[Cite as *State v. Bradford*, 2010-Ohio-6429.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-04-032
	:	O P I N I O N
- vs -		12/29/2010
	:	
DONTA BRADFORD,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 09CR25934

Rachel A. Hutzel, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Keith L. O'Korn, 440 Polaris Parkway, Westerville, Ohio 43082, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Donta Bradford, appeals his conviction in the Warren County Court of Common Pleas for burglary and menacing by stalking. For the reasons outlined below, we affirm.

{¶2} Appellant was indicted on one count of burglary in violation of R.C. 2911.12(A)(2), a second-degree felony, and two counts of menacing by stalking in violation of R.C. 2903.211(A)(1), both fourth-degree felonies. Following a two-day jury trial, appellant was found guilty on all counts and sentenced to serve a total of six years

in prison.[1]

{¶3} Appellant now appeals from his conviction, raising four assignments of error. For ease of discussion, appellant's assignments of error will be addressed out of order.

{¶4} Assignment of Error No. 2:

{¶5} "APPELLANT'S CONVICTIONS WERE BOTH AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WERE NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1, 10 & 16 OF THE OHIO CONSTITUTION."

{¶6} In his second assignment of error, appellant argues his conviction was not supported by sufficient evidence, and his conviction was against the manifest weight of the evidence.

{¶7} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. See *State v. Curtis*, Brown App. No. CA2009-10-037, 2010-Ohio-4945, ¶18; *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. In reviewing the sufficiency of the evidence underlying a criminal conviction, the appellate court examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *Curtis* at ¶18. In reviewing a record for sufficiency, "the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id.

{¶8} While the test for sufficiency requires a determination as to whether the

1. Appellant was also indicted for telecommunications harassment in violation of R.C. 2917.21(A)(5), but the trial court severed this charge under Crim.R. 8(A) to be tried separately.

state has met its burden of production at trial, a manifest weight challenge 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. Id. at ¶19. In determining whether a conviction is against the manifest weight of the evidence, the appellate court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. Id. However, while appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, these issues are primarily matters for the trier of fact to decide. Id.; *State v. Ligon*, Clermont App. No. CA2009-09-056, 2010-Ohio-2054, ¶23.

{¶9} "Because sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency. Thus, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." *Curtis*, 2010-Ohio-4945 at ¶20, quoting *State v. Carroll*, Clermont App. Nos. CA2007-02-030, CA2007-03-041, 2007-Ohio-7075, ¶119.

Menacing by Stalking

{¶10} Appellant first disputes the state proved, beyond a reasonable doubt, that he committed the crime of menacing by stalking when he entered the victim's home on June 10, 2009. To support his argument, appellant points to the victim's prior statement during the preliminary hearing that she was "not afraid" appellant was going to "harm" her when he entered her home the night of June 10, 2009.

{¶11} Appellant was charged with menacing by stalking in violation of R.C. 2903.211(A)(1), which states, in pertinent part:

{¶12} "No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or cause mental distress to the other person."

{¶13} "Mental distress" is defined by R.C. 2903.211(D)(2) as:

{¶14} "(a) Any mental illness or condition that involves some temporary substantial incapacity;

{¶15} "(b) Any mental illness or condition that would normally require psychiatric treatment, psychological treatment, or other mental health services, whether or not any person requested or received psychiatric treatment, psychological treatment, or other mental health services."

{¶16} In the case at bar, although the victim originally testified she did not fear appellant would "harm" her or her daughter during the burglary, she testified at trial that despite ending her relationship with appellant, he would repeatedly come to her home and "bang on [her] door." The victim also testified that despite asking appellant to cease calling her, he would "call 50 times after that" and "he was a hard person to get rid of." Moreover, the state presented evidence that appellant left several threatening voicemail messages on the victim's phone between June 1 and June 10, 2009. During the second voicemail, appellant told the victim "I will f*** you up * * * pull you by your f****** hair and chop your f****** head off[.]"

{¶17} Regarding appellant's voicemail and his overall behavior, the victim stated the following at trial:

{¶18} "STATE: Now, how did that phone [call] make you feel – when you received that voicemail?

{¶19} "VICTIM: I'm a different person now, I'm changed. I didn't grow from this, I didn't get stronger from this. It changed me. I live in fear, I never sleep. I have every

light on in my home.

