[Cite as *State v. Blackburn*, 2020-Ohio-1084.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 18CA3
vs.	:	
SHAWN BLACKBURN,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Timothy Young, Ohio Public Defender, and Patrick T. Clark, Assistant State Public Defender, Columbus, Ohio, for Appellant.[1]

Angela R. Canepa and Stephanie R. Anderson, Office of the Ohio Attorney General, Special Prosecutions Section, Columbus, Ohio, for Appellee.

CRIMINAL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 3-11-20
ABELE, J.

{¶ 1} This is an appeal from a Jackson County Common Pleas Court judgment of conviction and sentence. Shawn Blackburn, defendant below and appellant herein, assigns the following errors for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "SHAWN BLACKBURN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN BOTH OF HIS TRIAL ATTORNEYS FAILED TO OBJECT TO THE INTRODUCTION OF [S.W.]'S APRIL 3, 2016 AND JUNE 9, 2016 INTERVIEWS

[1] Different counsel represented appellant during the trial court proceedings.

WITH LAW ENFORCEMENT."

SECOND ASSIGNMENT OF ERROR:

"SHAWN BLACKBURN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN BOTH OF HIS TRIAL ATTORNEYS FAILED TO OBJECT TO THE INTRODUCTION OF EVIDENCE THAT WAS SUBSTANTIALLY MORE PREJUDICIAL THAN IT WAS PROBATIVE."

THIRD ASSIGNMENT OF ERROR:

"SHAWN BLACKBURN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN BOTH OF HIS TRIAL ATTORNEYS FAILED TO OBJECT TO THE JURY INSTRUCTIONS GIVEN FOR COUNT 6, OBSTRUCTING JUSTICE."

FOURTH ASSIGNMENT OF ERROR:

"SHAWN BLACKBURN'S CONVICTION FOR OBSTRUCTING JUSTICE WAS SUPPORTED BY INSUFFICIENT EVIDENCE IN VIOLATION OF HIS RIGHT TO DUE PROCESS OF LAW."

FIFTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN SENTENCING SHAWN BLACKBURN, WHEN IT DETERMINED THAT COUNT 5 (KIDNAPPING) AND COUNTS 6 AND 7 (OBSTRUCTING JUSTICE AND OBSTRUCTING OFFICIAL BUSINESS) WERE NOT ALLIED OFFENSES."

{¶ 2} On April 3, 2016, S.W., the victim's mother, called 911 to report that a "child molester" was in her home. The mother explained to the 911 operator that the mother observed appellant, the so-called "child molester," completely naked and exiting her thirty-three-year-old severely autistic daughter's bedroom. The mother reported that, after appellant exited her daughter's bedroom, the mother found her daughter naked in bed with a vibrator beside her.

{¶ 3} A Jackson County Grand Jury later returned an indictment that charged appellant with seven offenses: (1) rape, in violation of R.C. 2907.02(A)(1)(c); (2) two counts of gross sexual imposition, in violation of R.C. 2907.05(A)(5); (3) kidnapping, in violation of R.C. 2905.01(A)(2); (4) kidnapping, in violation of R.C. 2905.01(A)(5); (5) obstructing justice, in violation of R.C. 2921.23(A)(4); and (6) obstructing official business, in violation of R.C. 2921.31(A). Appellant entered not guilty pleas.

{¶ 4} At trial, the 911 dispatcher stated that she received the call from the mother and that the mother reported that she was having a problem with "[a] child molester." The mother explained to the dispatcher that the mother caught appellant exiting her thirty-three-year-old autistic daughter's bedroom. The mother additionally indicated that appellant used a vibrator on the daughter.

{¶ 5} Jackson County EMS paramedic Debra Burns testified that she responded to the 911 call. Upon arrival, mother informed Burns that when the mother went to check on her daughter, appellant "was coming out of the room completely naked and when she went into the bedroom, the girl was naked in the bed and she found an object that was a vibrator." Burns indicated that the mother specifically stated that appellant "was completely naked."

{¶ 6} Paramedic Ryan Foster likewise testified that the mother reported that appellant was naked as he left the bedroom.

{¶ 7} Linda McNeal stated that the mother and the victim presented to the emergency room for a sexual assault examination. McNeal explained that the victim was "severely autistic and mute" and McNeal obtained information that surrounded the alleged assault from the victim's mother. McNeal testified that the victim's mother reported that the mother observed

appellant exit the victim's bedroom and that appellant was naked. The mother checked on the victim and found her undressed from the waist down and with a vibrator on the bed. McNeal recited the mother's words: "I went into my daughter's bedroom to check on her. [Appellant] came out of her room with no clothes on, got dressed and left. My daughter was in the bed with no pants on and a dildo laying in the bed." McNeal additionally observed that the mother appeared "upset and tearful, anxious."

