[Cite as *State v. Carrasquillo*, 2010-Ohio-1373.]

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

STATE OF OHIO	C. A. No. 09CA009639
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
PAMELA CARRASQUILLO	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellant	CASE No. 07CR073187

DECISION AND JOURNAL ENTRY

Dated: March 31, 2010

CARR, Presiding Judge.

{¶1} Appellant, Pamela Carrasquillo, appeals the judgment of the Lorain County Court of Common Pleas. This Court affirms.

I.

{¶2} In the early morning hours of January 4, 2007, Herminio Carrasquillo ("Herminio") was shot four times in his home in Avon, Ohio. At the time of the shooting, he was sleeping in a guest bedroom. He received serious but nonfatal injuries. His estranged wife, Pamela Carrasquillo ("Pamela"), was charged with, and ultimately convicted of, attempting to murder Herminio that evening.

{¶3} Herminio and Pamela were married in 1979. Together they had four children, all of whom were adults at the time of the shooting. The Carrasquillo marriage experienced turmoil during the first seven years because of Herminio's involvement in an extramarital affair. After counseling, the couple reconciled for a period of time. Later, however, further infidelity by

Herminio caused additional problems. In January 2005, Herminio told Pamela that he wanted her to leave the marital home. Herminio found a house for Pamela that was approximately 1.2 miles from the marital home. The two ceased to share the marital residence after February of 2005.

{¶4} In 2004, Herminio had begun to engage in a romantic relationship with a co-worker, Sulane Sciabica. Sciabica testified that as her relationship with Herminio progressed, she grew upset that Herminio had yet to initiate divorce proceedings against Pamela.

{¶5} In October of 2006, Pamela retained an attorney and initiated divorce proceedings against Herminio. Herminio had concerns that a contested divorce would be expensive and he was uncomfortable with the fact that he was required to respond to detailed discovery requests. Because Pamela and Herminio had continued to have a conjugal relationship after she left the marital home, Pamela contended the separation should not have tolled the duration of the marriage for the purposes of calculating that spousal support. Tension between Herminio and Pamela began to escalate as the two began to make arrangements in preparation for their lives after the divorce.

{¶6} In the early morning hours of January 4, 2007, Sergeant Kevin Collins of the Avon Police Department was dispatched to Livingston Street in response to a 911 call in which a male indicated that he had been shot by his wife. Sergeant Collins arrived with two other officers. After securing the perimeter of the property, the officers entered the house through the garage. Upon calling out to the victim, Sergeant Collins heard a man scream, "I'm up here, I'm up here." After clearing the first floor, Sergeant Collins proceeded to the second floor where he found Herminio on the bedroom floor between the bed and the window. Sergeant Collins

testified that he could smell gun smoke inside of the room. Sergeant Collins took several pictures of the room prior to the arrival of the paramedics.

{¶7} An extensive investigation ensued. On April 11, 2007, Pamela Carrasquillo was indicted by the Lorain County Grand Jury on one count of attempted aggravated murder in violation of R.C. 2923.02(A)/R.C. 2903.01(A), a felony of the first degree; one count of attempted murder in violation of R.C. 2923.02(A)/2903.02(A), and one count of attempted murder in violation of R.C. 2923.02(A)/2903.02(B), both felonies of the first degree; one count of felonious assault in violation of R.C. 2903.11(A)(1), and one count of felonious assault in violation of R.C. 2903.11(A)(2), both felonies of the second degree. Each count in the indictment contained a firearm specification. A jury trial commenced on March 10, 2008. Counts three, four and five of the indictment were dismissed prior to the submission of the case to the jury. The jury subsequently found Pamela guilty of attempted aggravated murder in violation of R.C. 2923.02(A)/2903.01(A), and attempted murder in violation of R.C. 2923.02(A)/2903.02(A). The trial court found the offenses to be allied offenses and sentenced Pamela to ten years imprisonment on the attempted aggravated murder charge.

{¶8} On appeal, Pamela raises five assignments of error.

