

IN THE SUPREME COURT OF OHIO

10-1023

STATE OF OHIO,

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Plaintiff-Appellee,

vs.

TERRENCE BARNES,

Defendant-Appellant.

CASE NO: _____

On Appeal from the Eighth
Appellate District, Cuyahoga
County
COA CASE NO:92512

C.R. CASE NO:CR-03-440305

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT TERRENCE BARNES

TERRENCE BARNES #453-668
Richland Correctional Institution
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DEFENDANT-APPELLANT, PRO SE

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FILED
JUN 11 2010
CLERK OF COURT
SUPREME COURT OF OHIO

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A trial judge commits misconduct and undermines a defendant's constitutional right to Due Process and a fair trial by making inappropriate and prejudicial comments during trial and following the verdict. Fifth and Fourteenth Amendments, United States Constitution, Section 16, Article I, Ohio Constitution. (Trial Transcript 4, 9, 10, 17, 140, 167, 200-02, 204-05, 208, 217-20, 222-23, 225-26, 244-45, 359-60, 422-31, 435, 440-42).....4

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Judgment Entry and Opinion, Court of Appeals, Eighth Appellate District, County of Cuyahoga, Appeal denied April 15, 2010 and journalized May 6, 2010

EXPLANATION OF WHY THIS CASE IS A CASE PUBLIC
OR GREAT GENERAL INTEREST AND INVOLVES
A SUBSTANTIAL CONSTITUTIONAL QUESTION

Appellant contends that this case involves substantial constitutional question because it involves multiple constitutional issues relating to Due Process, proper conference of jurisdiction (see attached bindover to Grand Jury County Commitment); Ineffective Assistance of Counsel, and vindictiveness by a trial judge. This case is complex and involves special circumstances because the record and transcript are not complete. (see Propositions).

The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. GIDEON v. WAINWRIGHT, 372 U.S. 335, 344, 83 S. Ct. 792, 796, 9 L. Ed. 2d 799 (1963).

Appellant further request that this Honorable Court accept jurisdiction of this very important case.

STATEMENT OF THE CASE AND FACTS

In 2003, Terrence Barnes was arrested on 6/22/03 for Domestic Violence, a violation of R.C. §2020.25. On 6/26/03 he was bound over to the Court of Common Pleas in Cuyahoga County. On 7/29/03 he was indicted on Rape, a violation of R.C. §2907.02 with a repeat violent offender specification (RVOS) and a notice of prior conviction (NPC); Count Two, Felonious Assault, a violation of R.C. §2903.11 along with a RVOS and NPC; Count Three, Kidnapping, a violation of R.C. §2905.01 with RVOS, NPC and SMS specifications; Count Four, Domestic Violence, a violation of R.C. §2929.25. On September 18, 2003 the charges were amended and Mr. Barnes received (8) years of incarceration. On November 9, 2006, his case was remanded for trial. In 2007, a jury trial was held and Mr. Barnes was found not guilty on the Rape charge and guilty on the Felonious Assault and Kidnapping charges. All of the specifications except the SMS attached to the Kidnapping charge were dismissed prior to trial. The Domestic Violence charge were also dismissed. The trial court sentence Mr. Barnes to serve (6) years for Felonious Assault and (8) years for the Kidnapping, as well as (5) years of postrelease control. The trial court ran the sentences consecutively, so that Mr. Barnes was sentenced to an aggregate term of (14) years of imprisonment. Following a direct appeal, the Eighth District affirmed Mr. Barnes' conviction. STATE v. BARNES, 8th Dist. No. 92512, 2010-Ohio-1659. The court held, in pertinent part, that "...Mr. Barnes has demonstrated a reasonable likelihood that the harsher sentence was motivated by vindictiveness." Id. at ¶60. One judge dissented. On 6/22/03, Terrence Barnes was in an ongoing romantic relationship with Mary Williams, who was the mother of his young son Malik. Ms Williams alleged that on that day Mr. Barnes became violent with her following an evening of drinking at a family gathering. Trial Tr. 149-51. During trial Ms. Williams testimony change from her initial statements (see attached) during cross-examination, defense counsel raised questions about Ms. Williams' credibility,

instances were at issue. Id. Ms. Williams' testimony about other incidents of domestic violence, criminal nature. For example, Ms. Williams told the jury about unrelated incidents in which Mr. Barnes slapped her and threw her from room to room. Id. at 137. Such testimony is the very kind of propensity evidence that Evid. R. 404(B) is meant to bar.

Ms. Williams' statements are propensity evidence, which is not admissible against a criminal defendant. Under Evid. R. 404(B), evidence of other acts is expressly impermissible when admitted to prove propensity to commit the crime at issue. The Ohio Supreme Court has held that, "an accused cannot be convicted of one crime by proving he committed other crimes or is a bad person." *STATE v. JAMISON* (1990), 49 Ohio St. 3d 182, 184. Admissibility of other-acts evidence carries "substantial danger that the jury will convict the defendant solely because it assumes that the defendant has a propensity to commit criminal acts, or deserves punishment.

