[Cite as *State v. Harris*, 2015-Ohio-5400.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Sheila G. Farmer, J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 15CA9
ANDREW C. HARRIS	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Richland County Court of Common Pleas, Case No. 2014CR0559 D
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 18, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
DANIEL ROGERS Assistant Prosecuting Attorney Richland County Prosecutor's Office 38 South Park Street Mansfield, OH 44902	JOHN O'DONNELL III 10 West Newlon Place Mansfield, OH 44902

Gwin, P.J.

{¶1} Appellant Andrew Harris ["Harris"] appeals his convictions and sentences after a jury trial in the Richland County Court of Common Pleas on one count of domestic violence a felony of the fourth degree in violation of R.C. 2919.25(A) and one count of aggravated burglary a felony of the first degree in violation of R.C. 2911.11(A).

Procedural History

{¶2} Rhonda Jennings began dating Harris in 2006. The two continued dating and living together on and off for eight years. Rhonda gave birth to their daughter in 2009.

{¶3} In July 2014, Rhonda decided to end her relationship with Harris. She asked him to move out of the home they shared at 223 E. 2nd St. in Mansfield, Ohio.

{¶4} In the early morning hours of August 14, 2014, Harris visited the home. Harris knocked on the front door, and Rhonda let him inside. A short time later, Rhonda asked Harris to leave the premises. Harris left the home and Rhonda locked the door behind him. (1T. at 256).

{¶5} A short time later, Rhonda heard a loud noise, which led her to a back window where she discovered Harris had re-entered the home. Natasha Favors, who was visiting Rhonda, was asleep on the living room couch. Favors heard Harris break in through the window and called 9-1-1. Harris followed Rhonda upstairs to the child's bedroom and began to assault Rhonda in front of the child. The struggle eventually moved to the front porch, at which point Harris pushed Rhonda's head into the banister and bit Rhonda's chest.

{¶6} Latoya Bowman, a neighbor of Rhonda's saw Harris hit and choke Rhonda and attempt to throw her off the porch. Bowman further heard Harris threaten to kill Rhonda. Bowman called 9-1-1.

{¶7} Rhonda and Harris' child ran to a neighbor, Felicia Minors, for help. Minors saw Harris push Rhonda's head into the banister and bite her. Minors called 9-1-1.

{¶8} Harris eventually fled into an alley and attempted to hide underneath a blue Cadillac.

{¶9} Upon his arrival at the scene, Officer Terry Rogers made contact with Rhonda. He observed Rhonda was bleeding from the mouth and spitting blood on the sidewalk. Rhonda told Officer Rogers about Harris breaking into her house and assaulting her. Officer Rogers photographed Rhonda's injuries, the blood she spit out onto the sidewalk and the open rear window of the house.

{¶10} After speaking with Officer Rogers, Rhonda was transported to MedCentral for treatment. At 2:31 a.m., Officer Rogers and Officer Price took Harris into custody after finding him hiding in an alley.

{¶11} Tyler Sellers examined Rhonda upon her arrival at MedCentral. Rhonda told Sellers that Harris broke in through the back window, bit her chest and smashed her head into the banister. Rhonda's injuries corroborated this account, as she exhibited pain in her left temple and right breast, her right breast was bruised, and her temple was soft to the touch. Furthermore, Rhonda had no injuries to her hands, which would have been expected had she been in a fight rather than been the victim of an assault.

{¶12} Rhonda provided a recorded statement to police describing how Harris did not have permission to be at Rhonda's house, how Harris broke in through the rear

window and how Harris pulled her hair, hit her, choked her and smashed her head on the banister.

{¶13} While in the Richland County Jail prior to trial, Harris used a fellow inmate's pin number to call Rhonda on multiple occasions. During these phone calls, Harris repeatedly told Rhonda not to cooperate with police or appear for trial and Rhonda agreed not to testify. However, Rhonda turned herself into authorities pursuant to a material witness warrant on January 28, 2015, one day before trial, and subsequently testified against Harris at trial.

{¶14} On September 8, 2014, a Richland County Grand Jury indicted Harris on three counts. Count 1 was for Domestic Violence, as a fourth degree felony. Count 2 was for aggravated burglary and Count 3 was for burglary.

{¶15} The jury found Harris guilty of domestic violence and aggravated burglary. The trial court dismissed Count 3 burglary as a lesser-included offense of aggravated burglary. On February 4, 2015, the trial court sentenced Harris to eighteen months on Count 1 and five years on Count 2, with those sentences to run concurrently.

