

Rendered on the 29<sup>th</sup> day of December, 2010.

ALAN GABEL, Atty. Reg. No. 0025034, P. O. Box 1423, 411 East Fifth Street, Dayton,  
Ohio 45401  
Attorney for Defendant-Appellant

{¶ 1} Reginald Gardner, Jr. was convicted, following a jury trial, of aggravated burglary with a firearm specification. He was sentenced by the trial court to serve three years in prison for his aggravated burglary conviction and three years in prison for the firearm specification, with those sentences to be served consecutively.

{¶ 2} On appeal to this Court, Gardner asserted five assignments of error. We sustained his Fourth Assignment of Error, which stated: “The Trial Court Deprived Appellant of a Fair Trial and Due Process of Law by Failing to Properly Instruct the Jury.” See *State v. Gardner*, Montgomery App. No. 21357, 2007-Ohio-182.<sup>1</sup>

{¶ 3} In that assignment, Gardner argued that the trial court improperly instructed the jury concerning the offense of aggravated burglary. The trial court’s instruction as to this offense tracked the language of the aggravated burglary statute, R.C. 2911.11(A) (2), and stated as follows:

{¶ 4} “In Count Three of the indictment, Mr. Reginald Gardner is charged with aggravated burglary. Before you can find Mr. Gardner guilty of this offense, you must find beyond a reasonable doubt that on or about April 25, 2005, in Montgomery County, Ohio, he did by force, stealth or deception, trespass in an occupied structure, to-wit, a residence located at 1024 Danner Avenue, Apartment B, or in a separately secured or separately occupied portion of the occupied structure, when another person, other than an accomplice of the offender, was present, with the purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, and did have a deadly weapon or dangerous ordnance, to-wit- a handgun, on or about his person or under his control.”

{¶ 5} Gardner argued that by failing to specify the underlying criminal offense he had a purpose to commit, the trial court’s instruction permitted the jurors to return a verdict of

---

<sup>1</sup>The underlying events that gave rise to the charges filed against Gardner are set forth in paragraphs two through seven of our previous opinion.

guilty on a finding that he had a purpose to commit some criminal offense, without necessarily arriving at unanimous agreement about what that offense was. Gardner argued that as a result, he was deprived of his due process right to a unanimous verdict as required by Crim.R. 31(A).

{¶ 6} Because Gardner failed to object to the trial court's jury instruction on aggravated burglary, we analyzed Gardner's Fourth Assignment of Error under a plain error standard. We concluded that the failure of the trial court in its instructions to designate and define the elements of the underlying offense Gardner had a purpose to commit constituted a failure to instruct the jury on all of the essential elements of the offense charged, and permitted the jury to convict Gardner without unanimously agreeing upon the identity of that underlying offense. As a result, Gardner's right to due process was violated, thereby constituting reversible plain error. See *State v. Gardner*, supra, at ¶s 60-67. Concerning Gardner's other four assignments of error, we overruled them either on their merits, or because portions of them were not necessary to address in view of our decision on Gardner's Fourth Assignment of Error.

{¶ 7} The State of Ohio sought review of our judgment in the Ohio Supreme Court, which accepted jurisdiction of the State's appeal. The Supreme Court reversed our judgment and remanded the matter to us to consider any claims of error that we did not previously address in our opinion. *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, at ¶ 87.

{¶ 8} In its opinion, the Ohio Supreme Court reviewed the language of R.C. 2911.11(A)(2), the aggravated burglary statute, and concluded with respect to the "any

criminal offense” aspect of the statute, that “[g]iven the General Assembly’s use of the term ‘any’ in the phrase ‘any criminal offense,’ we presume that it intended to encompass ‘every’ and ‘all’ criminal offenses recognized by Ohio.” *Id.*, at ¶33. The Court framed the issue for review as “not whether there must be jury unanimity; the question is whether the jurors must agree unanimously as to which criminal offense a defendant intended to commit during a burglary.” *Id.*, at ¶37.

