[Cite as *State v. Winston*, 2010-Ohio-1354.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. ROBERT WINSTON, JR. Appellant	C. A. No. 24761 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 08 11 3852

DECISION AND JOURNAL ENTRY

Dated: March 31, 2010

MOORE, Judge.

{¶1} Appellant, Robert Winston, Jr., appeals from the decision of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} Robert Winston and Shasta Kelly, the victim, were previously in a relationship and have one child together. In October of 2008, Winston moved out of Kelly's apartment, where he had been staying. On November 5, 2008, Kelly called the police to report that she believed that Winston had attempted to break into her apartment. On November 13, 2008, the police responded to Kelly's apartment two times. The first was based on Kelly's report that Winston had attempted to break into her apartment; the second was based upon a neighbor's call that Winston had been kicking the apartment door.

{¶3} On the evening of November 20, 2008, Winston visited with his son at Kelly's apartment. He left shortly thereafter. Later in the evening, he called Kelly to tell her he wanted

to come back to the apartment to discuss their relationship. Kelly informed Winston that she did not want him to come over. In the early morning hours of November 21, 2008, despite Kelly's wishes, Winston arrived at the apartment. He first knocked on the door, and when Kelly denied him entrance, he began to kick on the door and threatened to break it down. Kelly initially placed a couch in front of the door, fearing he would break the door. Later she allowed him to enter the apartment. Winston, angry that Kelly had not immediately allowed him in, grabbed Kelly and slammed her head into a door. He then vomited in the kitchen sink. During this time, Kelly attempted to escape by running from the apartment. Winston caught her in the apartment complex parking lot and dragged her back to the apartment.

{¶4} Once back in the apartment, Winston started punching Kelly as she lay on the floor. He then got a knife and held it against her. The two walked to Kelly's bedroom where Winston set down the knife, and informed Kelly that he wanted to have anal sex. Kelly informed him that she did not want to have anal sex and offered to engage in oral sex instead. She proceeded to fellate Winston, who fondled her and then engaged in anal sex with Kelly. After the encounter, Winston went to the bathroom and Kelly went to the living room. Eventually, Winston fell asleep and Kelly called police.

{¶5} As a result of these incidents, Winston was indicted on one count of kidnapping, in violation of R.C. 2905.01; three counts of rape, in violation of R.C 2907.02(A)(2); one count of aggravated burglary, in violation of R.C. 2911.11(A)(1) and/or (2); one count of gross sexual imposition, in violation of R.C. 2907.05(A)(1); two counts of domestic violence, in violation of R.C. 2919.25(A) and (C); one count of endangering children, in violation of R.C. 2929.22(A); and one count of menacing by stalking, in violation of R.C. 2903.211(A)(1). Winston pled not guilty to the charges.

{¶6} Prior to trial, the State notified the court of its intent to use other acts evidence and expert testimony regarding battered woman syndrome. The trial court held a hearing on the State's notice of intent to use other acts evidence and expert testimony and deemed the evidence admissible.

{¶7} At the close of trial, the jury found Winston not guilty on the rape count involving vaginal sex and not guilty on the count of endangering children. The jury found Winston guilty of the remaining two rape charges, with relation to anal sex and oral sex, the aggravated burglary charge, the kidnapping charge, the gross sexual imposition charge, and two counts of domestic violence. The jury determined that Winston was not a sexually violent predator. Winston was sentenced to a total of 16 years of incarceration. Winston has timely appealed and has raised five assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ERRED BY PERMITTING IRRELEVANT EVIDENCE TO BE PRESENTED BY THE STATE AND BY NOT COMPLYING WITH OHIO EVIDENCE RULE 403, WHICH DEPRIVED [WINSTON] OF DUE PROCESS AND HIS RIGHTS TO A FAIR TRIAL."

