[Cite as *State v. Lytle*, 2015-Ohio-1133.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 13AP-866 (C.P.C. No. 13CR-127)
Daniel W. Lytle,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 26, 2015

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

Samuel H. Shamansky Co. L.P.A., and *Samuel H. Shamansky*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} Defendant-appellant, Daniel W. Lytle, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas reflecting convictions for aggravated burglary, kidnapping, abduction, violation of a protection order, and conspiracy to commit murder.

{¶ 2} The charges against appellant arose from a series of threats and violent acts toward his estranged wife, Tammy Lytle. The first of these involved a break-in at Tammy's apartment in the early morning hours of October 28, 2012, in which appellant allegedly kicked down the apartment door and held a knife to her throat. Subsequently, at various times through November and December 2012, appellant allegedly engaged in

conversations and preparatory actions with other individuals to arrange the murder or disfigurement of Tammy.

{¶ 3} The trial court's judgment entry contains two errors on its face: The kidnapping conviction is entered in error on a charge that was dismissed before trial, and the jury's guilty verdict on a further charge of conspiracy to commit kidnapping is not addressed in the entry at all. To ascertain the posture of this appeal, we must therefore recapitulate the basic procedural history of the case in detail, bearing in mind that a trial court speaks through its journal and that any defects in the entry are paramount. *State v. Miller*, 127 Ohio St.3d 407, 2010-Ohio-5705. " 'A court of record speaks only through its journal and not by oral pronouncement or mere written minute or memorandum.' " *State v. Osie*, 140 Ohio St.3d 131, 2014-Ohio-2966, ¶ 83, quoting *Schenley v. Kauth*, 160 Ohio St. 109, 113 (1953), paragraph one of the syllabus.

{¶ 4} The Franklin County Grand Jury originally returned an eight-count indictment: Count 1 alleged conspiracy to commit aggravated murder; Count 2 alleged aggravated burglary; Count 3 alleged aggravated robbery; Count 4 alleged kidnapping; Count 5 alleged violation of a protection order; Count 6 alleged abduction; Count 7 alleged domestic violence; and Count 8 alleged conspiracy to commit kidnapping.

{¶ 5} On the eve of trial, the prosecution submitted an entry to amend the indictment, dropping the domestic violence and kidnapping charges and changing the conspiracy to commit aggravated murder charge to conspiracy to commit murder. The amended indictment renumbered the counts as follows: Count 1 alleged conspiracy to commit murder; Count 2 alleged aggravated burglary; Count 3 alleged aggravated robbery; Count 4 alleged violation of a protection order; Count 5 alleged abduction; and Count 6 alleged conspiracy to commit kidnapping. The case went to trial on the charges as alleged and numbered in the amended indictment, and the jury received verdict forms suitably numbered and defined for each charge.

{¶ 6} The jury returned guilty verdicts on all counts except Count 3, aggravated robbery, for which it returned a verdict of not guilty. At the sentencing hearing, the trial court verbally and accurately announced the verdicts. The court logically determined that Counts 2 and 4, respectively aggravated burglary and violation of a protection order, would merge for sentencing. The court acknowledged that the state elected to sentence

appellant on the aggravated burglary charge pursuant to this merger. The court further determined that Counts 1 and 6, respectively conspiracy to commit murder and conspiracy to commit kidnapping, were committed through separate conduct and would not merge. The court then announced sentences as follows: for Count 1, conspiracy to commit murder, 11 years; for Count 2, aggravated burglary, 11 years; for Count 5, abduction, 2 years; and for Count 6, conspiracy to commit kidnapping, 5 years. The sentences for Counts 1, 2, and 6 were to be served consecutively and that for Count 5 concurrently, for a total of 27 years.

{¶ 7} When reducing the announced sentences to a written entry, however, the trial court did not duplicate the above determinations. The court erroneously revived the numbering used in the original indictment and, as a result, sentenced appellant on the kidnapping charge for which he had been neither tried nor convicted. Conversely, the court made no finding of guilt and imposed no sentence pursuant to the jury's guilty verdict on the charge of conspiracy to commit kidnapping.

{¶ 8} In addition to the convictions for conspiracy to commit murder and aggravated burglary, which retained their original numbering (Counts 1 and 2) across both versions of the indictment, the court's entry thus reflects guilt for "KIDNAPPING, in violation of Section 2905.01, a Felony of the First Degree, as charged in Count Four of the Indictment; * * * VIOLATING A PROTECTION ORDER * * * , in violation of Section 2919.27, a Felony of the Third Degree, as charged in Count Five of the Indictment; and * * * ABDUCTION, in violation of Section 2905.02, a Felony of the Third Degree, as charged in Count Six of the Indictment." Using this partially incorrect numbering, the court then specified the following sentences: Count 1 (conspiracy to commit murder), 11 years; Count 2 (aggravated burglary), 11 years; Count 5 (violation of a protection order), 2 years; and Count 6 (abduction), 5 years. The court merged Count 4 (kidnapping) with Count 2 (aggravated burglary) for sentencing.

{¶ 9} The mere misnumbering of certain counts in the entry's recitation of verdicts is of little importance with respect to those charges that can be clearly discerned from the amended indictment, jury verdicts, and verbal pronouncements of the court at the sentencing hearing. The numbering of charges in an indictment is not essential to the validity of the charges therein if the elements and operative facts of the alleged offenses

are otherwise clearly stated and distinct for each offense. *Braxton v. Maxwell*, 1 Ohio St.2d 134 (1965). For this reason, the state of the record does not preclude our review of the guilty verdicts for conspiracy to commit murder, aggravated burglary, violation of a protection order, and abduction. The charges against appellant were clearly and consistently numbered for these charges from the time of the amended indictment to the sentencing hearing, and, in particular, there is no possibility that the trial court's subsequent confusion of charges had any impact on the jury's consideration of the case. *State ex rel. Douthard v. Warden*, 11th Dist. No. 2002-T-0145, 2003-Ohio-325.

{¶ 10} The misidentification in the judgment entry of the conspiracy-to-commit-kidnapping verdict as kidnapping proper, however, complete with reference to the kidnapping statute (R.C. 2905.01) rather than the conspiracy statute (R.C. 2923.01) is more serious and requires us to vacate this conviction and remand the matter before we can review appellant's conviction for conspiracy to commit kidnapping. Likewise, the trial court's erroneous renumbering of counts in its recitation of sentences has resulted in the merger of the wrong counts and imposition of inapposite sentences and compels resentencing on all charges. Collectively, these constitute more than mere a scrivener's error and should not be corrected by means of a nunc pro tunc entry. *See generally* S*tate v. Henderson*, 5th Dist. No. 2013-CR-0409, 2014-Ohio-3121.

