[Cite as *State v. Williams*, 2009-Ohio-3162.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C.A. No. 24169
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
CAMERON D. WILLIAMS	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 07 08 2540

DECISION AND JOURNAL ENTRY

Dated: June 30, 2009

CARR, Judge.

{¶1} Appellant, Cameron Williams, appeals his conviction and sentencing out of the Summit County Court of Common Pleas. This Court affirms, in part, and reverses, in part.

I.

{¶2} On August 7, 2007, Williams was indicted on one count of aggravated murder in violation of R.C. 2903.01(A), a special felony, along with three distinct capital offense specifications and one firearm specification; one count of aggravated murder in violation of R.C. 2903.01(B), a special felony, along with three distinct capital offense specifications and one firearm specification; one count of aggravated murder in violation of R.C. 2903.01(D), a special felony, along with three distinct capital offense specifications and one firearm specification; one count of kidnapping in violation of R.C. 2905.01(A)(1)/(A)(2)/(A)(3)/(A)(4), a felony of the first degree, along with a firearm specification; one count of kidnapping in violation of R.C. 2905.01(B)(1)/(B)(2), a felony of the first degree, along with a firearm specification; one count

of aggravated burglary in violation of R.C. 2911.11(A)(1)/(A)(2), a felony of the first degree, along with a firearm specification; one count of burglary in violation of R.C. 2911.12(A)(2), a felony of the second degree, along with a firearm specification; one count of rape in violation of R.C. 2907.02(A)(2), a felony of the first degree, along with a firearm specification; one count of violating a protection order in violation of R.C. 2919.27, a felony of the third degree, along with a firearm specification; one count of intimidation of a crime victim or witness in violation of R.C. 2921.04(B), a felony of the third degree, along with a firearm specification; one count of escape in violation of R.C. 2921.34(A)(1), a felony of the third degree; one count of having weapons while under disability in violation of R.C. 2923.13(A)(1)/(A)(2)/(A)(3)/(A)(4), a felony of the third degree; one count of carrying concealed weapons in violation of R.C. 2923.12(A)(2), a felony of the fourth degree; one count of menacing by stalking in violation of R.C. 2903.211(A), a felony of the fourth degree, along with a firearm specification; and one count of domestic violence in violation of R.C. 2919.25(C), a misdemeanor of the first degree.

{¶3} Williams was arraigned on August 10, 2007. The magistrate issued an order from the arraignment on August 15, 2007, journalizing Williams' plea of not guilty to the charges in the indictment, modifying bond, and ordering that "Attorney Jon Sinn and Attorney John Alexander be permitted to withdraw as counsel, and Attorney Kerry O'Brien has been appointed as first chair counsel and Attorney John Greven has been appointed as second chair counsel for the Defendant in this case[.]" Williams did not move to set aside the magistrate's order. Also on August 15, 2007, Williams executed a time waiver. Attorneys O'Brien and Greven signed the certification on the time waiver, certifying that they had explained to Williams his right to have his case tried within 270/90 days after arrest and that Williams voluntarily agreed to waive time.

On August 16, 2007, a copy of an "Appointment of Trial Counsel in a Capital Case" form was filed. The form states, in part:

> "This form is used pursuant to Rule 20 of the Rules of Superintendence for the Courts of Ohio to report the appointment of trial counsel where the defendant is indigent, counsel is not privately retained by or for the defendant, and the death penalty can be or has been imposed upon the defendant."

The form indicated that Attorneys O'Brien and Greven were appointed on August 3, 2007. Both attorneys executed the attorney certification part of the form, accepting appointment, affirming their current certification under Sup.R. 20 to accept such appointments, and certifying that the appointment would not create an excessive workload which would interfere with the rendering of quality representation in accordance with constitutional and professional standards. The record does not include any earlier "Appointment of Trial Counsel in a Capital Case" form appointing any other attorneys to represent Williams.

{¶4} On August 23, 2007, Williams filed an index of twenty-eight motions he filed the same day. Included was a "motion for all motions to be heard on the record." The trial court held a hearing on all pending motions on September 13, 2007, and issued a journal entry on September 14, 2007, either ruling on or taking under advisement all motions. The trial court expressly granted the motion for all motions to be heard on the record.