{¶20} " * * *

{¶21} "STATE: Before June 10th, June 11th, how did you perceive [appellant's] conduct? How did it make you feel? The way that he was acting and the messages he was leaving for you?

{¶22} "VICTIM: Just, I felt violated * * * I shouldn't have to listen, hear this behavior, be around it and not be protected. So, I was continually calling the police and stressing my concern on him coming back because he would not go away. Even when they asked him to stop coming back, he didn't listen to them."

{¶23} Upon viewing the evidence in its totality, we find a rational jury could have found, beyond a reasonable doubt, that appellant knowingly caused the victim to believe he would cause her mental distress, if not physical harm. This court has previously held the "state need only show that a defendant knowingly caused the victim to *believe* that he would cause her mental distress or physical harm." *State v. Hart*, Warren App. No. CA2008-06-079, 2009-Ohio-997, ¶31. (Emphasis added.) Therefore, "neither actual physical harm nor actual mental distress is required." Id., quoting *State v. Horsley*, Franklin App. No. 05AP-350, 2006-Ohio-1208, ¶45.

{¶24} After reviewing the record and weighing all of the evidence, we cannot say the jury clearly lost its way and created a manifest miscarriage of justice requiring reversal of appellant's conviction for menacing by stalking. Accordingly, we find appellant's menacing by stalking conviction is not against the manifest weight of the evidence.

Burglary

{¶25} Regarding his burglary conviction, appellant first argues the state failed to prove the element of "trespass." See R.C. 2911.12(A)(2). Specifically, appellant argues

his burglary conviction is against the manifest weight of the evidence because he lived with the victim "up until the time of the incident."

{¶26} As previously stated, appellant was convicted of burglary in violation of R.C. 2911.12(A)(2), which provides: "(A) No person, by force, stealth, or deception, shall do any of the following: * * * (2) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense[.]"

{¶27} R.C. 2911.21 defines criminal trespass, in pertinent part, as: "(A) No person, without privilege to do so, shall do any of the following: (1) Knowingly enter or remain on the land or premises of another[.]" Privilege is the distinguishing characteristic between unlawful trespass and lawful presence on the land or premises of another. See *State v. Russ* (June 26, 2000), Clermont App. No. CA99-07-074, at 7. Privilege is "an immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity." R.C. 2901.01(A)(12). "Where no privilege exists, entry constitutes trespass." *Russ* at 7, quoting *State v. Lyons* (1985), 18 Ohio St.3d 204, 206.

{¶28} Appellant argues the state did not establish the underlying act of trespass required for a burglary conviction. Appellant prefaces his argument on the contention that he lived with the victim, and was therefore privileged to be on the premises. To support his argument, appellant points to testimony that (1) the victim purchased a vehicle for appellant; (2) appellant spent up to three nights per week at the victim's home; and (3) his clothes were in the victim's home.

{¶29} As to the element of trespass, the state presented the following evidence.

First, the victim and her daughter repeatedly testified appellant did not live in the victim's home. Both women also testified appellant did not keep more than one piece of clothing, if any, at the victim's home, and that appellant never had a key to the home. The women also testified the victim was the sole mortgagor of the home, and appellant did not pay "a dime for anything" in the home, including rent. The victim's daughter also testified she picked up her mother's mail every day, and never found any mail addressed to appellant. From this evidence, it can reasonably be inferred that appellant did not, in fact, live with the victim.

{¶30} Moreover, the evidence indicates the victim revoked any privilege appellant may have had to enter her home prior the incident on June 10, 2009. See *State v. Steffen* (1987), 31 Ohio St.3d 111, 115 ("a privilege once granted may be revoked"); *State v. Ray*, Lucas App. No. L-04-1273, 2005-Ohio-5886, ¶20 ("past consent does not constitute current consent"). Specifically, the state presented the following testimony during trial:

{¶31} "STATE: Before June 10, 2009. [sic] had you told [appellant] he was no longer permitted in your home?

{¶32} "VICTIM: I told [appellant] many times that.

{¶33} "STATE: When was the last time that [appellant] had been in your home before that day?