Assignments of Error

{¶16} Harris raises four assignments of error,

{¶17} "I. THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT/APPELLANT'S RULE 29 MOTION ON THE BURGLARY [sic.] INDICTMENT.

{¶18} "II. DEFENDANT/APPELLANT'S CONVICTION FOR AGGRAVATED BURGLARY WAS CONTRARY TO THE WEIGHT OF THE EVIDENCE.

{¶19} "III. THE TRIAL COURT ERRED IN SENTENCING DEFENDANT/APPELLANT ON THE DOMESTIC VIOLENCE AND THE AGGRAVATED BURGLARY.

{¶20} "IV. DEFENDANT/APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION."

I & II

{¶21} In his first assignment of error, Harris alleges that the trial court erred in not granting his Crim. R. 29 motion for acquittal at the conclusion of the state's case.[1] In determining whether a trial court erred in overruling an appellant's motion for judgment of acquittal, the reviewing court focuses on the sufficiency of the evidence. *See, e.g., State v. Carter*, 72 Ohio St.3d 545, 553, 651 N.E.2d 965, 974(1995); *State v. Jenks*, 61 Ohio St.3d 259, 273, 574 N.E.2d 492(1991). In his second assignment of error, Harris argues that his conviction for aggravated burglary is against the weight of the evidence.

{¶22} Because we find the issues raised in Harris' first and second assignments of error are closely related, for ease of discussion, we shall address the assignments of error together.

{¶23} Our review of the constitutional sufficiency of evidence to support a criminal conviction is governed by *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), which requires a court of appeals to determine whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could

[1] Although appellant references the burglary "conviction" in his assignment of error, we note the trial court dismissed count 3 of the indictment, burglary. We presume appellant is referring to the conviction for aggravated burglary.

have found the essential elements of the crime beyond a reasonable doubt." Id.; see also *McDaniel v. Brown*, 558 U.S. 120, 130 S.Ct. 665, 673, 175 L.Ed.2d 582(2010) (reaffirming this standard); *State v. Fry*, 125 Ohio St.3d 163, 926 N.E.2d 1239, 2010–Ohio–1017, ¶146; *State v. Clay*, 187 Ohio App.3d 633, 933 N.E.2d 296, 2010–Ohio–2720, ¶68.

{¶24} Weight of the evidence addresses the evidence's effect of inducing belief. *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1997), *superseded by constitutional amendment on other grounds as stated by State v. Smith,* 80 Ohio St.3d 89, 684 N.E.2d 668, 1997-Ohio–355. Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue, which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief." (Emphasis sic.) Id. at 387, 678 N.E.2d 541, *quoting* Black's Law Dictionary (6th Ed. 1990) at 1594.

{¶25} When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "'thirteenth juror'" and disagrees with the fact finder's resolution of the conflicting testimony. Id. at 387, 678 N.E.2d 541, *quoting Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). However, an appellate court may not merely substitute its view for that of the jury, but must find that "'the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *State v. Thompkins, supra*, 78 Ohio St.3d at 387, *quoting State v. Martin*, 20

Ohio App.3d 172, 175, 485 N.E.2d 717, 720–721 (1st Dist. 1983). Accordingly, reversal on manifest weight grounds is reserved for "'the exceptional case in which the evidence weighs heavily against the conviction.'" Id.

> "[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts.
>
> * * *
>
> "If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment."

Seasons Coal Co., Inc. v. Cleveland, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, *quoting* 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978).

{¶26} To be convicted of aggravated burglary the trier of fact would have to find beyond a reasonable doubt that Harris trespassed in an occupied structure when another person was present, with purpose to commit in the structure any criminal offense, and Harris inflicted, or attempted or threatened to inflict physical harm on another. R.C. 2911.11(A) (1). R.C. 2901.01 states, in relevant part: "(3) 'Physical harm to persons' means any injury, illness, or other physiological impairment, regardless of its gravity or duration."

{¶27} Harris contends that the state failed to prove the elements of trespass and purpose to commit a criminal offense. Specifically he argues that he lived at the home for

eight years "off and on" and was residing there on the date of the incident. Harris further contends given their history and the time lapse from his entry, the element of intent to commit domestic violence is highly suspect.