{¶5} On February 11, 2008, immediately prior to the commencement of trial, the State moved to dismiss certain counts and specifications and to amend the language in some specifications. The trial court granted the motion and the indictment was amended as follows. The trial court dismissed, pursuant to the State's recommendation, the first capital offense specification for each of counts one, two and three (the three aggravated murder charges); the second charge of kidnapping and its firearm specification; the charge of burglary and its firearm specification; the charge of rape and its firearm specification; the charge of menacing by stalking

and its firearm specification; and the charge of domestic violence. The trial court amended, pursuant to the State's recommendations, several charges and specifications to remove reference to charges and/or specifications which had been dismissed. The trial court, pursuant to the State's recommendation, amended the first remaining count of kidnapping to reflect the language in R.C. 2905.01(A)(2) only. The trial court, pursuant to the State's recommendation, further amended the charge of having weapons while under disability to delete the language "dangerous ordnance" and "and/or is drug dependent, in danger of drug dependence, or a chronic alcoholic." The indictment was renumbered accordingly.

{¶6} The matter proceeded to trial. During the course of trial, Williams filed a motion requesting jury instructions on the lesser included offenses of murder and voluntary manslaughter. The trial court granted the request for a jury instruction on the lesser included offense of murder in relation to the first charge of aggravated murder, denied it as to the other 2 charges of aggravated murder, and denied in toto the request for an instruction on the lesser included offense of voluntary manslaughter. At the conclusion of trial, the jury found Williams guilty of the following: the lesser included offense of murder in count one; two counts of aggravated murder, plus 2 capital offense specifications and a firearm specification for each count; kidnapping, plus the firearm specification; aggravated burglary, plus the firearm specification; violating a protection order while committing a felony, plus the firearm specification; intimidation of a crime victim while using force or unlawful threat of harm, plus the firearm specification; escape while under detention for a felony of the third, fourth or fifth degree; having weapons while under disability; and carrying a concealed weapon.

{¶7} The matter proceeded to the mitigation phase. The jury found in regard to both counts of aggravated murder that the aggravating circumstances did not outweigh the mitigating

factors presented in the case by proof beyond a reasonable doubt. The jury found that "the sentence of life imprisonment without parole eligibility for thirty full years should be imposed[.]"

{¶8} At sentencing, the trial court sentenced Williams to a mandatory three-year prison term on each of the six firearm specifications, then merged three specifications into the remaining three for a total of nine years. The trial court sentenced Williams to a mandatory term of life in prison with parole eligibility after 15 years on the murder count, to a mandatory term of life in prison with parole eligibility after 30 years on both aggravated murder counts, then merged the murder count and one aggravated murder count into the remaining aggravated murder count for a total of life in prison with parole eligibility after 30 years. The trial court sentenced Williams to ten years in prison for both the kidnapping and aggravated burglary counts, to five years for both the escape and having weapons while under disability counts, and ordered that those sentences would be served consecutively to each other for a total of 30 years. The trial court sentenced Williams to 5 years in prison for violation of a protection order, to 5 years for intimidation of a crime victim and to 18 months for carrying concealed weapons, and ordered that those sentences be served concurrently with the sentences imposed, respectively, for aggravated burglary, kidnapping and having weapons while under disability. In sum, the trial court sentenced Williams to life with parole eligibility after 69 years.

{¶9} Williams filed a timely appeal, raising five assignments of error for review.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO ALLOW THE JURY TO CONSIDER THE CHARGE OF VOLUNTARY MANSLAUGHTER."

{¶10} Williams argues that the trial court abused its discretion by failing to instruct the jury to consider the charge of voluntary manslaughter. This Court disagrees.

{¶11} The elements of voluntary manslaughter are set forth in R.C. 2903.03(A), which states:

> "No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another or the unlawful termination of another's pregnancy."

{¶12} The Ohio Supreme Court has stated:

> "Voluntary manslaughter is an inferior degree of murder, for its elements are contained within the indicted offense, except for one or more additional mitigating elements. Even though voluntary manslaughter is not a lesser included offense of murder, the test for whether a judge should give a jury an instruction on voluntary manslaughter when a defendant is charged with murder is the same test to be applied as when an instruction on a lesser included offense is sought.
>
> "Thus, a defendant charged with murder is entitled to an instruction on voluntary manslaughter when the evidence presented at trial would reasonably support both an acquittal on the charged crime of murder and a conviction for voluntary manslaughter.
>
> "When the evidence presented at trial going to a lesser included offense (or inferior-degree offense) meets this test, the trial judge must instruct the jury on the lesser (or inferior-degree) offense. On the other hand, when the evidence presented at trial does not meet this test, a charge on the lesser included (or inferior-degree) offense is not required." (Internal quotations and citations omitted.) *State v. Shane* (1992), 63 Ohio St.3d 630, 632.

