[Cite as *State v. Ambriez*, 2004-Ohio-5230.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-03-1051

Appellee — Trial Court No. CR-02-1969

v.

Ricardo Ambriez — **DECISION AND JUDGMENT ENTRY**

Appellant — Decided: September 24, 2004

* * * * *

Julia R. Bates, Prosecuting Attorney, and Mark Herr,
Assistant Prosecuting Attorney, for appellee.

Daniel Grna, for appellant.

* * * * *

HANDWORK, P. J.

{¶ 1} This is an appeal from a final judgment of the Lucas County Court of Common Pleas which found appellant guilty of burglary pursuant to R.C. 2911.12(A)(4), a fourth degree felony, and intimidation of a witness pursuant to R.C. 2921.04(B), a third degree felony, and sentenced appellant to terms of imprisonment. For the reasons stated herein, this court remands for resentencing, but affirms his convictions.

{¶ 2} The following facts are relevant to this appeal. Appellant fathered three children with Melissa Pesko and lived with them for around five years. Jasmine

Benavides, a child of Melissa but not of appellant, also resided with appellant during this time. Jasmine regarded appellant as her father and came to love him. Later, appellant and Melissa separated and appellant moved out.

{¶ 3} On March 31, 2002, at approximately 2:27 a.m., Jasmine, ten years old at the time, saw an intruder in her home. Although the intruder was wearing a ski mask, Jasmine recognized his voice and body. She ran to her mother saying that appellant was in the house. Jasmine and Melissa both testified as to this event; however, only Jasmine alleges that she actually saw appellant that night.

{¶ 4} Jasmine also testified that on her way to school on May 7, 2002, she again encountered appellant. Jasmine testified that appellant made a gun like gesture to his forehead and warned Jasmine to "tell your ma to be prepared for some of this tonight."

{¶ 5} As a result of these events, appellant was charged with burglary and intimidation of a witness. A jury returned guilty verdicts on both counts. The trial court considered the evidence and the following statement by appellant before sentencing him to consecutive sentences of twelve months and two years, respectively:

{¶ 6} "Well, the decision today is wrong, and I am not guilty, and justice hasn't served its time here today. Maybe it wasn't said exactly for you guys to understand as well. And I can understand this is a complicated situation for people to decide on. But I am not guilty. I put that on every kid's life that I have, as well as my mother and everyone else, I am not guilty."

{¶ 7} After considering several factors, the trial judge concluded that "there is no genuine remorse, [sic] because we had to proceed to trial; and obviously with your statement there's no genuine remorse."

{¶ 8} Appellant sets forth the following assignments of error:

{¶ 9} "Argument I. The sentence of the defendant was contrary to law and in violation of his constitutional rights because the trial court erroneously used the appellant's assertion of his constitutional right to a jury trial as one of the factors in imposing a term of imprisonment upon the appellant.

{¶ 10} "Argument II. The trial court committed plain error in erroneously instructing the jury on the elements that the state needed to prove in order to convict appellant of the crime of intimidating a witness, depriving the appellant of his constitutional right to due process of law and a fair trial.

{¶ 11} "Argument III. Appellant received ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution as well as under Section 10, Article I, of the Ohio Constitution by counsel's failure to object to the trial court's erroneous jury instruction regarding the definition of the term 'knowingly.'

{¶ 12} "Argument IV. The trial court committed reversible error when it determined that Jasmine Benavides, a ten year old child was competent to testify.

{¶ 13} "Argument V. The trial court abused its discretion in allowing evidence concerning appellant's polygraph examination as there was no testimony offered at trial to substantiate that the test was conducted under proper conditions."