{¶28} Rhonda Jennings testified that Harris did not live with her at the home on August 14, 2014. (1T. at 251). Rhonda testified that she had let him into the home, but asked him to leave. (1T. at 271). Rhonda admitted that she had told the police that she had let Harris in, asked him to leave and locked the door behind him. (1T. at 256). Rhonda testified that she heard “a big boom” and found Harris had entered the home through a window. (1T. at 252). Rhonda testified that she repeatedly asked Harris to leave. (1 T. at 271; 275).

{¶29} The State also introduced Natasha Favors' 911 call from August 14, 2014 in which she stated she heard Harris break in through the rear window while she was sleeping on Rhonda Jennings couch. (1T. at 317).

{¶30} Rhonda testified that after Harris came in through the window, Harris hit her, shoved her head into the banister, grabbed her hair and dragged her outside and bit her. (1T. at 252-253; 260).

{¶31} However, even if Harris may have had consent to enter Rhonda's home, once he committed an act of violence against Rhonda, the consent was revoked and Harris became a trespasser. *See State v. Cutts*, 5th Dist. Stark No.2008 CA 000079, 2009–Ohio–3563, ¶181. Where a defendant commits an offense against a person in the person's private dwelling, the defendant forfeits any privilege, becomes a trespasser and can be culpable for aggravated burglary. *See, e.g., State v. Steffen*, 31 Ohio St.3d 111, 115, 509 N.E.2d 383(1987).

{¶32} Viewing the evidence in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that Harris trespassed in an occupied structure when Rhonda was present with the intention to inflicted physical harm on Rhonda and that Harris did in fact inflict physical harm on Rhonda. We hold, therefore, that the state met its burden of production regarding each element of the crime of aggravated burglary and, accordingly, there was sufficient evidence to support Harris' conviction.

{¶33} As an appellate court, we are not fact finders; we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent and credible evidence, upon which the fact finder could base his or her judgment. *Cross Truck v. Jeffries*, 5th Dist. Stark No. CA–5758, 1982 WL 2911(Feb. 10, 1982). Accordingly, judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction*, 54 Ohio St.2d 279, 376 N.E.2d 578(1978). The Ohio Supreme Court has emphasized: "'[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts. * * *.'" *Eastley v. Volkman*, 132 Ohio St.3d 328, 334, 972 N.E. 2d 517, 2012-Ohio-2179, *quoting Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 603, at 191–192 (1978). Furthermore, it is well established that the trial court is in the best position to determine the credibility of witnesses. *See, e.g., In re Brown*, 9th

Dist. No. 21004, 2002–Ohio–3405, ¶ 9, *citing State v. DeHass*, 10 Ohio St .2d 230, 227 N.E.2d 212(1967).

{¶34} Ultimately, "the reviewing court must determine whether the appellant or the appellee provided the more believable evidence, but must not completely substitute its judgment for that of the original trier of fact 'unless it is patently apparent that the fact finder lost its way.'" *State v. Pallai*, 7th Dist. Mahoning No. 07 MA 198, 2008-Ohio-6635, ¶31, *quoting State v. Woullard*, 158 Ohio App.3d 31, 2004-Ohio-3395, 813 N.E.2d 964 (2nd Dist. 2004), ¶ 81. In other words, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. Mahoning No. 99 CA 149, 2002-Ohio-1152, at ¶ 13, *citing State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125(7th Dist. 1999).

{¶35} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212(1967), paragraph one of the syllabus; *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶118. *Accord, Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Marshall v. Lonberger*, 459 U.S. 422, 434, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983).

{¶36} The jury as the trier of fact was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Craig*, 10th Dist. Franklin No. 99AP-739, 1999 WL

29752 (Mar 23, 2000) *citing State v. Nivens*, 10th Dist. Franklin No. 95APA09-1236, 1996 WL 284714 (May 28, 1996). Indeed, the jury need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver*, 10th Dist. Franklin No. 02AP-604, 2003-Ohio-958, ¶21, *citing State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964); *State v. Burke*, 10th Dist. Franklin No. 02AP-1238, 2003-Ohio-2889, *citing State v. Caldwell*, 79 Ohio App.3d 667, 607 N.E.2d 1096 (4th Dist. 1992). Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks, supra.*

{¶37} We find that this is not an "'exceptional case in which the evidence weighs heavily against the conviction.'" *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541, *quoting Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717. The jury neither lost his way nor created a miscarriage of justice in convicting Harris of the charge of aggravated burglary.