{¶34} " * * *

{¶35} "VICTIM: Probably a week before that and then * * * when I got news about other things he had done to me, I just totally, that was it. I was never going to answer the door, answer the phone, I just totally am finished."

{¶36} This evidence indicates that during the burglary, appellant neither lived in the victim's home, nor did he have the privilege to be on the premises. While the jury

also heard appellant's testimony that he lived with the victim at the time of the offense, it clearly chose to disbelieve appellant's version of the events.

{¶37} Appellant next argues the state offered insufficient evidence to prove he had the purpose to commit any crime when he entered the victim's home. See R.C. 2911.12(A)(2).

{¶38} After a thorough review of the record, and while appellant may claim he merely "fell" into the victim's window and did not intend to harm or frighten anyone, it is well established that "[w]hen conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution testimony." *State v. v. Clements*, Butler App. No. CA2009-11-277, 2010-Ohio-4801, ¶25. In this matter, the state presented evidence that appellant entered the victim's home after forcibly breaking her bedroom window. During the night, appellant called the victim's cellular phone multiple times, leaving voicemail messages threatening to behead the victim. Taken together, these events provide sufficient circumstantial evidence that appellant entered the victim's home to commit a violent offense, such as attempted assault, assault, or even felonious assault. Cf. *State v. Hart*, Warren App. No. CA2008-06-079, 2009-Ohio-997.

{¶39} As a result, because the state presented an abundance of evidence that clearly indicates appellant entered the victim's home with the purpose to commit a crime, we find the jury did not lose its way so as to create such a manifest miscarriage of justice requiring appellant's burglary conviction to be reversed. Accordingly, appellant's burglary conviction is not against the weight of the evidence.

{¶40} As we have already determined that appellant's convictions for burglary and menacing by stalking were not against the manifest weight of the evidence, we necessarily conclude there was sufficient evidence to support the guilty verdicts in this

case.

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

{¶42} Assignment of Error No. 3:

{¶43} "THE COURT PLAINLY ERRED IN CONTRAVENTION OF *OREGON V. ICE*, BY IMPOSING CONSECUTIVE SENTENCES WITHOUT MAKING THE REQUIRED STATUTORY FINDINGS PURSUANT TO R.C. §§ 2929.14(E)(4), 2929.41(A)."

{¶44} In his third assignment of error, appellant argues *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711, "abrogated" the Ohio Supreme Court's holding in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, and the trial court thus failed to make the requisite findings under R.C. 2929.14(E)(4) and 2929.41(A) when it imposed consecutive sentences.

{¶45} *Foster* severed Ohio's statutory sentencing scheme requiring certain judicial findings before imposing maximum, consecutive, or nonminimum sentences. As we have already held, the United States Supreme Court did not expressly overrule *Foster* in the *Ice* decision. See *State v. Lewis*, Warren App. Nos. CA2009-02-012, CA2009-02-016, 2009-Ohio-4684, ¶10. Unless or until *Foster* is reversed or overruled, we are required to follow the law and decisions of the Ohio Supreme Court. Id. While the Ohio Supreme Court has acknowledged *Ice*, it has not yet addressed the application of *Ice* to *Foster.* See *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478; *State v. Hunter*, 123 Ohio St.3d 164, 2009-Ohio-4147. Thus, we see no reason to revisit these issues and decline appellant's invitation to reconsider our position at this time. See *Lewis*; *State v. McGraw*, Fayette App. No. CA2009-10-020, 2010-Ohio-3949.

{¶46} Accordingly, appellant's third assignment of error is overruled.

{¶47} Assignment of Error No. 1:

{¶48} "THE JURY INSTRUCTIONS VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL AND RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION, ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION, CRIMINAL RULES 30 AND 31, AND CONSTITUTED STRUCTURAL AND PLAIN ERROR."

{¶49} In his first assignment of error, appellant makes numerous challenges to the trial court's jury instructions. However, because appellant failed to object to the jury instructions or request supplemental instructions before the jury retired to consider its verdict, we find he has waived all but plain error on appeal. See *State v. Hartman*, 93 Ohio St.3d 274, 289, 2001-Ohio-1580.

