[Cite as *State v. Turner*, 2019-Ohio-5470.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 19CA4
	:	
vs.	:	
	:	
DANNY TURNER,	:	DECISION AND JUDGMENT
	:	ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Jessica M. Ismond, Oths, Heiser, Miller, Waigand & Clagg, LLC, Wellston, Ohio, for Appellant.

Justin Lovett, Jackson County Prosecuting Attorney, and Paul David Knipp, Assistant Prosecuting Attorney, Jackson, Ohio, for Appellee.

Smith, P.J.

{¶1} Danny Turner, ("Appellant"), appeals the judgment entry of the Jackson County Court of Common Pleas, dated February 25, 2019. Appellant pled guilty to one count of felonious assault, a violation of R.C. 2903.11 and a felony of the second degree. The trial court imposed a prison sentence of six years. On appeal, Appellant asserts that (1) his trial counsel rendered ineffective assistance; and (2) the trial court deprived Appellant of his right of allocution. Upon review, we find no merit to Appellant's

assignments of error. Accordingly, both assignments of error are overruled and the judgment of the trial court is affirmed.

FACTS AND PROCEDURAL HISTORY

{¶2} On August 9, 2018, Appellant was indicted on one count of felonious assault. Appellant's mother, Pamela Turner, was the victim. The indictment stemmed from an incident which occurred on July 3, 2018, at the victim's home, where Appellant had been living.

{¶3} According to the record, Appellant was choking Crystal Casey when his mother overheard the commotion and intervened.[1] Once that altercation stopped, Appellant followed his mother into the kitchen where he repeatedly "bounced her head off the kitchen counter like a basketball to the point where she passed out in the floor and came to with [Appellant] kicking her." Appellant's mother was transported to St. Mary's Medical Center where she was treated for head and facial injuries.

{¶4} Upon arraignment, Appellant pleaded not guilty. He was assigned court-appointed counsel. The arraignment transcript reflects that as early as arraignment the State offered to recommend a six-year prison sentence if Appellant pled guilty as charged. The trial court ordered Appellant be held on a $100,000 cash or surety bond with the condition that

[1] The record does not reveal the nature of the relationship between Appellant and Crystal Casey.

if Appellant was able to post bond, he would be ordered to house arrest and be required to wear a GPS ankle monitor.[2]

{¶5} The matter progressed with exchange of discovery. On October 17, 2018, at the final pretrial, the transcript reflects that the trial court opened the hearing by acknowledging his understanding that the parties had reached an agreement and the court would be proceeding with a plea. The prosecutor outlined the plea agreement for the court as follows: "[T]he defendant would agree to plead guilty to the single count in the Indictment, * * *the parties would agree to a joint sentencing recommendation of four (4) years….."

{¶6} The State further advised that it had contacted the victim and the local law enforcement agency and that both were in agreement with the resolution. The plea agreement also iterated that the joint sentencing recommendation was not binding on the court and the court was not bound to adopt any sentencing recommendation. The agreement provides in pertinent part:

> 6. Defendant agrees and understands that the State may elect to rescind this plea agreement or elect to argue

[2] On September 24, 2018, the State moved to modify bond to house arrest and ankle monitoring at Grant Hospital in Columbus, Ohio due to the fact that Appellant had injured himself at the Jackson County jail and was undergoing surgery at Grant. Apparently Appellant threw himself over a high rail at the jail. He appeared in a wheelchair at the court's first attempt at sentencing in December 2018.

any sentence permitted for the offense(s) in this case if defendant fails to comply with the following terms and conditions from the date of this agreement to such time as Defendant has been sentenced:

(d) Defendant, if at any time, moves the Court to withdraw any plea entered into it as a result of this agreement.

{¶7} Appellant executed the plea agreement, acknowledging that he had carefully reviewed every part of the agreement and that his decision to enter the agreement was informed and voluntary.

{¶8} At this point, the trial court inquired of Appellant as follows:

Q: State your name for the record.

