[Cite as *State v. Thacker*, 2020-Ohio-4620.]

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

STATE OF OHIO,	:	Case No. 18CA21
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
FRANK J. THACKER,	:	
Defendant-Appellant.	:	**RELEASED 9/16/2020**

APPEARANCES:

Matthew F. Loesch, Portsmouth, Ohio, for appellant.

Brigham Anderson, Lawrence County Prosecuting Attorney, Jeffrey M. Smith, Lawrence County Assistant Prosecuting Attorney, Ironton, Ohio, for appellee.

Hess, J.

{¶1} Frank J. Thacker appeals his conviction for rape, kidnapping, burglary, and abduction with a firearm specification.[1] Thacker raises ten assignments of error for our review. He contends that the conviction was against the manifest weight and sufficiency of the evidence because there was a significant reason for the victim to fabricate testimony and physical evidence contradicted her. However, witnesses' testimony, telephone records, photographs of the victim's face and backdoor, and DNA evidence all corroborate the victim's version of events. Reviewing the record as a whole we cannot say that this is an exceptional case where the evidence weighs heavily against the convictions, that the trier of fact lost its way, or that a manifest miscarriage of justice has occurred. Accordingly, the verdict was not against the manifest weight of the evidence.

[1] The abduction count merged with kidnapping at sentencing.

{¶2} Thacker argues that the trial court abused its discretion when it denied his motion to exclude other acts evidence concerning a protective order and when it denied his motion for a trial continuance. Thacker failed to object to the other acts evidence or the civil protective order at trial and forfeited all but plain error. And, because Thacker's trial counsel used the other acts evidence as part of his trial strategy to undermine the victim's credibility, any error was an invited error that he cannot challenge on appeal. Additionally, Thacker failed to cite to anything in the record to support his motion for a continuance based on not having replacement eyeglasses available. He had reading glasses and the trial court provided him with a magnifying glass. There was no evidence of the degree of his vision impairment and he cited nothing in the record to support his uncorroborated allegation that he was unable to assist in his defense. The trial court did not abuse its discretion in denying his continuance.

{¶3} Thacker contends that his trial counsel was ineffective for failing to object to hearsay statements, failing to object to improper comments made during the state's closing argument and failing to request a jury poll after a shotgun shell not admitted into evidence fell from the sweatpants that had been admitted into evidence. He contends that the trial court should have declared a mistrial. However, we find that the statements Thacker objects to were non-hearsay statements used to explain the witness's conduct. And, even if they constituted hearsay, we find any error to be either harmless or the result of counsel's trial strategy. Likewise, we find no improper statements in the state's closing argument. Therefore, we find no deficiency in trial counsel's failure to object to them. In reviewing the record concerning the shotgun shell that the jury discovered during deliberations, we find that the trial court did not err in deciding not to hold a hearing to

question the jury about potential prejudice. Therefore, Thacker cannot show that his trial counsel was deficient or that he was prejudiced.

{¶4} Thacker also argues that the trial court abused its discretion when it failed to grant his motion for an acquittal because the state failed to establish that the crimes occurred in Lawrence County, Ohio. However, the state introduced direct evidence through the victim's testimony and circumstantial evidence through law enforcement testimony and reports that the offenses all occurred in Lawrence County, Ohio. Therefore, the trial court properly denied his motion for acquittal.

{¶5} Thacker contends that the state committed discovery violations and should have been sanctioned with an order excluding certain receipts and checks as evidence. However, the state voluntarily agreed not to submit the receipts and checks to which Thacker's trial counsel objected. Thacker has failed to identify any receipts or checks that were admitted into evidence over his objection.

{¶6} Thacker argues that his convictions for burglary, kidnapping and rape should merge. However, the burglary offense resulted in a separate and identifiable harm from the harms that resulted from the kidnapping and rape offenses. And the kidnapping and rape convictions do not merge because the restraint on the victim was prolonged, the confinement was secretive, and the movement was substantial. In transporting the victim to two separate locations in Lawrence County in the backseat of a truck, Thacker subjected the victim "to a substantial increase in risk of harm separate and apart from that involved in the underlying crime" of rape. Therefore, the trial court did not err when it did not merge the burglary, kidnapping and rape convictions.

{¶7} Last, Thacker contends that these cumulative errors warrant a reversal. However, because we find no merit to any of his assignments of error, the cumulative error doctrine is not applicable.

{¶8} We reject his arguments, overrule his assignments of error, and affirm his convictions.

I. FACTS

{¶9} The Lawrence County Grand Jury indicted Thacker on three counts of rape in violation of R.C. 2907.02(A)(2), first-degree felonies; one count of burglary in violation of R.C. 2911.12(A)(1), a second-degree felony; two counts of kidnapping in violation of R.C. 2905.01(A)(3) and (A)(4), second-degree felonies; and one count of abduction in violation of R.C. 2905.02(A)(1)(b), a third-degree felony. All seven counts included firearm specifications. Thacker pleaded not guilty and the case proceeded to trial, which produced the following evidence.

{¶10} The victim, M.C., testified that she met Thacker in February or March 2017 and the two developed a romantic relationship. Thacker performed construction work on her home for which she paid him in full in October 2017. In May or June 2017, Thacker became more controlling and suspicious and over the summer their relationship was "on again off again." She was afraid to break it off with Thacker because of how controlling he had become.

{¶11} On September 22, 2017, Thacker came to her home and accused her of cheating on him. The argument escalated and Thacker forced her into his truck, drove her to a property he owned, assaulted her, and threatened to kill her and her two children. Although the assault occurred in September, she did not file charges against Thacker

until mid-October 2017 because she was afraid of what he might do. In mid-October, with her mother, stepfather and brother present, she told Thacker to get his tools and get off of her property. She testified that Thacker reminded her that he had threatened to kill her and her children, "Just remember everything I told you on that night. I meant everything I said. I always do what I say." She then immediately went to the police station and filed a report and obtained a civil protection order against Thacker. The state introduced the civil protection order into evidence which showed that M.C. applied for it on October 23, 2017 and the trial court issued it October 31, 2017.

{¶12} There was no evidence of any further contact between M.C. and Thacker until February 9, 2018. M.C. testified that, on Friday, February 9, 2018, Thacker had a court appearance on the September assault charges. At approximately 11:25 p.m. that same evening, Thacker began calling M.C., placing eleven consecutive telephone calls from 11:25 p.m. until 11:47 p.m. The state introduced telephone records and law enforcement testimony which corroborated the victim's testimony about the telephone calls. Thacker used a "*67" procedure to block his caller identification.

{¶13} M.C. testified that she answered one of the calls and recognized Thacker's voice and called 9-1-1. The state introduced telephone records, Lawrence County 9-1-1 reports, and law enforcement testimony that corroborated M.C.'s testimony. At approximately 11:55 p.m., February 9, 2018, Deputy Steven Sisler was dispatched to M.C.'s house, arriving there at 12:04 a.m., February 10, 2018. Deputy Sisler testified that he took M.C.'s statement and left at 12:11 a.m. to try to locate Thacker. Deputy Sisler testified that M.C. appeared scared, nervous and had a shotgun laying on the kitchen

counter. M.C. had no bruises or lacerations on her face and there was no sign that the kitchen door had been damaged, tampered with, or kicked in.

{¶14} M.C. testified that after Deputy Sisler left she remained in her home armed with her shotgun. At approximately 12:30 a.m., while she was in another room, her dog became agitated at the kitchen back door. M.C. went to the kitchen with her shotgun and while the dog was sniffing at the door, Thacker kicked the door in and came charging at her with a pistol aimed at her, screaming "Do you think you're gonna shoot me?" Thacker began struggling with her for control of the shotgun, continuously hitting her head. The struggle continued as Thacker dragged her outside. Thacker choked her, seized control over the shotgun, and forced her into the backseat of his truck. M.C. testified that she was terrified and believed she was going to die. Thacker started driving and telling her that she was going to die and that she should die with dignity by admitting everything she had done and that she was a "whore."

{¶15} Thacker drove her to a remote property he owned, trained the shotgun on her face, and continued to threaten to kill her, insisting that she had been involved with multiple men. M.C. testified that this went on for several hours, while she tried to calm him down and reason with him. At some point Thacker looked at his phone and the victim saw that the time was 5:08 a.m. Thacker ordered M.C. to get in the front seat of the truck and grabbed her and pulled her over and said, "Come over here, I want you to hug me like you used to." Thacker then vaginally and anally raped her. Thacker drove her to his residence at approximately 6:00 a.m., where Thacker's suspicious questioning and berating of M.C. started again. Thacker ordered M.C. into his bedroom where he raped her a second time. M.C. pleaded with Thacker to let her go home and promised not to

tell anyone what had happened. Thacker eventually agreed to take her home if she agreed not to notify law enforcement and to make up a story about how she received the injuries to her face.

{¶16} After taking her back to her home, Thacker returned her shotgun to her and left. M.C. took photographs of her face, called her mother and called 9-1-1. The state introduced photographs of the victim's face taken by her, by law enforcement and medical professionals, as well as medical reports, which showed bruises, lacerations and swelling on the victim's face. The state introduced telephone records and a 9-1-1 report, as well as the testimony of law enforcement, that showed that M.C. called 9-1-1 on Saturday morning, February 10, 2018 at 8:50 a.m. and reported that Thacker had abducted and raped her.

{¶17} M.C. testified that her cousin and her cousin's husband arrived at her house shortly thereafter, still in their pajamas. Her cousin accompanied her to the Lawrence County Sheriff's Department where she filed a report and then went to the emergency room for medical care. After she left the hospital, she went to her cousin's house and lived with them for a period of time.

{¶18} M.C.'s cousin testified that she lives less than a mile from the victim and that on the morning of Saturday, February 10, 2018, M.C.'s mother had called her and told her to go to M.C.'s house because she had been beaten up. The cousin testified that she rushed over to M.C.'s house while still in her pajamas. When she arrived, M.C. was standing out in the driveway, with a blank stare, walking in circles, her voice weak and trembly and she looked like she was in shock. She had bruises on the side of her face, lip and eye. M.C. told her that they needed to go to the Sheriff's department and when

they arrived, M.C. said that Thacker had attacked and raped her. The cousin testified that they left the Sheriff's department and went to the emergency room and she stayed with M.C. until M.C.'s mother, who lived in Morrow County, Ohio, arrived. The cousin then allowed M.C. to live in her garage apartment for approximately a month after the attack.