{¶ 9} The Supreme Court answered that question in the negative. It held that “Ohio’s burglary statutes proscribe a single crime that may be carried out in more than one manner or method.” *Id.*, at ¶63. Specifically, with respect to R.C. 2911.11(A)’s requirement of “proof that the defendant trespassed ‘with purpose to commit \*\*\* any criminal offense’”, the Court stated that “we do not discern in this language a statutory requirement that the jury be instructed on the elements of whatever offense the defendant intended to commit.” *Id.*, at ¶71. The Court “agree[d] with the Supreme Court of Washington, whose burglary statute is similar to Ohio’s, that ‘the specific crime or crimes intended to be committed inside burglarized premises is *not* an element of burglary that must be included in the \*\*\* jury instructions \*\*\* .’” *Id.* (citation omitted) (emphasis in the original).

{¶ 10} The Court recognized that “[t]he breadth of the phrase ‘any criminal offense’ is such that in some cases, it may invite a fatally ‘patchwork’ verdict based on conceptually distinct groupings of crimes or on multiple acts.” *Id.*, at ¶72. “[I]n such cases, due process requires that the jurors must be instructed as to the specific criminal act(s) that the defendant intended to commit inside the premises. \*\*\* (‘where there appears a possibility of jury

confusion in light of the allegations made and the statute charged, an augmented general instruction may be necessary to ensure that the jury understands its duty to unanimously agree *to a particular set of facts*’ [emphasis added])” *Id.* (citation omitted).

{¶ 11} Further, the Court found that “it is preferable for the trial judge to instruct the jury in all aggravated-burglary cases as to which criminal offense the defendant is alleged to have intended to commit once inside the premises and the elements of that offense.” *Id.*, at ¶73. “Nevertheless, we do not require this instruction in every case.” *Id.*, at ¶74. Instead, “[t]rial judges are in the best position to determine the content of the instructions based on the evidence at trial and on whether the case presents an alternative-means or multiple-acts scenario.” *Id.*

{¶ 12} After setting forth the above-principles, the Court then reviewed our conclusion that the trial court’s failure to instruct on the underlying offense in Gardner’s case constituted plain error. Concluding that it did not, the Court stated as follows:

{¶ 13} “[W]e find that no error was committed in this case. We also find no risk of a manifest miscarriage of justice.

{¶ 14} “There is no suggestion of jury confusion in this case. The jury did not question the meaning of the ‘any criminal offense’ element, and the state did not present evidence of an array of crimes that Gardner may have intended to commit in Lee’s home. Indeed, the evidence here supported only crimes within a single conceptual grouping - assault, felonious assault, or menacing.

{¶ 15} “If, as the state argues in this court, the underlying crime was felonious assault against Pippins in Lee’s home, we are not persuaded that the outcome of the trial would have

been different if the instructions had specified that offense and its elements. After all, the jury was well aware of those elements from other portions of the instructions, and its acquittal of Gardner and Justice indicates that it considered those elements carefully.

{¶ 16} \*\*\*

{¶ 17} “Gardner’s acquittal on the felonious assault charge is not dispositive, because there is no requirement in Ohio law that the criminal offense underlying an aggravated-burglary charge be completed in order for the latter charge to stand. R.C. 2911.11(A) (an accused need only have a ‘purpose to commit’ a criminal offense ...).

{¶ 18} “Nor are we persuaded that a manifest injustice occurred when we view the case in the manner in which the case was initially presented to the jury, i.e., that the felonious-assault charge arose from the allegation that Gardner, Justice, or both shot at Pippins upon their return to Lee’s home.

