[Cite as *State v. Hardges*, 2008-Ohio-5567.]

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

STATE OF OHIO Appellee v. DAVID J. HARDGES Appellant	C. A. No. 24175 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 07 09 2982

DECISION AND JOURNAL ENTRY

Dated: October 29, 2008

WHITMORE, Judge.

{¶1} Defendant-Appellant, David J. Hardges, appeals from his convictions and sentence in the Summit County Court of Common Pleas. This Court affirms.

I

{¶2} Hardges began communicating with Jocelyn Williams, the victim in this matter, via the social networking website, MySpace, while he was in jail on an unrelated matter. The two developed an online relationship and sent each other personal messages and e-mails. After Williams discovered that she had attended high school with Hardges' significant other, Lakeia Hardges, she also began accepting Hardges' collect calls. Hardges promised Williams that he would repay her for the collect calls if she accepted them and passed along his messages to Lakeia, who did not have a working phone. Williams promised Hardges that she would meet with him upon his release from jail.

{¶3} Hardges called Williams on the night of September 1, 2007, told her that he was out of jail, and asked her to pick him up. Although Williams was scheduled to begin work at 11:30 p.m., she agreed to meet Hardges so that he could give her the money for the collect calls that she had accepted. Once Williams picked up Hardges, however, he claimed that he did not have the money and asked her to drive him to several different places so that he could get it. Williams became unfamiliar with her surroundings as she continued to drive Hardges around Akron.

{¶4} As Williams drove her car down South Street, Hardges suddenly grabbed her neck and ordered her to pull the car into an area that Williams described as "just a little opening with a gate behind it." Hardges forced Williams into the backseat, raped her, and strangled her until she lost consciousness. When Williams awoke, Hardges had moved her car to a different location. The two spoke briefly, and Williams tried to get Hardges to release her. Instead, Hardges used Williams' clothing to wipe down her body and the car and forced her to clean any potential sample evidence out from underneath her fingernails with her work identification badge. Hardges then raped Williams again and strangled her with her scarf.

{¶5} Williams regained consciousness sometime later and found herself on the ground, naked from the waist down. Because her car was gone, Williams began to walk. She eventually stumbled upon two Akron Police Officers who called for an EMS team and transported her to the hospital. Williams suffered multiple bruises and abrasions to her face and body, vaginal tearing, broken ribs, and a collapsed lung. Williams told the officers and hospital staff that David, a man she had met through MySpace, had raped her.

{¶6} On September 18, 2007, the grand jury indicted Hardges. The matter proceeded to a jury trial, and on February 26, 2008, the jury found Hardges guilty of the following crimes:

(1) aggravated robbery, pursuant to R.C. 2911.01(A)(3); (2) two instances of rape, pursuant to R.C. 2907.02(A)(2); (3) attempted murder, pursuant to R.C. 2903.02(A)/(B)/2923.02; (4) kidnapping, pursuant to R.C. 2905.01(A)(2)/(3)/(4); (5) felonious assault, pursuant to R.C. 2903.11(A)(1); and (6) tampering with the evidence, pursuant to R.C. 2921.12(A)(1). The jury also found that Hardges had committed the crimes of attempted murder, kidnapping, and felonious assault with sexual motivation, pursuant to R.C. 2941.147. On March 7, 2008, the trial court held a specification hearing and found Hardges guilty of five sexually violent predator specifications, pursuant to R.C. 2941.148. The trial court sentenced Hardges to a total of sixty-three years in prison and classified him as a Tier III sexual offender.

{¶7} Hardges now appeals from the trial court's ruling and raises six assignments of error for our review. For ease of analysis, we rearrange and consolidate several of the assignments of error.

II

Assignment of Error Number Six

"APPELLANT HARDGES' INDICTMENT WAS DEFECTIVE BECAUSE THE STATE FAILED TO SPECIFY A PARTICULAR DEGREE OF CULPABILITY FOR THE AGGRAVATED ROBBERY, KIDNAPPING AND TAMPERING WITH EVIDENCE COUNTS."

{¶8} In his sixth assignment of error, Hardges argues that his indictment was defective because several of the counts failed to charge him with all of the essential elements of the specified crimes. Specifically, Hardges argues that his convictions for the crimes of aggravated robbery, kidnapping, and tampering with the evidence must be reversed because of his defective indictment. We disagree.

{¶9} The Ohio Supreme Court has held that an appellant may raise the issue of a defective indictment for the first time on appeal. *State v. Colon* ("*Colon I*"), 118 Ohio St.3d 26,

2008-Ohio-1624, syllabus. "[W]hen a defendant fails to object to an indictment that is defective because the indictment did not include an essential element of the charged offense, a plain-error analysis is appropriate." *State v. Colon* ("*Colon II*"), 119 Ohio St.3d 204, 2008-Ohio-3749, at ¶7. Compare *Colon I*, supra (applying structural error analysis where defect causes a reviewing court to question the reliability of the trier of fact's determination of guilt or innocence). Crim.R. 52(B) permits a reviewing court to take notice of "[p]lain errors or defects affecting substantial rights" even if a party forfeits an error by failing to object to the error at trial. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶15, quoting Crim.R. 52(B). To correct a plain error, all of the following elements must apply:

> "First, there must be an error, i.e., a deviation from the legal rule. *** Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. *** Third, the error must have affected 'substantial rights[]' [to the extent that it] *** affected the outcome of the trial." *State v. Barnes* (2002), 94 Ohio St.3d 21, 27.

"Courts are to notice plain error 'only to prevent a manifest miscarriage of justice.'" *Payne* at ¶16, quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus.