{¶19} The cousin's husband testified that when they arrived at M.C.'s house he saw that her kitchen back door had been kicked in and the kitchen was in disarray. He walked through the rooms of her house and then went back to his house to change into day clothes while his wife accompanied M.C. to the Sheriff's department. He then went to the Sheriff's department and to the emergency room with M.C. and took her cell phone home with him. He testified that it was about mid-afternoon when M.C.'s cell phone started ringing so he finally answered it and a man asked to speak to M.C. The state introduced phone records and law enforcement testimony that showed that Thacker called M.C.'s phone three times between 8:42 a.m. and 9:03 a.m. the morning of February 10, 2018 and again at 1:21 p.m., when the cousin's husband had it.

{¶20} Sergeant Easterling testified that he took M.C.'s statements when she arrived at the Lawrence County Sheriff Department that morning and went to her house to take photographs. Sergeant Easterling testified that when he arrived to take photographs, one of M.C.'s family members had straightened some things up. Parts of the door facing that were broken had been stacked on the counter. The kitchen back door was busted and there was a muddy shoe print about halfway up the door, next to the door handle. The state introduced into evidence the photographs of the busted door, broken wooden door facing, and muddy shoe print on the exterior of the door.

{¶21} The state also introduced evidence and law enforcement testimony that Thacker's DNA was present in the victim's vagina and on her shotgun barrel and handle, however they were unable to lift Thacker's fingerprints off the shotgun or unfired shotgun shell. Law enforcement seized and processed Thacker's truck but did not find evidence of seminal fluid or M.C.'s underwear, which M.C. believed was in Thacker's truck.

{¶22} Mark Kelms, a registered nurse at a medical center in Ashland, Kentucky, testified that Thacker called a crisis call center at 3:10 p.m., Saturday, February 10, 2018, which was transferred to him. Kelms testified that Thacker said he was suicidal and was in Huntington, West Virginia. The recording of the phone call was played for the jury and Thacker stated that he wanted to end his life through "a shoot out with the police." Kelms alerted the Lawrence County Sheriff Department. The state introduced additional phone records that showed that Thacker's family members and friends were texting him during the day on February 10, to inform him about police activity at his house and to try to locate him. Thacker was apprehended a few days later in Lexington, Kentucky.

{¶23} In his defense, Thacker introduced text messages between himself and M.C. between September 25, 2017 to October 9, 2017, which M.C. admitted she sent to Thacker after the September 22, 2017 assault that stated, "I love you I want you I need you" with heart and lips emojis and other romantic and sexually-nuanced texts. However, she explained that she was doing this to placate Thacker and to prevent any future assaults, "I was willing to do or say whatever it took to keep that from happening again."

{¶24} A private investigator testified concerning the investigative efforts of the Lawrence County Sheriff Department and his opinion that, based on the photographs, there was no struggle that occurred in the kitchen.

{¶25} Thacker's son, ex-wife, and two friends testified about Thacker's physical condition and his trial counsel introduced several medical records showing that Thacker had open heart surgery in mid-December. Thacker's friends and family described him as "very thin, no muscles, very frail," "didn't have any strength in his right hand," "limping quite noticeably," "real weak," "tripped a little," "stumbled" and he talked about anxiety and depression "everyday" and talked about "suicidal issues every night." One of Thacker's friends testified that he had expected Thacker to attend the friend's mother's funeral on Saturday, February 10, 2018, but that Thacker never showed up.

{¶26} However, in the state's case, another one of Thacker's friends, Cheryl Holtzapfel, testified that she was with him on Friday evening, February 9, 2018 at the Knights of Columbus where she works from about 5:30 p.m. until they both left at approximately 10:45 p.m. to go their separate ways. Thacker sat at the bar drinking and talking to other patrons. When she got off work at 8:15 p.m., she sat down at the bar with Thacker and talked to him for the next several hours. Thacker seemed fine, chit chatted, did not mention being suicidal, and did not act down or depressed. Thacker was not using a cane to walk and she had never seen him use a cane. Thacker was walking fine as they left the bar and went out to their cars. She told Thacker to text her when he got safely home, but Thacker did not text her and she did not hear from him the rest of the evening. Holtzapfel spoke to Thacker the next morning, February 10 at 8:29 a.m. and again he "seemed fine." Thacker told Holtzapfel that he was in a drive thru getting breakfast and he was going to a funeral of one of his friend's mother that day.

{¶27} The jury found Thacker guilty of one count of rape, one count of burglary, one count of kidnapping, and one count of abduction with a firearm specification, and not

guilty on the two remaining rape counts, the one remaining kidnapping count and the remaining firearm specifications. The trial court sentenced Thacker to a total prison term of 27 years.

II. ASSIGNMENTS OF ERROR

{¶28} Thacker assigns the following errors[2] for our review:

> 1. Appellant's convictions were against the manifest weight and sufficiency of the evidence.
>
> 2. The Trial Court abused its discretion when it denied Appellant's motion to exclude other acts evidence.
>
> 3. The Trial Court abused its discretion when it denied Appellant's motion to continue his jury trial.
>
> 4. Appellant's counsel was ineffective in his representation.
>
> 5. The Prosecutor of the State of Ohio made improper statements during closing arguments.
>
> 6. A mistrial should have been declared following the jury becoming privy to evidence not admitted during the course of the trial.
>
> 7. The Trial Court abused its discretion when it denied Appellant's motion for a Rule 29 acquittal.
>
> 8. The State of Ohio committed discovery violations which should have resulted in sanctions, specifically exclusion.
>
> 9. Appellant's sentences should have merged as a matter of law.

III. LAW AND ANALYSIS

{¶29} For ease of discussion, we address the assignments of error out of order.

A. Venue in Lawrence County

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[2] Some of the assignments of error identified in the statement of the assignments of error are stated differently in the body of Thacker's brief, but the differences are not substantive. We use the version contained in the statement section of the brief. *See generally* App.R. 16(A)(3).

{¶30} For his seventh assignment of error, Thacker contends that the state failed to prove that the attacks occurred in Lawrence County, Ohio. He concedes that certain cities and townships were discussed and law enforcement from Lawrence County testified at length, however, he argues that "it was never introduced into evidence that jurisdiction was proper in Lawrence County." He argues that the trial court erred when it denied his Crim.R. 29 motion for acquittal based on venue.

{¶31} Under Crim.R. 29(A), "[t]he court on motion of a defendant * * *, after the evidence on either side is closed, shall order the entry of acquittal * * *, if the evidence is insufficient to sustain a conviction of such offense or offenses." "A motion for acquittal under Crim.R. 29(A) is governed by the same standard as the one for determining whether a verdict is supported by sufficient evidence." *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 37; *State v. Husted*, 2014-Ohio-4978, 23 N.E.3d 253, ¶ 10 (4th Dist.).

{¶32} "When a court reviews a record for sufficiency, '[t]he 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 the crime proven beyond a reasonable doubt.' " *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 146, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In making its ruling a court does not weigh the evidence but simply determines whether the evidence, if believed, is adequate to support a conviction. In other words, the motion does not test the rational persuasiveness of the state's case, but merely its legal

adequacy. *State v. Reyes–Rosales,* 4th Dist. Adams No. 15CA1010, 2016-Ohio-3338, ¶ 15.

{¶33} Crim.R. 18(A) specifies that "[t]he venue of a criminal case shall be as provided by law." "Section 10, Article I of the Ohio Constitution fixes venue, or the proper place to try a criminal matter * * *." *State v. Headley*, 6 Ohio St.3d 475, 477, 453 N.E.2d 716 (1983); *accord State v. Hampton*, 134 Ohio St .3d 447, 2012–Ohio–5688, 983 N.E.2d 324, ¶ 19. Section 10, Article I, of the Ohio Constitution guarantees a criminal defendant the right to a trial in the "county in which the offense is alleged to have been committed." Additionally, R.C. 2901.12(A) codifies "the statutory foundation for venue." *State v. Draggo*, 65 Ohio St.2d 88, 90, 418 N.E.2d 1343 (1981). The statute provides that the "trial of a criminal case in this state shall be held in a court having jurisdiction of the subject matter, and in the territory of which the offense or any element of the offense was committed." R.C. 2901.12(A).

{¶34} "Establishing the correct venue is imperative in order to 'give the defendant the right to be tried in the vicinity of his alleged criminal activity.' " *State v. Baker*, 12th Dist. Warren No. CA2012–12–127, 2013–Ohio–2398, ¶ 11, quoting *State v. Meridy*, 12th Dist. Clermont No. CA2003–11–091, 2005–Ohio–241, ¶ 12. "The importance of venue is to give the defendant the right to be tried in the *vicinity* of his alleged criminal activity; the need to have venue is to limit the state from indiscriminately seeking a favorable location for trial or selecting a site that might be an inconvenience or disadvantage for the defendant." (Emphasis sic.) *Meridy* at ¶ 12.

{¶35} Venue is not, however, a material element of any criminal offense charged. *Headley*, 6 Ohio St.3d at 477; *State v. Jackson,* 141 Ohio St.3d 171, 2014–Ohio–3707,

23 N.E.3d 1023, ¶ 143. The state must nevertheless prove beyond a reasonable doubt that the defendant committed the alleged crime in the county where the indictment was returned and the trial held. *Headley*, 6 Ohio St.3d at 477. Therefore, unless the state proves beyond a reasonable doubt that the defendant committed the alleged crime in the county where the trial was held, the defendant cannot be convicted. *Hampton* at ¶ 19; *State v. Nevius*, 147 Ohio St. 263, 71 N.E.2d 258 (1947), paragraph three of the syllabus ("A conviction may not be had in a criminal case where the proof fails to show that the crime alleged in the indictment occurred in the county where the indictment was returned."). Despite the requirement that the state establish venue, the defendant may waive the right to be tried in the county where the crime allegedly occurred.

