-Ohio-5849.]

COURT OF APPEALS
MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 08-CA-14
GERRY PERSINGER	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Morrow County Court of Common Pleas Case No. 2008CR0086
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	November 3, 2009

APPEARANCES:

For Plaintiff-Appellee:

CHARLES HOWLAND
Morrow County Prosecutor
60 East High Street
Mt. Gilead, Ohio 43338

For Defendant-Appellant:

MELISSA M. PRENDERGAST 0075482
Assistant State Public Defender
250 East Broad Street, Ste. 1400
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Delaney, J.

{¶1} Defendant-Appellant, Gerry Persinger, appeals from the judgment of the Morrow County Court of Common Pleas, convicting him of four counts of unlawful sexual conduct with a minor, felonies of the second degree, in violation of R.C. 2907.04.[1]

{¶2} The charges stem from three separate incidents involving sexual conduct with a 14 year old minor girl, K.S., between the dates of December 1, 2004, and May 31, 2005.

{¶3} At trial, K.S. testified regarding three separate days of sexual activity involving Appellant that occurred between December 1, 2004, and May 31, 2005. K.S. testified that all three instances occurred at her friends', Amber and Jessica's house, which was down the road from K.S.'s home.

{¶4} K.S. testified that she had been dating Amber and Jessica's brother, Scott, who is the father of K.S.'s child. She stated that she started having sex with Scott approximately nine months before their child was born.

{¶5} Appellant was identified as Scott's uncle. K.S. testified that Appellant had sexual contact with her on three separate occasions.

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[1] R.C. 2907.04 Unlawful sexual conduct with a minor

(A) 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.

(B) Whoever violates this section is guilty of unlawful sexual conduct with a minor.

* * *

(4) If the offender previously has been convicted of or pleaded guilty to a violation of section 2907.02, 2907.03, or 2907.04 of the Revised Code or a violation of former section 2907.12 of the Revised Code, unlawful sexual conduct with a minor is a felony of the second degree.

{¶6} The first occasion occurred in a storage trailer that was also on the property where Amber and Jessica's house trailer was. Scott was present and both Scott and Appellant had sex with K.S. at the same time. She testified that prior to this occurring, Scott has asked her to have sex with him with someone else there and that she said no. She testified that she had just started having sex with Scott a couple of weeks prior to this first incident with Appellant.

{¶7} K.S. testified that the next incident with Appellant occurred a couple of weeks later in Amber and Jessica's house in their mom's bedroom, where they had vaginal intercourse. The third incident occurred within a couple of weeks of the second incident, according to K.S. She stated that it again occurred at Amber and Jessica's house. She testified that on this occasion, Appellant performed oral sex on her and then proceeded to have vaginal intercourse with her again.

{¶8} She also testified that between the second and third incidents, Appellant asked her how old she was.

{¶9} Scott also testified that he did have sex with K.S. with Appellant present on the first occasion, but that he was unaware that Appellant had sex with her the other two times.

{¶10} After trial, the jury convicted Appellant of all four counts. The trial court sentenced Appellant to eight years in prison on count 1, to be run consecutive to six years in prison on count two and consecutive to six years in prison on count three, and concurrent to six years in prison on count four, for a total term of incarceration of 20 years and ordered Appellant to pay court costs.

{¶11} Appellant raises three Assignments of Error:

{¶12} "I. THE TRIAL COURT ERRED BY CONVICTING MR. PERSINGER BASED UPON MULTIPLE, IDENTICAL, AND UNDIFFERENTIATED COUNTS OF A SINGLE OFFENSE, DENYING HIM DUE PROCESS OF LAW AND VIOLATING THE DOUBLE JEOPARDY CLAUSE. FIFTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION; SECTION 10, ARTICLE 1, OHIO CONSTITUTION. (TRANSCRIPT, VOL. III., PP. 682-83); (OCTOBER 17, 2008 JUDGMENT ENTRY OF SENTENCE, PP. 1-2).

