[Cite as *State v. Barnes*, 2010-Ohio-1659.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92512

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TERRENCE BARNES

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-440305

BEFORE: Cooney, J., McMonagle, P.J., and Stewart, J.

RELEASED: April 15, 2010

JOURNALIZED:

ATTORNEYS FOR APPELLANT

Timothy Young
State Public Defender

Claire R. Cahoon
Assistant State Public Defender
Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215-9311

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: T. Allan Regas
Timothy R. Fadel
Assistant County Prosecutors
8th Floor, Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Terrence Barnes ("Barnes"), appeals his convictions for felonious assault and kidnapping. Finding no merit to the appeal, we affirm.

{¶ 2} In July 2003, Barnes was charged with rape, felonious assault, kidnapping, and domestic violence. All of the charges except the domestic violence charge carried notices of prior conviction and repeat violent offender specifications. The charges related to allegations that Barnes had violently attacked and raped his girlfriend, M.W., on June 22, 2003.

{¶ 3} In September 2003, Barnes pled guilty to two of the charges, but this court reversed and vacated his plea because the trial court had failed to advise him of the mandatory term of postrelease control prior to accepting his plea. *State v. Barnes*, Cuyahoga App. Nos. 86654 and 86655, 2006-Ohio-5939.[1] Thereafter, a jury tried Barnes, finding him guilty of felonious assault and kidnapping. The trial court sentenced him to 14 years in prison, consisting of eight years for kidnapping and six years for felonious assault, to be served consecutively.

[1]Barnes's plea in a second case, Case No. CR-441912, was also vacated but is not part of the instant appeal, nor was it resolved at the time of Barnes's sentencing in the instant case.

{¶ 4} Barnes now appeals, raising four assignments of error for our review.[2]

Factual Background

{¶ 5} M.W. testified that on the evening of June 22, 2003, she and Barnes went to a party, and Barnes became highly intoxicated. After they returned home, Barnes left to purchase more alcohol. M.W. entered their shared apartment and locked the door to keep him out. When Barnes returned, she opened the door because he promised not to hurt her. Barnes entered the apartment, and M.W. ran to her bedroom and locked the door behind her. Barnes kicked in the bedroom door, and M.W. ran to the window to scream for help. Barnes grabbed her by the hair, bit her face, and beat her. He dragged her to the kitchen and stripped off her clothing to prevent her escape. He threatened to kill her, and she begged for her life. Barnes bit her several more times, choked her, and continued to beat her.

{¶ 6} Barnes then dragged M.W. to the bathroom by her hair and made her stay there while he relieved himself. He observed that her injuries appeared severe and feared that he would go to jail if anyone saw her, so he prohibited her going to work for the next few days. M.W. testified that

[2] We will disregard the assignments of error in Barnes's supplemental brief because he failed to serve it on the State.

Barnes took her to the bedroom and raped her. Before Barnes went to sleep, he tied her hand to his hand with a tee shirt so that she could not escape while he was sleeping. Nonetheless, after Barnes fell asleep, M.W. escaped and arranged to have a friend pick her up. After reporting the incident to police, M.W. obtained treatment at a local hospital.

Prior Acts Evidence

{¶ 7} In the first assignment of error, Barnes argues that he was denied a fair trial when the trial court (1) allowed M.W. to testify that he had previously hurt her and (2) failed to issue a limiting instruction regarding the testimony. Barnes argues that Evid.R. 404(B) precludes evidence of other acts to show a defendant's propensity to commit the crime at issue. Alternately, he argues that the trial court should have excluded the evidence under Evid.R. 403(A). The State counters that the evidence was relevant to prove that Barnes knowingly harmed and raped M.W. because it helped explain why M.W. did not resist him on the night of the alleged rape and why she continued to visit Barnes in jail after he was indicted.