{¶ 11} With these considerations settled, we review appellant's three assignments of error:

> [I.] THE TRIAL COURT ERRED IN FAILING TO DISMISS APPELLANT'S CASE FOR A VIOLATION OF HIS RIGHT TO SPEEDY TRIAL.
>
> [II.] INSUFFICIENT EVIDENCE EXISTED TO CONVICT APPELLANT AND CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
>
> [III.] THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENSE COUNSEL'S MOTION PURSUANT TO RULE 29 AT THE CLOSE OF THE STATE'S CASE.

{¶ 12} Appellant's first assignment of error concerns an alleged violation of his right to speedy trial under the U.S. and Ohio Constitutions. An accused is guaranteed the constitutional right to a speedy trial pursuant to the Sixth and Fourteenth Amendments of

the U.S. Constitution and Ohio Constitution, Article I, Section 10. *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, ¶ 32. Ohio's speedy trial statutes, found at R.C. 2945.71 et seq., were implemented to enforce those constitutional guarantees. *Brecksville v. Cook*, 75 Ohio St.3d 53, 55 (1996); *State v. Blackburn*, 118 Ohio St.3d 163, 2008-Ohio-1823, ¶ 10. The speedy trial statutory provisions are mandatory and require strict compliance by prosecutors, as well as strict enforcement by the courts. *State v. Bayless*, 10th Dist. No. 02AP-215, 2002-Ohio-5791, ¶ 16. If the trial court and prosecution fail to bring a defendant to trial within the time required, the trial court shall discharge the defendant. *Dublin v. Streb*, 10th Dist. No. 07AP-995, 2008-Ohio-3766, ¶ 23.

{¶ 13} The proper standard of review in speedy trial cases is simply to count the number of days passed, while determining to which party the time is chargeable under the various tolling events described in R.C. 2945.71 and 2945.72. *State v. Jackson*, 10th Dist. No. 02AP-468, 2003-Ohio-1653, ¶ 32, citing *State v. DePue*, 96 Ohio App.3d 513, 516 (4th Dist.1994).

{¶ 14} Upon demonstrating that more than the defined period has elapsed before trial, a defendant establishes a prima facie case for dismissal based on a speedy trial violation. *State v. Miller*, 10th Dist. No. 06AP-36, 2006-Ohio-4988, ¶ 9. Once a defendant establishes a prima facie case for dismissal, the state bears the burden to prove that time was sufficiently tolled and the speedy trial period extended. *Id*.

{¶ 15} If we find that the state did not violate appellant's statutory right to a speedy trial pursuant to R.C. 2945.71, we must next address whether his constitutional right to a speedy trial was violated. In *Barker v. Wingo*, 407 U.S. 514, 530 (1972), the United States Supreme Court set forth four factors to consider when evaluating whether an appellant's right to a speedy trial was violated: (1) whether the delay before trial was uncommonly long, (2) whether the government or criminal defendant is more to blame for the delay, (3) whether in due course, the defendant asserted his right to a speedy trial, and (4) whether he suffered prejudice as a result of the delay. These factors are balanced in a totality of the circumstances setting with no one factor controlling. *Id*. The Supreme Court of Ohio has recognized this test to determine if an individual's constitutional speedy trial rights have been violated. *State v. Selvage*, 80 Ohio St.3d 465, 467 (1997).

{¶ 16} The first of these factors, the length of the delay, "is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker* at 530; *Doggett v. United States*, 505 U.S. 647, 651 (1992). Therefore, the *Barker* analysis is only triggered once a "presumptively prejudicial" delay is shown. *Id*. at 651-52; *State v. Yuen*, 10th Dist. No. 03AP-513, 2004-Ohio-1276, ¶ 10. Generally, delay is presumptively prejudicial as it approaches one year. *State v. Miller*, 10th Dist. No. 04AP-285, 2005-Ohio-518, ¶ 12.

{¶ 17} Appellant faced various felony charges in this case. Pursuant to R.C. 2945.71(C)(2), the state must bring a defendant arrested on felony charges to trial within 270 days of his arrest, exclusive of any tolled days. If the defendant is held in jail in lieu of bail on the pending charge, each untolled day counts as three days, R.C. 2945.71(E), so that a defendant detained for the entire pre-trial period must be brought to trial in 90 days.

{¶ 18} The trial court held a hearing on the speedy trial issue on March 22, 2013. The parties agreed that appellant was arrested on December 30, 2012, held continuously in jail thereafter and, as the object of a felony indictment, his nominal trial date for statutory speedy trial purposes would have been March 29, 2013. Appellant does not dispute on appeal that a 21-day delay for discovery and subsequent 4-day waiver executed by appellant would toll speedy trial. Allowing only these delays, appellant argues that the adjusted speedy trial deadline would have been April 24, 2013. Because appellant was not brought to trial until July 8, 2013, appellant now argues that both his statutory and constitutional speedy trial rights were violated.

{¶ 19} The record reflects serial continuances between April 22, 2013 and the trial date of July 8, 2013. Appellant argues that he did not personally consent to these because the associated waivers were solely executed by his defense counsel. The fact that appellant did not sign, and perhaps (although there is no affirmative indication of this in the record) did not individually approve of each waiver, does not create a speedy trial issue in this case. "It is well-established that a defendant is bound by the actions of counsel in waiving speedy trial rights by seeking or agreeing to a continuance, even over the defendant's objections." *State v. Glass*, 10th Dist. No. 10AP-558, 2011-Ohio-6287,

¶ 17, citing *State v. McQueen*, 10th Dist. No. 09AP-195, 2009-Ohio-6272, ¶ 37. "A defendant's right to be brought to trial within the time limits expressed in R.C. 2945.71 may be waived by his counsel for reasons of trial preparation and the defendant is bound by the waiver even though the waiver is executed without his consent." *State v. McBreen*, 54 Ohio St.2d 315 (1978), syllabus; *see also State v. Watson*, 10th Dist. No. 13AP-148, 2013-Ohio-5603, ¶ 22.

{¶ 20} Because under this precedent we give full effect to the waivers executed by appellant's trial counsel, appellant has failed to establish a violation of his statutory right to speedy trial in this case. Nor does appellant articulate the kind of presumptively prejudicial delay that would give rise to a constitutional speedy trial violation under the factors set forth in *Barker* and *Selvage*. Appellant's first assignment of error is overruled.