{¶13} This Court reviews de novo the necessity of a voluntary manslaughter instruction. *State v. Smith*, 9th Dist. No. 23542, 2007-Ohio-5119, at ¶9. "However, we will not reach the issue of necessity unless we first find that the trial court abused its discretion in determining the sufficiency of the evidence." Id., citing *State v. Wolons* (1989), 44 Ohio St.3d 64, 68. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217,

219. An abuse of discretion demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. Id.

{¶14} The Ohio Supreme Court held:

> "Before giving an instruction on voluntary manslaughter in a murder case, the trial court must determine 'whether evidence of reasonably sufficient provocation occasioned by the victim has been presented to warrant such an instruction.' *Shane*, 63 Ohio St.3d at paragraph one of the syllabus. In making that determination, trial courts must apply an objective standard: 'For provocation to be reasonably sufficient, it must be sufficient to arouse the passions of an ordinary person beyond the power of his or her control.' Id. at 635." *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, at ¶81.

"The trial judge should evaluate the evidence in the light most favorable to the defendant, without weighing the persuasiveness of the evidence[,]" although the trial court still decides the issue as a matter of law. *Shane*, 63 Ohio St.3d at 637.

{¶15} The *Shane* court enumerated some "classic voluntary manslaughter situations[,]" specifically, "assault and battery, mutual combat, illegal arrest and discovering a spouse in the act of adultery." Id. at 635. In this case, Williams shot and killed Darian Polk as he was lying in bed with Tamara Hughes, Williams' ex-wife. Although there was testimony that Williams and Hughes had a child together and that they may have been planning to remarry, they were not spouses at the time Williams killed Polk.

{¶16} Tamara Hughes testified that, since her divorce from Williams in July 2005, she had on-again, off-again relationships with both Williams and Polk. Williams' statement to police after his arrest was admitted into evidence. In that statement, Williams admitted that he knew of Hughes' on-going sexual relationship with Polk. Williams asserted that he and Polk had made verbal threats to one another over the phone for 2 years, while Hughes maintained a

relationship with both men. Hughes testified, and Williams asserted in his police interview, that Williams was familiar with the car that Polk drove.

{¶17} Hughes testified that she had plans to return from her job in Chicago to her Akron Metropolitan Housing Authority ("AMHA") subsidized housing in Barberton on Friday, July 27, 2007. She testified that she had only given Williams her daughter's cell phone number as a means of contacting her. She testified that she had plans to spend the weekend with Polk, and that Williams was not expecting to "hook up" with her that night.

{¶18} Williams explained to the police the events of the morning of Saturday, July 28, 2007 as follows. He had obtained a gun about 3 days earlier for the purpose of robbing people to obtain "weed" and crack (cocaine). On Saturday morning, while "high" from "smokin' weed," he went to Hughes' apartment to talk. He recognized Polk's car in front of Hughes' apartment. The video surveillance tape of the housing complex shows Williams going to Hughes' front door, leaving and going to the side of the apartment and then around to the back of the apartment. Williams admitted, and the surveillance video confirms, that he broke into Hughes' apartment by tearing a screen and entering through the kitchen window. Williams told the police that he knew Polk was in the apartment and he went upstairs, "praying" that Polk was not in bed with Hughes.

{¶19} Williams asserted that he entered the apartment to confront both Hughes and Polk, and that he was willing to go with any "flow" that happened. He admitted during his interview that he entered Hughes' bedroom and was mad when he saw Polk in "his" bed with Hughes. Williams stated that he leaned over the bed, put the gun to Polk's head and pulled the trigger. He stated that the gun "clicked" without firing, so he pulled the slide back on the gun to chamber a round and fired 3-4 more times. Williams stated that Hughes and Polk had awakened

after the gun misfired, that he pushed Hughes out of the way, and that he kept firing as Polk rose from the bed and started to approach. Williams told the police that he "snapped" when he saw Polk's car and "passed out" and "lost it" upon seeing Polk in bed. Williams told the police that, after shooting Polk, he forced Hughes to get dressed and leave with him. The surveillance video shows that 84 seconds elapsed from the time Williams entered Hughes' apartment through the kitchen window until he and Hughes exited the apartment together through the front door.

{¶20} Hughes testified that she awakened on the morning of July 28, 2007, to find Williams leaning over her bed. She testified that she jumped up, grabbed Williams' arm, and saw his gun. Hughes testified that she tried to calm Williams, but he responded, "No, bitch, I told you." She testified that Williams began firing the gun and that she saw Polk on the floor. Hughes testified that Williams told her:

> "Come on, bitch, get your shit. You gonna get me out of here. You ain't gonna let them catch me. Get your shit on. Let's go, or I'm gonna take your life too. Now, look at that N*****. He dead. Dead. Now what?"