A: Danny J. Turner.

Q: How old are ya (sic.)?

A: Forty-three (43).

Q: How far have you gone in school?

A: I finished eleventh grade.

Q: Do you have your G.E.D.?

A: No sir.

Q: Are you able to read and write English?

A: Yes sir.

***

Q: Are you under the influence of any drugs, medications or alcohol?

A: No sir.

Q: Has anyone threatened you to enter this plea of guilty?

A: No sir.

Q: Has anyone promised you anything special if you enter this plea other than what we have said here today on the record?

A: No sir.

Q: You understand while the State has made a recommendation to the Court for sentencing the Court does not have to follow that recommendation?

A: Yes sir.

Q: Knowing that, you want to proceed with your plea?

A: Yes sir.

***

Q: Have you read the plea agreement?

A: Yes sir.

Q: Do you understand what it says?

A: Yes sir.

Q: Do you have any questions about it?

A: No sir.

Q: Have you had enough time to talk to Mr. Nash about this case before proceeding?

A: Yes sir.

Q: Has he talked to you about this case and answered all your questions?

A: Yes sir.

Q: Have you reviewed the Discovery, the Indictment and other legal documents in this case with him?

A: Yes sir.

Q: You understand that any pending motion or issue will not be heard by the Court if you enter a plea of guilty?

A: Yes sir.

Q: Are you satisfied with your attorney's services?

A: Yes sir.

***

Q: You understand that you have a right to a jury

of twelve persons?

A: Yes sir.

Q: You understand that all of the jurors must agree the State of Ohio has proven your guilt beyond a reasonable doubt before you can be convicted?

A: Yes sir.

Q: And you understand that at trial the State of Ohio has the obligation to prove your guilt beyond a reasonable doubt as to each element of each crime of which you are charged?

A: Yes sir.

Q: You understand your attorney has the right to cross examine any witnesses who testify against you at trial?

A: Yes sir.

Q: And you understand you have the right to subpoena your own witnesses to attend trial?

A: Yes sir.

Q: You understand you cannot be forced to testify against yourself at trial?

A: Yes sir.

Q: You understand if you plead guilty, you are going to give up all these importation [sic] constitutional rights we have just gone over?

A: Yes sir.

***

Q: Do you have any questions before we proceed?

A: No sir.

Q: Do you need to speak to Mr. Nash anymore?

A: No sir.

Q: Okay. You've had enough time to think about this decision?

A: Yes sir.

Q: And you are certain you want to proceed today and change your plea as we have outlined here today on the record?

A: Yes sir.

{¶9} The record also contains an Entry of Guilty Plea form wherein Appellant acknowledged his desire to withdraw his earlier plea, his waiver of constitutional, statutory, and procedural rights, the potential maximum penalties, and his satisfaction with his attorney. The trial court made a finding that Appellant was capable of proceeding with the plea and also made a finding of guilty.

{¶10} At this point, Appellant's counsel advised the trial court that Appellant, while wishing to proceed with sentencing, would be asking for a stay of execution. The trial court indicated if he did proceed with sentencing, he would deny a stay. Defense counsel then requested a future date for sentencing. Appellant added: "Ankle monitor, GPS monitor, anything just to get some things done." The prosecutor spoke, indicating that due to the nature of the offense and the victim involved, the State opposed any early release prior to sentence. Defense counsel then requested a separate sentencing hearing, which the trial court granted.

{¶11} The record next reflects that Appellant appeared in court on November 7, 2018, for a scheduled sentencing. This hearing began with the trial court's statement, "Mr. Nash, I understand your client…uh…has requested that you file a motion to withdraw the plea." The trial court then indicated defense counsel would be given an opportunity to file the motion.