{¶ 21} Appellant's second and third assignments of error assert that his convictions are supported by insufficient evidence or are against the manifest weight of the evidence, and that the trial court concomitantly erred when it denied his Crim.R. 29 motion for acquittal at the close of the state's case. Because these three propositions raise identical or closely related issues, we address the two assignments of error together.

{¶ 22} The legal concepts of sufficiency of the evidence and weight of the evidence involve different determinations. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). As to sufficiency of the evidence, " 'sufficiency' is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." *Id.*, citing *Black's Law Dictionary* 1433 (6 Ed.1990). A determination as to whether the evidence is legally sufficient to sustain a verdict is a question of law. *Thompkins* at 386. When we review the sufficiency of the evidence upon appeal, we construe the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. As a result, when we review the sufficiency of the evidence, we do not on appeal reweigh the credibility of the witnesses. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 79.

{¶ 23} The relevant inquiry on review of the sufficiency of the evidence is whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational

trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis sic.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). A reversal based on insufficient evidence has the same effect as a not guilty verdict because such a determination "means that no rational factfinder could have voted to convict the defendant." *Tibbs v. Florida*, 457 U.S. 31, 41 (1982).

{¶ 24} As opposed to the concept of sufficiency of the evidence, the court in *Thompkins* noted that "[w]eight 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 sic.) *Id.* at 387, quoting *Black's Law Dictionary* 1594 (6 Ed.1990). As the finder of fact, the jury is in the best position to weigh the credibility of testimony by assessing the demeanor of the witness and the manner in which he testifies, his connection or relationship with the parties, and his interest, if any, in the outcome. The jury can accept all, part or none of the testimony offered by a witness, whether it is expert opinion or eyewitness fact, whether it is merely evidential or tends to prove the ultimate fact. *State v. McGowan*, 10th Dist. No. 08AP-55, 2008-Ohio-5894, citing *State v. Antill*, 176 Ohio St. 61, 67 (1964).

{¶ 25} 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 juror" and disagrees with the factfinder's resolution of the conflicting testimony. *Thompkins* at 387. In undertaking this limited reweighing of the evidence, however, we are guided by the presumption that the factual findings of the trial court were correct: an appellate court "must always be mindful of the presumption in favor of the finder of fact." *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 21. Accordingly, the weight to be given the evidence and the credibility of the witnesses are primarily questions to be answered by the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. A reversal of a jury verdict on the ground that

it is against the manifest weight of the evidence must be made with the concurrence of all three judges of the appellate panel. Ohio Constitution, Article IV, Section 3(B)(3).

{¶ 26} A Crim.R. 29(A) motion for acquittal tests the sufficiency of the evidence. *State v. Reddy*, 10th Dist. No. 09AP-868, 2010-Ohio-3892, ¶ 12, citing *State v. Knipp*, 4th Dist. No. 06CA641, 2006-Ohio-4704, ¶ 11. In determining whether the trial court erred in denying a defendant's Crim.R. 29 motion for acquittal, we apply the same standard used to address a sufficiency of the evidence attack upon the final judgment of conviction. *State v. Ferguson*, 10th Dist. No. 12AP-1003, 2013-Ohio-4798, ¶ 47.

{¶ 27} We begin by reviewing the evidence heard at trial in this case with respect to those charges (aggravated burglary, abduction, and violation of a protection order) arising out of the October 28, 2012 incident at Tammy's apartment. To support these charges, the state principally presented Tammy's own testimony.

{¶ 28} Tammy began by describing the general state of relations between her and her husband at the time of the crimes. She stated that she married appellant in 1994. At the time, she had two young children, ages 2 and 4, and appellant raised them as their stepfather. The couple eventually experienced difficulties, and Tammy moved out of the marital residence on September 14, 2012 to an apartment in the Aries Court complex in southern Franklin County. At the time, Tammy believed that the separation was amicable and cooperative. Appellant initially did not hinder her departure and even assisted her in moving into the apartment.

{¶ 29} During the course of the 19-year marriage, Tammy had handled the finances. As part of the separation process, she assisted appellant in setting up on-line access to his checking account. She was surprised to find that he had available a significant amount of money, approximately $12,000, which did not correspond to her perception of the couple's finances.

{¶ 30} To prepare for later identifying testimony by other witnesses, the state asked Tammy to describe appellant's various vehicles owned at the time of the separation. She stated that he owned, among others, a distinctive older Chevrolet El Camino.

{¶ 31} After Tammy moved out, appellant filed a petition for dissolution on behalf of the couple on October 4, 2012. At this time, Tammy asked appellant to stay away from

her for 30 days while she adapted to her new living circumstances. Tammy immediately noticed that appellant's attitude and demeanor changed for the worse.

{¶ 32} On October 9, 2012, Tammy observed appellant sitting in his car in the parking lot of her apartment complex. She approached him, and appellant stated that he needed to discuss some paperwork for the former marital residence. Because it was raining and cold, Tammy invited him inside but, upon coming inside, appellant did not discuss the house paperwork. Instead, appellant aggressively asked if Tammy intended to come back home. When Tammy stated that she intended to stay in her apartment, appellant told her that she would "never see the day of [her] divorce, [and] that he would [kill] her and he would kill himself." (Tr. Vol. II, 75.) Tammy asked appellant to leave, but he refused. They engaged in a shoving match but appellant ultimately departed. Based on this incident, Tammy immediately sought and obtained a protection order on October 10, 2012.

{¶ 33} A short time after this initial incident, Tammy socialized for an evening out with appellant's daughter-in-law, Patricia Lytle, on October 27, 2012. Patricia was in the process of divorcing appellant's son by his first marriage. Tammy drove as the two went out to several bars and discussed their respective marital situations. Although they visited several bars, Tammy testified that she consumed little alcohol and was not intoxicated. The pair ultimately went to an all-night restaurant to eat, after which Tammy took Patricia home and then went home herself, arriving at her apartment between 3:00-3:30 on the morning of October 28th.

