ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	No. 11-0459
Plaintiff-Appellee,	:	On Appeal from the Greene County Court of Appeals, Second Appellate District.
-vs-	:	
DEMOND MOORE,	:	Court of Appeals Case No. 2010 CA 13
Defendant-Appellant.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT DEMOND MOORE

Robert Alan Brenner, No. 0067714 (Counsel of Record)
Robert Alan Brenner, LLC
PO Box 341021
Beavercreek, Ohio 45434-1021
(937)427-9450
Fax No. (937)427-9455
rabllc@yahoo.com

COUNSEL FOR APPELLANT, DEMOND MOORE

Stephanie R. Hayden, No. 0082881
Assistant Prosecutor
Greene County Prosecutor's Office
61 Greene Street, Xenia, Ohio 45385
(937)562-5250
Fax No. (937)562-5258

COUNSEL FOR APPELLEE, STATE OF OHIO

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A defendant is denied a fair trial in contravention of the Due Process Clauses of the Constitutions of Ohio and the United States when the State is allowed to present alleged prior bad acts to the jury, over objection, in violation of Ohio Evidence Rule 404 and the trial judge fails to give a limiting instruction. 4

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A defendant is denied a fair trial in contravention of the Due Process Clauses of the Constitutions of Ohio and the United States when a guilty verdict, which is against the manifest weight of the evidence, rests solely upon the testimony of the complaining witness and the complaining witness provided additional facts during subsequent police interviews and at trial that were not provided to police in initial statements. 5

Proposition of Law IV:

The double jeopardy protections of the Ohio and United States Constitutions, as codified in R.C. 2941.25, require that the offenses of abduction and burglary be merged because they are allied offenses of similar import when they are based on a continuing course of conduct with a single victim and single animus. 6

Proposition of Law V:

A defendant is denied his right to be free from cruel and unusual punishment in contravention of the Constitutions of Ohio and the United States when a trial court abuses its discretion by sentencing a defendant to more than minimum, concurrent prison terms when the factors of R.C. 2929.12 and the overriding purposes of felony sentencing in R.C. 2929.11 weigh in favor of a minimum, concurrent prison term. 7

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

Demond Moore was denied a fair trial when the State was allowed to use alleged prior bad acts to convict him, when the State used the prior bad acts and the trial judge gave no limiting instruction, and when his convictions were against the manifest weight of the evidence. Moore was punished twice for his alleged conduct because the offenses of burglary and abduction were not merged and he was convicted and sentenced on both. And Moore has been subjected to cruel and unusual punishment because he was sentenced to a nine year prison term.

This case is of great general and public interest and involves substantial constitutional questions regarding the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States and Article I, Sections Nine, Ten, and Sixteen of the Constitution of Ohio.

STATEMENT OF THE CASE AND FACTS

After being convicted by a jury of burglary in violation of R.C. 2911.12(A)(1), a felony of the second degree, and abduction in violation of R.C. 2905.02(A)(2), a felony of the third degree, Demond Moore appealed to the Second District Court of Appeals for Greene County Ohio. The Court of Appeals affirmed Moore's convictions and sentence by Opinion rendered on February 11, 2011.

Moore's convictions were the result of allegations by his former girlfriend made against him on June 3, 2009. In the early morning hours of that day, Lori Englund claimed that Moore entered her apartment in which they both once lived.

At about 3:30 AM Englund claims Moore called her and asked if he could come over.

She says she told him "no." According to her, Moore entered her apartment through an unlocked door while he was speaking with her on the phone.

She testified that Moore hit her in the back of the head and took her cell phone from her. She testified that he refused to give her phone back to her and hit her in her jaw and grabbed her neck when she refused his requests that she leave the bedroom and go into the living room with him. Englund testified that she went to the living room with Moore because she was afraid Moore would get abusive toward her as he had done in the past.

Englund testified that Moore asked her to play with his testicles and so she grabbed them really hard. She testified that Moore then punched her in the face, squeezed her breast really hard, and acted like he was going to throw a small chair at her. Englund testified that Moore told her he was going to cut her throat, that Moore got a knife and acted like he was going to throw it at her. She testified that Moore then put the knife back in the kitchen.

Englund testified that Moore tried to call his mother but failed to reach her. She testified that Moore then gave her the phone back and left. Englund eventually called the police.

Moore was convicted of burglary and abduction based on these alleged events.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law I:

A defendant is denied a fair trial in contravention of the Due Process Clauses of the Constitutions of Ohio and the United States when the State is allowed to present alleged prior bad acts to the jury, over objection, in violation of Ohio Evidence Rule 404.

