[Cite as *State v. Hoague*, 2018-Ohio-5380.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff - Appellee	:	Hon. Craig R. Baldwin, J.
	:	Hon. Earle E. Wise, J.
-vs-	:	
	:	
MICHAEL C. HOAGUE	:	Case No. 18 CAA 02 0012
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Delaware County Court of Common Pleas, Case No. 17-CR-I-02-0132
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	December 26, 2018

APPEARANCES:

For Plaintiff-Appellee

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Ohio Attorney General

By: BRAD L. TAMMARO
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Special Prosecuting Attorney
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For Defendant-Appellant

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Baldwin, J.

{¶1} Michael C. Hoague appeals the jury's verdict finding him guilty of one count of tampering with records (R.C. 2913.42(A)) a felony of the third degree, and one count of theft by deception (R.C. 2913.02(A)(3)) a felony of the fifth degree, as well as the sentence imposed by the Delaware County Court of Common Pleas. The appellee is the State of Ohio.

STATEMENT OF FACTS AND THE CASE

{¶2} Shirley and Burton Hamon retained appellant to defend their son, Timothy Hamon, against criminal charges in the Delaware County Common Pleas Court after they became concerned that his appointed counsel was not capable of providing an aggressive defense. Appellant was subsequently appointed by the Court to represent Timothy Hamon as co-counsel. Appellant filed an application for payment as appointed counsel and failed to disclose that the Hamon family had previously retained and paid him to represent Timothy Hamon. The failure to disclose the payment led to an investigation and conviction of appellant.

{¶3} Timothy Hamon was indicted on three counts of gross sexual imposition and re-indicted on the same charges with additional counts of rape. He was found indigent and Thomas Waldeck, a local attorney, was appointed to represent Mr. Hamon.

{¶4} Shirley and Burton Hamon asked to meet with Attorney Waldeck to discuss the case and their son's fate. They were not impressed with Mr. Waldeck and decided that they would hire an attorney to defend their son. Mrs. Hamon contacted an attorney, but he was too busy to accept the case. Ms. Hamon's niece recommended appellant, so she called him about representing her son. Appellant required ten thousand dollars to

accept the case, with a six thousand dollar payment due immediately. The Hamon's did not have the money and did not immediately retain appellant.

{¶5} The Hamon's talked with their daughter about her brother's dilemma and she suggested that her sons may be willing to purchase a house that they owned in which Timothy had been living prior to his arrest and incarceration. The Hamon's agreed to sell the house, then reached an agreement with appellant to pay four thousand dollars of the ten-thousand dollars he requested, with the balance paid in increments of five hundred dollars per month.

{¶6} On February 1, 2012 Timothy Hamon called appellant's office and spoke to Renee Floyd, appellant's assistant or secretary. She confirmed that his mother had contacted the office. She stated "we're aware of what you are charged with and who your attorney is. But she said that you expressed interest in having Mr. Hoague co-counsel the case." She explained that appellant would sit down with Attorney Waldeck and arrange an agreement to act as co-counsel and "pool their resources."

{¶7} The Hamon's payment of four thousand dollars was delivered to appellant's office on February 27, 2012. By August 15, 2013, the Hamon's paid an additional four thousand five hundred dollars to appellant for a total of eight thousand five hundred dollars.

HEARING OF FEBRUARY 3, 2012

{¶8} Mr. Hamon's case came before the trial court on February 3, 2012 on the motion of Attorney Waldeck to address dissemination of discovery materials to his client, a request for funds for a private investigator, a continuance of the trial and the need for a competency hearing for the victim. The trial court confirmed that the case was proceeding

on the second indictment only. Mr. Hamon waived his right to a speedy trial and the parties also discussed whether the alleged victim had been involved in a prior sexual assault. Appellant was present at this hearing, but was not sitting at the counsel table with Attorney Waldeck.

{¶9} After one of the first hearings, presumably the February 3, 2012 hearing, appellant met with Burton and Shirley Hamon and agreed to assume their son's defense, but did not reduce this agreement to writing.

HEARING OF APRIL 13, 2012

{¶10} At the hearing of April 13, 2012 the trial court confirmed that the case was proceeding only on the second indictment. The court addressed several motions, procedural issues and scheduling.

{¶11} Appellant did not attend this hearing.

NOTICE OF APPEARANCE OF APRIL 16, 2012

{¶12} Appellant filed a pleading on April 16, 2012 captioned Notice of Special, Limited Appearance of Co-Counsel, notifying appellee and the court that he was "entering a special, limited appearance as co-counsel for the defendant for the purposes of assisting assigned counsel in motions practice and trial preparations in this case." This document was not provided to his client, Timothy Hamon, or his co-counsel, Thomas Waldeck.

IN CHAMBERS CONFERENCE OF APRIL 30, 2012

{¶13} Douglas Dumolt, assistant prosecutor assigned to prosecute the Hamon case, was puzzled by appellant's notice of appearance as private counsel after Mr. Hamon had been found indigent and assigned a public defender. Attorney Dumolt

contacted the trial court and requested a hearing to discuss the parameters of the limited representation.

{¶14} On April 30, 2012 the judge conducted an informal hearing within his chambers and off the record. Attorney Dumolt, Attorney Waldeck, appellant and Judge Whitney were present.