{¶13} "II. THE TRIAL COURT ERRED BY IMPOSING COURT COSTS WITHOUT NOTIFYING MR. PERSINGER THAT HIS FAILURE TO PAY COURT COSTS MAY RESULT IN THE COURT'S ORDERING HIM TO PERFORM COMMUNITY SERVICE. (TRANSCRIPT, VOL. IV., PP. 710; OCTOBER 17, 2008 JUDGMENT ENTRY OF SENTENCE, P.4).

{¶14} "III. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE OHIO CONSTITUTION, SECTION 10, ARTICLE 1. (OCTOBER 17, 2008 JUDGMENT ENTRY OF SENTENCE, P. 4, TR., VOL. IV, P.710).

I.

{¶15} In his first assignment of error, Appellant essentially argues that the indictment was insufficient to inform him of the charges against him and that he could be placed in double jeopardy because of the vagueness of the indictment. We disagree.

{¶16} Appellant argues that the indictment does not give any specific dates as to when the alleged incidents of sexual conduct occurred and that these counts are

essentially "carbon copy" counts.[2] Appellant asserts that the broadly worded charges of the indictment deprived him of double jeopardy protection, and in support he relies upon a federal court decision, *Valentine v. Konteh* (C.A.6, 2005), 395 F.3d 626.

{¶17} *Valentine* involved an indictment alleging 20 counts of child rape and 20 counts of felonious sexual penetration occurring over an eleven-month period. The offenses were identically alleged and no further information was included to differentiate one count from another. The *Valentine* court stated:

{¶18} "In its charges and in its evidence before the jury, the prosecution did not attempt to lay out the factual bases of forty separate incidents that took place. Instead, the 8-year-old victim described 'typical' abusive behavior by Valentine and then testified that the 'typical' abuse occurred twenty or fifteen times. Outside of the victim's estimate, no evidence as to the number of incidents was presented." Id. at 632-633.

{¶19} The *Valentine* court noted that, "[w]hen prosecutors opt to use such carbon-copy indictments, the defendant has neither adequate notice to defend himself, nor sufficient protection from double jeopardy. * * * Importantly, the constitutional error in this case is traceable not to the generic language of the individual counts of the indictment but to the fact that there was no differentiation among the counts."

{¶20} As we have previously stated, notably, the *Valentine* court did not rule out multiple-count indictments, finding instead that, "[t]he due process problems in the indictment might have been cured had the trial court insisted that the prosecution delineate the factual bases for the forty separate incidents either before or during the

[2] We note that it does not appear that a Bill of Particulars request was filed in the present case, which would have required the prosecutor to provide more specific information as to the time and date of the offenses charged.

trial." *State v. Crawford*, 5th Dist. No. 07-CA-116, 2008-Ohio-6260, citing *Valentine*, at 634.

{¶21} In the present case, the record reflects that Appellant never challenged the sufficiency of this indictment at any time before or during his trial. Where a defendant fails to object to the form of the indictment before trial as required by Crim.R. 12(C), he waives all but plain error. *State v. Van Voorhis*, 3rd Dist. No. 8-07-23, 2008-Ohio-3224 citing *State v. Frazier* (1995), 73 Ohio St.3d 323, 332, 652 N.E.2d 1000; *State v. Skatzes*, 104 Ohio St.3d 195, 819 N.E.2d 215.

{¶22} Notice of "plain error," however, is to be taken only with "the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91.

{¶23} Pursuant to Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240. In *Barnes*, the Ohio Supreme Court articulated a three-part test for the finding of plain error:

{¶24} "First, there must be an error, i.e. a deviation from a legal rule. Second, the error must be plain. To be "plain" within the meaning of Crim.R. 52(B), an error must be an "obvious" defect in the trial proceedings. Third, the error must have affected "substantial rights." This aspect of the rule has been interpreted to mean that the trial court's error must have affected the outcome of the trial. *Barnes*, 94 Ohio St.3d at 27, 759 N.E.2d 1240 (internal citations omitted). Thus, "[o]nly extraordinary circumstances and the prevention of a miscarriage of justice warrant a finding of plain error." *State v. Brown*, 3rd Dist. No. 8-02-09, 2002-Ohio-4755 citing *State v. Long* (1978), 53 Ohio

St.2d 91, 372 N.E.2d 804 at paragraph three of the syllabus. Plain error does not exist unless, but for the error, the outcome at trial would have been different. *State v. Joseph* (1995), 73 Ohio St.3d 450 at 455, 653 N.E.2d 285.