A defendant has a right to due process and a fair trial pursuant to Amendments V and XIV of the Constitution of the United States and Article I, Section 16 of the Constitution of

Ohio. Ohio Evidence Rule 404(B) attempts to uphold that right by prohibiting the State from introducing evidence of other crimes, wrongs or acts to prove the character of the defendant in order to show action in conformity therewith.

In this case the complainant, Lori Englund, testified over objection about past verbal and physical abuse she said Demond Moore imposed on her. She testified that she was scared of him and complied with his requests because he abused her in the past when she did not comply with him.

The Court of Appeals determined that the prior bad acts – the prior alleged abuse by Moore upon Englund – was relevant since Moore was on trial for abduction and the State had to show that Moore was in fear. However, any probative value was clearly outweighed by the potential prejudice precisely because Moore was on trial for abduction. Evidence Rule 404(B) prohibits use of prior bad acts to show conformity therewith. But the Court of Appeals allowed it because the prior alleged abuse helped the State prove its case against Moore.

The potential prejudice also outweighed any probative value since Englund testified that Moore trespassed in her apartment, hit her in her head, took her phone, hit her in the jaw, grabbed her neck, punched her in the face, squeezed her breast "really hard," acted like he was going to throw a chair at her, and threatened her with a knife. There was no need for the trial court and then the court of appeals to allow the State to also allow Englund to testify about prior alleged abuse by Moore. Furthermore, the State's case rested mostly on the allegations by Englund.

Moore's convictions should have been reversed so he could get a fair trial.

Proposition of Law II:

A defendant is denied a fair trial in contravention of the Due Process Clauses of the Constitutions of Ohio and the United States when the State is allowed to present alleged prior bad acts to the jury, over objection, in violation of Ohio Evidence Rule 404 and the trial judge fails to give a limiting instruction.

A defendant has a right to due process and a fair trial pursuant to Amendments V and XIV of the Constitution of the United States and Article I, Section 16 of the Constitution of Ohio.

Not only did the trial court allow "other acts" evidence before the jury, over objection, the trial judge did not give a limiting instruction to the jury on how that testimony should be received. The court of appeals noted that Moore did not request any limiting instructions. And the court of appeals decided that the trial court did not commit plain error by failing to give limiting instructions because "the record of this case in no way suggests that the jury relied on the other acts evidence to convict Moore."

However, the jury does not normally speak except through its verdict. And Evidence Rule 403(A) excludes evidence when any probative value is outweighed by "the danger of unfair prejudice." Not the proof of unfair prejudice or the suggestion that the jury relied on the prejudicial evidence, but the "danger" of unfair prejudice.

There was a great danger of unfair prejudice in this case. The State's case relied almost exclusively on the allegations by the complainant. Moore was on trial for burglary and abduction, and the trial court permitted Englund to testify many times about an alleged history of abuse. The trial judge did not give a limiting instruction on how to use the "other acts" evidence.

Instead, the jury was free to hear about a history of alleged previous verbal and physical

abuse by the man on trial from the woman accusing him of burglary and abduction. And they were free to use that information to bolster the complainant's credibility and find Moore guilty based on this alleged history.

Moore's convictions should have been reversed so he could get a fair trial.

Proposition of Law III:

A defendant is denied a fair trial in contravention of the Due Process Clauses of the Constitutions of Ohio and the United States when a guilty verdict, which is against the manifest weight of the evidence, rests solely upon the testimony of the complaining witness and the complaining witness provided additional facts during subsequent police interviews and at trial that were not provided to police in initial statements.

A defendant has a right to due process and a fair trial pursuant to Amendments V and XIV of the Constitution of the United States and Article I, Section 16 of the Constitution of Ohio. When assessing whether a verdict is against the "manifest weight" of the evidence, the court of appeals sits as the thirteenth juror and determines whether the factfinder "clearly lost its way." *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652.

This case was based almost entirely on the word of the complaining witness. It was important, therefore, that she embellished her story from the time she reported to the first police officer, to when she spoke with the detective, and when she testified at trial. Lori Englund added details along the way like her child was in the bed when Moore first assaulted her, Moore made sexual comments to her, Moore exposed himself to her, Englund grabbed Moore's scrotum and he punched her in the face, Moore threatened her with a knife and chair, Moore choked her and screamed at her to shut up.

These embellishments make Englund's story unbelievable. In addition, Englund testified

about several assaults by Moore to Englund's head, face, neck, and breast, but the police officer who responded to the scene noted only minimal injuries.

The jury clearly lost its way when it convicted Moore of abduction and burglary, and then the court of appeals lost its way by finding that the convictions were not against the manifest weight of the evidence. The court of appeals should have reversed the convictions and remanded the case for a new trial.