{¶ 8} The mother testified that she called 911 because she thought that appellant "might have messed with her" daughter. The mother explained that one morning, she discovered appellant "by her [daughter's] bedroom door" and "he was naked." The mother asked appellant "what he was doing," but she does not recall his response. The mother "think[s] he said he used the bathroom or something." The mother then called 911.

{¶ 9} The prosecutor asked the mother whether she recalled "initially reporting that [she] caught a male relative coming out of [her] daughter's bedroom." The mother stated: "I caught him coming out, but I didn't report it. Well I think he come [sic] out, I wasn't sure on that [sic]." The mother continued to equivocate and indicated that she was uncertain whether she saw appellant standing by her daughter's bedroom door or whether she saw him exiting her daughter's bedroom. The mother agreed, however, that her memory would have been better at the time of the incident than it was at the time of her testimony.

{¶ 10} The prosecutor then asked the mother whether she recalled telling the 911 operator that the mother "caught [appellant] coming out of her [daughter's] bedroom." The mother responded, "No, I was too upset. I don't remember half of [it]" The mother additionally explained that she did not recall what she told the emergency medical responders or the medical

personnel at the hospital.

{¶ 11} The prosecutor next questioned the mother whether she recalled "telling people [on the date of the incident] that [appellant] said that he had been in her [daughter's] room checking on her." The mother stated that appellant "might have said that." The mother explained that after she asked appellant about his actions, the mother checked on her daughter. The mother stated that her daughter "was on her bed and she had a dildo." The prosecutor asked the mother whether the mother noticed anything else about her daughter, and the mother stated, "I'm really not sure." The prosecutor asked the mother what her daughter had been wearing, and the mother stated that she did not believe that her daughter "had anything on." The mother "think[s]" her daughter was completely naked but she cannot recall. The mother also could not recall "telling numerous people that day that she was, in fact, naked from the waist down." The mother explained that her daughter usually sleeps in pajamas and that she believes that her daughter's pajamas "were on the floor."

{¶ 12} The prosecutor next questioned the mother about the location of the vibrator. The mother stated that she believes her daughter "was just laying there playing with it." The mother stated that she does not recall previously reporting that the vibrator "was laying in the bed beside her." The mother stated that "[i]t might have been laying there, but [she's] pretty sure she was playing with it." The mother testified that she does not recall telling a sheriff's deputy that her daughter had not been "using it or handling it in any way."

{¶ 13} The prosecutor then played the 911 audio recording. During the call, the mother reported that she "caught [appellant] coming out of [her] daughter's room." The prosecutor asked the mother whether appellant's voice could be heard in the background stating, "you better

not be doing that shit." The mother stated that she "didn't make that part out."

{¶ 14} The prosecutor next played part of a second telephone conversation between the mother and the dispatcher. During this conversation, the mother stated: "He had a . . . I call it a dildo. Whatever you want to call it and he come [sic] out of her room (inaudible) and she was naked and that's what makes me, you know. . ." The mother testified that even if she had told the dispatcher that appellant had the dildo (which she stated she did not clearly hear during the audio replay), appellant "didn't have the dildo." Instead, her daughter had it "either in her hands or on the bed."

{¶ 15} The prosecutor also asked the mother whether "naked" meant that appellant did not "have any clothes on." The mother stated: "I can't swear to that because I really . . . it's been too long."

{¶ 16} The prosecutor next questioned the mother how her daughter could have obtained the vibrator. The mother explained that "it was supposed to have been throwed [sic] away," but she believes it had been "on the dresser or in the basket beside the dresser."

{¶ 17} During the mother's testimony, the judge interrupted the prosecutor's questioning and called the parties for a sidebar. The judge stated:

> This witness is highly evasive and can't seem to remember the most basic of facts. I've heard I don't know if that's even my own voice, oh, please. If this isn't a hostile witness, I don't know what is. She's trying to shuck and duck on every question. If you want her declared hostile, I'm going to at this point.

{¶ 18} The court stated that it would allow leading questions because the witness had been responding to open ended questions in a "completely non-responsive" manner. Appellant's counsel objected.

{¶ 19} At that point, the prosecutor played the recording of the mother's April 3, 2016 interview with law enforcement officers. During the interview, the mother stated that appellant exited her daughter's bedroom "totally naked." The mother explained that she asked appellant "what the hell he was doing," and appellant stated, "Oh, I wasn't doing nothing[;] I was checking on her." The mother advised the officers that she wondered why appellant would be "checking on her [daughter] with no clothes on" and why her daughter was not wearing her pajamas.