{¶ 8} "[A] trial court's decision to admit or exclude evidence 'will not be reversed unless there has been a clear and prejudicial abuse of discretion.'" *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, quoting *O'Brien v. Angley* (1980), 63 Ohio St.2d 159, 163, 17 O.O.3d 98, 407 N.E.2d

490. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 9} Evid.R. 404(B) states, in pertinent part:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶ 10} In the instant case, M.W. testified that Barnes had physically and emotionally abused her for several years prior to the June 22 attack. Still, she could not leave the relationship because she feared him. Whenever she spoke about leaving, he would beat her and threaten to kill her. Barnes had isolated her from her friends and relatives, and because of his violent behavior, they were afraid to help her. M.W. had actually left Barnes several times and gone to a domestic violence shelter. But she ultimately returned to the apartment that they shared.

{¶ 11} We find that the trial court abused its discretion in admitting this testimony over Barnes's objection. As previously stated, Evid.R. 404(B) excludes evidence of prior wrongs or acts except when offered for a purpose such as "proof of motive, opportunity, intent, preparation, plan, knowledge,

identity, or absence of mistake or accident." When prior acts evidence is admissible as an exception to the exclusionary rule, the trial court must give a limiting instruction to the jury for proper consideration of the evidence. See, *State v. Fischer* (Nov. 24, 1999), Cuyahoga App. No. 75222. The state argues that the evidence was admissible to prove that Barnes knowingly, and not mistakenly, caused serious physical harm to M.W. However, we fail to see how evidence of prior abuse would demonstrate absence of mistake or accident, particularly since Barnes did not assert as much.

{¶ 12} Furthermore, evidence that Barnes had been physically and emotionally abusive to M.W. for several years is not relevant to whether he was abusive on the date in question. The evidence does nothing more than create the inference that Barnes is an abuser who continued his abusive ways; an inference explicitly prohibited by the rule. See, e.g., *State v. Miley*, Richland App. Nos. 2005-CA-67 and 2006-CA 14, 2006-Ohio-4670, ¶73. Allowing testimony of Barnes's prior acts of abuse was improper and violated Evid.R. 404(B).

{¶ 13} Inadmissible evidence of prior bad acts is prejudicial, unless the reviewing court finds beyond a reasonable doubt that it did not affect the outcome of the trial. *State v. Williams* (1988), 55 Ohio App.3d 212, 563 N.E.2d 346. Based upon the record before us, we conclude that the error in

admitting evidence of the past abuse was harmless beyond a reasonable doubt. Separate from the other acts testimony, the state offered ample evidence of Barnes's guilt. Accordingly, we find the trial court's erroneous admission of evidence relating to past abuse was not prejudicial error. The first assignment of error is overruled.

Trial Court's Remarks Before, During, and After Trial

{¶ 14} In the second assignment of error, Barnes argues that his convictions should be reversed because the trial court made prejudicial comments during the trial. Barnes concedes that his counsel failed to object to these remarks during trial and that many of the remarks were made outside of the jury's presence.

{¶ 15} It is well-settled that a trial court is not precluded from making comments during trial and, in fact, must do so at times to control the proceedings. *J. Norman Stark Co., LPA v. Santora*, Cuyahoga App. No. 81543, 2004-Ohio-5960; *State v. Plaza*, Cuyahoga App. No. 83074, 2004-Ohio-3117. See, also, Evid.R. 611(A). However, a trial court should be cognizant of the influence its statements have over the jury and, therefore, must remain impartial and avoid making comments that might influence the jury. *State v. Boyd* (1989), 63 Ohio App.3d 790, 580 N.E.2d 443. When a

trial court's comments express an opinion of the case or of a witness's credibility, prejudicial error results. *J. Norman Stark Co., LPA*; *Plaza*.

{¶ 16} In this vein, the Ohio Supreme Court has warned:

{¶ 17} "In a trial before a jury, the court's participation by questioning or comment must be scrupulously limited, lest the court, consciously or unconsciously, indicate to the jury its opinion on the evidence or on the credibility of a witness.

> "In a jury trial, where the intensity, tenor, range and persistence of the court's interrogation of a witness can reasonably indicate to the jury the court's opinion as to the credibility of the witness or the weight to be given to his testimony, the interrogation is prejudicially erroneous."