{¶36} "Ideally, the prosecution will establish venue with direct evidence." *State v. Quivey*, 4th Dist. Meigs No. 04CA8, 2005–Ohio–5540, ¶ 16, citing *Toledo v. Taberner,* 61 Ohio App.3d 791, 793, 573 N.E.2d 1173 (6th Dist.1989). However, the state need not prove venue "in express terms" so long as "all the facts and circumstances in the case" establish, "beyond a reasonable doubt, that the crime was committed in the county and state as alleged in the indictment." *State v. Dickerson*, 77 Ohio St. 34, 82 N.E. 969 (1907), paragraph one of the syllabus; *Headley*, 6 Ohio St.3d at 477; *see also State v. Mercer*, 4th Dist. Ross No. 14CA3448, 2015-Ohio-3040, ¶ 7-11. Circumstantial evidence may be used to establish venue. *State v. Wood*, 2nd Dist. Clark No. 2016-CA-69, 2018-Ohio-875, ¶ 23.

{¶37} The venue statute R.C. 2901.12 provides:

> (A) The trial of a criminal case in this state shall be held in a court having jurisdiction of the subject matter, and, except in cases of emergency under section 1901.028, 1907.04, 2301.04, or 2501.20 of the Revised Code, in

> the territory of which the offense or any element of the offense was committed.
>
> (B) When the offense or any element of the offense was committed in an aircraft, motor vehicle, train, watercraft, or other vehicle, in transit, and it cannot reasonably be determined in which jurisdiction the offense was committed, the offender may be tried in any jurisdiction through which the aircraft, motor vehicle, train, watercraft, or other vehicle passed.
>
> (C) When the offense involved the unlawful taking or receiving of property or the unlawful taking or enticing of another, the offender may be tried in any jurisdiction from which or into which the property or victim was taken, received, or enticed.
>
> * * *
>
> (H) When an offender, as part of a course of criminal conduct, commits offenses in different jurisdictions, the offender may be tried for all of those offenses in any jurisdiction in which one of those offenses or any element of one of those offenses occurred. Without limitation on the evidence that may be used to establish the course of criminal conduct, any of the following is prima-facie evidence of a course of criminal conduct:
>
> (1) The offenses involved the same victim, or victims of the same type or from the same group.

{¶38} Under R.C. 2901.12, Thacker can be tried in the jurisdiction in which any element of the offense was committed, any jurisdiction from which or into which the victim was taken, and if he commits offenses in different jurisdictions, he may be tried in any jurisdiction in which any element of one of the offenses occurred.

{¶39} Thacker was convicted of rape, burglary, kidnapping and abduction. Some elements of the offenses occurred in Thacker's vehicle, or during transport. M.C. testified that she lives in Lawrence County and that all of the offenses occurred in Lawrence County, Ohio. A victim's testimony about the location of the crimes is sufficient to establish proper venue. *State v. Lancaster,* 2018-Ohio-315, 104 N.E.3d 951, ¶ 56 (2nd Dist.); *State v. Watkins*, 9th Dist. Lorain No. 02CA008087, 2003-Ohio-1308, ¶ 26.

Additionally, a number of law enforcement officials testified that they worked for the Lawrence County Sheriff Department; they investigated the crime scenes at both the victim's and Thacker's residences; they had Thacker's truck towed from his residence; and they prepared reports that identified the victim's residence in "Ironton, Ohio," Thacker's residence as "South Point, Ohio," and bore the caption "Lawrence County Sheriff Department" or "Office of the Sheriff, Lawrence County, Ohio * * * Ironton, Ohio." Thus, the state established that the offenses occurred in Lawrence County, Ohio with both direct evidence through the victim's testimony and circumstantial evidence through the testimony of law enforcement. *See State v. Kinn,* 2nd Dist. Montgomery No. 28336, 2020-Ohio-512, ¶ 27 (testimony from officers that the traffic stop and drug possession offense occurred in Dayton, Ohio on a specific street was sufficient circumstantial evidence to establish venue in Montgomery County). Under R.C 2901.12, venue was proper in Lawrence County, Ohio. Because there was substantial evidence for the jury to find that Thacker committed the offenses in Lawrence County, Ohio the trial court did not err in denying his Crim.R. 29 motion for acquittal.

{¶40} We overrule his seventh assignment of error.

B. Trial Court's Denial of Motion for Mistrial

{¶41} For his sixth assignment of error, Thacker contends that the trial court erred in failing to declare a mistrial when, during jury deliberations, a shotgun shell, which had not been introduced into evidence, fell from the pocket of the victim's sweatpants, which had been admitted into evidence.

1. Evidence and Testimony Concerning Shotgun Shell

{¶42} M.C. testified that on the evening of the attack, she was armed with a 20-gauge shotgun and carried it around her house with her from room to room because she was afraid Thacker was going to come to her house and harm her. She testified that the shotgun held one shell. She testified that when Thacker finally returned her to her home, she changed out of the sweatpants she was wearing and put on another pair of pants because during the ordeal she had urinated in her sweatpants. Law enforcement collected the urine-soiled sweatpants that she had been wearing and the state introduced the sweatpants into evidence. The victim did not give any testimony about whether she carried a second shotgun shell in her sweatpants pocket, the second shell was not discovered during the investigation, and it was not admitted into evidence.

{¶43} Detective Brad Layman, an investigator for the Lawrence County Sheriff Department, testified that he collected M.C.'s shotgun, which was a Rossi 20-gauge single shot hinge action shotgun, with an external manual safety. Detective Layman inspected the shotgun and found that it contained an unfired Remington shotgun shell, which he removed and preserved. The state introduced both the shotgun and the unspent shotgun shell into evidence.

{¶44} The trial court gave instructions to the jury about the presentation of evidence. The trial court instructed the jury that the attorneys would present evidence and the court would enforce the rules of evidence to determine admissibility. If an objection to certain evidence is sustained, the jury would be instructed to disregard that evidence and draw no inferences from it. The jury was also admonished not to attempt to obtain any additional information about the case outside the courtroom. They were instructed, "You

may only consider and decide this case upon the evidence received at the trial. If you acquire any information from an outside source, you must report it to the Court."

{¶45} The trial court also instructed the jury, "Evidence is all the testimony received from the witnesses, any exhibits admitted during trial, facts agreed to by counsel and any facts which the court requires you to accept as true." The jury was instructed to consider the exhibits that had been introduced and whether they are in the same condition as originally taken by police officers.

{¶46} The trial court informed the jury that if they wanted to see the sexual assault kit, the shotgun or the shotgun shell, they could ask the bailiff and those exhibits would be brought into the jury room. During deliberations, the jury requested to see certain medical records that had not been admitted into evidence. The trial court instructed, "In response to your question, be advised that you may only consider the evidence presented at trial. * * * Those matters include * * * the exhibits admitted during the trial."

{¶47} The jury requested a pair of nitrile gloves, which the trial court provided, and they opened the evidence bag containing the urine-soiled sweatpants from which a second, unspent shotgun shell fell. Outside the presence of the jury, the court explained:

> COURT: * * * The jury had sent a request out in writing for a pair of nitrile gloves. I responded affirmatively, had those gloves provided. * * * it was my understanding that after the gloves were given they opened up the evidence bag containing the sweatpants that were admitted into evidence and from within an unspent yellow shotgun shell of twenty gauge caliber fell out onto the floor. And that was then sent via the bailiff from the jury room to the main office of the Court. * * * It is not evidence in this case as it was not individually admitted into the record and shall not come into the record at any point in this case.

Thacker's attorney moved for a mistrial on all counts, "because an unsecured physical object that was not evidence was considered and seen by the jurors uh, outside of the

case. Again, it was not admitted as evidence. Uh, I don't think that that can be a bell that's unrung and for that purpose we're gonna move for a mistrial." The trial court denied the motion:

> COURT: * * * I am denying the Motion because I have, I can't reasonably conclude at this point that a shell falling out has any prejudicial effect upon the State or upon the Defendant in this case at this time * * *. I'm assuming that the Motion will be renewed in the event that this is a jury verdict returned in this case and there could be a different result from the Court at that time, but I believe it is premature now with the jury still deliberating and we are having no idea if this is going, mattering at all to the jury. So, the Motion at this time is Denied for Mistrial * * *.

Later in the proceedings, Thacker's attorney renewed his motion for a mistrial:

> DEFENSE: Your Honor, we'd like to move uh, and renew again, our Motion from yesterday for a mistrial on all charges. Uh, as you are aware, the shotgun shell fell out of uh, sweatpants that the sweatpants were the only piece of evidence that was admitted uh, through the case as an exhibit, as, as uh, evidence. Uh, we believe that the Defendant has been harmed because they saw and considered evidence uh, that had not been admitted properly and we believe that that potentially could affect the outcome of this case.

The state opposed the motion, arguing, "I don't think there's any reason at all, uh, in any, any portion of these proceedings to suggest that the jury * * * for any reason has lost its way or * * * its verdict, whatever it might be, has, has undermined, certainly not by uh, finding an extraneous uh, item uh, during their deliberations."

The trial court denied the motion:

> COURT: * * * after the shell was removed, * * * I had law enforcement take it and secure it. It is not with the jury. The jury did not have possession of it. I don't find that that rises to a level of uh, prejudice that would warrant a mistrial to be granted in this case * * *.

Defense counsel did not request a hearing to question the jury about whether they were prejudiced by the momentary presence of the second shotgun shell, the trial court did not

sua sponte question the jury about it, nor did the trial court repeat its earlier jury instructions about what constituted proper evidence in the case or advise the jury to disregard the second shotgun shell.

2. Standard of Review

{¶48} Trial courts are entitled to wide latitude when considering motions for mistrial. *State v. Gunnell*, 132 Ohio St.3d 442, 2012-Ohio-3236, 973 N.E.2d 243, ¶ 28. "[W]hen a mistrial is premised on the prejudicial impact of improper evidence or argument, the trial court's evaluation of the possibility of juror bias is entitled to 'great deference.'" *Id*. quoting *Ross v. Petro*, 515 F.3d 653 (6th Cir.2008). "A mistrial should not be ordered in a cause simply because some error has intervened. The error must prejudicially affect the merits of the case and the substantial rights of one or both of the parties." *Tingue v. State*, 90 Ohio St. 368 (1914), paragraph three of the syllabus. We review a trial court's grant or denial of a motion for mistrial for abuse of discretion, because the trial court is best situated to determine whether a mistrial is necessary. The phrase "abuse of discretion" implies that the court's decision was unreasonable, arbitrary, or unconscionable. *State v. Kulchar*, 4th Dist. Athens No. 10CA6, 2015-Ohio-3703, ¶ 38.

