[Cite as *State v. Cox*, 2004-Ohio-4977.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2003-05-113
	:	O P I N I O N
-vs-		9/20/2004
	:	
JAMES COX,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2002-11-1876

Robin N. Piper, Butler County Prosecuting Attorney, Randi E. Froug, Government Services Center, 315 High Street, 11th Floor, Hamilton, OH 45012-0515, for plaintiff-appellee

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YOUNG, P.J.

{¶1} Defendant-appellant, James P. Cox, appeals from his conviction and sentence for sexual battery and unlawful sexual conduct with a minor, following a jury trial in the Butler County Common Pleas Court.

{¶2} In the summer of 2002, C.C. went to stay with his father, who resided on the same street as appellant, in Middletown, Ohio. At this time, C.C. was 13 years old, and appellant was 59 years old. At some point during C.C.'s stay,

his father was forced to move from his residence, but C.C. did not go with him. Instead, he moved in with appellant, who had offered to let C.C. stay with him in exchange for C.C.'s performing various odd jobs. C.C. agreed to stay with appellant in order to remain close to a girl he was dating, who lived on appellant's street.

{¶3} C.C. stayed with appellant for three to four weeks from the middle of June to the middle of July. Appellant did not charge C.C. for rent, food or laundry; C.C. had no rules to obey and was free to come and go as he pleased. C.C. looked upon appellant as a father figure since appellant was providing for his care. C.C. and appellant would talk about matters like C.C.'s girlfriend and father. Appellant told C.C. that his (C.C.'s) father "wasn't the best of people" and that he "really [wa]sn't a father to [him]." He also told C.C. that he "cared a lot for [him]," and that he (C.C.) was "a good person." One time, appellant asked C.C. if he had done things with his girlfriend that he should not have; he advised him not to do anything with her before asking him.

{¶4} Approximately two days after C.C. had moved in with appellant, appellant told him that he knew of a cancer that boys C.C.'s age contracted. He told C.C. to take off his shorts so that he could check to see if he had it. When C.C. took his shorts off, appellant touched C.C.'s genitals. Following that incident, appellant kissed C.C. on the cheek. Several days later, appellant kissed him on the lips. Still

later, appellant asked C.C. to "French kiss" him; C.C. refused to do so. C.C. did not tell anyone about these incidents because appellant had told him that others would not understand their relationship and would think it was wrong.

{¶5} At some point during C.C.'s stay at appellant's residence, appellant asked C.C. to masturbate for him so that he could collect a sample of C.C.'s sperm and have it tested to determine whether C.C. "could make children." He told C.C. he wanted to monitor him while he was doing it, to prevent him from "contaminat[ing] the sperm." C.C. masturbated for appellant three times. On the first occasion, appellant touched C.C.'s genitals while C.C. masturbated. C.C. ejaculated, but appellant did not collect a sample, explaining that it had been contaminated. One week later, C.C. again masturbated for appellant. On this occasion, appellant touched C.C.'s "penis and genital area" with his hands and mouth to keep C.C. erect. C.C. did not ejaculate on this occasion, and the incident ended when appellant "just gave up." The third occasion occurred just two days later. Appellant again touched C.C.'s genitals with his hands and mouth to keep C.C. erect, while C.C. masturbated.

{¶6} Following these incidents, appellant invited C.C. to sleep in his bed because C.C. had found appellant's couch uncomfortable. As he was sleeping, C.C. was awakened by the bed's motion. The first thing C.C. noticed was the back of appellant's head. C.C. discovered that appellant had taken

C.C.'s penis, which had become erect while he was sleeping, and placed it in his anus. Once C.C. realized what was happening, his penis went soft. About three or four days after this incident, C.C. left appellant's residence and returned to his mother's house, at her insistence. C.C. did not immediately tell his mother what had happened at appellant's house because appellant had told him not to tell anyone, and C.C. was embarrassed about it. But C.C. eventually told his mother what had happened at appellant's house.