{¶25} "Specificity as to the time and date of an offense is not required in an indictment." *State v. Shafer*, 8th Dist. No. 79758, 2002-Ohio-6632.

{¶26} Pursuant to R.C. 2941.03:

{¶27} "an indictment or information is sufficient if it can be understood therefrom:

{¶28} " * * *

{¶29} "(E) That the offense was committed at some time prior to the time of filing of the indictment * * *."

{¶30} An indictment is not invalid for failing to state the time of an alleged offense or doing so imperfectly. The State's only responsibility is to present proof of offenses alleged in the indictment, reasonably within the time frame alleged. *Crawford*, supra, at ¶41.

{¶31} Moreover, "where such crimes constitute sexual offenses against children, indictments need not state with specificity the dates of alleged abuse, so long as the prosecution establishes that the offense was committed within the time frame alleged." Id. at ¶42, citing *State v. Yaacov*, 8th Dist. No. 86674, 2006-Ohio-5321, ¶ 17; see, also, *State v. Gus*, 8th Dist. No. 85591, 2005-Ohio-6717. This is partly due to the fact that the specific date and time of the offense are not elements of the crimes charged. *Gus* at ¶ 6.

{¶32} Moreover, many child victims are unable to remember exact dates and times, particularly where the crimes involved a repeated course of conduct over an

extended period of time. *State v. Mundy* (1994), 99 Ohio App.3d 275, 296, 650 N.E.2d 502; see *State v. Robinette* (Feb. 27, 1987), 5th Dist. No. CA-652. "The problem is compounded where the accused and the victim are related or reside in the same household, situations which often facilitate an extended period of abuse." *Robinette*, supra. Thus, "[a]n allowance for reasonableness and inexactitude must be made for such cases considering the circumstances." Id.

{¶33} We acknowledge that an exception to this general rule exists when the failure to allege a specific date "results in material detriment to the accused's ability to fairly defend himself, as where the accused asserts an alibi or claims that he was indisputably elsewhere during part, but not all, of the interval specified." *Yaacov* at ¶ 18.

{¶34} However, such is not the case here as Appellant does not assert an alibi, instead claiming that such abuse never took place and that the allegations of abuse are fabricated. Therefore, the failure to allege specific dates did not prejudice Appellant's ability to defend himself because his defense strategy centered on his claim that he never engaged in sexual conduct with K.S., regardless of the date or place they alleged the abuse took place. See *Yaacov*; *State v. Bennett*, 12th Dist. No. CA2004-09-028, 2005-Ohio-5898, ¶ 33 (remanded by *In re Ohio Crim. Sentencing Statutes Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109, 847 N.E.2d 1174); *State v. Carnes*, 12th Dist. No. CA2005-01-001, 2006-Ohio-2134; *State v. Barnecut* (1988), 44 Ohio App.3d 149, 152, 542 N.E.2d 353. See also, *State v. Ford*, 8th Dist. No. 88236, 2007-Ohio-2645, where the Eighth District Court of Appeals affirmed the convictions from multi-count indictments, finding there was no due process violation because the defendant denied any sexual contact whatsoever with the victims; thus, the lack of specificity in the

indictments as to specific dates or places of the alleged abuse did not result in prejudice to the defendant's defense.

{¶35} In *State v. Russell*, 8th Dist. No. 88008, 2007-Ohio-2108, and *State v. Rice*, 8th Dist. No. 82547, 2005-Ohio-3393, the Eighth District Court of Appeals rejected challenges based on *Valentine* where the testimony elicited from the child-victims provided sufficient differentiation among the counts.