ARGUMENT OF PROPOSITION OF LAW NO II:

An unbiased judge at trial is essential to Due Process. *JOHNSON v. MISSISSIPPI* (1971), 403 U.S. 212, 216. While a judge has some discretion in making remarks during a criminal trial, courts have recognized for over a century that "the influence of the trial judge on the jury is necessarily and properly of great weight." *STATE v. THOMAS* (1973), 36 Ohio St. 2d 68, 71; citing *STARR v. UNITED STATES* (1894), 153 U.S. 614, 626. Juries are highly sensitive to a trial judge's remarks rise to the level of a constitutional violation, the Ohio Supreme Court laid out five rules for assisiting prejudice: 1)the burden of proof is on the defendant to show prejudice, 2)it is presumed that the trial judge is in the best position to decide if there was a breach and how to correct it, 3) the remarks should be considered in light of the circumstances, 4)consideration is to be given to their possible effect on the jury, and 5)to their possible impairment on the effectiveness of counsel. *STATE v. WADE* (1978), 53 Ohio St.,

2d 182, 188.

Here, the trial judge made remarks throughout the proceedings, including pretrial, during trial, and following the verdict, which are inappropriate and showed bias against Mr. Barnes. The cumulative effect of those remarks denied Mr. Barnes a fair trial. Mr. Barnes' defense counsel failed to object to any of the judge's comments. Therefore, the standard of review is plain error. CRIM. R. 52(B). Plain error requires: 1) a deviation from the legal rule, 2) when the error is plain, and 3) affects substantial right. *STATE v. BARNES*, 94 Ohio St. 3d 21, 27, 2002-Ohio-68. The Sixth Circuit Court of Appeals has held that judicial misconduct can be the basis for a new trial, even under a plain error standard of review. *UNITED STATES v. SEGINES* (C.A. 6 1994), 17 F. 3d 847, 853. The Segines court stated, "We make this finding based upon the presumptively 'chilling effect' of the judge's comments upon the conduct of the trial by defense counsel. As such, we do not require Appellants to make a specific showing of this effect." *Id.*

This Court has previously overturned conviction based on judicial misconduct by applying the Wade rules. For instance, this Court reversed a conviction and ordered a new trial on the basis of judicial misconduct in *STATE v. LAING*, 8th Dist. No. 73927, 1999 Ohio App. LEXIS 5678. In Laing, the trial judge displayed bias against the defendant throughout the proceedings, beginning with his statement to the defendant that he would be sentenced to substantially more time if he went to trial. *Id.* The trial judge also improperly vouched for the credibility of State's witnesses and repeatedly interrupted and admonished defense counsel in front of the jury. This Court found that "cumulative effect of the trial court's actions and comments prejudiced appellant and denied him a fair trial." *Id.* See *UNITED STATES v. SALAZAR* (C.A. 2 1960), 293 F. 2d 442, 444

(judge reversed for berating defendant); *WALBERG v. ISRAEL*, (C.A. 7 1985), 766 F. 2d 1071, 1073 (judge reversed for ridiculing defendant's testimony). But the instances and evidence of a biased judiciary were so numerous and varied throughout the proceedings that their cumulative effect denied Mr. Barnes a fair trial. These instances included, but were not limited to:

- * The trial judge demonstrated his impatience and disagreement with the reversal of Mr. Barnes' conviction and the grant of a new trial. Trial Tr. 4.
- * The trial court chastised Mr. Barnes in front of the jury and insinuated that if Mr. Barnes did not testify it was because he had no defense. Id. at 140.
- * The trial judge openly assisted the State during trial. Id. at 167.
- * The trial judge frequently interrupted defense counsel. Id. at 200-02, 204-05, 208, 217-20, 222-23, 225-6.
- * The trial judge implied that he believed that Mr. Barnes was guilty. Id. at 359-60.
- * At sentencing and in front of the jury, the trial judge questioned Mr. Barnes' decision not to testify. Id. at 422-24.
- * The trial judge upbraided Mr. Barnes at length in front of the jury at sentencing. Id.
- * At sentencing, the trial judge implied in front of the jury that Mr. Barnes' decision not to testify was evidence of his guilt. Id. at 446-47.

The existence of several instances of inappropriate judicial behavior exposes a pattern of prejudicial conduct. *STATE v. WADE* (1978), 53 Ohio St. 2d 182. That prejudicial conduct prevented Mr. Barnes from having a fair trial. This Court must reverse Mr. Barnes' conviction and grant him a new trial that will be free from judicial misconduct.

ARGUMENT OF PROPOSITION OF LAW NO III:

Mr. Barnes was given a greater sentence following his new trial because he successfully appealed his guilty plea and elected to go to trial. Any increase

in a sentence above the original sentence is presumptively vindictive, and requires an affirmative explanation by the resentencing judge based on specific conduct or events that have taken place since the original sentence. *NORTH CAROLINA v. PEARCE* (1969), 395 U.S. 711, 725-726. If the presumption of vindictiveness is determined not to apply, defendant may nevertheless seek to demonstrate, from the record, that the harsher sentence is the product of actual judicial vindictiveness. *WASMAN v. UNITED STATES* (1984), 468 U.S. 559, 569; *UNITED STATES v. RODGERS* (6th Cir. 2001), 278 F. 3d 599, 604.