{¶50} A plain error is any error or defect "affecting substantial rights [that] may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). "Notice of plain error must be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Smith*, Fayette App. No. CA2006-08-030, 2009-Ohio-197, ¶38. Accordingly, an error does not rise to the level of plain error unless, but for the error, the outcome of the trial would have been different. Id.

{¶51} First, appellant argues the trial court improperly commented on the habitation of the victim's home during jury instructions by stating the following:

{¶52} "Before you can find the defendant guilty, you must find beyond a reasonable doubt, that * * * the defendant, by force, trespass, in an occupied structure, which was a permanent or temporary habitation of [the victim], when another person was present, or likely to be present, with the purpose to commit any crime. * * * So, the first part, about this occupied structure. There's really not an issue here. The defendant admits that the house that is involved in this case, was an occupied structure under the

law and that the house was the permanent habitation of [the victim], and she was present when the defendant entered the house."

{¶53} Appellant argues this instruction required the jury to "presume that the condo was the permanent habitation of [the victim] but not the cohabitation of [appellant]," which foreclosed the jury's consideration of appellant's defense of privilege to enter the home. Appellant also suggests this comment constituted judicial misconduct. We disagree on both grounds.

{¶54} R.C. 2909.01(C) defines "occupied structure" as:

{¶55} "[A]ny house, building, outbuilding, watercraft, aircraft, railroad car, truck, trailer, tent, or other structure, vehicle, or shelter, or any portion thereof, to which any of the following applies:

{¶56} "(1) It is maintained as a permanent or temporary dwelling, even though it is temporarily unoccupied and whether or not any person is actually present.

{¶57} "(2) At the time, it is occupied as the permanent or temporary habitation of any person, whether or not any person is actually present.

{¶58} "(3) At the time, it is specially adapted for the overnight accommodation of any person, whether or not any person is actually present.

{¶59} "(4) At the time, any person is present or likely to be present in it."

{¶60} In the case at bar, we find the trial court's statements do not rise to the level of plain error. Rather, appellant mischaracterizes the nature of the trial court's statements, which conform to the definition of "occupied structure," as well as to the related suggested jury instructions.[2] Contrary to appellant's argument, this instruction

2. **{¶a}** The suggested jury instructions for R.C. 2911.12(A)(2) state:

{¶b} "The defendant is charged with burglary. Before you can find the defendant guilty, you must find beyond a reasonable doubt that on or about the ____ day of _____, _____, and in _____ County, Ohio, the defendant, by (force) (stealth) (deception) trespassed in * * * (an occupied

does not invite the jury to find that no one *else* lived in the victim's home. We find the trial court merely provided the jury with the necessary information for purposes of giving its verdict pursuant to R.C. 2945.11: namely, the incident took place in the victim's home, which was clearly consistent with the definition of occupied structure under R.C. 2909.01(C).

{¶61} Reading the trial court's statements in their entirety, we find the instruction did not preclude the jury from considering appellant's argument that he, too, lived in the victim's home. Although no judicial commentary on this issue would have been preferred, there is no evidence that appellant was prejudiced by the trial court's statements, where ample evidence existed to refute appellant's privilege argument. As evidenced by the verdict, it is apparent that the jury believed the testimony of the prosecuting witnesses and the corroborating evidence presented by the state, and as previously discussed, such evidence was sufficient to support the guilty verdict. See, e.g., *State v. DeHass* (1967), 10 Ohio St.2d 230, 231.

{¶62} Further, because the trial court's instructions sufficiently complied with the applicable suggested instructions, we find the court's statements did not constitute judicial misconduct. Cf. *State v. Casino*, Cuyahoga App. No. 92536, 2010-Ohio-510. In addition, appellant's argument above goes to the issue of trespass, which was adequately covered by the court's instruction.

{¶63} The second issue appellant presents within this assignment of error relates to his claim that the trial court committed structural and plain error when it failed to specify the alleged crime appellant had the "purpose to commit" during the alleged burglary. We disagree.

---

structure) * * * that was the permanent or temporary habitation of *(insert name of occupant)* when another person (other than an accomplice of the defendant) was (present) (likely to be present), with purpose to

{¶64} The Ohio Supreme Court addressed this very issue in *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787. In *Gardner*, the defendant was charged with aggravated burglary pursuant to R.C. 2911.11(A)(2), but the trial court did not give the jury a specific crime to consider in determining defendant's intent in entering the victim's home. The Court held defendant was not deprived of a unanimous verdict because there was no jury confusion where the state presented evidence of "only crimes within a single conceptual grouping – assault, felonious assault, or menacing." Id. at ¶79.