{¶ 20} The officers also asked the mother where the vibrator came from, and the mother stated that it would have been in her drawer. The mother informed the officers that appellant claimed that her daughter retrieved the vibrator, but the mother "know[s] better [than that]." The mother informed the officers that appellant told her "he wasn't going to jail."

{¶ 21} When the prosecutor asked the mother whether listening to the recording refreshed the mother's recollection about the incident, the mother stated, "Not really, but * * * * [i]t was fresh in my mind then." The mother stated that she had some difficulty remembering because she has a "brain thing."

{¶ 22} The prosecutor next played a recording of the mother's June 9, 2016 interview with law enforcement officers. During this second interview, the mother stated that she called 911 on April 3, 2016 because she noticed appellant "walking around in boxers." The mother informed the officers that "walking around in boxers" means the same to her as "naked." The officers asked the mother where appellant was located when she saw him, and the mother responded, "I don't know. . . I'm half blind so I can't tell you exactly. I thought he was by her door. He said he was coming out of the bathroom." The mother explained that she then checked on her daughter and found her daughter with a vibrator.

{¶ 23} The prosecutor asked the mother whether the mother believed that the information the mother provided during her second interview significantly differed from her first interview. The mother stated, "Some I guess."

{¶ 24} The state additionally introduced DNA evidence from the rape kit showing that testing detected both appellant's and the victim's DNA. The mother claimed that appellant's DNA must have been mixed with the victim's while doing laundry and did not believe that appellant's DNA resulted from a sexual encounter.

{¶ 25} The state additionally presented evidence that, after investigators sought to have the victim's mental capacity evaluated, appellant, mother and the victim went to Kentucky. The state's witnesses suggested that appellant took the victim out of the state in order to prevent her from being evaluated, but mother claimed they simply went on a vacation and mother intended to take the victim to be evaluated the afternoon of their return home.

{¶ 26} The jury subsequently found appellant guilty of (1) rape, in violation of R.C. 2907.02(A)(1)(c); (2) two counts of gross sexual imposition, in violation of R.C. 2907.05(A)(5); (3) kidnapping, in violation of R.C. 2905.01(A)(5); (4) obstructing justice, in violation of R.C. 2921.32(A)(4); and (5) obstructing official business, in violation of R.C. 2921.31(A). The jury found appellant not guilty of kidnapping, in violation of R.C. 2905.01(A)(2).

{¶ 27} At sentencing, the trial court merged the rape offense with one of the gross sexual imposition offenses and the state elected to proceed to sentencing on the more serious rape offense. The court also merged the obstructing justice and obstructing official business offenses and the state elected to proceed to sentencing on the obstructing justice offense. The trial court also determined that the kidnapping offense did not merge with either the obstructing justice

offense or the obstructing official business offense.

{¶ 28} Consequently, the trial court sentenced appellant to serve the following prison terms, to be served consecutively to one another: (1) a mandatory eleven years to life in prison for rape; (2) eighteen months for gross sexual imposition; (3) eleven years for kidnapping; and (4) twelve months for obstructing justice. This appeal followed.

I

{¶ 29} In his first, second, and third assignments of error, appellant asserts that trial counsel failed to provide the effective assistance of counsel as guaranteed under the state and federal constitutions. For ease of discussion, we consider the assignments of error together.

{¶ 30} In his first assignment of error, appellant argues that trial counsel performed ineffectively by failing to object to the introduction of the mother's April 3, 2016 and June 9, 2016 interviews with law enforcement. In his second assignment of error, appellant asserts that trial counsel performed ineffectively by failing to object to evidence that was substantially more prejudicial than probative. In his third assignment of error, appellant claims that trial counsel performed ineffectively by failing to object to the obstructing-justice jury instruction.

A

{¶ 31} The Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution provide that defendants in all criminal proceedings shall have the assistance of counsel for their defense. The United States Supreme Court has generally interpreted this provision to mean a criminal defendant is entitled to the "reasonably effective assistance" of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *accord Hinton v. Alabama*, 571 U.S. 263, 272, 134 S.Ct. 1081, 188 L.Ed.2d 1 (2014)

(explaining that the Sixth Amendment right to counsel means "that defendants are entitled to be represented by an attorney who meets at least a minimal standard of competence").

{¶ 32} To establish constitutionally ineffective assistance of counsel, a defendant must show (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced the defense and deprived the defendant of a fair trial. *E.g., Strickland*, 466 U.S. at 687; *State v. Myers*, 154 Ohio St.3d 405, 2018-Ohio-1903, 114 N.E.3d 1138, ¶ 183; *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 85. "Failure to establish either element is fatal to the claim." *State v. Jones*, 4th Dist. Scioto No. 06CA3116, 2008-Ohio-968, ¶ 14. Therefore, if one element is dispositive, a court need not analyze both. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000) (stating that a defendant's failure to satisfy one of the ineffective-assistance-of-counsel elements "negates a court's need to consider the other").