{¶10} The portion of Hardges' indictment charging him with aggravated robbery reads, in relevant part, as follows:

> "[Hardges] did commit the crime of AGGRAVATED ROBBERY in that he did, in attempting or committing a theft offense *** or in fleeing immediately after the attempt or offense, inflict, or attempt to inflict, serious physical harm on another *** in violation of Section 2911.01(A)(3) of the Ohio Revised Code[.]"

With the exception of the seriousness requirement, the aggravated robbery statute and the robbery statute are virtually identical with respect to their physical harm provisions. Compare R.C. 2911.01(A)(3) (prohibiting the infliction or attempted infliction of "serious physical harm on another") with R.C. 2911.02(A)(2) (prohibiting the infliction, attempted infliction, or threat of infliction of "physical harm on another"). The Supreme Court has held that the catchall culpable

mental state of recklessness applies to the robbery statute because the statute neither specifies a particular mental state, nor plainly indicates that a strict liability standard applies. *Colon I* at ¶12-14. Our review of the aggravated robbery statute, which bears close resemblance to the robbery statute, convinces us that the catchall culpable mental state of recklessness applies to the aggravated robbery statute as well. See *State v. Sullivan* (Mar. 5, 1997), 9th Dist. No. 17909, at *2.

{¶11} Hardges' indictment did not specify that the mental state of recklessness applied to his aggravated robbery charge. A mere error, however, does not amount to a plain error pursuant to Crim.R. 52(B). For plain error to exists, an appellant also must demonstrate that an error affected his substantial rights. *Barnes*, 94 Ohio St.3d at 27. Hardges only asserts that his aggravated robbery conviction should be reversed because the indictment was defective. He fails to allege any prejudice as a result of the defect or to otherwise explain how the State's failure to include the element of recklessness in the aggravated robbery count affected the outcome of his trial as to that count. As such, Hardges cannot demonstrate plain error with regard to his aggravated robbery conviction.

{¶12} Our review of the record also convinces us that no error exists with regard to Hardges' kidnapping and tampering with the evidence convictions. The portion of Hardges' indictment charging him with kidnapping reads, in relevant part, as follows:

> "[Hardges] did commit the crime of KIDNAPPING in that he did, by force, threat, or deception, remove and/or restrain the liberty of [the victim] *for the purpose of* facilitating the commission of any felony or flight thereafter, and/or terrorizing, or to inflict serious physical harm on the victim or another, and/or engaging in sexual activity[.]" (Emphasis added.)

The wording of Hardges' indictment tracks the kidnapping statute's language, which defines kidnapping as the removal and/or restraint of a victim for a certain purpose. See R.C. 2905.01.

Both the language in the statute and Hardges' indictment clearly specify that the crime of kidnapping requires an offender to have acted with purpose. See *State v. Hartman* (2001), 93 Ohio St.3d 274, 289-90. As such, Hardges' indictment did not contain any error with regard to his kidnapping charge because it apprised Hardges that the mens rea of "purposely" applied to that charge.

{¶13} Similarly, Hardges' indictment does not contain any error with regard to his tampering with the evidence charge. Hardges' tampering charge reads, in part, as follows:

> "[Hardges] did commit the crime of TAMPERING WITH EVIDENCE in that he did, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, alter, destroy, conceal, or remove any record, document, or thing, to wit: car and items inside, *with purpose* to impair its value or availability as evidence in such proceeding or investigation[.]" (Emphasis added.)

As Hardges' indictment tracks the language in the tampering statute and apprises the reader that the mens rea of "purposely" applies to such a charge, Hardges' indictment was not defective. See *State v. Jones*, 9th Dist. No. 23234, 2006-Ohio-6963, at ¶13-15. Hardges' sixth assignment of error lacks merit.

Assignment of Error Number One

> "APPELLANT HARDGES' CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF SECTION 3(B)(3), ARTICLE IV OF THE OHIO CONSTITUTION, THUS CREATING A MANIFEST MISCARRIAGE OF JUSTICE BECAUSE THE GREATER WEIGHT OF THE EVIDENCE DEMONSTRATED THAT APPELLANT HARDGES DID NOT COMMIT THE OFFENSES."

{¶14} In his first assignment of error, Hardges argues that his convictions for attempted murder, aggravated robbery, rape, kidnapping, felonious assault, and tampering with the evidence are against the manifest weight of the evidence. Specifically, he argues that the evidence at trial showed that he was not with Williams when the crimes against her were

committed and that his convictions rested solely upon Williams' "confused and inconsistent" testimony. We disagree.

{¶15} When considering a manifest weight argument, the Court:

> "[M]ust 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 the conviction must be reversed and a new trial ordered." *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. Further, when reversing a conviction on the basis that the conviction was against the manifest weight of the evidence, the appellate court sits as the "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. Id. Therefore, this Court's "discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *Otten*, 33 Ohio App.3d at 340.

{¶16} R.C. 2903.02(A) provides that, "[n]o person shall purposely cause the death of another[.]" R.C. 2923.02(A) defines "attempt" as "purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, *** engag[ing] in conduct that, if successful, would constitute or result in the offense." "Purpose" refers to the "specific intention to cause a certain result, or *** to engage in conduct of [a certain] nature." R.C. 2901.22(A). On the other hand, a person acts "knowingly" when "regardless of his purpose, *** he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B).

{¶17} A person commits the offense of aggravated robbery when, "in attempting or committing a theft offense, *** or in fleeing immediately after the attempt or offense, [he] *** inflict[s], or attempt[s] to inflict, serious physical harm on another." R.C. 2911.01(A)(3). The Revised Code defines recklessness as follows:

> "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist." R.C. 2901.22(C).

As previously discussed, the mens rea of recklessness applies to an offense of aggravated robbery.

