**[Cite as *State v. Donald*, 2009-Ohio-4638.]**

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

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| STATE OF OHIO, | ) | |
| | ) | CASE NO. 08 MA 154 |
| PLAINTIFF-APPELLEE, | ) | |
| | ) | |
| - VS - | ) | O P I N I O N |
| | ) | |
| JOHNNY DONALD JR., | ) | |
| | ) | |
| DEFENDANT-APPELLANT. | ) | |

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| CHARACTER OF PROCEEDINGS: | Criminal Appeal from Common Pleas Court, Case No. 08CR389. |
| JUDGMENT: | Conviction Affirmed; Sentence Vacated; Case Remanded. |

APPEARANCES:

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| For Plaintiff-Appellee: | Attorney Paul Gains<br>Prosecuting Attorney<br>Attorney Ralph Rivera<br>Assistant Prosecuting Attorney<br>21 West Boardman Street, 6th Floor<br>Youngstown, Ohio 44503 |
| For Defendant-Appellant: | Attorney Aaron Snopek<br>34208 Aurora Road, No. 303<br>Solon, Ohio 44139 |

JUDGES:
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: August 31, 2009

VUKOVICH, P.J.

**¶{1}** Defendant-appellant Johnny Donald Jr. appeals the judgment of conviction and sentence entered in the Mahoning County Common Pleas Court. Appellant alleges that his sentence should be vacated based upon three allegations: the trial court equated his invocation of his right to remain silent with an admission and used this as a sentencing factor; the court participated in plea negotiations and then sentenced him more harshly due to his decision to exercise his right to a jury trial; and, the court found serious physical harm as a sentencing factor even though the jury found him not guilty of the count containing this element. Appellant then contends that his conviction should be vacated because the court's questioning of a witness for the state was not impartial. For the following reasons, appellant's conviction is affirmed. However, based upon a combination of his first and second arguments, appellant's sentence is vacated and the case is remanded for resentencing.

STATEMENT OF THE CASE

**¶{2}** Appellant was indicted on two alternative counts of second-degree felony felonious assault: one count alleging physical harm with a deadly weapon under R.C. 2903.11(A)(2), and one count alleging serious physical harm under R.C. 2903.11(A)(1). The case was tried to a jury.

**¶{3}** The victim testified that appellant was her boyfriend. She stated that she came home drunk on March 23, 2008 and that appellant was angry with her for drinking and for not having $2 to spare. (Tr. 292, 307). She explained that he originally acted as if he were about to hit her with a long wooden bed support. (Tr. 294, 316). The victim testified that appellant then said he had something "better" for her, at which point he picked up a golf club. (Tr. 294). He then hit her multiple times with the golf club, aiming for her head. (Tr. 292, 295, 297). Most of the blows hit her left arm. Photographs showed round bruises on this arm. She testified that one arm was fractured as a result of the beating. (Tr. 297, 318-319). She also testified that she still suffered pain from the beating. (Tr. 297).

**¶{4}** The responding officer testified that he responded to a 911 call which had reported that someone was being beaten. (Tr. 270). When he entered the

residence, the victim was sobbing, she appeared to be in pain, and she was cradling her arm which had large bruises on it. (Tr. 270, 273). She announced that appellant hit her with a golf club. Appellant admitted that he drank too much and "waled on her ass with a club." (Tr. 272, 282-283). The officers recovered a golf club which had been broken into two pieces, and the victim testified that the club was whole when he began beating her with it. (Tr. 274, 284, 294).

**¶{5}** The jury found appellant guilty of felonious assault involving physical harm with a deadly weapon but found him not guilty of felonious assault involving serious physical harm. In a June 27, 2008 entry, the court sentenced appellant to a maximum sentence of eight years. Appellant filed timely notice of appeal.

