[Cite as *State v. Stefanovski*, 2010-Ohio-5304.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-107**
- vs -	:	
NATASHA STEFANOVSKI,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 08 CR 000555.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Natasha Stefanovski, appeals from the judgment entered by the Lake County Court of Common Pleas, after trial by jury, convicting her on one count of obstructing justice, a felony of the fifth degree. For the reasons herein, we affirm.

{¶2} On November 6, 2006, Dr. Robert Kalina was beaten, robbed, kidnapped, and eventually murdered. His body was discovered two days later in Mentor, Ohio near a garbage dumpster in an industrial complex. An investigation into Dr. Kalina's murder

persisted over the course of two years when, in 2008, authorities developed a lead. In the summer of 2008, the doctor's Rolex watch, which had been stolen during the incident, was recovered from an auction house in southern Ohio. Detective John Knack, of the Willoughby Police Department, along with other officers, traced the sale of the watch to a pawnshop located in Cleveland, Ohio. Paperwork obtained from the pawnshop indicated that one Jasmin Miljkovic had pawned the watch in November of 2006 for $700. Additional paperwork indicated Miljkovic later sold the watch to the pawnshop in February of 2007 for $2,200.

{¶3} With this lead, officers began to investigate Miljkovic's background, attempting to identify friends, family, or associates. The officers also checked records and registries from various local hotels on or near the date of the doctor's death. They discovered that Miljkovic was a registered guest at the Studio 6 motel in Mentor on the night of Dr. Kalina's murder.

{¶4} Additional information was collected and, in August of 2008, the investigating officers established a plan to speak with Miljkovic, as well as appellant, the mother of his daughter with whom he resided at the time of the crime. On August 22, 2008, Miljkovic and appellant were apprehended separately. Police conducted interviews with both parties. Although appellant conceded she was with Miljkovic throughout the night of November 6, 2006 and she knew something "really bad" had happened, she denied any direct knowledge of the crimes.

{¶5} After several days of rigorous questioning, Miljkovic confessed to the murder of Dr. Kalina. The facts, as related by Miljkovic, indicated that, while appellant did not participate in the criminal actions which lead to Dr. Kalina's murder, she later

assisted him in disposing of crucial evidence. Miljkovic later pleaded guilty to aggravated murder, aggravated robbery, aggravated burglary, and kidnapping. Based upon the information gleaned from Miljkovic, appellant was indicted by the Lake County Grand Jury on two counts of felony obstruction of justice and one count of tampering with evidence. She entered pleas of "not guilty" to all charges. The matter proceeded to trial where Miljkovic testified on behalf of the state. During his testimony Miljkovic explained the details of the crime and the extent of appellant's involvement.

{¶6} Miljkovic initially testified he did not intend to murder the doctor, but simply rob him. Miljkovic stated he had encountered Dr. Kalina, a dentist, while accompanying appellant to an appointment with a different doctor. Miljkovic testified he was particularly impressed by Dr. Kalina's Rolex watch. At later visits, Miljkovic stated he observed Dr. Kalina in a Mercedes parked outside his office.

{¶7} On November 4, 2006, Miljkovic and appellant were traveling past the medical building in which Dr. Kalina had his office when he noticed the Mercedes sitting in the parking lot. Later that day, Miljkovic testified he told appellant he was going to rob the doctor. Miljkovic testified he and appellant went into their storage closet and retrieved a gun. As he left the apartment, appellant purportedly cautioned Miljkovic to "[b]e careful, if you need me, call me."

{¶8} According to Miljkovic, he drove his vehicle to the medical building and entered through a side door. After locating Dr. Kalina in his office, Miljkovic demanded the Rolex and money. The doctor refused and a scuffle ensued. Miljkovic eventually brandished the firearm, pistol whipping the doctor "a couple times." Dr. Kalina, beaten and bloody, surrendered his wallet and a black leather bag containing, among other

things, a digital camera. Miljkovic then escorted Dr. Kalina out of the building and into his vehicle.

{¶9} Miljkovic testified he planned to take the doctor to the hospital; instead, however, he drove Dr. Kalina to a remote location and forced him out of the car. Miljkovic then demanded the watch, which the doctor relinquished. Miljkovic claimed the doctor then "called [him] some names," and threatened "that [he] was going to pay for it[.]" In a panic, Miljkovic testified he fatally shot the doctor in the chest one time. He subsequently entered his car and drove to the Studio 6 motel in Mentor, leaving Dr. Kalina's body next to a garbage dumpster.