{¶36} In the present case, K.S. testified specifically about three separate incidents, all of which involved different conduct by Appellant. She was able to describe distinct acts by Appellant during each of the three incidents that distinguished them from each other. In the first incident, both Appellant and Scott forced her to have sex with them. During the second incident, she was in Amber and Jessica's mother's bedroom when Appellant came in, pulled her shirt up, groped her breasts, and then had vaginal intercourse with her. During the third incident, Appellant pulled her pants down, performed cunnilingus on her and then had vaginal intercourse with her. All three incidents took place within weeks of each other and occurred soon after she began having sex with Scott. She testified that their son was born on October 6, 2005, and that she began having sex with Scott approximately nine months before their son was born. She also testified that Appellant had sex with her the first time a few weeks after she began having sex with Scott. That would put the dates of the incidents in early 2005, which was within the time frame stated in the indictment.

{¶37} We find that K.S.'s testimony involved more than just descriptions of 'typical' abusive behavior as found in the *Valentine* case.

{¶38} Based on the foregoing, the jury could find that Appellant committed at least four counts of unlawful sexual conduct against K.S.

{¶39} Lastly, there is nothing to suggest that the outcome of the trial would have been different had the indictment specifically included dates of each incident of abuse. Accordingly, Appellant's first assignment of error is overruled.

II.

{¶40} In his second assignment of error, Appellant argues that the trial court erred by failing to inform him at his sentencing hearing that if he did not pay court costs, he would be subject to completing community service in lieu of paying court costs.

{¶41} In *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, paragraph two of the syllabus, the Supreme Court held that a motion by an indigent criminal defendant to waive payment of costs must be made at the time of sentencing. The court stated: "[i]f the defendant makes such a motion, then the issue is preserved for appeal and will be reviewed under an abuse-of-discretion standard. Otherwise, "the issue is waived and costs are res judicata." Id. at ¶ 23.

{¶42} When the trial court informed Appellant at his sentencing hearing, "[t]he Court costs you are obligated to pay," no objection was made, nor did Appellant assert his indigency as a reason that he could not pay costs. In fact, immediately following the trial court's statement regarding costs, Appellant asserted to his attorney that he would be hiring his own outside counsel for appeal and that "[i]t will not be appointed counsel."[3]

{¶43} Moreover, in the trial court's judgment entry, the court stated:

[3] Sentencing Transcript, p. 710.

{¶44} "If the defendant fails to pay the court costs or fails to timely make payments towards the court costs under a payment plan approved by the Court, the Court may order the defendant to perform community service in an amount of not more than forty (40) hours per month until the judgment is paid or until the court is satisfied that the defendant is in compliance with the approved payment schedule.

{¶45} "The defendant shall receive credit upon the court costs at the specified hourly credit rate per hour of the community service performed, and each hour of community service performed will reduce the court costs by that amount."

{¶46} While, under *Threatt*, the argument of court costs is considered res judicata, we will nonetheless address Appellant's argument that he was not informed of the possibility of having to perform community service at his sentencing hearing.

{¶47} R.C. 2947.23 provides:

{¶48} "(A)(1) In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution and render a judgment against the defendant for such costs. At the time the judge or magistrate imposes sentence, the judge or magistrate shall notify the defendant of both of the following: (a) If the defendant fails to pay that judgment or fails to timely make payments towards that judgment under a payment schedule approved by the court, the court may order the defendant to perform community service in an amount of not more than forty hours per month until the judgment is paid or until the court is satisfied that the defendant is in compliance with the approved payment schedule. (b) If the court orders the defendant to perform the community service, the defendant will receive credit upon the judgment

at the specified hourly credit rate per hour of community service performed, and each hour of community service performed will reduce the judgment by that amount."

{¶49} The Supreme Court of Ohio has ruled that, pursuant to R.C. 2947.23, a trial court must assess court costs in every case, even in cases in which the defendant has been deemed indigent for purposes of appointment of counsel. *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, at ¶ 8. Thus, the trial court did not err in assessing court costs without considering Appellant's present or future ability to pay.

