[Cite as *State v. Moore*, 2011-Ohio-636.]

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	:	
	:	

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O P I N I O N

Rendered on the 11th day of February, 2011.

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FROELICH, J.

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

I

{¶ 2} 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.

{¶ 3} 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.

{¶ 4} 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.

{¶ 5} 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.

{¶ 6} 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.

{¶ 7} 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.

{¶ 8} 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.

{¶ 9} 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.

{¶ 10} 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.

{¶ 11} Moore raises six assignments of error on appeal.

II

{¶ 12} Moore's first and second assignments of error state:

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

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

{¶ 15} 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.

{¶ 16} 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).

{¶ 17} 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.

{¶ 18} 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.

{¶ 19} 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).

{¶ 20} 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).

{¶ 21} 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.

{¶ 22} 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.

{¶ 23} 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.

{¶ 24} 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.

{¶ 25} The first and second assignments of error are overruled.

III

{¶ 26} Moore's third assignment of error states:

{¶ 27} "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."

{¶ 28} 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]

{¶ 29} 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

[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.

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."

{¶ 30} 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.

{¶ 31} 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.

{¶ 32} 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

{¶ 33} "'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.

{¶ 34} 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.

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

IV

{¶ 36} Moore's fourth assignment of error states:

{¶ 37} "THE TRIAL COURT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 38} 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.

{¶ 39} "[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.

{¶ 40} 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.

{¶ 41} 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.

{¶ 42} 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.

{¶ 43} 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.

{¶ 44} 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.

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

V

{¶ 46} Moore's fifth assignment of error states:

{¶ 47} "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."

{¶ 48} 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.

{¶ 49} R.C. 2941.25, concerning allied offenses of similar import, provides:

{¶ 50} "(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.

{¶ 51} "(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."

{¶ 52} "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.

{¶ 53} 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.

{¶ 54} *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).

{¶ 55} "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.

{¶ 56} 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.

{¶ 57} Moore's fifth assignment of error is overruled.

VI

{¶ 58} Moore's sixth assignment of error states:

{¶ 59} "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."

{¶ 60} 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).

{¶ 61} "[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)

{¶ 62} 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.

{¶ 63} 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.

{¶ 64} Moore's sixth assignment of error is overruled.

VII

{¶ 65} The judgment of the trial court will be affirmed.

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

Copies mailed to:

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