**[Cite as *State v. Isreal*, 2011-Ohio-1474.]**

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

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| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | CASE NO. CA2010-07-170 |
| | : | O P I N I O N |
| - vs - | | 3/28/2011 |
| | : | |
| CORY M. ISREAL, | : | |
| Defendant-Appellant. | : | |

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2009-10-1812

Michael T. Gmoser, Butler County Prosecuting Attorney, Donald R. Caster, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011-6057, for plaintiff-appellee

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**POWELL, P.J.**

**{¶1}** Cory Martell Isreal seeks to overturn his convictions related to the rape and robbery of a Middletown woman in 2009. We affirm Isreal's convictions, finding there was sufficient evidence to convict him of rape and kidnapping, he was not prejudiced by the prosecutor's rebuttal closing argument, and his prison sentence

was not contrary to law.

**{¶2}** Isreal was charged with rape, aggravated burglary, aggravated robbery, two counts of kidnapping, with a gun specification added to each of those five offenses, and misdemeanor receiving stolen property, after it was alleged that he and two other males forced an adult female at gunpoint into her home where she was raped and robbed. Isreal's case was tried to a jury, which returned a guilty finding as charged. The trial court imposed a total prison term of 43 years. Isreal now appeals, presenting three assignments of error for our review.

**{¶3}** Assignment of Error No. 1:

**{¶4}** "THE STATE'S EVIDENCE WAS INSUFFICIENT TO SUPPORT CONVICTIONS FOR KIDNAPPING AND RAPE."

**{¶5}** Isreal argues that while there was evidence he participated in the theft-related offenses with the two co-defendants, there was insufficient evidence to prove that he also committed complicity to rape and kidnapping.

**{¶6}** Before we begin our discussion of Isreal's first assignment of error, we will address the state's assertion that Isreal waived his sufficiency of the evidence argument. The state cites to this court's decision in *State v. Lloyd*, Warren App. Nos. CA2007-04-052, CA2007-04-053, 2008-Ohio-3383, and another case that cited *Lloyd*, for the proposition that when a defendant makes a Crim.R. 29 motion at the close of the state's case, but fails to renew his motion at the conclusion of all of the evidence, he has waived the sufficiency challenge. The *Lloyd* case does not support the state's argument because *Lloyd* involved a bench trial, not a jury, and we have stated in *State v. Miller*, Warren App. No. CA2009-10-138, 2010-Ohio-5532, that *Lloyd* misstated the law regarding Crim.R. 29 motions made during bench trials. Id.

at ¶6.

**{¶7}** In reference to bench trials, the Ohio Supreme Court case of *Dayton v. Rogers* (1979), 60 Ohio St.2d 162, 163, has often been cited for the statement that "in a non-jury trial, * * * the defendant's plea of not guilty serves as a motion for judgment of acquittal and obviates the necessity of renewing a Crim.R. 29 motion at the close of all the evidence. Id., overruled on other grounds, *State v. Lazzaro*, 76 Ohio St.3d 261, 266, 1996-Ohio-397.

**{¶8}** The question is whether this statement also now applies to jury trials. This court noted in *State v. Dixon*, Clermont App. No. CA2007-01-012, 2007-Ohio-5189, that several districts had so ruled, and cited in support the Ohio Supreme Court cases of *State v. Carter*, 64 Ohio St. 3d 218, 223, 1992-Ohio-127, and *State v. Jones*, 91 Ohio St.3d 335, 346, 2001-Ohio-57. Id., citing e.g., *State v. Coe*, 153 Ohio App.3d 44, 2003-Ohio-2732, ¶19-20, fn. 4, fn. 5, fn. 6.

**{¶9}** *Jones*, which involved a jury, cited *Carter* for the proposition that "[a]ppellant's 'not guilty' plea preserved his right to object to the alleged insufficiency of the evidence proving the prior offense [for a death penalty specification]." *Jones* at 346. We note that *Carter*, the case cited by *Jones*, also dealt with a death penalty specification involving a prior offense. *Carter* at 221-223. The *Carter* case involved a jury determination of guilt, but the defendant elected to have that particular specification decided by the bench, not the jury.