{¶50} Appellant is correct that the court in *State v. Ward*, 168 Ohio App.3d 701, 2006-Ohio-4847, that it is mandatory for a court to inform a defendant that they could be ordered to perform community service; however, Appellant omits to include a statement from the *Ward* court that the appellant in that case suffered no prejudice from the court's failure to inform her that it may, in the future, require her to perform community service to fulfill her obligation to pay costs as such an issue was not ripe for review.

{¶51} As previously stated, R.C. 2947.23 requires the court to include "in the sentence the costs of prosecution and render a judgment against the defendant for such costs." *State v. Clifford*, 3rd Dist. No. 11-04-06, 2005-Ohio-958, at ¶18. There is no requirement in the statute that the imposition of court costs be made on the record at the sentencing hearing. Since the imposition of court costs is mandatory, and not at the discretion of the trial court, the Crim.R. 43(A) protection that a defendant be present at the imposition of sentence was not violated.[4]

[4] Appellant cites to *State v. Clevenger*, 114 Ohio St.3d 258, 2007-Ohio-4006, 871 N.E.2d 579, ¶9 for the proposition that a trial court must inform a defendant at the sentencing hearing that failure to pay costs could result in the order to perform community service. We do not find this statement to be an accurate reflection of the requirements of R.C. 2947.23, as the statute and *Clevenger* merely state that the defendant must be informed at "sentencing" and states nothing to the effect that such notice must appear on the record, at a sentencing hearing; rather, we find that such a notice may appear in the sentencing entry.

{¶52} As such, we do not find that Appellant's rights were violated. He was properly informed in the sentencing entry that he could be subject to community service should he fail to pay his court costs. A trial court may properly order community service as a means of payment in accordance with R.C. 2947.23(A)(1)(a) and (b). Defendants who are not indigent at the time of sentencing, and therefore would have no reason to move for the waiver of payment then, have alternative means of satisfying the payment of court costs through community service if they later become indigent. *State v. Clevenger*, 114 Ohio St.3d 258, 2007-Ohio-4006, 871 N.E.2d 579.

{¶53} Appellant's second assignment of error is overruled.

III.

{¶54} In his third assignment of error, Appellant asserts that trial counsel was ineffective for failing to inform the trial court that Appellant was indigent and could not pay court costs.

{¶55} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that his trial counsel acted incompetently. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. In assessing such claims, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158, 164.

{¶56} "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in

the same way." *Strickland*, 466 U.S. at 689. The question is whether counsel acted "outside the wide range of professionally competent assistance." Id. at 690.

{¶57} Even if a defendant shows that his counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this "actual prejudice" prong, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

{¶58} The Supreme Court has held that R.C. 2947.23 requires a trial court to assess costs against all criminal defendants, and to do so even if the defendant is indigent. *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 8. Therefore, a defendant's financial status is irrelevant to the imposition of court costs.

{¶59} Moreover, at sentencing, Appellant indicated to trial counsel that he would be retaining his own appellate counsel and not seeking court appointed counsel. As such, it would be reasonable for counsel to presume that claiming Appellant's indigency would be disingenuous. We cannot, therefore, find that counsel was ineffective for failing to request that the court waive costs.

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

{¶61} For the foregoing reasons, Appellant's arguments are without merit. The judgment of the Morrow County Court of Common Pleas is affirmed.

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE

[Cite as *State v. Persinger*, 2009-Ohio-5849.]

IN THE COURT OF APPEALS FOR MORROW COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
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-vs-	:	JUDGMENT ENTRY
	:	
GERRY PERSINGER	:	
	:	
Defendant-Appellant	:	Case No. 08-CA-14
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Morrow County Court of Common Pleas is affirmed. Costs assessed to Appellant.

_____
HON. PATRICIA A. DELANEY

_____
HON. SHEILA G. FARMER

_____
HON. JOHN W. WISE