IN THE SUPREME COURT OF OHIO
2017

STATE OF OHIO,	Case No. 2017-1613
Plaintiff-Appellee,	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
-vs-	
EDWARD J. BARBER,	
Defendant-Appellant.	Court of Appeals Case No. 17AP-59

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION

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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

This case does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. Defendant's is seeking error correction on the very fact specific issue of whether the trial court acted vindictively during sentencing when it determined that defendant's offense was motivated, in part, by a bias against females. Essentially, he claims the trial court acted vindictively, because a finding of gender bias is not supported by the evidence. However, defendant fails to show that any error occurred.

The Tenth District found that defendant's arguments were meritless. *State v. Barber*, 10th Dist. Franklin No. 17AP-59, 2017-Ohio-7904, ¶24. It summarily rejected defendant's claim that the trial court acted vindictively and noted that the trial court is allowed to consider an offender's motivation and/or prejudice in committing an offense. Id. at ¶22. It also found that the record supported the trial court's finding that defendant's conduct was motivated by prejudice against women. Id. at ¶23.

Because defendant asks this Court to review a very fact specific and ultimately meritless claim, further review is unwarranted. It is respectfully submitted that jurisdiction should be declined.

STATEMENT OF THE CASE AND FACTS

On June 18, 2015, the Franklin County Grand Jury returned an indictment charging defendant with aggravated burglary, a first-degree felony. On November 28, 2016, defendant's case proceeded to trial.

Columbus Police Officer Benjamin Cook testified that on June 10, 2015, at approximately 2:25 a.m., he and his partner were dispatched to 1112 Sidney Street, in Franklin County, Ohio on the report of a domestic-violence incident. As they neared the scene, Cook saw defendant "walking down the center of Sidney Street[.]" Defendant "obviously seemed

agitated[.]" Cook and his partner stopped and talked to defendant. Cook said that defendant "seemed not aggressive toward us, but he had an aggressive manner to him." Cook also noticed that defendant was sweaty. After conducting a pat-down search of defendant to check for weapons, Cook realized that defendant was bleeding from a cut on his hand.

Defendant was placed in the officers' vehicle. The officers then went to check on the well-being of the 911 caller, Yvette Faison. Yvette told the officers that "her baby's father came in. He broke the front porch window into the living room", and "[r]eached in and unlocked the front window, pushing the front window open, and then climbing inside." Cook called the domestic violence and burglary detectives to respond to the scene.

Yvette Faison testified that she has four children ages 12, 10, 8, and 3. Keyvette is her oldest and the only girl. Yvette was in a relationship with defendant from 2006 until 2015. They have two children together. Defendant used to live with Yvette and her children at Yvette's house on Sidney Street. He moved out after Christmas in 2014. For a period of time after that, defendant was allowed to stay at the house. By March of 2015, defendant had completely moved out. Yvette did not allow defendant to be around the kids very much starting that month, because of "broken promises" to the kids, and because "every time he would come around, there was issues between me and him, and I got tired of dealing with him." Yvette clarified that she and defendant would argue over small things and Yvette did not like the way that defendant talked to her. Yvette testified that by March of 2015, defendant was not allowed to come into her home without permission.

At some point in April defendant left Yvette a voice mail in which he said:

> Girl, I want to talk to my kids, or I swear to God, bro, I don't give a fuck, girl, I swear to God, if you don't let me talk to my kids, you don't start acting right, nigga, I am telling you, I already know what the nigga drive, come to your house, I already know where

> the fuck you stay at, my nigga just followed him home. I know where the fuck he stay at. Nigga, girl, I swear to God, if I don't talk to my kids, I swear to God, I am gonna kill you and that bitch ass nigga. I am tired of y'all playing games with me. I swear to God, when I come back, bitch ass nigga better have my money when I get there, nigga. Now, you better let me see my kids. If you don't, I am going to come to your house. I am gonna act a fool. I don't give a fuck about going to jail. Girl, I swear to God, I am going to—I will kill you. Quit playing with me and my kids. I will kill you. I don't give a fuck. Girl, let me see my kids. I am telling you, nigga, somebody going to get hurt, (unintelligible) fuck with the bitch ass nigga. That is all right, nigga. My nigga follow you home. I know where the fuck that nigga stay at.

This voicemail scared Yvette. After hearing this message, Yvette told defendant that she "was completely done and that he had no reason to call my phone anymore[.]"

On June 10, 2015, it had been about two months since Yvette had last talked to defendant. That night, Yvette was woken up by pounding at the door. Yvette walked into the hallway and saw that Keyvette also had woken up. She told Keyvette to stay there and let her go and see what was going on. Yvette walked down the stairs. Keyvette did not listen and also came downstairs. Yvette realized the banging was coming from her front door. She yelled out and asked "who is it", and defendant said "it is Jay. I want to see my fucking kids." Defendant "sounded angry, intoxicated." Yvette did not let him in. She told him "it was late and that he needed to leave[.]" Yvette thought it was probably about 2:30 in the morning.