{¶ 34} Tammy's assigned parking spot in the complex was some distance from the door to her apartment. As she approached the door to her apartment, she placed her keys in the lock and noticed some movement to her right that caught her attention. She observed an individual approaching her dressed entirely in black. Immediately feeling threatened, Tammy hurriedly opened the door and entered her apartment, bracing herself against the door to attempt to close it in the face of this intruder. She heard someone say "No you don't." (Tr. Vol. II, 82.) She immediately recognized the voice as that of her estranged husband. As she struggled to latch the door, appellant broke the door open with a single kick and forced his way into the apartment. Although Tammy did not have time to turn on the lights upon entering the apartment before appellant burst in, a small light in a

curio cabinet provided enough illumination to allow her to visually confirm his identity in addition to previously identifying his voice. Appellant was dressed in a black zip-up hoodie with the hood up, dark-colored gloves, dark-colored pants, and dark shoes.

{¶ 35} Appellant pursued Tammy into the kitchen, pushed her up against a closet door, put his hand over her mouth, and held a knife to her throat. He made various angry accusations based upon having observed her going out that night and possibly based on her activities on a dating site or Facebook. Appellant insisted that Tammy leave with him, but she refused. She pulled away from him briefly, but he again cornered her between a table and the kitchen wall, held the knife to her stomach, repeatedly covered her mouth, and told her not to yell. At this time, appellant noticed Tammy was attempting to surreptitiously dial her phone for help. He reached into her pocket and took her phone.

{¶ 36} During most of the encounter, Tammy was unable to scream because appellant kept his hand pressed over her mouth. As appellant variously held the knife to her throat or to her abdomen, she could feel the knife blade pressing against her. Tammy felt that if she left with appellant, particularly in light of his prior threats that had triggered her request for a protection order, she would be unlikely to survive. Because of this, she realized that it was safer to face his threats in the apartment, and she steadfastly refused to leave with him. Faced with her continued resistance, appellant abruptly ceased his threats and left the apartment, taking with him the cell phone he had pulled from her pocket. As soon as appellant left, Tammy called 911 on another phone. She obtained a shower curtain rod and braced it against the damaged door in case appellant returned.

{¶ 37} Under specific questioning, Tammy categorically stated that appellant had never lived at the apartment and never spent the night or stayed there temporarily. He did not have permission to enter the apartment at any point that night. Presented with a copy of court filings related to the protection order, Tammy acknowledged that she had sought and obtained continuing effect for the protection order on November 19, 2012.

{¶ 38} At this point in Tammy's testimony, the court allowed the jury, over objection, to listen to a recording of Tammy's 911 call. In this call, Tammy described the events as they occurred, identified her husband as the assailant, and stated that she had not been seriously cut and did not require immediate medical attention for her other

minor injuries. The dispatcher confirmed her description of appellant and requested she stay in the apartment because officers were already on their way.

{¶ 39} Resuming her testimony, Tammy stated that she had suffered an injury to the inside of her lip from appellant pressing his hand over her mouth. Tammy was shown police photographs of the damage to her apartment. She identified the damage to the kicked-in door and stated that, prior to the evening in question, the door was undamaged. She identified the door jamb completely separated from the wall and lying on the apartment floor.

{¶ 40} Tammy testified that the couples' dissolution became final November 30, 2012. Tammy also described an incident in which she noticed that appellant, prior to the assault, had changed his Facebook status from "married" to "widowed." She confronted appellant about this and indicated that she was upset. He stated that it was a joke and that he would change it back but did not know how.

{¶ 41} Upon cross-examination, Tammy testified that, at the time of their marriage in 1994, appellant was 39 years old and she was 23. She acknowledged that at the time she received her initial civil protection order on or about October 9, 2012, appellant had also obtained a civil protection order against her. She admitted having perhaps six drinks on the night of the assault. On further cross-examination, Tammy was asked if she was aware prior to the incidents in question that appellant was on another dating website.

{¶ 42} Patricia Lytle, appellant's former daughter-in-law, testified regarding the events she observed on the night of October 27 and 28, 2012. She corroborated Tammy's account of the night they spent visiting different bars. She stated that she had known both appellant and Tammy for 20 years and had been married to appellant's son for 15 years. Patricia stated that she loved both appellant and Tammy and considered they would always be family members to her, making her testimony in appellant's trial that much more difficult.

{¶ 43} Patricia related that soon after Tammy had dropped Patricia off after their evening out, Patricia received a phone call from Tammy. Based on Tammy's statements during the phone call, Patricia immediately got dressed and went to Tammy's apartment where she found sheriff's personnel already present and beginning an investigation. On cross-examination, Patricia confirmed that appellant's phone number was 614-638-xxxx.

Patricia stayed at the apartment until the maintenance staff at the complex was able to fix the broken door. Patricia confirmed the door damage as described by Tammy. On cross-examination, Patricia stated that she had never observed appellant with a knife on his person.

{¶ 44} David Daubenmire testified for the prosecution. He stated that he did maintenance work for the Aries Court complex where Tammy lived. He saw appellant's characteristic El Camino vehicle at the apartment complex on the night of October 27, 2012. He easily recognized the unusual vehicle because appellant had used it when he helped Tammy move into her apartment and it had a loud exhaust.

{¶ 45} Officer Matthew Ewing of the Columbus Division of Police testified as the first officer to respond to Tammy's 911 call. He stated that he arrived at the Aries Court location within one and one-half minutes of the radio dispatch. Because the dispatch specified a domestic disturbance with weapons present, Officer Ewing approached the scene with his gun drawn. He noted that the door had manifestly been kicked in and the jamb was shattered. Upon entering the apartment, he observed that Tammy was very upset, shaking and with tears in her eyes. Officer Ewing rapidly made sure the apartment was clear, holstered his weapon, and attempted to calm Tammy in order to obtain further information. She described the assault and identified her assailant. Officer Ewing observed red marks on Tammy's face and throat that corresponded to her account of the attack. She did not manifest any severe bleeding and declined immediate medical transport.

{¶ 46} During his testimony, Officer Ewing identified various crime scene photographs of the damage to Tammy's front door. He confirmed that these were fair and accurate depictions of the scene.

{¶ 47} Curtis Upton testified for the prosecution. He lived in an apartment adjacent to Tammy's. He knew Tammy by sight as a neighbor and also knew appellant because he had seen appellant help Tammy move into her apartment. On a later date, he further interacted with appellant when they had a brief conversation while appellant worked on Tammy's car in the parking lot.

{¶ 48} On the night of October 27, 2012, at approximately 8:00 p.m. or 9:00 p.m., Upton lost electric power to his apartment. When he went outside to see if the power was

out everywhere in the complex, he determined that it was only his apartment that was affected. While outside checking on the electrical problem, he saw a person that resembled appellant. Assuming that it was indeed appellant and that he had just left Tammy's apartment, Upton asked if the power was out in Tammy's apartment. The person did not respond. Upton then called the electric company which informed him that there was no general power outage and instructed him to check the outside electrical meter boxes and cut-off switches. Upon doing so, he discovered that the meter boxes were mislabeled and that his box erroneously bore the number for Tammy's apartment. Despite this mislabeling, Upton ascertained which meter was his by observing that it was not moving and threw the appropriate switch to restore power to his unit.