Hughes testified that, after Williams took her from the apartment, she speculated that Polk might still be alive. She testified that Williams told her, "I want that N***** dead." She testified that Williams made her drive the two of them away, cautioning her to obey all traffic laws so as not to call attention to them. Hughes testified that Williams threatened that he would "blow your head off" if the police approached their vehicle.

{¶21} The record indicates insufficient evidence of provocation which was reasonably sufficient to arouse the passions of an ordinary person beyond the power of his or her control. See *Shane*, 63 Ohio St.3d. at 635. Williams and Hughes were not married. Williams admitted that he knew of Hughes' years-long sexual relationship with Polk, so that seeing the two of them in bed together could not have aroused in him the shock which accompanies an initial revelation.

In addition, Williams recognized Polk's vehicle outside of Hughes' apartment and told the police that he knew that Polk was inside Hughes' apartment during the early morning hours. Armed with that knowledge, and a loaded gun, Williams broke into the apartment and went directly to Hughes' bedroom to confront Hughes and Polk, and to go with the "flow" of whatever might happen.

{¶22} While Williams may have been angry that the woman he loved was with another man, there is insufficient evidence to indicate that Williams was under the influence of sudden passion or rage when he shot and killed Polk. Knowing that Polk was inside Hughes' apartment, Williams paced around the outside of Hughes' apartment, going first to the front door and then to the back door. He ripped the screen of the kitchen window to facilitate his entry into the apartment with the intent of confronting Hughes and Polk. When he got to the bedroom and saw Polk, he put the gun to Polk's head and fired. The gun, however, misfired, giving Williams time to reflect on the situation. Instead, Williams then deliberately pulled the slide back on the gun to chamber a round. Pushing Hughes out of the way to protect her, Williams fired multiple shots towards Polk until he ceased his approach. The Ohio Supreme Court has recognized multiple shots or stabs as indicative of purpose to kill. See, e.g., *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, at ¶70; *State v. Carter* (2000), 89 Ohio St.3d 593, 602. Williams then used Hughes to facilitate his escape. He further voiced his desire that Polk be dead and not merely wounded. This evidence tends to prove Williams' purpose to kill Polk rather than that his will was reasonably overborne by sudden rage due to any provocation by the victim.

{¶23} Because reasonably sufficient evidence of provocation was not presented, the trial court did not abuse its discretion by refusing to instruct the jury on the inferior charge of

voluntary manslaughter. See *Shane*, 63 Ohio St.3d at 638. Williams' first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO PRESERVE FOR THE RECORD THE REASON DEFENDANT'S INITIAL TRIAL COUNSEL WAS REMOVED FROM THE CASE."

{¶24} Williams argues that the trial court committed reversible error by failing to preserve for the record the reason for the removal of his initial trial counsel. This Court disagrees.

{¶25} Crim.R. 22 provides, in relevant part, that "[i]n serious offense cases all proceedings shall be recorded." The Ohio Supreme Court has repeatedly recognized that "a capital defendant is entitled to a 'complete, full, and unabridged transcript of all proceedings against him so that he may prosecute an effective appeal.'" *State v. Palmer* (1997), 80 Ohio St.3d 543, 553, quoting *State ex rel. Spirko v. Court of Appeals* (1986), 27 Ohio St.3d 13, 18. However, the *Palmer* court clarified a defendant's entitlement by holding that the record need not be "perfect for purposes of appellate review." *Palmer*, 80 Ohio St.3d at 553. The *Palmer* court reiterated:

> "In a number of cases involving death penalty appeals, this court has clearly held that reversal of convictions and sentences on grounds of some unrecorded bench and chambers conferences, off-the-record discussions, or other unrecorded proceedings will not occur in situations where the defendant has failed to demonstrate that (1) a request was made at trial that the conferences be recorded or that objections were made to the failures to record, (2) an effort was made on appeal to comply with App.R. 9 and to reconstruct what occurred or to establish its importance, and (3) material prejudice resulted from the failure to record the proceedings at issue." Id. at 554, citing, generally, *State v. Grant* (1993), 67 Ohio St.3d 465, 481-482; *State v. Davis* (1991), 62 Ohio St.3d 326, 347; *Spirko*, 59 Ohio St.3d at 15-16; *State v. Jells* (1990), 53 Ohio St.3d 22, 32, *State v. Tyler* (1990), 50 Ohio St.3d 24, 41-42; and *State v. Brewer* (1990), 48 Ohio St.3d 50, 60-61.