{¶8} In his first assignment of error, Winston contends that the trial court erred by permitting irrelevant evidence to be presented by the State and by not complying with Ohio Evidence Rule 403, which deprived him of due process and his rights to a fair trial. We do not agree.

Other Acts Evidence

{¶9} Initially, Winston contends that "[t]he Trial Court improperly admitted evidence against [Winston] related to two alleged incidents for which [he] was never charged." We conclude that Winston has forfeited this argument for purposes of appeal.

{¶10} On February 6, 2009, the State filed its notice of intent to use other acts evidence pursuant to Evid.R. 404(B). The notice was filed in accordance with Crim.R. 12(E)(1), which allows the State, at its discretion, to give notice of its intent "to use specified evidence at trial, in order to afford the defendant an opportunity to raise objections to such evidence prior to trial[.]"

{¶11} The State sought to introduce evidence of two prior instances where Winston allegedly forced his way into Kelly's home. One instance involved his using his key without Kelly's permission after he had threatened to kill her. The other instance involved the use of force to enter the home. Winston responded to the motion. Although he captioned this motion a "motion in opposition to State's notice of expert witness and notice to use other acts evidence[,]" we will construe the motion as a motion in limine. See *State v. Cromartie*, 9th Dist. No. 06CA0107-M, 2008-Ohio-273, at ¶5. On February 27, 2009, the trial court held a hearing. The trial court determined that the other acts were relevant to the three counts of rape and the count of aggravated burglary. Further, the trial court determined that the acts would go to prove the element of a "pattern of conduct" necessary to the count of menacing by stalking.

{¶12} A motion in limine "'is a precautionary request, directed to the inherent discretion of the trial judge, to limit the examination of witnesses by opposing counsel in a specified area until its admissibility is determined by the court outside the presence of the jury.'" *State v. Grubb* (1986), 28 Ohio St.3d 199, 201, quoting *State v. Spahr* (1976), 47 Ohio App.2d 221. The trial court's ruling on a motion in limine is preliminary. *State v. Gaughan*, 9th Dist. No. 08CA0010-M, 2008-Ohio-5528, at ¶18 (concluding that a motion in limine is "merely a preliminary ruling concerning an evidentiary issue that was anticipated but not yet presented in its full context." (Internal quotation and citation omitted.)) Thus, "a motion in limine does not preserve the record on appeal[;] *** [a]n appellate court need not review the propriety of such an

order unless the claimed error is preserved by an objection *** when the issue is actually reached *** at trial ." (Emphasis omitted.) *Grubb*, 28 Ohio St.3d at 203, quoting Palmer, Ohio Rules of Evidence Manual (1984), at 446. "Consequently, this Court reviews the trial record, not the motion in limine ruling, to determine whether an appellant preserved a contested issue by entering a timely objection at trial." *State v. Stoyer*, 9th Dist. No. 24010, 2008-Ohio-2964, at ¶7. The failure to properly object to the admission of the evidence at trial forfeits the argument for purposes of appeal. *State v. Gray*, 9th Dist. No. 08CA0057, 2009-Ohio-3165, at ¶7, quoting *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121. See, also, *Ponder v. Kamienski*, 9th Dist. No. 23270, 2007-Ohio-5035, at ¶12-13.

{¶13} Winston points this Court to his objection, made prior to trial, to support his argument that the trial court admitted the contested evidence over objection. He fails to point this Court to any portion of the *trial* where he objected to the admission of the evidence at the time where the issue was actually reached. Further, our review of the record does not reveal any objections. See App.R. 16(A)(7), App.R. 12(A)(2). "If reference is made to evidence, the admissibility of which is in controversy, reference shall be made to the pages of the transcript at which the evidence was identified, offered, and received or rejected." App.R. 16(D).

{¶14} As Winston only points this Court to his objection made prior to the start of trial, we conclude that he has forfeited the issue for appeal by not making a timely objection.