**{¶10}** There appears to be no disagreement that a conviction based on legally insufficient evidence constitutes a denial of due process. *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 1997-Ohio-52. Whether a sufficiency of the evidence argument is reviewed under a prejudicial error standard or under a plain error

standard is academic when a conviction based on legally insufficient evidence constitutes a denial of due process. *State v. Palmer*, Hamilton App. No. C-050750, 2006-Ohio-5456, ¶7. "Accordingly, if the evidence is insufficient (regardless of whether we review it under a * * * plain-error standard), the conviction must be reversed." *State v. McKinney*, Franklin App. No. 08AP-23, 2008-Ohio-6522, ¶37, quoting *Palmer* at ¶7. Therefore, we proceed to address the merits of Isreal's first assignment of error.

**{¶11}** The adult female victim and her boyfriend were unpacking in their new home in a neighborhood of Middletown in October 2009. The victim was alone when the boyfriend left to take his child home. The victim recalled walking outside and calling her niece on her cell phone to ask when the niece would be coming by. She returned inside the house to finish unpacking when she heard something in the detached garage behind the house. She opened the pedestrian door of the garage and encountered three black males inside the garage. Their sweatshirt hoods were pulled over their heads and red bandanas covered the lower part of their faces.

**{¶12}** The male closest to her pulled a handgun from the front pocket of his hoodie, pointed it in her face, and demanded money. When she indicated she didn't have money, the men forced her back into her house. The victim said the gunman pushed the gun to the back of the victim's head behind her ear and placed his other hand over her eyes.

**{¶13}** The victim testified that the gunman had tattoos on his eyelids. She was never able to see their faces and mostly differentiated among the three men by describing their location or voices. The victim was led into her kitchen, living area, and master bedroom with the gun to the back of her head and the gunman's hand

mostly covering her eyes. They asked her whether she had jewelry or guns or a vehicle. She heard them going through her belongings and her purse, in which she had $10. She said she was eventually led into her child's bedroom, where the child's bed, and her TV stand, DVD player, and unpacked boxes were.

**{¶14}** The victim could barely understand the speech of the man to her right. She heard him playing with and commenting on her cell phone. The victim said she could understand the speech of the male to her left better than the male with her cell phone or the gunman. The male to her left – the man the state argued was Isreal – asked the victim about whether her DVD player worked. At one point in the child's room, the victim caught a glimpse of the male on her left holding some white material, which she thought was rope; she would later say that material was a white bandana.

**{¶15}** The victim said the male to her right said he liked "little white girls." He told her to do something but she couldn't understand him and asked him to repeat it several times. Finally, the gunman told her to take off her clothes. The victim removed her clothing. She said after she disrobed, someone placed her hands behind her back and tied her wrists with what she thought was rope. She later discovered that her wrists were tied with her white bandana, which she had tied to the drawers of her TV stand to keep them closed.

**{¶16}** The victim was forced to the floor on her back. An article of her clothing was placed over her face. The gunman used his knees to hold down her shoulders and kept the gun to her head. The gunman groped the victim's breasts. The male to her right, the same one who previously had her cell phone, unzipped his pants and touched her vagina with his hand. When the victim indicated pain or discomfort, the male told her to "shut up bitch." The same individual then engaged in anal

intercourse with her.

**{¶17}** The victim indicated that she believed the male to her left may have left the room because she thought she heard him walking around the small house and at one point, asked her during the assault whether her television worked; she did not respond. She said that male came back into the doorway of the bedroom and said something to the effect that "we need to hurry up."

**{¶18}** The victim said someone took a fitted sheet from her child's bed and tucked it around her body. She was told to stay where she was or they would return. The men left. The victim eventually freed herself and dressed. Her boyfriend found her in her child's bedroom and they contacted police.