{¶12} The prosecutor interjected, announcing that pursuant to the plea agreement, if Appellant asked to withdraw the plea and the motion was not granted, the State was then free to ask for any sentence within the range. The prosecutor indicated he would be requesting an eight-year prison sentence. Defense counsel requested time to discuss this development with Appellant. The transcript reflects that defense counsel then informed the

trial court that Appellant was prepared to proceed with the motion to withdraw his plea. The trial court asked defense counsel how much time he would need to file the motion and counsel stated that one week would be sufficient.

{¶13} The transcript next reflects that a status/sentencing hearing took place on December 12, 2018. The hearing began with no mention whatsoever of a potential motion to withdraw plea. The prosecutor's opening comment indicated the parties had come to an agreement on a four (4) year sentence of incarceration. The prosecutor indicated the victim was present and wished to make a statement. Appellant's mother spoke briefly indicating her belief that Appellant was a danger to himself and to society. She also acknowledged that she was in agreement with the resolution of the case.

{¶14} The trial court then asked Appellant if there was anything he would like to tell the court before sentence was imposed. Appellant stated: "No sir." The judge inquired further: "Nothing"? The transcript reveals Appellant apparently mumbled: "Just (inaudible)…come up with something…."

{¶15} At this point, the judge asked the prosecutor to refresh the court on the underlying facts. The prosecutor summarized the felonious assault

incident and indicated that pictures of the victim's injuries were available. After reviewing the photos, the trial court commented that the photos were "deeply disturbing." The trial court further exclaimed: "It's your mother! For the love of God, sir, it's your mother! She gave birth to you. She raised you and this is how you treat her? I'm going to take five."

{¶16} When the court and the parties were back on the record, the judge again expressed his outrage at the crime and reminded the parties that he was not bound by the joint recommendation. The trial court further inquired: "But, explain to me why I should do four (4) years in this"? Defense counsel stated that the victim, "the person most affected," had been consulted and did not want Appellant to "go free." The trial court then inquired of Appellant's mother about her agreement to the four (4) year sentence. Appellant's mother stated:

> I agree with Your Honor about him being a danger. I raised him and know him better than anyone. I couldn't work because I couldn't even leave him with babysitters. He would bite kids, fight, and if he could get his way when he got older he would cut his self [sic]. It's a lot. And at two (2) years old he was diagnosed with ADD and personality disorder and he was my son, I loved

> him. He was born premature, but I knew all long [sic] D.J. had or Danny had psychiatric problems, mental problems, even with his sister I wouldn't leave him alone with her because he would tell her things, threaten to hurt her or (unintelligible) her doll. I dealt with it but it's broke me sir. Your Honor, it has. * * * And I've heard testimonies from other people hit with baseball bats and I don't someone coming and telling me that my son has took an innocent life. It could have been mine. I could have not been here today. * * * So, do what you, you're the Judge, I'm a loving mother but what if I say no I don't want the eight and he does get out and kills someone? And he's capable of killing his self [sic]. He's [sic] needs psychiatric help.

{¶17} Thereafter, the trial court told defense counsel that if he wanted additional time to argue for the four-year sentence, he would be given the opportunity. Defense counsel responded that he was unaware of potential psychological issues until the victim had spoken. The trial court and counsel agreed that Appellant should undergo a risk assessment so the court ordered one.

{¶18} On February 20, 2019, the record reflects that trial court and the parties had individual copies of a risk assessment report.[3] The trial court sentenced Appellant to a six-year prison term. This timely appeal followed.

ASSIGNMENTS OF ERROR

"I. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE OHIO AND UNITED STATES CONSTITUTIONS, RESULTING IN AN UNKNOWING AND INVOLUNTARY PLEA.

II. THE TRIAL COURT ERRED WHEN IT SENTENCED APPELLANT WITHOUT COMPLYING WITH RULE 32(A)(1) OF THE OHIO RULES OF CRIMINAL PROCEDURE."

ASSIGNMENT OF ERROR ONE -
INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

{¶19} To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Wilson,* 4th Dist. Lawrence No. 18CA15, 2019-Ohio-2754, at ¶ 25;

[3] The contents of the Risk Assessment were not discussed except for the trial court's comment that the report indicated Appellant was a "very dangerous person."

