

[Cite as *State v. Beshara*, 2009-Ohio-6529.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 07 MA 37
PLAINTIFF-APPELLEE,)	
)	
- VS -)	OPINION
)	
BENJAMIN BESHARA,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 06 CR 542.

JUDGMENT: Affirmed.

APPEARANCES:
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JUDGES:
Hon. Mary DeGenaro
Hon. Joseph J. Vukovich
Hon. Gene Donofrio

Dated: December 2, 2009

[Cite as *State v. Beshara*, 2009-Ohio-6529.]
DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, the parties' briefs, and their oral arguments before this Court. Appellant, Benjamin Beshara, appeals the decision of the Mahoning County Court of Common Pleas that convicted him of one count of aggravated murder, one count of aggravated robbery, and one count of kidnapping and sentenced him accordingly. On appeal Beshara presents four arguments.

{¶2} First he contends the trial court abused its discretion by prohibiting him from cross-examining one of the State's witnesses about a failed, stipulated polygraph test. Second, he argues that the trial court's failure to include complicity on the jury verdict forms constitutes plain error. Third, he contends his due process rights were violated when his indictments for kidnapping pursuant to R.C. 2905.01(A)(2)(3)(C) and aggravated robbery pursuant to R.C. 2911.01(A)(3) allegedly failed to expressly charge the mens rea element of the crimes. Fourth, he argues that his convictions were against the manifest weight of the evidence. Upon review, all of Beshara's arguments are meritless.

{¶3} First, the trial court did not abuse its discretion by precluding testimony about the witness's failed polygraph test, since Beshara did not formally stipulate to the results and the State did not stipulate to its use in Beshara's trial. In addition, Beshara's contention that this ruling contravened his confrontation clause rights is meritless since Beshara was afforded an adequate opportunity to cross-examine the witness. Additionally, the trial court's failure to include complicity on the jury verdict forms does not constitute plain error. Beshara cannot show that but for the alleged error the outcome of the trial would have been any different, since a defendant convicted as a complicitor has the same level of culpability as one convicted as the principal offender. Further, Beshara's indictment with respect to the kidnapping charge was not defective because it included the required mens rea of purpose. And although Beshara's indictment for aggravated robbery was defective, it does not rise to the level of plain error since the State presented a wealth of evidence that Beshara, at minimum, recklessly inflicted serious harm on the victim. Finally, Beshara's convictions were not against the manifest weight of the evidence. This case hinged on

credibility determinations best left to the jury as fact-finder. The jury did not lose its way so as to create a manifest miscarriage of justice. Accordingly, the judgment of the trial court is affirmed.

Facts

{¶4} On July 10, 2005, Youngstown police officers responded to a report of a woman who had been struck by a vehicle on Parkcliffe Avenue in Youngstown. The victim, later identified as Marilyn Guthrie of Niles, was transported to the hospital where she died. Guthrie's vehicle was later found burning in a remote area on the west side of Youngstown.

{¶5} In connection with Guthrie's death, the Mahoning County Grand Jury indicted Beshara on one count of kidnapping in violation of R.C. 2905.01(A)(2)(3)(C), a first-degree felony; one count of aggravated robbery in violation of R.C. 2911.01(A)(3)(C), a first-degree felony; and, one count of aggravated murder in violation of R.C. 2903.01(B)(F), a life-sentence felony. Beshara was arraigned, pled not guilty, and was appointed counsel. He also waived his speedy trial rights.

{¶6} Anthony Johnson, another man allegedly involved, was indicted on aggravated robbery and kidnapping charges. At first Johnson maintained he had no involvement in the crimes. He entered into a stipulated polygraph agreement with the State, in which the State agreed to dismiss the charges if Johnson passed a polygraph. If Johnson failed, both he and the State agreed that the results would be admissible in court. Johnson's first polygraph test proved inconclusive. However, the results of a second test, to which he also stipulated, indicated he was being deceptive about his involvement in the aggravated robbery and kidnapping.

{¶7} Subsequently, the Grand Jury issued a superceding indictment that also charged Johnson with aggravated murder, in addition to aggravated robbery and kidnapping. Upon motion of the State, the trial court joined Johnson's case with Beshara's case for trial. Subsequently, Johnson entered into a Crim.R. 11(F) plea agreement in which he agreed to plead guilty to involuntary manslaughter, aggravated robbery and kidnapping, and to testify against Beshara. In exchange, the State agreed to recommend an eight to ten year sentence.

{¶8} Beshara's trial commenced on January 17, 2007. Prior to voir dire, the trial court heard arguments regarding several pending pre-trial motions, including a motion in limine filed by the State in which it sought to exclude any testimony about the results of Johnson's polygraph tests. The trial court sustained the motion in limine. This issue was revisited again after opening arguments, and the trial court maintained its earlier ruling.

{¶9} The following evidence was adduced at trial. Guthrie was last seen by Jennifer Pountious, between 12:00 and 12:30 A.M. on Sunday, July 10, 2005. Guthrie spent Saturday evening with Pountious, along with several other friends. Among other things, Guthrie and Pountious pooled gas-money for an upcoming vacation, and each of them placed \$50 in an envelope which Guthrie then placed in her purse. Pountious testified that Guthrie was wearing a blouse, capri pants, tennis shoes, ankle socks and earrings that night. Pountious said it was her understanding that Guthrie planned to attend church services at around 7:30 on Sunday morning.

{¶10} Andy Leone testified that on the morning of July 10, 2005 at a few minutes past 8:00 A.M. he was sitting on his front porch on Hudson Road in Youngstown, when he heard tires screeching and looked up to see a blue-gray car on an area of Parkcliffe Avenue located diagonally across a school lot from his house. He saw the car back up quickly, fishtail, stop and then move forward again to hit something; the front, left side of the vehicle going up as it made impact. He said the car then sped away towards Market Street, where he lost sight of it. He went over to Parkcliffe to see what the car had struck, and discovered a person lying on her stomach in the road. He went home and called 911 and an ambulance arrived shortly thereafter to take Guthrie to the hospital where she died shortly thereafter.