{¶ 14} Appellant's first assignment of error challenges the trial judge's sentence for want of constitutionality. Except for one aggravating factor under R.C. 2929.12(B)(6), that appellant's relationship with the victim facilitated the offense, all factors that the trial judge considered related to the likelihood of recidivism. The trial judge found four factors "all of which make [] recidivism more likely." First, appellant was under community control sanctions at the time of the offenses. See R.C. 2929.12(D)(1). Second, appellant had a history of criminal convictions. See R.C. 2929.12(D)(2). Third, appellant had not responded to sanctions in the past. See R.C. 2929.12(D)(3). Fourth, there was no genuine remorse. See R.C. 2929.12(D)(5). Appellant does not challenge the trial judge's findings regarding the one aggravating factor nor the first three indicators of a propensity to recidivate.

{¶ 15} Instead, appellant merely challenges the rationale underlying the trial court's finding of no genuine remorse because appellant insisted on a trial. The trial judge found that "there's no genuine remorse, because we had to proceed to trial * * *." Appellant points to the following cases in arguing that the sentence is unconstitutional and contrary to law because of the trial court's reference to having to proceed to trial. *See State v. O'Dell* (1989), 45 Ohio St.3d 140, 147 ("[A] defendant is guaranteed the right to a trial and should never be punished for exercising that right or for refusing to enter a plea agreement * * *."); *United States v. Hutchings* (C.A.2, 1985), 757 F.2d 11, 14; *United States v. Araujo* (C.A.2, 1976), 539 F.2d 287, 291 ("Augmentation of a sentence based on [putting the Government to its proof] is, of course, improper."); *United States v. Derrick* (C.A.6, 1975), 519 F.2d 1, 4 ("[I]t is improper for a trial judge to impose a

heavier sentence as a penalty for the exercise of the right of jury trial, or as an example to deter others from exercising the right."); *United States v. Stockwell* (C.A.9, 1973), 472 F.2d 1186, 1187 ("[C]ourts must not use the sentencing power as a carrot and stick to clear congested calendars, and they must not create an appearance of such a practice.").

{¶ 16} *Araujo* dealt with several defendants, some who pled innocent, forcing a trial, and some who pled guilty and testified for the government during that trial. After jury verdicts of guilty and before sentencing, the trial judge commented to the jury: "What you have done enables me to send them away…*[a]nd sure, I'm going to cut off a bit when I come to sentence those who did plead guilty*, and if I believe there has been cooperation, I'll take that into consideration." *United States v. Araujo*, 539 F.2d at 291 (Ellipsis and emphasis *sic.*). The two defendants who insisted on trial received longer sentences than those who pled guilty. *Id.* Yet the *Araujo* court held that "[a] show of lenience to those who exhibit contrition by admitting guilt does not carry a corollary that the Judge indulges a policy of penalizing those who elect to stand trial." *Id.* at 292. The sentences were affirmed. *Id.*

{¶ 17} In *O'Dell* there was no indication that the sentence was in anyway determined by the fact that the defendant proceeded to trial. Instead, the trial judge considered the defendant's testimony during trial as a consideration for sentencing. *State v. O'Dell*, 45 Ohio St.3d at 147. In affirming the trial court's sentence, *O'Dell* held that because there is no constitutional right to lie on the witness stand, "the defendant's act of lying while under oath is probative of his prospects for rehabilitation. Such an act is one

of the factors that a trial judge may consider when imposing sentence under R.C. 2929.13." *Id*.

{¶ 18} In *Hutchings* the trial judge asked whether he could consider for sentencing the defendant's decision to go to trial. *United States v. Hutchings*, 757 F.2d at 14. Over initial objections, the trial judge stated that if he could consider the decision to stand trial, he would, but if he could not, he would not. *Id*. Both prosecution and defense submitted written arguments on this point before sentencing, yet at sentencing the trial judge did not state whether he considered the defendant's decision to stand trial or not. *Id*. Because there was not an "unequivocal statement by the judge as to whether Hutchings' decision to go to trial was or was not considered in imposing sentence" the case was remanded for resentencing. *Id*.