{¶18} R.C. 2907.02, the rape statute, provides that "[n]o person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." R.C. 2907.02(A)(2). Sexual conduct includes "vaginal intercourse between a male and female[.]" R.C. 2907.01(A). R.C. 2905.01, the kidnapping statute, provides as follows:

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

The phrase "sexual activity" includes sexual conduct. R.C. 2907.01(C).

{¶19} A person commits the crime of felonious assault when he "knowingly *** cause[s] serious physical harm to another[.]" R.C. 2903.11(A)(1).

{¶20} Finally, a person commits the crime of tampering with the evidence when he "knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, *** [a]lters, destroy[s], conceal[s], or remove[s] any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation." R.C. 2921.12(A)(1).

{¶21} As Hardges collectively challenges that all of his convictions are against the weight of the evidence for the same reasons, we collectively review the record to determine whether the jury lost its way in believing Williams' testimony and concluding that Hardges' alibi defense lacked merit. Furthermore, as Hardges does not challenge the jury's findings with regard to the sexual motivation specifications attached to several of his convictions, we do not address the jury's findings on those specifications. See App.R. 16(A)(7).

{¶22} Cynda Watts-Williams, the victim's mother, testified that her then twenty year old daughter left her home at approximately 6:00 p.m. on September 1, 2007. Cynda did not hear from her daughter again until the police called her at approximately 4:00 a.m. on the morning of September 2, 2007 and asked her to come to the hospital. Cynda stated that Williams' injuries kept her in the hospital for about two weeks, but that she continued to have discoloration in her eyes for three months after her injuries occurred.

{¶23} Williams testified that she was scheduled to begin work at 11:30 p.m. on the night of September 1, 2007, but that Hardges called her after she left Cynda's house and asked her to pick him up. Williams testified that she met Hardges through MySpace while he was in jail and continued to communicate with him until his release. Although Williams initially claimed that she never planned on seeing Hardges when he got out of jail and that she spoke with him just to be "friendly," she admitted on cross-examination that she promised Hardges she would meet

with him after his release. Williams testified that she agreed to meet Hardges on the night of September 1st because he told her that he would repay her for the collect calls that she had accepted from him while he was in jail. Williams' phone records confirm that Williams received calls from Hardges' telephone number at 6:25 p.m., 7:56 p.m., 8:17 p.m., and 8:30 p.m. on September 1st.

{¶24} Williams testified that she picked up Hardges and another male, who Hardges identified as his brother, at Burger King and drove them to an apartment building on Wooster Road. Hardges told Williams that another individual named Sergio lived in the apartment building and had money for Hardges. Sergio only had money in large denominations, however, so Sergio joined the group in Williams' car, and Williams drove the group to the Copley Road liquor store so that Sergio could change his larger bills. Williams stated that after the liquor store, she drove to a residence on York Street where Sergio and Hardges' alleged brother exited the vehicle. Hardges asked Williams to take him to Hazel Street. Although Hazel Street was relatively close in proximity to Williams' location, she took several unnecessary turns without the aid of directions and wound up traveling on South Street. Williams stated that as she drove down South Street, Hardges grabbed her by the neck and ordered her to turn into a place that she described as "just a little opening with a gate behind it."

{¶25} Williams testified that Hardges forced her to back the car into the place that he indicated so that the front of the car faced South Street. Once Williams placed the car in the parked position, Hardges took her keys and threw them to the floor on the passenger's side. He also took Williams' cell phone from the car's cup holder, removed the cell phone's battery, and threw the phone and battery to the floor. Hardges then forced Williams to climb over the seats and get into the back of the car. He continued to grab and choke her as he forced her into the

back. Once Hardges had Williams in the backseat, he told her that he was going to rape her and then did so. When Hardges finished raping Williams, he used his hands to choke her around the neck until she lost consciousness.

{¶26} Williams testified that when she awoke, she noticed that Hardges had moved the car. While she was not sure, she testified that she thought Hardges had moved the car to the top of a hill. Hardges was once again in the backseat with Williams when she awoke. Hardges used extra clothing that Williams had in the backseat to wipe between Williams' legs and to wipe down the car. According to Williams, Hardges told her that he might let her go if she helped him find someone to rob because he needed money. Williams testified that she instead tried to convince Hardges to release her by reminding him that he had children who he would never see again if he went to prison for hurting her. In response, Hardges forced Williams onto her stomach and raped her again. Williams testified that she tried to scratch Hardges during the rape, but thought that she was unsuccessful. Even so, when Hardges finished raping Williams, he took her work identification badge and made her use it to scrape under her fingernails and ensure that they were clean. Hardges then took a scarf that Williams had in the backseat, tied it around her neck, and strangled her into unconsciousness.

{¶27} Williams testified that when she regained consciousness she found herself alone, lying on the grass and wearing only a shirt and bra. Hardges had disappeared along with Williams' car, wallet, and cell phone. Consequently, Williams began to walk until she came across a road. Williams found two Akron Police Officers on the road, and the officers helped her until EMS arrived. Williams told the officers and paramedics that David had raped her.

{¶28} Akron Police Officer Kelly Johnson testified that she and her partner discovered Williams walking towards them along the road at approximately 4:19 a.m. on September 2,

2007. Officer Johnson observed that Williams was badly beaten. Williams had multiple facial contusions, swollen eyes, broken blood vessels in her eyes, and "pieces of skin removed from the top of her feet[.]" Williams told Officer Johnson that she had picked up a man named David, who she had met on MySpace, from Burger King sometime between 9:00 and 9:30 p.m. the previous evening and that he had attacked her. EMS Paramedics, Andrew Hoch and Daniel DeLuca, confirmed Officer Johnson's testimony and testified that when they arrived at the scene to help Williams, she told them that a man named David had attacked her. Paramedic Hoch confirmed that Williams' abrasion injuries were consistent with road rash injuries; the type that occurred as a result of being dragged across concrete or thrown onto it from a vehicle.