{¶15} The judge addressed appellant and asked for an explanation of the "limited notice of appearance." Appellant explained he had been contacted by the family who was trying to make arrangements to retain his services to assist in this matter. Attorney Dumolt was concerned that public funds were being used to provide a defense to Mr. Hamon when he had private counsel who had entered an appearance. Appellant mentioned that he was not asking to be appointed as counsel, but kept his responses rather ambiguous, suggesting that any payment from the Hamons would be received in the future, if at all. Attorney Dumolt left the conference with the impression that appellant had not received any payment at that time.

{¶16} The trial court addressed Mr. Waldeck and asked if he wanted appellant appointed and, if he did, instructed him to file a motion to request that appellant be appointed. Appellant, present during this conversation, did not object or reveal that he had been retained or received any payment from the family of Mr. Hamon.

{¶17} On May 3, 2012 Attorney Waldeck filed a motion requesting that the court appoint appellant as co-counsel. Attorney Waldeck notified appellant of his intent to file the motion and, while Attorney Waldeck does not recall his response, he is confident that if appellant had objected he would not have filed the motion requesting his appointment.

HEARING OF MAY 30, 2012

{¶18} Attorney Waldeck's motion to have appellant appointed as co-counsel came on for hearing on May 30, 2012. He argued that the volume of the work necessary to properly prepare for trial merited appointment of co-counsel. He also noted that appellant was familiar with the facts of the case making it advantageous to have appellant appointed as co-counsel. The state objected to the appointment, claiming this case was not as complicated as represented by Attorney Waldeck and co-counsel was unnecessary.

{¶19} The court asked appellant for his comments on the motion and he began by stating that "we had an extensive conversation, off the record in chambers, at that time I thought it made it clear I was not asking to be appointed by the court, I was not asking for public funds, the family was trying to make arrangements to engage me privately in the matter." (Transcript, May 30, 2012, page 5, lines 9 through 16). He did not refuse the appointment, did not disclose that he was privately retained by the Hamons and did not reveal that he had received payment of four thousand dollars from the Hamon family. Instead, appellant referred to the system of appointing public defender counsel pursuant to the Ohio Revised Code, vaguely suggesting that defendants have the right to counsel of their choice subject to the discretion of the court. He mentioned that he had entered an appearance as co-counsel and filed a motion asking the court to order the clerk of courts to not publish information regarding this case on the Internet.

{¶20} The court granted Attorney Waldeck's motion to have appellant appointed as co-counsel. Appellant did not object or comment. Burton and Shirley Hamon did not attend the hearing, however they did meet with appellant on May 30, 2012. At that meeting they executed a land installment contract prepared and notarized by appellant to

close the sale of real property to their grandson's to fund Timothy Hamon's defense by appellant.

HAMON TRIAL AND APPEAL

{¶21} Appellant served as co-counsel for Mr. Hamon at trial. The trial ended in a mistrial and the state elected to re-try Mr. Hamon. Appellant filed a motion to dismiss the charges claiming they were barred by double jeopardy. The motion was denied and Appellant filed an appeal on behalf of Mr. Hamon. Mr. Hamon's appeal was rejected and his case came back before the trial court in 2016. New counsel was appointed, much to the consternation of Mr. Hamon, who believed that appellant would be his attorney for all matters. Mr. Hamon entered a no contest plea and was sentenced to fifty four months incarceration.

{¶22} Appellant filed a Motion for Payment of Extraordinary Fees on June 17, 2013 requesting payment of fees in the amount of six thousand one hundred sixty dollars for his part in the jury trial of Mr. Hamon. That motion was accompanied by a form captioned Motion, Entry and Certification for Appointed Counsel Fees. The certification, signed by appellant, states in part that "I certify that I have received no compensation in connection with providing representation in this case other than that described in this motion or which has been approved by the court in a previous motion" On July 2, 2013 the trial court approved the application, but issued a reduced payment of five thousand dollars.

{¶23} Attorney Dumolt reviewed appellant's certification and the jail calls of Timothy Hamon, but the record does not provide a context or motivation for Attorney Dumolt's review. After he had listened to the jail calls, he contacted two detectives and

suggested an investigation of appellant's actions was warranted. The matter was presented to the grand jury and it issued an indictment charging appellant with two counts of tampering with records in violation of R.C. 2913.42 (A)(1) and/or (A)(2), and two counts of theft in violation of R.C. 2913.02 (A)(3). The charges arose from appellant's filing of an application for fees without disclosing that he had received funds from the Hamons.

{¶24} The charges were presented to a jury, and at the close of the state's case, appellant's counsel moved for acquittal pursuant to Criminal Rule 29. The trial court dismissed counts three and four, one count of theft and one count of tampering with records associated with the Hamon appeal. The remaining counts of tampering with records and theft, associated with the Hamon jury trial, were presented to the jury. Prior to reaching a verdict, one of the jurors was dismissed due to illness and an alternate was substituted with no objection. The jury returned a verdict of guilty on both counts.