ASSIGNMENT OF ERROR NUMBER ONE

**¶{6}** Appellant sets forth four assignments of error, the first of which contends:

**¶{7}** "THE TRIAL COURT ERRED IN THE SENTENCING OF THE APPELLANT BECAUSE THE APPELLANT WAS GIVEN A GREATER SENTENCE FOR EXERCISING HIS FIFTH AMENDMENT RIGHT TO STAND SILENT."

**¶{8}** Appellant argues that the sentencing court improperly held against him his decision to exercise his right not to testify. Specifically, the trial court stated:

**¶{9}** "And the defendant, after the victim and the police officer offered overwhelming testimony against him, chose not to speak at all. So, evidently, he agreed that all that was true the way it was presented." (Sent. Tr. 16).

**¶{10}** It is patently unconstitutional for a sentencing court to penalize those who exercise their constitutional rights or even their statutory rights. *North Carolina v. Pearce* (1969), 395 U.S. 711, 724 (court cannot base harsher sentence on defendant's successful use of appeal or postconviction proceedings). A defendant has the constitutional right to refuse to testify, and the exercise of this right against self-incrimination cannot be used against the defendant. U.S. Const. Amend. V; Ohio Const. Art. I, Sec. 10. Thus, the prosecutor cannot specifically comment on a defendant's refusal to testify, and the court often instructs the jury that they cannot use the defendant's silence at trial against him. See, e.g., *Griffin v. U.S.* (1965), 380 U.S. 609; *State v. Webb* (1994), 70 Ohio St.3d 325, 328-329.

**¶{11}** Furthermore, a sentencing court cannot use a defendant's silence at sentencing against him as the right against self-incrimination follows the defendant to sentencing. *Mitchell v. U.S.* (1999), 526 U.S. 314, 321. Courts have also concluded that a sentencing court cannot increase a sentence based upon the fact that the defendant chose to exercise his right against self-incrimination. See, e.g., *State v. Hall*, 10th Dist. No. 08AP-167, 2008-Ohio-6228, ¶16, 20 (remand for resentencing where court based sentence in part on fact that appellant would not testify against codefendant). *State v. Smith*, 2d Dist. No. 06CA11, 2007-Ohio-6355, ¶28 (remand for resentencing where court emphasized defendant's refusal to testify against his brother as this resulted in an improper penalization of a defendant for exercising his Fifth Amendment right to remain silent); *State v. Glass*, 8th Dist. No. 83950, 2004-Ohio-4495, ¶8-9 (remand for resentencing where court used the defendant's failure to testify against codefendant as an aggravating sentencing factor).

**¶{12}** Pursuant to all of this law, we conclude that the court's statement was improper. The court cannot hold it against a defendant at sentencing that he refused to testify in his own trial and thus penalize a defendant for exercising his constitutional right not to testify. Moreover, the failure to testify does not mean that the defendant "agreed that all that was true the way it was presented." (Sent. Tr. 16). In fact, the state does not dispute the impropriety of the statement.

**¶{13}** Rather, the state points to a case that determined that a sentencing court's negative comment regarding a defendant's invocation of her Fifth Amendment rights at another defendant's trial was harmless given the overwhelming evidence of her guilt, including her confession. See *State v. Horn*, 6th Dist. No. OT-03-016, 2005-Ohio-5257, ¶19-20. The state concludes that the sentence here is neither clearly and convincingly contrary to law nor an abuse of discretion because the court provided numerous other reasons why it sentenced appellant to the maximum.

**¶{14}** For instance, the court noted the harm to the victim and pointed out that appellant's intention was to cause whatever harm he could cause her with a laminate three wood with a brass plate. (Sent. Tr. 10, 14-15). Most notably, the court pointed out that appellant was convicted of felonious assault in 2004 in the same court. In that case, he used a piece of aluminum to strike the victim on the head and body while

saying he was going to kill the victim. (Tr. 11-12). The court commented that using a household instrument that can administer a great amount of pain and damage and beating people he was upset with must be appellant's "MO". (Tr. 12). The court found he had not responded favorably to treatment, pointing out that the court released him on probation after he served one year on the prior felonious assault. (Tr. 4, 15).