{¶7} On September 30, 2002, C.C. and his mother went to the office of Middletown Police Detective Fred Shuemake, and told him what had happened. Shuemake contacted appellant, informing him that C.C. had made certain allegations against him, and asking him to come to his office for an interview. Appellant agreed to do so. On October 3 and 4, 2002, Shuemake had C.C. make several phone calls to appellant from the police station, which were recorded without appellant's knowledge. In the phone calls, C.C. told appellant that he had talked to his mother about killing himself or running away, and that his mother had "freaked out." C.C. told appellant that he was looking for some help, and asked what he should do. Appellant told C.C. that he was scheduled to speak with Shuemake about allegations that C.C. had made. He counseled C.C. to tell the police that he made up the allegations because he was upset and was just trying to get his mother's attention. Throughout his conversation with C.C., appellant talked about his medical

problems, telling C.C. at one point that if his allegations ever surfaced, "it would finish [him] off." When C.C. asked him about the incident involving anal intercourse, appellant responded, "That's ridiculous. I don't remember anything like that." He also suggested to C.C. that he may have just dreamed that the incident happened, and insisted he "would never intentionally do anything like that." Several times, appellant discouraged C.C. from talking to anyone else about what had happened, saying that "the more people that get involved makes it worse for you and me both."

{¶8} On October 7, 2002, appellant was interviewed by Shuemake, who, again, recorded the interview without appellant's knowledge. Initially, appellant denied that anything improper had occurred between him and C.C., and suggested that C.C.'s mother might be trying to extort money from him. However, Shuemake reminded appellant that he had previously investigated him on similar allegations. Appellant eventually admitted that he had touched C.C. on one occasion and that he did have C.C. masturbate for him. He further admitted that the anal intercourse about which C.C. had spoken "could have happened," but that he did not remember it because of the medication he was taking. When appellant left Shuemake's office, Shuemake gleefully told another officer, "I got him! I got him!"

{¶9} On November 27, 2002, appellant was indicted on three counts of sexual battery pursuant to R.C. 2907.03(A)(5)[1] (Counts One, Two and Three), and three counts of unlawful sexual conduct with a minor pursuant to R.C. 2907.04(A)[2] (Counts Four, Five and Six). The counts involved the aforementioned act of anal intercourse (Counts One and Four) and two acts of fellatio (Counts Two, Three, Five and Six) between appellant and C.C.

{¶10} On February 11, 2003, appellant filed a motion in limine, requesting the trial court to suppress from evidence the recorded telephone conversations between him and C.C., and his recorded interview with Shuemake. After holding a hearing on the motion, the trial court denied it. On March 14, appellant
filed a second motion in limine, requesting the trial court to redact from the recorded interview between appellant and Shuemake, the statement Shuemake made to another officer after

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1. **{¶a}** R.C. 2907.03, which sets forth the offense of sexual battery, states in relevant part:

{¶b} "(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

{¶c} "***

{¶d} "(5) The offender is the other person's natural or adoptive parent, or a stepparent, or guardian, custodian, or person in loco parentis of the other person."

2. **{¶a}** R.C. 2907.04, which sets forth the offense of unlawful sexual conduct, states in relevant part:

{¶b} "(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."

appellant had left, stating, "We got him! We got him!" The trial court did not rule on this motion before trial.

{¶11} Appellant was tried by jury on March 17, 18 and 19, 2003. At the trial, the state presented the testimony of C.C. and Shuemake, plus the audio tapes of the telephone conversations between appellant and C.C., and appellant's interview with Shuemake. Before playing the tape of appellant's interview with Shuemake, the trial court issued a cautionary instruction to the jury, instructing them that any information "unrelated to the charges in this case revealed in the interview with the defendant by way of a detective's questions and/or statements to the defendant shall not be considered relevant."

{¶12} The jury convicted appellant on all six of the counts on which he had been indicted. The trial court found that the three counts of unlawful sexual conduct with a minor were allied offenses of similar import with the three, corresponding counts of sexual battery, and therefore merged them for sentencing purposes. The trial court then sentenced appellant to serve consecutive terms of four, three, and one years.

{¶13} Appellant appeals his conviction and sentence, raising five assignments of error, which we shall address in an order that facilitates our analysis.

{¶14} Assignment of Error No. 3:

{¶15} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT/APPELLANT IN ENTERING A VERDICT OF GUILTY TO THE

OFFENSES OF SEXUAL BATTERY AND UNLAWFUL CONDUCT WITH A MINOR AS THE VERDICTS ARE NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶16} Appellant argues that his convictions for sexual battery and unlawful sexual conduct with a minor were against the manifest weight of the evidence. We disagree with this argument.