{¶25} On January 2, 2018, Appellant was sentenced to community control sanctions not to exceed five years, ordered to pay five thousand dollars restitution and all costs of the case. On February 1, 2018 appellant filed his notice of appeal and now submits ten assignments of error:

{¶26} "I. THE TRIAL COURT ERRED WHEN IT OVERRULED THE CRIMINAL RULE 29 MOTIONS FOR JUDGMENT OF ACQUITTAL BECAUSE THERE WAS INSUFFICIENT EVIDENCE AS A MATTER OF LAW AND THEREBY THE COURT VIOLATED THE APPELLANT'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND OHIO CONSTITUTION, ARTICLE I, SECTIONS 10, 16."

{¶27} "II. PROSECUTORIAL AND WITNESS MISCONDUCT AT TRIAL INVOLVING PERJURED TESTIMONY AND OTHER IMPROPRIETIES RESULTED IN STRUCTURAL ERROR AND THE DENIAL OF A FAIR TRIAL IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND OHIO CONSTITUTION ARTICLE 1, SECTIONS 10, 16."

{¶28} "III. THE JURY VERDICTS FINDING THE APPELLANT GUILTY OF THEFT BY DECEPTION AND TAMPERING WITH RECORDS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND THUS VIOLATED APPELLANT'S SUBSTANTIAL RIGHTS UNDER THE DUE PROCESS CLAUSE AND EQUAL PROTECTION CLAUSE OF THE UNITED STATES AND OHIO CONSTITUTIONS."

{¶29} "IV. APPELLANT WAS CONVICTED ON EVIDENCE AND A PROSECUTION THEORY TIED TO A CRIME NOT CHARGED IN THE INDICTMENT, PRESENTED TO A GRAND JURY OR DISCLOSED IN A BILL OF PARTICULARS THEREBY DEPRIVING HIM OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND OHIO CONSTITUTION, ARTICLE I, SECTIONS 10, 16."

{¶30} "V. THE TRIAL COURT COMMITTED PREJUDICIAL AND PLAIN ERROR AND VIOLATED THE RULE OF STRICT CONSTRUCTION BY IMPROPERLY INSTRUCTING THE JURY ON THE DEFINITION OF "DEPRIVE" AND THEREBY VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION

AS GUARANTEED BY THE UNITED STATES CONSTITUTION AND OHIO CONSTITUTION."

{¶31} "VI. THE COURT ALLOWED INADMISSIBLE HEARSAY OF A TESTIMONIAL NATURE INTO EVIDENCE OVER OBJECTION IN VIOLATION OF THE HEARSAY RULE AND APPELLANT'S RIGHTS UNDER THE CONFRONTATION CLAUSE OF THE UNITED STATES AND OHIO CONSTITUTIONS."

{¶32} "VII. THE OPD-1026-R FORM IS OUTDATED, AMBIGUOUS AND DOES NOT PROVIDE PROPER NOTICE OF THE POTENTIAL FOR CRIMINAL PROSECUTION THEREFORE APPELLANT'S CONVICTIONS CANNOT STAND AS A MATTER OF LAW."

{¶33} "VIII. THE THEFT AND TAMPERING WITH RECORDS STATUTES ARE UNCONSTITUTIONAL AS APPLIED TO THE APPELLANT IN THE UNIQUE CIRCUMSTANCES PRESENTED THAT RESULTED IN A VIOLATION OF APPELLANT'S RIGHTS UNDER THE TAKINGS CLAUSE AND THE INVOLUNTARY SERVITUDE CLAUSE OF THE UNITED STATES AND OHIO CONSTITUTIONS."

{¶34} "IX. THE TRIAL COURT ORDERED APPELLANT TO REPAY THE APPOINTED-COUNSEL FEE HE RECEIVED AS EARNED COMPENSATION AND THAT DID NOT CONSTITUTE AN "ECONOMIC LOSS" TO DELAWARE COUNTY IN VIOLATION OF FEDERAL AND STATE LAW."

{¶35} "X. APPELLANT'S TRIAL ATTORNEYS PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY PERFORMING BELOW AN OBJECTIVE STANDARD OF REASONABLENESS THAT PREJUDICED THE APPELLANT TO SUCH A DEGREE THAT A NEW TRIAL SHOULD BE ORDERED."

THE RECORD

{¶36} Before we address the merits, we must consider the content of the record and appellant's April 6, 2018 request to supplement the record. We have reviewed the entire record submitted by the trial court and concluded that appellant is relying upon materials that are not part of the record and that his motion to supplement the record asserted facts that are not supported by the record. For those reasons, we are obligated to address the content of the record at this juncture.

{¶37} Appellant relies upon a tape recorded interview of Burton Hamon to support his conclusion that Mr. Hamon committed perjury and the prosecutor suborned perjury. While a document was filed with this court that is labeled as a transcript of the tape recorded interview of Burton Hamon, that document was not presented at trial, has not been authenticated or otherwise properly made a part of the record and the original recording has not been filed with the court. Appellee comments in a footnote that its use in this appeal is the first notice appellee has received of the transcript's existence. (Appellant's Brief, page 13, footnote 7). For those reasons we find that the document captioned Tape Recorded Interview of Burton Hamon is not part of the record and we may not consider it in our review.