1

{¶ 33} The deficient performance part of an ineffectiveness claim "is necessarily linked to the practice and expectations of the legal community: 'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Padilla v. Kentucky*, 559 U.S. 356, 366, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), quoting *Strickland*, 466 U.S. at 688; *accord Hinton*, 571 U.S. at 273. Prevailing professional norms dictate that "a lawyer must have 'full authority to manage the conduct of the trial.'" *State v. Pasqualone*, 121 Ohio St.3d 186, 2009-Ohio-315, 903 N.E.2d 270, ¶ 24, quoting *Taylor v. Illinois*, 484 U.S. 400, 418, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988).

{¶ 34} Furthermore, "'[i]n any case presenting an ineffectiveness claim, "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.'"

Hinton, 571 U.S. at 273, quoting *Strickland*, 466 U.S. at 688. Accordingly, "[i]n order to show deficient performance, the defendant must prove that counsel's performance fell below an objective level of reasonable representation." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 95 (citations omitted).

{¶ 35} Moreover, when considering whether trial counsel's representation amounts to deficient performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Thus, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* Additionally, "[a] properly licensed attorney is presumed to execute his duties in an ethical and competent manner." *State v. Taylor*, 4th Dist. Washington No. 07CA11, 2008-Ohio-482, ¶ 10, citing *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel's errors were "so serious" that counsel failed to function "as the 'counsel' guaranteed * * * by the Sixth Amendment." *Strickland*, 466 U.S. at 687; *e.g., State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 62; *State v. Hamblin*, 37 Ohio St.3d 153, 156, 524 N.E.2d 476 (1988).

{¶ 36} We further observe that the decision to object or not to object at trial ordinarily constitutes a question of trial strategy. *State v. Frierson*, 8th Dist. Cuyahoga No. 105618, 2018-Ohio-391, ¶ 25, citing *State v. Johnson*, 7th Dist. Jefferson No. 16 JE 0002, 2016-Ohio-7937, ¶ 46. Accordingly, "the failure to make objections is not alone enough to sustain a claim of ineffective assistance of counsel." *Conway* at ¶ 103.

> Experienced trial counsel learn that objections to each potentially objectionable event could actually act to their party's detriment. * * * In light of this, any single failure to object usually cannot be said to have been error unless the evidence sought is so prejudicial * * * that failure to object essentially defaults the case to the state. Otherwise, defense counsel must so consistently fail to use objections, despite numerous and clear reasons for doing so, that counsel's failure cannot reasonably have been said to have been part of a trial strategy or tactical choice.

State v. Johnson, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, at ¶ 140.

2

{¶ 37} To establish prejudice under the ineffective assistance of counsel standard, a defendant must demonstrate that a reasonable probability exists that "'but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the outcome.'" *Hinton*, 571 U.S. at 275, quoting *Strickland*, 466 U.S. at 694; *e.g., State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 113; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus; *accord State v. Spaulding*, 151 Ohio St.3d 378, 2016-Ohio-8126, 89 N.E.3d 554, ¶ 91 (indicating that prejudice component requires a "but for" analysis). "'[T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" *Hinton*, 571 U.S. at 275, quoting *Strickland*, 466 U.S. at 695. Furthermore, courts ordinarily may not simply presume the existence of prejudice but, instead, must require the defendant to affirmatively establish prejudice. *State v. Clark*, 4th Dist. Pike No. 02CA684, 2003-Ohio-1707, ¶ 22; *State v. Tucker*, 4th Dist. Ross No. 01CA2592 (Apr. 2, 2002); *see generally Roe v. Flores-Ortega*, 528 U.S. 470, 483, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2008) (observing that prejudice may be presumed in limited contexts, none of which are relevant here).

As we have repeatedly recognized, speculation is insufficient to establish the prejudice component of an ineffective assistance of counsel claim. *E.g., State v. Tabor*, 4th Dist. Jackson No. 16CA9, 2017-Ohio-8656, 2017 WL 5641282, ¶ 34; *State v. Jenkins*, 4th Dist. Ross No. 13CA3413, 2014-Ohio-3123, ¶ 22; *State v. Simmons*, 4th Dist. Highland No. 13CA4, 2013-Ohio-2890, ¶ 25; *State v. Halley*, 4th Dist. Gallia No. 10CA13, 2012-Ohio-1625, ¶ 25; *State v. Leonard*, 4th Dist. Athens No. 08CA24, 2009-Ohio-6191, ¶ 68; *accord State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 86 (stating that an argument that is purely speculative cannot serve as the basis for an ineffectiveness claim).