**¶{15}** The court noted that appellant was a danger to the community, stating that the court had to deter appellant and others. (Tr. 12-13). The court stated that appellant's relationship with the victim facilitated the offense. (Tr. 15). The court found appellant does not show genuine remorse and pointed out that it appeared appellant was hoping to have his charges dismissed due to the lack of cooperation by the victim (until she was picked up on a material witness warrant). (Tr. 2, 15).

**¶{16}** Although the court had other reasons for its sentence, part of the court's sentencing rationale was based upon appellant's exercise of his rights against self-incrimination. The court relied in part upon appellant's failure to testify and on its own improper opinion that the failure to testify meant that the defendant agreed with the state's evidence. The failure to testify at one's own trial cannot be punished.

**¶{17}** In determining that this violation of the defendant's rights was not harmless, we combine this problem with that expressed in the next assignment of error.

ASSIGNMENT OF ERROR NUMBER TWO

**¶{18}** Appellant's second assignment of error provides:

**¶{19}** "THE TRIAL COURT ERRED IN THE SENTENCING OF THE APPELLANT BECAUSE THE APPELLANT WAS GIVEN A GREATER SENTENCE FOR EXERCISING HIS RIGHT TO A JURY TRIAL."

**¶{20}** This assignment of error derives from the following statements at sentencing:

**¶{21}** "[DEFENSE COUNSEL]: Your Honor, it's my distinct impression from the pretrial discussions in chambers that you would be giving my client the maximum if he was found guilty at trial.

**¶{22}** "THE COURT: Well, I told your client in a pretrial discussion that the maximum sentence was eight years, and if he denied doing this and the jury of 12

people came into this courtroom and unanimously agreed that he was guilty beyond any reasonable doubt, then the maximum sentence was a probability, especially in light of the fact that he was being offered a sentence of two years if he were to enter into a plea. And I, in fact, asked him to tell me what the difference between eight years and two years is, and he understood it was six years but denied he had anything to do with this * * *." (Sent. Tr. 6-7).

**¶{23}** The court then pointed out that appellant knew what the overwhelming evidence would be at pretrial and that he was "stupid" for thinking he would get away with this offense by hoping the victim would fail to appear for trial. (Sent. Tr. 7-8).

**¶{24}** Appellant urges that this establishes that the court punished him more severely for exercising his constitutional right to trial. The state refers to its argument in the prior assignment on how the court also considered many proper factors to support its sentence and notes that after trial, the court has access to even more facts to support its sentence. The state also points out that the court should recognize the reality of the state's interest in offering lesser sentences for plea bargains and the fact that a defendant who enters a plea has shown a willingness to assume responsibility. See, e.g., *Corbitt v. New Jersey* (1978), 439 U.S. 212, 221-224 (where there was no court involvement in the plea, and where there were no sentencing statements indicating retaliation for going to trial); *Brady v. United States* (1970), 397 U.S. 742, 753.

**¶{25}** As stated supra, it is patently unconstitutional to penalize a defendant for exercising his constitutional or statutory rights, which would include the right to trial. See *Pearce*, 395 U.S. at 724. See, also, *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶33 (equating vindictive sentence with unconstitutional sentence). A defendant should thus never be punished for exercising his right to trial or for refusing to enter into a plea agreement. See *State v. O'Dell* (1989), 45 Ohio St.3d 140, 147.

**¶{26}** Accordingly, a trial court may not impose an increased sentence in retaliation for the defendant choosing to exercise his right to trial, regardless of whether the evidence of his guilt is said to be overwhelming. *State v. Mayles*, 7th Dist. No. 04CA808, 2005-Ohio-1346, ¶45, citing *State v. Scalf* (1998), 126 Ohio App.3d 614, 620. We do not presume impropriety by the mere fact that the sentence imposed

after trial is greater than a sentence offered by the state at plea negotiations. Id. at ¶46.