{¶38} Based upon the foregoing and the entire record in this matter, we find Harris' conviction is not against the sufficiency or the manifest weight of the evidence. To the contrary, the jury appears to have fairly and impartially decided the matters before them. The jury as a trier of fact can reach different conclusions concerning the credibility of the testimony of the state's witnesses. This court will not disturb the jury's finding so long as competent evidence was present to support it. *State v. Walker*, 55 Ohio St.2d 208, 378 N.E.2d 1049 (1978). The jury heard the witnesses, evaluated the evidence, and was convinced of Harris' guilt.

{¶39} Finally, upon careful consideration of the record in its entirety, we find that there is substantial evidence presented which if believed, proves all the elements of the crimes beyond a reasonable doubt.

{¶40} Harris' first and second assignments of error are overruled.

III.

{¶41} In his third assignment of error, Harris argues that the trial court erred in sentencing him on both Count 1-Domestic Violence and Count 2-Aggravated Burglary, claiming they were allied offenses requiring merger.

{¶42} In this case, Harris failed to object to his sentences in the trial court. In *State v. Rogers*, the Ohio Supreme Court recently examined a case where the defendant was convicted of multiple offenses pursuant to a guilty plea. *State v. Rogers*, 143 Ohio St.3d 385, 2015–Ohio–2459, 38 N.E.3d860. The defendant appealed and argued for the first time on appeal that some of the convictions should have merged for sentencing. Id. at ¶ 11. The matter was certified as a conflict and presented to the Ohio Supreme Court. In making its decision, the Court clarified the difference between waiver and forfeiture as it pertains to allied offenses. Id. at ¶19–21. The Court rejected the argument that by entering a guilty plea to offenses that could be construed to be two or more allied offenses of similar import, the accused waives the protection against multiple punishments under R.C. 2941.25. Id. at ¶ 19. The Court held that an accused's failure to seek the merger of his or her convictions as allied offenses of similar import in the trial court, the accused forfeits his or her allied offenses claim for appellate review. Id. at ¶ 21. "[F]orfeiture is the failure to timely assert a right or object to an error, and * * * 'it is a well-established rule that "an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." Id. at ¶ 21.

{¶43} The accused may raise a forfeited claim on appeal through Crim.R. 52(B). Pursuant to Crim.R. 52(B), "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The Court held in *Rogers:*

> An accused's failure to raise the issue of allied offenses of similar import in the trial court forfeits all but plain error, and a forfeited error is not reversible error unless it affected the outcome of the proceeding and reversal is necessary to correct a manifest miscarriage of justice. Accordingly, an accused has the burden to demonstrate a reasonable probability that the convictions are for allied offenses of similar import committed with the same conduct and without a separate animus; absent that showing, the accused cannot demonstrate that the trial court's failure to inquire whether the convictions merge for purposes of sentencing was plain error.

2015–Ohio–2459, ¶ 3. The Court in *Rogers* reaffirmed that even if an accused shows the trial court committed plain error affecting the outcome of the proceeding, the appellate court is not required to correct it. Id. at ¶ 23. The Supreme Court stated:

> [W]e have "admonish[ed] courts to notice plain error 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.'"(Emphasis added.) *Barnes* at 27, 759 N.E.2d 1240, *quoting State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

Rogers at ¶23.

{¶44} R.C. 2941.25, Multiple counts states:

> (A) Where the same conduct by 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.

{¶45} In *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.2d 892, the Ohio Supreme Court revised its allied-offense jurisprudence,

> 1. In determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must evaluate three separate factors-the conduct, the animus, and the import.
>
> 2. 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.

Ruff, at syllabus. The Court further explained,

> A trial court and the reviewing court on appeal when considering whether there are allied offenses that merge into a single conviction under R.C. 2941.25(A) must first take into account the conduct of the defendant.

> In other words, how were the offenses committed? If any of the following is true, the offenses cannot merge and the defendant may be convicted and sentenced for multiple offenses: (1) the offenses are dissimilar in import or significance—in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, and (3) the offenses were 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.

{¶46} R.C. 2919.25(A), Domestic Violence, provides, "No person shall knowingly cause or attempt to cause physical harm to a family or household member."

{¶47} R.C. 2911.11, aggravated burglary, provides, in relevant part,

> (A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:
>
> (1) The offender inflicts, or attempts or threatens to inflict physical harm on another.