B

{¶ 38} Appellant first asserts that trial counsel's failure to object to the introduction of the interview recordings constituted ineffective assistance of counsel. Appellant contends that counsel performed deficiently by failing to object to the interview recordings because the recordings were inadmissible under the rules of evidence. Appellant argues that the trial court would have sustained objections to the mother's interviews for one of the following three reasons: (1) the statements constituted inadmissible hearsay; (2) the state could not impeach the mother, its own witness, due to a lack of surprise; or (3) the state could not play the interviews before the jury in order to refresh the mother's recollection. Appellant further claims that counsel's alleged deficiency prejudiced his defense. Appellant contends that if counsel had objected to the introduction of the interviews, the trial court would have sustained the objection and the jury would not have heard evidence that the mother changed her story. Appellant suggests that if the jury had not heard evidence that the mother changed her story, the outcome of the trial would have been different.

{¶ 39} We first point out that counsel's decision not to object may have been sound trial strategy. The record reflects that counsel actually considered raising an objection. Before the state introduced the recordings, the court asked appellant's trial counsel whether appellant intended to object to the playing of the interviews. Counsel replied, "I think for the record, I probably have to render an objection and make one." Counsel further indicated that he wished to further consider the issue during the lunch break.

{¶ 40} When trial resumed after lunch, the prosecutor sought permission to play the mother's first interview. The trial court directly asked counsel whether appellant objected, and counsel responded, "No, your Honor." The record thus shows that trial counsel was well-aware of the potential to raise an objection but decided not to raise one. Consequently, the record demonstrates that counsel's decision was a calculated trial strategy.

{¶ 41} Assuming, arguendo, that trial counsel acted deficiently by failing to object and the trial court would have sustained an objection, the result of the proceeding would not have been different. Instead, the record contains overwhelming and powerful evidence of appellant's guilt. Even without the mother's two recorded interviews, one that implicated appellant and one a feeble attempt to exonerate him, several other witnesses testified that mother initially reported that appellant, completely naked, exited the victim's bedroom and mother found the victim in bed with a vibrator. The 911 dispatcher testified that the mother reported that she had a "child molester," appellant, in her home and that the mother stated that she "just caught [appellant] coming out of [her] daughter's room." Additionally, the two emergency responders testified that mother informed them that she saw appellant exit the victim's bedroom and appellant was completely naked. The emergency room nurse likewise testified that the mother reported that

she saw appellant leaving the victim's room and that appellant was completely naked. Appellant did not argue that the trial court erred by admitting these other witnesses' statements.

{¶ 42} Moreover, the mother's shifting nature of her story and her desire to exonerate appellant gave the trial court pause, and the trial judge deemed it appropriate to summon counsel to a sidebar. During the discussion, the court noted the mother's incredulous statement that she did not recognize her own voice and advised the parties that the court would declare the mother a hostile witness for the state. Thus, because the mother's trial testimony also shows that she attempted to exonerate appellant, a successful objection to the second interview would not have changed the result of the proceedings.

{¶ 43} In sum, we find nothing in the record suggests that trial counsel failed to provide the effective assistance of counsel as the United States Constitution guarantees. Trial counsel presented a vigorous defense and raised objections that counsel deemed appropriate. Simply because counsel did not raise every objection appellant now wishes counsel had made does not mean that counsel provided ineffective assistance. The record does not reveal that counsel's failure to object to the interview recordings essentially defaulted the case to the state. Therefore, we do not agree with appellant that trial counsel failed to provide the effective assistance of counsel guaranteed under the state and federal constitutions.

{¶ 44} Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

C

{¶ 45} Appellant next argues that trial counsel performed ineffectively by failing to object to evidence that appellant claims was more prejudicial than probative. In particular, appellant

asserts that trial counsel should have objected to the following evidence that had little to no probative value: (1) mother was limited to supervised visits with the victim after the victim was placed in foster care; (2) law enforcement speculated during an interview with the mother that appellant would plead guilty and "be punished for what he's done"; (3) law enforcement pushed the prosecutor to indict appellant; and (4) probate court orders that the victim was in danger while in appellant's presence. Appellant claims that the foregoing evidence carried little probative value, and instead, the evidence unfairly prejudiced his defense. Appellant posits that the evidence "invited the jury to adopt the factual conclusions about trial evidence made by others who hold positions of government authority."