State v. Short, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 113; *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In Ohio a properly licensed attorney is presumed competent. *State v. Gondor,* 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 62. Thus, in reviewing the claim of ineffective assistance of counsel, we must indulge in "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Strickland* at 697, 104 S.Ct. 2052. Failure to satisfy either part of the test is fatal to the claim. *Id*.; *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989); *State v. Ruble*, 2017-Ohio-7259, 96 N.E.3d 792, ¶ 47 (4th Dist.).

B. LEGAL ANALYSIS

1. Failure to file a Motion to Withdraw Plea

{¶20} Appellant argues alleged ineffective assistance of counsel by pointing to the inexplicable absence of a motion to withdraw plea filed in the trial court record. In his brief, Appellant sets forth the standard for granting a pre-sentence motion to withdraw plea and also sets forth the higher standard a defendant faces when filing a post-sentence motion to withdraw plea. Appellant concludes that it is possible that his counsel's failure to file

the motion constitutes deficient performance and that he was prejudiced by his counsel's failure to file the motion prior to his sentencing and thus, subjecting him to the higher standard for post-sentence motions. The discussion regarding the possible filing of a motion to withdraw has been set forth above at paragraphs 11-13.

{¶21} Appellant's summation of the differing standards of review for pre-or post-sentence motions to withdraw is correct. Crim.R. 32.1 states: "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." Crim.R. 32.1 permits a defendant to file a motion to withdraw a guilty plea before sentence is imposed. "While trial courts should 'freely and liberally' grant a pre-sentence motion to withdraw a guilty plea, a defendant does not "have an absolute right to withdraw a guilty plea prior to sentencing." *State v. Curtis*, 4th Dist. Meigs No. 18CA12, 2019-Ohio-1108, at ¶ 7, quoting *State v. Howard,* 2017-Ohio-392, 103 N.E.2d 108 (4th Dist.) at ¶ 21; quoting *State v. Xie,* 620 Ohio St.3d 521, 527, 584 N.E.2d 715.

{¶22} " 'A defendant who seeks to withdraw a plea of guilty after the imposition of sentence has the burden of establishing the existence of

manifest injustice.' " *State v. Snyder,* 2017-Ohio-8091, 96 N.E.3d 833, at ¶17, quoting, *State v. Smith,* 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus; *State v. Ogle,* 4th Dist. Hocking No. 13CA18, 2014-Ohio-2251, at ¶ 8. A manifest injustice is a clear and openly unjust act; it relates to a fundamental flaw in the proceedings resulting in a miscarriage of justice or a deprivation of due process. *See State ex rel. Schneider v. Kreiner,* 83 Ohio St.3d 203, 208, 699 N.E.2d 83 (1998); *Ogle* at ¶ 8; *State v. Hall,* 10th Dist. Franklin No. 03AP-433, 2003-Ohio-6939, at ¶ 12. "This is an 'extremely high standard' that permits a defendant to withdraw his plea 'only in extraordinary cases.' " *State v. Walton*, 4th Dist. Washington No. 13CA9, 2014-Ohio-618, at ¶ 10, quoting *State v. Darget,* 4th Dist. Scioto No. 12CA3487, 2013-Ohio-603, at ¶ 21. In this case, Appellant did not file neither a pre-nor post-sentence motion to withdraw his plea.

{¶23} Appellee responds by suggesting Appellant had "buyer's remorse," and nothing further which would merit withdrawing his negotiated plea. Appellee points out Appellant was in court two times after the original discussion about withdrawing his plea and made no further mention of it. Appellee also suggested that evidence outside the record would indicate a

meritless reason to withdraw the plea. For the reasons which follow, we find no merit to Appellant's argument.

{¶24} At the outset, we note that at the plea hearing, Appellant specifically testified that he was satisfied with his attorney's services. He also executed an Entry of Guilty Plea. In this form, he acknowledged that he had reviewed the facts of the case and the law with his attorney and that he was "completely satisfied with the legal representation and advice I have received from counsel."