{¶38} We likewise find that we may not consider the transcription of the telephone calls made from the jail with the exception of State's Exhibit 4. Appellant requested that the record be supplemented with the transcript of these calls because "the recorded jail calls were played to the jury at trial and, or, quoted in court filings but never transcribed for purposes of the record." (Appellant's Motion, April 6, 2018, p.1). Appellee did not oppose the motion, and this court granted the motion based upon appellant's

representations. However, upon review of the record we find that the telephone call transcribed as State's Exhibit 4 was played for the jury, but no other call was presented at the trial. Appellant did quote one of the recorded conversations in his trial brief in support of his objection to the presentation of these telephone calls to the jury, but there are no further citations to the recordings in the record. (Defendant's Trial Brief, October 30, 2017, p. 8, Docket 88).

{¶39} During trial, the state discussed its plan to play the jail call recordings for the jury and appellant objected. (Transcript, page 570-581). After a lengthy debate, the trial court held that "I am going to overrule your request to play those tapes. I will let them come in on cross-examination, so--). (Trial Transcript, Page 587, lines 3-5). The conversation continued and the court made a preliminary ruling regarding what became State's Exhibit 4. The recording of that telephone conversation was presented to the jury and a transcript was submitted. Neither party played the other calls or presented the transcripts of the calls to the trial court or the jury during direct or cross examination.

{¶40} The facts cited by the appellant in support of his motion, that the recordings were played for the jury and quoted in pleadings, are not corroborated by our review of the record. While we did grant the motion to supplement the record, we must revoke that authorization and, with the exception of State's Exhibit 4, decline to consider the recordings of the jail phone calls as they are not properly before this court.

ANALYSIS

ASSIGNMENTS OF ERROR ONE AND FOUR

{¶41} Appellant argues in his first and fourth assignments of error that the trial court erred in overruling his counsel's motion for acquittal, so we will address those assignments together.

{¶42} "A motion for acquittal under Crim.R. 29(A) is governed by the same standard as the one for determining whether a verdict is supported by sufficient evidence." *State v. Spaulding*, 151 Ohio St.3d 378, 2016-Ohio-8126, 89 N.E.3d 554, ¶ 164, reconsideration denied, 147 Ohio St.3d 1480, 2016-Ohio-8492, 66 N.E.3d 766, citing *State v. Tenace,* 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 37. "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*., citing *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶43} In the first assignment of error, appellant contends the trial court erred by failing to grant the motion for acquittal because appellee failed to prove that he had a purpose to deprive the state of funds, that appellee failed to prove the trial judge was deceived and that the appellant earned the payment he received.

{¶44} At trial appellant based his motion for acquittal on a failure to prove an intent to deceive. Appellant argued that "Counts 1 and its related Count 2 fail for having proven (sic) the essential element of intent to deceive." (Transcript page 736, lines 22-24). Appellant never referred to "intent to deprive", never used the term "deprive" in the motion

he presented to the trial court and did not refer to R.C. 2913.01(C)(3) either directly or indirectly.

{¶45} Appellant also failed to request that the trial court include the definition he now promotes in the jury instructions. The instructions defined "deprive" as meaning "to withhold property of another permanently, or that appropriates a substantial portion of its value or use, or with the purpose to restore only upon payment of a reward or other consideration" adopting the definition within R.C. 2913.01(C)(1). (Jury instructions, November 17, 2017, Docket 118, page 9). Appellant tacitly approved the jury instructions by failing to object or requesting that the definition in R.C. 2913.01(C)(3) should be included.

{¶46} Because appellant's argument regarding the application of R.C. 2913.01(C)(3) was not presented to the trial court, waiver precludes our consideration of those issues absent plain error, and appellant has failed to demonstrate outcome-determinative plain error. *State v. Hooks*, 92 Ohio St.3d 83, 2001-Ohio-150, 748 N.E.2d 528 (2001); *State v. Long*, 53 Ohio St.2d 91, 96–97, 372 N.E.2d 804, 808 (1978).

{¶47} Appellant cites *State of Ohio v. Shanks*, 4th Dist. Ross No. 830, 1981 WL 6030 (Sept. 21, 1981) to support his argument there was no evidence of deception and that the trial court was obligated to dismiss the charges on those grounds. This argument was not presented to the trial court and may not be considered, *Hooks, supra,* but if we were to consider it, we would find it unpersuasive.

{¶48} In *Shanks* the defendant changed the price tags on items, substituting a tag with a lower price. Ms. Shanks was stopped at her vehicle in the parking lot with the mispriced items and was charged and convicted with theft by deception. The appellate

court found the conviction and sentence contrary to law because the state failed to provide any evidence of the appellant proceeding through the checkout counter, what appellant paid for the merchandise, or if she paid for it. *Id* at *1. The state provided evidence that the defendant changed the price tags and that the merchandise was recovered from her vehicle, but nothing more. The *Shanks* court held simply switching the tags does not constitute a criminal offense and that "there must be a nexus between the "deception" and the surrender of control to the person engaging in the deception, i.e., the deception must induce such surrender." *Id.*

{¶49} Assuming, arguendo, we would consider this argument, we find sufficient evidence in the case at bar to establish a nexus between appellant's certification to the court that he had not received any compensation for representation in this case and the payment by the court. The submission of the motion and certification requesting payment of fees did not disclose that appellant had been paid for his representation of Mr. Hamon and it is clear that the submission of that document prompted the payment of fees.