{¶11} At approximately 9:30 A.M. that same morning Lieutenant Ed Holcomb of the Youngstown Fire Department testified he responded to a call that something was burning near the tracks on North Belle Vista Avenue on the city's west side. He found a car on fire at least 100 yards away from the road, and stated that by the time they were able to reach it, it had been totally consumed by flames. The location of the burning car made it impossible to reach it with hoses, and thus, in the end, all that was

left was a shell of the vehicle. Lt. Holcomb notified police who determined from the license plate number that the vehicle belonged to Guthrie, and that it had not been reported stolen. After Guthrie's death was ruled a homicide, Youngstown Police Officer Lou Ciavarella also went to the scene where Guthrie's car was recovered. He discovered a charred ladies wristwatch near the vehicle.

{¶12} Robin Ruschman, Guthrie's sister-in-law testified that she received a concerned phone call from Guthrie's employer on Monday July 11, 2005, stating that Guthrie had not reported to work that morning. Ruschman eventually went to Guthrie's apartment at the Carnegie Arms complex. Ruschman entered the apartment along with Niles police and saw a towel and bathing suit hanging in the shower, an unmade bed, and Guthrie's church clothes laid out. Guthrie's purse, keys, watch, and the envelope containing the \$100 were all missing however the apartment was not in disarray. Ruschman looked outside and noticed Guthrie's car was also missing. Ruschman said she did not talk to any neighbors and did not see Beshara standing outside that morning. Ruschman further testified that Guthrie had no friends on the west side of Youngstown and she had no idea why Guthrie would have been there. With the help of Ruschman and Dr. Robert Johnson, a forensic dentist for the Mahoning County Coroner's Office, the victim found on Parkcliffe Avenue was positively identified as Guthrie.

{¶13} Seventeen-year-old Coryan Bertram, who lived with friends on Second Street in Youngstown at that time, testified next. On Saturday July 9, 2005, he spoke with Beshara by phone and that Beshara asked him to take part in a quick, easy robbery where some money and pills would be stolen. Bertram testified that Beshara did not identify the intended victim of the proposed robbery. Bertram stated that Anthony Johnson and Josiah Smith were also present during that phone conversation. Bertram testified that they called a relative of Johnson's to get a ride to Beshara's apartment complex. Bertram said that he, Johnson, and Smith left Bertram's residence at about 3:30 A.M. on the morning of July 10, 2005 and arrived at Beshara's apartment at around 4:00-4:15 A.M., and that their ride dropped them off and left.

{¶14} Bertram testified that it was his understanding that it would be an "easy"

robbery and that the three of them had not been instructed to bring weapons. Once they arrived outside of Beshara's apartment, Bertram said that Beshara told them that the plan was to rob an older lady, and that they would somehow get her out of her apartment, knock her down and take her money. Bertram said Beshara told them that he planned to lure the victim out of her home by asking her to do him a favor and take him to the pharmacy to get medicine for his ailing father. According to Bertram, Beshara said he often asked the victim to do favors for him since she knew his father was sick.

{¶15} Bertram testified that when he, Smith and Johnson saw the lady come out of her house, all three rushed her and knocked her to the ground. Bertram said Beshara was on his way down the apartment stairs at that time. Bertram identified a photograph of Guthrie as the woman they knocked down that morning. Bertram stated that after Guthrie was knocked down, Beshara and one of the others picked her up, placed her in the trunk of her car and closed it. Then Bertram, Smith and Johnson got into the car, while Beshara took Guthrie's keys and went back upstairs into the apartment for approximately ten to fifteen minutes.

{¶16} Bertram testified that Beshara came back outside, got in the driver's seat of the car and drove off to the west side of Youngstown. He then stopped in the parking lot of a market off of Mahoning Avenue and parked the car at the side of the building with the trunk facing the building. Bertram testified that Beshara then got out of the car, opened the trunk and started talking to Guthrie, demanding money and pills. Bertram said he heard the victim cry and plead for her life, saying things like: "why are you doing this Ben, stop it." Bertram confirmed that he specifically heard Guthrie refer to Beshara by his first name.

{¶17} Bertram testified that Beshara then got back in the car and told them that the victim must be killed because they were not wearing masks and she could recognize them and identify them to police. According to Bertram, Beshara said if the victim identified them they would all go to jail and that he refused to go to jail. Bertram said that Beshara then started suggesting some ways that the victim could be killed, such as setting her car on fire while she was still in the trunk. Bertram testified that he,

Johnson and Smith were against this idea.

{¶18} Bertram said that Beshara then drove to the south side of Youngstown and stopped on Parkcliffe Avenue. He said that Beshara then exited the vehicle, first telling the three of them that maybe they did not need to kill the victim after all; that perhaps she would not be able to identify them. Bertram testified that Beshara then proceeded to take the victim out of the trunk. Bertram said Beshara then returned to the car, put it in reverse and backed up over the victim. He said Beshara then put the car in drive and ran over the victim a second time and then drove away. Bertram testified he could hear the victim being hit by the car. Bertram stated that after several initial arguments, the mood in the car became quiet, and that everyone was mad.

{¶19} According to Bertram, Beshara then drove to Youngstown's west side, and warned the three of them not to say anything about what had happened because he was affiliated with the Mafia and had "connections." Beshara allegedly told them that they and their families would be in danger if they talked to police. Bertram said he took this as a threat. He said he knew Beshara from the past and believed he had mob connections. Bertram provided several examples of incidents he witnessed that caused him to believe Beshara was affiliated with the Mafia.

{¶20} Bertram admitted he spoke with police several times on August 2, 2005 and told them stories that were not true. His first story was that he was not present and did not participate in the crimes. His second story was that he was picked up by a friend who already had Guthrie in the trunk at the time. His third story was that a friend picked him up from a party that night. Bertram testified that these three stories were lies, and stated he lied because he was afraid of Beshara. Bertram admitted he never told police that Beshara was present until he made a statement to them in March 2006. Bertram claimed that the March 2006 statement was the truth, and was consistent with his present testimony. When asked why he changed his story in March 2006, Bertram stated that he knew it was the right thing to do and that his attorney had assured him that nothing bad would happen to his family. Bertram agreed he was initially charged with a number of crimes in connection with this incident, but that he pled guilty to one count of kidnapping and was sentenced to two years in DYS prison,

with one year suspended.