**{¶19}** A few hours later, the victim's cell phone company provided police with the area where the victim's cell phone was being used. When police arrived, Isreal and the person identified as the gunman were standing outside a convenience store. Isreal was wearing clothing similar to the clothing described by the victim. The gunman ran into the store; Isreal did not. Police recovered a handgun discarded in a store aisle. They noted that the gunman had tattoos on his eyelids.

**{¶20}** Police seized the victim's camera and a red bandana from Isreal. The victim's camera still contained images of the victim and her family. The victim's cell phone was subsequently found on another suspect a few days later. The victim positively identified the handgun and her possessions.

**{¶21}** A police detective told the jury that Isreal talked with police, initially telling them that he was hanging out with some friends that day and he bought the camera from a "dope fiend" called "Goo Goo." About two hours into the interrogation, one of the police detectives asked Isreal whether it was supposed to go down the

way it did.

**{¶22}** Isreal reportedly hung his head and said it went bad from the beginning. He told police that the handgun they found was "everybody's gun." Isreal admitted he was with two other males who entered the victim's open garage. He admitted that as he walked around the house looking for things, he heard one of the men tell the victim to "get naked." He said he walked into one of the rooms and saw the nude victim on the floor. He told police he saw the other guy unzip his pants and lay on top of her. The police detective said Isreal indicated that toward the end of the incident he walked over to the man on top of the victim, kicked him in the leg, and said "c'mon let's go" or something to that effect.

**{¶23}** The victim was examined at the hospital the same day. A sexual assault nurse examiner testified that she found a circular-shaped mark behind the victim's ear consistent with the victim's testimony that a gun was held there. The nurse also found marks suggesting the victim's wrists were bound and that pressure was exerted on the victim around the shoulder area. Several tears were found near and around the victim's anal area, which indicated to the nurse the use of "an extreme amount of force." The nurse described the injuries as "profound."

**{¶24}** As previously noted, Isreal challenges the sufficiency of the evidence for the kidnapping and the rape counts, but does not dispute for purposes of this appeal that the kidnappings and rape occurred. He contests whether the state presented sufficient evidence that he was complicit with his co-defendants in the kidnappings and rape. Therefore, we will discuss the law applicable to complicity.

**{¶25}** The complicity statute, R.C. 2923.03, states that:

**{¶26}** "(A) No person, acting with the kind of culpability required for the

commission of an offense, shall do any of the following: (1) Solicit or procure another to commit the offense; (2) Aid or abet another in committing the offense; (3) Conspire with another to commit the offense in violation of section 2923.01 of the Ohio Revised Code; (4) Cause an innocent or irresponsible person to commit the offense.

**{¶27}** "(B) It is no defense to a charge under this section that no person with whom the accused was in complicity has been convicted as a principal offender.

**{¶28}** "(C) No person shall be convicted of complicity under this section unless an offense is actually committed, but a person may be convicted of complicity in an attempt to commit an offense in violation of section 2923.02 of the Revised Code. * * *

**{¶29}** "(E) It is an affirmative defense to a charge under this section that, prior to the commission of or attempt to commit the offense, the actor terminated his complicity, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

**{¶30}** "(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense."

**{¶31}** Isreal argues that he was merely present in the house for the kidnappings and rape and wasn't even in the same room when the rape occurred. He argues that the evidence shows he tried to end the assault.

**{¶32}** The trial court charge to the jury included an instruction on aiding and abetting. To support a conviction for complicity by aiding and abetting, the evidence must show the defendant supported, assisted, encouraged, cooperated with,

advised, or incited the principal in the commission of the crime. *State v. Johnson*, 93 Ohio St.3d 240, 2001-Ohio-1336, syllabus; *State v. Smith*, Butler App. No. CA2008-03-064, 2009-Ohio-5517, ¶82 (aiding and abetting may be inferred by overt acts of assistance such as serving as a lookout or creating a diversion so that the principal can commit the offense).

**{¶33}** Evidence of aiding and abetting may be shown by direct or circumstantial evidence, and participation in criminal intent may be inferred from presence, companionship, and conduct before or after the offense is committed. *State v. Gragg*, 173 Ohio App.3d 270, 2007-Ohio-4731 at ¶21.