{¶50} Appellant concludes his argument regarding the first assignment of error by asserting the trial court erred by failing to dismiss the charge of tampering with records, suggesting that because appellant performed the services listed in the application for fees, there is no purpose to defraud. Because the focus of the case was not upon the incorrect or fraudulent recording of time but the failure to disclose prior payment, appellant's argument is inapposite. Further, appellant's reliance upon the case of *State v. Brewster*, 5th Dist. Coshocton No. 09CA0018, 2010-Ohio-2497 is misplaced. In *Brewster,* the insurance company that made the payment was aware of the fact that the insured had submitted a claim with false information and paid the claimant nevertheless. *Id* at

¶20. As we noted above, appellant failed to disclose that he had received payment for representation of Mr. Hamon in his application for fees and the submission of the application resulted in his receipt of a five thousand dollar payment. Neither the presiding judge nor anyone involved with paying the fee was aware of the falsehood within the application.

{¶51} Appellant's first assignment of error is overruled.

{¶52} Appellant argues in his fourth assignment of error that "appellant was convicted on evidence and a prosecution theory tied to a crime not charged in the indictment, presented to a grand jury or disclosed in the bill of particulars." The crux of his argument, as far as we can distill, is appellant's contention that the trial court overruled the motion for acquittal based upon appellant's failure to disclose to the trial court on May 30, 2012 that he had received payment from the Hamon's. (Appellant's Brief, page 22). First, this argument was not made to the trial court and, therefore, cannot be considered upon appeal for the first time absent plain error, and appellant has failed to demonstrate outcome-determinative plain error. *State v. Hooks*, *supra*. Furthermore, we believe that appellant's interpretation of the judge's comments is a strained effort to create an error that does not exist.

{¶53} The trial court issued its decision regarding the motion for acquittal prior to the quote cited by appellant, and the comments relied upon by appellant were the result of additional argument regarding the availability and relevance of related documentation. The trial court concluded those documents would not impact his decision because appellant had suggested something that was not true—that he was trying to make arrangements for payment after he received payment of four thousand dollars. However,

the indictment and the charges arise out of the failure to disclose that payment when he submitted his application for fees and received payment on the dates described in the indictment. The judge's comments did not alter the nature of the charges, but only highlighted the fact that the appellant's conduct early in the case culminated in a criminal offense on the dates described in the indictment.

{¶54} For the forgoing reasons, appellant's fourth assignment of error is overruled.

ASSIGNMENT OF ERROR TWO

{¶55} Appellant's second assignment of error accuses witnesses of perjury and the prosecutor of misconduct, purportedly sufficient to warrant a new trial. Prior to addressing the merits, it is critical that we note this assignment of error relies upon matters that are not part of the record. For the reasons previously stated, we will not consider the transcript of the interview of Burton Hamon or the transcript of any jail calls with the exception of State's Exhibit 4. Those documents are not part of the record.

{¶56} To the extent that appellant relies upon these transcripts, we can give the argument no consideration. However, even if we were to consider these documents we are not convinced that the record contains evidence of misconduct on behalf of the prosecutor or perjury by any witness.

{¶57} If we are to assume that the recorded statement of Burton Hamon is authentic, we will not assume that it was made under oath. There is a rebuttable presumption that one told the truth under oath, and thus proof that statements under oath that are at variance with previous unsworn statements will not support a conclusion that the witness committed perjury. *State v. Goodin*, 56 Ohio St.2d 438, 446, 384 N.E.2d 290 (1978). Unsworn statements that conflict with later sworn statements are insufficient to

support a charge of perjury. *Id.* Consequently, any difference between Mr. Hamon's statement in the purported tape-recorded interview and his statement under oath at trial does not persuade us that he committed perjury or that the prosecutor suborned perjury. The appellant's arguments with regard to Timothy Hamon and the conflict with the jail call recordings are subject to the same analysis and cannot be countenanced.

{¶58} Further, we are not persuaded that the prosecutor acted inappropriately. Appellant highlights arguments that counsel for the state made in summation, attempting to use those to support his contention that the prosecutor was guilty of misconduct. As we review the record, we find the prosecutor was merely commenting on the evidence before the court. *State v. Elliott,* 91 Ohio App.3d 763, 773, 633 N.E.2d 1144 (3rd Dist.1993). "Both the prosecution and the defense have wide latitude in summation as to what the evidence has shown and what reasonable inferences may be drawn therefrom." *State v. Stephens*, 24 Ohio St.2d 76, 82, 263 N.E.2d 773 (1970), *State v. Lott*, 51 Ohio St.3d 160, 165, 555 N.E.2d 293 (1990). The prosecutor's comments were well within the boundaries of commentary on the evidence and not impermissible misconduct.

{¶59} Finally, appellant contends in the heading of this assignment of error that the error is "structural" but offers no authority or argument to support that contention. The Supreme Court of Ohio concluded "[c]onsistent with the presumption that errors are not 'structural,' the United States Supreme Court 'ha[s] found an error to be "structural," and thus subject to automatic reversal, only in a "very limited class of cases." *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997), *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643. We have concluded that the trial court did not err, so this argument is moot. Had we found any error, appellant's

unsupported assertion would be insufficient to rebut the presumption that the errors are not structural.