{¶17} "Weight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. *** Weight is not a question of mathematics, but depends on its effect in inducing belief.'" (Emphasis sic.) State v. Thompkins, 78 Ohio St.3d 380, 387, 1997-Ohio-52. When an appellate court reverses a jury's verdict on the basis that it is against the manifest weight of the evidence, the appellate court sits as a "thirteenth juror," disagreeing with the fact-finder's resolution of any conflicting testimony. Id., citing Tibbs v. Florida (1982), 457 U.S. 31, 42, 102 S.Ct. 2211. When deciding whether a jury's verdict is against the manifest weight of the evidence, an appellate "court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new

trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." State v. Martin (1983), 20 Ohio App.3d 172, 175, quoted in Thompkins, 78 Ohio St.3d at 387.

{¶18} Appellant contends that the only evidence presented by the state to establish his guilt on the offenses with which he was charged was C.C.'s testimony and the recordings of the telephone conversations between him and C.C., and his interview with Shuemake. He argues that C.C.'s testimony was "confusing and inconsistent." In support of this contention, he states that on cross-examination, C.C. stated that he had told the jury about every sexually offensive act committed by appellant, but that later, he talked about additional incidents that occurred. However, C.C. plausibly explained this contradiction in his testimony, stating that he did not believe that those incidents were relevant to the charges that had been brought against appellant.

{¶19} Appellant also argues that it was clear from C.C.'s testimony that he had been "coached," and that he "perhaps tailored his testimony to match the charges." As examples of this, he points to C.C.'s testimony that he looked at appellant as a "father figure since he was providing care for me over the two weeks[,]" and that since he was "still in [his] childhood days, *** this shouldn't be something that someone of my age should be having to go to court and go on trial and everything." However, the phrases C.C. used in his trial

testimony were not inconsistent with what someone his age would say about his circumstances; it is not unusual for children who are even younger than C.C. was at the time of these offenses to speak in this manner. C.C.'s account of what happened between him and appellant was compelling, and it is not at all surprising that the jury chose to believe it.

{¶20} Appellant also challenges the evidentiary impact of the recordings of his telephone conversations with C.C. and his interview with Shuemake, stating that he did not confess to engaging in sexual conduct with C.C., which was a necessary element of the charges of sexual battery and unlawful sexual conduct with a minor. Appellant argues that "at most," he admitted that he had sexual contact with C.C.,[3] and that he had that on only one occasion, not three. However, this argument ignores several key facts.

{¶21} When appellant spoke with C.C. over the telephone, appellant clearly attempted to manipulate C.C. into dropping the allegations against him, by referring to, among other things, his health problems. Moreover, appellant encouraged C.C. not to talk to anyone about the incidents, even though

3. The offenses with which appellant was charged, i.e., sexual battery, pursuant to R.C. 2907.03(A)(5) and unlawful sexual conduct with a minor, pursuant to R.C. 2907.04(A), both require proof that the offender engaged in "sexual conduct" with another. "Sexual conduct" includes such things as anal intercourse and fellatio, R.C. 2907.01(A), whereas "'sexual contact' means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region *** for the purpose of sexually arousing or gratifying either person." While appellant argues that his convictions are against the manifest weight of the evidence, he does not argue that his convictions are not supported by sufficient evidence. Thus, appellant apparently concedes that the state presented sufficient evidence to prove each of the material elements of the offenses with which he was charged. See Thompkins, 78 Ohio St.3d at 386.

C.C. had told appellant that he had considered committing suicide. During his interview with Shuemake, appellant first tried to claim that C.C.'s mother was raising the allegations to try to extort money from him. However, he subsequently admitted that the act of anal intercourse between him and C.C. "could have happened" but that he did not remember it because of the medications he was taking. It is not surprising that appellant attempted to minimize his accountability and involvement in the alleged offenses, even after he had backtracked from his initial, total denial of C.C.'s allegations. However, appellant's claim that he could not remember whether he had had anal intercourse with C.C. is unbelievable. Although appellant, in his interview with Shuemake, never expressly confessed to having performed fellatio on C.C., and claimed not to have remembered whether he had anal intercourse with C.C., the statements he made during that interview, along with the statements he made to C.C. in their recorded, telephone conversations, provided devastating proof of appellant's guilt on each of the offenses with which he was charged and convicted. Looked at in its totality, the evidence of appellant's guilt was overwhelming, and his convictions for sexual battery and unlawful sexual conduct with a minor were not against the manifest weight of the evidence.