{¶21} On cross, Bertram agreed he initially implicated Johnson as the one who picked him up, placed Guthrie in the trunk and ran her over. He agreed he was originally facing murder charges and a pending motion to be tried as an adult. He claimed he was not promised a more lenient sentence or favorable treatment in exchange for his testimony. However, he agreed that on the same day he gave a statement to the prosecutor, April 13, 2006, he pled guilty to the kidnapping charge, and the murder charge and pending motion to transfer were dismissed. Bertram agreed that as part of his plea agreement, he received a minimum of one year in DYS, but could be imprisoned for up to four years, i.e., until his twenty-first birthday, at the discretion of DYS authorities.

{¶22} Bertram was asked to silently read the statement he made to the prosecutor in April 2006, and agreed that this statement left out some details about which he had just testified. He further agreed that his statement consisted of leading questions by the prosecutor, to which he answered, "yes, sir." On redirect, Bertram agreed that any omissions in his April 2006 statement to the prosecutor stemmed from the fact that the prosecutor did not ask those specific questions.

{¶23} Bertram admitted that prior to the incident, he had not spoken with Beshara for approximately two years. He stated that when he gave his initial false statements to the police he was not aware that Smith, who was his next-door neighbor, had also given a statement to police and had also been arrested. Bertram testified that he found out about Smith's arrest when Smith was placed in the same juvenile detention home about a week later. He claimed he did not talk to Smith about the case or try to corroborate stories.

{¶24} Randy Pavlinko, the owner of Buckeye Auto Mart, corroborated Bertram's story about how he knew Beshara. Pavlinko said that in July 2004, Beshara rented a 2000 Chevy Lumina from his business, and he identified the signed rental agreement between Buckeye Auto Mart and Beshara, which included Beshara's date of birth and Social Security number. Pavlinko testified that the rented vehicle was never returned to him because it was involved in a fatal crash. He said to his

knowledge that car remains in the Youngstown Police Department impound lot. Sergeant Kenneth Linden of the Youngstown Police Department investigated the accident involving the rented Lumina. Sgt. Linden testified that Bertram was a passenger in the Lumina at the time of the accident, but was able to jump out of the car and escape harm.

{¶25} Phone records for the Beshara household around the time Guthrie was killed revealed calls made between Beshara's apartment and the residence where Bertram was living. In addition, the phone number of Beshara's good friend, Steve Cook, was dialed from Beshara's home phone at 6:15 A.M. on July 10, 2005, and just minutes later, at 6:22 A.M., Cook's number was dialed from *Guthrie's* phone. Several other phone calls were made from Guthrie's home phone that morning, including a call to Beshara's home phone at 6:36 A.M. and a call to the Medical Dental Bureau, the company that processes after-hours calls for the Carnegie Arms apartment complex, at 6:41 A.M.

{¶26} Beshara's friend Steve Cook testified he met with Beshara at a restaurant bar in the Eastwood Mall on the afternoon of Tuesday, July 12, 2005, and that Beshara asked him if he had heard about what happened to the lady who lived in his apartment complex. Cook responded that he heard about her disappearance on the news. According to Cook, Beshara said the police had been to his house to question him about it, and he was nervous that they were wrongfully accusing him. Cook initially said Beshara was aware that the victim had been murdered at the time of that conversation. On cross, Cook admitted he was unsure if Beshara knew the woman was dead. Cook said he, himself, knew this from the news reports. Further, he stated that the meeting at the Eastwood mall could have taken place on Wednesday instead of Tuesday.

{¶27} Marge Maguire, a telephone operator at the Medical Dental Bureau, the company that processes after-hours phone calls for Carnegie Arms, testified that she received a phone call from Guthrie's number from a person claiming to be Beshara's father Phil at approximately 6:40 A.M. on July 10, 2005. She said the caller told her he was locked out of his apartment at the Carnegie Arms. Maguire then contacted Jolene

Games, an assistant manager for Carnegie Arms, who then personally responded to the lock-out call. Games said she walked over to the Besharas' apartment building at about 7:00 A.M., but saw no signs of Phil Beshara either inside or outside of the building. She then walked back to her own apartment, which was also in the complex. Games said she knew Phil Beshara and that at the time he was wheel-chair bound, blind and generally in failing health. In fact, she stated she had never seen Phil Beshara outside of his apartment. Games stated that on her walk over to check out the reported lock-out, it dawned on her that she was uncertain how Phil Beshara could have been locked out due to his fragile condition.

{¶28} Elsie Pearson, a property manager for Carnegie Arms, testified that Guthrie moved to Carnegie Arms in 2003 and Phillip Beshara moved into an adjacent apartment in November 2004. According to Pearson, Phillip Beshara moved to Carnegie Arms from Liberty Arms, the assisted living facility where Guthrie worked. Pearson said she never saw Phillip Beshara leave the apartment unassisted. She testified that in the spring of 2005, Phillip Beshara called her and told her that his son, the defendant, would be coming to stay with him for a while. Pearson said she knew that Beshara eventually moved in with his father. Pearson testified that the Carnegie Arms is a gated community and that in order to enter or exit the community between the hours of 7:00 A.M. and 7:00 P.M., either a code is needed, or a visitor may call a resident and get buzzed in or out.

{¶29} Anthony Johnson testified that he had been friends with Bertram and Smith for several months prior to Guthrie's death. In July 2005 he lived on the west side of Youngstown. He said that he, Bertram and Smith entered into a plan to rob someone. On the evening in question, he said the three were together at Bertram's house on Second Street, smoking marijuana, but that he left because it was getting late. Johnson testified that after he returned home he received a call from Bertram telling him about the proposed robbery. Johnson said that upon Bertram's request he asked his brother to give the three of them a ride to Niles, explaining to his brother that the three of them were going to see some girls. He and his brother then went to pick up Bertram and Smith and they went to Niles. Johnson said that Bertram had the

directions.

{¶30} According to Johnson, when the three arrived at the apartment complex Bertram made a call to Beshara who came out and started conversing with Bertram. Johnson said he could not really hear what they were saying and that he had never met Beshara prior to this time. He identified Beshara as the defendant in the courtroom. Johnson testified that Beshara then went into the apartment complex and about five minutes later a woman walked out. Johnson identified State's Exhibit 1, Guthrie's photograph, as that woman.