{¶10} Miljkovic testified he checked into a room and called appellant at their apartment. He asked appellant to bring him a change of clothing and indicated he would explain the situation when she arrived. While waiting for appellant to arrive, Miljkovic testified he showered, dismantled the gun, and separated the property he had taken from Dr. Kalina which included a wallet, personal effects, the camera, the watch, and $7,800 in cash. Miljkovic set the items on a counter-top in the motel room.

{¶11} Appellant arrived and entered the room with Miljkovic's change of clothes. After appellant asked Miljkovic what had happened, he told her he had shot the doctor and said they needed to dispose of the gun. Miljkovic collected Dr. Kalina's property, keeping the watch, camera, and cash; he testified he placed the remaining items, with his bloody clothing, in a bag in the trunk of his car with the exception of a portion of the cash, which he gave to appellant. They drove by the place where Miljkovic shot the doctor, then to a nearby Walgreens where Miljkovic purchased two one-gallon jugs of water to clean the interior of the vehicle. According to Miljkovic, appellant suggested

that he additionally purchase some alcohol because it "kills everything." The couple then traveled to a car wash where Miljkovic washed the interior floor mats and the exterior of the vehicle. Eventually, appellant assisted Miljkovic in cleaning blood and fingerprints from the interior of the vehicle using the alcohol and wipes.

{¶12} Miljkovic testified the couple then drove to a bar in Cleveland called Milka's. Miljkovic left the bar briefly to fill the water jugs with gasoline. He returned to Milka's, picked up appellant, and the couple drove to Miljkovic's former place of employment to burn potentially incriminating items. Upon their arrival, appellant removed the bag from the trunk and dumped its contents into a barrel. Miljkovic dumped gasoline into the barrel and lit everything on fire. The couple then returned to Milka's for several more drinks.

{¶13} Upon leaving Milka's, Miljkovic told appellant to drive him to Edgewater Park in Cleveland in order to dispose of the gun. When they arrived, appellant parked the car and turned off the head lights. Miljkovic testified he then stepped out of the vehicle and threw the gun, which was in several pieces, into the lake.

{¶14} While driving back to the motel, the couple passed Dr. Kalina's office building. A tow truck and several police cars were in the parking lot. In the weeks following the murder, Miljkovic and appellant used the cash for shopping and paying bills. Miljkovic eventually pawned the Rolex for $700 and Miljkovic used the digital camera several times to photograph appellant and their daughter. In February of 2007, Miljkovic sold the Rolex for $2,200; Miljkovic testified he gave half of the money to appellant.

{¶15} Almost two years passed before Miljkovic was apprehended at his mother's house on August 22, 2008. After securing a search warrant, police recovered Dr. Kalina's camera from Miljkovic's bedroom. On August 22, 2008, appellant was also brought into the police station for an interview. During her interview, which was played during trial and a copy of the same was published to the jury, appellant initially denied any involvement with the crimes. She was eventually more forthcoming about the evening in question after speaking with her attorney.

{¶16} In particular, appellant stated that, around 5 or 6 p.m., on November 4, 2006, Miljkovic told her he was leaving their apartment and would return in a couple hours. She received a call from Miljkovic on November 4, 2006 requesting her to bring him clothes and a sponge to him at a motel in Mentor. When she arrived, appellant stated Miljkovic was in his boxers. Appellant stated Miljkovic instructed her not to touch anything and proceeded to take a shower. While waiting, appellant asserted she noticed a black leather case in the room, along with a black bag at the side of the wall that contained Miljkovic's clothing. After his shower, appellant claimed Miljkovic left the motel room for about 30 minutes and, when he returned, they drove to Cleveland.

{¶17} Once Miljkovic returned, appellant asserted she and Miljkovic went to Miljkovic's former employer's where he took a bag from the trunk. According to appellant, Miljkovic had indicated he intended on burning his clothes. Miljkovic walked away with the bag and, although appellant remained in the car, she stated she could see flames coming from behind the building. Appellant asserted they then went to Milka's for a couple drinks then went to the lake. Appellant claimed she stayed in the car while Miljkovic retrieved another bag from the vehicle's trunk and walked toward the

lake. She maintained she did not know what appellant was doing, but did observe Miljkovic making throwing movements. Appellant also recalled stopping somewhere where Miljkovic bought a bottle of alcohol to clean the backseat of the vehicle; she denied, however, helping him clean the vehicle's interior.