{¶65} Similarly, in the case at bar, the state presented evidence supporting crimes of a "single conceptual grouping," or, as the state characterized it, "crimes of violence," namely: assault, attempted assault, or menacing by stalking. As in *Gardner*, a reasonable jury could conclude that appellant's threatening voicemail messages and suspicious drive-by activities were a "criminal offense" of some form, even without a specific instruction as to the elements of assault, attempted assault, or menacing by stalking. Thus, given the evidence presented by the state, the absence of any apparent jury confusion regarding the "any criminal offense" element, and that the state did not present a "multiple-acts" case or submit evidence suggesting that the "any criminal offense" element was satisfied by crimes of "distinct conceptual groupings," we find no risk of manifest injustice in the court's instruction. Id. at ¶87. Accordingly, appellant's second argument is meritless.

{¶66} Third, appellant claims additional prejudice resulted from the jury instructions relating to the menacing by stalking charges. While somewhat unclear, appellant appears to argue pursuant to *Gardner*, he was entitled to an instruction requiring a unanimous finding that he caused the victim to believe he would cause her

---

commit therein the offense of *(insert name of applicable criminal offense)*." 4 Ohio Jury Instructions (2005), Section 511.12(1) at 388. (Emphasis in original.)

either physical harm *or* mental distress.

{¶67} The trial court instructed the jury as follows regarding R.C. 2903.211(A)(1): "Before you can find the defendant guilty, you must find beyond a reasonable doubt, that from the first through the 16th day of June in 2009, * * * the defendant did knowingly engage in a pattern of conduct, causing another to believe that he will cause physical harm to the other person or cause mental distress to said other person. So, it's in the alternative, either causing [the victim] to believe that he would cause her physical harm, or that he caused her mental distress."

{¶68} Because the jury instructions adequately tracked the language of the indictment and R.C. 2903.211(A)(1), we find no error therein. See *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017. Accordingly, appellant's third argument is meritless.

{¶69} Fourth, appellant argues the trial court improperly instructed the jury that his prior domestic violence convictions could be used to assess his credibility. Because appellant failed to object to this instruction, his argument is again limited to plain error review.

{¶70} In 2002, appellant was convicted of domestic violence in the Mason Municipal Court pursuant to Mason Cod. Ord. 537.14. Additionally, in 2004, appellant received a second domestic violence conviction in the Hamilton County Municipal Court pursuant to R.C. 2919.25.

{¶71} At trial, the court granted the state's request to instruct the jury they could use the prior convictions to assess appellant's credibility.

{¶72} Evid.R. 609 provides in relevant part:

{¶73} "(A) General Rule. For the purpose of attacking the credibility of a witness:

{¶74} " * * *

{¶75} "(3) Notwithstanding Evid.R. 403(A), but subject to Evid.R. 403(B),

evidence that any witness, including an accused, has been convicted of a crime is admissible if the crime involved dishonesty or false statement, regardless of the punishment and whether based upon state or federal statute or local ordinance."

{¶76} Under Evid.R. 609(A)(3), "all convictions for crimes involving dishonesty or false statement, regardless of the possible punishment, are admissible for purposes of impeaching witnesses." *State v. McCrackin*, Butler App. No. CA2001-04-096, 2002-Ohio-3166, ¶34, quoting Weissenberger's Ohio Evidence Treatise (2002) 258, Section 609.5. While convictions for offenses like perjury, subornation of perjury, bribery, false statement, criminal fraud, embezzlement, false pretense or concealment clearly fall within the scope of Evid.R. 609(A)(3), offenses solely involving force, assault, disorderly conduct, criminal damaging, public intoxication or driving under the influence clearly do not. *McCrackin* at ¶34.

{¶77} In the case at bar, appellant's convictions for domestic violence were not admissible pursuant to Evid.R. 609(A)(3), because domestic violence is not an offense involving dishonesty or false statement. Id. at ¶35. Therefore, we find the trial court erred in instructing the jury it could use appellant's prior domestic violence convictions to assess his credibility. However, we also find the trial court's error did not rise to the level of plain error.