{¶31} Johnson testified that when Guthrie walked out, Bertram rushed her and hit her, while he and Smith looked out to make sure nobody interfered. Johnson said that Beshara followed behind, and that Beshara then took Guthrie's keys and opened the trunk of her car. Johnson said Beshara and Bertram then placed Guthrie in the trunk. Johnson said Beshara then went back inside the apartments for about ten to twenty minutes, finally emerging and telling them he had not found any money. Johnson said Beshara then drove all of them to the west side of Youngstown, parked the car at the side of a building, and then got out and opened the trunk. He said he could hear Beshara talking to Guthrie but could not make out what was said. Johnson said Beshara then entered the car and told them that they would have to kill the lady. Johnson claimed he then told Beshara that they did not need to do that, but that Beshara stated that the woman knew him because he was her neighbor and that therefore she would need to be killed.

{¶32} According to Johnson, Beshara then drove down Mahoning Avenue towards downtown to Glenwood Avenue, then turned down another street and stopped. Johnson said Beshara and Bertram then got out of the car and placed the victim on the ground. He said the two then got back into the car, and Beshara placed the car in reverse and backed up over Guthrie. Johnson said Beshara then put the car in drive and ran over Guthrie again. Johnson said he could hear the victim underneath the car.

{¶33} Johnson said after Beshara pulled away from the scene the mood in the car was quiet. Beshara then drove them back to the west side of Youngstown and told

the three of them not to tell anyone what happened, and that if they did he would find them and they would be killed. Johnson claimed Beshara told them he had connections to the police and the prosecutor and that even if they talked Beshara would not be prosecuted. Johnson said at the time he believed that Beshara was in the Mafia. Johnson said he was scared by Beshara, especially considering that he just saw Beshara kill someone. Johnson admitted he initially denied all involvement to police. Johnson said that when he learned that only he, Bertram and Smith were apprehended, he figured what Beshara said about having connections was true.

{¶34} After Beshara's eventual arrest, Beshara and Johnson were housed in the same jail cell because their cases were joined at the time. Johnson said Beshara told him to "keep his mouth shut;" that it would be their word against Smith's and Bertram's.

{¶35} In November 2006, Johnson agreed to cooperate with prosecutors. He pled guilty to involuntary manslaughter, aggravated robbery and kidnapping. He said that he was facing a potential sentence of thirty years in prison, but that in exchange for his testimony, the State agreed to recommend a ten-year sentence. Johnson testified that he decided to cooperate and plead guilty because he knew he played a role in the incident and he knew what Bertram and Smith were saying was true. Johnson said he was very remorseful about what he did.

{¶36} Johnson claimed that after he pled and agreed to cooperate, Beshara began sending threats to him in jail, by way of a man named Nicholas Molina. He said these threats made him fearful and that for a time he considered withdrawing his guilty plea. On cross, Johnson agreed that he did not complain to the sheriff or deputies about the threats. However, he said he told his own attorney and the prosecutor.

{¶37} On cross, Johnson also clarified that the State had agreed to recommend eight to ten years as part of his plea deal. He reiterated that he did not come forward sooner due to his fear of Beshara. He knew Beshara was not jailed initially and could have come after him. However, Johnson conceded that although Beshara was arrested on May 25, 2006 and was unable to make bond, Johnson still did not agree to cooperate until November 2006. Johnson claimed he remained afraid

of Beshara, even though he knew Beshara was in jail. Johnson admitted that he gave a statement in exchange for favorable treatment. He denied that he had waited to make a statement in order to get the best deal, but agreed that he never admitted involvement in the crimes until the time he made his plea deal.

{¶38} Defense counsel approached Johnson with the sworn statement he made to prosecutors. After reviewing the document, Johnson agreed that his statement consisted of leading questions by the prosecutor, followed by a yes or no response from him. He admitted to meeting with his attorney and the prosecutor prior to making that statement. He said he was aware that Bertram and Smith had given statements that initially implicated him as the one who ran over Guthrie.

{¶39} Rondell Lightfoot testified that in July 2005 he resided both on Parkcliffe Avenue and Almyra Avenue, which is located two streets over from Parkcliffe. Lightfoot stated he bought a Cadillac from Beshara who came to collect payment from him between 3:00-4:00 AM on the same morning Guthrie was found dead. He later stated he could not recall the exact time, but that it was early in the morning. Detective-Sergeant Brad Blackburn of the Youngstown Police, who testified next, stated that Beshara's phone records indicated contact with Lightfoot, however, the detective did not elaborate on exact times.

{¶40} Det. Blackburn further testified that when he went to Guthrie's apartment on July 14, 2005, nothing appeared missing, there were no signs of forced entry, and the place was not ransacked. Det. Blackburn said he spoke to Beshara that day, and that Beshara told him he had not seen Guthrie for over a week, and that he was home all Saturday and Sunday evening. Beshara further told him he saw nothing out of the ordinary. Det. Blackburn interviewed Beshara again on July 20, 2005 and Beshara gave similar responses. Det. Blackburn interviewed Beshara a third time on August 18, 2005, after his initial review of Guthrie's phone records. When asked why there were phone calls to his home and to his friend's home from Guthrie's phone on July 10, 2005, Beshara had no explanation. Det. Blackburn had also asked Beshara about Smith, Bertram and Johnson, and Beshara denied knowing them. He also denied ever being inside Guthrie's apartment or using her phone.

{¶41} In August 2005, Bertram and Smith who were juveniles, and Johnson, an adult, were arrested and charged in connection with Guthrie's death. On March 8, 2006, Bertram appeared with his attorney to give a statement. Det. Blackburn said that to his knowledge no formal plea agreement was in place at that time in consideration for Bertram's cooperation. Det. Blackburn said Bertram seemed visibly upset during the meeting and that he was crying and shaking. Bertram proceeded to implicate Beshara as the person who set up the robbery and drove the vehicle that killed Guthrie. Following that meeting, Det. Blackburn took a second statement from Smith.

{¶42} Det. Blackburn again spoke to Beshara, on April 26, 2006. Det. Blackburn again asked Beshara if he knew Johnson, Bertram and Smith, and he again, denied knowing them. It was not until Det. Blackburn confronted Beshara with the Buckeye Auto rental agreement that Beshara finally admitted he knew Bertram.