Proposition of Law IV:

The double jeopardy protections of the Ohio and United States Constitutions, as codified in R.C. 2941.25, require that the offenses of abduction and burglary be merged because they are allied offenses of similar import when they are based on a continuing course of conduct with a single victim and single animus.

A defendant is protected from twice being put into jeopardy for the same offense by Amendment V of the Constitution of the United States and Article I, Section 10 of the Constitution of Ohio. R.C. 2941.25 is Ohio's attempt to codify the double-jeopardy protections, and it states that a defendant may be convicted of only one offense when the defendant's conduct constitutes allied offenses of similar import.

In this case the complainant's description is of a continuing course of conduct against her by Moore who had one animus. In other words, the offenses in this case of burglary and abduction "were committed by the same conduct." *State v. Johnson*, __ Ohio St.3d __, 2010-Ohio-6314, ¶ 47.

The court of appeals attempted to apply *Johnson* but the court of appeals applied a *Rance* type of rigid analysis that resulted in an absurd result. *Johnson* at ¶ 40. According to the court of appeals, you cannot commit abduction while also committing burglary, and the court attempts to

break down Moore's conduct to make the analysis work.

However, when viewing Moore's conduct as one continuous course of conduct with one animus as outlined in the facts of this Memorandum, it is clear that burglary and abduction in this case were allied offenses of similar import that should have merged. Moore's sentence should have been reversed by the court of appeals and the case should have been remanded for re-sentencing.

Proposition of Law V:

A defendant is denied his right to be free from cruel and unusual punishment in contravention of the Constitutions of Ohio and the United States when a trial court abuses its discretion by sentencing a defendant to more than minimum, concurrent prison terms when the factors of R.C. 2929.12 and the overriding purposes of felony sentencing in R.C. 2929.11 weigh in favor of a minimum, concurrent prison term.

A defendant is protected from cruel and unusual punishment by Amendment VIII of the Constitution of the United States and by Article I, Section 9 of the Constitution of Ohio. The overriding purposes of felony sentencing are to protect the public and punish the offender. R.C. 2929.11(A). Trial courts must consider factors that indicate whether the offense was more or less serious than conduct normally constituting the offense, and factors that indicate the offender is more or less likely to commit future crimes. R.C. 2929.12. A sentence should be reversed if the trial judge abused his discretion in sentencing the defendant. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912.

The court of appeals determined that the trial judge did not abuse his discretion since the sentence was not the minimum or the maximum it could have imposed. However, the court of appeals appears to be saying that the sentence was not an abuse of discretion because it was not

contrary to law. Whether a sentence is contrary to law is the first question. The second question is whether the trial judge abused his discretion. Id.

The trial judge in this case abused his discretion in imposing a nine-year prison sentence. First, Demond Moore had no prior involvement with the felony court and minimal involvement with the criminal justice system at all. Second, he was clearly an outstanding member of the community (Sentencing Memorandum filed January 13, 2010, with attached letters from esteemed leaders in the community). Third, the complainant did not suffer serious physical harm.

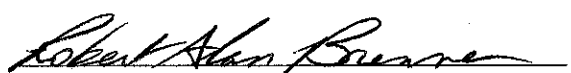
The nine-year sentence was excessive in this case and the trial judge abused his discretion in imposing it. Instead of ruling that the sentence was not an abuse of discretion because it was not contrary to law, the court of appeals should have reversed the sentence because the trial court abused its discretion in imposing the sentence in light of R.C. 2929.11 and R.C. 2929.12.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The appellant requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

Robert Alan Brenner, Counsel of Record

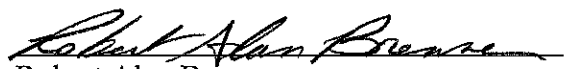


Robert Alan Brenner

COUNSEL FOR APPELLANT
DEMOND MOORE

Certificate of Service

I certify that a copy of this Notice of Appeal was served upon the Greene County Prosecutor's Office, 61 Greene Street, Xenia, Ohio 45385, by hand delivery this 21st day of March, 2011.



Robert Alan Brenner

COUNSEL FOR APPELLANT
DEMOND MOORE

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COURT OF APPEALS
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IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2010 CA 13
v.	:	T.C. NO. 09 CR 358
DEMOND MOORE	:	**FINAL ENTRY**
Defendant-Appellant	:	
	:	

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Pursuant to the opinion of this court rendered on the 11th day of February, 2011, the judgment of the trial court is affirmed.

Costs to be paid as stated in App.R. 24.