{¶26} The Ohio Supreme Court recently clarified that its holding in *Palmer* applied to "the failure to record relatively unimportant portions of a trial" such as a jury view or conferences in chambers or at the bench, but not matters which implicate constitutional issues, as in the case of the removal of a deliberating juror. *State v. Clinkscale*, Slip Opinion No. 2009-Ohio-2746, at ¶13-19. In refusing to presume regularity in the absence of a complete record, the *Clinkscale* court further noted the defendant's objection to the incomplete record and the trial court's refusal to render the record complete. Id. at ¶17. *Clinkscale's* limitations on the application of the *Palmer* test are not applicable to the instant matter because the unrecorded portion of the proceedings does not implicate constitutional concerns and Williams did not object to the incompleteness of the record.

{¶27} Williams filed motions on August 23, 2007, requesting that all motions be heard on the record and that side bar proceedings be recorded. The trial court granted those motions. Williams had not made any such requests at the time of the withdrawal of original counsel and the appointment of alternate counsel. Williams' argument that the trial court did not retroactively comply with its order granting the August 23, 2007 motions is disingenuous.

{¶28} In addition, Williams failed to object during his arraignment on August 10, 2007, when the magistrate ordered that Attorneys Alexander and Sinn "are withdrawn" and that Attorneys O'Brien and Greven were appointed on the case. At a hearing on August 29, 2007, the trial court noted that Attorney Sinn was counsel of record for Williams in another pending criminal case which was recently transferred to the court's docket. The trial court counseled defense counsel to confer with Attorney Sinn regarding the status of the other pending case and ordered that Attorney Sinn should appear at the next pre-trial, at which time the court would determine whether Attorneys O'Brien and Greven would handle the older case in addition to the

instant case. The trial judge remarked that she had appointed Attorneys O'Brien and Greven to represent Williams in this capital case after verifying that they were qualified by the Supreme Court of Ohio to handle such a case, and notifying the Supreme Court of the appointment. Williams was present and did not raise any objections.

{¶29} At a motion hearing on September 13, 2007, the trial judge noted for the record that she understood that the attorneys had reached a consensus that Attorney Sinn would withdraw from further representation of Williams and that Attorneys O'Brien and Greven would represent him in regard to all pending charges. The trial court inquired of Williams who asserted, "I agree with no objections." Williams further failed to raise any objection to Attorney Alexander's earlier withdrawal from representation.

{¶30} When Williams filed his docketing statement in connection with this appeal, he indicated that the record would include the original papers and exhibits, a certified copy of the docket and journal entries, and a full or partial transcript of proceedings. He did not indicate that the record would include a statement of the evidence or proceedings pursuant to App.R. 9(C) or an agreed statement of the case pursuant to App.R. 9(D). Rather, Williams merely asserts that he wished to proceed in the capital case under the representation of Attorney Alexander. He complains that the record is incomplete, yet he made no attempt to create an adequate record.

{¶31} Finally, Williams has failed to demonstrate material prejudice. General averments of prejudice are insufficient. *Palmer*, 80 Ohio St.3d at 555. In this case, Williams does not even make general averments. Rather, he merely asserts that "it is virtually impossible to determine whether [his] initial trial counsel should have remained on the case."

{¶32} Based on the above reasoning, Williams has failed to demonstrate trial court error requiring reversal of his convictions. See id. at 554. Williams' second assignment of error is overruled.

ASSIGNMENT OF ERROR III

> "TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO CHALLENGE THE PRIOR CONVICTIONS ADMITTED AT TRIAL."

{¶33} Williams argues that trial counsel were ineffective for failing to object to the admission into evidence of his prior convictions. This Court disagrees.

{¶34} This Court uses a two-step process as set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 687, to determine whether a defendant's right to the effective assistance of counsel has been violated.

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id.

{¶35} To demonstrate prejudice, "the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus. "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." *Strickland*, 466 U.S. at 691.

{¶36} This Court must analyze the "reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. The defendant must first identify the acts or omissions of his attorney that he claims were not the

result of reasonable professional judgment. This Court must then decide whether counsel's conduct fell outside the range of professional competence. Id.