{¶25} To prove ineffective assistance on the basis of a failure to file a particular motion, a defendant must establish that the motion stood a reasonable probability of success. *State v. Purvis-Mitchell,* 4th Dist. Washington No. 17CA30, 2018-Ohio-4032, at ¶ 71; *See State v. Adkins,* 161 Ohio App.3d 114, 2005-Ohio-2577, 829 N.E.2d 729 (4th Dist.) at ¶ 14; *State v. Hollis,* 9th Dist. Stark No. 2004CA00207, 2005-Ohio-1486, at ¶ 25; *State v. Morrison,* 4th Dist. Highland No. 03CA13, 2004-Ohio-5724, at ¶ 10; *State v. Haskell,* 6th Dist. Seneca No. 13-03-45, 2004-Ohio-3345, at ¶ 19. In this case, the record does not reveal any reason for Appellant's desire to withdraw his plea. As Appellee points out, Appellant was in court two additional times after the plea hearing and failed to raise the issue of withdrawing his plea although the trial court addressed him and gave him

what appears to be ample opportunity to raise the issue. Furthermore, Appellant does not make any argument in his brief which explains his reason for wishing to withdraw his plea.

{¶26} We have reviewed, and set forth above at paragraph 8, the trial court's colloquy with Appellant at the plea hearing. " 'The underlying purpose, from the defendant's perspective, of Crim.R. 11(C) is to convey to the defendant certain information so that he can make a voluntary and intelligent decision whether to plead guilty.' " *State v. Collins,* 4th Dist. Lawrence No. 18CA11, 2019-Ohio-3428, at ¶ 7, and *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, at ¶ 18, quoting *State v. Ballard,* 66 Ohio St.2d 473, 479–480, 423 N.E.2d 115 (1981). As set forth above and in the record, it appears the trial court satisfactorily complied with the dictates of Crim. R.11. Based on our review of the record, we cannot find any evidence that a motion to withdraw Appellant's plea would have had a reasonable probability of success even if defense could had filed one. For this reason, we cannot find counsel's performance to be deficient.

{¶27} Even if we found the failure to file a motion to be deficient, along with failing to give a reason for desiring to withdraw his plea, Appellant also fails to explain in what way he has been prejudiced by the alleged deficient act of his attorney. Any speculation on our part as to the

alleged prejudice would not support Appellant's ineffective assistance claim. (*See State v. Young*, 8th Dist. Cuyahoga No. 103024, 2016-Ohio-2720, at ¶13; *State v. Spencer*, 8th Dist. Cuyahoga No. 69490, 2003–Ohio–5064, ¶ 12.) For the foregoing reasons, we find no merit to Appellant's claim that he was rendered ineffective assistance of counsel by counsel's alleged inappropriate failure to file a motion to withdraw the guilty plea.

2. Failure to Correct State's Misrepresentation

{¶28} The record reflects that Appellant entered his guilty plea on October 17, 2018. The record further reflects, as we have set forth above in paragraph 8, that the trial court engaged Appellant in a fully compliant Crim.R. 11(C) colloquy.

{¶29} The alleged misrepresentation occurred thereafter at Appellant's first attempted sentencing hearing on November 7, 2018. There, after the motion to withdraw issue was raised, the prosecutor stated:

> The State would just like to put on that the Defendant is facing a felony of the second degree, felonious assault, with a potential of…maximum prison sentence of eight (8) years. According to the plea agreement that he entered in part 5 of that if he is moving to withdraw a plea into that the State can rescind it's [sic] plea agreement and elect to argue sentencing permitted for

> the offenses in the case…um…making that motion have consequences and **I hope the Defendant know that because he is doubling the term for the recommended sentence.** (Emphasis added.)