{¶18} Appellant told police she knew Miljkovic brutally beat somebody who he had gone to rob. She claimed, however, Miljkovic never told her he killed anyone or that Dr. Kalina was involved.

{¶19} On July 17, 2009, the jury returned a verdict finding appellant "guilty" of Count 2 of the indictment, obstructing justice; she was acquitted of counts 1 and 3. On July 19, 2009, appellant filed a motion for acquittal as to Count 2, which the court denied. Appellant was sentenced to a term of twelve months imprisonment and this timely appeal follows.

{¶20} Appellant assigns six errors for this court's review. Appellant's first assignment of error alleges:

{¶21} "The trial court erred to the prejudice of the defendant-appellant in entering a judgment of guilty to obstruction of justice, a fifth-degree felony, where the verdict form was insufficient to find a felony of the fifth degree, in violation of her rights to a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution."

{¶22} Under her first assignment of error, appellant argues the trial court erred in convicting her of felony-five obstruction because the jury verdict form failed to meet the mandates of R.C. 2945.75(A)(2).

{¶23} R.C. 2945.75(A)(2) provides:

{¶24} "[a] guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged."

{¶25} In *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, the Supreme Court of Ohio was faced with delineating the application and effect of the foregoing statute. In *Pelfrey*, the defendant was indicted for tampering with records, in violation of R.C. 2913.42. Tampering with records is a misdemeanor of the first degree absent a finding that the tampering involved government records, which would elevate the offense to a third-degree felony pursuant to R.C. 2913.42(B)(4). At Pelfrey's trial, the jury found the defendant guilty, and the trial court imposed a sentence for a third-degree felony. Neither the verdict form nor the trial court's verdict entry, however, stated the degree of the offense or that the jury found the aggravating element, i.e., that the records with which Pelfrey tampered were government records. Based on R.C. 2945.75, the Supreme Court concluded that the defendant could only be convicted of the least degree of offense under R.C. 2913.42, a first degree misdemeanor. In so doing, the Court formally held:

{¶26} "Pursuant to the clear language of R.C. 2945.75, a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense." *Pelfrey,* supra, at syllabus.

{¶27} In the matter sub judice, the jury found appellant guilty of obstructing justice. There are various degrees of obstructing justice under R.C. 2921.32.

Specifically, if the crime committed by the person aided is aggravated murder, it is a felony of the third degree. See R.C. 2921.32(C)(4). Moreover, if the crime committed by the person aided is any other felony, it is a felony of the fifth degree. See R.C. 2921.32(C)(3). Finally, if the crime committed by the person aided is a misdemeanor, it is the same degree of misdemeanor as the underlying misdemeanor crime. See R.C. 2921.32(C)(2).

{¶28} Here, appellant was charged in the indictment with felony-three obstructing justice as the crime aided was aggravated murder. The jury returned a verdict of guilty on the obstructing justice charge. The jury concluded, however, appellant neither knew nor had reason to believe the crime in which she aided was aggravated murder. The verdict forms read, respectively:

{¶29} "We, the jury, being duly impaneled and sworn, find the defendant, Natasha Stefanovski Guilty *** of Obstructing justice as charged in the indictment.

{¶30} "***

{¶31} "We, the jury, being duly impaneled and sworn, find the defendant, Natasha Stefanovski, guilty of obstructing justice, and we DO NOT *** find that Natasha Stefanovski knew or had reason to believe that the crime committed by the other person was aggravated murder."

{¶32} As the jury concluded appellant did not know or have reason to believe Miljkovic committed aggravated murder, the court was precluded from entering a judgment of conviction for felony-three obstruction. The court consequently determined appellant was guilty of felony-five obstruction.

{¶33} Appellant argues the trial court erred in entering a judgment of conviction for felony-five obstructing justice because the verdict form violated the clear language of R.C. 2945.75(A)(2) as construed in *Pelfrey.* That is, the verdict form did not contain a degree of the offense of which appellant was convicted and the jury did not find the aggravating factor. Accordingly, appellant asserts she is entitled to a finding of guilty on the least degree of the offense of obstructing justice, viz., a misdemeanor.

{¶34} Alternatively, the state argues appellant's failure to object to the verdict form waived all but plain error on appeal. Further, the state maintains that even though the verdict form did not state appellant was guilty of felony-five obstructing justice, such a conclusion was necessary because the crime in which she aided was *not* a misdemeanor. In other words, the state asserts the lowest degree of the offense with which appellant was charged was felony-five obstructing justice because the underlying crime committed by Jasmin Miljkovic, aggravated murder, was an unclassified felony offense, not a misdemeanor.