II.

ASSIGNMENT OF ERROR I

"PAMELA CARRASQUILLO WAS DENIED DUE PROCESS OF LAW WHEN THE TRIAL COURT REFUSED TO ALLOW THE DEFENSE TO INTRODUCE THE TESTIMONY OF TWO SURREBUTTAL WITNESSES THAT WOULD HAVE IMPEACHED THE CREDIBILITY OF THE STATE'S REBUTTAL WITNESS, [CONSUELA] CHILDERS."

{¶9} In her first assignment of error, Pamela claims she was denied her due process rights when the trial court refused to allow her to introduce the testimony of two witnesses on surrebuttal. This Court disagrees.

{¶10} The decision to allow a defendant the opportunity to present surrebuttal testimony "lies soley within the discretion of the trial court." *State v. Spirko* (1991), 59 Ohio St.3d 1, 28, citing *State v. Moore* (1973), 47 Ohio App.2d 181, 188. A "[trial] court does not, ipso facto, abuse its discretion in denying a criminal defendant the opportunity to present surrebuttal testimony." *State v. King* (May 31, 2000), 9th Dist. No. 2963-M, quoting, *Spirko*, 59 Ohio St.3d at 28. The term "abuse of discretion" connotes more than an error of judgment; it implies that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An abuse of discretion demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. Id.

{¶11} As early as 1871, the Supreme Court of Ohio recognized the wide discretion granted to trial courts in deciding whether to exclude or allow surrebuttal testimony. *Morris v. Faurot* (1871), 21 Ohio St. 155, 161-162. Surrebuttal is only considered a right when new matters are first introduced on rebuttal. Id. at 162; see, also, Markus, Trial Handbook for Ohio Lawyers (2009), Section 8:4. The Sixth District Court of Appeals was confronted with a case similar to the case at bar in *State v. Leroux* (Dec. 1, 1989), 6th Dist. No. H-88-38. In *Leroux*, the defendant was accused of aggravated burglary, attempted rape, and gross sexual imposition. On cross-examination, the defendant was asked whether he admitted to the victim's grandmother that he entered the victim's home on the night of the incident. The defendant denied telling the

victim's grandmother that he entered the home. After the defendant rested his case, the victim's grandmother testified on rebuttal that the defendant admitted to breaking into the house. The defendant cross-examined the victim's grandmother. The defendant then moved the trial court to present the two surrebuttal witnesses who would have reinforced the defendant's testimony and attacked the credibility of the grandmother. The trial court ruled the testimony of the surrebuttal witnesses would be cumulative and exercised its discretion to deny the motion for surrebuttal witnesses. The Sixth District affirmed the ruling of the trial court on the basis that the testimony of the victim's grandmother did not introduce a new matter on rebuttal, as the admission or lack thereof had been introduced by the defendant himself on cross-examination. *Leroux*, supra. Therefore, the court held that because the rebuttal testimony did not introduce a new matter, the trial court did not abuse its discretion in excluding surrebuttal. Id.

{¶12} The facts in the case at bar are similar to the facts of *Leroux*. During pre-trial proceedings in this case, the State indicated that it intended to call Consuela Childers as a witness but did not have her testify in its case in chief. When Pamela testified in her own defense though, the State brought up the subject of Childers. During its cross-examination of Pamela, the State questioned her about her relationship with Childers in the county jail. Pamela denied discussing her case with Childers in the jail. She also denied telling Childers that she entered Herminio's bedroom on the night of the incident and shot at him. Pamela's trial counsel further questioned her about her lack of contact with Childers at the jail. Pamela then rested her case in chief and the State called Childers as a rebuttal witness. Childers testified on rebuttal that Pamela had told her in the jail that she had entered her husband's bedroom and shot him four times on the night of the incident. Pamela cross-examined Childers extensively, attacking her credibility. Pamela then attempted to call two surrebuttal witnesses to reinforce her own

testimony and further attack the credibility of Childers. After initially allowing one of the witnesses to begin testifying on surrebuttal, the trial court determined that the testimony of the two witnesses was not proper surrebuttal testimony. Just as in *Leroux*, the trial court here properly exercised its discretion in excluding this testimony. Pamela did not have a right to present surrebuttal testimony since the subject of Pamela's alleged admissions to Childers was introduced for the first time during Pamela's cross-examination and was not introduced for the first time during rebuttal. See *Morris*, 21 Ohio St. at 161-162. Accordingly, the trial court did not abuse its discretion in excluding surrebuttal.