2. Extraneous Physical Object in Jury Room

{¶49} Thacker argues that the second unspent shotgun shell was not admitted into evidence but was "considered" by the jury when it fell from the sweatpants and turned over by them to the bailiff. He contends that the trial court was required to conduct an examination of the jury to determine whether the jury's observation of the shell biased the jury, citing *State v. Phillips*, 74 Ohio St.3d 72, 1995-Ohio-171, 656 N.E.2d 643. However, *State v. Phillips* involved a third party's "improper outside communication" with jurors and

the hearing that a court conducts to determine whether the communication biased the jury, known as a *Remmer* hearing. *See Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450 98 L.Ed.2d 654 (1954).

{¶50} Here there was no "outside communication" with the jury, no independent outside experimentation or research conducted by the jury, and no threats or bribes of the jury. Rather, a physical object was discovered by the jury and turned over to court personnel. Although Thacker argues that it was "considered" by the jury, he cites nothing in the record to support this allegation and it is entirely speculative. Instead the record shows that the jury followed the trial court's instructions to "consider and decide this case upon the evidence received at the trial. If you acquire any information from an outside source, you must report it to the Court" and "you may only consider the evidence presented at trial. * * * Those matters include * * * the exhibits admitted during the trial." To the extent the second shotgun shell was "information from an outside source," the jury reported it, turned it over to the Court, and did not consider it in their deliberations. "Unless an appellant demonstrates otherwise, we should assume that the members of the jury followed their oaths and deliberated only upon the evidence adduced at trial." *State v. Gunnell*, 132 Ohio St.3d 442, 2012-Ohio-3236, 973 N.E.2d 243, ¶ 32.

{¶51} Even if we assume that the second shotgun shell was an improper communication from an outside source, " 'not all communications with jurors warrant a hearing for a determination of bias.' " *State v. Ford,* 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, ¶ 275, quoting *White v. Smith*, 984 F.2d 163, 166 (6th Cir. 1993). "An allegation of an unauthorized communication with a juror requires a *Remmer* hearing only when the alleged contact presents a likelihood of affecting the verdict." *Id.* citing *United*

States v. Frost, 125 F.3d 346, 377 (6th Cir. 1997). Here the trial court determined that the second shotgun shell did not present a likelihood of affecting the verdict. The shotgun and the loaded, unspent shotgun shell were both admitted into evidence for the jury's consideration. The jury heard the victim's testimony about her use of the shotgun for personal protection and could inspect the shotgun and one of the two shells. The trial court determined that a second shell falling from the victim's sweatpants is not the sort of "contact" that presents a likelihood of affecting the verdict.

{¶52} Thacker has failed to establish that the momentary presence of the second shell, not marked or admitted into evidence, had any likelihood of affecting the verdict. "[T]he defense must prove that the juror has been biased." *State v. Phillips*, 74 Ohio St.3d 72, 88, 1995-Ohio-171, 656 N.E.2d 643, 661, citing *United States v. Zelinka,* 862 F.2d 92, 95 (6th Cir. 1988); *United States v. Pennell,* 737 F.2d 521, 532 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158, 105 S.Ct. 906, 83 L.Ed.2d 921 (1985) ("In light of *Phillips* [455 U.S. 209, 201 S.Ct. 940, 71 L.Ed.2d 78 (1982)], the burden of proof rests upon a defendant to demonstrate that unauthorized communications with jurors resulted in actual juror partiality. Prejudice is not to be presumed."). Thacker's assertion that the jury was biased is unsupported by the record and is pure speculation. After the trial court informed the parties that the jury discovered a second shell, Thacker did not request a *Remmer* hearing or object to the trial court's decision not to conduct a *Remmer* hearing. Therefore, he has forfeited all but plain error. *State v. Lee,* 10th Dist. Franklin No. 17AP-908, 2018-Ohio-3957, ¶ 26; *State v. Thomas,* 9th Dist. No. 27266, 2015-Ohio-2935, ¶ 53, citing *State v. Wooten,* 5th Dist. Stark No. 2008CA00103, 2009-Ohio-1863, ¶ 38 (applying the plain error doctrine to an argument that the trial court failed to hold *Remmer* hearings when

appellant did not challenge such a failure in the trial court). "Plain error is an obvious defect in the trial proceeding that affects substantial rights. The alleged error must have 'substantially affected the outcome of the trial,' such that 'but for the error, the outcome of the trial clearly would have been otherwise.' "(Citations omitted.) *State v. Cepec,* 149 Ohio St.3d 438, 2016-Ohio-8076, 75 N.E.3d 1185, ¶ 67. Even if we assume that the trial court's failure to conduct a *Remmer* hearing was erroneous, Thacker has failed to establish that it substantially affected the outcome of the trial. Thus, the trial court's failure to hold a *Remmer* hearing did not amount to plain error. After careful consideration of the record, we find nothing unreasonable, arbitrary, or unconscionable about the trial court's denial of Thacker's motion for mistrial.

{¶53} We overrule his sixth assignment of error.

C. Denial of Motion for Continuance

{¶54} For his third assignment of error, Thacker contends that the trial court abused its discretion when it denied his motion for a trial continuance. "The grant or denial of a continuance is a matter which is entrusted to the broad, sound discretion of the trial judge. An appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion." *State v. Unger*, 67 Ohio St.2d 65, 67, 423 N.E.2d 1078, 1080 (1981).

{¶55} Approximately four days prior to trial, Thacker filed a motion for a one-week continuance of the trial because he had broken his glasses, it was taking longer than expected to obtain a replacement pair, and he needed them to assist in his defense. On the first day of trial, before beginning the trial proceedings, the trial court addressed the motion. Thacker's attorney explained that Thacker had broken his glasses and his

replacement glasses had not yet arrived. Thacker's motion cited no case law to support his request for a continuance and the trial court stated that it had "done a significant amount of research on the issue" and could find no case law concerning visual impairment or blind individuals being unable to proceed to trial. Moreover, the trial court noted that Thacker was wearing reading glasses and the court had provided him with a magnifying glass. Therefore, the trial court denied Thacker's motion for a continuance.

{¶56} On appeal, for the first time Thacker argues that he was entitled to a continuance based upon his "need for further investigation and preparation" as well as being "ambushed by newly discovered evidence." Because Thacker did not raise these arguments in the trial court, we will not consider them on appeal.

> It is well-settled law in Ohio that appellate courts will not consider as error issues that are raised for the first time on appeal. *Schade v. Carnegie Body Co*., 70 Ohio St.2d 207, 210, 436 N.E.2d 1001 (1982); *see also Ohio Performance, Inc. v. Nelson,* 4th Dist. Scioto No. 94CA2226, 1995 WL 103634, *3 (Mar. 7, 1995) ("It is axiomatic that a litigant's failure to raise an issue in the trial court waives the litigant's right to raise that issue on appeal. * * * Litigants must not be permitted to hold their arguments in reserve for appeal, thus evading the trial court process.").

Carr v. State, 4th Dist. Ross No. 14CA3468, 2015-Ohio-3893, ¶ 28.

{¶57} There was no evidence in the record of the degree of Thacker's visual impairment. Thacker cites nothing in the record to support his uncorroborated allegation that, even with reading glasses and a magnifying glass, he was unable to assist his trial counsel in his defense.

> Ohio courts often conclude a party's uncorroborated allegation of medical issues, standing alone, is not enough to render a decision denying a continuance an abuse of discretion. See, e.g., *Calvary SPV I, L.L.C. v. Furtado,* 10th Dist. No. 05AP–361, 2005–Ohio–6884, ¶ 8, 12 (determining the trial court did not abuse its discretion or commit plain error in not granting a continuance where defendant left a telephone message for the court on the day before trial advising she would not be able to attend as a result of

> health issues, including spine problems, but did not provide "affidavits in support" or any "medical evidence" that "would have been helpful * * * in persuading the trial court of the merits of defendant's contentions"); *State v. Naypaver,* 11th Dist. No.2008–T–0102, 2009–Ohio–4620, ¶ 28–31 (deciding trial court did not abuse its discretion in denying various motions for continuance where the defendants, three members of a family, moved for a continuance on the uncorroborated statement that none of the family members could attend a hearing due to the father's medical condition stemming from "follow-up care and rehabilitation following his hip replacement" out of state); *Hudson v. Ohio Dept. of Rehab. & Corr.,* 10th Dist. No. 04AP–562, 2004–Ohio–7203 (concluding trial court did not abuse its discretion in denying plaintiff's motion for a continuance, made the morning of the trial, based on her "medical problems," where medical records plaintiff provided to the court did not support her contention that she could not have sought a continuance prior to the morning of the trial at which the defendant's witnesses were present and ready to testify).

Jacobs v. Jones, 10th Dist. Franklin No. 10AP-930, 2011-Ohio-3313, ¶ 19.

{¶58} Accordingly, we find nothing unreasonable, arbitrary or capricious about the trial court's decision denying Thacker's motion for a continuance.

{¶59} We overrule his third assignment of error.

D. Other Acts Evidence

{¶60} For his second assignment of error, Thacker contends that the trial court abused its discretion when it overruled his motion to exclude other acts evidence. He argues that, "Review of the transcripts clearly demonstrates that the State of Ohio introduced inadmissible evidence from the victim which painted the Appellant as a violent stalker, despite there being no actual evidence to support these allegations." He also argues that evidence of the protective order violation "could constitute other acts evidence."