{¶60} Appellant's second assignment of error is overruled.

ASSIGNMENT OF ERROR THREE

{¶61} Appellant argues in his third assignment of error that the conviction is against the manifest weight of the evidence, relying upon the testimony of attorney John Rion.

> Weight of the evidence concerns "the inclination of the *greater amount of credible evidence,* offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief.*" (Emphasis added.) Black's, *supra,* at 1594.
>
> When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a " 'thirteenth **547 juror' " and disagrees with the factfinder's resolution of the conflicting testimony. *Tibbs,* 457 U.S. at 42, 102 S.Ct. at 2218, 72 L.Ed.2d at 661. See, also, *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 20 OBR 215, 219, 485 N.E.2d 717, 720–721. ("The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in

> the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The 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. Thompkins, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541 (1997).

{¶62} Attorney Rion testified at length and provided an opinion in support of appellant. Attorney Rion focused upon the application for fees and concluded that it was designed to prevent duplicate payments and, so long as appellant did not claim payment for services for which he was previously paid, he could safely execute and submit the form. His testimony was not as strong or clear when he was asked about the language in the application that is at issue in this case. The relevant language is in State's Exhibit 12:

> I certify that I have received no compensation in connection with providing representation in this case other than that described in this motion or which has been approved by the court in a previous motion, nor have any fees and expenses in this motion been duplicated on any other motion.

{¶63} The state pressed Attorney Rion regarding this language and suggested that there were two conditions contained within the paragraph-that the attorney had not received anything other than what was described in the application and nothing had been duplicated. Attorney Rion finally responded by saying "you know what, I am not going to

argue with you over various meanings of words." (Trial Transcript, p. 827, lines 4-5). He concluded by stating that as long as the attorney was verifying that payment had not been duplicated the requirements of the application were satisfied.

{¶64} Attorney Rion's admitted that he does not currently accept appointments to represent indigent defendants and has not done so for several decades. While his accomplishments were impressive, he had no experience submitting the application that is the focal point of this case. Further, the critical language in the application is neither complex nor ambiguous. The jury could have reasonably relied on those facts to find that Attorney Rion's opinion was of little weight.

{¶65} While it may be helpful, expert testimony, even when uncontradicted, is not necessarily conclusive. *State v. Dickerson*, 45 Ohio St.3d 206, 210, 543 N.E.2d 1250, 1255 (1989). And, after review of the record, we cannot find that the jury arbitrarily disregarded the expert testimony, *State v. White*, 118 Ohio St.3d 12, 2008-Ohio-1623, 885 N.E.2d 905, ¶ 71 (2008) or that the jury lost its way in finding that the appellant was guilty of all charges. Appellant's third assignment of error is overruled.

ASSIGNMENT OF ERROR FIVE

{¶66} Appellant argues that the trial court committed plain error and violated "the rule of strict construction" by improperly instructing the jury on the definition of "deprive" in his fifth assignment of error. The appellant did not object to the jury instructions and did not submit proposed jury instructions. Appellant's failure to object to the jury instructions waives any right to argue an error on appeal and while this court has the discretion to consider plain error, this case does not present exceptional circumstances

warranting the exercise of that discretion. For the reasons that follow, we do not find the trial court erred in its jury instructions.

{¶67} The Ohio Supreme Court has recently clarified the standard of review for plain error: Crim.R. 52(B) affords appellate courts discretion to correct "[p]lain errors or defects affecting substantial rights" notwithstanding an accused's failure to meet his obligation to bring those errors to the attention of the trial court. However, the accused bears the burden to demonstrate plain error on the record, *State v. Quarterman*, 140 Ohio St.3d 464, 2014–Ohio–4034, 19 N.E.3d 900, ¶ 16, and must show "an error, i.e., a deviation from a legal rule" that constitutes "an 'obvious' defect in the trial proceedings," *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). Even if the error is obvious, it must have affected substantial rights, and "[w]e have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial." *Id*. We recently clarified in *State v. Rogers,* 143 Ohio St.3d 385, 2015–Ohio–2459, 38 N.E.3d 860, that the accused is "required to demonstrate a reasonable probability that the error resulted in prejudice—the same deferential standard for reviewing ineffective assistance of counsel claims." (Emphasis sic.) *Id*. at ¶ 22, citing *United States v. Dominguez Benitez*, 542 U.S. 74, 81–83, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004). If the accused shows that the trial court committed plain error affecting the outcome of the proceeding, an appellate court is not required to correct it; we have "admonish[ed] courts to notice plain error 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " (Emphasis added.) *Barnes* at 27, 759 N.E.2d 1240, quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶68} Appellant excuses his failure to object by complaining that he did not have the opportunity to object to jury instructions. This assertion is not supported by the record. Appellant did not take advantage of the opportunity to file proposed instructions, Crim.R. 30(A), did not respond to appellee's filing of proposed instructions (State's Jury Instructions, January 15, 2017, Docket 40) and engaged in a discussion with the trial court regarding removing a reference to Counts 3 and 4 from the instructions. (Trial Transcript, p. 863, lines 6-12). Appellant had the opportunity to address the instructions during an argument regarding his motion for acquittal prior to the trial court reconvening the jury and reading the instructions, and a second opportunity to do so at the close of the instructions. The record contains no evidence that trial counsel was prevented from arguing any defect in the instructions.