{¶13} Pamela's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED WHEN, AFTER CONCLUDING THAT EVIDENCE OF A FIRING DEMONSTRATION WAS SCIENTIFICALLY INVALID, IT NONETHELESS ALLOWED THE JURY TO CONSIDER THE EVIDENCE."

{¶14} In her second assignment of error, Pamela argues that the trial court erred when it allowed the jury to consider the results of Detective Eric Peachman's "firing demonstration." This Court disagrees.

{¶15} When an issue arises with regard to the reliability of evidence, the trial judge acts as a "gatekeeper" who determines whether a piece of evidence is sufficiently reliable to be admissible. *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, at ¶17. An appellate court reviews the trial court's determination with regard to the admissibility of evidence for an abuse of discretion. *State v. Awkal* (1996), 76 Ohio St.3d 324. The term "abuse of discretion" connotes more than an error of judgment; it implies that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore*, 5 Ohio St.3d at 219. An abuse of discretion demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency."

Pons, 66 Ohio St.3d at 621. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. Id.

{¶16} The victim in this case, Herminio Carrasquillo, testified on behalf of the State at trial. Herminio testified as follows. On the morning of January 4, 2007, he went to bed sometime after 2:00 a.m. He had trouble getting to sleep that night because the light in the bedroom was particularly bright. Herminio finally fell asleep while lying on his side with his back to the door. He awoke when he heard a noise from behind him. As he turned to look over his shoulder, he saw a figure and immediately there was a gunshot. He said the gunshot was "disorienting" and he did not immediately realize what had happened. Herminio jumped in the bed but he was unable to hold himself up. The shooter then fired a second gunshot. At this point Herminio put his arms in the air and there was subsequently a third gunshot which caused him to fall off the bed. When he turned away he was shot for a fourth time in the back. At that point, Herminio looked back in the direction of the shooter and saw the shooter leave the room and close the door. Herminio testified that Pamela was the shooter. Despite the fact it was nighttime, there was some light in the room because of a street lamp outside and, according to Herminio, there was a full moon that night. Herminio testified he was looking right at the shooter as the second and third shots were fired and he was able to see her face as a "shower of sparks" was coming from the gun.

{¶17} Detective Eric Peachman of the Avon Police Department also testified on behalf of the State at trial. As the State began to question Detective Peachman regarding whether the handgun used in the shooting typically causes a flash, counsel for Pamela objected on the grounds that Detective Peachman was not a ballistics expert and, therefore, his testimony lacked reliability. The trial judge then stated on the record:

> "[I]f the officer has fired both types of weapons and both types of rounds, he can testify as to his experience. I'm not accepting, and the jury should not except this testimony as expert (sic) testimony, only the officer's experience with weapons and centerfire bullets with a primer, and rimfire bullets with no primer."

{¶18} On direct-examination, Detective Peachman testified that he had experience with firing both centerfire and rimfire rounds. Detective Peachman testified that a .25 caliber shell casing from a centerfire bullet was found in this case at the scene of the crime. Detective Peachman also testified that a primer was found. Detective Peachman testified that he has experience firing firearms of .25 caliber with .25 caliber ammunition in the dark. The trial judge instructed the State to limit its questions to what Detective Peachman had done "with a .25 caliber centerfire bullet in the dark." The State proceeded to ask if a .25 caliber gun with a primer causes an illumination or flash if fired in the dark. Detective Peachman testified that it does, in fact, cause a flash.