**¶{27}** However, if the record also demonstrates that the defendant received an enhanced sentence in retaliation for exercising his constitutional right to a jury trial, then the sentence should be vacated unless the court specifically stated that this was not a reason. See *State v. Morris* 159 Ohio App.3d 775, 2005-Ohio-962, ¶13 (Fourth District vacated sentence based upon sentencing court's statements that "[t]here wasn't anything to try" and that the defendant "jammed up the system"). See, also, *Mayles*, 7th Dist. No. 04CA808 at ¶45; *State v. Barnette*, 7th Dist. No. 02CA65, 2004-Ohio-7211, ¶62, 65. In the *Scalf* case, which we cited in *Mayles*, the Eighth District vacated a sentence after finding the sentencing court's statements gave rise to an inference that sentence was based upon the defendant's failure to plead and where there were no unequivocal statements rebutting the court's improper statements and affirmatively stating that the court did not consider the defendant's act of going to trial as a reason for the sentence. *Scalf*, 126 Ohio App.3d at 620-621.

**¶{28}** Some courts have also specifically held that where a trial court participated in plea bargaining, discussed a tentative sentence, and sentenced the defendant more harshly later, there is a presumption of retaliation for exercising the right to trial. *State v. Stafford*, 1st Dist. No. C-030297, 2004-Ohio-3893, ¶15. In order to overcome this presumption, the record must affirmatively show the court did not give improper weight to the defendant's refusal to plead guilty and must affirmatively show that the court sentenced the defendant solely upon the facts of his case and his personal history rather than as punishment for asserting his right to a jury trial. Id., citing *Columbus v. Bee* (1979), 67 Ohio App.2d 65.

**¶{29}** Here, the sentencing court acknowledged that it participated in plea discussions. The court had disparagingly asked the defendant if he knew the difference between the two-year sentence offered by the state and the maximum eight-year sentence he would probably get after trial. (Sent. Tr. 6). See *Stafford*, 1st Dist. No. C-030297 at ¶15. See, also, *State v. Byrd* (1980), 63 Ohio St.2d 288, 293 (trial court should avoid participating in plea negotiations). The sentencing court also made much of the fact that appellant was aware of the overwhelming evidence against

him at the pretrial and he did call him "stupid" for bringing the case to trial and for not taking the two-year offer. (Sent. Tr. 7-8).

**¶{30}** Merely because the trial court gave other valid reasons for the sentence as well does not unequivocally show that the court did not base its maximum sentence in part upon the refusal to accept the plea and upon the defendant's decision to go to trial. See *State v. Fritz*, 2d Dist. No. 22377, 2008-Ohio-4389, ¶30 (any other sentencing factors discussed did not dispel glaring inference in court's comments that refusal to plead was factor involved in fashioning the sentence).

**¶{31}** Considering all the errors encompassed in the first and second assignments of error, we conclude that the sentencing court violated the defendant's constitutional rights.[1] First, the court should not involve itself in plea negotiations. Second, the court attempted to persuade the defendant to take a plea or face a maximum sentence and then followed through after a jury trial, acknowledging that the defendant had been warned. Finally, the court made grossly inappropriate comments at sentencing such as calling the defendant "stupid" for taking a case to trial and construing his failure to testify as an admission. We are dismayed that at this stage in American jurisprudence we must admonish a court to abstain from fashioning a punishment based upon a defendant's exercise of the constitutional right to a jury trial and to remain silent, but the totality of the record compels us to do so here.

ASSIGNMENT OF ERROR NUMBER THREE

**¶{32}** Appellant's third assignment of error states:

**¶{33}** "THE TRIAL COURT ERRED IN THE SENTENCING OF THE APPELLANT BECAUSE THE TRIAL COURT SENTENCED THE APPELLANT BASED UPON FACTS EXPRESSLY NOT FOUND BY THE JURY."