{¶ 19} “Although the jury was not given a specific crime to consider in determining Gardner’s intent in entering Lee’s home, a reasonable jury could conclude that Gardner’s attack on Pippins or his threat to kill him was a ‘criminal offense’ of some form, even without the benefit of the elements of assault, R.C. 2903.13, or menacing, R.C. 2903.22. Indeed, Ohio courts have recognized that one who forcibly enters a dwelling in the manner depicted in this case may reasonably be assumed to do so with the intent to commit a criminal act within. \*\*\*\*\* Consistent with the court of appeals in this case, we find that Gardner’s conviction in this case is not against the manifest weight of the evidence and that there is sufficient evidence to sustain it. Accordingly, we find no manifest injustice.

{¶ 20} “Given the evidence and the inference arising from it that Gardner entered

Lee's home to commit an assault on Pippins, the absence of any apparent jury confusion about the 'any criminal offense' element, and that the state did not present a multiple-acts case or suggest that the 'any criminal offense' element was satisfied by crimes of distinct conceptual groupings, we find no risk of manifest injustice here." *Id.*, at ¶'s 78-80, 84-87 (citations omitted).

{¶ 21} We now review, pursuant to the Supreme Court's remand, those errors asserted by Appellant that we did not address in our prior opinion. We will review the assignments in the order that facilitates our analysis.

## I.

{¶ 22} Gardner's First and Fifth Assignments of Error stated as follows:

{¶ 23} "Appellant's Convictions For Aggravated Burglary, and the Gun Specification Associated With the Aggravated Burglary, Are Against the Sufficiency and/or Manifest Weight of the Evidence."

{¶ 24} "The Trial Court Erred in Failing to Suppress Appellant's Involuntary Statement."

{¶ 25} In our earlier opinion, we considered these two assignments of error in their entirety and overruled them. Nothing remains to be addressed with respect to these two assignments of error. See *State v. Gardner*, 2007-Ohio-182, at ¶'s 20, 71.

## II.

{¶ 26} Gardner's Fourth Assignment of Error stated as follows:

{¶ 27} "The Trial Court Deprived Appellant of a Fair Trial and Due Process of Law by Failing to Properly Instruct the Jury."

{¶ 28} In our previous opinion, we sustained this assignment of error with respect to the trial court’s jury instruction on aggravated burglary, reversed the trial court’s judgment, and remanded the case to the trial court for further proceedings. As noted above, the Supreme Court reversed our decision in this regard. The effect of the Supreme Court’s decision was, of course, to effectively overrule this assignment of error as it relates to the trial court’s jury instruction on aggravated burglary. Thus, nothing remains to be addressed with this assignment of error to the extent it relates to the trial court’s aggravated burglary instruction.

{¶ 29} In his brief, Gardner also argued under the Fourth Assignment of Error that the trial court failed to provide adequate jury instructions concerning juror note-taking and “other acts” evidence. Gardner also addressed these same alleged deficiencies in the trial court’s jury instructions in his Second Assignment of Error, where he asserted that trial counsel was ineffective for having failed to object to the court’s jury instructions concerning juror note-taking and “other acts” evidence. Although we did not address these allegations directly under the Fourth Assignment of Error in our prior opinion, we did address and overrule them in our analysis of Gardner’s Second Assignment of Error. As raised in the Fourth Assignment of Error, these alleged deficiencies in the Court’s jury instructions must now be analyzed from a plain error perspective, given that Gardner failed to object to them at trial. “A reviewing court should use the utmost caution in taking notice of plain error and should do so only if it is clear that, but for the error, the result in the trial court would have been different. \*\*\* Notice of plain error should be taken only in exceptional circumstances and only to prevent a manifest miscarriage of justice.” *State v. Cochran*, Montgomery App.



No. 23624, 2010-Ohio-4915, ¶ 9 (citation omitted).