{¶43} On cross, Det. Blackburn agreed that Bertram, Smith and Johnson all resided on Youngtown's west side, in close proximity to one another. He agreed that Guthrie's burnt-out vehicle was found approximately one-half mile from where the three teenagers lived. Det. Blackburn agreed that when he spoke to Bertram and Smith on August 2, 2005, both told him Johnson was the driver. He said Bertram told him at that time that Johnson had placed Guthrie in the trunk, Johnson ran her over, and that Johnson dropped them off afterwards.

{¶44} Det. Blackburn said that to his knowledge there was never any attempt to fingerprint Guthrie's apartment or test the apartment for DNA evidence, because there was initially no evidence that one of the perpetrators had been inside Guthrie's apartment. He said he only realized this fact later, upon reviewing Guthrie's phone records.

{¶45} When pressed by defense counsel about whether Smith and Bertram truly made statements in March 2006 with no expectations of leniency, Det. Blackburn admitted there was an understanding that nothing they said would be used against them. He also said that it was his understanding that something was worked out between the attorneys before he arrived, but that his role was to talk to the teenagers

and explain to them that they needed to tell the truth.

{¶46} The State then presented its final witness, Dr. Robert Belding, Deputy Coroner for the Mahoning County Coroner's Office, who had performed an autopsy on Guthrie. He described Guthrie's extensive injuries. Dr. Belding determined the cause of death, based on a reasonable degree of medical certainty, was "diffuse cerebral edema due to the horrible contusions, the bruising of the brain, to the blunt force injury." He explained this meant that although Guthrie had many injuries, it was the blunt force trauma to the brain and the resultant brain swelling that ultimately caused her demise. He testified that Guthrie's cause and manner of death were consistent with being hit by a car.

{¶47} The State then rested and the defense moved for acquittal pursuant to Crim.R. 29, which was overruled by the trial court. Jury instructions were discussed. The court noted that the State had requested a complicity instruction regarding the kidnapping, aggravated murder and aggravated robbery charges. Defense counsel objected to the inclusion of a complicity instruction, and arguments were heard on both sides. Ultimately, the trial court ruled that it would give a general complicity instruction with the required mental state instructions. The court further ruled that it would not give a complicity charge on the verdict forms since being found guilty as a principal or a complicitor has the same level of guilt.

{¶48} After conferring with Beshara, the defense chose to present no witnesses and rest its case. After closing arguments and jury instructions, the jury began deliberations. Ultimately, the jury found Beshara guilty on all three charges: aggravated murder, aggravated robbery and kidnapping. Judgment was entered on the verdicts on January 23, 2007.

{¶49} A sentencing hearing was held on January 26, 2007. After consideration of the required factors, the trial court sentenced Beshara to ten years on the kidnapping charge, ten years on the aggravated robbery charge, and life imprisonment without parole on the aggravated murder charge. The trial court ordered the sentences to be served consecutively.

{¶50} On July 28, 2009, this court issued a limited remand to the trial court

because the sentencing entry did not comport with the requirements of *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163. On August 3, 2009, the trial court issued an amended sentencing entry that complies with *Baker*.

Johnson's Polygraph Result

{¶51} In Beshara's first of four assignments of error he argues:

{¶52} "The trial court erred to the prejudice of Appellant by prohibiting trial counsel from cross examining Anthony Johnson for impeachment purposes regarding a failed, stipulated polygraph test, violating Appellant's right to confrontation."

{¶53} Beshara contends that the results of that test would have been used to impeach Johnson with regard to his proffer that Beshara was involved in the crimes. Beshara insists that the trial court's decision to prohibit questioning about Johnson's polygraph results violated his confrontation clause rights and constituted an abuse of discretion.

{¶54} It is undisputed that on October 13, 2005, Johnson and the State executed a stipulated polygraph agreement. On November 2, 2005, Johnson took a polygraph examination, which yielded inconclusive results. Johnson submitted to a second polygraph examination on December 6, 2005, in which he was found to be deceptive about whether he participated in the Guthrie kidnapping and aggravated robbery. Prior to trial, the State filed a motion in limine requesting an order excluding the use of Johnson's polygraph examination. The trial court heard arguments from both sides and ultimately sustained the motion in limine, ruling that any polygraph evidence was inadmissible. Further the court ordered the attorneys not to discuss, nor use the word "polygraph" in front of the jury.

{¶55} A trial court's evidentiary rulings are reviewed for an abuse of discretion. *State v. Bey* (1999), 85 Ohio St.3d 487, 490, 709 N.E.2d 484. An abuse of discretion "connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 16 O.O.3d 169, 404 N.E.2d 144. Based upon an abuse of discretion standard of review, an appellate court is not permitted to substitute its judgment for that of the trial court on evidentiary issues. *State v. Jenkins* (1984), 15 Ohio St.3d

164, 222, 15 OBR 311, 473 N.E.2d 264.

{¶56} The trial court did not abuse its discretion in this case. In *State v. Souel* (1978), 53 Ohio St.2d 123, 7 O.O.3d 207, 372 N.E.2d 1318, the Ohio Supreme Court held that "the results of a polygraphic examination are admissible in a criminal trial for purposes of corroboration or impeachment, provided that the following conditions are observed:

{¶57} "(1) The prosecuting attorney, defendant and his counsel must sign a written stipulation providing for defendant's submission to the test and for the subsequent admission at trial of the graphs and the examiner's opinion thereon on behalf of either defendant or the state.

{¶58} "(2) Notwithstanding the stipulation, the admissibility of the test results is subject to the discretion of the trial judge, and if the trial judge is not convinced that the examiner is qualified or that the test was conducted under proper conditions he may refuse to accept such evidence.

{¶59} "(3) If the graphs and examiner's opinion are offered in evidence the opposing party shall have the right to cross-examine the examiner respecting:

{¶60} "(a) the examiner's qualifications and training;

{¶61} "(b) the conditions under which the test was administered;

{¶62} "(c) the limitations of and possibilities for error in the technique of polygraphic interrogation; and,

{¶63} "(d) at the discretion of the trial judge, any other matter deemed pertinent to the inquiry.