{¶ 18} *State ex rel. Wise v. Chand* (1970), 21 Ohio St.2d 113, 256 N.E.2d 613, paragraphs three and four of the syllabus.

{¶ 19} In *State v. Wade* (1978), 53 Ohio St.2d 182, 373 N.E.2d 1244, the Ohio Supreme Court set forth the following criteria in determining whether a trial court's remarks are prejudicial:

> "(1) The burden of proof is placed upon the defendant to demonstrate prejudice, (2) it is presumed that the trial judge is in the best position to decide when a breach is committed and what corrective measures are called for, (3) the remarks are to be considered in light of the circumstances under which they are made, (4) consideration is to be given to their possible effect upon the jury, and (5) to their possible impairment of the effectiveness of counsel."

{¶ 20} We first turn to the comments that the trial court made in the jury's presence. Barnes objects to the trial court's conduct in (1) admonishing Barnes not to interrupt M.W.'s testimony, (2) "assisting" the prosecution to authenticate photographic evidence, and (3) interrupting defense counsel's cross-examination of M.W.

{¶ 21} We first examine the following exchange when Barnes interrupted M.W.'s testimony:

{¶ 22} Barnes: "That's ridiculous."

{¶ 23} Court: "I don't want anymore [sic] comments from you; you hear me?"

{¶ 24} Barnes: "Yes, sir. She lying."

{¶ 25} Court: "I said I don't want anymore [sic] comments from you. If you want to testify you can take the stand."

{¶ 26} Barnes: "I would like to."

{¶ 27} Court: "If you don't — you keep your mouth shut, Mr. Barnes — Mr. Barnes, do you understand me?"

{¶ 28} Barnes: "Yes sir."

{¶ 29} Court: "You will keep your mouth shut or I will have you bound and gagged — "

{¶ 30} Barnes: "Yes."

{¶ 31} Court: "— if there is one more word."

{¶ 32} Barnes: "So I can't talk to —"

{¶ 33} Court: "You will not be making comments during the course of this trial in front of the jury; do you hear me? Do you hear me?"

{¶ 34} Barnes: "Yes, sir."

{¶ 35} Barnes interrupted M.W. during a very emotional portion of her testimony in which she stated that Barnes had threatened to decapitate her and save her head in a jar. By interrupting M.W., Barnes may have intended to unnerve her. There was testimony that M.W. feared him. While the judge's remarks were perhaps unnecessarily harsh, we do not find that they affected the jury's assessment of the substantial evidence in the case or impeded defense counsel's performance.

{¶ 36} Next, Barnes argues that the judge improperly assisted the State in authenticating photographic evidence when the prosecutor asked whether the photographs "adequately" depicted the crime scene. The judge corrected the prosecutor's terminology, stating, "It's accurately," informing the prosecutor that the correct question was whether the photographs "accurately" depicted the crime scene. We are not convinced that this minor comment affected the jury's decision, impeded defense counsel's performance, or improperly assisted the State.

{¶ 37} Finally, Barnes argues that the judge frequently interrupted his counsel's cross-examination of M.W., asking her to move on with her

questions, challenging the relevance of her line of questioning, remarking that counsel's questions were repetitive and inappropriate, and calling the attorneys to sidebar. But the judge acted within his discretion to stop defense counsel from asking repetitive questions and interrupting M.W.'s testimony. In one instance, the judge called the attorneys to sidebar after the prosecutor objected to defense counsel's line of questioning. We find that the comments were not prejudicial and well within the judge's role to control the proceedings.

{¶ 38} Next, Barnes argues that the judge engaged in misconduct by making inappropriate comments before trial and after the jury delivered the verdict. The pretrial comments, however, were made outside of the jury's presence. And post-verdict comments necessarily could not affect the jury's decision or impede defense counsel's performance at trial. Accordingly, we cannot find that these comments, although perhaps inappropriate, prejudiced Barnes.

{¶ 39} The second assignment of error is overruled.