The United States Supreme Court has found that new adverse factual information, properly identified by the court, can rebut the presumption of vindictiveness that attaches to a greater sentence following a second or subsequent trial. *Wasman*, at 561-62. In *Wasman*, additional convictions on other unrelated offenses occurred between the first and second trials. *Id.* Mr. Wasman received a greater sentence after his second trial, which the sentencing court explained was due to the additional convictions that he had received. *Id.* at 562. In that context, the Court found, "after retrial and conviction following a defendant's successful appeal, a sentencing authority may justify an increased sentence by affirmatively identifying relevant conduct or events that occurred subsequent to the original sentencing proceedings." *Id.* at 572.

The trial judge in the instant case gave the appearance of bias by implying that Mr. Barnes would receive more time for proceeding to trial. Trial Tr. 9. The trial court also sentenced Mr. Barnes to additional time without a basis for increasing his sentence. Therefore, this Court must remand Mr. Barnes' case for a resentencing.

ARGUMENT OF PROPOSITION OF LAW NO IV:

Courts apply a two-step analysis to determine whether a defendant has been

deprived of the effective assistance of counsel. *STRICKLAND v. WASHINGTON* (1984), 466 U.S. 668. First, the defendant must show that counsel's performance was deficient. *Id.* at 687. Second, the defendant must show that the deficient performance prejudiced the defense. *Id.*

Here, Mr. Barnes was denied the effective assistance when his trial attorney failed to request a limiting instruction regarding other-acts evidence. See Assignment of Error I. This Court recently held that a defendant is generally entitled to such a limiting instruction, although it may be reasonable trial strategy for counsel to not request one. *STATE v. SPERK*, 8th Dist. No. 91799, 2009-Ohio-1615, at ¶38. When there is no reasonable probability that the testimony contributed to the conviction, the lack of a limiting instruction does not constitute plain error. *STATE v. MITCHELL*, 8th Dist. No. 88977, 2007-Ohio-6190, at ¶85-86. However, it was not reasonable trial strategy for defense counsel to fail to request a limiting instruction. Without an instruction, the jurors almost certainly used Ms. Williams' testimony about other acts as evidence that Mr. Barnes committed the instant offense. Such testimony is prejudicial and should not have been used for that purpose. Therefore, defense counsel was ineffective in failing to request a limiting instruction.

Moreover, defense counsel was ineffective in failing to object to the trial judge's prejudicial remarks, as well as the length of Mr. Barnes' sentence. See Assignment of Error II and III. Counsel's performance was deficient because the trial judge's remarks evidenced bias and prejudiced the jury against Mr. Barnes. Therefore, trial counsel was constitutionally ineffective and Mr. Barnes' conviction should be reversed for a new trial.

ARGUMENT OF PROPOSITION OF LAW NO V:

Defendant-Appellant contends that he was in Court on September 17, 2003 and September 18, 2003. The docket sheet only referenced the Court appearance

of September 18, 2003 and is completely voided of the factual hearing held on September 17, 2003. In Appellate Counsel's Brief she incorrectly implies that defendant plead guilty on September 17, 2003 which is completely untrue and Defendant-Appellant has brought this to her attention. The complete transcripts has been intentionally hidden as not to reveal what actually occurred in Court. Defendant-Appellant made numerous attempts to obtain the complete transcripts of said proceeding was indeed critical to prove Judge Daniel Gaul's biased and prejudiced behavior. Such a procedure cannot be deemed adequate for the right for full appellate review and nor can this issue be ignored. In *HARDY v. UNITED STATES* (1964), 375 U.S. 289, 84 S. Ct. 424, the Court stated that:

"As any effect advocate will attest, the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law. Anything short of a complete transcript is incompatible with effective appellate advocacy."

The U.S. Supreme Court in *GARDNER v. CALIFORNIA*, supra followed this theory by stating:

"We deal with an adversary system where the initiative rest with the moving party. Without a transcript the Petitioner...would only have his/her own lay memory of what transpired...For an effective presentation of the case he would need the findings...and the evidence that had been weighed and rejected in order to present his case in the most favorable light. Certainly a lawyer accustomed to precise point of law and nuances in testimony, would be lost with such transcript. A layman needs the transcript more."

Defendant-Appellant further contends that the initial proceedings is now void in the docket, do to the failure of the Clerk to maintain the completeness, accuracy and integrity of the court files.

The record of a judicial proceeding is a history of the case from its beginning to its end, see *NEWNAM'S LESSEE v. CITY OF CINCINNATI*, 18 Ohio 323, (1849); *CHAPMAN v. SEELY*, 1 Ohio Dec. 439, 4 Ohio C.D. 395, 1891 WL 307 (Cir. Ct. 1891); *FIRST NAT. BANK OF TOLEDO v. FITCH*, 7 Ohio N.P. 426, 5 Ohio Dec.