{¶37} Williams bears the burden of proving that counsel's assistance was ineffective. *State v. Hoehn*, 9th Dist. No. 03CA0076-M, 2004-Ohio-1419, at ¶44, citing *State v. Colon*, 9th Dist. No. 20949, 2002-Ohio-3985, at ¶49; *State v. Smith* (1985), 17 Ohio St.3d 98, 100. In this regard, there is a "strong presumption [] that licensed attorneys are competent and that the challenged action is the product of a sound strategy." *State v. Watson* (July 30, 1997), 9th Dist. No. 18215. In addition, "debatable trial tactics do not give rise to a claim for ineffective assistance of counsel." *Hoehn* at ¶45, quoting *In re Simon* (June 13, 2001), 9th Dist. No. 00CA0072, citing *State v. Clayton* (1980), 62 Ohio St.2d 45, 49. Even if this Court questions trial counsel's strategic decisions, we must defer to his judgment. *Clayton*, 62 Ohio St.2d at 49. The Ohio Supreme Court has stated:

> "'We deem it misleading to decide an issue of competency by using, as a measuring rod, only those criteria defined as the best of available practices in the defense field.' *** Counsel chose a strategy that proved ineffective, but the fact that there was another and better strategy available does not amount to a breach of an essential duty to his client." Id., quoting *State v. Lytle* (1976), 48 Ohio St.2d 391, 396.

{¶38} "[A] defendant is not deprived of effective assistance of counsel when counsel chooses, for strategical reasons, not to pursue every possible trial tactic." *State v. Brown* (1988), 38 Ohio St.3d 305, 319, citing *State v. Johnson* (1986), 24 Ohio St.3d 87. In addition, "the end result of tactical trial decisions need not be positive in order for counsel to be considered 'effective.'" *State v. Awkal* (1996), 76 Ohio St.3d 324, 337.

{¶39} Williams concedes that evidence of his prior convictions was relevant, and indeed "critical," to the determination of whether he committed several of the crimes with which he was charged. He further does not dispute that certified copies of judgment entries of his prior

convictions were presented for admission. He argues, however, that mere certified copies of judgment entries of conviction are insufficient to prove a defendant's prior conviction. Rather, he argues that additional evidence identifying the defendant as the person named in the judgment entries of conviction is necessary.

{¶40} R.C. 2945.75(B)(1) states:

> "Whenever in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction."

{¶41} Williams argues that a review of the multi-jurisdictional clerk of courts web site for Summit County, Ohio, indicates that no fewer than five "Cameron Williams" have criminal convictions. At trial, however, Jeff Jones, Williams' parole officer testified that he familiarized himself with Williams' criminal history, including Williams' prior felony convictions. In addition, Mr. Jones testified that Williams was on parole to him in regard to several of those felony convictions. Mr. Jones reviewed the certified copies of judgment entries of conviction for a 1992 felony drug offense, a 1994 burglary and discharging a firearm into a habitation, a 2004 felony domestic violence, and a 2005 escape. He testified that those convictions constituted a portion of Williams' criminal history and that Williams was on parole to him in regard to the 1994, 2004 and 2005 convictions. Accordingly, Mr. Jones presented additional evidence sufficient to identify Williams as the defendant named in the certified judgment entries of conviction presented by the State. Because such evidence, in conjunction with the certified copies of the judgment entries, was sufficient pursuant to R.C. 2945.75(B) to prove Williams' prior convictions, counsel's failure to challenge those convictions did not constitute deficient performance. Williams' third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

"THE CONVICTION FOR VIOLATION OF A PROTECTION ORDER IS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

{¶42} Williams argues that his conviction for violating a protection order is not supported by sufficient evidence. This Court agrees.

> "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Galloway* (Jan. 31, 2001), 9th Dist. No. 19752.

{¶43} The test for sufficiency requires a determination of whether the State has met its burden of production at trial. *State v. Walker* (Dec. 12, 2001), 9th Dist. No. 20559; See, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390.

{¶44} Williams was convicted of violating a protection order in violation of R.C. 2919.27(A)(1), which states:

> "No person shall recklessly violate the terms of *** [a] protection order issued or consent agreement approved pursuant to section 2919.26 or 3113.31 of the Revised Code."

Significantly, the indictment did not contain language charging Williams with violating a protection order issued by a court of another state. R.C. 2919.27(A)(3).

{¶45} R.C. 3113.31 provides for the issuance of protection orders/consent agreements in cases of domestic violence. Regardless of whether any such protection order or consent agreement is issued ex parte or after full hearing, the trial court must issue a copy of the order to the respondent, directing "that a copy of an order be delivered to the respondent on the same day that the order is entered." R.C. 3113.31(F)(1).