{¶ 30} In our review of Gardner’s Second Assignment of Error in our prior opinion, we concluded that Gardner’s argument that the trial court’s jury instruction on note-taking was inadequate because it invited jurors to entirely disregard the opinions of note takers misrepresented the meaning of the trial court’s instruction. We reviewed the instruction in its entirety, and concluded that “the instruction simply indicated that the mere fact that a particular juror took notes should not cause other jurors who did not to give that person’s opinion any extra or added weight.” *State v. Gardner*, 2007-Ohio-182, at ¶ 33. We thus concluded that trial counsel did not act ineffectively by failing to object to the Court’s jury instruction on note-taking. *Id.* Although not stated explicitly, we did so because we did not find the trial court’s instruction to be erroneous. Accordingly, with respect to the Fourth Assignment of Error, we conclude that the Court’s jury instruction on note-taking did not constitute error, much less plain error.

{¶ 31} Similarly, Gardner also argued in his Second Assignment of Error that trial counsel was ineffective for having failed to request, and to object to the absence of, an “other acts” limiting instruction in the Court’s jury instructions. Specifically, he argued that the evidence before the jury that he planned to sell marijuana to the occupant of the home he was charged with burglarizing indicated that he had a propensity to commit crime. In the Fourth Assignment of Error, now under review, Gardner asserts generally that the trial court’s instructions should have included an “other acts” instruction.

{¶ 32} When we reviewed Gardner’s allegation in the context of his ineffective assistance of counsel claim in our prior opinion, we concluded that counsel’s decision not to

request a limiting instruction in this regard may have been a matter of strategy. Further, and more germane to the present assignment of error, we stated as follows:

{¶ 33} “Even if counsel should have requested a limiting instruction, Gardner still must prove that he was prejudiced by counsel’s failure before he can prevail on a claim of ineffective assistance of counsel. The fact that Gardner was not convicted of felonious assault and burglary indicates that the jury did not convict him of aggravated burglary simply because his possession of marijuana shows a propensity to commit crime. Given the evidence discussed above, we conclude that it is unlikely that the lack of a limiting instruction caused the jury to convict Gardner of aggravated burglary. In other words, it is unlikely that Gardner would have been acquitted had his counsel requested and received a limiting instruction.” *State v. Gardner*, 2007-Ohio-182, at ¶ 26.

{¶ 34} In short, we have already concluded that the lack of an “other acts” limiting instruction likely did not cause Gardner to be convicted of aggravated burglary. For purposes of plain error analysis, the same result obtains here. The failure of the trial court to *sua sponte* give an “other acts” limiting instruction, if error at all, would not have clearly led to a different result at trial with respect to the aggravated burglary conviction. As a result, we cannot conclude that a manifest miscarriage of justice has occurred or that this is the exceptional case where we must find plain error.

{¶ 35} Finding no plain error with respect to the Court’s jury instruction on juror note-taking and “other acts” evidence, the remaining portion of Gardner’s Fourth Assignment of Error that was not previously addressed by us is overruled.

### III.

{¶ 36} Gardner’s Third Assignment of Error stated as follows:

{¶ 37} “Appellant Was Deprived of Due Process and a Fair Trial Through Prosecutorial Misconduct.”

{¶ 38} Under this assignment of error, Gardner argued that the prosecutor misstated the law with respect to aiding and abetting in his closing argument and with respect to the jury’s function during voir dire. Gardner also argued that the prosecutor engaged in misconduct when suggesting to the jury in closing argument that Gardner had been drinking.

We addressed these aspects of Gardner’s Third Assignment of Error in our previous opinion, found them to be without merit, and overruled them. See *State v. Gardner*, 2007-Ohio-182, at ¶’s 47-48. Nothing remains to be addressed with respect to these aspects of Gardner’s Third Assignment of Error.

{¶ 39} Gardner also argued under the third assignment of error that the prosecutor engaged in misconduct by failing to correct inaccurate jury instructions. His entire argument in this regard states as follows:

{¶ 40} “As is noted in detail in the Fourth Assignment of Error herein, certain errors were present in the jury instructions. It was incumbent upon the State to call the Trial Court’s error to its attention. *State v. Breaston* (1993), 83 Ohio App.3d 410.”