Mike Fain
MIKE FAIN, Judge

Mary E. Donovan
MARY E. DONOVAN, Judge

Jeffrey E. Froelich
JEFFREY E. FROELICH, Judge

11-02-1675

Copies mailed to:

Stephanie R. Hayden
Assistant Prosecutor
61 Greene Street
Xenia, Ohio 45385

Jeremiah J. Denslow
First National Plaza
130 W. Second Street, Suite 1600
Dayton, Ohio 45402

Hon. Stephen A. Wolaver
Common Pleas Court
45 N. Detroit Street
Xenia, Ohio 45385

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COURT OF APPEALS
CLERK OF COURTS

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2010 CA 13
v.	:	T.C. NO. 09 CR 358
DEMOND MOORE	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

. . . . . .

OPINION

Rendered on the 11th day of February, 2011.

. . . . . .

STEPHANIE R. HAYDEN, Atty. Reg. No. 0082881, Assistant Prosecutor, 61 Greene Street, Xenia, Ohio 45385
Attorney for Plaintiff-Appellee

JEREMIAH J. DENSLOW, Atty. Reg. No. 0074784, First National Plaza, 130 W. Second Street, Suite 1600, Dayton, Ohio 45402
Attorney for Defendant-Appellant

. . . . . .

FROELICH, J.

Demond Moore was found guilty by a jury in the Common Pleas Court of Greene County of burglary and abduction. He was sentenced to five years for the burglary and

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four years for the abduction, to be served consecutively. He appeals from his convictions.

I

The victim of the alleged offenses was Moore's former girlfriend, Lori Englund. She testified that Moore had been physically and verbally abusive during their relationship. She had lived with Moore for several years, but had asked him to move out of her home in April 2009.

According to Englund, Moore called her in the middle of the night on June 3, 2009, saying that he wanted to come over for "some pussy." She refused. Moore then "busted through [her] back door" (which he knew to have a broken lock), came into her bedroom, and punched her in the head, making her dizzy. Moore grabbed Englund's cell phone and began looking at her recent calls and messages. Englund told Moore to leave, but he did not. Moore asked Englund to come into the living room with him and, when she refused, he hit her in the jaw and grabbed her neck. During the course of this altercation, Englund fell backward onto her bed, where her five-year-old daughter was sleeping, which awoke the daughter. Englund then agreed to go to the living room with Moore, and her daughter went back to sleep.

Englund testified that, in the living room, Moore pulled down his pants and asked her to "play with his balls," whereupon she "grabbed them [his testicles] real hard." Moore punched Englund in the face, squeezed her breast forcefully, and threatened to throw a chair at her. He then closed some of her windows, threatened to cut her throat, grabbed a kitchen knife, and acted like he was going to throw it at her. After these events, Moore tried to reach his mother by phone, because he usually drove her to work in the early morning. When he could not reach his mother, Moore returned Englund's phone to her

and left.

After Moore left, Englund called her sister, Lisa Blackman. Englund was afraid to call the police because Moore had told her, in the past, that his uncle was a judge and would "get him off" right away. Englund feared that she would further enrage Moore by calling the police. However, after talking with her sister, Englund did call the Fairborn Police, and officers responded to her home.

Englund gave Detective Mark Miller a statement about the June 3 incident, and he took pictures of the injuries on her face and neck. Englund testified that she had not slept and had a bad headache when she gave this statement, and she admitted that her trial testimony was more detailed than her initial statement to the police.

Later in the day on June 3, Moore texted Englund asking her about her head and eye and asking for her forgiveness. When she did not respond, Moore texted that he was on his way to her house. She testified that, in the past, he had frequently texted her that he was on a road near her house ("444") when she failed to respond to his messages, as a way of telling her that he was on his way. She did not know whether Moore ever, in fact, returned to her house on June 3. Englund showed the June 3 text messages from Moore to the police.

For a couple of days after the June 3 incident, Englund stayed with her sister. By the night of June 7, Englund had returned to her own home, but her sister was staying with her. They had blockaded the back door with 2x4s because of the broken lock. Around 1:00 a.m., Englund started getting phone calls from Moore. "At the same time," he started knocking on the front door and ringing the doorbell. Moore also went around the house knocking on bedroom windows. Englund called 911 and ran into the bathroom with her

sister. Through the bathroom door, she had a view of the living room window. She testified that she saw Moore coming through the living room window; however, the police arrived before he could enter completely.

Officer Benjamin Roman responded to the 911 call on June 7, stopped Moore in the yard, and questioned Moore about why he was at the house. He described Moore as "jumpy" and "nervous." Moore told Roman that he had brought flowers for Englund, but he did not have any flowers in his hands. Roman observed a screen laying on the porch beneath the living room window, and the curtain of that window was pulled aside. Moore suggested that the screen had fallen out or a cat had knocked it out. Another officer later observed "old, wilted" flowers on the rear floorboard of Moore's car.