{¶29} Doctor Todd Jensen, a third year resident at Akron General, testified that he examined Williams when officers brought her to the hospital on September 2, 2007. He noted that Williams had multiple abrasions, injuries that appeared to be consistent with road rash, a fractured sternum and multiple rib fractures, and a collapsed lung. He further opined that Williams' neck injuries were consistent with strangulation injuries and that, depending upon the amount of force exerted, death could result from strangulation. Doctor Jensen also performed Williams' rape kit and found vaginal tearing upon his examination.

{¶30} Chad Britton, a forensic scientist with the Ohio Bureau of Criminal Identification and Investigation ("BCI"), testified that he examined the samples from Williams' rape kit. Britton discovered the presence of sperm on the sample slides from the kit and also discovered the presence of blood on all of Williams' clothing and on the boxer shorts that Hardges' had worn during the time of Williams' attack. Although BCI did not perform a blood analysis for DNA on these items, Stacy Violi, another BCI forensic scientist, did perform a DNA analysis on the sperm that Britton had discovered on Williams' rape kit slides. Violi testified that Hardges

could not be excluded as the source of the semen on the vaginal swab slides. She further testified that "[t]he proportion of the population that [could] []not be excluded as possible contributors to the mixture of DNA profiles in the sperm fraction of the vaginal swabs [was] 1 in 1,449,000,000 unrelated individuals."

{¶31} In the course of their investigation, police also were able to recover Williams' wallet and car. During the early morning hours of September 2, 2007, Officer Dawn Forney discovered Williams' car parked on Bloom Court, a small alleyway off of Hazel Street. Officer Forney testified that Bloom Court is located about two blocks from Cotter Street, where Hardges was living at the time. At approximately 9:30 to 10:00 a.m. on September 3, 2007, a concerned citizen found Williams' wallet on the ground on Carroll Street near Market Street, another area close to Cotter Street, and saw that the wallet was turned into the police.

{¶32} Hardges argues that the jury erred in convicting him because Williams gave inconsistent testimony and he had an alibi. First, he points to Williams' admissions on cross-examination that parts of her testimony conflicted with the statements that she gave to Detective Bertina King when Detective King interviewed her at the hospital. The inconsistencies were as follows: (1) Williams claimed not to know Hardges' last name even though she might have known it; (2) Williams claimed that she never intended to see Hardges upon his release from jail and that she only talked to him to be friendly, but her MySpace messages and e-mails to him contained endearments and promises to meet with him; (3) Williams told Detective King that she picked up Hardges and his "friend" from Burger King, but testified at trial that she picked up Hardges and his brother; (4) Williams' recounting of which individuals went into the Copley Road liquor store and which remained in her car varied; and (5) Williams told Detective King

that Hardges had asked her to take him to Cleveland at the end of the night, not to Hazel Street, as she testified at trial.

{¶33} Williams fully admitted all of the foregoing inconsistencies at trial, so the jury was well aware of the discrepancies in her statements. While Williams could have been more forthcoming with regard to some of her testimony, especially that in which she minimized her role in communicating with Hardges while he was confined, it is not difficult to understand her reluctance to fully disclose her poor judgment in this situation. Nor is it entirely clear that many of her inconsistencies were intentional. Detective King testified that her interviews with Williams took place at the hospital very close to the time of the attack and that Williams did not even remember Detective King coming to the hospital every day to see her. Furthermore, none of the foregoing inconsistencies had any bearing on the events directly surrounding Williams' attack. As such, we cannot conclude that the jury lost its way in accepting Williams' testimony.

{¶34} Second, Hardges argues that the jury lost its way in convicting him because the evidence showed that he was not with Williams when her attack occurred.

{¶35} Officer Gerald Miles testified that he obtained surveillance tapes from the cameras surrounding Hardges' Cotter Street apartment building. Detective King testified that she reviewed all of the tapes and that Hardges appeared twice on the tapes, once exiting the building at 9:11 p.m. on September 1, 2007 and again exiting the building at 3:43 a.m. on September 2, 2007. Hardges argues that the tapes show that he came back into the Cotter Street building at some point between these two times, and therefore, could not have been with Williams when she was attacked. Officer Miles testified, however, that a person may both enter and exit the Cotter Street apartment building without appearing on camera. Thus, it is entirely possible that Hardges returned to the building shortly before 3:43 a.m. without being seen and

then exited again at 3:43 a.m. Indeed, it is entirely possible that Hardges exited the building again at 3:43 a.m. for the distinct purpose of being recorded by the building's cameras.

{¶36} Although Hardges' wife, his brother (Ivory), and the mother of his brother's child (Tenisha) all testified on Hardges' behalf, they all presented inconsistent versions of the events. Both Ivory and Tenisha alleged that Williams had come over to Ivory's home on the night of September 1st and volunteered to drive Hardges, Ivory, and another man to Burger King. Ivory testified that Williams dropped off Hardges at the Cotter Street apartment building, then drove Ivory and the other man around for a period of time, and then eventually dropped Ivory back at home. Ivory claimed that he last saw Williams and that she was fine when she dropped him off at approximately 3:30 a.m. Tenisha testified that she thought Williams dropped off Ivory at home at approximately 4:00 a.m. Thus, according to Ivory and Tenisha, there was enough time in between when they last saw Williams and 4:19 a.m. (when she staggered up to Officer Johnson and her partner) for an unknown individual to meet her, travel with her to the South Street area, beat and rape her, steal her car, and for Williams to regain consciousness and walk to where she met Officer Johnson and her partner.