Vindictive Sentence

{¶ 40} In the third assignment of error, Barnes argues that the trial court violated his constitutional right to due process when it imposed a "vindictive" sentence. He argues that he received a 14-year sentence after a jury found him guilty but only an eight-year sentence when he pled guilty in 2003. The U.S. Supreme Court addressed the issue of vindictive sentencing in *Alabama v. Smith* (1989), 490 U.S. 794, 801, 109 S.Ct. 2201, 104 L.Ed.2d 865, holding that:

> "While sentencing discretion permits consideration of a wide range of information relevant to the assessment of punishment, see *Williams v. New York*, 337 U.S. 241, 245-249, 69 S.Ct. 1079, 1082-1084, 93 L.Ed. 1337 (1949), we have recognized it must not be exercised with the purpose of punishing a successful appeal. [*North Carolina v. Pearce* (1969), 395 U.S. 711, 723-725, 89 S.Ct. 2072, 2079-2080, 23 L.Ed.2d 656] * * * .
>
> "While the *Pearce* opinion appeared on its face to announce a rule of sweeping dimension, our subsequent cases have made clear that its presumption of vindictiveness 'do[es] not apply in every case where a convicted defendant receives a higher sentence on retrial.' *Texas v. McCullough*, 475 U.S., at 138, 106 S.Ct., at 979. As we explained in *Texas v. McCullough*, 'the evil the [*Pearce*] Court sought to prevent' was not the imposition of 'enlarged sentences after a new trial' but 'vindictiveness of a sentencing judge.' Ibid. See also *Chaffin v. Stynchcombe*, 412 U.S. 17, 25, 93 S.Ct. 1977, 1982, 36 L.Ed.2d 714 (1973) (the *Pearce* presumption was not designed to prevent the imposition of an increased sentence on retrial 'for some valid reason associated with the need for flexibility and discretion in the sentencing process,' but was 'premised on the apparent need to guard against vindictiveness in the resentencing process'). Because the *Pearce* presumption 'may operate in the absence of any proof of an improper

> motive and thus * * * block a legitimate response to criminal conduct,' *United States v. Goodwin*, supra, 457 U.S., at 373, 102 S.Ct., at 2488, we have limited its application, like that of 'other "judicially created means of effectuating the rights secured by the [Constitution],"' to circumstances 'where its "objectives are thought most efficaciously served,"' *Texas v. McCullough*, supra, 475 U.S., at 138, 106 S.Ct., at 979, quoting *Stone v. Powell*, 428 U.S. 465, 482, 487, 96 S.Ct. 3037, 3046, 3049, 49 L.Ed.2d 1067 (1976). Such circumstances are those in which there is a 'reasonable likelihood,' *United States v. Goodwin*, supra, 457 U.S., at 373, 102 S.Ct., at 2488, that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority. Where there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness, see *Wasman v. United States*, 468 U.S. 559, 569, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984).
>
> * * *
>
> "[W]hen a greater penalty is imposed after trial than was imposed after a prior guilty plea, the increase in sentence is not more likely than not attributable to the vindictiveness on the part of the sentencing judge. Even when the same judge imposes both sentences, the relevant sentencing information available to the judge after the plea will usually be considerably less than that available after a trial. A guilty plea must be both 'voluntary' and 'intelligent,' *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969), because it 'is the defendant's admission in open court that he committed the acts charged in the indictment,' *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 1468, 25 L.Ed.2d 747 (1970). But the sort of information which satisfies this requirement will usually be far less than that brought out in a full trial on the merits."

{¶ 41} Therefore, under *Smith*, the defendant bears the burden to demonstrate that there was a reasonable likelihood that vindictiveness motivated the harsher sentence. To this end, the trial court may rebut such a presumption by "'[making] affirmative findings on the record regarding

conduct or events that occurred or were discovered after the original sentencing.'" *State v. Anderson*, Cuyahoga App. No. 81106, 2003-Ohio-429, quoting *State v. Nelloms* (2001), 144 Ohio App.3d 1, 4, 759 N.E.2d 416, and citing *Pearce* and *Wasman*. If the defendant cannot meet his or her burden, then he or she may prove actual vindictiveness using the record.