{¶35} We shall first address the state's argument regarding waiver. Prior to the Supreme Court's ruling in *Pelfrey*, the Second Appellate District held a defendant's "'failure to raise [an R.C. 2945.75(A)(2) challenge] at trial [does] not waive it ***.'" *State v. Pelfrey*, 2d Dist. No. 19955, 2005-Ohio-5006, at ¶23, quoting, *State v. Woullard*, 158 Ohio App.3d 31, 2004-Ohio-3395. Although the Supreme Court did not expressly address this issue in *Pelfrey*, we believe, at the very least, the conclusion was affirmed sub silento when the Court affirmed the second appellate district's decision in its entirety. Id. at 424, 426. Thus, appellant's failure to specifically object to the purported deficiency in the verdict form is of no moment.

{¶36} Turning to appellant's argument, R.C. 2921.32, in relevant part, can be a felony of the third degree if the underlying crime is aggravated murder; a felony of the fifth degree if the underlying crime is any other felony; or a misdemeanor of the same degree as the underlying misdemeanor crime in which the defendant is alleged to have aided. Appellant points out that, pursuant to *Pelfrey*, she is entitled to a finding of guilty on an unspecified misdemeanor because the jury form did not strictly follow the dictates of R.C. 2945.75(A)(2). Because the jury failed to follow the directive of R.C. 2945.75(A)(2), appellant's position has some ostensible merit. Because the jury form sufficiently comports with the statute, however, we find no error.

{¶37} Although the issue in this case is similar to *Pelfrey*, we believe the instant matter is distinguishable from the facts precipitating the Supreme Court's ruling in that case. In *Pelfrey*, the verdict form at issue neither contained the degree of the offense nor did it mention the aggravating factor necessary to convict the defendant of the greater degree of the offense of tampering with records. In effect, the verdict form was completely devoid of any information that could have allowed the jury to find the defendant guilty on the higher degree of the offense. Cf. *State v. McIntyre*, 9th Dist. Nos. 24934 and 24945, 2010-Ohio 2569. (A case released June 9, 2010, in which a defendant was convicted of, inter alia, obstructing justice, but the verdict form failed to mention the degree of the offense or an aggravating element. Because it was structurally identical to *Pelfrey*, the Ninth District reversed the conviction as a violation of R.C. 2745.75(A)(2).)

{¶38} Conversely, in this case, there was a "special finding" verdict form. While this verdict form did not specify the degree of the crime of obstructing justice, it did

mention the aggravating factor necessary to convict on the greater degree. And, even though the aggravating factor relating to appellant's knowledge of the commission of the aggravated murder was not found by the jury, the verdict form expressly included a specific reference to the underlying crime of aggravated murder. We believe this point, in conjunction with the crime with which appellant was charged and ultimately convicted are sufficient to differentiate the instant case from *Pelfrey*.

{¶39} As discussed above, obstructing justice requires an underlying crime. The underlying crime which appellant was alleged to have aided in was aggravated murder. To obtain the felony-three conviction, the state had to prove not only that appellant assisted in the destruction and/or concealment of evidence relating to the aggravated murder, but that she knew or had reason to believe Miljkovic committed aggravated murder. The jury found she did not possess the requisite mens rea to be convicted of felony-three obstruction. In order to reach the special finding, however, the jury necessarily drew the conclusion that appellant did obstruct justice by aiding Miljkovic in the commission of an underlying crime. Given the language of the special verdict form, the only offense appellant could have aided in, even if she aided unwittingly, was aggravated murder, an unclassified felony.

{¶40} We acknowledge that the verdict form did not specify the degree of the offense; it did, however, outline the aggravating factor. Reading the verdict form as a whole, the interplay between the jury's verdict of guilty on count two and the language of the special finding, indicate the only crime of which appellant could be convicted was felony-five obstructing justice, i.e., aiding in the commission of a felony without the

presence of the felony-three aggravating element of knowing or having reason to know the crime committed was aggravated murder.

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

{¶42} For her second assignment of error, appellant argues:

{¶43} "The trial court violated the defendant-appellant's due process rights to receive adequate notice of the charges against her as a result of a misleading indictment and overexpansive bill of particulars."

{¶44} Under her second assignment of error, appellant argues the state improperly used a bill of particulars to essentially amend her indictment to such a degree that the identity of the charge was changed.