{¶48} Domestic violence does not require a trespass; aggravated burglary can be committed by inflicting, attempting to inflict or threatening to inflict harm on someone who is not a "family member."

{¶49} In *State v. Johnson*, 88 Ohio St.3d 95, 723 N.E.2d 1054 (2000), the Ohio Supreme Court held that aggravated murder, aggravated robbery, and aggravated burglary were not allied offenses,

> Appellant committed aggravated burglary when he entered the home occupied by Shanon with the intent to commit a crime, carrying a ball bat as a weapon. He committed aggravated robbery when he viciously beat Shanon with the bat and took money from her purse. He committed aggravated murder when he killed Shanon. As a result, the offenses at issue were committed separately and with a separate animus.

Id. at 115, 723 N.E.2d 1054.

{¶50} Harris committed the crime of aggravated burglary when he broke into Rhonda's home with the intent to commit a crime. Harris committed the crime of domestic violence when he caused physical harm to Rhonda. As a result, the offenses at issue were committed separately and with a separate animus.

{¶51} In addition, in the case at bar Rhonda testified that once the pair were outside of the home, Harris hit Rhonda's head on the banister. (1T. at 261-262; 268). Felicia Minors testified that she saw Harris hit, choke and try to throw Rhonda off the front porch. (1T. at 155).

{¶52} In *State v. Powell* (1991), 59 Ohio St.3d 62, 63, 571 N.E.2d 125(1991), the Ohio Supreme Court determined that "[t]he crime of aggravated burglary continues so

long as the defendant remains in the structure being burglarized because the trespass of the defendant has not been completed." Consequently, the aggravating element of the offense must be committed prior to the offender exiting the structure. Otherwise, the burglary cannot be aggravated. *See, State v. Clark,* 107 Ohio App.3d 141, 146(2nd Dist. 1995); *State v. Perry,* 2nd Dist. Mont. No. 26421, 2015-Ohio-2181, ¶28.

{¶53} In the case at bar, physical harm occurred outside of the premises as well as inside the premises. Pursuant to *Rogers,* it is Harris's burden to demonstrate a reasonable probability that the convictions were for allied offenses of similar import committed with the same conduct and without a separate animus. Because the elements of domestic violence were also committed outside the residence after the aggravated burglary would have ceased, on the record before us we find that Harris has failed to demonstrate any probability that he was convicted of allied offenses of similar import committed with the same conduct and with the same animus.

{¶54} Harris's third assignment of error is overruled.

IV.

{¶55} In his fourth assignment of error, Harris claims he was denied effective assistance of trial counsel because his trial attorney failed to request a continuance and failed to object to the state's use of leading questions during the state's case-in-chief.

{¶56} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122

L.Ed.2d 180(1993); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373(1989).

{¶57} Counsel is unconstitutionally ineffective if his performance is both deficient, meaning his errors are "so serious" that he no longer functions as "counsel," and prejudicial, meaning his errors deprive the defendant of a fair trial. *Maryland v. Kulbicki,* 577 U.S. __, 2015 WL 5774453(Oct. 5, 2015)(citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

{¶58} "'The failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel.'" *State v. Fears*, 86 Ohio St.3d 329, 347, 715 N.E.2d 136(1999), *quoting State v. Holloway*, 38 Ohio St.3d 239, 244, 527 N.E.2d 831(1988). A defendant must also show that he was materially prejudiced by the failure to object. *Holloway*, 38 Ohio St.3d at 244, 527 N.E.2d 831. *Accord, State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶233.

{¶59} Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel. *State v. Phillips*, 74 Ohio St.3d 72, 85, 1995–Ohio–171. Even if the wisdom of an approach is questionable, "debatable trial tactics" do not constitute ineffective assistance of counsel. Id. "Poor tactics of experienced counsel, however, even with disastrous result, may hardly be considered lack of due process * * *." *State v. Clayton*, 62 Ohio St.2d 45, 48, 402 N.E.2d 1189 (1980)(*quoting United States v. Denno,* 313 F.2d 364 (2nd Cir.1963), *certiorari denied* 372 U.S. 978, 83 S.Ct. 1112, 10 L.Ed.2d 143.