{¶ 41} The jury instruction errors Gardner complained of in his Fourth Assignment of Error, which he now asks us to review in this Third Assignment of Error from the perspective of alleged prosecutorial misconduct, concern the lack of a limiting instruction with respect to “other acts” evidence, the Court’s instruction regarding note-taking by the jurors, and the Court’s jury instruction on aggravated burglary. In our previous opinion, we

did not directly address these jury instruction claims from the perspective of prosecutorial misconduct. See *State v. Gardner*, 2007-Ohio-182, at ¶ 49.

{¶ 42} When analyzing a claim of prosecutorial misconduct, “ ‘ [t]he touchstone of analysis “is the fairness of the trial, not the culpability of the prosecutor.”’ [ *State v. Jones*, 90 Ohio St.3d 403, 420, 2000-Ohio-187], quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 947, 71 L.Ed.2d 78. Where it is clear beyond a reasonable doubt that a jury would have found the defendant guilty even absent the alleged misconduct, the defendant has not been prejudiced, and his conviction will not be reversed. See *State v. Loza* (1994), 71 Ohio St.3d 61, 78, 1994-Ohio-409 [overruled on other grounds]. In reviewing allegations of prosecutorial misconduct, we review the alleged wrongful conduct in the context of the entire trial. *Darden v. Wainwright* (1986), 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144.” *State v. Gardner*, 2007-Ohio-182, at ¶ 45. See also, *State v. Stevenson*, Greene App. No. 2007-CA-51, 2008-Ohio-2900, at ¶ 42.

{¶ 43} In our discussion of Gardner’s Fourth Assignment of Error herein, we have already concluded that the trial court’s instruction with respect to juror note-taking was not erroneous. In that the trial court’s instruction in this regard was not erroneous, it cannot be said that the prosecutor engaged in misconduct in failing to “correct” the trial court’s instruction. Further, we also concluded that Gardner suffered no prejudice as a result of the trial court’s failure to give a “limiting acts” instruction in our discussion concerning Gardner’s Fourth Assignment of Error. Accordingly, we cannot say that Gardner did not receive a fair trial or that he would not have been convicted in the absence of alleged prosecutorial misconduct with respect to these two jury instruction issues.

{¶ 44} Concerning the court's jury instruction on aggravated burglary, which Gardner asserts should have included a designation of the specific underlying criminal offense that Gardner had a purpose to commit when trespassing in the occupied structure and that the prosecutor engaged in misconduct by failing to call the trial court's "error" to its attention, the Supreme Court's opinion in this case effectively forecloses that line of argument.

{¶ 45} When reviewing the trial court's aggravated burglary instruction, the Supreme Court found that R.C. 2911.11(A) (the aggravated burglary statute) did not impose "a statutory requirement that the jury be instructed on the elements of whatever offense the defendant intended to commit. \*\*\* '[T]he specific crime or crimes intended to be committed inside burglarized premises is *not* an element of burglary that must be included in the \*\*\* jury instructions.'" *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, ¶ 71 (citations omitted; emphasis sic). Although there may be situations in which an instruction as to the underlying offense should be given, the Court did not conclude that this was such a case. Instead, the Court held that despite the lack of such an instruction here, not only was there no plain error, *Id.* at ¶ 77, "we find that no error was committed in this case. We also find no risk of a manifest miscarriage of justice." *Id.*, at ¶ 78. The Court elaborated:

{¶ 46} "Given the evidence and the inference arising from it that Gardner entered Lee's home to commit an assault on Pippins, the absence of any apparent jury confusion about the 'any criminal offense' element, and that the state did not present a multiple-acts case or suggest that the 'any criminal offense' element was satisfied by crimes of distinct conceptual groupings, we find no risk of manifest

injustice here.” *Id.*, at ¶ 87.