Defendant did not leave; instead, he "continued to bang on the door, continued to yell things through the door" like, "[y]ou don't want to open the door because you got some bitch ass nigger in there, things of that sort." Defendant stopped banging on the door for a few seconds, but started banging on the front window. Yvette went upstairs to get her phone to call the cops.

After Yvette grabbed her phone and went back downstairs, "[t]here was some yelling back and forth[.]" Yvette asked defendant to leave, and he said "he wasn't going to leave[.]" Defendant's banging on the window caused the glass to shatter. Defendant then came in through

the window and stepped over the couch and stated "fuck it, I am going to jail for murder tonight." Yvette believed defendant.

Yvette ran out the front door and across the street to her sister's house. Yvette saw defendant behind her when she was running. His hand was bleeding. He was screaming at her that she was "a bitch and that if he couldn't see the kids, then I wouldn't have them and I wouldn't be here to see them, and things of that nature."

Yvette made it to her sister's house and started banging on the door and screaming her sister's name, "trying to get her or somebody to open the door before he got to me." Yvette's sister's boyfriend opened the door, and Yvette ran inside the kitchen to grab a knife. Yvette called 911, and her sister and her sister's boyfriend blocked the door so that defendant could not get in. In her 911 call, Yvette relayed that her children's father "just busted my window, and he is threatening to kill me."

Keyvette also testified. She was twelve years old at the time of the trial. On June 10, 2015, Keyvette was woken up by "banging on the door." Keyvette and her mother went downstairs, and Keyvette testified that she "saw Jay come in the window." Keyvette identified defendant as Jay. Keyvette got her baby brother and put him into the room with her other brothers. Keyvette then went back downstairs, and saw that her mother "ran across the street" to Keyvette's "auntie's house." Keyvette saw defendant chase after her mother.

The jury found defendant not guilty of aggravated burglary but guilty of attempted-aggravated burglary. On January 13, 2017, the Court held defendant's sentencing hearing. At the sentencing hearing, the State asked for a sentence over five years. The prosecutor said:

> * * * * If I may address his record first, while he may not have too many convictions, we do see a pattern of alleged violence towards women and an inability to follow the rules that are placed upon him.

> He was charged in 2008 with domestic violence involving this victim. He does have those drug charges in Oklahoma, but he was given chances to handle himself out in the community and ordered to complete drug court. And then he eventually ended up getting sent to prison because he could not follow these rules out in the community or he violated his probation in some way.
>
> In addition, after this—I think what's really important is after this offense took place, we have this list of July 2015 violation of protection orders. And those were dismissed, but I think it's important to note those were dismissed after he was convicted in our case. Those violation of protection order counts took place between this offense happening and when he bonded out after indictment and then when we had our first court date, and they involved this victim.
>
> So he's charged with a high-level felony, a felony of the first degree. He has an order to stay away. She has a protection order, and he cannot follow the rules.
>
> He called her multiple times. Actually, one day it was 12 times in a row. And those cases followed along with ours.
>
> Now, as we all know with the system, I would presume those were dismissed because he's going to be sentenced in this case and he's been in for so long. But I don't think those should just be dismissed as, well, he wasn't convicted of them because I do think it shows exactly how he views the system.

The prosecutor also pointed out:

> * * * * He has that history of violence, and I think that the court heard it, and I think he has this huge disrespect for women, and we're ignoring that. That is how this offense took place, and I don't think being sober for 500 and some days is going to fix that part of this.
>
> * * * *
>
> You heard how he referred to the mother of his children on that phone call. You heard what he said when he showed up that night. You heard how he refers to her as bro, bra, uses derogatory terms.
>
> In addition, I listened to a lot of jail calls, and we've had this conversation. He was—he's had a hard time getting along with his female attorneys, not Ms. Phipps. And he's been very derogatory towards the court, which I think is indicative of how he

views all of this.

The trial court also found that defendant "demonstrated a consistent pattern of disrespect for women, for the mother of your children, for your children by your choices and your behavior. And I'm clear about that today. You have consistently been disrespectful." It then noted "[t]he voice messages that I heard during the trial, the 911 calls that I heard during the trial, demonstrate who you are as a man and as a father." The court said:

> And so I am bothered by the pattern of behavior that I have seen through this case. And I believe what you said on that—on that voice message to Ms. Faison. If you had an opportunity I believe that you would do physical harm to her. And but for intervening circumstances, that didn't occur on the night of this offense. That' what I believe, and so I believe that the jury was absolutely correct in the verdict it reached.
>
> So I'm just going to go right into the factors for felony sentencing because I know that you feel a certain way about me, and that definitely is not going to impact my decision. But I don't want to try your patience on today.