**{¶34}** Mere presence is not enough in and of itself to find that an accused was an aider and abettor. *Johnson* at 243. This rule is to protect innocent bystanders who have no connection to the crime other than simply being present at the time of its commission. Id.

**{¶35}** When reviewing a challenge to the sufficiency of the evidence to support a criminal conviction, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶34.

**{¶36}** After reviewing R.C. 2907.02 and R.C. 2905.01, the statutory sections for the offenses of rape and kidnapping, respectively, and construing the evidence most favorably for the prosecution, we find that any rational trier of fact could have found the essential elements of the kidnappings and rape beyond a reasonable doubt.

**{¶37}** The jury could conclude beyond a reasonable doubt that Isreal was

prepared to commit crimes when he and the two other men entered the garage and concealed their identities; that all three men handled the handgun that day and were aware it was being carried; that Isreal and the other two males forced the victim at gunpoint into her house and kept the victim in the house against her will; that Isreal and the other two moved the victim from room to room looking for things to steal, and moved her to her child's room and kept her there to facilitate the rape offense.

**{¶38}** The jury could conclude beyond a reasonable doubt that Isreal heard the victim being told to get naked; that Isreal tied the victim's wrists behind her back with the white bandana he was seen handling and this took place after the victim disrobed; Isreal assisted in the crimes by encouraging the rapist to hurry and finish what he was doing so they wouldn't get caught; that Isreal knew what was going to occur before it occurred, and contributed to the unlawful acts.

**{¶39}** We find no error in regard to the sufficiency of the evidence on Isreal's convictions for rape and two counts of kidnapping. His first assignment of error is overruled.

**{¶40}** Assignment of Error No. 2:

**{¶41}** "APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL WERE VIOLATED BY PROSECUTORIAL MISCONDUCT."

**{¶42}** Isreal argues that the prosecutor who gave the closing argument on rebuttal repeatedly mischaracterized the evidence and the law, and verbally attacked defense counsel.

**{¶43}** Isreal failed to object to the prosecutor's comments during closing argument, and any perceived error not brought to the attention of the trial court is

waived unless it rises to the level of plain error. *State v. Morgan*, Clinton App. No. CA2008-08-035, 2009-Ohio-6050, ¶39; Crim.R. 52(B). Prosecutorial misconduct rises to the level of plain error if it is clear the defendant would not have been convicted in the absence of the improper comments. *Morgan* at ¶39.

**{¶44}** The prosecution is normally entitled to a certain degree of latitude in making its closing argument. *State v. Baldev*, Butler App. No. CA2004-05-106, 2005-Ohio-2369, ¶19, citing *State v. Smith* (1984), 14 Ohio St.3d 13. However, an attorney should not express his personal belief or opinion on the credibility of a witness or the guilt of the accused. *Baldev* at ¶20, citing *Smith* at 14. As to defense witnesses, including the defendant, the prosecutor may comment upon their testimony and suggest the conclusions to be drawn therefrom. *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, ¶116.

**{¶45}** "It is a prosecutor's duty in closing arguments to avoid efforts to obtain a conviction by going beyond the evidence which is before the jury." *Smith* at 14. A prosecutor may not make excessively emotional arguments tending to inflame the jury's sensibilities. *State v. Tibbetts*, 92 Ohio St.3d 146, 168, 2001-Ohio-132. Further, it is improper to denigrate defense counsel in the jury's presence. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶304.

**{¶46}** For purposes of this assignment of error, we note Isreal testified in his own defense and denied making any statement that he participated in any of the crimes that day. Isreal maintained to the jury that a "dope fiend" gave him the camera and $50 in a trade for 0.7 grams of crack. He said he used the money to buy some "weed."

**{¶47}** Isreal cites several passages from the transcript of the closing rebuttal in support of his prosecutorial misconduct argument. The state argues that the prosecutor's statements responded to the arguments of defense counsel. We have reviewed all of the prosecutor's statements cited by Isreal for this assignment of error. We will include some excerpts of the prosecutor's argument after we list some excerpts of the arguments from Isreal's trial counsel.