{¶ 47} In view of the Supreme Court’s conclusion that an instruction concerning the underlying criminal offense was not required to be given under the facts of this case and that the trial court did not commit plain error, or indeed, error in failing to give such an instruction, it cannot be said that the prosecutor engaged in “misconduct” by failing to call the alleged “error” to the trial court’s attention. Moreover, in finding that the trial court did not commit plain error when it failed to include a jury instruction as to the underlying offense the defendant intended to commit, the Supreme Court necessarily concluded that the outcome of the trial would not have been different had such an instruction been given. (“Plain error is not present unless but for the error complained of, the outcome of the trial would have been different.” *Gardner*, 118 Ohio St.3d 420, at ¶ 78). That being so, the prosecutor’s alleged “misconduct” in failing to “correct” the trial court’s instruction cannot be said to have resulted in prejudice to the defendant.

{¶ 48} We also disagree with the fundamental assumption underlying *Gardner*’s argument in this assignment of error. *Gardner*’s argument presupposes that the prosecutor has a duty to correct the trial court’s allegedly erroneous jury instructions. *Gardner* cites *State v. Breaston* (1993), 83 Ohio App.3d 410, for that proposition. However, in *Breaston*, the Tenth District did not reach such a sweeping conclusion. Instead, the Court concluded only that “[w]hile the defendant ordinarily is required to call to the attention of the trial court error in the proceedings, \*\*\* it is incumbent upon the prosecution to call the error to the attention of the trial court [when] the error prejudices the prosecution, not the

defendant.” *Id.*, at 413.

{¶ 49} We reached a conclusion similar to the Tenth District in *State v. Justice*, Montgomery C.A. 21375, 2006-Ohio-5965. In that case, which involved Gardner’s accomplice in the aggravated burglary at issue here, Defendant Justice also asserted “that the prosecutor’s failure to correct erroneous jury instructions concerning the elements of aggravated burglary and note taking by the jurors constitute[d] misconduct.” *Id.*, at ¶ 38. In analyzing that claim, we stated as follows:

{¶ 50} “As for the allegation of prosecutorial misconduct, we are unaware of any affirmative duty on the part of the prosecutor to correct or bring to the trial court’s attention any error in the court’s instructions, especially if that alleged error results in prejudice to the defendant and not the State. *State v. Breaston* (1993), 83 Ohio App.3d 410. If Justice believed that the trial court’s instructions were either misleading or inadequate and prejudiced him, it was incumbent on Justice to timely object. Crim.R. 30(A). The trial court afforded Justice an opportunity to object to the Court’s instructions out of the jury’s hearing, but Justice made no objection. We see no misconduct by the prosecutor in relation to the Court’s jury instructions, much less any plain error.” *State v. Justice*, 2006-Ohio-5965, at ¶ 39.

{¶ 51} Gardner’s Third Assignment of Error alleging prosecutorial misconduct is overruled.

#### IV.

{¶ 52} Finally, Gardner’s Second Assignment of Error states as follows:

{¶ 53} “Appellant was Denied his Sixth Amendment Right to Effective Assistance of Counsel.”

{¶ 54} In his brief, Gardner argued that he received ineffective assistance from trial counsel in the following respects:

{¶ 55} Counsel failed to request an “other acts” limiting instruction and failed to object to the lack of such an instruction in the Court’s jury charge.

{¶ 56} With respect to the trial court’s jury instruction on aggravated burglary, counsel failed to request that the instruction designate the particular criminal offense Gardner had a purpose to commit when he trespassed in the occupied structure.

{¶ 57} Trial counsel failed to object to the Court’s jury instruction regarding juror note-taking.

{¶ 58} Trial counsel failed to object to the prosecutor’s misstatement of law during voir dire as to the function of the jury.

{¶ 59} Trial counsel failed to object to the prosecutor’s misstatement of the law during closing argument with respect to aiding and abetting.

{¶ 60} Trial counsel failed to object to the prosecutor’s statement in closing argument that Gardner had been drinking when the evidence did not support this statement.