> "By forfeiting the issue for appeal, [Winston] has confined our analysis to an assertion of plain error. *State v. Payne*, 114 Ohio St.3d 502, [] 2007-Ohio-4642, at ¶23; Crim.R. 52(B). However, this Court will not undertake a plain error analysis sua sponte when the appellant has failed to assert such an argument in his brief. See *State v. Hairston*, 9th Dist. No. 05CA008768, 2006-Ohio-4925, at ¶11 (noting that it is the appellant's obligation to assert that plain error exists). *State v. Gray*, supra, at ¶7.

{¶15} Winston has not argued plain error, and therefore we decline to undertake such a review. Id. Accordingly, this portion of Winston's first assignment of error is overruled.

Battered Woman's Syndrome Testimony

{¶16} Next, Winston contends that the trial court erred in permitting Dana Zedak to testify as an expert on the subject of battered woman's syndrome. Prior to trial, the State notified the trial court and Winston of its intent to use Zedak's testimony because it "anticipate[d] that the trial will include evidence of a history of domestic violence incidents between [Winston] and [Kelly]."

{¶17} Winston contends that because Zedak did not speak with Kelly or review any facts related to the instant case, that she had a "complete lack of knowledge of any facts of this case" which "clearly demonstrates the lack of probative value of her testimony." Winston fails to point this Court to any case law or rule to support this contention. App.R. 16(A)(7).

{¶18} The Ohio Supreme Court has held that testimony regarding battered woman's syndrome is relevant to explain a victim's actions. *State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, ¶44.

> "[T]he party seeking to introduce battered woman syndrome evidence must lay an appropriate foundation substantiating that the conduct and behavior of the witness is consistent with the generally recognized symptoms of the battered woman syndrome, and that the witness has behaved in such a manner that the jury would be aided by expert testimony which provides a possible explanation for the behavior." (Internal citations and quotations omitted.) Id. at ¶47.

{¶19} Winston's sole contention on appeal is that Zedak's testimony was not probative because she did not offer specific testimony with regard to the particular facts of the case. However,

> "experts who are called to testify in domestic violence prosecutions must limit their testimony to the general characteristics of a victim suffering from the battered woman syndrome. The expert may also answer hypothetical questions

> regarding specific abnormal behaviors exhibited by women suffering from the syndrome, but *should never* offer an opinion relative to the alleged victim in the case." (Emphasis added.) Id. at ¶56.

{¶20} Therefore, Zedak could not have testified as Winston argues was necessary. Accordingly, this portion of Winston's first assigned error is overruled.

Hostile Witness

{¶21} Winston contends that the trial court improperly declared Kelly to be a hostile witness to the State. We decline to address this portion of Winston's assigned error.

{¶22} Winston fails to point this Court to any case law or other rule that would support the error. App.R. 16(A)(7), App.R. 12(A)(2). Further, he fails to inform this court how any alleged error was prejudicial. Accordingly, we decline to address this portion of Winston's first assigned error.

{¶23} Winston's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A FINDING OF GUILT FOR KIDNAPPING; TWO COUNTS OF RAPE; AGGRAVATED BURGLARY; GROSS SEXUAL IMPOSITION; MENACING BY STALKING, AND DOMESTIC VIOLENCE."

{¶24} In his second assignment of error, Winston contends that the evidence was insufficient to sustain his convictions for kidnapping; two counts of rape; aggravated burglary; gross sexual imposition; menacing by stalking; and domestic violence. We do not agree.

{¶25} When considering a challenge to the sufficiency of the evidence, the court must determine whether the prosecution has met its burden of production, while a manifest weight challenge requires the court to examine whether the prosecution has met its burden of persuasion. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). To

determine whether the evidence in a criminal case was sufficient to sustain a conviction, an appellate court must view that evidence in a light most favorable to the prosecution:

> "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

Kidnapping

{¶26} Winston was convicted of kidnapping, in violation of R.C. 2905.01(A), which states, in part that:

> "No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:
>
> "***
>
> "(2) To facilitate the commission of any felony or flight thereafter;
>
> "(3) To terrorize, or to inflict serious physical harm on the victim or another;
>
> "(4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will[.]"