{¶45} We first point out that appellant failed to raise the alleged defectiveness of the indictment at trial and thus the trial judge did not have a chance to consider the issue. When a defendant fails to preserve objections to an alleged defective indictment, the issues are generally forfeited and must be reviewed under a plain error analysis. See *State v. Colon*, 119 Ohio St.3d 204, 205, 2008-Ohio-3749. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). "Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise." *State v. Moreland* (1990), 50 Ohio St.3d 58, 62.

{¶46} Count Two of appellant's indictment alleged:

{¶47} "On or about the 4th day of November, 2006, as part of a continuing course of criminal conduct committed in different jurisdictions in which one or more element occurred in Lake County, State of Ohio, one Natasha Stefanovski, with purpose

to hinder the discovery, apprehension, prosecution, conviction, or punishment of Jasmin Miljkovic for a crime or to assist Jasmin Miljkovic to benefit from the commission of a crime, did destroy or conceal evidence of the crime or act, or induce Jasmin Miljkovic to withhold testimony or information or to elude legal process summoning him to testify or supply evidence

{¶48} "The crime committed by the person aided was Aggravated Murder.

{¶49} "This, to-wit: Obstructing Justice, constitutes a felony of the Third degree, contrary to and in violation of the Ohio Revised Code, Title 29 [Sec.] 2921.32(A)(4) and against the peace and dignity of the State of Ohio."

{¶50} Prior to trial, appellant requested a bill of particulars in order to clarify what the state intended to prove at trial. With respect to Count Two, the bill of particulars stated that appellant "did destroy and/or conceal physical evidence of the crimes or acts committed by Jasmin Miljkovic, including, but not limited to aggravated murder." Appellant asserts the language of the bill of particulars effectively changed the identity of the charge to the extent it suggested appellant would be tried for obstructing justice not just for Miljkovic's aggravated murder conviction, but other, unstated crimes he may have committed prior to, during, or after the murder of Dr. Kalinda. We disagree.

{¶51} The indictment is clear; it states the principle charge for which appellant would be tried (obstruction of justice), its numerical statutory designation (R.C. 2921.32(A)(4)), and expressly set forth the crime's felony classification (a felony of the third degree). It further set forth the criminal act in which she was alleged to have aided in committing the crime of obstruction of justice (aggravated murder). In addition, the bill of particulars set forth the alleged actions, enumerated under R.C. 2921.32(A)(4),

which led to the charge set forth under Count Two; namely, that appellant destroyed or concealed physical evidence of the crimes or acts committed by Miljkovic. Although the bill of particulars stated those crimes or acts included but were not limited to aggravated murder, neither the charging instrument nor the bill of particulars enumerates any additional crime(s). We therefore reject appellant's claim that the bill of particulars somehow changed the name or identity of the crime charged.

{¶52} The Supreme Court of Ohio has held that "[t]he purposes of an indictment are to give an accused adequate notice of the charge and enable an accused to protect himself or herself from any future prosecutions for the same incident." *State v. Buehner*, 110 Ohio St.3d 403, 405, 2006-Ohio-4707. Further, an indictment passes constitutional muster if it (1) contains the elements of the offense charged and fairly informs a defendant of the charge against which she must defend and (2) allows her to plead an acquittal or conviction in bar of future prosecutions for the same offense. Id. See, also, *State v. Childs*, 88 Ohio St.3d 558, 564-565, 2000-Ohio-425. Under the circumstances, the indictment, clarified by the bill of particulars, was sufficiently clear to apprise appellant of the charge set forth under Count Two. We therefore hold the indictment was constitutional.

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

{¶54} Appellant's third assignment of error provides:

{¶55} "The trial court erred to the prejudice of the defendant-appellant when it admitted ex.s 8 & 9 - - telephone records and charts made from them - - that had not been properly authenticated in violation of the defendant-appellant's state and federal constitutional rights to due process and a fair trial as guaranteed by the Fifth and

Fourteenth Amendments to the United States Constitution and Sections 10 and 16 of the Ohio Constitution."

{¶56} At trial, the state attempted to introduce certain telephone records from the apartment shared by appellant and Milijkovic, labeled State's Exhibit 8. The state also attempted to introduce a chart identifying the phone numbers called, the time of the calls, and the duration of each call. The chart was labeled State's Exhibit 9. Each exhibit was introduced during the testimony of Lt. Thomas Trem of the Willoughby Police Department and eventually admitted by the trial court.