Attorney Nash clarified:

> If I understood that…let me speak up loudly and ask to be corrected if I'm wrong but if I understood that correctly if Mr. Turner asks to withdraw his plea he has then breached the plea agreement with the State and then if the Court decides not to grant that plea withdraw the State is then free to ask for any sentence within the range, do I understand that correctly, Your Honor?

The trial court agreed that was his understanding of the agreement. The prosecutor then added: **"It would double it up to eight (8) years in prison so it's a big decision."** (Emphasis added.)

{¶30} Appellant argues that the State misrepresented the consequence that Appellant would face if he elected to file a motion to withdraw his guilty plea. In the language we have emphasized in bold print above, Appellant argues that the State indicated that Appellant would face a doubled eight-year sentence, the maximum under the law and that his

attorney failed to clarify this mistake on the record. Then when the parties proceeded to sentencing, Appellant did not enter his plea with a full understanding of the consequence and thus did not make his guilty plea knowingly, intelligently and voluntarily. Appellant concludes that he was prejudiced by his counsel's failure to clarify the record and that his plea was obtained without a full understanding of the consequences and should be vacated.

{¶31} We disagree. Appellant entered his knowing and voluntary plea on October 17, 2018. The alleged misrepresentation occurred on November 7, 2018. The prosecutor's statements, in bold above, do not misrepresent the plea agreement. Rather, the statements reflect what the prosecutor would **recommend** at sentencing should Appellant move unsuccessfully to withdraw his plea. (Emphasis added.)

{¶32} Even if the prosecutor's statements constituted misrepresentations requiring correction, they occurred on November 7, 2018, after Appellant entered his plea - - not before, on October 17, 2018. Therefore, Appellant could not have relied on them when entering his plea. Given that Appellant had already entered his plea by the time the alleged misrepresentation occurred, we find no prejudicial error occurred by counsel's failure to correct the alleged misrepresentation.

{¶33} For the foregoing reasons, we find no merit to Appellant's second argument, that he was rendered ineffective assistance of counsel due to his attorney's failure to correct the alleged misrepresentation. Accordingly, having found no merit to either of Appellant's arguments under the first assignment of error, it is hereby overruled.

ASSIGNMENT OF ERROR TWO - RIGHT OF ALLOCUTION

A. STANDARD OF REVIEW

{¶34} When reviewing felony sentences we apply the standard of review set forth in R.C. 2953.08(G)(2). *State v. Brunner,* 4th Dist. Scioto Nos. 18CA3848 and 3849, 2019-Ohio-3410, at ¶ 37; *State v. Brewer,* 2014–Ohio–1903, 11 N.E.3d 317, ¶ 33 (4th Dist.) ("we join the growing number of appellate districts that have abandoned the *Kalish* plurality's second step abuse-of-discretion standard of review; when the General Assembly re-enacted R.C. 2953.08(G)(2), it expressly stated '[t]he appellate court's standard of review is not whether the sentencing court abused its discretion' "); *see also State v. Graham,* 4th Dist. Highland No. 13CA11, 2014–Ohio–3149, ¶ 31. R.C. 2953.08(G)(2) specifies that an appellate court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds either that "the record

does not support the sentencing court's findings" under the specified statutory provisions or "the sentence is otherwise contrary to law."

B. LEGAL ANALYSIS

{¶35} Crim.R. 32(A)(1) in part reads, "At the time of imposing sentence, the court shall * * * address the defendant personally and ask if he or she wishes to make a statement on his or her own behalf or present any information in mitigation of punishment." Crim.R. 32(A)(1) confers an absolute right of allocution. *State v. Leeth,* 4th Dist. Pike No. 05CA745, 2006-Ohio-3575, at ¶ 7; *State v. Green*, 90 Ohio St.3d 352, 358, 738 N.E.2d 1208 (2000). The trial court has the affirmative obligation to personally ask the defendant if he wishes to exercise his allocution right. *See Green* at 359. It cannot be waived. *State v. Campbell,* 90 Ohio St.3d 320, 324-325, 738 N.E.3d 1178 (2000).