{¶27} The testimony at trial revealed that, after Winston gained entry to the apartment, Kelly attempted to run out of the apartment. Winston chased her to the parking lot, where, according to Kelly's testimony, he forcefully dragged her back into the apartment. Once inside the apartment Winston hit Kelly. He then went to the kitchen and obtained a knife. He put the knife against Kelly and led her to the bedroom where he put the knife on a nearby dresser. According to Kelly, Winston wanted to engage in anal sex, but she said no. She attempted to negotiate with him, but he insisted on engaging in anal sex. Winston engaged in anal sex with

Kelly. Viewing the testimony in the light most favorable to the State, we conclude that Winston's kidnapping conviction was based on sufficient evidence.

Aggravated Burglary

{¶28} Winston was convicted of aggravated burglary, pursuant to R.C. 2911.11, which states in pertinent part:

> "(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:
>
> "(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;
>
> "(2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control."

{¶29} First, Winston contends that because he had previously lived at the apartment, the evidence indicated that he was welcome at the apartment by invitation, and therefore the State failed to prove the element of trespass. "[T]respass is an essential element of aggravated burglary." *State v. O'Neal* (2000), 87 Ohio St.3d 402, 408. Criminal trespass is defined by R.C. 2911.21, which states in part: "[n]o person, without privilege to do so, shall *** [k]nowingly enter or remain on the land or premises of another." R.C. 2911.21(A). Kelly's testimony revealed that on November 21, 2008, she informed Winston that he was not welcome at her apartment. In fact, she testified that she informed him several times that she did not want him to come to her apartment. Despite Kelly's lack of permission, Winston went to the apartment and knocked on the door. Kelly testified that at first she did not answer, but he would not go away. She explained that he attempted to coax her to open the door. When she still would not answer, he started to kick the door. She stated that her children were asleep so she was concerned about

the noise. She then put the couch in front of the door, however, she was afraid that Winston would break down the door. Kelly testified that when she asked him to go away, he told her to open the door or he would kick it in. As a result, she moved the couch out of the way and Winston pushed the door open. Finally, Akron Police Officer Robert Miller, who responded to the scene, testified that Kelly informed him that Winston kicked her door and that because he had broken her door in the past, she let him in because she was afraid she would get in trouble with the housing authority. Thus, a reasonable juror could conclude that the fact that Kelly eventually relented and allowed Winston into the apartment was a result of his threats to kick in the door and her concern that, because he had broken her door in the past, that she would get in trouble with the housing authority. Kelly's actions prior to the threat indicate that she did not want Winston to enter her apartment, thus establishing the trespass element. Winston's argument that the State failed to show that his unwanted presence at the apartment was achieved by force, threat, or deception is without merit.

{¶30} Further, the testimony revealed that once inside the apartment, Winston immediately grabbed Kelly and twice slammed her head against the door. "For purposes of defining the offense of aggravated burglary pursuant to R.C. 2911.11, a defendant may form the purpose to commit a criminal offense at any point during the course of a trespass." *State v. Fontes* (2000), 87 Ohio St.3d 527, syllabus. Thus, Kelly's testimony that Winston slammed her head into the door is sufficient to establish that he entered the apartment with the purpose to commit a crime: domestic violence. Further, this testimony is sufficient to prove that Winston did inflict harm on Kelly. Accordingly, this portion of Winston's second assigned error is overruled.

Gross Sexual Imposition

{¶31} Winston was convicted of gross sexual imposition, in violation of R.C. 2907.05(A)(1), which states:

> "(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:
>
> "(1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force."

{¶32} Sexual contact is defined as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B). Kelly testified that Winston touched her vagina with his fingers. Further, she testified that the touching occurred after Winston forced her to her bedroom while holding a knife against her and informed her that he wanted to have anal sex with her. Thus, the State presented sufficient evidence that sexual contact occurred and it was the result of force.