{¶ 42} In determining whether Barnes has met his burden, we examine the trial court's conduct during the pretrial, trial, and sentencing portions of the case. During pretrial proceedings, the trial court expressed its displeasure that the appellate court reversed Barnes's guilty plea based on the trial court's failure to adequately advise Barnes of postrelease control. Then the trial court addressed Barnes directly, in the following exchange:

{¶ 43} Court: "Mr. Barnes, what would you like to say in this matter?"

{¶ 44} Barnes: "Like I said four years ago, I just want a fair trial."

{¶ 45} Court: "You didn't say that four years ago."

{¶ 46} Barnes: "Yes. You threatened me into pleading guilty. Wasn't on the record."

{¶ 47} Court: "Let me explain something to you, ok? I remember your case very well."

{¶ 48} Barnes: "I do too."

{¶ 49} Court: "And there was a record made of your case that I've read, your attorney has read, the prosecutor has read. You had every opportunity with your attorney at that time to try this case and you chose to plead guilty.

{¶ 50} "Now, the institution is full of innocent men and a lot of guys who plea are also innocent, and the trial court judge forced them or made a face at them or didn't wear his robe or whatever. And let's just say this, let bygones be bygones because guess what? You get a new time at bat."

{¶ 51} Barnes: "That's all I wanted."

{¶ 52} Court: "But when you say that's all you want, that new time at bat also includes the fact that are you [sic] now indicted for crimes for which you can do over six years."

{¶ 53} Thereafter, Barnes complained that he had never received a fair trial, informed the court that he had filed a motion for recusal, and claimed that there were inconsistencies in the record. Then the following exchange occurred:

> Court: "I've heard all these arguments before. Okay. I don't need to hear them a second and third time. My time is valuable. You need to save these arguments that I've now heard three times for the jury. Not me. I'm not going to decide your guilt or innocence. A jury will decide your guilt or innocence.
>
> "I'm going to sit here. We'll give you a new attorney. We'll give you a fair trial, and if you walk out of here not guilty, God bless you; but if you're guilty of any one of these charges, you're going to have a serious problem and you're going to go back to the institution, and in all likelihood you're going to go back for a far longer period than you're currently doing now."

{¶ 54} We next review the trial court's comments during sidebar. Defense counsel objected that the State had waited until the day of trial to provide defense counsel a recorded interview of M.W., which it intended to

play at trial. The trial court noted the objection, admonished the State to provide such evidence to defense counsel, but allowed the State to introduce the evidence. The prosecutor and defense counsel continued to argue, and the trial court stated,

> "We shouldn't be trying this case a second time because the reason this guy had his sentence reversed is ridiculous. He was told about post release control over and over at the sentencing, and sometimes I think the Eighth District Court of Appeals is looking for a little work or nitpicking.[3]

{¶ 55} "All right [sic]. That having been said, I don't want to try it a second time and so for the smooth administration of justice I wish that

[3]This court previously reversed this case because the trial court failed to inform Barnes before entering his guilty plea (not at sentencing) that he would be subject to a mandatory five years of postrelease control. Being critical of a court's decision, regardless of the accuracy of the criticism, should not be done in a manner that is prejudicial to public confidence in the judiciary. See R. of Jud. Conduct 1.2 and Comment 5. Not only did the trial court express its dismay at this court's decision to trial counsel, but reiterated the dismay to the jury prior to sentencing, stating:

> "This defendant pled guilty to these charges some years ago and appealed his guilty plea because he says I didn't tell him about postrelease control, parole, which is ridiculous. And I pulled a copy of the transcript. So if there is anybody looking at this over at the Eighth district, okay, I want you to take these comments right now to the three judges who are presiding over this case and I think that they have got to use better discretion when reviewing some of these cases.
>
> "The former plea in this case clearly, clearly dealt with and mentioned parole and post conviction release [sic], not once, but twice or maybe three times. And the unfortunate reversal by the Eighth District Court of Appeals made this jury retry this case, but most importantly, made this victim relive this horrifying situation in her life."

everyone would give everybody a preview so we don't have these issues at side bar [sic] taking up our individual trial time."