**¶{34}** As aforementioned, the jury found appellant guilty of the count of felonious assault that entailed knowingly causing physical harm with a deadly weapon. See R.C. 2903.11(A)(2). However, the jury found him not guilty of the count of felonious assault which entailed knowingly causing serious physical harm. See R.C. 2903.11(A)(1).

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[1]We also note that the judge made mention of a newspaper article that he read on the morning of sentencing that was "like a little dig" in reporting that this same court had granted the defendant judicial release. (Sent Tr. 4).

**¶{35}** In determining whether the offender's conduct is more serious than conduct normally constituting the offense, one of the factors the court is to consider is whether:

**¶{36}** "[t]he victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense." R.C. 2929.12(B)(2).

**¶{37}** At sentencing, defense counsel asked the court to consider a sentence commensurate with the fact that the jury found physical harm and not serious physical harm. (Tr. 9). In considering this sentencing factor, the court stated:

**¶{38}** "Factors that make the crime more serious, the victim suffered serious physical harm as a result -- well, I believe she did suffer serious physical harm, maybe not to rise to the level of conviction for felonious assault, but as the Court of Appeals has taught me, I can't use what was found in the conviction as another finding to determine the sentence, so they found it was physical harm. The court has reviewed the evidence and the exhibits and find that it was serious physical harm at least for purposes of considering the factors under 2929.12(B) and (C)." (Tr. 14-15).

**¶{39}** Appellant argues that the court is not permitted to base its sentence on an element that was specifically discarded by the jury, urging that the court expressly contradicted a finding of the jury.[2] The state agrees with the trial court's statement that even if the physical harm was not serious for purposes of a felonious assault conviction, it could be considered serious for purposes of the sentencing factors.

**¶{40}** Serious physical harm to a person is statutorily defined as: (a) any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment; (b) any physical harm that carries a substantial risk of death; (c) any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity; (d) any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement; or (e) any physical harm that involves acute pain of such duration as to

[2]Note that this was not a case of the jury reaching a compromise verdict or deciding for themselves that the defendant should not be convicted of two crimes due to one act (not knowing that the offenses would have merged under the doctrine of allied offenses of similar import). Rather, the trial court specifically stated at sentencing that the court spoke with the jury, and they advised that the state was remiss in failing to put on evidence of the victim's medical records to establish that her arm had in fact been fractured. (Tr. 9).

result in substantial suffering or that involves any degree of prolonged or intractable pain. R.C. 2901.01(A)(5).

**¶{41}** This statute begins by stating, "[a]s used in the Revised Code" without limiting the definitions therein to certain sections of the Revised Code. See R.C. 2901.01 (A)(5). Thus, the statutory definition applies to the use of "serious physical harm" in the felonious assault statute and in the sentencing statutes. The question is whether the sentencing court can find the serious physical harm factor applies even if a jury specifically found that there was not enough evidence to find serious physical harm.

**¶{42}** Appellant cites a Tenth District case which held that the sentencing court cannot consider facts found not to exist by a jury and sentence a defendant based upon elements of the crime for which the defendant was acquitted. See *State v. Patterson* (1996), 110 Ohio App.3d 264, 271, citing *Columbus v. Jones* (1987), 39 Ohio App.3d 87, 90 (a trial court is "to give no consideration to the evidence tending to indicate defendant to be guilty of the offense of which he was found not guilty by the jury"). However, the Tenth District changed its position on the grounds that the United States Supreme Court has pronounced differently. See *State v. Epley* (Aug. 25, 1998), 10th Dist. No. 97APA11-1469.

**¶{43}** Specifically, the High Court has stated that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has just been acquitted. *United States v. Watts* (1997), 519 U.S. 148 (holding in one case that the court can consider guns with drugs even though the jury acquitted the defendant of a firearm offense, and holding in another case that the sentencing court can consider the total amount of drugs alleged even though the jury acquitted the defendant of the count dealing with five ounces and only convicted the defendant of the count dealing with one ounce).