Rape

{¶33} Winston was convicted of two counts of rape, in violation of R.C. 2907.02(A)(2), which states, "[n]o person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." R.C. 2907.01(A) defines "sexual conduct" as "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse."

{¶34} The parties stipulated to the designation of the rape counts at trial. Count Two, the first rape count, referred to anal sexual conduct; Count Three, the second rape count, referred to vaginal sexual conduct; Count Four, the third rape count, referred to oral sexual conduct. Winston was convicted of Count Two and Count Four. Thus, he was convicted of rape based upon the anal sexual conduct and the oral sexual conduct.

{¶35} Kelly testified that the sexual conduct at issue occurred after Winston hit her in the hallway, obtained a knife, and led her to the bedroom. He then informed her that he wanted to have anal sex. Kelly testified that she told Winston she did not want to have anal sex and, in an effort to negotiate, she offered to, and did, fellate Winston. Despite Kelly's attempted negotiation, Winston initiated anal sexual conduct. Winston contends that because Kelly offered to fellate him that the State failed to show that he forced the oral sexual conduct. However, Kelly testified that she made the offer after the threat of anal sexual conduct. Thus, there was sufficient evidence that Winston compelled Kelly to engage in oral sex by force or threat of force, i.e., forcing her to have anal sex.

{¶36} Next, Winston contends that "[w]hether there was enough evidence for rape based on the engaging of anal intercourse is also suspect, since there was testimony by Mr. Winston and Ms. Kelly that they had relations in this manner on other occasions." Any testimony regarding past sexual relations does not negate Kelly's testimony that she informed Winston that she did not want to engage in anal sex on *this* occasion. Neither does it negate her testimony that Winston led her to the bedroom while holding a knife against her. Further, Winston does not cite this Court to any case law to support his proposition. App.R. 16(A)(7).

{¶37} Lastly, Winston contends that Kelly specifically testified that she was not afraid of Winston, thus, the State failed to present sufficient evidence that Winston used force or the

threat of force to engage in sexual conduct with Kelly. While testimony regarding fear can be sufficient to satisfy the element of force or threat of force, see *State v. Eskridge* (1988), 38 Ohio St.3d 56, 58-59, Winston does not provide any authority to this Court for his proposition that the State cannot establish the element without evidence of fear. App.R. 16(A)(7). Regardless of whether the State was required to establish that Kelly was fearful in order to establish the element of force or threat of force, the State presented evidence, although conflicting, that Kelly was afraid. Kelly testified on direct that she was afraid when Winston held the knife against. Later during direct examination, Kelly stated that while she was upset, she could not say she was afraid. Finally, on re-cross, Kelly indicated again that she was scared, but upon further questioning stated again that she was not afraid. Viewing Kelly's testimony in the light most favorable to the State, a rational juror could find that she was afraid.

{¶38} Thus, we conclude that the State presented sufficient evidence that 1) Winston engaged in anal and vaginal sexual conduct with Kelly, by 2) compelling Kelly to submit by force or threat of force. Accordingly, this portion of Winston's second assignment of error is overruled.

Menacing by Stalking

{¶39} Winston was convicted of menacing by stalking, pursuant to R.C. 2903.211(A)(1). This section states that "[n]o person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or cause mental distress to the other person." R.C. 2903.211(A)(1).

{¶40} Winston contends that the State failed to present sufficient evidence that he engaged in a pattern of conduct. This argument is without merit. "'Pattern of conduct' means two or more actions or incidents closely related in time, *whether or not there has been a prior*

conviction based on any of those actions or incidents." (Emphasis added). R.C. 2903.211(D)(1). Therefore, despite Winston's contention, the State was not required to present only evidence of conduct for which Winston had been convicted. Instead, the State was free to present evidence of any relevant incidents closely related in time.