{¶ 49} Jason Baker testified for the defense. He stated that he lived in the Aries Court apartment complex on the back side of the same building where Tammy resided. He stated that he does automobile painting and collision repair for a living and was correspondingly familiar with older vehicles and historical plates. He testified that he would recognize an older Chevrolet El Camino if he saw one. He was not contacted by police after the October 28th incident and was not aware of it until he was contacted by a private investigator for defense counsel. On the night of the alleged assault, he did not observe any disturbance of any sort, including any screaming or the sound of a door being kicked in. He had never observed a Chevrolet El Camino in the parking lot.

{¶ 50} On cross-examination, Baker testified that he was not in a position to nor did he have any desire to keep a continuous watch on the apartment complex parking lot for certain vehicles.

{¶ 51} With respect to the events of October 27 and 28, 2012, appellant was convicted of aggravated burglary, violation of a protection order, and abduction. In order to prove the crime of aggravated burglary as charged, the state was required to show that, in violation of R.C. 2911.11, appellant by force, stealth or deception trespassed in Tammy's apartment and purposefully committed a criminal offense therein, having a deadly weapon on or about his person or under his control. In order to establish violation of a protection order as charged, the state was held to show that appellant, in violation of R.C. 2919.27, recklessly violated the terms of a previous protection order through conduct strictly prohibited under the terms of the order. In order to show the crime of abduction,

the state was held to show that appellant, in violation of R.C. 2905.02, without privilege to do so, knowingly restrained Tammy by force or threat, thereby creating a risk of physical harm to her or placing her in fear.

{¶ 52} The testimony set forth above with respect to the events of October 27 and 28, 2012, amply establishes both the sufficiency and weight of the evidence supporting appellant's conviction on these counts. Direct testimony described appellant's forcible entry into Tammy's apartment, his forcible restraint of her at knifepoint, and the theft of her cell phone. The evidence also supports the reasonable inference that appellant attempted to disable her electric service prior to the attack. Other witnesses placed appellant at the scene, as did cell phone records that will be more fully discussed below in connection with his other convictions. The state presented uncontroverted evidence of the existence of a standing protective order. Appellant's second and third assignments of error with respect to these convictions are therefore overruled.

{¶ 53} To support the charges of conspiracy to commit murder and conspiracy to commit kidnapping, the state relied on further aspects of Tammy's testimony and presented the testimony of alleged co-conspirators. The state's case described two separate plans initiated by appellant. In one scheme, appellant conspired to commit murder by engaging the services of an acquaintance, Brad Fickenworth, who in turn attempted to hire another man, Terry Webb, to kill Tammy. Tiring of delays in execution of this plan, appellant, through an intermediary, contacted another man, Wayne Vanblarcume, seeking to have someone slash Tammy's face and beat her up. This formed the basis for the charge of conspiring to kidnap Tammy. Because we have determined that the trial court's entry of conviction and sentence does not reflect conviction on the latter scheme, we review only the conviction for conspiracy to commit murder.

{¶ 54} During her testimony at trial, Tammy was asked to confirm appellant's cell phone number during the period in question. Tammy stated that it was 614-409-xxxx and had formerly been their landline number. Tammy also was asked whether she knew an individual by the name of Brad Fickenworth. She stated that she knew Fickenworth as someone who had worked with appellant in the heating and air conditioning business, had done mechanical work on appellant's cars, dated her daughter, and was friends with

her son. He had often visited the former marital residence and was friendly with appellant.

{¶ 55} The prosecution asked Tammy to identify several photographs of her that were recovered from Terry Webb as part of the investigation. In particular, she identified a print photograph of herself that once depicted her with two other family members. She previously kept this group photograph in a frame on the dresser in the former marital residence. When she vacated the residence she did not take the photograph with her. She now identified the print in evidence as representing that image of her with the other family members cut out.

{¶ 56} Tammy further testified that, on December 27, 2012, two Columbus police detectives came to her apartment and notified her of a threat to her safety. The officers requested specific information about her ex-husband, which she provided. She also informed them of the protection order in force and the October 28, 2012 home invasion incident. The detectives also asked her for information about Fickenworth, which she provided. The officers then advised Tammy that she could relocate to a hotel where they would provide protection. During her stay at the hotel, investigators monitored her phone. Her stay at the hotel lasted from about December 27 to December 30, when she returned to her apartment. Upon returning to her apartment, police searched the apartment to ensure that no break-ins occurred in her absence.

{¶ 57} Terry Webb testified for the prosecution and described his role in the alleged conspiracy to commit murder. He stated that his involvement began on December 12, 2012, when he spoke with his son Lewis. Based upon the result of that conversation, Webb received a phone call from a person and number theretofore unknown to him. This caller stated that he was acting as an intermediary for a husband who wished to have his wife killed before she could appear for a scheduled court date. The husband would pay Webb $12,500 for the job.

{¶ 58} Although this caller did not provide his name during this initial conversation, when Webb called the phone number back later he learned that his caller's name was Brad. He later fully identified this person as Brad Fickenworth. Webb understood that Fickenworth had obtained his name from Webb's son Lewis. Several

more phone calls ensued, and Webb demanded money in advance in order to prove that Fickenworth was serious about the arrangement.

{¶ 59} During this part of his testimony, the prosecution asked Webb to confirm the phone numbers involved in order to corroborate eventual admission of the relevant phone records. Webb confirmed his own cell phone number during this period as 614-625-xxxx, and the number used by Fickenworth as 614-271-xxxx. The two also communicated by text message, and Webb was able to identify certain text messages recovered from the cell phones involved and presented to him during his testimony.

{¶ 60} On Sunday, December 16th, Webb spoke with Lieutenant Donald Cade of the Columbus Division of Police, whom Webb knew as a deacon at Webb's church. Based on the results of that conversation, Webb went forward with another meeting with Fickenworth initially planned for December 17th, later rescheduled to December 20th. Because the two had never met in person, Fickenworth told Webb to recognize him by his vehicle, a blue Honda with a lowered suspension. At this point in his testimony, Webb identified Fickenworth's vehicle from a photograph shown to him on the stand.