{¶19} On cross-examination, trial counsel for Pamela questioned Detective Peachman on the topic of an experiment he had conducted on the day prior to giving his testimony. When asked how many weapons he had shot, Detective Peachman testified that he "grew up shooting." Trial counsel for Pamela then stated that his questions were only in reference to this particular case. Detective Peachman then testified that on the previous day, he had fired one .25 caliber centerfire, semiautomatic handgun at a shooting range. Detective Peachman further testified that during the experiment, he discharged the handgun while two other officers stood at an angle in front of him so they could observe whether there was a flash. Detective Peachman also testified that he was not aware of the handgun's brand name but he could find out if necessary.

{¶20} Near the conclusion of Detective Peachman's testimony, the trial judge made the following statement to the jury:

> "I'm instructing the jury that that is not a scientific experiment. However, the jury can give to it, the testimony, whatever weight it feels the testimony deserves in terms of determining whether Herminio Carrasquillo would have seen the same thing."

{¶21} Pamela argues that the trial court erred in allowing the jury to consider this testimony after stating that the purported "firing demonstration" was not a scientific experiment. It should be noted that the trial judge did not make a finding that the evidence was unreliable. Rather, the trial judge simply instructed the jury that Detective Peachman's testimony was based on his own personal experience as an officer and was not to be considered expert testimony. Because the jury, as the trier of fact, was free to give the testimony whatever weight it deemed appropriate after making a determination with regard to the credibility of the witness, the trial judge did not err in clarifying this point for the jury. See *State v. Crowe*, 9th Dist. No. 04CA0098-M, 2005-Ohio-4082, at ¶22.

{¶22} Furthermore, this Court notes that the State, on direct-examination, did not inquire as to the details of the firing demonstration. The State merely asked Detective Peachman if, in his personal experience, he knew whether a .25 caliber gun with a primer caused an illumination or flash when fired in the dark. On cross-examination, counsel for Pamela asked a series of questions about the details of the firing demonstration. The State, on re-direct, noted on the record that it had not elicited testimony regarding the firing demonstration on direct-examination. It is well settled that "[a] party will not be permitted to take advantage of an error which he himself invited or induced the trial court to make." *Lester v. Leuck* (1943), 142 Ohio St. 91, paragraph one of the syllabus. Therefore, because Pamela elicited the testimony which serves as the basis of her complaint, she cannot prevail on her assignment of error.

{¶23} It follows that Pamela's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

> "THE TRIAL COURT ERRED WHEN IT REFUSED TO ALLOW DEFENSE COUNSEL TO PARTICIPATE IN A REVIEW OF WITNESS PEACHMAN'S PRIOR STATEMENTS TO DETERMINE IF THEY CONTAINED STATEMENTS INCONSISTENT WITH PEACHMAN'S TESTIMONY ON DIRECT EXAMINATION."

{¶24} In her third assignment of error, Pamela argues the trial court erred in refusing to allow trial counsel to participate in a review of Detective Peachman's prior statements to determine if they were inconsistent. This Court disagrees as Pamela has forfeited this issue on appeal.

{¶25} Crim.R. 16 states, in pertinent part:

> "(B) Disclosure of evidence by the prosecuting attorney[.]
>
> "(1) Information subject to disclosure.
>
> "(g) In camera inspection of witness' statement. Upon completion of a witness' direct examination at trial, the court on motion of the defendant shall conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.
>
> "If the court determines that inconsistencies exist, the statement shall be given to the defense attorney for use in cross-examination of the witness as to the inconsistencies.
>
> "If the court determines that inconsistencies do not exist the statement shall not be given to the defense attorney and he shall not be permitted to cross-examine or comment thereon.
>
> "Whenever the defense attorney is not given the entire statement, it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal."

{¶26} Pamela contends the trial court erred in two respects. First, Pamela contends the trial court erred by determining that her request to review the case management report was untimely. Second, Pamela contends the trial court erred by not permitting defense counsel to

participate in the in camera inspection of the case management report for inconsistencies as is required by Crim.R. 16(B)(1)(g).