{¶37} Based on our review of the record we cannot agree that the jury lost its way in refusing to believe Hardges' alibi evidence. The record reflects that Hardges raped Williams, choked her into unconsciousness and caused multiple other bruises and injuries to her face and body, moved her to a different location, raped her again, attempted to destroy the evidence of the rape by using Williams' clothes to wipe away the evidence and by forcing her to clean her fingernails with her work identification badge, strangled her into unconsciousness again, took her car and wallet, and left her half-naked and unconscious on the ground in a strange location. Apart from the fact that Williams' car and wallet later appeared in two locations within walking

distance of Hardges' residence, the vaginal swabs from Williams' rape kit also tested positive for Hardges' DNA. As such, none of Hardges' convictions are against the manifest weight of the evidence, and Hardges' first assignment of error is overruled.

Assignment of Error Number Five

> "THE TRIAL COURT ERRED WHEN IT SENTENCED APPELLANT HARDGES FOR THE MULTIPLE ALLIED OFFENSES OF RAPE AND KIDNAPPING AND ATTEMPTED MURDER AND FELONIOUS ASSAULT IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT OF OHIO REVISED CODE § 2941.25."

{¶38} In his fifth assignment of error, Hardges argues that the trial court erred by sentencing him to multiple allied offenses in contravention of R.C. 2941.25. Specifically, he argues that the trial court should have merged his rape and kidnapping convictions and merged his attempted murder and felonious assault convictions as allied offenses of similar import. We disagree.

{¶39} The Double Jeopardy Clause of the United States Constitution, as applied through Section 10, Article I of the Ohio Constitution, prohibits the allocation of multiple punishments for the same offense. *State v. Brown*, Slip Opinion No. 2008-Ohio-4569, at ¶10. If two offenses are found to be allied offenses of similar import, such that the same conduct supports each offense, then the sentencing court may not impose a separate punishment for each offense. Id. at ¶11-12. To determine whether two offenses are allied offenses of similar import, a reviewing court must first look to the statutory language of the offenses to determine whether the Generally Assembly plainly and unambiguously intended for the statute(s) to set forth separately punishable offenses. See id. at ¶37-40. If no plain and unambiguous intent emerges from the statutory language, then the court must employ the two-part test set forth in R.C. 2941.25 to determine whether two offenses are allied offenses of similar import. Id. at ¶12.

{¶40} R.C. 2941.25 provides as follows:

> "(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."

Thus, a defendant may be convicted of two offenses if the offenses are either: "(1) offenses of dissimilar import [or] (2) offenses of similar import committed separately or with a separate animus." *Brown* at ¶17, citing *State v. Rance* (1999), 85 Ohio St.3d 632, 636.

{¶41} The Supreme Court has explained the first part of R.C. 2941.25's test as follows:

> "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import." *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, paragraph one of the syllabus.

The second part of R.C. 2941.25's test then requires the court to consider the defendant's conduct. Id. at ¶14, quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117. "If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses." *Blankenship*, 38 Ohio St.3d at 117. The term "animus" refers to a person's "purpose or, more properly, immediate motive." *State v. Logan* (1979), 60 Ohio St.2d 126, 131.

Rape and Kidnapping

{¶42} Hardges argues that his kidnapping and rape convictions are allied offenses of similar import based on the Ohio Supreme Court's decision in *State v. Donald* (1979), 57 Ohio

St.2d 73, 75. *Donald*, however, involved convictions for rape pursuant to R.C. 2907.02(A)(1) and for kidnapping, pursuant to R.C. 2905.01(A)(4). *Donald*, 57 Ohio St.2d at syllabus (holding that the offenses of rape and kidnapping pursuant to R.C. 2907.02(A)(1) and R.C. 2905.01(A)(4) are offenses of similar import). The jury convicted Hardges of rape, pursuant to R.C. 2907.02(A)(2). Moreover, Hardges' indictment for kidnapping was not limited to subsection (A)(4) of R.C. 2905.01. Hardges' indictment also included charges of kidnapping, pursuant to R.C. 2905.01(A)(2) and (A)(3).

{¶43} This Court has held that the offenses of rape, pursuant to R.C. 2907.02(A)(2), and kidnapping, pursuant to R.C. 2905.01(A)(3), are not allied offenses of similar import. *State v. Razzano* (Apr. 22, 1998), 9th Dist. No. 96CA006630, at *8. The record reflects that the trial court instructed the jury that it could find Hardges guilty of kidnapping based on the purposes set forth in either R.C. 2905.01(A)(2), (A)(3), or (A)(4). Further, the jury's verdict form only contains a general, unanimous verdict of guilt on the charge of kidnapping without specifying the subsection upon which the jurors based their finding of guilt. See *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, at ¶64 ("[W]hen the jury unanimously reaches a verdict, the individual jurors need not agree on which of the alternative bases [in the kidnapping statute] support their individual findings."). Hardges never objected to the trial court's instructions or requested separate verdict forms outlining each of the three kidnapping subsections with which he was charged. Consequently, this Court cannot determine whether the jury convicted Hardges of allied offenses. Compare *Razzano* at *8 (holding that violations of R.C. 2907.02(A)(2) and R.C. 2905.01(A)(3) are not allied offenses) with *State v. Evans*, 9th Dist. No. 07CA0057-M, 2008-Ohio-4772, at ¶22-24 (noting that violations of R.C. 2907.02(A)(2) and either R.C. 2905.01(A)(2) or (A)(4) are allied offenses). As Hardges has not proven that the jury convicted

him of allied offenses of similar import, we cannot say that the trial court erred in refusing to merge his kidnapping and rape convictions. See *Brown* at ¶17 (noting that the trial court may convict a defendant of two offenses if they are offenses of dissimilar import).