{¶ 61} The two men met as planned on December 20th in a public parking lot on Main Street in Columbus. They drove in Fickenworth's car to Tammy's apartment complex, where Fickenworth showed Webb Tammy's parking spot and front door, including the apartment number. Fickenworth described to Webb how he had been observing Tammy over the past two weeks, and described her schedule, including her typical time of arrival home from work and her practice of walking straight from the car to her door. Because of her predictable schedule, he advised Webb that it would be easiest to kill Tammy as she came home from work rather than try to get inside the apartment at another time. Fickenworth also took Webb to Tammy's place of employment. During the course of this meeting, Fickenworth provided Webb with $1,500, two pictures of Tammy, and asked if Webb would require any weapons.

{¶ 62} At this point in his testimony, Webb was shown photographs of Tammy's apartment and the surrounding area and identified them as a true and accurate depiction of the location Fickenworth had shown him. He also identified the original photographs of Tammy given to him by Fickenworth.

{¶ 63} The next day, Webb received an unexpected additional call from Fickenworth and met with him at the corner of Frebis Avenue and Fairwood Road in Columbus. Fickenworth provided an additional $2,000 and a new cell phone. Despite the fact that Fickenworth asked Webb to use the new cell phone for further communications, the two primarily communicated on Webb's own cell phone thereafter.

{¶ 64} The day after this meeting, Webb again contacted Lieutenant Cade who informed Webb that he was now retired from the department but that Webb should contact a number with the homicide division of the Columbus police. Webb did not immediately call the number, choosing to put it off until after the Christmas holiday.

{¶ 65} On December 24, 2012, Fickenworth and Webb spoke again. Fickenworth demanded that Webb kill Tammy that very evening, Christmas Eve, because her husband had gone out of town and wanted the murder committed while he was in Florida and thus had an alibi. Webb responded that he himself had intended to be out of town with his family and would have to get back with Fickenworth. Webb thereupon left for West Virginia on the 26th where he stayed until the 27th. He had no cell service at his mountainous location in West Virginia and did not attempt to contact Columbus police until his return on December 27th, at which time he spoke with Detective William Rotthoff. Webb met with the detective and they went together to Tammy's apartment. The detective entered the apartment to speak with Tammy and then took Webb to Columbus Police Headquarters, where Webb identified a picture of Fickenworth. Webb gave Detective Rotthoff the two pictures of Tammy that he had received from Fickenworth.

{¶ 66} The next day, December 28, 2012, Webb met with Detective Michael Madry and another officer and again described all of the events leading up to that day and his interactions with Fickenworth. The investigators first planned to have Webb bow out of the scheme and substitute an undercover officer. While they were attempting to orchestrate this, however, Fickenworth called Webb and investigators were able to record the call.

{¶ 67} The prosecution played the recorded phone call in open court. In this call, Fickenworth urged Webb to complete the job before the husband, who was at the root of the scheme, returned from Florida, thereby losing his alibi. Fickenworth accused Webb of

spending the advance money before earning it. Fickenworth stated that when the husband returned from Florida he would demand his advance money back and that Fickenworth would have to pay it himself because Webb had already spent it. The two bickered over the terms of the agreement, including how much would be paid in advance and how much upon completion. Webb stated that he would complete the job if he received an additional $3,000 in advance. Webb intimated that he needed the additional money to split with another hit man. Fickenworth was displeased with the possibility and stated that he would personally come pick up Webb, see that he did the job properly, and drop him back off. The additional money would be paid after the husband returned home. The call thereupon terminated.

{¶ 68} The detectives advised Webb to call Fickenworth back and take a more aggressive posture. The call was again recorded. The men again bickered at length over the timing and payment for the murder, and Fickenworth eventually stated that he had just called Webb's son Lewis, who would send someone else out to take care of it.

{¶ 69} After these controlled phone calls, the detectives left providing Webb with phone numbers to reach them in case Fickenworth contacted him again. On December 30th, Fickenworth again called Webb and demanded his money back, prompting Webb to again contact the detectives. Webb testified that his involvement largely ended at this point. He stated that he had spent the $3,500 received from Fickenworth to donate to his church and also to pay for his holiday trip to West Virginia. He confirmed that he had received an additional $500 from the Columbus Division of Police for his informant work on the case.

{¶ 70} On cross-examination, Webb stated that Fickenworth had never actually disclosed the husband's name. He admitted that he could not identify appellant if asked to do so in open court. When confronted with a court file establishing that he had been convicted of giving false information to a police officer in an unrelated matter, Webb disputed the conviction.

{¶ 71} Donald Cade, retired from the Columbus Division of Police with the rank of lieutenant, testified for the prosecution. He described his career with the division of police and also corroborated Webb's testimony regarding their shared church activities. He stated that when Webb first approached him regarding the alleged murder plot,

Webb's demeanor was very serious with a sense of urgency. He confirmed at that time he furnished Webb with the appropriate number for the homicide division and urged Webb to make the call.

{¶ 72} Detective Michael Malloy of the Columbus Division of Police testified regarding his role in the investigation. He stated that his efforts focused on identifying the individual who initiated the conspiracy and hired Fickenworth. Detective Malloy specified that from the outset the investigators took the position that Terry Webb was not criminally liable for his role in the matter, and the focus would be on building the case against Fickenworth and the as-yet unidentified "husband" who funded and promoted the criminal enterprise. The preferred tactic was to substitute as rapidly as possible an undercover officer to replace Webb in continuing contact with Fickenworth, both to better develop the evidence and to assure Webb's safety. After Detective Malloy and his partner initiated the successful recorded calls between Webb and Fickenworth, however, events progressed too quickly to allow the substitution. Detective Malloy concluded his testimony by authenticating the recordings and transcriptions of the controlled calls between Webb and Fickenworth.

{¶ 73} Detective Rotthoff testified regarding his actions as lead investigator on the case. His participation began with Webb's phone call to the homicide division on December 27, 2012. Detective Rotthoff met with Webb and learned of Fickenworth's role in the conspiracy, although at this point Webb could only identify him as "Brad." Webb could not provide the intended victim's name, but furnished two photographs of her that he had obtained from Fickenworth, as well as information regarding the victim's place of work and home address. Detective Rotthoff used this information to identify Tammy Lytle as the target of the conspiracy. He and another detective met with Tammy in her home and confirmed that she matched the person depicted in the photographs obtained from Webb. They also asked if she knew an individual by the name of Brad, the name provided by Webb, and she suggested Brad Fickenworth. Tammy also described the October 28th incident with her estranged husband. The investigators then used this information to obtain from Webb a photo identification of Fickenworth based on existing photo files. The December 28, 2012 controlled call between Webb and Fickenworth ensued.