With respect to any judicial body which is a Court of Record, it is a basic principle that such a Court acts and speaks only through its records. Defendant asserts that it was impossible to receive effective assistance of counsel when counsel relied solely on an incomplete transcript and inaccurate record.

For the foregoing reasons, Defendant-Appellant request that this Court issue an order demanding the complete transcripts so that it can see for itself what actually occurred or in the alternative issue a new trial that is free from vindictiveness.

ARGUMENT OF PROPOSITION OF LAW NO VI:

Defendant-Appellant contends that he received ineffective assistance of appellate counsel and trial counsel when both failed to make the preliminary hearing a part of the record for trial and appellate review.

Under equal protection principles, an indigent defendant must be provided with basic tools of an adequate defense. This obligation includes "a transcript of prior proceedings when that transcript is needed for an effective defense." ANDERSON v. COMMONWEALTH, 19 Va. App. 208, 211, 450 S. E. 2d 394, 395-96 (1994) quoting BRITT v. NORTH CAROLINA, 404 U.S. 226, 227 (1971). [FN2] in determining need, two factors predominate: the strategic "value" of the transcript proves to the defense, and the availability of alternative devices that would fulfill the same functions as a transcript." BRITT 404 U.S. at 227; WHITE v. COMMONWEALTH, 21 Va. App. 710, 714, 467 S.E. 2d 297, 299 (1996); ANDERSON, 19 Va. App. at 211-12, 450 S.E. 2d at 396 (citation omitted). An indigent does not have to show a particularized need tailored to the facts of the particular case." BRITT, 404 U.S. at 228. Nor does an indigent "bear the burden of proving inadequate such alternatives as may be suggested by the State or conjured up by a Court in hindsight." ANDERSON, 19 Va. App. at 212-13,

450 S.E. 2d at 396 (citation omitted). This hearing was indeed critical along with all the initial proceeding against Appellant. Appellant has not had the opportunity to meet his burden of establishing prejudice with the inaccurate record and critical documents. At the minimum Defendant-Appellant could have atleast utilized Page (10) of Preliminary Hearing to show that M.W. stated in open court when asked by attorney, "Is it fair for me to say that you've made a habit of charging him with crimes and then saying that he didn't commit them later, correct" and she states "Yes Sir". Had trial counsel on appellate counsel utilized these transcripts the outcome would have been vastly different since M.W. did infact have a habit of playing a **damsel in distress** often times and filing false complaints against Defendant-Appellant for crimes he never committed. Appellant contends that M.W. hired court appointed counsel Ruth Fischbein-Cohen to defend Appellant on a false charge that she made against him in the past. All of this and more was indeed critical to Appellant's defense and it was never asserted by either counsel. Accordingly, Mr. Barnes' conviction should indeed be reversed.

ARGUMENT OF PROPOSITION OF LAW NO VII:

The inadequate representation that Defendant-Appellant received prior to and during trial fell below and objective reasonable standard, violating Defendant-Appellant's right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution where Counsel actively represented conflicts of interest, failed to investigate the police misconduct by Duane R. Funk, purposely withheld documents from defendant, refused to bring forth exhibits, and knowingly lied to court about exhibits. Counsel acted in bad faith while engaging in behavior involving moral turpitude, dishonesty, deceit and misrepresentation.

In the above-styled case, Defendant-Appellant contends that appointed counsel Ruth Fischbein-Cohen actively represented conflicts of interest when

she failed to present the exhibits he gave her for trial. The exhibits include the following:

1. Page one of the discharge instructions from Southwest General Health Center on 6/22/03 where it clearly states, sexual assault, and that the patient (Mary Williams) has been examined for sexual assault, see attached.
2. Page one of final report (**CAT SCAN-CT BRAIN/HEAD**) without contrast from Southwest General Health Center, see attached.
3. Page one of two (continued) of final report. Diagnostic radiology cervical spine from Southwest General Health Center, see attached.
4. (3) pages of the case information forms.
5. Initial statements Mary Williams (alleged victim) wrote, see attached.
6. Prior police reports and complaints filed by alleged victim Mary Williams whom had a habit of making false complaints and lying on Defendant-Appellant. Defendant-Appellant was unable to obtain the police reports where Mary Williams spent (3) days in Parma Jail for lying on Defendant-Appellant, but it was brought to counsel's attention.
7. the initial police report. NO:MD0301886.

Had these been presented, the proceedings would have been vastly different. Counsel clearly was acting in bad faith when she failed to submit the critical documents that the Defendant-Appellant gave her. These exhibits were indeed crucial and it clearly prejudiced the Defendant-Appellant during trial and for appellate review. Defendant-Appellant literally begged counsel to put him on the stand to dispute the lies that M.W. and the State were alleging when it became obvious that she would not submit the exhibits. Counsel initially misled Defendant-Appellant to believe that she would submit them. Although counsel acknowledged that Defendant-Appellant did in fact give her the exhibits, see TR. PG. (6) line (10) and (11) she deceitfully lied in open court stating that they were frivolous, see TR. PG. (6) line (12) and (13). Certainly, this prejudiced the Defendant-Appellant because it was an "outright lie" and counsel was not acting as an advocate of the Defendant-Appellant. In addition, counsel failed to subpoena the phone conversations held during the visits of alleged victim

M.W. that were also crucial for his defense. Counsel was put on notice of these visits and the conversations and was well aware that Defendant-Appellant never asked M.W. to visit him, nor did he force her to violate the protection order that was in place. Defendant-Appellant was often surprised how alleged victim continuously was allowed to visit him on numerous occasions. The conversations on the visits contained M.W. continuously stating that Detective Duane R. Funk was threatening to send her bad to Iraq and he was coaching her to say false things in relations to the case.