{¶78} First, as we previously found, ample, if not overwhelming, evidence existed connecting appellant to the crimes to permit the jury to choose to believe the state's evidence over appellant's testimony. In fact, several aspects of appellant's version of events appeared implausible. For instance, appellant asserted he "fell" through the victim's bedroom window. However, the victim's daughter testified the window was three to four feet from the ground, and one would "literally have to go through the bushes * * * maybe two feet above the bottom of the window that you would have to climb through

the bushes to break the window." The state also presented photographs taken by an officer of the Mason Police Department, depicting heavy shrubbery in front of the victim's windows.[3]

{¶79} In light of the evidence challenging appellant's credibility in this case, we conclude the trial court's erroneous statement regarding the use of appellant's prior domestic violence convictions to assess his credibility did not prejudice appellant, nor rise to the level of plain error. Accordingly, appellant's fourth argument is meritless.

{¶80} Fifth, appellant argues the trial court erred in failing to issue an instruction that the victim's prior statements could be used for substantive purposes to show his innocence, rather than just for impeachment purposes against the victim. Appellant's argument relates to the following testimony during the preliminary hearing in September 2009:

{¶81} "STATE: Did you fear he was going to harm you that night?

{¶82} "VICTIM: Not me, no.

{¶83} "STATE: Were you in fear that he was going to harm some family member?

{¶84} "VICTIM: When he opened the door and looked at us both he did not say one word, he left. That's when I realized it wasn't about getting us."

{¶85} This court has held that a "victim is not a party opponent," and "[o]ut of court statements of a victim are not statements of a party opponent." *State v. Browning* (Dec. 19, 1994), Clermont App. No. CA94-04-022, at 6; *State v. Ingram*, Butler App. No. CA2006-01-012, 2006-Ohio-4559, ¶8. At this time, we find no compelling reason to

3. While not argued on appeal, we note appellant's prior domestic violence convictions were admissible to prove he had a history of violence to justify a statutory enhancement of the penalty for his menacing by stalking conviction. R.C. 2903.211(B)(2)(e). Additionally, we find these prior convictions were admissible pursuant to Evid.R. 404(B), as contradictory evidence to appellant's testimony that he accidentally "fell" through the victim's window and had no intention of scaring or harming anyone upon entering the home.

reconsider our decisions in *Browning* and *Ingram*, and therefore find the trial court did not err in omitting an instruction to use the victim's testimony as that of a party-opponent within the meaning of Evid.R. 801(D)(2). Accordingly, appellant's fifth argument is meritless.

{¶86} Sixth, appellant argues the trial court committed structural error in failing to notify the jury of appellant's plea of not guilty by reason of insanity and in failing to give an NGRI instruction. Appellant cites *State v. Cihonski*, Van Wert App. No. 15-08-04, 2008-Ohio-5191, to support his argument. In *Cihonski*, the defendant admitted to the conduct with which he was charged, but claimed his actions were not voluntary, and instead were the product of a "reflex action." The defendant also testified he had left a psychiatric hospital a few days prior to the incident. Based upon this testimony, the *Cihonski* court concluded he was advancing a defense of insanity and that by failing to notify the jury of his NGRI plea, the trial court committed structural error. *Cihonski* at ¶23.

{¶87} NGRI is an affirmative defense that a defendant must prove by a preponderance of the evidence. *State v. Monford*, Franklin App. No. 09AP-274, 2010-Ohio-4732, ¶70. R.C. 2901.01(14) provides: "A person is 'not guilty by reason of insanity' relative to a charge of an offense only if the person proves, in the manner specified in section 2901.05 of the Revised Code, that at the time of the commission of the offense, the person did not know, as a result of a severe mental disease or defect, the wrongfulness of the person's acts."

{¶88} "The proper standard for determining whether a defendant has successfully demonstrated this defense and is thus entitled to an NGRI instruction is whether he has 'introduced sufficient evidence, which, if believed, would raise a question in the minds of reasonable men concerning the existence of such issue.'"

Monford at ¶70; *State v. Melchior* (1978), 56 Ohio St.2d 15, paragraph 1 of the syllabus. "A trial court does not err in refusing to include an instruction to the jury on the defense of insanity where the evidence presented does not warrant such an instruction." *Monford* at ¶70.