{¶64} "(4) If such evidence is admitted the trial judge should instruct the jury to the effect that the examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged, and that it is for the jurors to determine what weight and effect such testimony should be given." *Id.* at syllabus.

{¶65} However, *Souel* involved the admissibility of the defendant's own stipulated polygraph examination. As we have previously noted, "appellate courts have not specifically ruled that a witness's polygraph test is admissible under the same conditions as a defendant's polygraph test." *State v. Hubbard*, 150 Ohio App.3d 623,

2002-Ohio-6904, 782 N.E.2d 674, at ¶39, citing *State v. Lascola* (1988), 61 Ohio App.3d 228, 236, 572 N.E.2d 717.

{¶66} Even assuming *Souel* does apply to witness polygraphs, the requirements prescribed by the Court in *Souel* were not met in this case. There is no indication that Beshara himself was party to the stipulation involving Johnson's polygraph test. Further, although the State and Johnson may have stipulated to their use in *Johnson's* trial, there is no indication that the State stipulated to their use in *Beshara's* trial. Moreover, the trial court ultimately retains discretion to allow testimony about polygraph results and can rule them inadmissible even when the other requirements are met. *Souel* at syllabus.

{¶67} In this case, the trial court found polygraph tests to be unreliable indices of truth or falsehoods that hold too great a potential to confuse the jury. This is consistent with recent Ohio Supreme Court cases. For example in *In re D.S.*, 111 Ohio St.3d 361, 2006-Ohio-5851, 856 N.E.2d 921, the Court questioned the reliability of polygraph tests and noted it has "not adopted the unrestrained use of polygraph results at trial, and [that] polygraphs themselves remain controversial." *Id.* at ¶13. The Court continued that "only if there is a stipulation between the parties do we allow the admission of polygraph results at trial, and then for corroboration or impeachment only. *Id.*

{¶68} In addition, we reject Beshara's argument that the trial court's ruling contravened his Confrontation Clause rights.

{¶69} "[T]he Sixth Amendment to the United States Constitution and the Ohio Rules of Evidence guarantee the right of a criminal defendant to confront the witnesses against him for the biases they may hold.' *State v. McIntosh* (2001), 145 Ohio App.3d 567, 578, 763 N.E.2d 704. However, a criminal defendant's right to confront and cross-examine a witness is not unlimited. *Delaware v. Van Arsdall* (1986), 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674. A trial court retains 'wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation

that is repetitive or only marginally relevant.' *Id.* Thus, 'the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' (Emphasis sic.) *Delaware v. Fensterer* (1985), 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15." *State v. Freeman*, 7th Dist. No. 07JE5, 2008-Ohio-2925, at ¶11.

{¶70} Beshara was afforded the opportunity to effectively cross-examine Johnson, despite the court's ruling that forbade discussion of Johnson's polygraph results. Defense counsel questioned Johnson extensively about the plea deal he entered in exchange for his testimony against Beshara, a fact which called his credibility into question. Further, Johnson admitted at trial that he initially lied to police, telling them he had no involvement in the crimes. Accordingly, it seems that the defense was afforded adequate opportunity to impeach Johnson's credibility in this case. See *State v. Hesson* (1996), 110 Ohio App.3d 845, 858-859, 675 N.E.2d 532 (undertaking a similar analysis and ultimately holding that the trial court did not abuse its discretion in declining to admit alleged evidence that defendant's acquaintances/state witnesses failed polygraph tests.)

{¶71} For the foregoing reasons, the trial court's ruling excluding Johnson's polygraph results was not an abuse of discretion, or in violation of Beshara's confrontation clause rights. Therefore, Beshara's first assignment of error is meritless.

Jury Verdict Forms

{¶72} In his second assignment of error, Beshara argues:

{¶73} "The trial court erred by failing to submit to the jury verdict forms on the charge of complicity for each of the respective charges Appellant was tried for violating Appellant's Fourteenth Amendment right to due process."

{¶74} Beshara insists that complicity should have been included on the verdict forms since the trial court instructed the jury about complicity. He claims this omission violates his due process rights. The State counters that Beshara failed to object to the jury verdict forms at trial, and has therefore waived all but plain error. The State argues that the failure to include a complicity charge on the verdict forms does not rise to the level of plain error because in Ohio the principal and the complicitor have the

same level of culpability. In other words, the State contends Beshara cannot demonstrate that the outcome of the trial would have been different had complicity been included on the jury verdict forms.

{¶75} Although Beshara objected to a general jury charge on complicity, he failed to object to the trial court's subsequent decision to submit verdict forms to the jury without reference to complicity. An appellate court need not resolve an alleged error if it was not brought to the attention of the trial court "at a time when such error could have been avoided or corrected by the trial court." *State v. Carter* (2000), 89 Ohio St.3d 593, 598, 734 N.E.2d 345. In the absence of objection, this court may only examine the court's actions for plain error. *Id.* Plain error should be used "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Barnes* (2000), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (citation omitted). A claim of plain error does not stand unless, but for the error, the outcome of the trial would have been different. "[T]he test for plain error is stringent. A party claiming plain error must show that (1) an error occurred, (2) the error was obvious, and (3) the error affected the outcome of the trial." *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, at ¶378.

{¶76} There is no significant distinction between a defendant convicted as a complicitor and one convicted as the principal offender. R.C. 2923.03(F) states that one who is guilty of complicity to commit an offense, "shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense."

{¶77} Accordingly, the trial court's failure to include a complicity charge on the verdict forms does not rise to the level of plain error in this case. Beshara cannot show that the outcome of the trial would have been different had there been separate verdict forms. Accord *State v. Alexander*, 6th Dist. No. WD-02-047, 2003-Ohio-6969. Beshara's second assignment of error is meritless.

Colon Issues

{¶78} In Beshara's third assignment of error he argues:

{¶79} "The Defendant-Appellant's state constitutional right to a grand jury

indictment and state and federal constitutional rights to due process were violated when his indictment for kidnapping pursuant to R.C. 2905.01(A)(2)(3)(C) and aggravated robbery pursuant to R.C. 2911.01(A)(3) failed to expressly charge the mens rea element of the crimes."

{¶80} Beshara concedes that these errors were not raised in the trial court, but claims they were obvious errors that substantially prejudiced him, and undermined the fairness of the proceedings.