{¶61} Prior to trial, the state filed a notice of intention to present evidence of "other crimes, wrongs, or acts" pursuant to Evid.R. 404(B). The state planned to elicit testimony about the history of the relationship between Thacker and M.C., including the events on

September 22, 2017, that led to the filing of assault charges against Thacker. The assault charge was pending on February 9, 2018 and the trial court had held a pre-trial conference on that date. Later that night and the following early morning, the crimes for which Thacker was being tried were committed. The state explained, "the testimony about the events that happened September 22, 2017 will be primarily offered to explain to the jury the history and the nature of the former relationship of the defendant with the victim. But the testimony also supports the prosecution's theme that defendant committed the alleged crimes with the requisite intent, preparation, plan, knowledge, and without mistake or accident. * * * are substantially similar to defendant's action in the commission of the crimes of February 10 and 11, 2018.[3] They are factually and temporally closely related."

{¶62} Thacker filed a pretrial motion in limine to exclude the other acts evidence, but agreed that the assault charges and the September 22, 2017 incident that led to them may be relevant to explain his and the victim's history and relationship: "Defendant stipulates that such prior charges may be relevant to explain the Defendant and the alleged victim's prior history and relationship, Defendant wholly states that allowing these statements for any other purpose, including to show that Defendant acted in conformity to the past charges, should be ruled inadmissible."

{¶63} The trial court declined to issue a pre-trial ruling on the admissibility of any evidence and instead stated it "will evaluate and rule on the admissibility of all evidence presented at trial, in accordance with the Ohio Rules of Evidence."

{¶64} In his opening statement, Thacker's trial counsel told the jury that Thacker and M.C. had consensual sex – it was not rape – on the night in question and referred to

[3] This appears to be a typographical error as the crimes occurred February 9 and 10, 2018.

their "complex history" and "volatile relationship." He described how Thacker had completed "thousands of dollars of construction work on her home" but as soon as the construction was finished in October, 2017, the victim broke up with Thacker and "filed charges against Mr. Thacker about an incident that occurred almost a month before that, in * * * September 22, 2017. * * * [T]he evidence and those charges are extremely important for these charges. Uh, they're relevant for a few reasons because it shows not only the context of their relationship and the volatility of the relationship, but it also goes to speak to credibility. And when we discuss those charges, I want you all to pay attention to how those uh, allegations were made in September uh, when they were made and the context of how * * * the relationship was uh, leading up to when the charges were filed. And I want you to consider those charges when you judge the credibility of the charges that were here today, that we face today."

{¶65} M.C. testified that Thacker was her ex-boyfriend and that their relationship began to deteriorate in June 2017, when Thacker became controlling and they started to have repeated break-ups and reconciliations. She testified about the events that occurred on September 22, 2017, which lead to criminal assault charges against Thacker. Although the assault occurred on September 22, 2017, she did not report it to the police until mid-October. The victim testified that on Friday, February 9, 2018, Thacker had a court appearance on those assault charges, and it was that same evening that Thacker came to her house and burglarized, kidnapped, and raped her in the early hours of February 10, 2018. She also testified that she obtained a civil protection order against him in October, 2017, which was in effect on February 9 and 10, 2018.

{¶66} Thacker did not object to any of the victim's testimony about the September 22, 2017 assault or the civil protection order. The state submitted the civil protection order into evidence and it was admitted without objection.

{¶67} On cross examination, Thacker's trial counsel asked the victim repeatedly about the September 22, 2017 charges and the civil protection order. In response, the victim admitted that she had sent Thacker a number of loving, sexually-nuanced text messages after September 22, 2017, even though in the charges she filed on September 22, she stated "I told him I no longer wanted be [sic] with him." Thacker's trial counsel also asked a number of questions about the civil protection order and the victim's claims that Thacker had been "stalking" her.

{¶68} The state argues that the events leading up to the September 22, 2017 assault charges and the October 2017 civil protection order were admissible to show Thacker and the victim's past history and relationship and were used by both the state and Thacker during the trial without any objection, the events "cut both ways," and "contained features that were not complimentary to either party."

{¶69} Thacker's trial counsel filed a pretrial motion to exclude other acts evidence. However, in the motion he expressly stipulated that the September 22, 2017 assault charge and the incident leading up to it may be relevant to explain his and M.C.'s prior history and relationship; he only objected to their use to show he acted in conformity to the past charges. Then, in his opening statement, Thacker's trial counsel highlighted the September 22, 2017 charges and the incident surrounding them by stating that they "are extremely important for these charges" to show "not only the context of their relationship and the volatility of the relationship, but it also goes to speak to credibility." Not only did

he stipulate to the use of these other acts to show the history and context of the relationship and volunteer them in his opening statement, he failed to make any objection when the state referenced them at trial. When a party files a motion in limine regarding the exclusion of evidence but fails to timely object at trial, the court reviews the admission of such evidence under a plain error analysis. *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, ¶133; *State v. Deckard,* 2017-Ohio-8469, 100 N.E.3d 53, ¶ 23 (4th Dist.).

{¶70} However, we will not conduct a plain error review because Thacker's argument is barred by the invited error doctrine. Thacker's trial counsel stipulated to the use of the other acts evidence to show context and history – and the record shows that they were used in this way. Moreover, he introduced them to the jury in his opening statement and proactively used the other acts evidence strategically in his defense to undermine the victim's credibility. If there was any error, it was invited error and not subject to plain error analysis. The doctrine of invited error precludes a defendant from making an affirmative and apparent strategic decision at trial and then complaining on appeal that the result of that decision constitutes reversible error. *State v. Doss*, 8th Dist. Cuyahoga No. 84433, 2005-Ohio-775, ¶ 7. The doctrine applies when defense counsel is "actively responsible" for the trial court's error. *State v. Campbell*, 90 Ohio St.3d 320, 324, 738 N.E.2d 1178 (2000); *State v. Jarrell*, 2017-Ohio-520, 85 N.E.3d 175, ¶ 54 (4th Dist.); *Dickess v. Warden, Ross Correctional Inst.,* S.D. Ohio No. 1:09CV635, 2010 WL 5184829, *5, (Nov. 24, 2010) report and recommendation adopted, 2010 WL 5276992 (applying the invited error doctrine where "not only did Dickess's counsel fail to object to the testimony concerning Dickess's prior conviction, but he also volunteered the information during his opening statement"); *but see State v. McWhite,* 73 Ohio App.3d

323, 327, 597 N.E.2d 168, 170 (6th Dist.1991) (an expert may not testify as to the expert's opinion of the veracity of the statements of a child declarant and the defendant's remarks in opening statement suggesting the child had been "coached" by expert was not sufficient to invite a line of questioning and did not constitute an "invited error").

{¶71} We overrule Thacker's second assignment of error.

E. Discovery Sanctions

{¶72} In his eighth assignment of error, Thacker contends that it was not until the first day of trial that the state provided him with copies of receipts and cancelled checks that M.C. provided to prove that she paid Thacker for the construction work he performed on her house. Thacker argues that the receipts and checks should not have been admitted into evidence and he is entitled to a new trial.

{¶73} According to the record, the victim testified that in October 2017, she paid Thacker for the construction work he performed on her house. Thacker's trial counsel did not object to her testimony. When the state attempted to proffer the receipts and checks as evidence of the victim's payments, Thacker's trial counsel objected to those documents at a bench conference held during the victim's testimony. The state agreed not to submit the receipts and checks and they were never admitted into evidence. Thacker has not identified any exhibits in the record to support his contention that these documents were admitted over his objection. Thus, contrary to Thacker's contentions, we find that these documents were not admitted into evidence and Thacker suffered no prejudice.

{¶74} We overrule Thacker's eighth assignment of error.

F. Prosecutorial Misconduct

{¶75} In his fifth assignment of error, Thacker contends that during closing argument rebuttal, the prosecutor misstated evidence and improperly vouched for the victim's credibility. He argues that the prosecutor commented that: (1) Thacker was "a determined assailant" when there was no evidence of what a determined assailant was capable of; (2) Thacker was bigger and stronger than the victim when there was no evidence of their relative strength; and (3) improperly vouched for the victim's credibility "by discussing her 'determination' in pursuing these charges" against Thacker. He contends these comments deprived him of a fair trial and warrant a reversal of his conviction.

{¶76} Thacker's trial counsel did not object to the prosecutor's statements so he forfeited all but plain error. *See, e.g., State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 123; *State v. Neal*, 2016-Ohio-64, 57 N.E.3d 272, ¶ 36 (4th Dist.). Appellate courts take notice of plain error "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus; *State v. Bethel*, 4th Dist. Jackson No. 13CA11, 2014-Ohio-3861, ¶ 7. To prevail Thacker "must show that an error occurred, that the error was plain, and that but for the error, the outcome of the trial clearly would have been otherwise." *State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶ 69.

{¶77} " 'The test regarding prosecutorial misconduct in closing arguments is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant.' " *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 149, quoting *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d

883 (1984). A prosecutor's conduct cannot be grounds for error unless the conduct deprived the defendant of a fair trial. *State v. Keenan*, 66 Ohio St.3d 402, 405, 613 N.E.2d 203 (1993). Thus "[t]he touchstone of the analysis 'is the fairness of the trial, not the culpability of the prosecutor.' " *Powell* at ¶ 149, quoting *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). "Prosecutors are granted wide latitude in closing argument, and the effect of any conduct of the prosecutor during closing argument must be considered in light of the entire case to determine whether the accused was denied a fair trial." *Powell* at ¶ 149. The Supreme Court of Ohio has found that prosecutorial misconduct constitutes reversible error only in " 'rare instances.' " *Keenan* at 405, quoting *State v. DePew*, 38 Ohio St.3d 275, 288, 528 N.E.2d 542 (1998).

1. Misstatement of Evidence

{¶78} Thacker argues that the prosecutor misrepresented evidence when he discussed "a determined assailant" and the relative strengths of Thacker and M.C. in the following remarks:

> We're gonna know some things though. Look at her size. Let's talk about, let's talk about size and strength. You saw her. You see him. Who's bigger? who's stronger? A determined assailant can do a lot. I wonder which hand he was using to drink beer at the Knights if he's so weak? I wonder how Cheryl Holtzapfel missed it when she said that night he seemed okay.