{¶ 56} Finally, we turn to the trial court's comments during sentencing. The trial court had dismissed the jury; however, all but one of the jurors remained to observe the sentencing. Barnes had complained about his defense counsel's performance, objected to the trial court's inquiring about a prior conviction for robbery, and complained that he had been denied the opportunity to testify on his own behalf. The trial court responded that Barnes had the opportunity to testify. Then the following exchange occurred:

> Court: "I've heard the testimony in this case along with this jury and the uncontroverted testimony is that you assaulted this woman, that you kidnapped her and that you assaulted her. And after trying this particular case I am quite struck by the barbaric nature of your behavior. It's very unusual for a victim to be covered with human bite marks. The uncontroverted testimony is that you actually had pieces of [M.W.]'s flesh in your teeth after the assault.
>
> "The uncontroverted testimony is that she bears a scar on her right shoulder as a result of the flesh that you tore off of her. Her uncontroverted testimony is that one of the reasons you were biting her about the neck, about the face, about the head multiple times is because you thought that she was too pretty."

* * *

{¶ 57} "The uncontroverted testimony is that you did these things, okay. And you know the serious nature of the harm that was caused to the victim in this case, the offense against the peace and the dignity of the state of Ohio; the

unwillingness of you at any time to take responsibility for your actions; the unwillingness or inability for you to express any kind of remorse, any kind of sorrow or responsibility or sadness for what has gone on here demonstrates to me that you are a dangerous and violent offender[.] * * *"

{¶ 58} After the State made its sentencing recommendations and defense counsel spoke in mitigation, the trial court pronounced Barnes's sentence as follows:

> "You're found guilty of felonious assault, that's an F2, that's punishable by two, three, four, five, six, seven, eight years in a state penal institution. And because of the seriousness of this offense you are hereby sentenced to a period of six years in a state penal institution.
>
> "Now as to count three, the kidnapping, I want to make a record here. This kidnapping went on for a very extensive period of time. This kidnapping occurred so that he could assault her, no question, but the kidnaping continued for hours, okay, so that he could have sex with her.
>
> "Now the jury has found this defendant not guilty of count one, rape, and it is within their province to do so. However, I am somewhat shocked that they acquitted him on count one. However, the Court feels that the kidnapping continued for an extensive period of time. And the Court heard the testimony, uncontroverted testimony that you actually tied yourself to the victim so that she would not leave the apartment. And tied her to you as you slept so that she would not escape. And this obviously is a continuation and a separate criminal offense with a separate intent animus and as such it is a very serious offense.

{¶ 59} "Therefore, you are sentenced on this felony of the first degree to eight years in a state penal institution. And because of the barbaric, violent, sadistic nature of what you were involved in this day, your sentences, sir, are

consecutive. You will be given 14 years from today. Now we will credit you for time served."

{¶ 60} In the instant case, we find that many of the trial court's comments prior to trial, at sidebar, and during sentencing were clearly inappropriate. Several times, he expressed his dismay over the appellate court's decision to vacate Barnes's guilty plea and frustration that the case would have to be tried. Furthermore, the trial court actually stated that Barnes would "go back [to prison] for a longer period if found guilty on any *one* of [the] charges." (Emphasis added.) Thus, we conclude that Barnes has demonstrated a reasonable likelihood that the harsher sentence was motivated by vindictiveness.

{¶ 61} However, when the trial court imposed a harsher sentence after trial than it had done following Barnes's infirm guilty plea, the court must then justify the sentence by "affirmatively identifying relevant conduct or events that occurred subsequent to the original sentencing proceedings." *Wasman* at 572. The jury convicted Barnes of kidnapping and felonious assault, more serious charges than gross sexual imposition and felonious assault to which he pled guilty. The trial court imposed a six-year sentence for felonious assault and an eight-year sentence for kidnapping. Thus, Barnes actually received a shorter sentence for felonious assault after trial than the eight-year sentence he

received when he pled guilty to the offense. Furthermore, kidnapping, a first degree felony, carries a much harsher penalty than gross sexual imposition, a fourth degree felony.