{¶57} Appellant argues the trial court erred in admitting state's exhibits 8 and 9 as the state failed to lay a proper foundation for their admission pursuant to Evid.R. 803(6). The record indicates the defense objected to the introduction of State's Exhibit 9, but did not specifically object to State's Exhibit 8. Given that Exhibit 9 is simply a compilation of the relevant evidence included in Exhibit 8, however, we shall consider counsel's objection sufficient to preserve appellant's argument as to both admissions.

{¶58} The decision to admit or exclude evidence is within the sound discretion of the trial court and will not be reversed on appeal save an abuse of discretion. *State v. Sledge*, 11th Dist. No. 2001-T-0123, 2003-Ohio-4100, at ¶20. The phrase "abuse of discretion" "essentially connot[es] a judgment exercised by a court which neither comports with reason, nor the record." *State v. Porterfield*, 11th Dist. No. 2010-T-0005, 2010-Ohio-4287, at ¶30.

{¶59} In support of her argument, appellant cites this court's decision in *State v. Brown*, 11th Dist. 2004-T-0131, 2006-Ohio-129. In *Brown*, the trial court permitted the state to introduce telephone records demonstrating an inmate at a county jail had

regularly called a particular phone number. The records included an affidavit from a telephone company employee, the custodian of the records, attesting to the authenticity of the records. This court determined that the officer submitting the records could not lay a proper foundation for the telephone records because the affidavit did not qualify as "foundational testimony" and the officer did not have the "requisite knowledge with respect to the operation of the business *** which created the records, or the circumstances of the record's preparation." Id. at ¶34. As a result, this court concluded the records were not properly authenticated under Evid.R. 803(6).

{¶60} Evid.R. 803(6) permits records of regularly conducted activity to be admitted "*** if kept in the course of a regularly conducted business activity *** as shown by the testimony of the custodian or other qualified witness ***." Here, the state did not call "the custodian or [some] other qualified witness" to testify as to the authenticity of the phone records. Moreover, Exhibit 9 was produced from the information gleaned from the phone records in Exhibit 8; as a result, the information in Exhibit 9 cannot be considered information that is regularly maintained by law enforcement and therefore Lt. Trem was not qualified to authenticate it. Pursuant to Evid.R. 803(6) and this court's holding in *Brown*, Exhibits 8 and 9 should have been excluded.

{¶61} Despite this conclusion, the state put forth admissible evidence of the phone calls which were the subject of Exhibits 8 and 9. Miljkovic testified that, subsequent to the murder, while he was staying at the Studio 6 motel room, he placed a phone call to appellant at the couple's apartment. During this call, he claimed he gave appellant instructions to bring him a change of clothes to the motel, which she did.

Further, during appellant's interview with police, she conceded she received a phone call from Miljkovic to retrieve a change of clothes and bring it to the motel. Although the records were not properly authenticated, the record contained evidence that phone calls were received at the apartment from the motel on the day of the murder. Much like the records in *Brown*, therefore, the information in Exhibits 8 and 9 was cumulative of other properly admitted evidence and therefore any error in their admission was harmless.

{¶62} Appellant's third assignment of error is overruled.

{¶63} Appellant's fourth assignment of error contends:

{¶64} "The defendant-appellant's constitutional rights to due process under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution were prejudiced by the ineffective assistance of trial counsel."

{¶65} To sustain a claim of ineffective assistance of counsel, a defendant must show: (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the outcome of the proceeding would have been different when considered in relation to the totality of the evidence before the court. See, generally, *Strickland v. Washington* (1984), 466 U.S. 668.

{¶66} With regard to the first prong, counsel is entitled to a strong presumption that his or her conduct falls within the vast range of reasonable professional assistance. Appellant must therefore overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." Id. at 689. Strategic and

tactical decisions fall squarely within the scope of professionally reasonable judgment. Id. at 699.

{¶67} With respect to the second prong, appellant must demonstrate she was prejudiced by "a probability sufficient to undermine confidence in the outcome." Id. at 694. The inquiry is whether counsel's errors were so serious as to deprive appellant of a proceeding whose results are reliable, i.e., "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686.

{¶68} Any questions regarding the ineffectiveness of counsel must be viewed in light of the evidence against the defendant with a strong presumption that counsel's conduct is within the broad range of professional assistance. See, e.g., *State v. Bradley* (1989), 42 Ohio St.3d 136,142-143.