{¶46} R.C. 2919.26 provides for the issuance of temporary protection orders upon motion of a victim (or arresting officer on behalf of a victim in emergency situations), in conjunction with the filing of a complaint for criminal damaging, criminal mischief, burglary, aggravated trespass, any offense of violence, or any sexually oriented offense. R.C. 2919.26(A)(1). Regardless of whether any such temporary protection order is issued ex parte or after full hearing, the trial court must issue a copy of the order to the respondent, directing "that a copy of the order be delivered to the defendant on the same day that the order is entered." R.C. 2919.26(G)(1).

{¶47} R.C. 2901.22(C) provides:

> "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."

{¶48} Before Williams could "disregard a known risk" of violating a protection order, he necessarily had to have notice of the existence of the protection order. Ohio courts have held that the mere lack of service of the protection is not enough to indicate lack of notice, where the evidence indicates that the respondent/defendant was otherwise aware of the protection order. See, e.g., *State v. Rutherford*, 2d Dist. No. 08CA11, 2009-Ohio-2071, at ¶28-9; *State v. Bombardiere*, 3d Dist. No. 14-06-27, 2007-Ohio-1537, at ¶16. In addition, circumstantial evidence that the respondent/defendant has been notified, i.e., the trial court's instructions that the order be mailed to the respondent's/defendant's proper address, is sufficient evidence that the respondent/defendant had notice of the protection order. See, e.g., *State v. McLean*, 11th Dist. Nos. 2003-T-0117, 2003-T-0118, 2005-Ohio-1562, at ¶19.

{¶49} In this case, the State presented evidence of 5 documents which it argues gave Williams notice that he was to have no contact with Tamara Hughes. Officer Martin Eberhart of the Barberton Police Department testified regarding 2 purported documents. Officer Eberhart testified that he spotted Williams with Hughes on AMHA property on June 23, 2007, while he was off-duty but working a security job for the housing authority. The officer testified that he arrested Williams on an outstanding felony warrant for domestic violence against Hughes. Officer Eberhart testified that a protection order is automatically issued upon the filing of a complaint for domestic violence. No such protection order was admitted into evidence, and Williams made no statement to the police that he was aware of the issuance of any such order. Nor did the officer testify that he advised Williams of the existence of a protection order.

{¶50} Officer Eberhart further testified that, as a result the arrest, he issued an AMHA criminal trespass notice to Williams. The notice served to ban Williams from all AMHA properties and notified him that any violation might result in his prosecution for the charge of criminal trespass. Both Williams and Hughes signed the notice. The notice, however, does not constitute a protection order and cannot form the basis for the charge of violating a protection order pursuant to R.C. 2919.27.

{¶51} Williams' parole officer testified that he learned on June 26, 2007, that Williams had been arrested for felony domestic violence. Mr. Jones identified a certified copy of a journal entry of Williams' arraignment for the domestic violence charge. The magistrate ordered that, as a condition of bond, Williams was to have no contact with the alleged victim. No victim was identified by name. Furthermore, the no contact order was issued as a condition of bond and did not constitute a protection order issued pursuant to R.C. 2919.26 or R.C. 3113.31.

{¶52} Mr. Jones further testified that Tamara Hughes contacted him on July 23, 2007, to report that Williams had been spending time with her in Illinois in violation of the terms of his parole. Mr. Jones testified that, when Williams later reported to him on July 23, 2007, he imposed a parole sanction because Williams had been in Illinois without permission from the parole officer and had had contact with Hughes. The sanction required Williams to be on home incarceration with GPS monitoring until February 9, 2008, and to have "No Contact with Tamara Hughes whatsoever!!!" Again, the no contact order was merely a parole sanction and did not constitute a protection order issued pursuant to R.C. 2919.26 or R.C. 3113.31.

{¶53} Finally, the State admitted a copy of a certified copy of an emergency order of protection issued on July 24, 2007, by the Nineteenth Judicial Circuit Court, Lake County, Illinois, to Tamara Hughes, and naming Williams as the respondent. Hughes testified that this was the only temporary protection order that she had in regard to Williams. The order indicates that it was effective until 5:00 p.m. on August 14, 2007, and that a hearing on a final protection order was scheduled for 7:00 a.m. on August 14, 2007. The order contains no instructions for service on Williams, and the box next to "Respondent (via Sheriff)" in the "cc:" list is not marked. Hughes did not testify that she told Williams about the out-of-state protection order, even though she admitted that she maintained contact with him after its issuance. Williams did not indicate that he was aware of the existence of any protection order during his statement to the police.

{¶54} State's Exhibit 49 is a copy of a photograph taken of the back seat of Hughes' vehicle. The picture shows the Lake County, Illinois, emergency order of protection lying on top of clothing and other papers strewn about the back seat. Even though the State presented evidence that Williams had been in the vehicle with Hughes, there was no evidence presented to

demonstrate that Williams was aware of the existence of the order in the back seat, or even whether the order was present or visible to Williams when he was in Hughes' vehicle.