**¶{44}** Even before that, however, the Ohio Supreme Court had pronounced: "It is well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even one of which the defendant has been acquitted." *State v. Wiles* (1991), 59 Ohio St.3d 71, 78 (in death penalty case). This court has also stated that not guilty verdicts can be considered at sentencing. See *State v.*

*Bundy*, 7th Dist. No. 02CA211, 2005-Ohio-3310, ¶86 (provided it was not the sole basis for the sentence). See, also, *State v. Potts* (Sept. 11, 2001), 7th Dist. No. 747, fn.1, citing *Wiles*, 59 Ohio St.3d at 78.

**¶{45}** Finally, we add that the standard of proof in the criminal trial was proof beyond a reasonable doubt. This standard did not apply to sentencing. See *Watts*, 519 U.S. at 155. Thus, merely because the jury declined to find that serious physical harm was proven beyond a reasonable doubt does not mean that there was not sufficient evidence of serious physical harm for purposes of discretionary sentencing. The victim testified that she could not even count the number of times appellant struck her with the golf club, the photographs showed the large bruises caused thereby, the victim stated that the beating caused a fractured arm, and the victim expressed that she still felt pain from the beating.

**¶{46}** Accordingly, the sentencing court's utilization of the serious physical harm sentencing factor was not erroneous.

ASSIGNMENT OF ERROR NUMBER FOUR

**¶{47}** Appellant's fourth and final assignment of error alleges:

**¶{48}** "THE TRIAL COURT ERRED BY DENYING THE APPELLANT HIS FUNDAMENTAL CONSTITUTIONAL RIGHT TO A FAIR TRIAL. FIFTH AMENDMENT, FOURTEENTH AMENDMENT; ARTICLE 1, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION."

**¶{49}** At sentencing, the court stated that the evidence against appellant was overwhelming, especially considering his own statement to police. The court noted that appellant knew at the pretrial what evidence would be presented against him. The court concluded that appellant was not only "bad" for his beating of the victim but was also "stupid" for thinking he would be acquitted if he could talk the victim into hiding during the trial. (Sent. Tr. 7-8).

**¶{50}** At this point, defense counsel interjected: "And I think that you thought that before the trial even started." (Sent. Tr. 8). Appellant urges that this all demonstrates a fixed mindset on the part of the court.

**¶{51}** If appellant believed the court was biased prior to trial, an affidavit of disqualification would have been the procedure to follow, as we have no authority to

void a jury verdict on the grounds of judicial bias or prejudice alone. See, e.g., *Beer v. Griffith* (1978), 54 Ohio St.2d 440, 441-442; *Gains v. Harman*, 148 Ohio App.3d 357, 2002-Ohio-2793, ¶42-43 (7th Dist.). In reviewing the conviction itself, we can only review manifestations of bias that occurred in front of the jury. *State v. Wade* (1978), 53 Ohio St.2d 182, 188.

**¶{52}** Appellant apparently realizes this and thus focuses on actions that took place in front of the jury. For instance, he notes that the court used the phrase "the victim" at least three times, citing pages 30-31 which occurred prior to jury selection and page 251 which occurred just after jury selection. He asks that we consider the aforementioned setting in conjunction with the following questioning of the police officer by the court, which appellant complains contained leading questions and manifested the court's bias in front of the jury.

**¶{53}** "THE COURT: So in this conversation – I'm sorry, my bailiff passed me a note when you were testifying. You had a conversation with Mr. Donald?

**¶{54}** "THE WITNESS: Yes.

**¶{55}** "THE COURT: And this was at the house?

**¶{56}** "THE WITNESS: Yes, they were not separated. They were -- it's a very small room, and they were right next -- one was right next to each other on either side of the room. Like I said, it was a very small area.

**¶{57}** "COURT: So you said that -- I'm asking -- I just want to confirm it -- you said that she told you that he beat her with this golf club?