ARGUMENT OF PROPOSITION OF LAW NO VIII:

In a manifest-weight analysis, an Appellate Court "review[s] the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and ***resolve[s] conflicts in the evidence." **THOMPkins, 78, Ohio St. 3d at 387, 678 N.E. 2d 541.** "A court reviewing questions of weight is not required to view the evidence in a light most favorable to the Prosecution, but may consider and weigh all of the evidence produced at trial." **Id. at 390, 678 N.E. 2d 541 (Cook, J. concurring).** An Appellate Court may not merely substitute its view for that of the jury, but must find that "the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." **Id. at 387, 678 N.E. 2d 541.**

The Defendant-Appellant hereby states that the sentences and conviction in this case are unconstitutional because the charges are against the manifest weight of evidence, the charges were improperly conveyed to Cuyahoga County, and the indictment was improperly obtained.

The Defendant-Appellant brings this claim based on the assertion that he was arrested on 6/22/03 for Domestic Violence "only," incident number MD0301886. He was not arrested on that day for any other cases, nor was he on probation or parole for any other charges at the time of this arrest.

The circumstances, nor the facts of the hospital report, nor the illegally obtained indictment support the conviction of Felonious Assault. At best, it was nothing more than a Domestic Violence. At worst it was nothing more than Aggravated Assault. The initial proceedings need to be examined in order to support the facts surrounding these circumstances. Defendant-Appellant was never arraigned in Berea Municipal Court for Felonious Assault.

Furthermore, the Kidnapping Charge was mere handwritten as if an afterthought on the bindover to Grand Jury County commitment form.

The illegally obtained indictment along with the Bill of Particulars specifically state, furthermore, on the same date, and at the same location, the Defendant, Terrence L. Barnes, unlawfully and by force, threat or deception removed Jane Doe, date of birth March 14, 1978, from the place where she was found or restrained her of her liberty for the purpose of facilitating the commission of a felony or the flight thereafter and/or engaging in sexual activity, as defined in Section 2907.01 of the Revised Code, with Jane Doe against her will.

SEXUAL MOTIVATION SPECIFICATION

R.C. §2941.147

The Grand Jury further find and specify that the offender committed the offense with a sexual motivation. Making clear the accusation the the defendant committed a kidnapping with a sexual motivation. Defendant was found not guilty of rape and was acquitted of all sexual charges, and thus did not support a charge of kidnapping that was illegally transferred to Cuyahoga County... For the first time during trial defendant heard the false accusation that he tied the alleged victim to his arm and went to sleep which was clearly a lie. On cross the alleged victim stated that defendant tied himself up to her with a towel, where a few seconds previous she alleged defendant used a T-shirt which was also a complete lie.

Defendant states that he made a Prima Facie Case as to why this case should be reopened and reversed and he asserts that he is entitled to relief from the operation of the judgment and that such relief would serve substantive justice.

CONCLUSION

For the reasons cited here Appellant respectfully requests that this Honorable Court accept jurisdiction of this very important case.

Respectfully Submitted,

Terrence Barnes

Terrence Barnes 453-668
Defendant-Appellant, pro se
Richland Correctional Inst.
P.O. Box 8107
Mansfield, Ohio 44901

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent by regular U.S. Mail to Timothy Faden, Cuyahoga County Assistant Prosecutor, 9th Floor, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, on this 7 day of June, 2010.

Terrence Barnes
Sender

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

TERRENCE BARNES,

Defendant-Appellant.

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CASE NO: _____
On Appeal from the Eighth
Appellate District, Cuyahoga
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COA CASE NO:92512
C.R. CASE NO:CR-03-440305

APPENDIX TO

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT TERRENCE BARNES

MAY 06 2010

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: MAY 06 2010

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FILED AND JOURNALIZED
PER APP.R. 22(C)

MAY X 6 2010
GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

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ANNOUNCEMENT OF DECISION
PER APP.R. 22(B) AND 26(A)
RECEIVED

APR 15 2010

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

CA08092512

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ALL PARTIES--COPIES TAKEN

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

COLLEEN CONWAY COONEY, J.:

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

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.

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.

Barnes now appeals, raising four assignments of error for our review.²

¹Barnes'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.

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

Factual Background

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.

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 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

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.

"[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.

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.”

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.

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.

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).

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

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.

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*.

In this vein, the Ohio Supreme Court has warned:

"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.”

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

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.”

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.

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

Barnes: “That's ridiculous.”