{¶27} Although Pamela argues that the trial court wrongfully determined that her trial counsel had not timely requested to review the report, the trial court, nonetheless, reviewed the case management report and determined that no inconsistencies existed. Consequently, the trial court's initial ruling regarding the timeliness of the request is irrelevant. The only remaining issue is the manner in which the trial court conducted the review of the case management report.

{¶28} After trial counsel for Pamela objected to the trial court's ruling that the Crim.R. 16(B)(1)(g) motion was untimely, the trial judge then notified the parties that he would review the document anyway for inconsistencies. Trial counsel did not object or request to participate in the review. The trial judge subsequently reviewed the document outside the presence of the jury and stated, "I don't see anything in there that would have been inconsistent with the detective's testimony." At the conclusion of the trial judge's discussion of the case management report with the attorneys, he stated that the report would be placed into an envelope and "preserved for appellate purposes." Counsel again did not object to the trial court's review of the case management report without the participation of defense counsel.

{¶29} In an almost identical situation, the Supreme Court of Ohio held that a defendant had waived all but plain error in not objecting to a trial court's review of witness statements under Crim.R. 16(B)(1)(g) without counsel's participation. *State v. Cunningham*, 105 Ohio St.3d 197, 2004-Ohio-7007, at ¶48. In *Cunningham*, the Supreme Court stated,

> "Nevertheless, once the trial court concluded that there were no inconsistencies between the statements and trial testimony of Goodloe, Coron Liles, and Tomeaka Grant, defense counsel did not ask to review the statements or object to the procedure employed by the court in examining the statements. Defense counsel merely accepted the trial court's decision that there were no inconsistencies and asked that the statements be preserved for appellate review." Id.

{¶30} In this case, just as in *Cunningham*, trial counsel for Pamela did not object to the procedure the trial court used to review the document in question for prior inconsistent statements. "A defendant cannot be heard to complain on appeal about a matter which the trial judge could have remedied if the defense had complained then." *Cunningham* at ¶48, quoting *State v. Jenks* (1984), 15 Ohio St.3d 164, 226. As Pamela did not preserve this issue for appeal and has not argued plain error, we decline to address it. *State v. Meyers*, 9th Dist. Nos. 23864, 23903, 2008-Ohio-2528, at ¶42. Therefore, her third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

"THE TRIAL COURT PLAINLY ERRED WHEN IT ALLOWED OFFICER REINKER TO TESTIFY ABOUT THE WARMTH OF THE RADIATOR ON THE DEFENDANT'S VEHICLE."

{¶31} In her fourth assignment of error, Pamela argues that the trial court committed plain error in allowing Officer Michael Reinker to testify about the warmth of the radiator on Pamela's car on night of the incident. This Court disagrees.

{¶32} Pamela concedes on appeal that trial counsel for Pamela did not timely object to Officer Reinker's testimony regarding the warmth of the radiator. Therefore, Pamela has forfeited all but plain error. See Crim.R. 52(B).

{¶33} Pursuant to Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." To constitute plain error, the error must be obvious and have a substantial adverse impact on both the integrity of, and the public's confidence in, the judicial proceedings. *State v. Tichon* (1995), 102 Ohio App.3d 758, 767. A reviewing court must take notice of plain error only with the utmost caution, and only then to prevent a manifest miscarriage of justice. *State v. Bray*, 9th Dist. No. 03CA008241, 2004-Ohio-1067, at ¶12.