On June 11, 2009, Moore was indicted for committing burglary and abduction on June 3 and for committing attempted burglary on June 7. A jury found him guilty on the first two counts, as described above, but acquitted him on the attempted burglary. He was sentenced to an aggregate term of nine years of imprisonment.

Moore raises six assignments of error on appeal.

II

Moore's first and second assignments of error state:

"THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF DEFENDANT'S PRIOR BAD ACTS IN VIOLATION OF EVID.R. 404."

"THE TRIAL COURT COMMITTED PLAIN ERROR BY NOT GIVING A LIMITING INSTRUCTION REGARDING DEFENDANT'S PRIOR BAD ACTS."

Moore claims that the trial court erred in permitting the State to offer evidence of his physical and verbal abuse of Englund during their four-year relationship, because the

evidence was not offered for any of the reasons set forth in Evid.R. 404(B). He also claims that the trial court committed plain error when it did not instruct the jury on the limited purpose for which this evidence could be considered. The State responds that the trial court did not abuse its discretion in admitting this evidence, because it was relevant to how Englund responded to Moore's actions and threats, and that the failure to give the limiting instruction was not plain error.

Evid.R. 404(B) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted 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." Relevant evidence is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. Evid.R. 402; Evid.R. 403(A).

The decision whether to admit evidence is left to the sound discretion of the trial court, and a reviewing court will not reverse that decision absent an abuse of discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. An abuse of discretion implies an arbitrary, unreasonable, or unconscionable attitude on the part of the trial court. *State v. Adams* (1980), 62 Ohio St.2d 151.

At trial, Englund testified that she had dated Moore for four years, including a period during which she lived with him, and that during their relationship he became "controlling" and verbally and physically abusive. She told him to move out in April 2009, less than two months before the incidents for which Moore was charged. Her testimony did not dwell on the incidents of abuse or recount any specifics about them.

This history of abuse – the prior bad acts – gave context to Englund's fear when Moore broke into her house during the night. The offense of abduction, as it was charged in this case, requires knowing restraint of the liberty of another by force or threat under circumstances that create a risk of physical harm to the victim or place that person in fear. R.C. 2905.02(A). Thus, placing Englund in fear was a element of the abduction offense. See *State v. Thomas*, Butler App. No. CA2008-08-197, 2009-Ohio-4261, ¶16, citing *State v. Kelly* (1993), 89 Ohio App.3d 320, 323-324 (holding that testimony relating to defendant's prior criminal actions was relevant to an element of the crime of abduction, specifically the victim's fear based upon her knowledge of defendant's previous attack of a girlfriend).

Further, Moore's history of threatening, frightening, and abusing Englund was relevant to his motive in breaking into her home, and it helped to explain Englund's reluctance to call the police after the first incident. See *State v. Crowley*, Clark App. No. 2009 CA 65, 2009-Ohio-6689 (holding prior domestic violence admissible to explain victim's fear of defendant); *State v. Kneisley* (Jan. 15, 1999), Montgomery App. No. 17027 (holding that prior incident of domestic violence was admissible to show victim's state of mind).

Moore objected when the State asked Englund about physical abuse, but the court discussed the objection "out of the hearing of the Jury and the Court Reporter." Thus, neither the exact nature of Moore's objection to this testimony nor the court's reasons for overruling the objection are contained in the record. However, there was a subsequent reference to physical abuse, to which Moore did not object, so we infer that Moore's objection to references to prior acts was overruled (if, in fact, that was the basis of his objection). Moore did not request, and the court did not give, any instruction to the jury on the limited used of such evidence.

On the record before us, we conclude that the alleged prior bad acts were relevant to the victim's fearful response to Moore's behavior and to her state of mind. The trial court did not abuse its discretion in permitting Englund's testimony about prior physical and verbal abuse by Moore.

Moore also claims that the trial court erred in failing to give a limiting instruction to the jury. Because he did not request such an instruction or object to its omission, he has waived all but plain error. *State v. Cooper*, Montgomery App. No. 23143, 2010-Ohio-5517, ¶11.