Court: “I don't want anymore [sic] comments from you; you hear me?”

Barnes: “Yes, sir. She lying.”

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

Barnes: "I would like to."

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

Barnes: "Yes sir."

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

Barnes: "Yes."

Court: "— if there is one more word."

Barnes: "So I can't talk to —"

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?"

Barnes: "Yes, sir."

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.

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.

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.

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.

The second assignment of error is overruled.

Vindictive Sentence

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."

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.

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:

Court: “Mr. Barnes, what would you like to say in this matter?”

Barnes: “Like I said four years ago, I just want a fair trial.”

Court: “You didn’t say that four years ago.”

Barnes: “Yes. You threatened me into pleading guilty. Wasn’t on the record.”

Court: “Let me explain something to you, ok? I remember your case very well.”

Barnes: “I do too.”

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.

“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."

Barnes: "That's all I wanted."

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."

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."

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

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

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

³This 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."

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."

* * *

"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[.] * * *"

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 kidnaping 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.

"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."

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.

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.

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.

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

The third assignment of error is overruled.

Ineffective Assistance of Counsel

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.

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

"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."

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.

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.

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

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.

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.

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.

The fourth assignment of error is overruled.

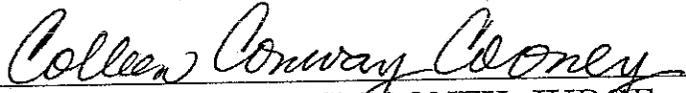
Judgment is affirmed.

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

⁴Failure 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.

⁵I 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.

⁶On 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.

STATE OF OHIO)
)SS.
COUNTY OF RICHLAND)

AFFIDAVIT OF TERRENCE BARNES

I, Terrence Barnes, do hereby solemnly swear that according to law and under the penalty of perjury, being competent to testify to the facts enumerated herein, do, hereby swear and affirm that the following statements are true and correct.

1. I am the Defendant-Appellant in said case CR-03-440305 and 92512.
2. Defendant-Appellant states that Judge Daniel Gaul displayed a personal bias and obvious prejudice towards Defendant-Appellant on 9/17/03 and 9/18/03.
3. Defendant-Appellant affirms that the factual hearing held on 9/17/03 has been purposely hidden and/or destroyed as not to reveal what actually occurred during said hearing.
4. Defendant-Appellant affirms that the factual hearing held on 9/18/03 was extremely abnormal, irregular, biased, one-sided, and thus prejudice Defendant-Appellant.
5. Defendant-Appellant affirms that the proffered transcript does not accurately reflect what actually occurred on 9/17/03 and 9/18/03 and involve fraudulent, frivolous, deceitful dialog that never occurred and intentionally omitted and/or altered dialogue that actually occurred.
6. Defendant-Appellant affirms that the above-styled case reeks of foul play.
7. Defendant-Appellant contends that he asked for Court Appointed Ruth Fischbein-Cohen because of her familiarity with the declarant in above-styled case. Specifically the declarant hired Attorney Ruth Fischbein-Cohen to defend Defendant-Appellant in CR-390914.
8. Defendant-Appellant verily believes that above mentioned Attorney knowingly, and actively represented conflicts of interest in CR-03-440305 and further acted in bad faith as well as committed ethical violations of the code of professional responsibility.
9. Defendant-Appellant further contends that Ruth Fischbein-Cohen knowingly engaged in conduct involving moral turpitude, dishonesty, deceit and misrepresentation when she knowingly lied in open court stating that Defendant-

Appellant gave her frivolous documents as an attempt to make an excuse or justification for not providing documents to the Court that the Defendant-Appellant gave her.

10. Defendant-Appellant contends that above-mentioned Attorney purposely withheld these critical documents from the Court and Jury and it prejudiced Defendant-Appellant to have a fair trial.
11. Defendant-Appellant contends that above-mentioned Attorney adamantly refused to give Defendant-Appellant any documents pertaining to his case prior to, during or after trial and the documents that Defendant-Appellant has, obtained them on his own and through other resources.
12. Defendant-Appellant also contends that above-mentioned Attorney knowingly lied to the Court on 9/5/07 when she stated that she's just now hearing about Defendant-Appellant's witnesses right before trial and purposely kept the two witnesses in the hallway during trial while having the Defendant-Appellant under the impression that these witnesses would be used.
13. Defendant-Appellant contends that above-mentioned Attorney initially led him to believe that she would infact submit the exhibits/documents he gave her. During trial when he questioned her about it she stated that it wasn't our turn to show them yet.
14. Defendant-Appellant contends that the above-mentioned Attorney failed to object and/or challenge jury member King who clearly raised his hand when everyone was asked, "is there anyone in here who can't be fair to this Defendant for any reason".
15. Defendant-Appellant contends that above-mentioned Attorney failed to file critical pre-trial motions and ignored Defendant-Appellant's request to do so which prejudiced Defendant-Appellant.
16. Defendant-Appellant contends that after the first day of trial he came back and immediately wrote out two motions to be preserved for Appeal.
17. Defendant-Appellant contends that despite a no contact order, the alleged

victim visited him on numerous occasions expressing to Defendant-Appellant that she was being threatened by Detective Duane R. Funk to be sent back to Iraq because she didn't have a citizenship. Trial Attorney was well aware of these facts and failed to get the records of these conversations.