{¶ 19} In *Stockwell* the trial judge told the defendant before trial that if he accepted a plea bargain he would get a three year sentence but if he chose to stand trial he would receive a sentence from five to seven years. *United States v. Stockwell*, 472 F.2d at 1187. The defendant chose trial and received seven years. *Id*. The appellate court found that "[w]hile we do not believe that the experienced trial judge actually punished the defendant for standing trial, the record leaves unrebutted the inference drawn by the defendant." *Id*. *Stockwell* cautioned that where a court participates in plea bargaining and a tentative sentence is discussed the "record must affirmatively show" that the defendant was not penalized for choosing to stand trial. *Id*. Accordingly, because the record did not affirmatively demonstrate an absence of improper penalty for standing trial the case was remanded for resentencing. *Id*. at 1188.

{¶ 20} In *Derrick* the trial judge made clear to several defendants his displeasure with the fact that they did not plead guilty given the enormous amount of incriminating evidence. *United States v. Derrick*, 519 F.2d at 2. Among other comments, the trial judge concluded as to one defendant the following: "I can't put this man on probation. He has put this government to two long trials and goodness knows how much money the government has spent on this case. In those situations I don't feel like I can put him on probation." *Id*. The appellate court found that "[c]ertainly a trial judge is likely to take into account the difference in mental attitude between the defendant who admits his guilt and seeks to reform and the defendant who, although proved guilty beyond a reasonable doubt, gives no indication of his willingness to be rehabilitated." *Id*. at 4. In remanding for resentencing the court made clear that the actual sentence was not necessarily improper under the circumstances, but only that the articulated reasons for the sentence were improper. *Id*. at 5.

{¶ 21} Thus, the law has developed the following dichotomy by which the impropriety of a sentence turns on the articulated rationale for that sentence. "A genuine admission of guilt may properly result in a lighter sentence than would be appropriate for an intransigent and unrepentant malefactor." *United States v. Stockwell*, 472 F.2d at 1187. However, "it is improper for a trial judge to impose a heavier sentence as a penalty for the exercise of the right of jury trial, or as an example to deter others from exercising the right." *United States v. Derrick*, 519 F.2d at 4. In other words, the issue is whether the trial judge was unable to give a lighter sentence for want of a genuine admission of guilt under R.C. 2929.12(E)(5) or whether the trial judge gave a harsher sentence as a

penalty for standing trial because there was no genuine remorse under R.C. 2929.12(D)(5).

{¶ 22} R.C. 2929.12(D)(5) and R.C. 2929.12(E)(5) mirror each other. If the "offender shows no genuine remorse for the offense" the trial court must consider that as an indication that the offender will commit future crimes under R.C. 2929.12(D)(5). If the "offender shows genuine remorse for the offense," however, then the court must consider that as an indication that the offender will not commit future crimes under R.C. 2929.12(E)(5).

{¶ 23} In the instant case, the trial court found: "As to (D) and (E), whether recidivism is more likely or less likely, *the Court finds that recidivism is more likely because* this was committed while you were under community control sanction in Michigan; you have a history of criminal convictions; you've obviously not responded to sanctions in the past; *there's no genuine remorse, because we had to proceed to trial*; and obviously with your statement there's no genuine remorse, *all of which makes recidivism more likely*, thus would tip the scales on the side of [sic] prison term." (Emphasis added).

{¶ 24} Because "proceeding to trial" was considered in the context of indicators that make recidivism more likely we can only conclude that the trial court was referring to R.C. 2929.12(D)(5) and not R.C. 2929.12(E)(5). Consequently, the inference that appellant's sentence was augmented because he chose to stand trial is unavoidable.

{¶ 25} It appears then that the sentences below were partially predicated on the decision to stand trial. *See United States v. Derrick*, 519 F.2d at 4-5. This appearance of impropriety cannot be overcome here because there is not an "affirmative showing" in the

record that appellant was not penalized for standing trial, *see United States v. Stockwell*, 472 F.2d at 1187, nor is there an "unequivocal statement" that standing trial was not a factor considered in sentencing. *See United States v. Hutchings*, 757 F.2d at 14. For these reasons, appellant's first assignment of error is found well-taken.