{¶69} Under this assignment of error, appellant first claims counsel was ineffective for failing to move to dismiss the indictment or, in the alternative, the bill of particulars. As discussed under appellant's second assignment of error, the indictment, clarified by the bill of particulars, was sufficiently specific to place appellant on notice of the crime with which she was charged and mount an informed defense. In short, the documents passed constitutional muster. Even had counsel moved to dismiss the indictment or, in the alternative, object to the bill of particulars, such requests would have been properly denied by the trial court. Hence, the indictment and bill of particulars, as they were filed, neither undermined the reliability of the adversarial process nor affected the overall reliability of the proceedings themselves.

{¶70} Next, appellant argues counsel was ineffective for failing to object to the verdict form. As discussed under appellant's first assignment of error, a failure to object pursuant to R.C. 2945.75(A)(2) does not operate as a waiver of the statutory challenge on appeal. See *Pelfrey*, supra, at 424, 426. As a matter of law, therefore, appellant could not be prejudiced by counsels' failure to object. Regardless, our analysis under appellant's first of assignment of error demonstrates the jury's verdict form in this case did not violate R.C. 2945.75(A)(2) as construed in *Pelfrey.*

{¶71} Appellant's fourth assignment of error is without merit.

{¶72} We shall next consider appellant's fifth assignment of error, which asserts:

{¶73} "The trial court erred to the prejudice of the defendant appellant when it denied her motion for acquittal made pursuant to Crim.R. 29(A)."

{¶74} An inquiry into the sufficiency of the evidence asks whether the state introduced adequate evidence to support the verdict as a matter of law. *State v. Ansell*, 11th Dist. No. 2008-P-0111, 2009-Ohio-4802, at ¶43. "An appellate court reviewing whether the evidence was sufficient to support a criminal conviction examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the mind of the average juror of the defendant's guilt beyond a reasonable doubt." *State v. Troisi*, 179 Ohio App.3d 326, 329, 2008-Ohio-6062. A reviewing court may not reweigh or reinterpret the evidence; rather, the proper inquiry is, after viewing the evidence most favorably to the prosecution, whether the jury could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273.

{¶75} Appellant was found guilty of obstructing justice pursuant to R.C. 2921.32(A)(4). In order to meet its burden, the state was required to prove, beyond a reasonable doubt, that appellant, with purpose to hinder the discovery, apprehension, prosecution, conviction, or punishment of Miljkovic for crimes or to assist Miljkovic to benefit from the commission of a crimes, did destroy or conceal physical evidence of the crimes. The indictment identified the underlying crime as aggravated murder. Pursuant to R.C. 2921.32(C)(4), when the underlying crime is aggravated murder, the crime of obstructing justice is a felony of the third degree. Thus, to find appellant guilty of felony-three obstruction, the state was required to additionally prove that the crime committed by Miljkovic, the person aided, was aggravated murder and appellant knew or had reason to believe that the crime in which she aided was aggravated murder. Id.

{¶76} Notwithstanding this conclusion, appellant argues that because the jury concluded appellant did not know or have reason to believe Miljkovic committed the crime of aggravated murder, it failed to prove the underlying crime. We disagree.

{¶77} At trial, Miljkovic testified at length about the details of the murder. After being arrested, he further testified that he pleaded guilty to a charge of aggravated murder and a certified judgment of conviction was admitted into evidence. This evidence demonstrates the state put forth sufficient evidence to prove, beyond a reasonable doubt, the underlying "primary" offense as alleged in the indictment.

{¶78} With respect to appellant's argument, the jury's verdict did not indicate the state failed to prove the underlying crime; rather, it provided that the state failed to prove beyond a reasonable doubt that appellant "knew or had reason to believe" Miljkovic committed aggravated murder. Without this specification, the court could not enter

judgment for felony three obstruction. Still, as discussed under appellant's first assignment of error, the state established at trial that Miljkovic committed the underlying crime of aggravated murder, an unclassified felony. Because this crime is a felony, the trial court had sufficient evidence before it to enter judgment for felony five obstruction.

{¶79} With these points in mind, we further hold the state put forth sufficient evidence of the remaining elements of the crime of obstructing justice. During his testimony, Miljkovic detailed how, after beating, kidnapping, robbing, and finally murdering Dr. Kalina, appellant aided him in concealing and destroying evidence.