Attempted Murder and Felonious Assault

{¶44} Next, Hardges argues that his felonious assault and attempted murder convictions are allied offenses of similar import because the commission of one automatically results in the commission of the other. Hardges does not argue that the language of the two offenses evinces an unambiguous legislative intent that they not be separately punishable offenses. See *Brown* at ¶37-40. He merely argues that this Court should adopt the reasoning of the Eighth District in *State v. Gimenez* (Sept. 4, 1997), 8th Dist. No. 71190, and the Second District in *State v. Puckett* (Mar. 27, 1998), 2d Dist. No. 98 CA 43. The Eighth District, however, retreated from its position in *Gimenez* in *State v. Nicholson* where it noted that the *Gimenez* Court failed to conduct an abstract review of the elements of attempted murder and felonious assault in its analysis that they were allied offenses. *State v. Nicholson*, 8th Dist. No. 85635, 2005-Ohio-5687, at ¶13-14 (finding that attempted murder and felonious assault are not allied offenses of similar import). Similarly, our review of *Puckett* fails to convince us that the Second District performed an abstract comparison of the elements of attempted murder and felonious assault before concluding that the two were allied offenses based on the defendant's conduct. See *Puckett*, supra (quoting R.C. 2941.25's two-part test, but basing its reasoning on the defendant's actual commission of the offenses). While this Court has never determined whether the crimes of felonious assault, pursuant to R.C. 2903.11(A)(1), and attempted murder, pursuant to R.C. 2903.02(A)/(B) and R.C. 2923.02, are allied offenses, we find the reasoning of the Sixth District persuasive.

{¶45} In *State v. Johnson*, 6th Dist. No. L-03-1206, 2005-Ohio-1222, the Sixth District determined that the offenses of attempted murder and felonious assault are not allied offenses of similar import. The court based its decision on the three following reasons: (1) an attempted murder conviction requires proof that the offender acted "purposely" while a felonious assault conviction only requires the offender to have acted "knowingly;" (2) attempted murder requires that the offender attempt to cause the death of another person while felonious assault only requires serious physical harm; and (3) felonious assault requires proof of serious physical harm while the victim need not have suffered any physical harm to sustain a conviction for attempted murder.[1] *Johnson* at ¶27-28. We agree that an abstract review of the elements of the two offenses reveals that the two offenses are not allied offenses of similar import. See *Cabrales* at paragraph one of the syllabus. While the elements of the two offenses may align in certain instances, there are many other instances where the commission of one offense need not necessarily result in the commission of the other. See id. See, also, *State v. Locklear*, 10th Dist. No. 06AP-259, 2006-Ohio-5949, at ¶28-31 (holding that attempted murder and felonious assault are not allied offenses of similar import because each offense requires proof of at least one element that the other does not). As such, the trial court did not err in refusing to merge

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[1] Although *Johnson* dealt solely with R.C. 2903.02's subsection (A) and not subsection (B), the jury did not specify whether Hardges' attempted murder conviction pertained to a finding of guilt under subsection (A) or (B). As was the case with regard to Hardges' kidnapping and rape convictions, Hardges never objected to the trial court's jury instructions or to the jury verdict forms. While it is possible that the jury rested its unanimous verdict solely upon R.C. 2903.02(B), this Court will not discount *Johnson* based upon the mere speculation that the jury might have relied upon R.C. 2903.02(B) and not R.C. 2903.02(A). Furthermore, we will not address the issue of whether attempted murder, pursuant to R.C. 2903.02(B), and felonious assault, pursuant to R.C. 2903.11(A)(1), are allied offenses of similar import as such a finding is not necessary to the determination of this appeal.

Hardges' convictions for attempted murder and felonious assault. Hardges' fifth assignment of error is overruled.

Assignment of Error Number Two

> "THE TRIAL COURT ERRED WHEN IT FOUND APPELLANT HARDGES TO BE A SEXUALLY VIOLENT PREDATOR PER OHIO REVISED CODE § 2971.0[1](H)(1) ON THE BASIS OF THE PRESENT CONVICTION."

{¶46} In his second assignment of error, Hardges argues that the trial court erred in determining that he was a sexually violent predator on the basis of his present conviction. Specifically, he argues that a sexually violent predator specification may not attach to a sexually violent offense conviction "if the conduct leading to the conviction and the sexually violent predator specification are charged in the same indictment." *State v. Smith*, 104 Ohio St.3d 106, 2004-Ohio-6238, syllabus.

{¶47} This Court applies a de novo standard of review to an appeal from a trial court's interpretation and application of a statute. *Red Ferris Chevrolet, Inc. v. Aylsworth*, 9th Dist. No. 07CA0072, 2008-Ohio-4950, at ¶4. "[W]here the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom." *State v. Knoble*, 9th Dist. No. 08CA009359, 2008-Ohio-5004, at ¶12, quoting *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, at ¶14. "If it is ambiguous, we must then interpret the statute to determine the General Assembly's intent. If it is not ambiguous, then we need not interpret it; we must simply apply it." *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, at ¶13.

{¶48} R.C. 2971.01 defines the term "sexually violent predator" as follows:

> "(H)(1) 'Sexually violent predator' means a person who, on or after January 1, 1997, commits a sexually violent offense and is likely to engage in the future in one or more sexually violent offenses."

Accordingly, R.C. 2971.01's plain language unambiguously requires that the three following factors exist before a defendant may be labeled as a sexually violent predator: (1) that on or after January 1, 1997; (2) he commits a sexually violent offense; and (3) it is likely that he will engage in at least one more sexually violent offense in the future. Hardges, however, argues that the term "commits" is ambiguous and urges this Court to apply *State v. Smith*.

{¶49} In *Smith*, the Ohio Supreme Court considered the former version of R.C. 2971.01(H)(1) and determined that the statute required a person to have at least one prior sexually violent offense conviction outside of the offenses listed in the current indictment to be labeled as a sexually violent predator. *Smith* at ¶18-29 (holding that only an earlier conviction, not contained in the present indictment, may sustain a sexually violent predator specification). The former version of R.C. 2971.01(H)(1) read as follows:

> "'Sexually violent predator' means a person who has been convicted of or pleaded guilty to committing, on or after January 1, 1997, a sexually violent offense and is likely to engage in the future in one or more sexually violent offenses."