The court then discussed its responsibility in sentencing and went through the factors listed in R.C. 2929.12. In regards to the factors indicating that defendant's conduct was more serious, it first considered whether the "physical or mental injuries suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition of or age of the victim." It noted Keyvette's testimony and found this factor was present. It also found that Yvette and Keyvette suffered psychological harm, and that defendant's relationship with Yvette facilitated this offense.

In reviewing whether defendant committed the offense based on prejudice, the court found that the offense was motivated by prejudice based on gender. It explained:

> You seem to prey on what I will call the weaker sex, on women. I don't think that you would have approached this situation if you were dealing with a man or someone of the male gender. And so I will find that your behavior was motivated by

Ms. Faison's gender.

It also found that the offense was more serious because it involved a family member and the offense was committed in the vicinity of one or more of defendant's children. After balancing these factors, the court found that "this is the more serious type of conduct for this offense."

The court then considered the factors indicating this offense was less serious. It did not find that the victim induced or facilitated this offense. It also did not find that defendant acted under strong provocation. It found that in committing the offense, defendant did "cause or expect to cause physical harm to any person or property." It said, "[a]gain, the 911 call demonstrates that your intention, if you had the opportunity, was to physically harm Ms. Faison. You pounded on a glass window, which would certainly cause harm to property." Next it considered whether there were substantial grounds to mitigate defendant's conduct and found that there were no grounds to mitigate this conduct. As such, it found that none of the factors indicating that this offense was less serious were present.

The court also analyzed the recidivism factors. It noted that defendant initially was out on bond but his bond had to be revoked. Based on the PSI, the court found that defendant demonstrated "prolific use of alcohol, marijuana. There is use of cocaine, ecstasy, prescription medications, and other substances." The court found that defendant failed to acknowledge the pattern of drug or alcohol abuse or the need for treatment. The court also found that defendant had not demonstrated genuine remorse.

It further noted that defendant had two prior juvenile adjudications for petty theft and for being unruly. He had a few offenses he pled guilty to in Oklahoma. It also took into account the allegations that defendant violated the protection order in the present case. The court determined that defendant had not been living a law-abiding life for a significant number of years. It noted his record according to the PSI concluded at age 30, and he was only 31 at the time of

sentencing. The court also found that the offense was likely to recur. It thought that "as long as there is ongoing tension between you and Ms. Faison there's a distinct possibility that this same set of circumstances would continue to recur based on your own statements again in that voice message that you left with Ms. Faison." Based on all the foregoing, the court found that defendant was likely to recidivate. The court sentenced defendant to a total term of imprisonment of seven years at the Department of Rehabilitation and Corrections.

Defendant appealed and raised as an assignment of error that the sentence the court imposed was vindictive. On September 28, 2017, the Tenth District affirmed defendant's conviction and sentence.

RESPONSE TO PROPOSITION OF LAW NO. ONE:

A TRIAL COURT IS NOT VINDICTIVE BY CONSIDERING AT SENTENCING EVIDENCE THAT THE DEFENDANT IS BIASED AGAINST FEMALES AND THAT THIS BIAS WAS A FACTOR IN THE COMMISION OF THE OFFENSE AT ISSUE.

The defendant bears the burden of proving that the judge acted vindictively. *State v. Rahab,* Slip Opinion No. 2017-Ohio-1401, ¶3. "[A]n appellate court may reverse a sentence for vindictiveness only if, upon its examination of the entire record, it clearly and convincingly finds the sentence was based on actual vindictiveness." Id.

At the outset, defendant failed to preserve this claim. Thus, he must show plain error. Crim.R. 52(B). He cannot do so. Plain error exists only if there is an "obvious" defect in the trial proceedings that affected the defendant's "substantial rights." *State v. Payne,* 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶16, citing *State v. Barnes,* 94 Ohio St.3d 21, 27, 795 N.E.2d 1240 (2002). To show plain error, defendant must show that, but for the claimed error, the outcome of the trial clearly would have been different. *State v. Long,* 53 Ohio St.2d 91, 97, 372 N.E.2d 804 (1978). Notice of plain error is to be taken with utmost caution, under

exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Phillips*, 74 Ohio St.3d 72, 80, 656 N.E.2d 643 (1995).