{¶89} In the case at bar, appellant failed to request an NGRI jury instruction. Moreover, while appellant testified he was diagnosed in 1995 with bipolar disorder and paranoid schizophrenia, he did not provide a scintilla of evidence showing that at the time he committed the offense, he suffered from a severe mental disease or defect. We agree with the state's contention that appellant failed to adduce any evidence, expert or otherwise, that his mental disorders caused him to be unaware of the wrongfulness of his actions at the time of the offense. Regarding his mental state, appellant testified he cut his arm after breaking the victim's window "out of frustration," which caused an anxiety attack and his desire for his "Xanaxes." However, such testimony is hardly sufficient to warrant an instruction to the jury on an NGRI plea. Accordingly, we dually find *Cihonski*'s structural error analysis is inapplicable to the case at bar and appellant's sixth argument meritless.

{¶90} Finally, we note appellant argues the state made inflammatory comments during its closing argument. Specifically, appellant argues the state committed reversible error in stating appellant "got some advice from another inmate that the best way to beat a burglary charge is to say that you lived there." However, because appellant failed to object to the prosecutor's comments during closing argument, he again waived all but plain error review. Crim.R. 52(B); *State v. Givens*, Butler App. Nos. CA2009-05-145, CA2009-05-146, 2010-Ohio-5527, ¶9. Prosecutorial misconduct rises to the level of plain error if it is clear the defendant would not have been convicted in the absence of the improper comments. Id.

{¶91} The state is normally entitled to a certain degree of latitude in making its closing argument. Id. at ¶10. Additionally, closing arguments must be viewed in their entirety to determine whether the disputed remarks were unfairly prejudicial. *State v. Treesh* (2001), 90 Ohio St.3d 460, 466. However, "[i]t is improper for an attorney to express his personal belief or opinion as to the credibility of a witness or as to the guilt of the accused." *Givens* at ¶10. Further, it is improper for a prosecutor to state that the defendant is a liar or that he believes the defendant is lying. Id. Also, "[i]t is a prosecutor's duty in closing arguments to avoid efforts to obtain a conviction by going beyond the evidence which is before the jury." Id. "[T]he prosecution must avoid insinuations and assertions which are calculated to mislead the jury." Id., quoting *State v. Smith* (1984), 14 Ohio St.3d 13, 14.

{¶92} After reviewing the record, we conclude that the outcome of appellant's trial would not clearly have been otherwise, absent the alleged improper remarks. Even if we assume the state improperly commented on appellant's credibility, appellant cannot demonstrate prejudice. The evidence of appellant's guilt was strong, as previously discussed.

{¶93} In light of the foregoing, we find the jury instructions and other perceived errors were either not improper, or did not prejudice appellant so as to deny him a fair trial. Therefore, appellant's first assignment of error is overruled.

{¶94} Assignment of Error No. 4:

{¶95} "TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION."

{¶96} In his remaining assignment of error, appellant argues he was denied the

effective assistance of counsel in numerous respects.

{¶97} To demonstrate ineffective assistance of counsel, a defendant must establish that his counsel's representation fell below an objective standard of reasonableness, and the defendant was prejudiced from counsel's deficient performance. *Strickland v. Washington* (1984), 466 U.S. 668, 687-691, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-143. "Reversal of a conviction for ineffective assistance of counsel 'requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, ¶199, quoting *Strickland* at 687. In addition, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

{¶98} "Trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance." *State v. Smith*, 2009-Ohio-197 at ¶49, citing *Strickland* at 689. "Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel." *Smith* at ¶49.

{¶99} The cumulative errors appellant asserts are counsel: (1) failed to object to the jury instructions; (2) failed to seek instructions for lesser-included charges, including fourth-degree burglary; (3) failed to address appellant's NGRI plea filed with the court; (4) failed to object on grounds of prosecutorial misconduct during closing arguments; (5) failed to object when the court did not permit the victim's prior testimony to be used as statements of a party-opponent; (6) failed to move for a Crim.R. 29 acquittal at the close

of the state's case and/or at the close of evidence; (7) failed to object to appellant's sentence based upon *Oregon v. Ice*; (8) failed to make a "proportionality objection because six years in prison is disproportionate to [appellant's] conduct"; (9) failed to object to the notification of "three years of mandatory post-release control as [appellant] did not injure or threaten to injury [sic] anyone"; (10) failed to object to the court's "utter failure to make any findings under R.C. §§ 2929.11 and 12 [sic] during the sentencing hearing"; (11) failed to introduce documents into evidence supporting appellant's defense that he lived in the victim's home at the time of the incident; and (12) failed to object to the racial composition of the jury pool.