{¶34} Pamela's argument centers around the portion of Officer Reinker's testimony in which he indicated that shortly after arriving at Pamela's home, he touched the radiator of her car and found it to be warm. A review of the record reveals that a portion of the trial transcript which contains Officer Reinker's testimony on this subject is missing. Specifically, the pages of the transcript to which Pamela cites in her brief in support of her assignment of error are missing. This Court has repeatedly held that, "it is the duty of the appellant to ensure that the record on appeal is complete." *State v. Daniels*, 9th Dist. No. 08CA009488, 2009-Ohio-1712, at ¶22, quoting *Lunato v. Stevens Painton Corp.*, 9th Dist. No. 08CA009318, 2008-Ohio-3206, at ¶11. "When portions of the transcript which are necessary to resolve assignments of error are not included in the record on appeal, the reviewing court has 'no choice but to presume the validity of the [trial] court's proceedings, and affirm.'" *Cuyahoga Falls v. James*, 9th Dist. No. 21119, 2003-Ohio-531, at ¶9, quoting *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. In the absence of a complete transcript, this Court must presume regularity of the trial court's proceedings and accept its judgment. *Macedonia v. Ewing*, 9th Dist. 23344, 2007-Ohio-2194, at ¶8, citing *Wozniak v. Wozniak* (1993), 90 Ohio App.3d 400, 409. A complete review of Officer Reinker's testimony is necessary for the determination of Pamela's plain error claim. Because the partial transcript does not contain all of the evidence relevant to Pamela's fourth assignment of error, this Court must presume regularity in the trial court's proceedings and affirm the judgment of the trial court. Id; see, also, *Knapp*, 61 Ohio St.2d at 199.

{¶35} It follows that Pamela's fourth assignment of error is overruled.

ASSIGNMENT OF ERROR V

"PAMELA CARRASQUILLO RECEIVED THE INEFFECTIVE ASSISTANCE OF COUNSEL."

{¶36} In her fifth assignment of error, Pamela claims the outcome of her trial would have been different if not for the ineffective assistance of trial counsel. This Court disagrees.

{¶37} This Court uses a two-step process as set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 687, to determine whether a defendant's right to the effective assistance of counsel has been violated.

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id.

{¶38} To demonstrate prejudice, "the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691.

{¶39} This Court must analyze the "reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. The defendant must first identify the acts or omissions of her attorney that she claims were not the result of reasonable professional judgment. This Court must then decide whether counsel's conduct fell outside the range of professional competence. Id.

{¶40} Pamela bears the burden of proving that counsel's assistance was ineffective. *State v. Hoehn*, 9th Dist. No. 03CA0076-M, 2004-Ohio-1419, at ¶44, citing *State v. Colon*, 9th Dist. No. 20949, 2002-Ohio-3985, at ¶49; *State v. Smith* (1985), 17 Ohio St.3d 98, 100. In this regard, there is a "strong presumption [] that licensed attorneys are competent and that the challenged action is the product of a sound strategy." *State v. Watson* (July 30, 1997), 9th Dist. No. 18215. In addition, "debatable trial tactics do not give rise to a claim for ineffective assistance of counsel." *Hoehn* at ¶45, quoting *In re Simon* (June 13, 2001), 9th Dist. No. 00CA0072, citing *State v. Clayton* (1980), 62 Ohio St.2d 45, 49. Even if this Court questions trial counsel's strategic decisions, we must defer to his judgment. *Clayton*, 62 Ohio St.2d at 49. The Ohio Supreme Court has stated:

> "'We deem it misleading to decide an issue of competency by using, as a measuring rod, only those criteria defined as the best of available practices in the defense field.' *** Counsel chose a strategy that proved ineffective, but the fact that there was another and better strategy available does not amount to a breach of an essential duty to his client." Id., quoting *State v. Lytle* (1976), 48 Ohio St.2d 391, 396.

{¶41} "[A] defendant is not deprived of effective assistance of counsel when counsel chooses, for strategical reasons, not to pursue every possible trial tactic." *State v. Brown* (1988), 38 Ohio St.3d 305, 319. In addition, "the end result of tactical trial decisions need not be positive in order for counsel to be considered effective." *Awkal* , 76 Ohio St.3d at 337.

{¶42} The Ohio Supreme Court has recognized that a court need not analyze both prongs of the *Strickland* test, where the issue may be disposed upon consideration of one of the factors. *Bradley*, 42 Ohio St.3d at 143. Specifically,

> "'Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's

> performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.'" *Bradley*, 42 Ohio St.3d at 143, quoting *Strickland*, 466 U.S. at 697.