{¶ 62} Additionally, the trial court explained the severity of Barnes's crimes on the record. He noted that he was "struck by the barbaric nature" of the crimes. He pointed out that M.W. observed pieces of her skin in Barnes's teeth. He chastised Barnes for his utter lack of remorse and remarked that this made him dangerous to society.

{¶ 63} Therefore, the court justified the harsher sentence by identifying relevant conduct and overcame the presumption of vindictiveness.

{¶ 64} The third assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 65} In the fourth assignment of error, Barnes claims that he received ineffective assistance of counsel because his counsel failed to (1) request a limiting instruction regarding other acts evidence, (2) object to the trial court's prejudicial remarks, and (3) object to the length of his prison sentence.

{¶ 66} The Ohio Supreme Court recently held, in *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, ¶200:

{¶ 67} "To establish ineffective assistance, [a criminal defendant] must show (1) deficient performance by counsel, i.e., performance falling below an

objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that but for counsel's errors, the proceeding's result would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraphs two and three of the syllabus."

{¶ 68} We must presume that a licensed attorney is competent and that the challenged action is the product of sound trial strategy and falls within the wide range of professional assistance. *Strickland* at 689. Courts must generally refrain from second-guessing trial counsel's strategy, even where that strategy is questionable, and appellate counsel claims that a different strategy would have been more effective. *State v. Jalowiec*, 91 Ohio St.3d 220, 237, 2001-Ohio-26, 744 N.E.2d 163.

{¶ 69} A trial attorney may decide to eschew limiting instructions regarding potentially prejudicial evidence for tactical reasons, because limiting instructions might call more attention to the evidence and reinforce jurors' prejudice. *Strongsville v. Sperk*, Cuyahoga App. No. 91799, 2009-Ohio-1615, ¶38. Therefore, we do not find that Barnes's counsel was ineffective in failing to ask for a limiting instruction.

{¶ 70} Next, we consider whether Barnes was prejudiced by his counsel's failure to object to his sentence. We find that he was not.

{¶ 71} In the instant case, Barnes's sentence is not contrary to law. His sentence is within the permissible statutory range for each offense. In the sentencing journal entry, the trial court acknowledged that it had considered all factors of law and found that prison was consistent with the purposes of R.C. 2929.11. And it is axiomatic that a court speaks through its journal entries. *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, 863 N.E.2d 1024, ¶47, citing *Kaine v. Marion Prison Warden*, 88 Ohio St.3d 454, 455, 2000-Ohio-381, 727 N.E.2d 907.

{¶ 72} We also do not find that the trial court abused its discretion in sentencing Barnes. The court commented on the barbaric nature of the attack, stating that it was very unusual for a victim to be covered in human bite marks. During trial, the court observed photos of M.W.'s extensive injuries following the attack, which included two black eyes and numerous bite marks and bruises. The trial court noted that Barnes did not accept responsibility for his actions or show remorse and that Barnes was dangerous. Nonetheless, the trial court did not impose the maximum sentence for each offense. Accordingly, we find that defense counsel could not have changed the outcome by objecting to the sentence.

{¶ 73} Because we find that Barnes has not met his burden to show that his counsel's performance prejudiced him, we do not find merit to his claim of ineffective assistance of counsel.

{¶ 74} The fourth assignment of error is overruled.

{¶ 75} Judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

_____

COLLEEN CONWAY COONEY, JUDGE

MELODY J. STEWART, J., CONCURS;
CHRISTINE T. McMONAGLE, P.J., DISSENTS
(SEE ATTACHED DISSENTING OPINION)

CHRISTINE T. McMONAGLE, P.J., DISSENTING:

I respectfully dissent from the majority's conclusion that this was not a vindictive sentencing, as prohibited by *Alabama v. Smith* (1989), 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865, and *North Carolina v. Pearce* (1969), 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656.