Plain error may be noticed if a manifest injustice is demonstrated. Crim.R. 52(B); *State v. Herrera*, Ottawa App. No. OT-05-039, 2006-Ohio-3053. In order to find a manifest miscarriage of justice, it must appear from the record as a whole that but for the error, the outcome of the trial clearly would have been otherwise. *State v. Long* (1978), 53 Ohio St.2d 91. The Supreme Court of Ohio has held that, when the defense fails to request a limiting instruction on other acts evidence, the trial court's failure to give such an instruction is not plain error if "[n]othing suggests that the jury used 'other acts' evidence to convict [the defendant] because [he] was a bad person." *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, ¶136, citing *State v. Diar,* 120 Ohio St.3d 460, 2008-Ohio-6266, ¶91, citing *State v. Grant* (1993), 67 Ohio St.3d 465, 472. The record of this case in no way suggests that the jury relied on the other acts evidence to convict Moore. Thus, we conclude that the trial court's failure to give a limiting instruction related to the prior bad acts was not plain error.

The first and second assignments of error are overruled.

III

Moore's third assignment of error states:

"THE TRIAL COURT ERRED WHEN IT ADMITTED PICTURES OF THE COMPLAINING WITNESS AT THE REQUEST OF THE STATE WHEN THE STATE'S COMPLAINING WITNESS TESTIFIED THAT THE PICTURES DID NOT TRULY AND ACCURATELY DEPICT THE INJURIES CONTAINED THEREIN."

Moore contends that two photographs of Englund's injuries, Exhibits 3 and 4, should not have been admitted because two witnesses testified that these pictures *did not* accurately depict Englund's injuries after the alleged attack, and no one testified that they did accurately depict her injuries.[1]

Both of the photographs in question were taken by Detective Miller on June 3, 2009. Englund testified that Exhibit 3 depicted the injury over her eye; she testified that it happened when Moore "hit [her] in the eye" and that she did not "have that injury prior to the Defendant coming into [her] house" on the morning of June 3, 2009. She also testified that other bruising to her face (under her nose in the picture) was attributable to being hit in the face by Moore. Exhibit 4 depicts injuries to Englund's neck. She testified that she "[saw] the marks around [her] neck" in the picture, that those marks had not been there before Moore came to her house, and that she sustained those injuries when "he choked [her] on the neck." Although Englund did not specifically state that the pictures "fairly and accurately depicted" her injuries, her testimony refutes Moore's suggestion that the pictures were not authenticated or were not "what its proponent claims."

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[1]Although Moore's statement of the assignment of error suggests that Englund testified that the photographs did not accurately depict her injuries, he does not reference such testimony in his argument, and the transcript does not support this claim.

Detective Miller and Englund's sister, Lisa, also testified about the photographs. On cross-examination, Detective Miller testified that Englund had not reported specific injuries to him as a result of being hit by Moore. With respect to Exhibit 3, he identified a "half-inch square mark" of discoloration on Englund's eyelid, but no other injuries to the side of her face. With respect to Exhibit 4, he testified that he took a photo of her neck, but he did not know when the injuries depicted therein had been sustained. On redirect examination, Miller stated that he saw the injury on the victim's neck even though she had not pointed it out to him, and that "[t]here was a significant enough marking on the neck that was photographable evidence." He was also asked: "[W]hen you saw it [her neck], did it have the same linear like red marks that it has now – that it looked like now, is that accurate?" He answered affirmatively.

Blackman, Englund's sister, testified that Exhibit 3 depicted her sister's left eye on June 3, but that the eye "looked worse in person than on the picture." Blackman testified that Exhibit 4 depicted the marks around Englund's neck the same day, but that the marks were actually darker than the photograph demonstrated. Blackman's testimony on cross-examination that the photographs did "not fairly and accurately depict" her sister's injuries reflected her opinion that the actual injuries looked worse than they appeared in the photographs.

Trial courts have broad discretion with respect to the admission or exclusion of evidence, and decisions in such matters will not be disturbed by a reviewing court absent an abuse of that discretion that has caused material prejudice. *State v. Rowland*, Montgomery App. No. 20625, 2005-Ohio-3756, citing *State v. Noling* (2002), 98 Ohio St.3d 44, 2002-Ohio-7044

"'A picture cannot be admitted without a proper foundation. There must be testimony that the photograph is a fair and accurate representation of that which it represents.'" *State v. Griffin*, Montgomery App. No. 20681, 2005-Ohio-3698, ¶59, quoting *Heldman v. Uniroyal, Inc.* (1977), 53 Ohio App.2d 21, 31. To properly authenticate photographs, the proponent need only produce a witness with knowledge of the purported subject matter of the photographs, who, by way of foundation, can testify that the photographs represent a fair and accurate depiction of the actual item at the time the picture was taken. *State v. Ponce*, Cuyahoga App. No. 91329, 2010-Ohio-1741, ¶35; *State v. Combs*, Montgomery App. No.22712, 2009-Ohio-1943, ¶31. When a witness testifies that photographs do not fairly and accurately depict an injury because the actual injury looked worse than it does in the photographs, the "photographs would inure to the benefit of the defendant and no prejudice would result through their admission." *State v. Rogers* (1975), 44 Ohio App.2d 289, 292.