{¶55} This Court concludes that the State failed to present sufficient evidence to allow any rational trier of fact to find beyond a reasonable doubt that Williams violated a protection order. There is no evidence that the Lake County, Illinois emergency order of protection, the only document in the record which constitutes a protection order within the purview of R.C. 2919.27, was ever served on Williams. Furthermore, there is no evidence that Williams was otherwise aware of the terms, or even the very existence, of the protection order. Accordingly, the State failed to present sufficient evidence to establish that Williams recklessly violated the terms of a protection order. Williams' fourth assignment of error is sustained.

ASSIGNMENT OF ERROR V

> "THE TRIAL COURT COMMITTED ERROR IN SENTENCING [DEFENDANT] ON THE KIDNAPPING CHARGE FOR A FELONY OF THE [FIRST] DEGREE RATHER THAN A FELONY OF THE [SECOND] DEGREE IN THE ABSENCE OF THE JURY MAKING SPECIFIC FINDINGS FOR SUCH INCREASED PENALTY."

{¶56} Williams argues that the trial court erred by sentencing him on a felony of the first degree in regard to the kidnapping charge instead of on a felony of the second degree, where the jury made no finding regarding whether the victim had been released unharmed. This Court disagrees.

{¶57} Williams was convicted of kidnapping in violation of R.C. 2905.01(A)(2), which states: "No person, by force, threat, or deception *** shall remove another from the place where the other person is found or restrain the liberty of the other person *** [t]o facilitate the commission of any felony or flight thereafter[.]" R.C. 2905.01(C) states: "Whoever violates this

section is guilty of kidnapping, a felony of the first degree. If the offender releases the victim in a safe place unharmed, kidnapping is a felony of the second degree."

{¶58} Williams argues that, in the absence of a finding by the jury that he did not release the victim unharmed, he could only be convicted and sentenced for second degree kidnapping. He relies on R.C. 2945.75(A)(2), which states:

> "When the presence of one or more additional elements makes an offense one of more serious degree: *** [a] guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged."

{¶59} This Court has held:

> "[T]he State is not required to prove that the defendant failed to release his victim unharmed and in a safe place. *State v. Leslie* (1984), 14 Ohio App.3d 343, 345. This is a circumstance that mitigates a defendant's criminal culpability, not an element of the crime. *State v. Cornute* (1979), 64 Ohio App.2d 199, 201." *State v. Adkins* (Jan. 29, 1997), 9th Dist. No. 17828.

"[K]idnapping is a per se first degree felony unless in mitigation it is shown that the victim was released unharmed in a safe place." *State v. Moses* (July 17, 1984), 10th Dist. No. 84AP-77. Accordingly, the jury was not required to find that the victim had not been released unharmed before the trial court could sentence Williams for a felony of the first degree.

{¶60} Williams did not object to the jury instructions or verdict forms in regard to this issue. Moreover, he has not argued plain error. "[T]his Court will not construct a claim of plain error on behalf of an appellant who fails to raise such an argument in [his] brief." *State v. White*, 9th Dist. Nos. 23955, 23959, 2008-Ohio-2432, at ¶33. Williams' fifth assignment of error is overruled.

III.

{¶61} Williams' first, second, third and fifth assignments of error are overruled. His fourth assignment of error is sustained. The judgment of the Summit County Court of Common Pleas is affirmed, in part, reversed, in part, and the cause remanded for further proceedings consistent with this decision.

Judgment affirmed, in part,
reversed, in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

DONNA J. CARR
FOR THE COURT

MOORE, P. J.
CONCURS

BELFANCE, J.
CONCURS, SAYING:

{¶62} I concur that under the circumstances of this case, the objective standard as enunciated in *Shane* was not supported by the facts. The fact that Williams knew of the continuing sexual relationship with Polk for several years and Williams and Polk had exchanged threats with each other are among the strongest facts that would not support a finding of sufficiently reasonable provocation. See, e.g., *State v Eubanks* (Apr. 22, 1999), 8th Dist. No. 73421, at *4 (voluntary manslaughter instruction not justified where husband was aware of spouse's alleged infidelity for approximately one week before the murder). I write separately only to point out that under certain circumstances, the firing of multiple shots would not necessarily preclude an objective finding of reasonably sufficient provocation.

APPEARANCES:

ROBERT ROE FOX, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and THOMAS J. KROLL, Assistant Prosecuting Attorney, for Appellee.