{¶ 74} Investigators then obtained warrants to track the now-identified suspects, Fickenworth and appellant, via cell phone location. The investigators determined that appellant was in Florida and Fickenworth was in Athens, Ohio. When investigators determined that Fickenworth had returned to central Ohio by December 30th, they asked Webb to set up a meeting that ultimately allowed officers to take Fickenworth into custody.

{¶ 75} After the arrest, Detective Rotthoff interviewed Fickenworth to discuss possible cooperation that could lead to a reduction in charges. Although Fickenworth initially denied any role in the conspiracy, he revised his story when confronted with the information obtained from Webb. He then agreed to participate in a controlled call with appellant in order to provide evidence of appellant's participation in the conspiracy to murder Tammy. Over objection, the prosecution played for the jury a recording of this call:

> FICKENWORTH: So anyways, I went up there, pretty much talked to them for a little bit. So I mean, I don't know how you - - I mean, are you still - - you still want to do this tomorrow?
>
> LYTLE: Well, that would be wonderful, if possible.
>
> FICKENWORTH: Okay. I mean, how you gonna do it?
>
> LYTLE: Well, I'm not sure. Need to look at it and scope it a little bit first, see what the best way is.
>
> FICKENWORTH: Well - -
>
> LYTLE: Since I don't have a clue, you know, what it looks like or the surrounding area or anything.
>
> FICKENWORTH: I mean, it's snowy.
>
> LYTLE: Well, that's probably a good thing because, like I say, depending on what you wear, you know - -
>
> FICKENWORTH: Well, I'd say probably your best bet would be what you say earlier.
>
> LYTLE: Yeah.

FICKENWORTH: With the towel and I guess the .22.

LYTLE: Yeah.

FICKENWORTH: So - -

LYTLE: Yeah. Probably so.

FICKENWORTH: But I mean, you're actually gonna go through with this?

LYTLE: This has to get done, yeah. Yeah. It either has to be me or somebody, you know what I mean?

FICKENWORTH: Yeah. Well I mean, so you want me to pick you up then?

LYTLE: If you want to run and take a look, we can.

FICKENWORTH: Okay.

LYTLE: That would be perfect.

FICKENWORTH: Well I can't do it right now.

LYTLE: No. That's fine.

FICKENWORTH: But I meant like as I'm taking you over there, dropping you off so you can - - so you can kill your wife there.

LYTLE: Well, scope it, like I said.

FICKENWORTH: But I don't - - when you go to do that, I don't want to be there. Like I'll drop you off, sit across the street, whatever. But I'm not going up there with you.

LYTLE: That's fine.

FICKENWORTH: So but I mean we need to discuss on how - - how you're gonna do this because - -

LYTLE: Well, like I say, I need to see what the layout is first because I don't know 'til you see it.

FICKENWORTH: So what time do you want - - do you want me to pick you up tomorrow?

> LYTLE: Whenever you get ready. Well, I don't know about tomorrow. That would depend too, see, because if it's setting up there tonight, that means that tomorrow morning she'll be leaving there.
>
> FICKENWORTH: What now?
>
> LYTLE: What you want to do -- depending on where she is now, you know, if she's there now or if she's not there now. If she's not there now then that means she's going to be moving from out here because I may want to -- depending on what it looks like, may want to do it in the morning.
>
> FICKENWORTH: Do it in the morning?
>
> LYTLE: Maybe.
>
> FICKENWORTH: Well I mean, your best time would be at dark.
>
> LYTLE: Well yeah, absolutely. Yep. Absolutely.

(Tr. Vol. III, 264-67.) Detective Rotthoff closed his testimony on direct examination by authenticating the telephones he obtained during the arrests of Fickenworth and appellant. He also confirmed that he later authorized a payment to Webb of $500 from the department's informant compensation funds.

{¶ 76} Officer Robert Moledor of the Columbus Division of Police testified for the state and described his investigation of the various cell phone records and cell phone device usage undertaken in connection with the conspiracy investigation, with a particular emphasis on call locations as established by cell phone tower routing. He stated that he had performed an historical records analysis in the cases against appellant and Fickenworth. He described the manner in which he used records documenting which cell phone had made calls through which cell tower to obtain a general physical location for any phone at a given time, and described the strengths and limitations of this method of establishing cell phone locations.

{¶ 77} Officer Moledor described his investigation of cell phone number 614-409-xxxx, subscribed in appellant's name, and number 614-271-xxxx, belonging to

Fickenworth. He authenticated the summaries and reports that he produced from his examination of cell phone data, and explained the significant aspects of the information in relation to the facts of the case. He first described a series of calls from appellant's phone occurring on the night of October 27 to 28, 2012, the night of the assault on Tammy at her apartment. Cell phone tower data placed appellant's phone in the vicinity of the Aries Court complex for these calls between 8:00 p.m. and 12:33 a.m. In another section, he described a summary of communications between appellant's phone and Fickenworth's. The state's questioning of Officer Moledor on this aspect of his report did not particularly emphasize cell phone location for these calls.

{¶ 78} Joseph Trawicki of Sprint telephone and Seth Pezzopane of AT&T cellular telephone testified for the state to collaborate the methodologies employed by Officer Moledor in analyzing cell phone records and cell phone equipment usage.

{¶ 79} Detective James Howe of the Columbus Division of Police testified about his investigation of cell phone usage by the various parties in the case. His analysis emphasized timing and destination of calls and text messages, rather than the location analyses undertaken by Officer Moledor. Detective Howe worked from cell phone company records obtained via subpoena, as well as a physical examination and extraction of information from phones taken from parties during the investigation. He described color-coded charts he produced to illustrate communication between Terry Webb, Lewis Webb, Fickenworth, and appellant.

{¶ 80} These call summaries revealed no calls or text messages directly between Terry Webb and appellant. The summaries did outline a number of calls between Fickenworth and appellant through the months of November and December 2012, including the controlled call initiated by Detective Rotthoff after Fickenworth was taken into custody. The summaries also reflected the earlier controlled calls between Webb and Fickenworth, as well as the other calls between the two as described in Webb's trial testimony.

{¶ 81} On cross-examination, Detective Howe agreed that the cell phone records reflected only calls between appellant and Fickenworth beginning in October 2012, and would not illustrate the long-term pattern of communication between the two men.