**¶{58}** "THE WITNESS: With a club, she stated.

**¶{59}** "THE COURT: With a club?

**¶{60}** "THE WITNESS: Yes.

**¶{61}** "THE COURT: And he told you that he waled on her with this club?"

**¶{62}** "THE WITNESS: Yes, sir.

**¶{63}** "THE COURT: Did he say anything to you other than that? I mean, did he say that she started it or she –

**¶{64}** "THE WITNESS: No, sir. They really didn't say anything. We explained to him that he was being placed under arrest for domestic violence. He was completely cooperative, didn't make any statements at all to us really.

**¶{65}** "THE COURT: Other than that he –

**¶{66}** "THE WITNESS: Other than the initial statement when he was sitting in the chair." (Tr. 286-288).

**¶{67}** Appellant failed to object to the nature of the court's questioning of the police officer and failed to object when the court called the alleged victim "the victim". Thus, appellant waived any argument absent plain error.

**¶{68}** If an error was not brought to the attention of the trial court, the appellate court may recognize plain error if there existed an obvious error affecting such substantial rights that it was outcome determinative. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, ¶62. Recognition of plain error must be done with the utmost of care by the appellate court and only in exceptional circumstances where it is necessary to avoid a manifest miscarriage of justice. *State v. Hughbanks*, 99 Ohio St.3d 365, 2003-Ohio-4121, ¶39. Even so, plain error is a discretionary doctrine which may, *but need not*, be employed if warranted. Id. See, also, Crim.R. 52(B).

**¶{69}** First, it has been held that use of the phrase "the victim" by the trial court is not plain error. See *State v. Wright*, 9th Dist. No. 02CA008179, 2003-Ohio-3511, ¶3-6; *State v. Ricker* (Sept. 30, 1997), 10th Dist. No. 97APC01-96. Even assuming arguendo the term is erroneous, there was overwhelming evidence that appellant hit the victim with a golf club and thus the use of the phrase was harmless.

**¶{70}** As for court questioning of a witness, it has been stated that a trial court's questioning must be scrupulously limited to avoid consciously or unconsciously indicating an opinion on the evidence or on the credibility of a witness. *State ex rel. Wise v. Chand* (1970), 21 Ohio St.2d 113. Pursuant to Evid.R. 614(B), the trial court "may interrogate witnesses, in an impartial manner", an adoption of the *Wise* holding. See 1980 Staff Note.

**¶{71}** The right to question witnesses pursuant to Evid.R. 614(B) rests within the sound discretion of the trial court. *State v. Sloan*, 7th Dist. No. 04BA47, 2005-Ohio-2932, ¶13. Impartial questions that attempt to clarify the testimony and are directed to relevant factual issues do not display an abuse of discretion. Id. at ¶14. Moreover, a trial court's questioning is not deemed partial merely because the

testimony provided in response to the court's question is damaging to the defendant. Id. at ¶16.

**¶{72}** Here, the court asked a few follow-up questions that were directly relevant. See *Metro. Life Ins. Co. v. Tomchik* (1999) 134 Ohio App.3d 765 (7th Dist). There is no indication the questions suggested a bias for one side or the other. See id. The court clarified the testimony as the court had been distracted for a moment, and the court informed the jury that it had been so distracted by a note from the bailiff. See *Sloan*, 7th Dist. No. 04BA47.

**¶{73}** Notably, the court was not using its own language when the court asked the officer if the defendant said, "he waled on her with this club." Rather, it was the defendant's own phraseology that he had "waled on her ass with a club." (Tr. 272, 282-283). Thus, we find no error.

**¶{74}** In any event, as aforementioned, there was overwhelming evidence that appellant knowingly caused physical harm to the victim with a deadly weapon. As such, even if improper, the court's questioning would not constitute plain error. This assignment of error is overruled.

**¶{75}** For the foregoing reasons, appellant's conviction is hereby affirmed, but the sentence is vacated and the case is remanded for resentencing with instructions to refrain from making inappropriate comments and to abstain from imposing sentence based upon improper considerations.

Waite, J., concurs.
DeGenaro, J., concurs.