{¶ 46} Appellant contends that counsel's alleged deficient performance prejudiced his defense. Appellant claims that a successful objection would have resulted in the exclusion of the above mentioned evidence from the jury's consideration. Appellant posits that had the jury not heard that evidence, "the jury would have more closely scrutinized" the forensic evidence. Appellant thus asserts that a reasonable probability exists that the outcome of the trial would have been different.

{¶ 47} We again note that trial counsel need not object to all potentially objectional evidence. Experienced counsel understand "that each potentially objectionable event could actually act to their party's detriment." *Johnson* at ¶ 140. Thus, "any single failure to object usually cannot be said to have been error unless the evidence sought is so prejudicial * * * that failure to object essentially defaults the case to the state." *Id.*

{¶ 48} In the case at bar, we conclude that counsel's decision not to object to the evidence might have been a strategic decision. Counsel raised other objections throughout the trial and

did not so consistently fail to object to evidence that clearly was inadmissible such that the case, in essence, defaulted to the state. We thus question whether counsel's failure to object constitutes deficient performance.

{¶ 49} Assuming, arguendo, that counsel's failure to object constitutes deficient performance, we do not believe that the alleged deficiency prejudiced appellant's defense.

{¶ 50} We first recognize that the admission or exclusion of evidence generally rests within a trial court's sound discretion. *E.g., State v. Crotts*, 104 Ohio St.3d 432, 2004–Ohio–6550, 820 N.E.2d 302, ¶ 25; *State v. Noling*, 98 Ohio St.3d 44, 781 N.E.2d 88, 2002–Ohio–7044, ¶ 43. Thus, absent an abuse of discretion, an appellate court will not disturb a trial court's ruling regarding the admissibility of evidence. *Id.* Courts recognize that an abuse of discretion implies that a court's attitude is unreasonable, arbitrary, or unconscionable. *E.g., Adams, supra*.

{¶ 51} Generally, all relevant evidence is admissible. Evid.R. 402. Evid.R. 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401 and Evid.R. 402. A trial court must, however, exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403. A trial court has broad discretion when determining whether to exclude evidence under Evid.R. 403(A), and "'an appellate court should not interfere absent a clear abuse of that discretion.'" *State v. Yarbrough*, 95 Ohio St.3d 227, 2002–Ohio–2126, 767 N.E.2d 216, ¶ 40.

{¶ 52} Evid.R. 403(A) "manifests a definite bias in favor of the admission of relevant

evidence, as the dangers associated with the potentially inflammatory nature of the evidence must substantially outweigh its probative value before the court should reject its admission." *State v. White*, 4th Dist. Scioto No. 03CA2926, 2004–Ohio–6005, ¶ 50. Thus, "[w]hen determining whether the relevance of evidence is outweighed by its prejudicial effects, the evidence is viewed in a light most favorable to the proponent, maximizing its probative value and minimizing any prejudicial effect to the party opposing admission." *State v. Lakes*, 2nd Dist. Montgomery No. 21490, 2007–Ohio–325, ¶ 22.

{¶ 53} All relevant evidence may be prejudicial in the sense that it "tends to disprove a party's rendition of the facts" and thus, "necessarily harms that party's case." *Crotts* at ¶ 23. Evid.R. 403(A) does not, however, "attempt to bar all prejudicial evidence." *Id.* Instead, the rules provide that only unfairly prejudicial evidence is excludable. *Id.* "'Evid.R. 403(A) speaks in terms of unfair prejudice. Logically, all evidence presented by a prosecutor is prejudicial, but not all evidence unfairly prejudices a defendant. It is only the latter that Evid.R. 403 prohibits.'" *State v. Skatzes*, 104 Ohio St.3d 195, 2004–Ohio–6391, 819 N.E.2d 215, ¶ 107, quoting *State v. Wright*, 48 Ohio St.3d 5, 8, 548 N.E.2d 923 (1990). "'Unfair prejudice' does "not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis."'" *State v. Lang*, 129 Ohio St.3d 512, 2011–Ohio–4215, 954 N.E.2d 596, ¶ 89, quoting *United States v. Bonds*, 12 F.3d 540 (6th Cir.1993). Unfairly prejudicial evidence is evidence that "might result in an improper basis for a jury decision." *Oberlin v. Akron Gen. Med. Ctr.*, 91 Ohio St.3d 169, 172, 743 N.E.2d 890 (2001), quoting Weissenberger's Ohio Evidence (2000) 85–87, Section 403.3. It is evidence that arouses the jury's emotions, that "'evokes a sense of horror,'" or that

"'appeals to an instinct to punish.'" *Id.* "'Usually, although not always, unfairly prejudicial evidence appeals to the jury's emotions rather than intellect.'" *Id.* Thus, "[u]nfavorable evidence is not equivalent to unfairly prejudicial evidence." *State v. Bowman*, 144 Ohio App.3d 179, 185, 759 N.E.2d 856 (12th Dist.2001).