**{¶48}** Isreal's counsel began his closing argument by asking the jury to forget their hearts and emotions. He focused on the confession, noting there was no taped confession. "[T]he most serious case they get besides murder, and you can't record it? Are you kidding me? Are you kidding me?"

**{¶49}** Isreal's trial counsel noted that the detective indicated they talked with Isreal for more than two hours and counsel said the jury heard "five minutes of highlights." "What the hell happened in the other two hours and 25 minutes? I don't know. I don't know. Just take my word for it. Nothing fishy. Nothing backhanded. It was all straightforward. It was fine. Just take my word for it. * * * We don't need real evidence. We'll just show up and just take my word for it."

**{¶50}** Isreal's counsel told the jury that his client got on the stand and "[c]ontrary to what my colleague said, he [Isreal] was incredibly honest. It rang true what he said."

**{¶51}** "* * *

**{¶52}** "No, he told the truth. He didn't say he was crocheting * * *. Sold the guy some crack. I was smoking weed. * * * He came up there and didn't give a Pollyanna story. Didn't make up some story."

**{¶53}** Regarding the testimony of the sexual assault nurse examiner, trial counsel argued that she was brought in for one reason, which was "so you'd listen to your heart instead of your head. She was brought in to make you angry. * * *"

**{¶54}** Summing up his argument, trial counsel returns to his point about the detectives failing to record Isreal's statements. "And did you notice that the officers' * * * testimony lined up really, really, really good? * * * It's amazing that their five-minute summation of a two-and-a half hour conversation sounded the exact same.

**{¶55}** "* * *

**{¶56}** "Are they telling the truth? I don't know. Are they lying? I don't know." Trial counsel acknowledged to the jury that it was difficult to believe that police officers would lie, that they would "cut corners in their job."

**{¶57}** Counsel asked the jury to make a list of reasons why one would not record a confession. "Number one reason why you would not tape a confession is so that people could come to court and lie. * * * Tell me what number two is? I believe the reason we got is that it's too difficult to edit. That's it—a jury would have to watch a lot of blank tape. Well, damn, we've been sitting here for two days. We can't sit through 20 minutes of blank tape to get a confession? Don't do me any favors here, pal. How about you put the damn tape on and we watch it and see what he actually said * * *."

**{¶58}** The prosecutor began the rebuttal argument by telling the jury, "I hate to tell you this, but you've been lied to. * * * And you get to figure out who's lying to you. Either he [Isreal] lied to you today, because he said he didn't say any of that stuff. Or this man and that man [the detectives] are liars. Not cut cornerers. Cutting corners is working at Subway and stiffing me out of the extra slice of turkey. That's

cutting a corner. Making up confessions is dirty cop. It's a fraud. It's a crime. But in this case, if these guys are liars, not only are they dirty cops, but they're incompetent. Because why if you're going to go through the trouble of making up a confession, would you make up the confession of the accomplice to the rape?"

**{¶59}** Isreal also indicates that the prosecutor attacked trial counsel when the prosecutor commented that "it was ironic, very rhetorically ironic to hear somebody tell you to forget your heart, use your head, don't be emotional while they're using very emotionally heavy language and this damn this, hell that, breathlessly working you up about dirty cops. That is an emotional appeal."

**{¶60}** Isreal also includes other citations to the record, including where the prosecutor said, "This isn't TV. It's very easy to write lines for a character of a dirty rogue cop who for some Batman motivation decides it's more important to frame this guy than to get to the truth, and so he crafts all this stuff and pulls it off, and then there's this innocent man in a prison somewhere, and it's *Shawshank Redemption* all over again. That's not real life. That's not what happened here."