The testimony from all three witnesses about Exhibits 3 and 4 clearly indicated that the photographs depicted Englund's injuries on the day in question. The only question was whether they depicted the full extent or severity of Englund's injuries; any discrepancies between the photographs and the actual injuries seem to have worked to Moore's advantage, because Englund's injuries apparently looked less severe in the photographs than in person. Considering these circumstances, the trial court did not abuse its discretion in admitting the photographs.

The third assignment of error is overruled.

IV

Moore's fourth assignment of error states:

"THE TRIAL COURT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT

OF THE EVIDENCE."

Moore claims that his convictions were against the manifest weight of the evidence because Englund's testimony was "difficult, if not impossible, to believe," there was little corroborating evidence, her injuries did not reflect the events that she described, and her story changed over time.

"[A] weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive." *State v. Wilson*, Montgomery App. No. 22581, 2009-Ohio-525, ¶12. When evaluating whether a conviction is contrary to the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

Because the trier of fact sees and hears the witnesses at trial, we must defer to the factfinder's decisions whether, and to what extent, to credit the testimony of particular witnesses. *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288.

The fact that the evidence is subject to different interpretations does not render the conviction against the manifest weight of the evidence. *Wilson* at ¶14. A judgment of conviction should be reversed as being against the manifest weight of the evidence only in exceptional circumstances. *Martin*, 20 Ohio App.3d at 175.

At trial, Englund testified that Moore "busted through [her] back door" in the middle

of the night on June 3, 2009, notwithstanding the fact that she had refused his sexual advances on the phone a short time earlier. He came into her bedroom and punched her in the head. As Moore looked through her cell phone, Englund told Moore to leave, but he did not. When Englund refused to come into the living room with him, Moore hit her in the jaw and grabbed her neck. After they moved into the living room, Moore made sexual advances, which Englund rejected, and another altercation occurred, including threats by Moore to seriously injure Englund. This testimony, if believed, supported Moore's convictions.

It is undisputed that Englund's initial statements to the police on June 3 did not contain all of the details that emerged during subsequent interviews and at trial. Englund explained this fact by stating that she had been in a lot of pain and had not slept all night when she was first interviewed. It was the jury's role to determine whether this explanation was credible. Similarly, at trial, the parties disputed whether Englund's injuries – and the photographs of the injuries – were consistent with the events she described. There was conflicting evidence about whether the photographs presented to the jury truly reflected the seriousness of the injuries. Again, it was the province of the jury to assess the witnesses' credibility.

Based on the evidence presented, the jury could have reasonably concluded that Moore had committed burglary and abduction. Thus, Moore's convictions were not against the manifest weight of the evidence.

The fourth assignment of error is overruled.

V

Moore's fifth assignment of error states:

"THE TRIAL COURT ERRED WHEN IT FAILED TO MERGE THE ALLIED OFFENSES INTO A SINGLE CONVICTION AND FURTHER ERRED WHEN IT SENTENCED APPELLANT ON BOTH CONVICTIONS."

Moore claims that the burglary and abduction offenses of which he was convicted were allied offenses of similar import because they resulted from one course of conduct, occurred simultaneously, and had the same victim and animus. The State contends that the offenses are not allied offenses because the commission of one does not result in the commission of the other.

R.C. 2941.25, concerning allied offenses of similar import, provides:

"(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

"(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

"R.C. 2941.25 codifies the double jeopardy protections in the federal and Ohio constitutions, which prohibit courts from imposing cumulative or multiple punishments for the same criminal conduct unless the legislature has expressed an intent to impose them. R.C. 2941.25 expresses the legislature's intent to prohibit multiple convictions for offenses which are allied offenses of similar import per paragraph (A) of that section, unless the conditions of paragraph (B) are also satisfied." *State v. Barker*, 183 Ohio App.3d 414,

2009-Ohio-3511, ¶22, citing *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, overruled on other grounds by *State v. Johnson*, __ Ohio St.3d __, 2010-Ohio-6314.

In *Johnson*, the Ohio Supreme Court recently clarified the process by which courts determine whether offenses are allied offenses of similar import. *Johnson* overruled *Rance* "to the extent that it calls for a comparison of statutory elements solely in the abstract under R.C. 2941.25." *Johnson* at ¶44. Now, "[w]hen determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." Id.