{¶ 54} In the case at bar, even if we concluded that counsel performed deficiently by failing to object, we cannot conclude that counsel's alleged deficiency prejudiced his defense. First, it is far from clear that the trial court would have sustained an Evid.R. 403(A) objection that the evidence is unfairly prejudicial. Certainly, the evidence was unfavorable. The evidence also portrayed the victim as sympathetic and helpless. But we cannot state that any of the evidence was so unfairly prejudicial that the trial court would have abused its discretion by failing to sustain an objection to the evidence.

{¶ 55} Moreover, even if the court had sustained the objections, appellant has failed to show a reasonable probability exists that the outcome of his trial would have been different. As we explained in our discussion of appellant's first assignment of error, overwhelming evidence supports appellant's convictions. We do not see any danger that the evidence appellant believes counsel should have objected to so infected the jury's decision-making process that the verdicts are unreliable.

{¶ 56} Accordingly, based upon the foregoing reasons, we overrule appellant's second assignment of error.

D

{¶ 57} In his third assignment of error, appellant asserts that trial counsel performed ineffectively by failing to object to the obstructing-justice jury instruction. Appellant contends

that reasonably competent trial counsel should have recognized that the court's instruction omitted an essential element of the offense–that he "had the specific intention of hindering the discovery, apprehension, prosecution, conviction, or punishment of another person." Appellant asserts that counsel's failure to object to the jury instruction prejudiced his defense because the prosecution did not present any evidence that he acted with the intention of protecting another person.

{¶ 58} We recognize that the state candidly and forthrightly agrees with appellant's third assignment of error and requests that we vacate appellant's obstructing-justice conviction and remand for re-sentencing on the merged count–obstructing official business.

{¶ 59} Generally, a trial court has broad discretion to decide how to fashion jury instructions. A trial court must not, however, fail to "fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder." *E.g., State v. Comen*, 50 Ohio St.3d 206, 553 N.E.2d 640 (1990), paragraph two of the syllabus. Additionally, a trial court may not omit a requested instruction, if such instruction is "'a correct, pertinent statement of the law and [is] appropriate to the facts * * *.'" *State v. Lessin*, 67 Ohio St.3d 487, 493, 620 N.E.2d 72 (1993), quoting *State v. Nelson*, 36 Ohio St.2d 79, 303 N.E.2d 865, paragraph one of the syllabus (1973).

{¶ 60} R.C. 2921.32(A)(4) sets forth the offense of obstructing justice as charged in appellant's indictment and provides as follows:

> (A) No person, with purpose to hinder the discovery, apprehension, prosecution, conviction, or punishment of another for crime or to assist another to benefit from the commission of a crime, and no person, with purpose to hinder the discovery, apprehension, prosecution, adjudication as a delinquent child, or disposition of a child for an act that if committed by an adult would be a crime or

> to assist a child to benefit from the commission of an act that if committed by an adult would be a crime, shall do any of the following:
>
> * * * *
>
> (4) Destroy or conceal physical evidence of the crime or act, or induce any person to withhold testimony or information or to elude legal process summoning the person to testify or supply evidence[.]

{¶ 61} In the case at bar, the trial court's jury instruction did not inform the jury that the offense requires the defendant's conduct to be for the benefit of another person. The court's instruction reads:

> The defendant is charged with obstructing justice. Before you can find the defendant guilty, you must find beyond a reasonable doubt, that on or about the 25th day of September, 2016, through about the 5th day of October, 2016, and in Jackson County, Ohio, the defendant did, with purpose to hinder the discovery, apprehension, prosecution, conviction, or punishment of the defendant for a felony crime, destroy or conceal physical evidence of the crime or act, and/or induce [the mother] and/or [the victim] to withhold testimony, or information, or to elude legal process summoning [the mother] and/or [the victim] to testify or supply evidence.

Thus, because the court's instruction did not accurately state the elements of the charged offense, we agree with appellant that trial counsel should have objected to the instruction and that counsel's failure to do so prejudiced the outcome of the proceedings. Moreover, the state did not present any evidence to show that appellant engaged in conduct designed to prevent another from escaping detection or punishment.

{¶ 62} Accordingly, based upon the foregoing reasons, we sustain appellant's third assignment of error and remand this matter for re-sentencing on the merged count.

III

{¶ 63} In his fourth assignment of error, appellant asserts that the state did not present sufficient evidence to support his obstructing justice conviction. Because we believe that our

disposition of appellant's third assignment of error renders his fourth assignment of error moot, we need not address it. See App.R. 12(A)(1)(c).