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

{¶23} Assignment of Error No. 1:

{¶24} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT/APPELLANT IN DENYING HIS MOTION IN LIMINE ASKING TO PROHIBIT APPELLEE FROM PLAYING ANY PART OR ALL OF THE STATEMENTS MADE BY APPELLANT TO THE MIDDLETOWN POLICE DEPARTMENT AND RECORDED BY IT."

{¶25} Appellant argues that the trial court abused its discretion by not ordering redacted that portion of his recorded interview with Detective Shuemake in which Shuemake stated he had previously investigated appellant for similar allegations. He asserts that those previous, similar allegations constitute "[e]vidence of other crimes, wrongs, or acts" that were inadmissible under Evid.R. 404(B). He acknowledges that the trial court issued a cautionary instruction to the jury before playing the tape, but he contends that that instruction was inadequate because, among other things, it left it to the jurors, themselves, to determine whether or not the evidence was relevant.

{¶26} The trial court's cautionary instruction to the jury stated as follows:

{¶27} "Ladies and gentleman, I'm going to give you an instruction about this tape you are to consider in listening to it. Questions and/or statements made by detectives during the interview with the defendant may or may not be substantiated or probative of any relevant facts at issue in this case.

{¶28} "You should not automatically presume questions and/or statements made by the detectives in prompting

conversation with the defendant are relevant to this case. Information unrelated to the charges in this case revealed in the interview with the defendant may -- let me start that again.

{¶29} "Information unrelated to the charges in this case revealed in the interview with the defendant by way of a detective's questions and/or statements to the defendant shall not be considered relevant. You alone shall determine what information is reliable, credible, and to be used by you in making determinations in weighing evidence. To help you make your determinations, you would want to only use information that is related or relevant to these charges.

{¶30} "Do you understand? Hopefully, the way I garbled it up, you still understand it."

{¶31} This instruction was potentially confusing. The trial court first instructed the jury that information unrelated to the charges revealed by Shuemake's questions or comments to appellant "shall not be considered relevant." It then instructed the jury that it would only want to use information that is relevant to the charges against appellant in weighing the evidence. These portions of the trial court's instruction were appropriate. However, sandwiched in between these two statements was the trial court's instruction to the jury that, "You alone shall determine what information is reliable, credible, and to be used by you in making determinations in weighing evidence." This instruction may

have been confusing to the jury in light of the fact that they were first told that they were not to consider certain evidence as relevant, and then told that they, alone, were to determine what evidence was relevant. Nevertheless, we are convinced that any error the trial court made in issuing this cautionary instruction was harmless, given the fact that the state presented overwhelming evidence of appellant's guilt.

{¶32} Generally, an error is harmless where there is no reasonable possibility that it contributed to an accused's conviction, such as where there is overwhelming evidence of the accused's guilt or some other indicia that the error did not contribute to the conviction. See State v. DeMarco (1987), 31 Ohio St.3d 191, 195. For the reasons stated in response to appellant's third assignment of error, we conclude that any error committed by the trial court in issuing the cautionary instruction was harmless in light of the overwhelming evidence of appellant's guilt.

{¶33} Appellant also argues that the trial court abused its discretion by allowing the state to play the portion of the tape recording in which Detective Shuemake stated to another officer, "I got him! I got him!" immediately after appellant left the interview. Appellant argues that such evidence constituted improper opinion testimony from a lay witness, and was prejudicial because Shuemake's saying, "I got him! I got him!" could have led the jury to believe that the tape of the interview, alone, established that he had committed all of the

elements of the offenses with which he was charged, when, it fact, it did not.