{¶41} Kelly testified that on July 27, 2008, she contacted the police regarding an argument she had with Winston that ended with him giving her a bloody, swollen lip. She stated that Winston hit her. As a result, Winston pled guilty to domestic violence/menacing. Further, with regard to this incident, Kelly's neighbor testified that she overheard Winston and Kelly fighting and when she opened her door, she heard Winston tell Kelly that he was going to kill her.

{¶42} Kelly further testified that on November 5, 2008, and November 13, 2008, she called the police because Winston tried to get into her apartment. She testified that he attempted to kick in her door, and that her lock was broken. On re-direct examination, Kelly stated that on November 5 and 13, she believed that Winston was trying to get into her home and that she did not want him to come in. She called the police to establish a record. She stated that Winston admitted to her that he tried to get into her apartment. Further, with regard to the November 13, 2008 incident, the responding police officer testified that Kelly informed him that she found Winston's military ID outside the door, shortly after someone tried to break in. Finally, another of Kelly's neighbors testified that she called the police on November 13 because she heard kicking on Kelly's door. The neighbor stated that she saw Winston go upstairs towards Kelly's apartment before she heard the kicking. Insofar as Winston contends that the State failed to present sufficient evidence regarding a pattern of conduct for his conviction of menacing by stalking, this portion of his assigned error is overruled.

Domestic Violence

{¶43} Winston was convicted of two counts of domestic violence pursuant to R.C. 2919.25 (A) and (C).

{¶44} Although Winston lists both convictions and states they were not based upon sufficient evidence, he does not present this Court with an argument as to which element(s) he believes the State failed to establish. App.R. 16(A)(7). Instead, he concedes that he "admitted putting his hands on Ms. Kelly[.]" Indeed, the testimony at trial indicated that Winston grabbed and slammed Kelly into the door after gaining entry to the apartment. He does not present any argument with regard to this portion of his assigned error and therefore, we disregard it. App.R. 16(A)(7), App.R. 12(A)(2); *Cardone v. Cardone* (May 6, 1998), 9th Dist. No. 18349, at *8.

{¶45} Winston's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

"THE VERDICT OF GUILTY OF KIDNAPPING; RAPE; AGGRAVATED BURGLARY; GROSS SEXUAL IMPOSITION; MENACING BY STALKING WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶46} In his third assignment of error, Winston contends that his convictions for kidnapping, rape, aggravated burglary, gross sexual imposition, and menacing by stalking were against the manifest weight of the evidence. We do not agree.

{¶47} Winston does not present this Court with an argument that his convictions were against the manifest weight of the evidence. Instead, he contends that the jury was mislead and confused because of 1) Zedak's testimony regarding battered woman's syndrome, 2) the trial court's jury instructions with regard to the other act testimony of November 5, 2008 and November 13, 2008, and 3) declaring Kelly a hostile witness. In our disposition of Winston's first assignment of error, we determined that Zedak's testimony was properly before the jury.

Therefore, any argument regarding Zedak's testimony does not support a contention that the convictions were against the manifest weight of the evidence.

{¶48} Winston contends that the trial court's limiting instructions to the jury with regard to the November 5 and 13 incidents should have mentioned that he was not "convicted, indicted, arrested, charged, or even questioned" or that he was "entitled to the presumption of innocence on these other act allegations." However, the two citations to the record that he presents to this Court indicate that he did not object to these limiting instructions, nor did he present the trial court with alternate instructions. Further, we note that Winston has not argued plain error nor demonstrated why this Court should address these issues for the first time on appeal. *Hairston*, supra, at ¶9; Crim.R. 52(B). See *In re L.A.B.*, 9th Dist. No. 23309, 2007-Ohio-1479, at ¶19 (overruled on other grounds); *State v. Meyers*, 9th Dist. Nos. 23864, 23903, 2008-Ohio-2528, at ¶42.