{¶81} Beshara cites to the Ohio Supreme Court's *Colon* line of cases: *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 (*Colon I*), and *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169 (*Colon II*) in support of his arguments. As an initial matter, we note that the *Colon* cases apply to the instant case, as both were decided during the pendency of this appeal. See *Colon II* at ¶3-5.

{¶82} In *Colon I*, the defendant was convicted of robbery in violation of R.C. 2911.02(A)(2), which provides that no person, in attempting or committing a theft offense, or in fleeing immediately thereafter, shall inflict, attempt to inflict, or threaten to inflict physical harm on another. The Court noted that the statute does not expressly state a degree of culpability for the act of "[i]nflict[ing], attempt[ing] to inflict, or threaten[ing] to inflict physical harm,' nor does the statute plainly indicate that strict liability is the mental standard." *Id.* at ¶14. The Court therefore concluded the State was required to prove that the defendant *recklessly* inflicted, attempted to inflict, or threatened to inflict physical harm. *Id.* The indictment in that case did not include a mental state for that element of the crime. The Court held that this constituted structural error, warranting automatic reversal. *Id.*

{¶83} Pursuant to a motion for reconsideration, in *Colon II* the Ohio Supreme Court issued a clarification of its ruling in *Colon I*. In *Colon II*, the Court held that the structural error analysis it applied in *Colon I* "is appropriate only in rare cases, * * * in which multiple errors at the trial follow the defective indictment." *Colon II* at ¶8. It explained, "[i]n *Colon I*, the error in the indictment led to errors that 'permeate[d] the trial from beginning to end and put into question the reliability of the trial court in serving its function as a vehicle for determination of guilt or innocence.'" *Id.*, citing

Colon I, at ¶23 and *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, at ¶17.

{¶84} The Court further explained how the errors in that case permeated the trial proceedings from beginning to end, namely that: (1) the indictment did not charge the recklessness element for robbery; (2) the State did not attempt to prove the element of recklessness; (3) the trial court failed to instruct the jury on the mens rea element of recklessness; and (4) in closing arguments, the State treated robbery as a strict liability offense. *Colon II* at ¶6.

{¶85} The Court noted that in most cases errors would not permeate the trial process in that way, and that therefore a structural error analysis would not apply. Rather, "[i]n most defective indictment cases, the court may analyze the error pursuant to Crim.R. 52(B) plain error analysis." *Colon II* at ¶8.

{¶86} Thus, when faced with a defective indictment challenge that was not raised in the trial court, we must first determine if the indictment is in fact defective. If so, then we proceed to the second part of the analysis and determine if the error so permeated the trial process as to warrant a structural error analysis and reversal. Finally, if structural error analysis does not apply, then we apply a plain error analysis.

{¶87} Looking first to the kidnapping charge, we conclude that the indictment was not defective. Beshara seemed to concede as much at oral argument. The indictment in this case properly listed a mens rea of "purpose" for the "remove" element of kidnapping. See, e.g., *State v. Hardges*, 9th Dist. No. 24175, 2008-Ohio-5567, at ¶12; *State v. Carver*, 2d Dist. No. 21328, 2008-Ohio-4631, at ¶145-146; *State v. Parker*, 8th Dist. No. 90256, 2008-Ohio-3681, at ¶8, citing *State v. Maurer* (1984), 15 Ohio St.3d 239, 270, 473 N.E.2d 768.

{¶88} Beshara also challenges the validity of his indictment for aggravated robbery. Count Two of the indictment states as follows:

{¶89} "The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County of Mahoning, on their oaths, and in the name and by the authority of the State of Ohio, do find and present that on or about July 10, 2005 at Mahoning County, BENJAMIN BESHARA did in attempting or committing or in fleeing

immediately after attempting or committing a theft offense as defined in Section 2913.01 of the Revised Code, inflict or attempt to inflict serious physical harm on Marilyn Guthrie. In violation of Section 2911.01(A)(3)(C) of the Revised Code, a Felony of the First Degree, and against the peace and dignity of the State of Ohio."

{¶90} This indictment is defective because it does not charge a mens rea element. R.C. 2911.01(A)(3)(C), the aggravated robbery statute at issue here, is similar to the robbery statute at issue in *Colon I*, in that it does not specify a mens rea for the "inflict or attempt to inflict serious physical harm" element. See ¶113, *infra*.

{¶91} Since no mens rea is specified, the default mens rea of recklessness applies. See *Hardges*, *supra*, at ¶10. Inasmuch as Beshara's indictment for aggravated robbery does not charge recklessness, thus omitting an essential element, it is defective. Further, this error went beyond just the indictment in this case. The prosecutor failed to specifically mention recklessness, or any mens rea, throughout his discussion of aggravated robbery during closing arguments. In addition, the trial court failed to instruct the jury on the required mental state for the "inflict or attempt to inflict serious physical harm" element.

{¶92} The State contends the trial court did instruct the jury on a mental state, i.e., "knowingly." However, the court only mentioned knowingly when defining the theft offense. It did not instruct the jury that it need find that Beshara recklessly inflicted or attempted to inflict serious physical harm on Marilyn Guthrie.

{¶93} Thus, we must decide whether to apply a plain error or structural error analysis. We conclude that plain error is the proper framework for review in this case. Although Beshara's aggravated robbery indictment did not charge recklessness, the State did not mention recklessness in closing arguments, and the trial court failed to instruct the jury on recklessness, the State did argue purposefulness at trial. The State's theory of the case was that in committing a theft offense Beshara purposefully inflicted serious physical harm on Guthrie. The serious physical harm was the murder of Guthrie, or in other words, that Beshara purposefully caused her death. For this reason, it is inappropriate to apply a structural error analysis to the defective indictment in this case, and instead we review for plain error.

{¶194} Plain error did not occur in this case. Beshara cannot show how the outcome of the trial would have differed. In convicting Beshara of aggravated murder, the jury necessarily found that Beshara purposefully inflicted serious physical harm on Guthrie. Since purposefully is a more difficult mental state to prove than recklessly, Beshara, suffered no prejudice as a result of the defective indictment. Had the indictment listed the proper mental state of recklessly, the outcome of Beshara's trial would not have changed. Accordingly, Beshara's third assignment of error is meritless.