{¶36} Trial courts must "painstakingly adhere to Crim.R. 32, guaranteeing the right of allocution." *State v. Long,* 1st Dist. Hamilton No. C-150713, 2016-Ohio-5345, at ¶ 4, quoting, *Green* at 359; *State v. Brown,* 1st Dist. Hamilton No. C–140509, 2015–Ohio–2960, ¶ 5. However, a violation of the right of allocution is also subject to the invited error and harmless error doctrines. *State v. Roach,* 7th Dist. Belmont No. 15BE0031, 2016-Ohio-4656, at ¶ 10 citing *Campbell,* at 326. As to harmless error, the

Supreme Court has explained, "a trial court's failure to address the defendant at sentencing is not prejudicial in every case." *Id*. at 325. Failure to demonstrate prejudice renders an error harmless. *See* Crim.R. 52(A). *See also State v. McBride,* 2d Dist. Montgomery No. 18016, 2001 WL 62543 (Jan.26, 2001), at *4.

{¶37} As set forth in the factual background above, Appellant's first sentencing hearing occurred on December 12, 2018. On that date, the prosecutor described the jointly agreed recommendation of a four-year prison sentence. Appellant's mother, the victim, spoke. Then the trial court asked Appellant if there was anything he would like to tell the court before sentence was imposed. Appellant replied: "No sir." The trial court inquired further: "Nothing"? Appellant thereafter mumbled something transcribed as "inaudible."

{¶38} After reviewing the facts of Appellant's case, reviewing the photos, expressing outrage at Appellant's crime of felonious assault against his mother, taking a five-minute break, inquiring further of counsel and the victim, and ordering a risk assessment, the trial court continued sentencing to February 20, 2019. On this date, the only reference to Appellant's evaluation was the trial court's recognition on the record that both parties had copies of a risk assessment. The State indicated it did not wish to make

additional arguments for sentencing and would rely on the joint recommendation of four years, supported by law enforcement and the victim. Defense counsel also asked the court to implement the plea agreement.

{¶39} The trial court then proceeded to impose sentence, stating that it had considered the sentencing factors in R.C. 2929.11 and R.C. 2929.12, the victim's expressed desire, and the recommendation submitted. The trial judge again expressed outrage at the photos submitted in the matter. The judge also alluded to the risk assessment language finding Appellant a "very dangerous person." The judge continued:

> The Court is going to sentence you to six (6) years in prison. I guess before I should say that I should give Mr. Turner any additional opportunity to make a statement to the Court. Mr. Turner, is there anything else you want to say?
>
> Defendant: I just want to say I'm sorry.
>
> Judge: Okay.
>
> Defendant: I'm sorry I hit my mom.
>
> Judge: Well, I think it's…

Defendant: …please ask for leniency so I can get help or something instead of just throwing me away to prison, please.

Judge: Well…go ahead…

Defendant: …I was high. I was drunk and I don't even remember coming home that night. And I've never been in trouble. Please have leniency…mercy for me, please…

The judge proceeded as follows:

Well, prison…it's prison for you. It's a matter of how long. The State isn't agreeing to anything…uh…they're not agreeing to no prison. They want four (4) years and that's because your mom is showing you some mercy. You could do eight (8). When I look at what you did to your mom, you stomped her. You stomped her head with your boot! (emphasis added). You beat her head off the table so badly she was life flighted? (emphasis added). This Risk Assessment indicates you've got a long history of this type of problematic behavior and you've got little insight and little motivation to change. Again, if you'll do this to your mother, I have grave

> concern what you'd do to some…uh…any stranger you'd come upon. Um…so (6) years….