{¶69} Appellant's contention that the failure to object is excused because the definition of "deprived" was central to the appellant's defense and was raised by appellant in Crim.R. 29 motions is unsupported by any legal authority and not borne out by the record.

{¶70} Appellant contends the trial court was obligated to include in the jury instructions the definition of deprive found in R.C. 2913.01(C)(3), but that definition is limited to those circumstances where a person accepts, uses or appropriates money with purpose not to give proper consideration in return for the money without reasonable justification or excuse. Neither the allegations nor the facts would justify including that definition in the instructions. *Murphy v. Carrollton Mfg. Co.,* 61 Ohio St.3d 585, 591, 575 N.E.2d 828 (1991). The appellee did not claim or present any evidence that the appellant was paid for work he did not perform, but instead focused upon appellant's receiving and

retaining payment as a result of deception. We find that the trial court did not deviate from a legal rule that constitutes an obvious defect in the trial proceedings, but instead committed no error by using the definition of "deprived" from R.C. 2913.01(C)(1).

{¶71} Appellant's fifth assignment of error is overruled.

ASSIGNMENT OF ERROR SIX

{¶72} In his sixth assignment of error, appellant contends the trial court erred by admitting the recording of a telephone conversation between Renee Floyd, an assistant of appellant, and Timothy Hamon. Appellant argues that the statement was hearsay not covered by any exception and was testimonial and thus prohibited by the holding of *State v. Stahl,* 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834.

{¶73} "[A] trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence." *Rigby v. Lake Cty.,* 58 Ohio St.3d 269, 271, 569 N.E.2d 1056 (1991). As a general rule, all relevant evidence is admissible. Evid.R. 402; cf. Evid.R. 802. Our task is to look at the totality of the circumstances in the case sub judice, and determine whether the trial court failed to comply with the rules of procedure and evidence or acted unreasonably, arbitrarily or unconscionably in allowing or excluding the disputed evidence. *State v. Oman*, 5th Dist. Stark No. 1999CA00027, 2000 WL 222190; *Rigby, supra.*

{¶74} The phone conversation in question occurred on February 1, 2012 when Mr. Hamon phoned appellant's office and the phone was answered by Renee Floyd, who explained that appellant needed Mr. Hamon's consent to represent him in the pending trial. Prior to the introduction of this call, Burton Hamon discussed his contact with

appellant through Renee Floyd, in his direct examination and during cross examination, and identified her as appellant's assistant. Appellant's counsel acknowledged that she was appellant's assistant. (Trial Transcript, p. 668, lines 19-20). Therefore, the record does contain evidence of the agency independent of the statement. *Valley Roco Mixing Co. v. Am. Intern. Sales & Dev.,* 9th Dist. Summit No. 15832, 1993 WL 120266, (April 23, 1993) *4, citations omitted.

{¶75} Timothy Hamon identified the recording as a call from himself to Renee Floyd and provided a positive identification of his voice and Ms. Floyd's. It is evident from the trial transcript that Timothy Hamon called to speak to appellant and expected Renee Floyd to answer. One would usually and properly assume upon the dialing of a business office phone number that the person who answers is employed by and has the authority to speak for the business, *United States v. Portsmouth Paving Corp*., 694 F.2d 312, 321–22 (4th Cir.1982), and a secretary or assistant taking calls from a client regarding the retention of the attorney for the client's defense is engaged in a matter within the scope of the agency or employment. *In re Estate of Williams*, 7th Dist. Mahoning No. 00 CA 109, 2003-Ohio-1436, ¶ 46.

{¶76} The trial court could reasonably conclude the recorded statement was not hearsay because it was offered against the appellant and it was either "a statement by a person authorized by the party to make a statement concerning the subject" or "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship," Evid.R. 801(D)(2)(c),(d). For those reasons, we find that the trial court did not abuse its discretion

by overruling appellant's objection and permitting the appellee to play a portion of the phone call for the jury.

{¶77} Appellant's sixth assignment of error is denied.

ASSIGNMENT OF ERROR SEVEN

{¶78} In his seventh assignment of error, appellant argues, for the first time, that the form completed by appellant to receive payment as an appointed attorney is ambiguous and does not provide a proper notice of the potential for criminal prosecution. Appellant argues that he cannot be held responsible for providing information that is false because the form provides no warning that criminal liability will attach and there is no space on the form to disclose compensation received outside of the appointment process. Appellant provides no citation to authority in support of his argument and, as noted above, it was not presented to the trial court. Appellant concludes this is a violation of due process, but cites no authority in support of his conclusion. Appellant did not raise this argument before the trial court, so we decline to consider it for the reasons that follow:

> [T]he question of the constitutionality of a statute must generally be raised at the first opportunity and, in a criminal prosecution, this means in the trial court. See *State v. Woodards* (1966), 6 Ohio St.2d 14 [215 N.E.2d 568] [35 O.O.2d 8]. This rule applies both to appellant's claim that the statute is unconstitutionally vague on its face and to his claim that the trial court interpreted the statute in such a way as to render the statute unconstitutionally **527 vague. Both claims were apparent but yet not made at the trial court level.