{¶80} Miljkovic testified that after the murder he checked into a motel and called appellant to bring him clean clothes. Appellant brought the clothes, at which time, Miljkovic asserted he disclosed his crime. Miljkovic testified he gave appellant most of the cash he took from the doctor. They left the motel and, according to Miljkovic, "took [appellant] around [the] place where [he] shot [the] doctor." The couple then purchased some water and two bottles of alcohol to scrub the interior of Miljkovic's car; according to Miljkovic, appellant suggested alcohol "kills everything." They then went together to have the exterior of Miljkovic's vehicle washed. After Miljkovic purchased some gasoline, the couple then proceeded to burn Miljkovic's bloody, soiled clothing as well as some miscellaneous items belonging to the deceased doctor. According to Miljkovic, appellant "dumped" Miljkovic's used clothing into a barrel, which Miljkovic doused with gas and subsequently lit. Next, Miljkovic testified appellant drove him to Edgewater Park where he tossed the firearm he used to murder the doctor into the lake. Later, Miljkovic testified appellant assisted him in cleaning the interior of his

vehicle with "wipes" and the alcohol purchased earlier. Miljkovic testified appellant did all of the above voluntarily and, at no point, did she ask to leave or go to the police.

{¶81} The above evidence was sufficient to show appellant, with purpose to hinder the discovery, apprehension, prosecution, conviction, or punishment of Miljkovic, did destroy or conceal physical evidence of Miljkovic's crime, to wit, aggravated murder.

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

{¶83} Finally, we shall address appellant's sixth assignment of error, which contends:

{¶84} "The trial court erred to the prejudice of the defendant-appellant when it returned a verdict of guilty against the manifest weight of the evidence."

{¶85} While a test of evidential sufficiency requires a determination of whether the state has submitted enough evidence to meet its burden of production, a manifest weight inquiry examines whether the state met its burden of persuasion. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52. (Cook, J., concurring). That is, a manifest weight challenge concerns:

{¶86} "'[T]he 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, citing Black's Law Dictionary (6th Ed. 1990).

{¶87} The appellate court must bear in mind the trier of fact's superior, first-hand perspective in judging the demeanor and credibility of witnesses. See *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The power to reverse on "manifest weight" grounds should only be used in exceptional circumstances, when "the evidence weighs heavily against the conviction." *Thompkins*, supra. As a result, a reviewing court will not reverse a conviction where there is substantial evidence upon which the court could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt. *State v. Johnson* (1991), 58 Ohio St.3d 40, 42.

{¶88} Appellant argues, under her final assignment of error, that the evidence in this matter weighed heavily against the jury's verdict because Miljkovic's testimony had no credibility and was fundamentally unbelievable. In support, appellant notes Miljkovic conceded he had given six different versions of the events, five of which did not include her; Miljkovic was an admitted liar; Miljkovic was admittedly angry that appellant had spoke with authorities; and Miljkovic was admittedly upset with appellant because she would not allow him to see their daughter. Appellant maintains that Miljkovic's credibility problems in conjunction with appellant's version of events (indicating she never actually was aware that Miljkovic murdered the doctor) militate strongly against the conviction.

{¶89} Notwithstanding these points, various aspects of appellant's version of events were consistent with Miljkovic's. Appellant conceded Miljkovic called her to bring him clothes at the motel; she conceded she drove with Miljkovic to burn his clothing; she also admitted she accompanied Miljkovic to Edgewater park where appellant disposed of the firearm; finally, appellant confirmed she was with Miljkovic when he purchased

the alcohol, which was eventually used to clean the interior of Miljkovic's car. Although she maintained Miljkovic remained stoic and uncommunicative about his behavior that evening, the jury was free to reject her story in view of Miljkovic's testimony.

{¶90} Although Miljkovic was an admitted murderer, liar, and thief, the jury nevertheless found his detailed testimony of the events, which occurred on the evening of November 6, 2006, compelling. It is a long-standing principle of appellate law that a reviewing court is required to defer to the factual findings of the jury regarding the weight to be given the evidence and credibility of witnesses. *DeHass*, supra. As a result, "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123. If the evidence is susceptible to more than one interpretation, a reviewing court must interpret it in a manner consistent with the verdict. *Warren v. Simpson* (Mar. 17, 2000), 11th Dist. No. 98-T-0183, 2000 Ohio App. LEXIS 1073, *8.

{¶91} With these points in mind, we hold there was sufficient, persuasive evidence to support the jury's verdict. Thus, the jury did not lose its way in convicting appellant of obstruction of justice.

{¶92} Appellant's final assignment of error is overruled.

{¶93} For the reasons discussed in this opinion, appellant's six assignments of error are not well taken.

As a result, the judgment of the Lake County Court of Common Pleas is hereby affirmed.

MARY JANE TRAPP, P.J.,

TIMOTHY P. CANNON, J.,

concur.