First, the law "ordinarily 'presumes honesty and integrity in those serving as adjudicators." *Rahab*, supra, at ¶13, citing *Plumley v. Austin*, __U.S.__, 135 S.Ct. 828, 190 L.Ed.2d 923 (2015) (Thomas, J., dissenting from denial of certiorari), quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 891, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009) (Roberts, C.J., dissenting), quoting *Withrow v. Larkin*, 421 U.S. 35, 47, 95S.Ct. 1456, 43 L.Ed.2d 712 (1975). Additionally, here, there is no indication that the court punished defendant for something the law plainly allows him to do. *Rahab*, supra, at ¶8. There is no allegation that the court imposed an impermissible trial tax. The court did not involve itself in plea negotiations. It also did not increase defendant's sentence after a successful appeal. *North Carolina v. Pearce*, 395 U.S. 711, 725, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) (finding due process of flaw "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial").

In fact, there is nothing in the record indicating that the sentence the court imposed was the result of vindictiveness. Instead, the record shows that the court considered the purposes and principles of felony sentencing and considered the sentencing factors before announcing its sentence. The court also specifically said "I know that you feel a certain way about me, and that definitely is *not going to impact my decision*." (Emphasis added). Thus, the record actually refutes defendant's claim of vindictiveness.

For all the foregoing reasons, defendant's claim of vindictiveness fails.

B.

Defendant's claim of vindictive sentencing is really just his disagreement with the court's

finding that the crime was committed, in part, due to defendant's prejudice or bias against females. This is not a claim of vindictiveness. To succeed here, defendant must demonstrate that the record clearly and convincingly does not support this finding. Defendant cannot do so, as both the prosecution and the trial court cited numerous instances that showed defendant does have a bias against females and that this offense occurred, in part, as a result of that bias.

"[A]n appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶1. "The foregoing standard is highly deferential as the "the 'clear and convincing' standard used by R.C. 2953.08(G)(2) is written in the negative. It does not say that the trial judge must have clear and convincing evidence to support its findings. Instead, it is the court of appeals that must clearly and convincingly find that the record does not support the court's findings." *State v. Williams*, 11th Dist. Lake No. 2016-L-050, 2017-Ohio-1002, ¶9, citing *State v. Venes*, 8th Dist. Cuyahoga No. 98682, 2013–Ohio–1891, ¶21.

Here, the prosecutor detailed facts that support this finding. She noted that there is a "pattern of alleged violence towards women and an inability to follow the rules that are placed upon him." She explained how defendant was charged in 2008 with domestic violence in an incident involving Yvette. She also pointed out that after this offense took place and defendant was out on bond, there were numerous instances where defendant was alleged to have violated Yvette's protection order. She noted how defendant used derogatory language when speaking to Yvette. Significantly, the prosecutor explained that she listened to a lot of defendant's jail calls, and she noted that defendant "*had a hard time getting along with his female attorneys*, not Ms.

Phipps. And *he's been very derogatory towards the court*[.]" Id. (Emphasis added). Based on all this, the record does contain evidence that defendant is biased against females and that his bias played a role in the offense at issue.

The judge also explained why it made this finding. First, at the start of the sentencing hearing she noted that defendant "demonstrated a consistent pattern of disrespect for women, for the mother of your children, for your children by your choices and your behavior. And I'm clear about that today. You have consistently been disrespectful." To support this, the judge referenced the voice message defendant left Yvette, and the 911 call. The judge then found that defendant seemed "to prey" on women. It did not think that defendant would have approached the situation he found himself in with Yvette the same if he had been dealing with someone of the male gender. Only then did it find that defendant's behavior was "motivated by Ms. Faison's gender."

In sum, the record shows that defendant had a history of disrespecting Yvette. The prosecutor also referenced problems defendant had with his female attorney and even with the trial judge, all who were female. Thus, defendant cannot show by clear and convincing evidence that the record does not support the court's finding that he committed this offense in part due to a bias against females or that plain error occurred in this regard.

C.

Even if defendant could demonstrate that the court erred by making this finding, there is no likelihood of a different sentencing outcome. The court went through all the sentencing factors. It found none of the factors making this offense less serious were present. It found numerous other more-serious factors were present. It also found that defendant was likely to commit crimes of this nature in the future. Thus, even if the court erred by finding defendant

committed this offense in part based on his prejudice against females, there is no likelihood that he would have received a different sentence.

Significantly, all the evidence the court relied on to find that this offense was motivated by a bias against females was still relevant and could be taken into consideration at sentencing even if it did not support that specific finding. R.C. 2929.12(A), allows the trial court to consider "any other relevant factors to achieve the purposes and principles of sentencing." As a result, the court could still consider defendant's attitude towards women at sentencing. It could still consider defendant's pattern of conduct towards this victim specifically.

Based on all foregoing, defendant's claim is meritless, and further review is unwarranted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal does not present questions of such constitutional substance nor of such great public interest as would warrant further review. It is respectfully submitted that jurisdiction should be declined.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, November 16, 2017, to TOKI MICHELLE CLARK, 341 S. Third Street, Suite 104, Columbus, Ohio 43215; Counsel for Defendant-Appellant.

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