{¶43} In this case, Pamela argues that the result of trial would have been different had trial counsel filed a motion to suppress the evidence relating to Officer Reinker's determination that the radiator on Pamela's car was warm. As we noted above, the trial transcript is missing a relevant portion of Officer Reinker's testimony. Because the record is incomplete, this Court must presume regularity of the proceedings and affirm the decision of the trial court. See *Knapp*, 61 Ohio St.2d at 199. The Court is silent as to whether the evidence in question would have been the proper subject of a motion to suppress.

{¶44} Pamela also contends that trial counsel may have been successful in getting Detective Peachman's testimony regarding the muzzle flash stricken from the record if he had moved for an in camera *Daubert* [v. *Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579] hearing. This Court discussed the nature of Detective Peachman's testimony in addressing Pamela's second assignment of error. We note, however, that trial counsel for Pamela objected to portions of Detective Peachman's testimony on direct-examination and, furthermore, moved the trial court to have the testimony stricken from the record. The methods employed by trial counsel to challenge the reliability of Detective Peachman's testimony fall within the purview of trial tactics and cannot serve as the basis of a claim for ineffective assistance of counsel. See *Brown*, 38 Ohio St.3d at 319.

{¶45} It follows that Pamela's fifth assignment of error is overruled.

III.

{¶46} Pamela's five assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, 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.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
CONCURS

BELFANCE, J.
DISSENTS, SAYING:

{¶47} I respectfully dissent. Carrasquillo argues in her first assignment of error that the trial court erred when it refused to allow two witnesses to testify in surrebuttal which resulted in

the denial of her due process rights. I would conclude that the peculiar and troubling facts of this case warrant this Court sustaining that assignment of error.

{¶48} In this case, during the defense's case in chief, the State questioned Carrasquillo on cross-examination concerning whether she talked to Childers when she was in jail and whether she confessed to Childers. Carrasquillo denied discussing the matter with Childers and denied confessing to her as well. Then on rebuttal the State called Consuela Childers who testified that, inter alia, Carrasquillo confessed to committing the crime to her. Carrasquillo then planned to call two surrebuttal witnesses. One of those witnesses, Ms. Stewart, was supposed to testify that Carrasquillo did not even talk to Childers in jail. Stewart took the stand and began to testify. Sua sponte, in the middle of Stewart's testimony, the trial court called a side bar conference after which it concluded that it would not allow Stewart to continue testifying as it determined that she was not a proper surrebuttal witness. When the parties went back on the record, the trial court indicated that defense counsel would later proffer the testimony. And in fact that is what later occurred; Carrasquillo's counsel did proffer the testimony.

{¶49} I begin by noting that Childers was not a proper rebuttal witness in the first place. Clearly the evidence Childers provided, namely that of a confession to the crime, was evidence that properly belonged in the State's case in chief. It was evidence, which if believed, would directly aid the State in meeting its burden of proof. Interestingly, it appears from the transcript that immediately prior to trial the State planned to call Childers in its case in chief as it indicated that Childers would probably be its ninth of ten witnesses. Why the State then decided not to call Childers in its case in chief is completely unclear from the record.

{¶50} The Ohio Supreme Court has described rebuttal evidence as follows: "Rebutting evidence is that given to explain, refute, or disprove new facts introduced into evidence by the

adverse party; it becomes relevant only to challenge the evidence offered by the opponent, and its scope is limited by such evidence." *State v. McNeill* (1998), 83 Ohio St.3d 438, 446. Here the State put Childers on the stand to rebut testimony it itself elicited from Carrasquillo on cross-examination. That is not appropriate rebuttal evidence. See, also, *Weimer v. Anzevino* (1997), 122 Ohio App.3d 720, 726 ("Clearly, appellant cannot rebut evidence that was introduced by appellant's own counsel. Appellant may rebut evidence adverse to her side, but that evidence must be introduced by the opposing party and not by appellant herself.").