Johnson states that "the intent of the General Assembly is controlling." Id. at ¶46. "We determine the General Assembly's intent by applying R.C. 2941.25, which expressly instructs courts to consider the offenses at issue in light of the defendant's conduct." Id. The trial court must determine prior to sentencing whether the offenses were committed by the same conduct. The court no longer must perform any hypothetical or abstract comparison of the offenses at issue in order to conclude that the offenses are subject to merger. Id. at ¶47 "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense *and* commit the other with the same conduct, not whether it is possible to commit one *without* committing the other. If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import." Id. at ¶48 (internal citation omitted).

"If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" Id. at ¶49 (citation omitted). "If the answer to both

questions is yes, then the offenses are allied offenses of similar import and will be merged." Id. at ¶50. "Conversely, if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." Id. at ¶51.

The trial court, which sentenced Moore prior to the decision in *Johnson*, analyzed this issue under *Rance* and *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625. As the court noted, burglary requires trespass in an occupied structure where another person is present by force, stealth, or deception or for the purpose to commit in that structure any criminal offense (R.C. 2911.12(A)(1)); abduction, as it was charged in this case, requires knowing restraint of the liberty of another by force or threat under circumstances that create a risk of physical harm to the victim or place that person in fear (R.C. 2905.02(A)). Although the trial court considered whether "the commission of one offense require[d] the commission of the other offense" by "comparing the elements in the abstract," we nonetheless conclude that the trial court reached the correct result, i.e., the result it would have reached if it had analyzed the case under *Johnson*. According to *Johnson*, the question is whether it is possible to commit one offense *and* commit the other with the same conduct (not whether it is possible to commit one *without* committing the other). The conduct required for the commission of a burglary cannot also result in the commission of an abduction. The burglary was complete when Moore entered Englund's home; his subsequent restraint of her liberty was a separate offense. Thus, the trial court properly concluded that the offenses were not allied offenses of similar import and did not err in refusing to merge Moore's convictions for sentencing.

Moore's fifth assignment of error is overruled.

VI

Moore's sixth assignment of error states:

"THE TRIAL COURT ERRED IN IMPOSING THE NINE YEAR SENTENCE BECAUSE THE COURT DID NOT PROPERLY APPLY THE PURPOSES AND PRINCIPLES OF SENTENCING OR THE SERIOUSNESS AND RECIDIVISM FACTORS IN R.C. 2929.11 AND R.C. 2929.12, RESPECTIVELY."

Moore claims that the trial court should have favored the shortest prison term because this was his first conviction, the victim suffered no serious harm, and there were no other factors present that enhanced the seriousness of his offenses. He relies on R.C. 2929.14(B).

"[T]he Supreme Court of Ohio has held, in *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, paragraph seven of the syllabus, that '[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or their reasons for imposing maximum, consecutive, or more than the minimum sentences.'" *State v. Israel,* Miami App. No. 09-CA-47, 2010-Ohio-5044, ¶35. "The Supreme Court of Ohio has further held, in *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, ¶26, that a reviewing court, 'must examine the sentencing court's compliance with all the applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard.'" Id. "If the court of appeals finds under the test set out in *Kalish* that the sentence is not clearly and convincingly contrary to law, then it must proceed to the

second prong of the test, whether there was an abuse of discretion by the court made during sentencing." Id. Again, an abuse of discretion "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. (second cite)

Moore's conviction for burglary was a felony of the second degree, for which he could have been sentenced to two, three, four, five, six, seven, or eight years of imprisonment; he was sentenced to five years. His conviction for abduction was a felony of the third degree, for which he could have been sentenced to one, two, three, four or five years; he was sentenced to four years. At the sentencing hearing, Moore relied heavily on his lack of prior felony convictions and the "lack of physical evidence" to show that this was not the worse form of the offense. The State relied on the "history *** of abuse *** throughout the relationship" and the victim's statement to the court in requesting the maximum sentence of thirteen years.

The trial court expressed concern about Moore's "potential to future crime." Although Moore was not convicted of the attempted burglary on June 7, 2009, the court noted that Moore's "willingness to go back to a situation where clearly [he] was not wanted" concerned the court. The court stated: "I believe you have a character trait that I feel comfortable in saying is that you do have a problem staying away from people that you want to be with who don't want you around.*** [T]he sentence I'm crafting in this case is because of that particular finding." The court found that prison was appropriate for both of the offenses and that "anything other than a prison sentence would demean the seriousness of [his] offenses." The trial court did not abuse its discretion in imposing a sentence that was neither the maximum nor the minimum sentence for these offenses or in ordering that the

sentences be served consecutively.

Moore's sixth assignment of error is overruled.

VII

The judgment of the trial court will be affirmed.

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FAIN, J. and DONOVAN, J., concur.

Copies mailed to:

Stephanie R. Hayden
Jeremiah J. Denslow
Hon. Stephen A. Wolaver