**{¶61}** In the conclusion of the prosecutor's rebuttal, the prosecutor said, "Folks, if you believe that Detectives [named detectives] made this up, then by all means find him not guilty, and then heaven help us all, because we have some of the most crooked, incompetent buffoons investigating one of the most serious crimes Middletown has seen in a while. On the other hand, if you believe that this man is the one who lied to you, then there are six verdict forms he's going to give you * * * that are all deserving of a word. It's called guilty. * * *"

**{¶62}** Both parties have latitude in responding to arguments of opposing counsel; therefore, the prosecutor has the right to respond in rebuttal to statements

made by the defendant during closing arguments. *State v. Martin*, Cuyahoga App. No. 91276, 2009-Ohio-3282, citing *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, ¶217.

**{¶63}** The defense took the approach that the detectives' work in not recording Isreal's statements was questionable, too convenient, and possibly cutting corners or facilitating lies. The prosecutor's comments were responding to those defense arguments, albeit, in a manner and with a tone we have previously rebuked and do so here, again.

**{¶64}** Upon review of the record, however, we find the comments made by the prosecutor on rebuttal and cited by Isreal did not prejudicially affect Isreal's substantial rights. See *State v. Cornwell*, 86 Ohio St.3d 560, 570-571, 1999-Ohio-125 (the test for prosecutorial misconduct is whether remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused). Therefore, the prosecutor's remarks do not rise to the level of plain error. Isreal's second assignment of error is overruled.

**{¶65}** Assignment of Error No. 3:

**{¶66}** "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT ISSUED A SENTENCE THAT IS INCONSISTENT WITH THE SENTENCES OF THE OTHER CO-DEFENDANTS."

**{¶67}** Isreal argues that the 43-year stated prison term he received was contrary to law because it was inconsistent with the co-defendants who received 24 and 31 total years, respectively, when one co-defendant held a gun to the victim and groped her while the other raped her. Isreal contends that he only roamed the house looking for things to steal and "took actions to stop the sexual assault."

**{¶68}** According to the judgment entries provided to this court by Isreal, his two co-defendants pled guilty to and were each convicted of four first-degree felony offenses, with each of the four counts carrying a gun specification. Both defendants were sentenced *after* Isreal was sentenced. One defendant's sentence was reportedly an agreed sentence. The criminal history of each of those co-defendants, as well as the content of their allocution, is not part of the record in this appeal.

**{¶69}** In support of his argument for consistency, Isreal relies on R.C. 2929.11(B), which states that a "sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, 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 crimes committed by similar offenders."

**{¶70}** Consistency in sentencing, however, does not require uniformity. See *State v. Buckley*, Madison App. No. CA2005-05-020. 2006-Ohio-4322, ¶7. A defendant has no substantive right to a particular sentence within the statutorily authorized range, and there is no requirement that co-defendants receive equal sentences. *State v. Hall*, Franklin App. No. 09AP-302, 2009-Ohio-5712, ¶9.

**{¶71}** The mere fact that a trial judge may view the background or conduct of one offender differently from that of another involved in the same crime does not render the different sentences inconsistent. *State v. Bari*, Cuyahoga App. No. 90370, 2008-Ohio-3663, ¶24. The imposition of consistent sentences requires a trial court to weigh the same factors for each defendant, which will ultimately result in an outcome that is rational and predictable. *State v. Ward*, Meigs App. No. 07CA9, 2008-Ohio-2222, ¶17. In that respect, two defendants convicted of the same offense with a

similar or identical history of recidivism could properly be sentenced to different terms of imprisonment. Id.

**{¶72}** A consistent sentence is not derived from a case-by-case comparison, but from the trial court's proper application of the statutory sentencing guidelines. *Hall*, 2009-Ohio-5712 at ¶10. In other words, a defendant claiming inconsistent sentencing must show the trial court failed to properly consider the statutory sentencing factors and guidelines found in R.C. 2929.11 and 2929.12. Id.

**{¶73}** Our review of the record demonstrates the trial court based its sentencing decision on the statutory factors and imposed a sentence within the statutory range for the offenses. R.C. 2929.14; see, also, *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. Accordingly, Isreal failed to show error; his third assignment of error is overruled.

**{¶74}** Judgment affirmed.

BRESSLER and HENDRICKSON, JJ., concur.