In focusing on the language "has been convicted of or pleaded guilty to committing," the Supreme Court held that "[t]hese words clearly indicate that at the time of indictment, the person has already been convicted of a sexually violent offense. A grand jury cannot indict based on a conviction that has not occurred and may not ever occur." *Smith* at ¶18. The Court reasoned that:

> "Had the General Assembly intended that a conviction on a sexually violent offense [] be sufficient to prove a sexually- violent-predator specification alleged in the same indictment, it would have used language like *** a sexually violent predator is a person who 'committed' a sexually violent offense." Id. at ¶27.

Thus, the Court concluded that R.C. 2971.01(H)(1) could not apply to first-time sexually violent offenders "without an unambiguous mandate from the General Assembly." Id. at ¶29.

{¶50} Hardges argues that *Smith's* rational still applies to R.C. 2971.01(H)(1). Post-*Smith*, however, the General Assembly amended the statute to its current version, which defines a sexually violent predator as one who *commits* a sexually violent offense on or after January 1, 1997 and who is likely to commit another such offense in the future. We consider the amended language of R.C. 2971.01(H)(1) to be "an unambiguous mandate from the General Assembly." Id. Based on the statute's current language, a person need not have already been convicted of a sexually violent offense at the time of indictment to be indicted for and subsequently found guilty of a sexually violent predator specification. See id. at ¶18. The person need only have committed a sexually violent offense after January 1, 1997. We find that the amendments to R.C. 2971.01(H)(1) track the Supreme Court's suggestion in *Smith* that the legislature could have used language such as "a sexually violent predator is a person who 'committed' a sexually violent offense" if it wished for the statute to apply to first time offenders. (Emphasis sic.) See *Smith* at ¶27. We do not agree with Hardges' argument that the current version of the statute is ambiguous or that *Smith's* holding impedes R.C. 2971.01(H)(1)'s application to Hardges. As such, the trial court did not err in finding Hardges to be a sexually violent predator based on his present convictions. Hardges' second assignment of error lacks merit.

Assignment of Error Number Three

"THE STATE FAILED TO MEET ITS CONSTITUTIONAL BURDEN OF PROOF BEYOND A REASONABLE DOUBT, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, WHEN IT FAILED TO INTRODUCE SUFFICIENT EVIDENCE TO SHOW THAT APPELLANT HARDGES WAS LIKELY TO COMMIT A SEXUALLY VIOLENT OFFENSE IN THE FUTURE."

Assignment of Error Number Four

"APPELLANT HARDGES' CONVICTION AS A SEXUALLY VIOLENT PREDATOR WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF SECTION 3(B)(3), ARTICLE IV OF THE OHIO

> CONSTITUTION, THUS CREATING A MANIFEST MISCARRIAGE OF JUSTICE BECAUSE THE GREATER WEIGHT OF THE EVIDENCE DEMONSTRATED THAT APPELLANT HARDGES WAS NOT LIKELY TO COMMIT A FUTURE SEXUALLY VIOLENT OFFENSE AND HE HAD NO PRIOR CONVICTIONS FOR SEXUALLY VIOLENT OFFENSES."

{¶51} In his third and fourth assignments of error, Hardges argues that his sexually violent predator specifications are based on insufficient evidence and are against the manifest weight of the evidence. Specifically, he argues that the trial court erred in finding him guilty of the specifications because the trial court never determined that he was likely to commit a future sexually violent offense and because Hardges never had a prior conviction for a sexually violent offense.

{¶52} A review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally distinct determinations. *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600, at *1. "While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." Id., citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks* (1991), 61 Ohio St.3d 259, 274. Furthermore:

> "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id. at paragraph two of the syllabus; see, also, *Thompkins*, 78 Ohio St.3d at 386.

In *State v. Roberts*, this Court explained:

> "[S]ufficiency is required to take a case to the jury[.] *** Thus, a determination that [a] conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." (Emphasis omitted.) *State v. Roberts* (Sept. 17, 1997), 9th Dist. No. 96CA006462, at *2.

Accordingly, we address Hardges' challenge to the weight of the evidence first, as it is dispositive of his claim of sufficiency. We incorporate the manifest weight standard from Hardges' first assignment of error.

{¶53} R.C. 2971.01(H)(2) provides that in determining whether a person is likely to commit a sexually violent offense in the future, the trier of fact may consider any of the following factors as evidence:

> "(a) The person has been convicted two or more times, in separate criminal actions, of a sexually oriented offense or a child-victim oriented offense. For purposes of this division, convictions that result from or are connected with the same act or result from offenses committed at the same time are one conviction, and a conviction set aside pursuant to law is not a conviction.
>
> "(b) The person has a documented history from childhood, into the juvenile developmental years, that exhibits sexually deviant behavior.
>
> "(c) Available information or evidence suggests that the person chronically commits offenses with a sexual motivation.
>
> "(d) The person has committed one or more offenses in which the person has tortured or engaged in ritualistic acts with one or more victims.
>
> "(e) The person has committed one or more offenses in which one or more victims were physically harmed to the degree that the particular victim's life was in jeopardy.
>
> "(f) Any other relevant evidence."

For a sexually violent predator specification to apply to an offender, the State must prove beyond a reasonable doubt that R.C. 2971.01(H) applies to the offender. *State v. Williams* (2000), 88 Ohio St.3d 513, 532.