{¶ 26} Appellant's second assignment of error alleges the trial court committed plain error in its jury instruction on what constitutes "knowingly." Appellant's third assignment of error alleges ineffective assistance of counsel for failure to object to the jury instruction. The jury instruction cannot be the predicate for reversal, however, because it amounts to harmless error and must be disregarded. Crim.R. 52(A).

{¶ 27} The trial court instructed the jury that knowingly under R.C. 2921.04(B) means that appellant "was aware of what he was doing and his lack of authority or privilege." R.C. 2901.22(B) defines this mental state differently: "A person acts knowing * * * when he is aware that his conduct will probably cause a certain result * * *" R.C. 2921.04(B) provides that "[n]o person, knowingly * * * by unlawful threat of harm to any person

- * * shall attempt to influence, intimidate, or hinder the victim of a crime in the filing or prosecution of criminal charges."

{¶ 28} The jury found that appellant "was aware of what he was doing and his lack of authority of privilege" because appellant made a gun like gesture to the forehead and told Jasmine to "tell your ma to be prepared for some of this tonight." It is not tenable to suggest that the jury would not have also found that appellant was "aware that his conduct [would] probably cause a certain result * * *" had this alternative instruction been given.

Assuming that either the jury instruction was plain error, or that trial counsel's failure to object fell below an objective standard of reasonable representation, the jury instruction was nonetheless harmless error. Crim.R. 52(A). For this reason we find appellant's second and third assignments of error not well-taken.

{¶ 29} Appellant's fourth assignment of error challenges the competency of Jasmine. Jasmine was ten years old and some months during the events in question and eleven years old at the time of trial. Evid.R. 601 provides that "[e]very person is competent to be a witness except * * * children *under* ten years of age * * *" (Emphasis added). Thus, the state did not have to prove that Jasmine was competent to testify because under the rule she is competent by default. *See State v. Jackson*, 8th Dist. No. 79871, 2002-Ohio-2137, at ¶18 ("Without prima facie evidence of incompetence, there is a presumption of competence, and the state did not have the burden of proving Armstrong's competency prior to his giving testimony."). Appellant's fourth assignment of error is found not well-taken.

{¶ 30} Appellant's fifth assignment of error challenges the admission of the polygraph report. The parties stipulated to the admissibility of appellant's polygraph report. The polygraph examiner testified that appellant was not truthful. The prosecution moved to admit the polygraph report over objections and it was admitted. Appellant argues that because there was no testimony regarding how the "polygraph was conducted, or if it was taken under the proper conditions" its admission violates *State v. Souel*, infra.

{¶ 31} Relevant to this appeal, *Souel* provides: "Notwithstanding the stipulation, the admissibility of the test results is subject to the discretion of the trial judge, and if the

trial judge is not convinced that the examiner is qualified or that the test was conducted under proper conditions he may refuse to accept such evidence." *State v. Souel* (1978), 53 Ohio St.2d 123, paragraph two of the syllabus. This holding does not predicate admission of polygraph evidence on testimony describing how the polygraph was conducted. Instead, it empowers the trial judge to exclude or admit the evidence at his discretion. Had there been any reason to believe the test was not conducted properly appellant was free to cross-examine the polygraph expert on that issue. Appellant did not. We will not now label admission of the polygraph evidence an abuse of discretion in the absence of any evidence at all that suggests the examination was improperly conducted. Appellant's fifth assignment of error is not well-taken.

{¶ 32} On consideration whereof, this court finds that the defendant was not prejudiced or prevented from having a fair trial and affirms the convictions of the Lucas County Court of Common Pleas, but finds that the sentences imposed were improper and remands the case for resentencing consistent with appellant's constitutional right to trial. Costs are to be shared equally.

JUDGMENT AFFIRMED, IN PART
AND REVERSED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Peter M. Handwork, P.J. _____

JUDGE

Mark L. Pietrykowski, J.

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Judith Ann Lanzinger, J. JUDGE

CONCUR.

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JUDGE