18. Defendant-Appellant contends that CR-03-440305 was indeed illegally transferred from Berea Municipal Court to Cuyahoga County Court of Common Pleas.
19. Defendant-Appellant never requested victim to visit him and she did so solely on her own accord.
20. Defendant-Appellant never attempted to coerce, threaten, or persuade the alleged victim to testify in his behalf.
21. Defendant-Appellant does not waive his Supplemental Assignment of Errors and was totally not aware that the State did not receive a copy.
22. Defendant-Appellant contends that he was only arrested for Domestic Violence (Case No:MD0301886).
23. Defendant-Appellant contends that the hospital reports does not support Felonious Assault and Appellant contends that he did not knowingly, nor intentionally harm M.W.
24. Defendant-Appellant further contends that he did not kidnap M.W. nor tie M.W. to his wrist and the first time he heard such an accusation was during trial, thus his outburst stating that was a lie because it caught him by surprise.
25. Defendant-Appellant contends that he brought the behaviors of Trial Judge Daniel Gaul and Detective Duane R. Funk to the attention of Doctor Sherif Soliman at the Northcoast Behavior Healthcare. (See report written by Doctor Sherif Soliman)
26. Defendant-Appellant has received Ineffective Assistance of Counsel when Appellant's Counsel failed to make the Preliminary Hearing, along with all proceedings from the Berea Municipal Court a part of this record for this Court's Review.

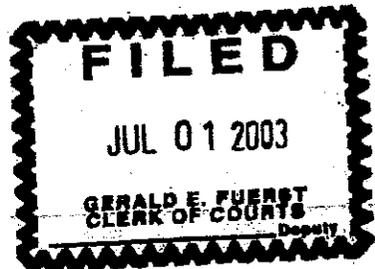
27. Defendant-Appellant contends that this Court relied on an incomplete and inaccurate record and thus should order a complete record of the entire proceedings. This Court failed to see the complete transcript of the hearings held on 9/17/03 and 9/18/03. These hearings were crucial to prove a prejudice, biased Judge.
28. Defendant-Appellant contends that Appellate Counsel was ineffective because she failed to raise these winning issues and Defendant-Appellant was prejudiced because his conviction would have been reversed either by this Court or a higher Court if Appellate Counsel would have raised these issues.
29. Defendant-Appellant contends that the testimony of M.W. was false and clearly orchestrated.
30. Defendant-Appellant contends that prior to this case, the Judge in Berea Municipal Court, Mark Comstock stated that "I don't know who's crazier you or him, but yall two come back in my courtroom somebody's going to jail".
31. Defendant-Appellant contends that M.W. hired Attorney Ruth Fischbein-Cohen to defend Appellant in CR390914 concerning an complaint.
32. Defendant-Appellant contends that at the time of his second trial the alleged victim had a case pending, thus a motivation to continue with the false testimony.

Terrence Barnes
Terrence Barnes 453-668

Sworn to and subscribed in my presence, a Notary Public this 13 day of May, 2010.

Rebecca Williams
Notary Public
Rebecca Williams
Notary Public
State Of Ohio
My Commission Expires
4 Mar 2013

Berea Municipal Court
11 Berea Commons, Berea, Ohio 44017
(440) 826-5960 Fax (440) 891-3387



STATE OF OHIO
COUNTY OF CUYAHOGA
CITY OF MIDDLEBURG HTS

Case No. 03CRA01082-1-2

vs.

Offense: RAPE, Kidnapping
O.R.C./Ordinance 2907.02
Offense Date: 06/22/03

440305

TERRANCE L. BARNES
758 PARKWOOD
CLEVELAND OH 44128

DAYS SERVED: 4

SS# 272-72-5757
DOB: 09/20/70

BIND OVER TO GRAND JURY
COUNTY COMMITMENT

Defendant

Defendant having appeared before Berea Municipal Court, and having been advised of Criminal Rule 5 Rights, has either waived the right to a preliminary hearing OR having testimony taken at a preliminary hearing, there was probable cause found that this Defendant committed an offense

Therefore, Defendant is bound over to the Grand Jury on the following charges:

2907.02 RAPE 2905.01 KIDNAPPING

Defendant shall furnish bail for his/her personal appearance in the Cuyahoga County Common Pleas Court or in default thereof to stand committed.

Cash or Surety Bond \$250,000.00
10% Bond: 10% of:
Personal Recognizance

DATE: 06/26/03

JUDGE

This is certified to be a correct copy of the order as journalized in the Berea Municipal Court Signed and sealed on 06/26/03.