The relevant facts gleaned from the docket and from the prior appeals (Cuyahoga County Common Pleas Court Case Nos. CR-440305 and CR-441912; Eighth District Court of Appeals Nos. 86654 and 86655) are that on September 18, 2003, appellant entered pleas of guilty as follows: In Case No. CR-440305, he pled guilty to gross sexual imposition, a fourth degree felony under Count 1 of the indictment, and felonious assault, a second degree felony under Count 2 of the indictment. At that same plea, he pled guilty in Case No. CR-441912 to Count 1, attempted rape, a second degree felony, and Count 2, abduction, a felony of the third degree.

The trial court sentenced him as follows: 18 months on the gross sexual imposition, eight years on the felonious assault, eight years on the attempted rape, and three years on the abduction. All counts were run concurrent with each other for a total of eight years.

Appellant appealed the plea in both cases. In Appeal Nos. 86654 and 86655, this court reviewed those pleas, determined that the trial court did not

adequately advise the defendant of postrelease control prior to accepting the pleas, reversed, and ordered the pleas vacated. Upon return to the trial court, the court stated upon the record:

> "We shouldn't be trying this case a second time because the reason this guy had his sentence reversed is ridiculous. He was told about postrelease over and over at the sentencing and sometimes I think the Eighth District Court of Appeals is looking for a little work or nit-picking.[4]

* * *

> I'm going to sit here. We'll give you a fair trial, and if you walk out of here not guilty, God bless you; but if you're guilty of **any one** of these charges, you're going to have a serious problem and you're going back to the institution and **in all likelihood, you're going to go back for a far longer period than you're currently doing now**." (Emphasis added.)

Despite the threat (or promise) of a far longer sentence than that imposed upon the plea, appellant went to trial. On September 13, 2007, in Case No. CR-440305, the jury found him guilty of felonious assault, a second degree felony, and kidnapping, a first degree felony. The trial court sentenced him to six years on the felonious assault and eight years on the kidnapping; the counts were to run **consecutively** for a total of 14 years.[5]

---

[4]Failure to properly advise appellant of postrelease control as part of the plea colloquy (not failure to sentence him to postrelease control at sentencing) resulted in this court ordering vacation of the plea.

[5]I note **this** sentence is in excess of the maximum sentence that could be imposed for a conviction for attempted murder with a three-year gun specification.

This time, prior to sentencing, the trial court again referred to the appellate court's previous reversal, and told the jury:

> "This defendant pled guilty to these charges some years ago and appealed his guilty plea because he says I didn't tell him about postrelease control, parole, which is ridiculous. And I pulled a copy of the transcript. So if there is anybody looking at this over at the Eighth District, okay, I want you to take these comments right now to the three judges who are presiding over this case and I think that they have got to use better discretion when reviewing some of these cases.
>
> The former plea in this case clearly, clearly dealt with and mentioned parole and post conviction release [sic], not once, but twice or maybe three times. And the unfortunate reversal by the Eighth District Court of Appeals made this jury retry this case, but most importantly, made this victim relive this horrifying situation in her life."

Again, at the conclusion of the sentencing, the trial court remarked, "Hopefully, that will satisfy the Court of Appeals."[6]

In sum, when defendant pled to four felony counts, he was sentenced to eight years in prison; when he went to trial after reversal of his plea and threats by the court of more severe sentencing, he was found guilty of only two counts, but then sentenced to 14 years. The discrepancy in sentencing alone is enough to presume this was a vindictive sentencing. However, this court need not rely upon the presumption; the trial court's words themselves clearly evince that this was a vindictive sentence.

---

[6]On September 16, 2008, appellant went to trial in Case No. CR-441912; in that matter, the jury found him not guilty of all counts.

Accordingly, I would reverse and remand the matter to the trial court with instructions to vacate the sentence and order resentencing.