Manifest Weight

{¶195} In his final assignment of error, Beshara argues:

{¶196} "The trial court denied Appellant due process under the Fourteenth Amendment due to the fact his convictions for kidnapping, aggravated robbery and aggravated murder were against the manifest weight of the evidence and the jury's verdict was inconsistent with the evidence and testimony presented at trial."

{¶197} In determining whether a verdict is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences and determine whether, in resolving conflicts in the evidence, 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* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541.

{¶198} "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." *Id.* (emphasis sic.) In making its determination, a reviewing court is not required to view the evidence in a light most favorable to the prosecution but may consider and weigh all of the evidence produced at trial. *Id.*

{¶199} However, a conviction will only be reversed as against the manifest weight of the evidence in exceptional circumstances. *Id.* This is so because the trier of fact is in a better position to determine credibility issues, since he personally viewed the demeanor, voice inflections and gestures of the witnesses. *State v. Hill* (1996), 75 Ohio St.3d 195, 204, 661 N.E.2d 1068; *State v. DeHass* (1967), 10 Ohio St.2d 230,

231, 39 O.O.2d 366, 227 N.E.2d 212.

{¶100} 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 factfinder lost its way.'" *State v. Pallaj*, 7th Dist. No. 07MA198, 2008-Ohio-6635, at ¶31, quoting *State v. Woulard*, 158 Ohio App.3d 31, 2004-Ohio-3395, 813 N.E.2d 964, at ¶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. No. 99CA149, 2002-Ohio-1152, at ¶13, citing *State v. Gore* (1999), 131 Ohio App.3d 197, 201, 722 N.E.2d 125.

{¶101} Here, Beshara was convicted on three counts, the first of which is aggravated murder, defined as follows:

{¶102} "(B) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, terrorism, or escape." R.C. 2903.01(B).

{¶103} Beshara was also convicted of kidnapping, defined as follows:

{¶104} "(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:

{¶105} "(2) To facilitate the commission of any felony or flight thereafter;

{¶106} "(3) To terrorize, or to inflict serious physical harm on the victim or another." R.C. 2905.01(A)(2)(3).

{¶107} Beshara was also found guilty of aggravated robbery, defined as follows:

{¶108} "(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or

offense, shall do any of the following:

{¶109} "(3) Inflict, or attempt to inflict, serious physical harm on another." R.C. 2911.01(A)(3).

{¶110} Beshara's convictions for these three crimes are not against the manifest weight of the evidence. Both Johnson and Bertram provided testimony implicating Beshara as the mastermind of, and a participant in the robbery and kidnapping, and as the person who ultimately ran over and killed Guthrie. Of course, their credibility was called into question in several respects. In Bertram's initial conversations with police, he failed to mention Beshara's involvement in the crimes, and did not implicate Beshara until March 2006, months after Bertram was arrested. Johnson also lied to police initially, denying all involvement in the crimes. However, both Johnson and Bertram maintained they did not implicate Beshara originally because they were afraid of him. They claimed Beshara threatened them and their families, and alleged he had ties to organized crime. This seems like a reasonable explanation for their delays in coming forward with allegations against Beshara, and inasmuch as the jury believed it, it does not appear that they clearly lost their way.

{¶111} In addition, the presence of plea deals for Bertram and Johnson also calls their credibility into question. This seems especially so with regard to Bertram's credibility, since Bertram claimed he made a statement to police without any expectation of leniency, while Det. Blackburn states it was his understanding that some tentative agreement was in place before he took a statement from Bertram. However, Johnson and Bertram's version of events is corroborated by other evidence, most notably the phone records, the car rental agreement, and Lightfoot's testimony placing Beshara in the vicinity of Parkcliffe Avenue on the morning Guthrie was killed.

{¶112} There are also some conflicts between Bertram and Johnson's versions of events. For instance, Bertram claims that "one of the others" assisted Beshara in placing Guthrie inside the trunk, and that Beshara acted alone in taking her out of the trunk. Contrastingly, Johnson claims it was Bertram who assisted Beshara with placing Guthrie in the trunk and later taking her out. In addition, Johnson testified that he was not present when Bertram received the phone call from Beshara to set up

the robbery, while Bertram stated Johnson was present. However, in the end, Bertram and Johnson's testimony is consistent inasmuch as they both allege that Beshara planned the robbery, lured Guthrie out of her house, took her keys and her vehicle, placed her in the trunk of her vehicle, and later took her out of the trunk, placed her on Parkcliffe Avenue, and ran her over two times.

{¶113} Bertram and Johnson's testimony that Beshara planned the robbery and kidnapping is bolstered by the fact that Beshara and Guthrie were neighbors, and the fact that the Carnegie Arms apartment complex is a gated community that required a code or a buzz from a resident to gain ingress or egress between the hours of 7:00 P.M. and 7:00 A.M. Further, the jury could have reasonably concluded from the evidence presented that Beshara decided he needed to kill Guthrie since Guthrie was familiar with him as a neighbor and would probably have been able to identify him had she been released.

{¶114} In the end, this case turned on credibility determinations best left to the jury as fact-finder. Based on a review of all the evidence in this case, the jury did not lose its way so as to create a manifest miscarriage of justice. Therefore, Beshara's fourth assignment of error is meritless.

Conclusion

{¶115} All of Beshara's assignments of error are meritless. The trial court did not abuse its discretion by precluding testimony about Johnson's failed polygraph test since Beshara did not formally stipulate to the results and the State did not stipulate to its use in Beshara's trial. The trial court's failure to include complicity on the jury verdict forms does not constitute plain error since Beshara cannot prove that but for the alleged error the outcome of trial would have been different. Further, Beshara's indictment with respect to the kidnapping charge was not defective since it included the required mens rea of purpose. Although Beshara's indictment for aggravated robbery was defective, it does not rise to the level of plain error. Finally, Beshara's convictions were not against the manifest weight of the evidence. This case hinged on credibility determinations best left to the jury as fact-finder. We conclude that the jury did not lose its way so as to create a manifest miscarriage of justice. Accordingly, the

judgment of the trial court is affirmed.

Vukovich, P.J., concurs.

Donofrio, J., concurs.