RAYMOND J. WOHL, CLERK OF COURT

Total Costs Due: \$130.00

BY: Colleen Conner

1278P

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PURSUANT TO SUPERINTENDENCE
RULE 45**

JAIL

MUNICIPAL COURT - CRIMINAL AND TRAFFIC

03CRA01089-1-1 MD0301886 MIDDLEBURG HTS

TERRANCE L. BARNES (street, city, state, zip)

7665 NORMANDIE BLVD. D-18 MIDDLEBURG HTS

Soc. Sec. # Birth Date Arrest Date 09/20/70 06/22/03

Ord. No./O.R.C. # Charge 2903.11 FELONIOUS ASSAULT (FL)

Operators License # state Enclosed

License Plates # DET. FUNK

Court Date 06/25/03 NON-WAIVERABLE

PATRICK TALTY Assigned Phone: c/o 032 WAIVED

BOND: CASH SURETY 30% PERSONAL \$250,000 Bond No. 01082

and Co. Receipt No. JIM

Condition Bond No contact w/ Bond Con't Date

INSURANCE: PROVEN NOT PROVEN

ARRAIGNMENT: (6/25/03) CONTINUE SO DEFENDANT CAN OBTAIN COUNSEL, RESET TO: (/ /)

PLEA: GUILTY NOT GUILTY NO CONTEST FOUND GUILTY WSP NO WSP FT TRIAL PH PSI JIM

WAVE PH BOGJ SENTENCE NOW OVER FINE ONLY \$ SET PH 6/26/03 - 9:00 AM

ADVERSE PLEA: GUILTY NO CONTEST-Consent guilty, waive defects. (/ /) SENTENCE NOW OVER PSI

DEFER SENTENCE TO FINE ONLY \$ + COSTS. JIM

VEHICLE: DAY IMMOBILIZATION PERIOD. AFTER HEARING, RELEASE VEHICLE TO DEFENDANT. (/ /)

RELEASE VEHICLE TO INNOCENT OWNER. AFTER HEARING, APPEAL DENIED, OCCUPATION DRIVING GRANTED.

OCCUPATIONAL DRIVING GRANTED. ALS TERMINATED OTHER. JIM

ARRANT: APIAS (/ /) JIM COLLECT BOND (/ /) JIM

CASE DISMISSED (/ /) COST PAID BY: CITY/STATE DEFENDANT 6/26/03 PH had - Prob Case found - BOGJ

WAIVER OF ATTORNEY I, the above named Defendant herein, having been fully advised of the right to obtain Counsel, and if indigent, to the right to have an attorney appointed, do hereby waive such right in Open Court, in accordance with Ohio Rules of Criminal Procedure (Rule 22 and Rule 44 B & C) and this waiver applies equally to all related cases.

WAIVER OF TIME I, the above named Defendant herein, having been fully advised in open court of my right to trial upon the charge before this Court within days after my arrest or the service of summons pursuant to the provisions of the Ohio Revised Code Sec. 2945.71, and with full knowledge of same, do hereby waive such right and consent to the Berea Municipal Court's setting this matter for trial at said court's convenience and this waiver applies equally to all related cases.

Witness to each signature above:

Table with 4 columns: Date, Fine, Costs, Total. Sub-headers: Date, Rec't. No., Amt. Paid, Balance.

Police Department

CITY OF MIDDLEBURG HEIGHTS

15850 Bagley Road • Middleburg Heights, Ohio 44130
440/243-1234 • 440/243-0221 fax



Gary W. Starr
Mayor

John W. Maddox
Chief of Police

Sandra Kerber
Safety Director

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Berea Municipal Court

11 Berea Commons • Berea, Ohio 44017 • (440) 826-5860 • Fax: (440) 891-3387

Mark A. Cornstock
Judge

Charles D. Castrigano
Magistrate

Raymond J. Wohl
Clerk of Court

NOTICE OF FELONY BINDOVER

DATE 6-26-03

THE CASES LISTED BELOW HAVE BEEN BOUND OVER TO
CUYAHOGA COUNTY COMMON PLEAS COURT, CRIMINAL
DIVISION ON 6-26-20-03

CITY OF MH vs Terrence L. Barnes
TOWNSHIP OF _____

CASE NO 0344 01082-1-2

CASE NO 0344 01089-1-1

CASE NO _____

RAYMOND J. WOHL, CLERK OF COURT

C. Coyle
Deputy Clerk

COPY TO POLICE DEPT. _____

Serving
Berea
Brook Park
Middleburg Heights
Olmsted Falls
Olmsted Township
Strongsville
Ohio State Patrol
Cleveland MetroParks



Police Department

CITY OF MIDDLEBURG HEIGHTS

15850 Bagley Road • Middleburg Heights, Ohio 44130
440/243-1234 • 440/243-0221 fax



Gary W. Starr
Mayor

John W. Maddox
Chief of Police

Sandra Kerber
Safety Director

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CURRENT INFORMATION ON DEFENDANT (Video Arraignments)

(PLEASE PRINT)

NAME Terrance L. Barnes

ADDRESS 765 Normandie Blvd. D18
Middleburg Heights, Ohio 44130

PHONE NO. N/A

PLACE OF EMPLOYMENT:
N/A

EMPLOYER'S PHONE NO. N/A

SOCIAL SECURITY NO. 272-72-5757

EMERGENCY PHONE NO. N/A

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RULE 45**