> Although R.C. 2505.21 gives appellate courts discretion to review a claimed denial of constitutional rights not raised below, 'that discretion will not ordinarily be exercised to review such claims, where the right sought to be vindicated was in existence prior to or at the time of trial.' *171 *State v. Woodards*, supra [6 Ohio St.2d], at 21 [215 N.E.2d 568].

State v. 1981 Dodge Ram Van, 36 Ohio St.3d 168, 170, 522 N.E.2d 524, 526–27 (1988).

{¶79} The alleged defect in the form completed by the appellant was at issue prior to the trial and at the trial of this matter. Appellant chose not to address it at that juncture and we decline to consider it now. Assuming, arguendo, we were to address it, our decision would likely be unchanged. Appellant's arguments are unpersuasive and disappointing. The form requires certification that appellant "received no compensation in connection with providing representation in this case other than that described in this motion or which has been approved by the court in a previous motion." That phrase contains no ambiguity and, in the case at bar, disclosure of prior compensation could have been made in writing or orally to the court. Appellant's complaints regarding the inability to use this form to fulfill his obligations are unsupportable. The seventh assignment of error is overruled.

ASSIGNMENTS OF ERROR EIGHT AND NINE

{¶80} Appellant's eighth and ninth assignments of error are closely related as they both address alleged unconstitutional aspects of the trial and will be considered together.

{¶81} Appellant argues that R.C. 2913.02 and 2913.42 are unconstitutional as applied to the appellant in the "unique circumstances presented" in his eighth assignment

of error. In his ninth assignment of error appellant contends that the trial court's order to pay restitution is a violation of federal and state law. Both assignments address the issue of the constitutionality of the trial court's order of restitution, but neither argument was presented to the trial court and, therefore, we cannot consider these assignments.

{¶82} As noted above in *State v. 1981 Dodge Ram Van*, arguments regarding constitutionality are waived if not brought to the attention of the trial court. The constitutional arguments in assignment of error eight and nine were not made to the trial court. " 'An appellate court will not consider any error, including constitutional error, which counsel for a complaining party could have, but failed to call to the trial court's attention at a time when such error could have been avoided by the trial court.' *In re 730 Chickens, 75 Ohio App.3d 476, 488, 599 N.E.2d 828 (4th Dist.1991),* citations omitted.

{¶83} Appellant argues issues in both his eighth and ninth assignment of error that were present at trial arising out of the order of restitution. He had the opportunity to make his argument regarding the unconstitutionality of the order when the court announced it was ordering appellant to pay restitution by presenting them to the trial court at that time or by demanding a hearing on the issue. (R.C. 2929.18(A)(1). He did not request a hearing or otherwise present the arguments to the trial court, so waiver precludes our consideration of those issues absent plain error, and appellant has failed to demonstrate outcome-determinative plain error. *State v. Hooks, supra.*

{¶84} Assignments of error eight and nine are denied.

ASSIGNMENT OF ERROR TEN

{¶85} Appellant concludes by arguing that his trial attorneys provided ineffective assistance of counsel. This assignment is no more than a bald assertion without any

supporting authority or argument regarding how the alleged errors may have prejudiced the appellant.

{¶86} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838 (1993); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989).

{¶87} In order to warrant a finding that trial counsel was ineffective, the petitioner must meet both the deficient performance and prejudice prongs of *Strickland* and *Bradley. Knowles v. Mirzayance*, 556 U.S. 111, 129 S.Ct. 1411, 1419, 173 L.Ed.2d 251 (2009).

{¶88} Appellant's tenth assignment of error contains only conclusory statements regarding aspects of the case that appellant counsel now contends should have been addressed differently by trial counsel. He refers to these actions as "uncharacteristic miscues" but does not argue that trial counsel's performance "fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties." He then lists a number of actions that "likely affected the outcome of the proceedings" but fails to describe what prejudicial effect, if any, directly resulted from these actions. *State v. Rodgers,* 6th Dist. Lucas No. L-02-1089, 2004-Ohio-3795, ¶ 17. "Appellant's conclusory assertions are insufficient to demonstrate ineffective assistance of counsel." *State v. Buckingham,* Montgomery App. No. 19205, 2003-Ohio-44, at ¶ 17; *State v. Hall*, 10th Dist. Franklin No. 04AP-1242, 2005-Ohio-5162, ¶ 58.

{¶89} Further, we have reviewed the record and concluded that trial counsel's decisions regarding objections, impeachment or the filing of motion for a mistrial were part of a considered strategy. "We will not second-guess the strategic decisions counsel made at trial even though appellate counsel now argue that they would have defended differently." *State v. Post*, 32 Ohio St.3d 380, 388, 513 N.E.2d 754 (1987) as cited in *State v. Mason,* 82 Ohio St.3d 144, 169, 1998-Ohio-370, 694 N.E.2d 932 (1998).

{¶90} Assignment of error ten is denied and the decision of the Delaware County Court of Common Pleas is affirmed.

By: Baldwin, J.

Hoffman, P.J. and

Wise, Earle, J. concur.