{¶34} We agree that the trial court erred by allowing this portion of the tape to be played to the jury. However, appellant failed to raise a timely, specific objection to this evidence at trial, as required by Evid.R. 103(A)(1), and the admission of this evidence does not amount to plain error. Plain error is to be recognized only where, but for the error, the outcome of the proceedings clearly would have been different. State v. Braden, 98 Ohio St.3d 354, 362, 2003-Ohio-1325; State v. Long (1978), 58 Ohio St.2d 91, paragraph two of the syllabus. Here, the outcome of appellant's trial would not clearly have been different but for the playing of tape with Shuemake's comments, "I got him! I got him!," given the fact that the remaining evidence presented against appellant was overwhelming.

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

{¶36} Assignment of Error No. 2:

{¶37} "THE TRIAL COURT ABUSES ITS DISCRETION WHEN IT ALLOWS THE PROSECUTOR TO MAKE REMARKS IN CLOSING ARGUMENT THAT CONSTITUTE CONDUCT PREJUDICIAL TO THE RIGHT OF THE APPELLANT TO A FAIR TRIAL."

{¶38} Appellant argues that the trial court abused its discretion by allowing the prosecutor to make remarks in closing argument that prejudiced his right to a fair trial. However, he failed to raise a timely objection to any portion of the

prosecutor's closing argument. Thus, in order for us to reverse appellant's conviction on this basis, we must find that the trial court's failure to exclude the prosecutor's comments, which he now challenges, constituted plain error.

{¶39} Appellant first argues that the prosecutor engaged in misconduct when she implicitly commented on his decision not to testify at trial, by stating on several occasions that the evidence was "uncontroverted." For example, during closing arguments, the prosecutor told the jury that the evidence that appellant had engaged in fellatio and anal intercourse with C.C. was uncontroverted. A prosecutor is generally entitled to tell the jury that the state's evidence is uncontradicted, "unless it is evidence only the defendant could contradict." State v. Webb, 70 Ohio St.3d 325, 329, 1994-Ohio-425. Since only appellant could have contradicted C.C.'s contentions that appellant had performed fellatio on him and that anal intercourse had occurred between the two, the prosecutor's comment that C.C.'s testimony was uncontroverted as to those events could be viewed as an indirect reference to appellant's refusal to testify. However, given the overwhelming nature of the evidence presented against appellant, we conclude that these statements did not rise to the level of plain error.

{¶40} The remainder of the prosecutor's comments that appellant challenges amounted to fair comment on the evidence presented and the arguments raised by defense counsel. For instance, when the prosecutor argued that defense counsel was

creating "smoke and mirrors to hide the truth," and "the truth is what he wants to avoid[,]" she was referring to the fact that defense counsel's arguments largely centered around issues tangential to the actual charges brought against appellant.

{¶41} Furthermore, the prosecutor did not improperly bolster the credibility of her chief witness by telling the jury in her rebuttal to defense counsel's closing argument that they could see how "emotional," "fragile" and "impressionable" C.C. was. In his or her rebuttal argument, a prosecutor may comment upon a witness' circumstances and demeanor, and may conclude that these things make the witness' testimony more or less believable and deserving of more or less weight. State v. Draughn (1992), 76 Ohio App.3d 664, 670.

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

{¶43} Assignment of Error No. 4:

{¶44} "THE CUMULATIVE EFFECT OF ERRORS IN THE PROCEEDINGS BELOW DENIED DEFENDANT/APPELLANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL."

{¶45} Appellant argues that even if the errors he has previously cited are individually harmless, their cumulative effect deprived him of a fair trial, pursuant to State v. DeMarco (1987), 31 Ohio St.3d 191. We disagree with this argument. The errors alleged by appellant neither singularly nor collectively deprived appellant of a fair trial, particularly, in light of the overwhelming evidence of his guilt presented by the state at his trial.

{¶46} Appellant's fourth assignment of error is overruled.

{¶47} Assignment of Error No. 5:

{¶48} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT IN SENTENCING HIM TO CONSECUTIVE SENTENCES AND IN SENTENCING HIM TO FOUR, THREE AND ONE YEARS."