We find no misrepresentations in these statements. The prosecutor was responding in rebuttal to Thacker's trial counsel's closing argument in which he stated, "Frank was physically incapable of doing this. * * * look at the medical records that we submitted into evidence. You'll see that there's * * * weakness in the right arm * * * issues with the left leg." The prosecutor did not state that Thacker was stronger than M.C., but rather asked

the jury to look at their relative sizes and consider the testimony of Cheryl Holtzapfel in evaluating the defense's claim of physical incapacitation.

2. Vouching

{¶79} "It is improper for a prosecutor to vouch for the credibility of a witness at trial. Vouching occurs when the prosecutor implies knowledge of facts outside the record or places his or her personal credibility in issue." *State v. Myers*, 154 Ohio St.3d 405, 2018-Ohio-1903, 114 N.E.3d 1138, ¶ 145. Consequently, "[a]n attorney may not express a personal belief or opinion as to the credibility of a witness." *Myers* at ¶ 145.

{¶80} Thacker argues that the prosecutor improperly personally vouched for M.C.'s credibility by stating that she had determination:

> What kind of determination does [M.C.] have? What? She fabricates this whole thing? She makes it all up? That's determination right there. She goes through this horrific assault, then she goes for the forensic medical examination, endures the humiliation of that. Then she comes in here and tells you that, over the course of an afternoon and part of the next morning about every little detail of this. For what?

{¶81} No improper vouching occurred because the prosecutor did not express any personal belief about the victim's credibility. Rather, the prosecutor was simply responding to defense counsel's attacks on the victim's credibility by commenting on her determination in pursuing the charges and her lack of motive to fabricate them. *See State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 241 (No improper vouching occurred in closing rebuttal because the prosecutor did not express any personal belief about the experts' credibility and "was simply responding to defense attacks by commenting on the experts' collective experience"). No error, plain or otherwise, occurred.

{¶82} We overrule Thacker's fifth assignment of error.

G. Ineffective Assistance of Counsel

{¶83} For his fourth assignment of error Thacker contends that his conviction should be reversed based on ineffective assistance of counsel. Specifically, he argues that his trial counsel: (1) failed to object to "two key hearsay statements" made by one of the witnesses; (2) failed to effectively cross examine M.C. about the money Thacker contends he was owed for the construction work he did on her house; (3) failed to put on evidence that the assault charge had been dismissed; (4) failed to request a *Remmer* hearing of the jury after they discovered the second shotgun shell;[4] and (5) failed to object to the prosecutor's statement in his closing rebuttal.

{¶84} To establish constitutionally ineffective assistance of counsel, a criminal defendant must show (1) that his or her counsel's performance was deficient and (2) that the deficient performance prejudiced the defense and deprived him or her of a fair trial. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Accord State v. Issa,* 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001); *State v. Goff,* 82 Ohio St.3d 123, 139, 694 N.E.2d 916 (1998). "In order to show deficient performance, the defendant must prove that counsel's performance fell below an objective level of reasonable representation. To show prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *State v. Conway,* 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 95. "Failure to establish either element is fatal to the claim." *State v. Jones,* 4th Dist. Scioto No. 06CA3116, 2008-Ohio-968, ¶ 14.

[4] In his brief, Thacker describes this as a "jury poll." However, the record shows that the trial court did, in fact, poll the individual jurors after they announced their verdict pursuant to Crim.R. 31(D). Thus, any failure by trial counsel to request a jury poll was not prejudicial. For this reason, we interpret his argument as one based on the failure to request a *Remmer* hearing.

{¶85} When considering whether trial counsel's representation amounts to deficient performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Strickland* at 689, 104 S.Ct. 2052. Thus, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Quotation omitted.) *Id.* "A properly licensed attorney is presumed to execute his duties in an ethical and competent manner." *State v. Taylor,* 4th Dist. Washington No. 07CA11, 2008-Ohio-482, ¶ 10, citing *State v. Smith,* 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel's errors were so serious that he or she failed to function as the counsel guaranteed by the Sixth Amendment. *State v. Gondor,* 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 61.

{¶86} "Furthermore, courts may not simply assume the existence of prejudice, but must require that prejudice be affirmatively demonstrated." *State v. Walters,* 4th Dist. Washington Nos. 13CA33, 13CA36, 2014-Ohio-4966, ¶ 24*; State v. Jones,* 2018-Ohio-239, 104 N.E.3d 34, ¶ 21-24 (4th Dist.). We have repeatedly recognized that speculation is insufficient to establish the prejudice component of an ineffective assistance of counsel claim*. E.g., State v. Dailey,* 4th Dist. Adams No. 18CA1059, 2018-Ohio-4315, ¶ 33 and cases cited therein.

1. Failure to Object to Hearsay Statements

{¶87} Thacker argues that his trial counsel was deficient for failing to object to M.C.'s cousin's testimony that M.C. told her that Thacker had raped her and that M.C.'s mother had also told the cousin over the phone that Thacker had attacked the victim.

{¶88} A failure to object to inadmissible hearsay testimony will not always support a claim of ineffective assistance of counsel. *State v. Mickens,* 10th Dist. Franklin No. 08AP–626, 2009-Ohio-1973, ¶ 29, citing *State v. Hale,* 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 233, quoting *State v. Holloway,* 38 Ohio St.3d 239, 244, 527 N.E.2d 831 (1988). "Because 'objections tend to disrupt the flow of a trial, [and] are considered technical and bothersome by the factfinder * * * competent counsel may reasonably hesitate to object in the jury's presence.' " (Citation omitted.) *Mickens* at ¶ 29, quoting *State v. Campbell,* 69 Ohio St.3d 38, 53, 630 N.E.2d 339 (1994); *State v. Blair*, 2016-Ohio-2872, 63 N.E.3d 798, ¶ 108 (4th Dist.).

{¶89} An attorney's decision as to whether to object at certain times during trial is presumptively considered a trial tactic or strategy that we will not disturb. *State v. Fisk,* 9th Dist. Summit No. 21196, 2003-Ohio-3149, ¶ 9; *State v. Phillips*, 74 Ohio St.3d 72, 85, 656 N.E.2d 643, (1995).

{¶90} The Supreme Court of Ohio has recognized that if counsel decides, for strategic reasons, not to pursue every possible trial strategy, the defendant is not denied effective assistance of counsel. *State v. Waters,* 4th Dist. Vinton No. 13CA693, 2014-Ohio-3109, ¶ 22; *State v. Black,* 4th Dist. Ross No. 12CA3327, 2013-Ohio-2105, ¶ 40; *State v. Brown,* 38 Ohio St.3d 305, 319, 528 N.E.2d 523 (1988). *State v. Blair*, at ¶109.

{¶91} Here M.C. had already testified that Thacker had raped her and that as soon as she got home she called her mother and 9-1-1, and that her cousin, who lived nearby, had arrived and accompanied her to the Sheriff's department. M.C.'s cousin testified that she lived less than a mile from the victim and that in the early morning of Saturday,

February 10, 2018, the victim's mother had called her and told her to go to the victim's house because "he had beat her up," but did not state who she meant by "he." Thus, contrary to Thacker's assertion, the victim's mother did not specifically identify him as the attacker. The cousin testified that she rushed over to M.C.'s house while still in her pajamas. When she arrived, M.C. was standing out in the driveway, with a blank stare, walking in circles, her voice weak and trembly and she looked like she was in shock. M.C. had bruises on the side of her face, lip and eye. At the Sheriff's department, M.C. told her cousin that Thacker had attacked and raped her. The cousin testified that they left the Sheriff's department and went to the emergency room and she stayed with M.C. until her mother, who lived in Morrow County, Ohio, arrived. The cousin then allowed M.C. and one of her children to stay in her garage apartment for approximately a month after the attack.

{¶92} The state argues that the cousin's testimony that the victim told her she was attacked and raped by Thacker is admissible under Evid.R. 803 (1) – (3), which permits the introduction of certain statements that might otherwise be considered hearsay if it describes a present sense impression, an excited utterance, or a then existing mental, emotional or physical condition. However, by the time M.C. had made the statements to her cousin at the police station, her statements were the result of reflective thought. *State v. Taylor*, 66 Ohio St.3d 295, 300, 612 N.E.2d 316, 320 (1993) ("an excited utterance must be the product of reactive rather than reflective thinking").

{¶93} " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). A statement is not hearsay when offered for a purpose other

than to prove the truth of the matter asserted. *State v. Davis,* 62 Ohio St.3d 326, 343, 581 N.E.2d 1362 (1991). Here it is possible that M.C. or her mother's statements did not establish the truth of the matter asserted – that Thacker raped M.C., but were for the nonhearsay purpose of establishing the cousin's conduct. "[T]estimony which explains the actions of a witness to whom a statement was directed, such as to explain the witness' activities, is not hearsay." *State v. Maurer,* 15 Ohio St.3d 239, 262, 473 N.E.2d 768, 790 (1984); *State v. Osie*, 140 Ohio St.3d 131, 2014-Ohio-2966, 16 N.E.3d 588, ¶¶ 117-118 (2014); *State v. Young*, 4th Dist. Washington No. 12CA14, 2013-Ohio-3418, ¶ 22; *State v. Spires*, 4th Dist. Gallia No. 10CA10, 2011-Ohio-3661, ¶ 16; *State v. Wente,* 8th Dist. Cuyahoga No. 85501, 2005–Ohio–4825, ¶ 8–10 (statement by witness that she received a call from her mother informing her that her house had been broken into was not offered for the truth of the matter asserted, but to explain what the witness did as a result and therefore was not inadmissible hearsay).

{¶94} The cousin's testimony about statements by M.C. and her mother could have been used to explain why the cousin rushed to M.C.'s house while still wearing pajamas early that morning, accompanied her to the Sheriff's department, stayed with her at the Sheriff's office, accompanied her to the emergency room, stayed with her until M.C.'s mother arrived, and provided a place for M.C. to live for over a month after the attack. If the cousin's testimony was not hearsay, trial counsel's failure to object to it would not be deficient.