{¶49} Finally, as we explained above, Winston has failed to support an argument that the trial court erred when it declared Kelly a hostile witness. App.R. 16(A)(7); App.R. 12(A)(2).

{¶50} Winston's third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

"THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING [WINSTON] TO A TOTAL OF SIXTEEN YEARS IN PRISON."

{¶51} In his fourth assignment of error, Winston contends that the trial court abused its discretion in sentencing him to a total of 16 years in prison. We do not agree.

{¶52} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio found that Ohio's sentencing structure was unconstitutional to the extent that it *required* judicial fact-finding. (Emphasis added.) Id. at paragraphs one through seven of the syllabus. The *Foster* Court further noted that "there is no mandate for judicial fact-finding in the general guidance

statutes. The court is merely to 'consider' the statutory factors." Id. at ¶42. Moreover, post-*Foster*, it is axiomatic 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 give their reasons for imposing maximum, consecutive, or more than the minimum sentences." Id. at paragraph seven of the syllabus.

{¶53} Following *Foster*, a plurality of the Supreme Court of Ohio declared that appellate courts should implement a two-step test when reviewing sentencing. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶ 26. The Court stated:

> "First, they must examine the sentencing court's compliance with all 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.

{¶54} Winston does not challenge the first prong of the *Kalish* test. Rather, he contends that the trial court abused its discretion by imposing consecutive prison terms. Specifically, he contends that the trial court made findings of facts to justify the sentence that were not supported by the evidence.

{¶55} Pursuant to *Foster*, the trial court was required to consider the facts set forth in R.C. 2929.11 and R.C. 2929.12.

{¶56} R.C. 2929.11 provides in pertinent part as follows:

> "(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.
>
> "(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this

> section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders."

R.C. 2929.12(A) states, in pertinent part, that

> "a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct and the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing."

{¶57} Winston contends that the trial court made an unconstitutional finding of fact because it noted the impact of Winston's action upon Kelly. While *Foster* excised the required judicial fact-finding in Ohio's sentencing structure, the trial court was still required to consider the above statutory factors. Thus, by noting that Kelly's "behavior speaks volumes about what can happen to a victim of domestic violence, and the cycle of violence that can occur and did occur in this case[,]" and that it believed Kelly to be traumatized, the trial court was merely considering the harm to the victim, pursuant to R.C. 2929.12(B)(2). Accordingly, we conclude that the trial court did not abuse its discretion when it imposed consecutive prison terms.

{¶58} Winston's fourth assignment of error is overruled.

ASSIGNMENT OF ERROR V

> "THE TRIAL COURT ERRED BY NOT CONSIDERING RAPE AND GROSS SEXUAL IMPOSITION ALLIED OFFENSES AND CONVICTING [WINSTON] OF BOTH."

{¶59} In his fifth assignment of error, Winston contends that the trial court erred by not considering rape and gross sexual imposition allied offense and by convicting him of both. We do not agree.

{¶60} At the outset, Winston has failed to support this argument with any citations to case law, or with any discussion as to *why* rape and gross sexual imposition are allied offenses. App.R. 16(A)(7). Instead he begins his argument with the presumption that the convictions are allied offenses. We have consistently held that we will not create an argument for an appellant. *Cardone*, supra.

{¶61} Finally, a review of the record reveals that this issue was not raised below. Because Winston has forfeited the issue for appeal, if we chose to create an allied offense argument for Winston, we would then be confined to a plain-error analysis. *Payne*, 114 Ohio St.3d at ¶23. However, Winston has failed to argue plain error on appeal. Because he has failed to establish any allied offense argument, he has not given this Court any basis upon which to delve into this issue for the first time on appeal. Accordingly, we decline to sua sponte undertake a plain error analysis. *Gray*, supra, at ¶7.

{¶62} Winston's sixth assignment of error is overruled.

III.

{¶63} Winston's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

JAMES W. ARMSTRONG, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.