{¶ 64} Accordingly, based upon the foregoing reasons, we overrule appellant's fourth assignment of error as moot.

IV

{¶ 65} In his fifth assignment of error, appellant asserts that the trial court erred by determining that the kidnapping count did not merge with the obstructing justice and obstructing official business counts.

{¶ 66} "R.C. 2941.25 codifies the protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, which prohibits multiple punishments for the same offense." *State v. Underwood*, 124 Ohio St.3d 365, 2010–Ohio–1, 922 N.E.2d 923, ¶ 23; *accord State v. Miranda*, 138 Ohio St.3d 184, 2014–Ohio–451, 5 N.E.3d 603; *State v. Washington*, 137 Ohio St.3d 427, 2013–Ohio–4982, 999 N.E.2d 661, ¶ 11. The statute provides:

> (A) Where the same conduct by [a] defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶ 67} For purposes of R.C. 2941.25 "a 'conviction' consists of a guilty verdict and the imposition of a sentence or penalty." *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶ 12; *accord State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d

234, ¶ 17. Consequently, "R.C. 2941.25(A)'s mandate that a defendant may be 'convicted' of only one allied offense is a protection against multiple sentences rather than multiple convictions." *Whitfield* at ¶ 18. Accordingly, "once the sentencing court decides that the offender has been found guilty of allied offenses of similar import that are subject to merger, R.C. 2941.25 prohibits the imposition of multiple sentences." *Williams* at ¶ 19 (citation omitted). The sentencing court thus has a mandatory duty to merge allied offenses. *Id.* at ¶ 27. "[I]mposing separate sentences for allied offenses of similar import is contrary to law and such sentences are void." *Id.* at ¶ 2. Therefore, "a judgment of sentence is void * * * when the trial court determines that multiple counts should be merged but then proceeds to impose separate sentences in disregard of its own ruling." *State ex rel. Cowan v. Gallagher*, 153 Ohio St.3d 13, 2018-Ohio-1463, 100 N.E.3d 407, ¶ 19, citing *Williams* at ¶ 28–29.

{¶ 68} Courts conduct a three-part inquiry to determine whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25: "(1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation? An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, and the import must all be considered." *State v. Earley*, 145 Ohio St.3d 281, 2015–Ohio–4615, 49 N.E.3d 266, ¶ 12, citing *State v. Ruff*, 143 Ohio St.3d 114, 2015–Ohio–995, 34 N.E.3d 892, ¶ 31 and paragraphs one, two, and three of the syllabus.

{¶ 69} Offenses are of dissimilar import "if they are not alike in their significance and their resulting harm." *Ruff* at ¶ 21. Additionally, "a defendant's conduct that constitutes two or more offenses against a single victim can support multiple convictions if the harm that results

from each offense is separate and identifiable from the harm of the other offense." *Id.* at ¶ 26. Thus, "two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable." *Id.* at ¶ 23. We further note that the defendant bears the burden to establish that R.C. 2941.25 prohibits multiple punishments. *State v. Washington*, 137 Ohio St.3d 427, 2013–Ohio–4982, 999 N.E.2d 661, ¶ 18, citing *State v. Mughni*, 33 Ohio St.3d 65, 67, 514 N.E.2d 870 (1987).

{¶ 70} In the case sub judice, we previously determined that we must reverse appellant's obstructing justice conviction and remand this matter to the trial court for re-sentencing on the merged offense–obstructing official business. Until the court sentences appellant for obstructing official business, we believe that a merger analysis would be inappropriate and premature. *See generally State ex rel. Quinn v. Delaware Cty. Bd. of Elections*, 152 Ohio St.3d 568, 2018-Ohio-966, 99 N.E.3d 362, ¶ 37, quoting *State ex rel. Jones v. Husted*, 149 Ohio St.3d 110, 2016-Ohio-5752, 73 N.E.3d 463, ¶ 21 ("To be justiciable, a claim must be ripe for review, and a claim is not ripe 'if it rests on contingent events that may never occur at all.'"); *State v. Lykins*, 4th Dist. Adams No. 16CA1021, 2016-Ohio-8409, 2016 WL 7626615.

{¶ 71} Accordingly, based upon the foregoing reasons, we overrule appellant's fifth assignment of error.

V

{¶ 72} In conclusion, we (1) overrule appellant's first, second, fourth, and fifth assignments of error, (2) sustain appellant's third assignment of error, and (3) remand this matter to the trial court so that it may consider a sentence for the obstructing official business count.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Appellant and appellee shall equally share the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Jackson County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J. & Hess, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.