{¶95} However, even if we were to characterize the cousin's testimony as hearsay, we find any error to be either harmless or the result of counsel's trial strategy. M.C. had previously testified that Thacker had raped her, that she had called her mother,

and that her cousin had arrived soon thereafter. The cousin's testimony repeated this narrative and was cumulative. The improper admission of evidence is harmless error where the remaining evidence constitutes overwhelming proof of a defendant's guilt, beyond a reasonable doubt. *State v. Murphy*, 91 Ohio St.3d 516, 555, 2001–Ohio–112, quoting *State v. Williams*, 6 Ohio St.3d 281 (1983), paragraph six of the syllabus. In making a Crim.R. 52(A) harmless error analysis, any error will be deemed harmless if it did not affect the accused's "substantial rights." An error is harmless where there is no reasonable probability that the error contributed to the outcome of the trial. *State v. Brown*, 65 Ohio St.3d 483, 485, 1992–Ohio–61. Here the victim's testimony, the phone records, the DNA evidence, the testimony of law enforcement, photographs of the victim's face, and evidence of the busted kitchen door all provided overwhelming evidence of Thacker's guilt beyond a reasonable doubt.

{¶96} Finally, trial counsel may have reasonably determined that an objection would needlessly highlight M.C.'s prior testimony and be perceived as bothersome or technical to the jury. Thus, we find that trial counsel's decision not to object to the cousin's testimony was both harmless error and trial strategy and was not deficient.

2. Failure to Conduct Effective Cross Examination of Witness

{¶97} Thacker argues that his trial counsel failed to effectively cross examine M.C. concerning the "significant amount of money for home improvement work" that Thacker contends was owed to him.

{¶98} Generally, "[t]he extent and scope of cross-examination clearly fall within the ambit of trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel." *State v. Guysinger*, 4th Dist. Ross No. 15CA3514, 2017-Ohio-

1167, ¶ 27, *appeal not allowed*, 151 Ohio St.3d 1454, 2017-Ohio-8842, 87 N.E.3d 222, ¶ 27 (2017), quoting *State v. Leonard*, 104 Ohio St.3d 54, 2004–Ohio–6235, 818 N.E.2d 229, ¶ 146. Moreover, " '[a]n appellate court reviewing an ineffective assistance of counsel claim must not scrutinize trial counsel's strategic decision to engage, or not engage, in a particular line of questioning on cross-examination.' " *Id.,* quoting *State v. Dorsey*, 10th Dist. Franklin No. 04AP–737, 2005–Ohio–2334, ¶ 22, quoting *In re Brooks*, 10th Dist. Franklin No. 04AP164, 2004–Ohio–3887, ¶ 40; *see also State v. Allah*, 4th Dist. Gallia No. 14CA12, 2015–Ohio–5060, ¶ 23.

{¶99} Here M.C. testified on direct that she paid Thacker everything she owed him for the construction work. The state had receipts and checks that it attempted to introduce to support her testimony but, in response to Thacker's objections, were not admitted into evidence. Thacker's trial counsel's decision not to cross examine her about those payments falls within the ambit of trial strategy, particularly where in so doing, he might open the door to the admission of the receipts and checks. Because we find that the scope and extent of defense counsel's cross-examination of M.C. was trial strategy, we reject Thacker's argument that his trial counsel was ineffective in his cross examination of this witness. "We will 'not second-guess trial strategy decisions.' " *State v. Cepec,* 149 Ohio St.3d 438, 2016-Ohio-8076, 75 N.E.3d 1185, ¶ 52, quoting *State v. Mason,* 82 Ohio St.3d 144, 157, 694 N.E.2d 932 (1998).

3. Failure to Put on Evidence that the Assault Charges were Dismissed

{¶100} Thacker argues that his trial counsel failed to put on evidence that the September 22, 2017 assault charges were dismissed and that this "was clearly necessary to attack [M.C.'s] credibility." However, the record shows that evidence that

those charges were dismissed was already established by the state during its direct examination of M.C. and it was the state's decision to dismiss those charges based on Thacker's indictment on the current charges:

> Q. You know that those charges were never adjudicated, don't you?
> A. Yes.
> Q. You know that we, we dismissed those after he was indicted for these charges, don't you?
> A. Yes.

{¶101} Therefore, trial counsel was not deficient for failing to establish that the charges were dismissed or in failing to cross examine M.C. over the state's decision to dismiss them.

4. Failure to Request a *Remmer* Hearing & Object to Prosecutor's Closing Rebuttal

{¶102} Thacker contends that his trial counsel was ineffective for (1) failing to request a *Remmer* hearing of the jury after the second shotgun shell fell from the sweatpants during deliberation and (2) failing to object to remarks made during the prosecutor's closing rebuttal. We have already reviewed these two issues in overruling his fifth and sixth assignments of error and found no error in the trial court's decision not to conduct a *Remmer* hearing and no improper remarks during the state's closing rebuttal. Therefore, trial counsel was not deficient in this respect, nor can Thacker affirmatively demonstrate that he was prejudiced.

{¶103} We overrule Thacker's fourth assignment of error.

H. Manifest Weight of the Evidence

{¶104} For his first assignment of error, Thacker asserts that his convictions are against the manifest weight and sufficiency of the evidence. Because a determination

if a conviction is supported by the manifest weight of the evidence is dispositive of the sufficiency question, we address that first.

1. Standard of Review

{¶105} In determining whether a criminal conviction is against the manifest weight of the evidence, we must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that we must reverse the conviction. *State v. Thompkins,* 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 119. *State v. Phillips*, 4th Dist. Scioto No. 18CA3832, 2018-Ohio-5432, ¶ 23.

{¶106} To satisfy its burden of proof, the state must present enough substantial credible evidence to allow the trier of fact to conclude that the state had proven all the essential elements of the offense beyond a reasonable doubt. *See State v. Adams*, 2016-Ohio-7772, 84 N.E.3d 155, ¶ 22 (4th Dist.) citing *State v. Eley*, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978), syllabus, (superseded by state constitutional amendment on other grounds in *State v. Smith*, 80 Ohio St.3d 89, 684 N.E.2d 668 (1997)). However, it is the role of the jury to determine the weight and credibility of evidence. *See State v. Kirkland,* 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 132. " 'A jury, sitting as the trier of fact, is free to believe all, part or none of the testimony of any witness who appears before it.' " *State v. Reyes-Rosales*, 4th Dist. Adams No. 15CA1010, 2016-Ohio-3338, ¶ 17, quoting *State v. West,* 4th Dist. Scioto No. 12CA3507, 2014-Ohio-1941, ¶ 23. We defer to the trier of fact on these evidentiary weight and credibility issues because it

is in the best position to gauge the witnesses' demeanor, gestures, and voice inflections, and to use these observations to weigh their credibility. *Id.; State v. Koon*, 4th Dist. Hocking No. 15CA17, 2016-Ohio-416, ¶ 18.

2. Physical Evidence of Use of Force

{¶107} Thacker contends that there was no physical evidence that he raped, kidnapped, burglarized or abducted the victim. His trial counsel explained in opening statement that Thacker and M.C. had dated and "we also agree that uh, Mr. Thacker even had sex with [the victim] that night," but that the physical evidence does not support the allegations that he used force or threat of force. Specifically, Thacker argues that there were numerous inconsistencies between the physical evidence found and the testimony of the victim: (1) no physical evidence of a struggle inside the victim's kitchen; (2) no bodily fluids found in Thacker's truck; (3) the victim's underwear was not found in Thacker's truck; (4) Thacker was physically incapable of carrying out the offenses with force or threat of force as a result of recent heart surgery; and (5) the loving and sexual nature of the text messages the victim sent to Thacker in September and early October 2017.

{¶108} Thacker was convicted of rape under R.C. 2907.02(A)(2), which required the proof that he engaged in sexual conduct with another person when the offender purposely compels the other person to submit "by force or threat of force." His conviction for burglary likewise requires proof that he used "force, stealth, or deception" under R.C. 2911.12(A)(1). His conviction of kidnapping under R.C. 2905.01(A)(3) requires proof of "force, threat, or deception" and his conviction for abduction under R.C. 2905.02(A)(1)(b) requires proof of "force or threat."

{¶109} However, the state presented the testimony of the victim, who testified that Thacker came to her house, kicked in the door, brandished a handgun, hit her in the face and head, struggled with her in the kitchen and into the yard and then forced her into his truck, transported her to his house, raped her several times and held her at gunpoint. The victim had obtained a civil protection order against Thacker and called 9-1-1 at 11:55 p.m., February 9, 2018 after receiving repeated phone calls from Thacker. The state introduced a cell phone extraction report for the victim and Thacker's telephones that showed that Thacker placed eleven telephone calls on February 9, 2018 starting at 11:25 p.m. and continuing until 11:47 p.m. to the victim from his phone but used a "*67" procedure to block his caller identification. Detective Sisler testified that he responded to the victim's initial 9-1-1 call concerning the harassing calls. When he arrived at the victim's house at approximately 12:04 a.m. Saturday, February 10, 2018, there was no damage to the backdoor, nor were there any visible bruises or cuts on M.C.'s face. M.C. appeared scared and nervous and had a shotgun on the counter.

{¶110} The state introduced evidence of the victim's 9-1-1 call at 8:50 a.m., February 10, 2018 during which she reported being abducted and raped by Thacker. M.C.'s cousin and the cousin's husband both testified that that morning they rushed to M.C.'s house after receiving a phone call from M.C.'s mother. M.C. had bruises on her face and appeared to be in a state of shock. Her kitchen was "a wreck" and the kitchen door was damaged and looked like it had been kicked in. The state introduced photographs taken by law enforcement on February 10, 2018 of M.C.'s bruised face and the busted kitchen door frame and damaged kitchen back door that had a muddy boot print on the exterior next to the door handle.

{¶111} The state also introduced DNA evidence that showed that Thacker's DNA was present in the victim's vagina and on the shotgun barrel and handle. The phone records also showed that Thacker called M.C.'s cell phone using the "*67" blocking procedure three more times the morning of February 10, 2018, beginning at 8:42 a.m. and ending at 9:03 a.m.

{¶112} In sum, the jury considered the state's witnesses' testimony and exhibits and chose to believe the victim's version of events. " '[A] conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution testimony.' '' *State v. Fletcher,* 4th Dist. Lawrence No. 14CA14, 2015–Ohio–1624, ¶ 28, quoting *State v. Cooper,* 170 Ohio App.3d 418, 2007–Ohio–1186, 867 N.E.2d 493, ¶ 17 (4th Dist.)*; State v. Fox*, 4th Dist. Washington No. 14CA36, 2015-Ohio-3892, ¶ 26.