{¶ 82} Lawrence Landenberger testified for the prosecution. He stated that he knew appellant as a fellow member of a sportsman's club and also through his own work as a contractor and appellant's work in the heating and cooling business. Landenberger testified that, on October 19, 2012, he returned a phone call from appellant. During the course of the conversation, appellant stated that he had been beaten up in his own garage and asked if Landenberger had a gun to sell or loan him for protection. Appellant stated that he no longer had access to his own guns because the sheriff had taken them. Appellant specified that he needed only a cheap gun, preferably a .22 caliber weapon. Landenberger declined to give appellant a gun, sensing that appellant was a poor risk. He was particularly troubled by the fact that appellant admitted that he was the object of a protective order.

{¶ 83} Landenberger further testified that he was familiar with appellant's vehicles and that appellant owned a distinctive black El Camino with numerous custom modifications. He identified the vehicle from a photograph.

{¶ 84} In order to prove the crime of conspiracy to commit murder, the state was required to establish the elements set forth in R.C. 2923.01:

> (A) No person, with purpose to commit or to promote or facilitate the commission of * * * murder, * * * shall do either of the following:
>
> (1) With another person or persons, plan or aid in planning the commission of any of the specified offenses;
>
> (2) Agree with another person or persons that one or more of them will engage in conduct that facilitates the commission of any of the specified offenses.
>
> (B) No person shall be convicted of conspiracy unless a substantial overt act in furtherance of the conspiracy is alleged and proved to have been done by the accused or a person with whom the accused conspired, subsequent to the accused's entrance into the conspiracy. For purposes of this section, an overt act is substantial when it is of a character that manifests a purpose on the part of the actor that the object of the conspiracy should be completed.
>
> (C) When the offender knows or has reasonable cause to believe that a person with whom the offender conspires also has conspired or is conspiring with another to commit the

> same offense, the offender is guilty of conspiring with that other person, even though the other person's identity may be unknown to the offender.
>
> (D) It is no defense to a charge under this section that, in retrospect, commission of the offense that was the object of the conspiracy was impossible under the circumstances.
>
> (E) A conspiracy terminates when the offense or offenses that are its objects are committed or when it is abandoned by all conspirators. In the absence of abandonment, it is no defense to a charge under this section that no offense that was the object of the conspiracy was committed.
>
> (F) A person who conspires to commit more than one offense is guilty of only one conspiracy, when the offenses are the object of the same agreement or continuous conspiratorial relationship.
>
> * * *
>
> (H)(1) No person shall be convicted of conspiracy upon the testimony of a person with whom the defendant conspired, unsupported by other evidence.
>
> * * *
>
> (J) Whoever violates this section is guilty of conspiracy * * * .

{¶ 85} R.C. 2923.01 does not require that both parties intend to commit the offense. "A conspiracy may be 'unilateral,' that is, one party who plans the underlying crime may still be guilty of conspiracy even if the other party does not act with the requisite culpable mental state but merely feigns agreement." *State v. Fitzgerald*, 9th Dist. No. 23072, 2007-Ohio-701, ¶ 25, citing *State v. Marian*, 62 Ohio St.2d 250 (1980), syllabus. While the offense of conspiracy requires an agreement to accomplish an unlawful object and an overt act in furtherance thereof, remuneration is not required. *State v. Lindsey*, 87 Ohio St.3d 479, 481 (2000). For purposes of the conspiracy statute, the phrase "overt act" means an open act, done outwardly, without an attempt at concealment and performed pursuant to and manifesting a specific intent or design. Such an act is substantial "when it is of such character as to manifest a purpose on the part of an actor that the object of the conspiracy should be completed." *State v. Papp*, 68 Ohio

App.2d 21, 23 (10th Dist.1980). When a defendant is charged with conspiracy, a trial court must instruct the jury on the essential elements of the underlying offense or offenses that form the basis of the conspiracy offense. *State v. Endicott*, 99 Ohio App.3d 688, 694 (6th Dist.1994); *State v. Smith*, 4th Dist. No. 97 CA 2547 (Mar. 15, 1999).

{¶ 86} Because appellant was charged with conspiracy to commit two different offenses, the state, in order to satisfy R.C. 2923.01(F), alleged two separate conspiratorial agreements or relationships. The first involved Fickenworth and Webb in a plot to murder Tammy. The second involved Vanblarcume in a plot to kidnap Tammy.

{¶ 87} With respect to the proposed murder, appellant clearly engaged, if the state's evidence is believed, in overt acts in furtherance of the conspiracy through his communications and actions with Fickenworth and (indirectly) Webb. The timing of the phone calls described by the prosecution, which appellant has not specifically contested on appeal, supports the evolution of appellant's plan and his action further thereof. Fickenworth's acts, and the reasonable inference that they were performed at the direction of appellant, based upon the address and identity of the proposed victim, were well supported by Webb's testimony. The recorded conversation between Webb and Fickenworth, followed by that between Fickenworth and appellant, when considered together, provide a firm basis to establish appellant's role at the heart of the matter. Various overt acts took place in furtherance of the conspiracy: appellant solicited Fickenworth for a ride to Tammy's home in order to shoot her with a .22 muffled by a towel; Fickenworth solicited Webb to kill Tammy and paid $3,500 toward this end; Fickenworth, who to Tammy's knowledge had never been to her new residence, knew her address and drove there and various locations with Webb to gather information to facilitate the murder; Fickenworth provided Webb with photographs of Tammy, with the strong inference that these were supplied by appellant; and Fickenworth provided Webb with a dedicated cell phone for future confidential communications. Various communications explicitly made clear that the object of the plot was to purposely cause the death of Tammy.

{¶ 88} Based upon this evidence heard at trial, the charge of conspiracy to commit murder is supported by sufficient evidence and is not against the manifest weight of the

evidence. Appellant's second and third assignments of error are accordingly overruled with respect to this conviction.

{¶ 89} In summary, appellant's first assignment of error is overruled. His second and third assignments of error are overruled in part and mooted to the extent that they address the charge of conspiracy to commit kidnapping. Appellant's conviction for kidnapping is vacated. His convictions for aggravated burglary, abduction, violation of a protection order, and conspiracy to commit murder are affirmed. The judgment of the Franklin County Court of Common Pleas is affirmed in part and vacated in part, and this cause is remanded to that court to enter judgment reflecting the jury's verdict on the conspiracy to commit kidnapping charge and to resentence appellant on all convictions.

Judgment affirmed in part and vacated in part;
cause remanded with instructions.

TYACK and SADLER, JJ., concur.