{¶60} The Rules of Evidence provide in Rule 611(C):

> (C) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

{¶61} It is within the discretion of the trial court to permit the state to ask leading questions of its own witnesses. *State v. Miller*, 44 Ohio App.3d 42, 45, 541 N.E.2d 105(6th Dist. 1988); *State v. Madden*, 15 Ohio App.3d 130, 133, 472 N.E.2d 1126(12th Dist. 1984). As the court stated in *State v. Lewis*, 4 Ohio App.3d 275, 278, 448 N.E.2d 487, 490(3rd Dist. 1982), "[t]he exception 'except as may be necessary to develop his testimony' is quite broad and places the limits upon the use of leading questions on direct examination within the sound judicial discretion of the trial court." This form of questioning is routinely allowed and any objection undoubtedly would have been overruled.

{¶62} App.R. 16(A)(7) states that appellant shall include in his brief "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies. The argument may be preceded by a summary." An appellate court may rely upon App.R. 12(A) in overruling or disregarding an assignment of error because of "the lack of briefing" on the assignment of error. *Hawley v. Ritley*, 35 Ohio St.3d 157, 159, 519 N.E.2d 390, 392-393(1988).

{¶63} Because Harris fails to properly reference portions of the record supporting his claim that his trial counsel was ineffective because he did not object to the state's use

of leading questions, Harris cannot demonstrate the claimed error. *See Daniels v. Santic*, 11th Dist. Geauga No. 2004-G-2570, 2005-Ohio-1101, ¶ 13-15. See, also, App.R. 12(A)(2) and 16(A) (7); *Graham v. City of Findlay Police Dept*. 3rd Dist. Hancock No. 5-01-32, 2002-Ohio-1215("[t]his court is not obliged to search the record for some evidence of claimed error. * * * Rather, an appellant must tell the appellate court specifically where the trial court's alleged errors may be located in the transcript"); *State ex rel. Physicians Commt. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees*, 108 Ohio St.3d 288, 2006-Ohio-903, 843 N.E.2d 174, ¶13; *State ex rel. Petro v. Gold*, 166 Ohio App.3d 371, 2006-Ohio-943, 850 N.E.2d 1218(10th Dist.), ¶ 94, *appeal not allowed*, 110 Ohio St.3d 1439, 2006-Ohio-3862, *reconsideration denied*, 111 Ohio St.3d 1418, 2006- Ohio-5083; *Porter v. Keefe*, 6th Dist. Erie No. E-02-018, 2003-Ohio-7267, ¶ 109-113.

{¶64} After a careful review of the record, this court cannot find that the trial court erred in permitting the limited use of leading questions or that trial counsel was ineffective in his representation in the argued failure to object to the prosecutor's use of leading questions.

{¶65} Harris further posits that counsel should have requested a continuance because the state identified the two 9-1-1- callers only days prior to the start of trial.

{¶66} Appellant must demonstrate that he suffered prejudice from his counsel's performance. See *Strickland,* 466 U.S. at 691 ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment"). To establish prejudice, "[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. A reasonable probability is a

probability sufficient to undermine confidence in the outcome." *Id.* at 694. To prevail on his ineffective-assistance claim, Appellant must show, therefore, that there is a "reasonable probability" that the trier of fact would not have found him guilty.

{¶67} Harris has failed to establish that he suffered prejudice because of the failure of counsel to request a continuance. Specifically Harris does not provide this Court with any rationale as to how his case would have proceeded any differently had a continuance been granted. We find no errors rising to the level of *Bradley* and *Strickland* nor any deficiency in trial counsel's performance that deprived Harris of a fair trial.

{¶68} Harris's fourth assignment of error is overruled.

{¶69} For the foregoing reasons, the judgment of the Court of Common Pleas of Richland County, Ohio, is affirmed.

By Gwin, P.J., and

Wise, J., concur;

Farmer, J., dissents

Farmer, J., dissents

{¶70} I respectfully dissent from the majority's opinion that under *State v. Ruff,* 143 Ohio St.3d 114, 2015-Ohio-995, there is a separate animus to the aggravated burglary charge and the domestic violence charge.

{¶71} Aggravated burglary does not occur unless there is a trespass accompanied by the attempt or infliction of physical harm on another. Without the harm [R.C. 2911.11(A)(1)], there is but a simple trespass.

{¶72} I find the distinction adopted by the majority (the infliction of physical harm continued outside the home, on the porch) to be a distinction without a difference. It is similar to finding the transport of a stolen item outside a residence during an aggravated burglary to have a separate animus.

{¶73} I would grant the assignment of error and remand the case for the state to elect which charge the trial court should impose sentence.

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HON. SHEILA G. FARMER