{¶40} " 'The requirement of allocution is considered fulfilled when the conduct of the court clearly indicates to the defendant that he has a right to make a statement prior to the imposition of sentence.' " *State v. Haynes,* 12th Dist. Butler No. CA2010-10-273, 2011-Ohio-5743, at ¶ 37, quoting, *State v. Harvey*, 3rd Dist. Allen No. 1–09–48, 2010–Ohio–1627, ¶ 15, citing *Defiance v. Cannon,* 70 Ohio App.3d 821, 828, 592 N.E.2d 884 (3rd Dist. 1990.) And, " 'the inquiry is much more than an empty ritual: it represents a defendant's last opportunity to plead his case or express remorse.' " *Roach, supra,* at ¶ 9, quoting, *Green,* 90 Ohio St.3d 352, at 359–60, 738 N.E.2d 1208. In *State v. Leeth, supra,* the trial court found *Leeth* guilty and immediately sentenced him without addressing him and asking him if he had anything to say in mitigation of the sentence. In *State v. Spradlin,* 4th Dist. Pike No. 04CA727, 2005-Ohio-4704, the court allowed defense counsel to speak but never personally addressed *Spradlin* and asked if he would like to make a statement. The defendants in *Leeth* and *Spradlin* were clearly denied the right of allocution, and those cases are distinguishable from Appellant's.

{¶41} In this case, the trial court directly addressed Appellant and extended him his right to allocution before pronouncing sentence on

December 12th . It is obvious the trial court struggled with the sentencing decision in this case and kept an open mind with regard to sentencing. Here, at the December hearing, the trial court took the five-minute break, inquired of all involved again as to their thoughts on Appellant's sentence, and then ordered an evaluation and delayed sentencing.

{¶42} At the February 20th sentencing, the trial court began to impose sentence without directly addressing Appellant, to the extent of stating a six-year sentence before stopping and correcting himself. The trial court clearly gave Appellant one last opportunity to plead his case or express remorse, which Appellant did. Appellant said he was sorry for his act and begged for leniency. The trial court engaged in a back and forth discussion with him and at one point stated: "Well, go ahead." While this could be construed as an "empty ritual," we find that the trial court's technical misstep in pronouncing a six-year prison sentence and then correcting itself and inquiring of Appellant to be, at most, a harmless error.

{¶43} Again, it was clear that the trial court struggled with the sentencing decision. The trial court inquired of counsel, Appellant, and the victim numerous times. The trial court took a five-minute break during the December attempt at sentencing. The trial court gave the attorneys additional time to argue sentence. And, the trial court ordered the evaluation

and delayed sentencing in an obvious attempt to have the most information possible. Given the trial court's obvious lengthy consideration of a sentencing decision, we do not find the trial court allowed Appellant only the right of an empty ritual. We find the trial court stopped itself and allowed Appellant the right of allocution prior to imposition of the six-year sentence. The fact that Appellant did not manage to say anything which changed the outcome does not mean the trial court did not meaningfully consider Appellant's plea for leniency.

{¶44} In *State v. Long, supra,* the appellant contended he had not been allowed to speak at the appropriate time because the trial court, after indulging some back and forth discussion between itself and *Long*, refused to let him say anything after the discussion of information contained in *Long's* pre-sentence investigation report (PSI). However, the appellate court observed that the trial court addressed *Long*, specifically asked him if he had anything to say, and listened to him when he spoke. The record demonstrated that *Long* had the PSI report before the sentencing hearing. He knew its contents and had an opportunity to address the information when the court specifically asked him if he had anything to say. The appellate court found that under the circumstances *Long* was not denied his right of allocution.

{¶45} In this case, the trial court had delayed sentencing in order to obtain a psychiatric evaluation of Appellant. Appellant and his attorney had the risk assessment beforehand. Appellant did not choose to reference anything in the risk assessment which may have swayed the trial court's sentencing decision. If the trial court erred by its technical misstep, we find it a harmless error and Appellant has not demonstrated any prejudice.

{¶46} For the foregoing reasons, we find no merit to Appellant's argument hereunder. Error, if any, was harmless. Accordingly, we overrule the second assignment of error.

{¶47} Having found no merit to either of Appellant's assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Jackson County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Jason P. Smith
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.