{¶49} Appellant argues that the trial court abused its discretion and erred as a matter of law by failing to impose the minimum sentence for each of the offenses on which he was convicted, without making the necessary findings under State v. Edmonson, 86 Ohio St.3d 324, 1999-Ohio-110. He further argues that the trial court improperly imposed consecutive sentences on him without making the findings required by State v. Comer, 99 Ohio St.3d 463, 2003-Ohio-4165.

{¶50} Initially, the trial court complied with the statutory requirements for imposing consecutive sentences on appellant. R.C. 2929.14(E) provides, in relevant part:

{¶51} "(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

{¶52} "***

{¶53} "(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct."

{¶54} In this case, the trial court found all of the facts necessary under R.C. 2929.14(E)(4) to impose consecutive sentences on appellant. The trial court found that consecutive sentences were necessary to protect the public from future crime and to punish appellant; that consecutive sentences were not disproportionate to the seriousness of appellant's conduct and to the danger he poses to the public; and that appellant committed at least two of the multiple offenses as part of one or more courses of conduct, and the harm caused by those offenses was so great or unusual that no single prison term reflected the seriousness of appellant's conduct. R.C. 2929.14(E)(4)(b).

{¶55} In addition to making the requisite findings under R.C. 2929.14(E), the trial court also gave reasons supporting those findings, as required by R.C. 2929.19(B)(2)(c).[4] See

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4. **{¶a}** R.C. 2929.19(B)(2)(c) states, in relevant part:

{¶b} "(2) The court shall impose a sentence and shall make a finding that gives its reasons for selecting the sentence imposed in any of the following circumstances:

{¶c} "***

{¶d} "(c) If it imposes consecutive sentences under section 2929.14 of the Revised Code, its reasons for imposing the consecutive sentences[.]"

Comer, 99 Ohio St.3d 464, paragraph one of the syllabus. The trial court stated that the sentence it was imposing on appellant was based upon his lack of remorse, his failure to accept responsibility for his actions, the serious emotional harm he inflicted on a vulnerable child, and the fact that he took advantage of his situation with C.C. to do it.

{¶56} However, the trial court made all of the foregoing comments in support of its decision to impose consecutive sentences on appellant. The trial court did not make these comments in support of its decision not to impose the minimum sentence on appellant. R.C. 2929.14(B) requires a sentencing court to sentence a first offender to the shortest term authorized unless the court "finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others." (Emphasis added.) R.C. 2929.14(B)(2). "Pursuant to R.C. 2929.14(B), when imposing a nonminimum sentence on a first offender, a trial court is required to make its statutorily sanctioned findings at the sentencing hearing." Comer, 99 Ohio St.3d 464 at paragraph two of the syllabus.[5]

{¶57} The Ohio Supreme Court has stated that "[t]he structure of the various sentencing statutes suggests that the

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5. However, "R.C. 2929.14(B) does not require that the trial court give its reasons for its finding that the seriousness of the offender's conduct will be demeaned or that the public will not be adequately protected from future crimes before it can lawfully impose more than the minimum

General Assembly approached felony sentencing by mandating a record reflecting that judges considered certain factors and presumptions to confirm that the court's decision-making process included all of the statutorily required sentencing considerations." Edmonson, 86 Ohio St.3d at 327. Where such a record is absent, there is no confirmation that the sentencing court first considered imposing the minimum sentence on the first-time offender, as required by R.C. 2929.14(B), before choosing to depart from the statutorily mandated minimum based on one of the reasons permitted under R.C. 2929.14(B)(2). See Edmonson at 328.

{¶58} In this case, the trial court failed to make the necessary findings mandated by R.C. 2929.14(B) when it chose not to impose the minimum sentence on Counts One and Two. We must therefore vacate appellant's sentence and remand this cause to the trial court for resentencing in accordance with the Ohio Supreme Court's decisions in Edmonson and Comer.

{¶59} Appellant's fifth assignment of error is sustained.

{¶60} Appellant's convictions for sexual battery and unlawful sexual conduct with a minor are affirmed, but his sentence for those offenses is vacated, and this matter is remanded to the trial court for resentencing in accordance with this opinion and law.

{¶61} Judgment affirmed in part and reversed in part.

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authorized sentence." (Emphasis sic.) Edmonson, 86 Ohio St.3d 324, syllabus.

POWELL and VALEN, JJ., concur.