{¶100} The majority of appellant's claims relate to previously discussed assignments of error for which we have already decided no error or prejudice occurred.

{¶101} Appellant additionally argues his counsel was ineffective for failing to request a lesser-included offense instruction on fourth-degree burglary. We find this decision was part of counsel's trial strategy and did not establish ineffective assistance of counsel. A decision not to seek an instruction on a lesser-included offense is a calculated and reasonable trial strategy aimed at obtaining a complete acquittal. *State v. Mackey* (Feb. 14, 2000), Warren App. No. CA99-06-065 at 12. Therefore, we find that counsel's failure to request a lesser-included offense instruction did not rise to the level of ineffective assistance of counsel and did not prejudice appellant.

{¶102} Appellant additionally argues his counsel was ineffective for failing to assert a Crim.R. 29 motion. However, the failure to assert a Crim.R. 29 motion is not, per se, ineffective assistance of counsel. See *State v. Annor*, Butler App. No. CA2009-10-248, 2010-Ohio-5423, ¶21. Trial counsel was not ineffective in this case for failing to move for acquittal under Crim.R. 29 because, as noted above, sufficient evidence was presented to support appellant's convictions. Any such motion would have been futile.

Id. Similarly, we conclude the failure to object to the court's notification of three years of mandatory post-release control did not prejudice appellant because the trial court correctly stated "[i]t is mandatory that you have three years of post-release control [for Count One]." See R.C. 2967.28(B)(2). Therefore, any objection thereto would have been futile.

{¶103} Appellant also argues his counsel was ineffective for failing to object to the proportionality of the sentence. Under *Strickland*, appellant cannot show that the outcome of his trial would have been different if counsel would have objected at the post-trial sentencing hearing. He therefore cannot show his counsel's failure to object prejudiced him in anyway. Lastly, even if his counsel had objected, it is unlikely this in and of itself would have changed his sentence. Accordingly, this argument lacks merit. Cf. *State v. Simmons*, Cuyahoga App. No. 93331, 2010-Ohio-3412.

{¶104} Appellant also argues his counsel was ineffective for failing to object to the racial composition of the jury, since appellant is black and the victim is white. Specifically, appellant takes issue with counsel's failure to object, ask for a mistrial, or seek a continuance "to investigate the juror venire selection process in Warren County or [ask] for a change in venue under Crim.R. 18 so to avoid a jury in such a racially charged courtroom[.]"

{¶105} Appellant's argument is unpersuasive. Counsel was present for voir dire and could see and hear the jurors answer questions. Appellant's counsel was in a much better position to determine if an objection or additional voir dire was appropriate. See, e.g., *State v. Sanders* (2001), 92 Ohio St.3d 245, 274. See, also, *State v. McKnight*, Vinton App. No. 07CA665, 2008-Ohio-2435, ¶89-93 (rejecting argument that counsel rendered ineffective assistance by failing to argue for change of venue based upon race when defendant failed to present evidence that the venire did not represent a fair cross-

section of the community or that any of the jurors who did serve were unable to render an impartial verdict); *State v. Braswell*, Miami App. No. 2001CA 22, 2002-Ohio-4468, ¶8.

{¶106} Similarly, in the case at bar, appellant failed to show the jury venire did not contain a representative cross-section of the community or that any of the seated jurors were unable to render an impartial verdict. Thus, appellant does not show that there is a "reasonable probability" that but for counsel's actions, the result of the case would have been different. *Strickland*, 466 U.S. at 694.

{¶107} Because none of appellant's alleged errors meet the test for ineffective assistance of counsel, appellant's final assignment of error is overruled.

{¶108} Judgment affirmed.

YOUNG, P.J., and BRESSLER, J., concur.