{¶51} Nonetheless, although the State elected not to present Childers' testimony in its case in chief, it does appear from the record that at some point the parties came to an understanding that Childers would testify in rebuttal and Carrasquillo would present two surrebuttal witnesses. After the defense rested, the State indicated its intent to call three rebuttal witnesses, one of whom was Childers. Although each party described these witnesses as rebuttal and surrebuttal witnesses, when observing what actually occurred, the State in essence "reopened" its case to offer evidence of a confession and the defense "reopened" its case to offer testimony to contradict the State's evidence. After some discussion about whether Childers was in the courthouse, the Court commented about the need for Childers, who was incarcerated, to be transported on a separate bus from the bus transporting Carrasquillo's two surrebuttal witnesses, who were also incarcerated at the time. The court further informed the jury that it would then hear rebuttal testimony from the State followed by surrebuttal testimony from Carrasquillo's witnesses.

{¶52} Thus, prior to Childers' testimony one might have expected the defense to object because Childers was not a proper rebuttal witness. However, it is unsurprising that Carrasquillo did not object when the State called Childers as a rebuttal witness, given the apparent

understanding that subsequently Carrasquillo would be given the opportunity to call witnesses to refute Childers' testimony. Not surprisingly, when Carrasquillo presented her surrebuttal witnesses the State also did not object.

{¶53} However, what I find deeply troubling is that after Stewart began to testify in surrebuttal, and without any objection from the State, the court sua sponte concluded that it was improper to allow the witnesses to testify. The existence or nonexistence of a confession is a critical fact, particularly in a case such as this where the other evidence does not overwhelmingly establish the defendant's guilt. Thus, Carrasquillo was deprived of the opportunity to present her defense to the State's case. Had the State offered this evidence in its case in chief, then Carrasquillo would have had the opportunity to contradict that testimony as part of the defense. In essence, the State effectively was permitted to reopen its case without making a proper request and the defense was not. Thus, Carrasquillo was deprived of her right to fully present her defense to the charge against her. From the record before us, I would imagine that both Carrasquillo and the State were quite surprised by the trial court's intervention and its ruling; it does not appear that either side expected that Carrasquillo would be prevented from presenting surrebuttal testimony. Thus, I believe it is at this point when the trial court interfered in the presentation of the testimony that the error occurred. Once the trial court had allowed impermissible rebuttal testimony to be presented to the jury, it was improper for the trial court to strip Carrasquillo of the opportunity to present her defense to that testimony. Further, the trial court's intervention in the absence of the State's objection, all occurred in the presence of the jury. The trial court specifically informed the jury that each side would be presenting additional witnesses only to observe that the trial judge himself terminated the testimony without explanation. In light of the trial court's conduct, the jury no doubt attached substantial

significance to the termination of the witness' testimony. Thus, the jury not only was deprived of hearing the testimony that rebutted Childers, it also witnessed the unusual act of the judge himself terminating a witness' testimony.

{¶54} In examining the unusual manner in which the evidence was adduced, I conclude that Carrasquillo was deprived of her right to present her defense to evidence that properly belonged in the State's case in chief. Once the State was permitted to present such evidence, it was error for the trial court to have deprived Carrasquillo of her right to present her defense.

{¶55} In light of the foregoing, I would sustain Carrasquillo's first assignment of error. Carrasquillo complied with both prongs of Evid.R. 103(A)(2). Evid.R. 103(A)(2) provides that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and * * * [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." See, also, *State v. Brooks* (1989), 44 Ohio St.3d 185, 195 ("Evid.R. 103(A)(2) requires an offer of proof in order to preserve any error in excluding evidence, unless the excluded evidence is apparent in the record."). Here, Carrasquillo correctly proffered the testimony, thereby preserving the error for appeal. Moreover, it is clear from the nature of that testimony that Carrasquillo's substantial rights were affected by the trial court's improper exclusion of that evidence. Because I would sustain Carrasquillo's first assignment of error, I would not address the remaining assignments of error.

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