{¶ 61} With the exception of Gardner’s argument concerning trial counsel’s failure to object to the trial court’s jury instruction on aggravated burglary, we addressed in our prior opinion each of Gardner’s claims of ineffective assistance of trial counsel, found them to be without merit, and thus overruled Gardner’s Second



Assignment of Error. See *State v. Gardner*, 2007-Ohio-182, at ¶'s 25-26 ("other acts" limiting instruction), 28-33 (juror note-taking), 34 (prosecutor's misstatements in voir dire concerning the jury's function), 35-38 (prosecutor's misstatements in closing argument concerning aiding and abetting), and 39-40 (prosecutor's statement in closing argument that Gardner had been drinking).

{¶ 62} Thus, the only aspect of this assignment of error that remains to be addressed is Gardner's argument that his counsel was ineffective for having failed to object to the trial court's jury instruction on aggravated burglary. Specifically, Gardner contends that counsel should have requested that the trial court include in its instruction a designation as to the particular criminal offense Gardner had a purpose to commit when he trespassed in the occupied structure and that in the absence thereof, Gardner was deprived of his due process right to a unanimous verdict. We did not specifically reach the issue of ineffective assistance of counsel in our prior opinion because we found (in our resolution of Gardner's Fourth Assignment of Error) that the trial court's jury instruction on aggravated burglary constituted plain error. *Id.* at ¶ 27.

{¶ 63} "Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arose from counsel's performance. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed2d 674. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must affirmatively demonstrate to a reasonable probability that were it not for counsel's errors, the result of the trial would have

been different. *Id.*; *State v. Bradley* (1989), 42 Ohio St.3d 136. Further, the threshold inquiry should be whether a defendant was prejudiced, not whether counsel's performance was deficient. *Strickland.*" *State v. Carr*, Montgomery App. No. 23445, 2010-Ohio-3442, at ¶ 4.

{¶ 64} As noted previously herein, the Supreme Court has concluded in this case that "Ohio's burglary statutes proscribe a single crime that may be carried out in more than one manner or method," that the aggravated burglary statute does not contain "a statutory requirement that the jury be instructed on the elements of whatever offense the defendant intended to commit," that " ' the specific crime or crimes intended to be committed inside burglarized premises is *not* an element of burglary that must be included in the \*\*\* jury instructions'" (emphasis sic), and that "a defendant charged with burglary is not deprived of a unanimous verdict 'simply because the jury was not required to agree unanimously as to the nature of the crime the defendant intended to commit at the time he entered unlawfully into the victim's building..." *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, at ¶'s 63, 71, 71, and 68 respectively (citations omitted). Moreover, the Court concluded that under the facts of this case, the trial court did not commit plain error, nor even error, in failing to instruct the jury on the underlying offense. *Id.* at ¶'s 77-87.

{¶ 65} In view thereof, we cannot say that trial counsel was ineffective for having failed to request an instruction designating the underlying offense. As noted in the previous section on prosecutorial misconduct, in finding no plain error, the Supreme Court necessarily concluded that the outcome of the trial would not have been different had an instruction on the underlying offense been given.

Thus, trial counsel's alleged ineffectiveness in not seeking such an instruction cannot be said to have prejudiced Gardner. Absent prejudice, counsel's performance cannot be deemed ineffective. *Strickland v. Washington, supra*. Moreover, the Supreme Court concluded that "no error" was committed by the trial court with respect to the aggravated-burglary instruction. Thus, we cannot conclude that trial counsel's performance fell below an objective standard of reasonable representation by failing to seek an instruction that was not required to be given under the facts of this case or by failing to object to an aggravated burglary instruction that the Supreme Court has found not to be erroneous.

{¶ 66} Gardner's Second Assignment of Error alleging ineffective assistance of counsel is overruled.

V.

{¶ 67} Having overruled all of Gardner's assignments of error, the judgment of the trial court is affirmed.

.....

FAIN, J. and GRADY, J., concur.

Copies mailed to:

R. Lynn Nothstine  
 Alan Gabel  
 Hon. Connie Price