{¶113} Reviewing the record as a whole, we cannot say that this is an exceptional case where the evidence weighs heavily against the convictions, that the trier of fact lost its way, or that a manifest miscarriage of justice has occurred. Accordingly, the verdict was not against the manifest weight of the evidence. Thacker's first assignment of error is overruled.

I. Merger

{¶114} For his ninth assignment of error, Thacker argues that the trial court should have merged his burglary, kidnapping and rape convictions for the purposes of sentencing because he contends that they were all of similar import and significance, and committed at the same time with the same motivation.

{¶115} At the sentencing hearing, Thacker and the state agreed that the abduction and kidnapping offenses merged, but Thacker failed to raise merger of the

burglary, kidnapping and rape offense and forfeited all but plain error. *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 21, 28 ("the failure to raise the allied offense issue at the time of sentencing forfeits all but plain error"). To establish plain error defendant must show that "but for a plain or obvious error, the outcome of the proceeding would have been otherwise, and reversal must be necessary to correct a manifest miscarriage of justice." *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 16.

{¶116} The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." This protection applies to Ohio citizens through the Fourteenth Amendment and is additionally guaranteed by Article I, Section 10 of the Ohio Constitution. This constitutional protection prohibits multiple punishments for the same offense in the absence of a clear indication of contrary legislative intent. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), *overruled on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989); *Whalen v. United States*, 445 U.S. 684, 691-692, 100 S. Ct. 1432, 63 L.Ed.2d 715 (1980).

{¶117} The General Assembly enacted R.C. 2941.25 to identify when a court may impose multiple punishments:

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

{¶118} The trial court's duty to merge allied counts at sentencing is mandatory. *State v. Underwood,* 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 26. But merger is a sentencing question where the defendant bears the burden of establishing entitlement to the protection of R.C. 2941.25. *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, ¶ 18. Because Thacker forfeited all but plain error, he must show that the error is obvious, it affected substantial rights, i.e., must have affected the outcome of the trial, and that it must be corrected "to prevent a manifest miscarriage of justice." *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 23.

{¶119} In *State v. Ruff*, 143 Ohio St.3d 114, 2015–Ohio–995, 34 N.E.3d 892, which focused largely on the issue of dissimilar import, the Supreme Court of Ohio clarified the appropriate analysis to determine whether two offenses merge under R.C. 2941.25. "In determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must evaluate three separate factors—the conduct, the animus, and the import." *Id*. at paragraph one of the syllabus. "Under R.C. 2941.25(B), a defendant whose conduct supports multiple offenses may be convicted of all the offenses if any one of the following is true: (1) the conduct constitutes offenses of dissimilar import, (2) the conduct shows that the offenses were committed separately, or (3) the conduct shows that the offenses were committed with separate animus." *Id.* at paragraph three of the syllabus.

{¶120} Further, unlike at trial where the state bears the burden of proof, at sentencing "[t]he defendant bears the burden of establishing his entitlement to the protection, provided by R.C. 2941.25, against multiple punishments for a single criminal

act." *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, ¶ 18, quoting *State v. Mughni*, 33 Ohio St.3d 65, 67, 514 N.E.2d 870 (1987). Finally, we review the trial court's determination of allied offenses de novo. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 28; *State v. Conrad*, 4th Dist. Hocking No. 18CA4, 2019-Ohio-263, ¶ 35.

1. Burglary Does Not Merge with Kidnapping or Rape

{¶121} Burglary does not merge with kidnapping or rape because of the dissimilar import; the harm that results from burglary is separate and identifiable from the harm that results from rape or kidnapping:

> [A] defendant's conduct that constitutes two or more offenses against a single victim can support multiple convictions if the harm that results from each offense is separate and identifiable from the harm of the other offense. We therefore hold that two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable.

State v. Ruff, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 26 (2015).

{¶122} Thacker was convicted of burglary under R.C. 2911.12, not aggravated burglary under R.C. 2911.11, thus his conviction for burglary did not require the state to prove that he inflicted physical harm on another and distinguishes this case from those involving a merger analysis of rape and aggravated burglary. *See State v. Ruff,* 1st Dist. Hamilton No. C-120533, 2015-Ohio-3367, ¶ 22 (If Ruff had been charged and convicted of both simple burglary and rape, the convictions would not have merged). Under R.C. 2911.12(A)(1) burglary is:

> (A) No person, by force, stealth, or deception, shall do any of the following: (1) Trespass in an occupied structure * * * when another person other than an accomplice of the offender is present, with purpose to commit in the structure * * * any criminal offense;

{¶123} Thacker completed his burglary offense when he kicked in the victim's door and entered into her home with the purpose of intimidating her as a victim of the pending September assault offense. The harm in simple burglary is not physical harm to the occupant, but rather is a "sense of privacy had been 'invaded and compromised.' " *State v. Gillman*, 4th Dist. No. 14CA699, 2015-Ohio-4421, 46 N.E.3d 130, ¶ 23 (comparing the harm from burglary to the economic harm from theft and finding they do not merge). However, the harm from kidnapping involves physical asportation or restraint and the harm from rape is independent physical injury, exposure to an increased risk of contracting a sexually transmitted disease, and emotional distress. *See State v. Dean,* 2018-Ohio-1740, 112 N.E.3d 32, ¶ 56 (6th Dist.) (refusing to merge kidnapping and rape convictions under a *Logan* analysis).

{¶124} Thacker has failed to show any error in the trial court's decision not to merge the burglary conviction with either the kidnapping or rape convictions. Because the harm that resulted from the burglary conviction was separate and identifiable from either the kidnapping or rape convictions, they were not allied offenses subject to merger.

2. Kidnapping and Rape Do Not Merge

{¶125} Ohio courts still apply the test found in *State v. Logan*, 60 Ohio St.2d 126, 135, 397 N.E.2d 1345 (1979), to determine whether rape and kidnapping convictions merge for sentencing even though this test predates *Ruff.* "The primary issue * * * is whether the restraint or movement of the victim is merely incidental to a separate underlying crime or, instead, whether it has a significance independent of the other offense." *Id.* Courts must ask "whether the victim, by such limited asportation or restraint, was subjected to a substantial increase in the risk of harm separate from that involved in

the underlying crime." *Id.*; *State v. Williams,* 8th Dist. Cuyahoga No. 107748, 2019-Ohio-2335, ¶ 78; *State v. Armengau,* 2017-Ohio-4452, 93 N.E.3d 284, ¶ 125 (10th Dist.) ("Even though *Logan* predates *Ruff,* this court and others continue to apply the guidelines set forth in *Logan* in determining whether kidnapping and another offense were committed with a separate animus, in accordance with the third prong of the *Ruff* test.").

> In establishing whether kidnapping and another offense of the same or similar kind are committed with a separate animus as to each pursuant to R.C. 2941.25(B), this court adopts the following guidelines:
>
> (a) Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions;
>
> (b) Where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions.

State v. Logan, 60 Ohio St.2d 126, 397 N.E.2d 1345, 1346 (1979), syllabus.

{¶126} Under the facts of this case, it is clear that the kidnapping and rape convictions do not merge. Sometime after midnight on February 10, Thacker forced the victim into his truck and drove her to a remote location where he trained the shotgun on her, threatened to kill her, and yelled at her to confess to cheating on him with a number of men. (Tr. 253- 257) Then at 5:08 a.m., Thacker forced the victim back into his truck, raped her, then drove her to his home and raped her again. At some point before approximately 8:30 a.m., Thacker drove the victim back to her home.

{¶127} The entire ordeal lasted anywhere from about six to eight hours. The restraint here "is prolonged, the confinement is secretive, or the movement is substantial

so as to demonstrate a significance independent of the other offense." *Id.* And, by transporting the victim to two separate locations in Lawrence County in the backseat of a truck, Thacker subjected the victim "to a substantial increase in risk of harm separate and apart from that involved in the underlying crime" of rape. *Id.*

{¶128} Again, Thacker has failed to show any error in the trial court's decision not to merge the kidnapping conviction with the rape conviction. We find that merger does not apply to Thacker's kidnapping and rape convictions.

{¶129} We overrule Thacker's ninth assignment of error.

J. Cumulative Error

{¶130} In his tenth assignment of error, Thacker contends that his right to a fair trial and due process were violated by the cumulative errors identified in his first nine assignments of error.

{¶131} Under the cumulative-error doctrine, "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." *State v. Garner*, 74 Ohio St.3d 49, 64, 656 N.E.2d 623 (1995), citing *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus; *State v. Ruble*, 2017-Ohio-7259, 96 N.E.3d 792, ¶ 75 (4th Dist.). "Before we consider whether 'cumulative errors' are present, we must first find that the trial court committed multiple errors." *State v. Smith*, 2016-Ohio-5062, 70 N.E.3d 150, ¶ 106 (4th Dist.), citing *State v. Harrington*, 4th Dist. Scioto No. 05CA3038, 2006-Ohio-4388, ¶ 57.

{¶132} The cumulative error doctrine does not apply where the defendant "cannot point to 'multiple instances of harmless error.' " *See State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶ 148 ("And to the extent that Mammone more broadly invokes the doctrine of cumulative error, that doctrine does not apply because he cannot point to 'multiple instances of harmless error.' "); *State v. Fannon*, 2018-Ohio-5242, 117 N.E.3d 10, ¶ 124-125 (4th Dist.).

{¶133} Thacker argues that his trial counsel's and the trial court's cumulative errors violated his constitutional right to a fair trial. However, because none of Thacker's individual assignments of error have merit, he "cannot establish an entitlement to relief simply by joining those claims together." *State v. Mammone,* 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶ 173.

{¶134} We overrule his tenth assignment of error.

IV. CONCLUSION

{¶135} We overrule Thacker's assignments of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Court of Common Pleas 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. & *Myers, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Michael D. Hess, 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.

*Judge Beth A. Myers, First District Court of Appeals, sitting by assignment of the Supreme Court of Ohio in the Fourth Appellate District.