{¶54} Hardges argues that his sexually violent predator specification convictions are against the manifest weight of the evidence because his present convictions constituted the sole evidence in support of the specifications. Hardges relies upon *State v. Eppinger* (2001), 91 Ohio St.3d 158, for the proposition that a person who has been convicted of one sexually oriented offense is not necessarily likely to engage in a future sexually oriented offense.

{¶55} Initially, we note that *Eppinger* involved a civil sexual predator classification, not a criminal sexually violent predator specification determination. As the Supreme Court noted in *Williams*, R.C. 2971.01(H) occupies a distinctly punitive role separate from the remedial concerns attached to civil sexual offender classifications. *Williams*, 88 Ohio St.3d at 531, quoting *State v. Ward* (1999), 130 Ohio App.3d 551, 567 ("Unlike the remedial aspects of a sexual predator determination, the provisions of the sexually violent predator specification are penalty provisions which enhance the offender's sentence."). Indeed, courts employed different statutory factors to determine whether an offender was a sexual predator who was likely to commit a future offense versus whether a criminal defendant was a sexually violent predator who was likely to commit a future offense.[2] Compare Former R.C. 2950.09(B)(3)(a)-(j) (directing court to consider offender's age, entire criminal record, the victim's age, the number of victims involved, whether drugs or alcohol were involved, any treatment the offender had received, any mental illness or disability on the offender's part, the nature of the sexual conduct or contact involved, the presence of any cruelty in the commission of the crime, and any other relevant, behavioral characteristics of the offender) with R.C. 2971.07(H)(2). With R.C. 2971.07(H)'s

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[2] We note that the factors from R.C. 2950.09(B)(3) are no longer relevant to a civil sexual offender classification determination based on the enactment of the Adam Walsh Act.

punitive scheme in mind, we turn to the evidence in the record to determine whether Hardges' sexually violent predator specifications are against the weight of the evidence.

{¶56} At Hardges' specification hearing, the trial court took judicial notice of all of the testimony from Hardges' trial. The court also heard from Hardges and a woman named Shayna Glass. Shayna testified that Hardges raped her on March 20, 2005 and later threatened to kill her. Hardges argues that Shayna's testimony was wholly unreliable because the two had a consensual sexual relationship for several months and because Shayna was inconsistent with regard to her explanation as to why she never sought charges against Hardges for the rape. Shayna averred that she reported the rape incident to police and wanted to seek criminal charges against Hardges, but that an Akron Detective told her that he had lost her files and the case could not proceed. In her testimony at the specification hearing, Detective King testified that there was no evidence that the lead detective in Shayna's case had lost the files. Instead, Detective King noted that Shayna's police report indicated that Shanya just "wanted to move on" and no longer wished to pursue charges against Hardges. The report did not indicate, however, that Shayna ever retracted her rape accusation. Shayna's testimony only differed with respect to her reason for not pursuing criminal charges against Hardges. Her insistence that Hardges had raped her never varied.

{¶57} During his testimony at the specification hearing, Hardges fervently denied raping either Shayna or Williams. He admitted that his sister-in-law, Lakesha, also had accused him of raping her. In response to Lakesha's accusation, Hardges simply stated that Lakesha had accused "a busload of people" of rape.

{¶58} While the trial court did not give a lengthy explanation of its reasons for imposing sexually violent predator specifications upon Hardges, the court did note that it was only

"enumerate[ing] some of the reasons" for its decision. The court primarily focused on the great lengths to which Hardges had gone to conceal his crimes against Williams, such as forcing her to clean out her fingernails with her work identification badge, wiping down her car after raping her, and dumping her half-naked, unconscious, and alone to potentially die in an isolated area. Hardges argues that these facts alone do not establish that he was likely to commit other sexual offenses in the future and that, even if his prior history might suggest as much, the trial court specifically noted that it was not basing its predator determination upon his history. Under a manifest weight standard, however, nothing prevents this Court from considering Hardges' prior history, including the two prior allegations of rape stemming from two separate individuals. See *Thompkins*, 78 Ohio St.3d at 387 (describing an appellate court as the "thirteenth juror" in its review of criminal convictions and permitting the court to weigh the evidence in the record pursuant to that role). We also look to Hardges' continual denial of his role in this case even to the extent of insisting that he was not around Williams when she was raped, in spite of the fact that his DNA appeared on her rape kit slide. Hardges put Williams' life in serious jeopardy. The record reflects that he strangled Williams into unconsciousness twice, raped her twice, likely beat her as evidenced by her broken sternum, collapsed lung, and multiple bruises, somehow caused road rash on the tops of her feet, and left her without any indication of whether she would regain consciousness. Based on Hardges' prior history, the egregiousness of his crimes against Williams, and his complete denial of responsibility for the same, we cannot conclude that Hardges' is not likely to commit future sexually violent offenses. See R.C. 2971.01(H)(2).

{¶59} Finally, Hardges argues that the trial court erred in finding him guilty of sexually violent predator specifications because he never had a prior conviction for a sexually violent offense. We have already determined, however, that R.C. 2971.01(H)(1) permits a trial court to

enter a finding of guilt based upon a present conviction. As such, Hardges' argument that the trial court could not find him guilty of a sexually violent predator specification in the absence of a prior conviction lacks merit. The trial court did not err by concluding that Hardges was a sexually violent predator because he committed a sexually violent offense after January 1, 1997 and the evidence supports the conclusion that he is likely to commit another such offense in the future. See R.C. 2971.01(H).

{¶60} Having disposed of Hardges' challenge to the weight of the evidence, we similarly dispose of his sufficiency challenge. See *Roberts*, supra, at *2. Hardges' third and fourth assignments of error lack merit.

III

{¶61} Hardges' six assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

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

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

CARR, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

J. DEAN CARRO, Appellate Review Office, School of Law, The University of Akron, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and THOMAS J. KROLL, Assistant Prosecuting Attorney, for Appellee.