[Cite as *State v. Johnson*, 2009-Ohio-3383.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 08AP-652
v.	:	(C.P.C. No. 06CR06-4322)
Shawan M. Johnson,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 9, 2009

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Keith O'Korn, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Shawan M. Johnson, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment.

{¶2} As a result of a shooting incident involving appellant that left one man dead and two other people wounded, a Franklin County Grand Jury indicted appellant with one count of aggravated murder in violation of R.C. 2903.01, two counts of felonious assault in violation of R.C. 2903.11, and one count of having a weapon while under disability in violation of R.C. 2923.13. The murder and felonious assault counts also contained

firearm specifications pursuant to R.C. 2941.145. Appellant entered not guilty pleas to the charges and proceeded to a jury trial.

{¶3} The facts were disputed at trial. The state presented evidence at trial supporting the following factual scenario.

{¶4} On the afternoon of November 9, 2005, appellant drove to the Nelson Park Apartments in Columbus, Ohio. He backed into a parking place next to a black car in which Tyrell Davis and Manny Cummings were seated. Appellant knew both men and often bought marijuana from Davis. Richard Willis was standing in between the two cars talking to Davis and Cummings. Appellant also knew Willis.

{¶5} Danielle Hogg, a resident of the apartment complex, stood outside of her apartment directly behind appellant's car. She testified that she saw appellant get out of his car, immediately pull out a hand gun, and start shooting at Willis. Hogg turned to run into another apartment, but she was shot in the leg before she could get to the apartment. Hogg did not see specifically who shot her.

{¶6} Dennis White was also at the apartment complex visiting friends at the time of the shooting. He also saw appellant get out of a car and immediately start shooting at Willis. White was also hit by gunfire. White testified that he was standing in between the two cars and was the first person appellant shot. White did not go to the hospital and waited a number of months before he spoke to police about the shooting.

{¶7} After the shooting, appellant got into his car and drove away. He drove to a nearby intersection, where he left the car. His sister picked him up and he subsequently fled to Detroit, Michigan, where he was ultimately arrested.

{¶8} Columbus police officers responded to the scene shortly after the shooting. Officer James Yoder found a male victim (Willis) on the ground and a female victim

(Hogg) lying just inside an apartment door. Neither victim could identify the person who shot them. Willis died as a result of his wounds. An autopsy revealed that Willis died from multiple gunshot wounds: one in his left forearm, one in his groin, and two in his chest. All four of the gunshots entered the front of Willis' body.

{¶9} Detective Phil Walden of the Columbus Police Department Crime Scene Search Unit arrived at the scene later that afternoon. He collected five shell casings from the parking lot area. Four of the casings were found in a bunch, toward the rear of the parking space where appellant had parked his car. The fifth casing was found in front of appellant's parking spot. Detective Walden also found four spent bullets at the scene. One of those bullets was discovered among clothes removed from Hogg when medical personnel attended to her.

{¶10} Mark Hardy, a Firearms Examiner for the Columbus Police Department, examined the ballistic evidence found at the scene. He concluded that the four casings found in a bunch were fired from the same gun. The fifth casing, however, was fired from a different gun. Thus, Hardy concluded that there were at least two guns fired at the scene. Additionally, Hardy examined the bullets recovered at the scene and concluded that the bullet found among Hogg's clothes was fired by a different gun than the gun that fired the other three spent bullets. Hardy also opined that the gun that fired these three spent bullets was the same gun that fired a bullet later removed from Willis' body.

{¶11} Tony Pace, a prisoner who spent time in jail with appellant, testified that appellant confessed to him that appellant killed Willis because Willis stole cocaine from one of appellant's friends. According to Pace, appellant told him that appellant received $10,000 and some cocaine to kill Willis.

{¶12} Appellant described a different version of events. Appellant testified that he drove to the apartment complex to buy some drugs from Davis. He backed into the parking place next to the car in which Davis and Cummings were seated. Mark Norton was standing in the parking lot in front of appellant's car. As appellant got out of his car, Norton shot at appellant. Appellant explained that Norton and Willis were known to rob people they knew.

{¶13} After Norton began shooting at appellant, appellant saw Willis fumbling with a gun. Willis' gun became stuck on a shoestring in his pants. Appellant put his hands on the gun so that Willis could not pull the gun out of his pants. Appellant testified that his act of grabbing the gun caused the gun to fire three or four times, although he was not clear if all of those shots hit Willis. Appellant further testified that Norton continued to shoot at him and that one of those shots probably hit Willis in the chest. Appellant then got into his car and drove away. He testified that he went to Detroit, Michigan, where he has family, to save money and to hire a lawyer.

{¶14} The jury rejected appellant's version of events and found him guilty of one count of murder, as a lesser-included offense of aggravated murder, and the attendant firearm specification, and one count of having a weapon while under disability. The jury acquitted appellant of both counts of felonious assault. Subsequently, appellant filed motions to set aside the verdict as well as for a new trial. The trial court orally denied those motions at appellant's sentencing hearing and then imposed sentence.

{¶15} Appellant appeals and assigns the following errors:

> ASSIGNMENT OF ERROR #1
>
> THE TRIAL COURT PLAINLY ERRED IN FAILING TO INSTRUCT THE JURY ON SELF-DEFENSE WHICH CONSTITUTED FUNDAMENTAL UNFAIRNESS AND VIOLATED THE APPELLANT'S RIGHTS TO DUE

PROCESS AND TO PRESENT A COMPLETE DEFENSE IN VIOLATION OF THE OHIO AND FEDERAL CONSTITUTIONS.

ASSIGNMENT OF ERROR #2

APPELLANT'S CONVICTIONS FOR MURDER AND WUD WERE NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1 & 16 OF THE OHIO CONSTITUTION AND THE MURDER AND WUD CONVICTIONS WERE ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND THE COURT ERRED IN DENYING APPELLANT'S RULE 29 MOTION.

ASSIGNMENT OF ERROR #3

THE TRIAL COURT ERRED IN DISQUALIFYING APPELLANT'S ORIGINAL RETAINED ATTORNEY THEREBY DEPRIVING APPELLANT OF HIS RIGHT TO COUNSEL IN VIOLATION OF CHOICE AND DUE PROCESS AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR #4

THE TRIAL COURT PLAINLY ERRED BY FAILING TO DECLARE A MISTRIAL AFTER NUMEROUS JURORS NOTIFIED THE COURT THAT THEY BECAME AWARE OF PUBLICITY THAT A WITNESS HAD BEEN SHOT TO DEATH DURING THE TRIAL THEREBY VIOLATING THE APPELLANT'S RIGHT TO A FAIR AND UNBIASED JURY UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND SECTION 10, ARTICLE 1 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR #5

THE TRIAL COURT ERRED WITH [SIC] IT EXCLUDED A 911 TAPE PROFFERED BY THE APPELLANT IN VIOLATION OF THE OHIO RULES OF EVIDENCE AND THE APPELLANT'S RIGHTS TO DUE PROCESS AND TO PRESENT A COMPLETE DEFENSE UNDER THE FEDERAL AND OHIO CONSTITUTIONS.

ASSIGNMENT OF ERROR #6

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS TO SET ASIDE THE VERDICT AND FOR A NEW

TRIAL IN VIOLATION OF FEDERAL AND OHIO GURANTEES OF FUNDAMENTAL FAIRNESS, DUE PROCESS, AND THE RIGHT TO PRESENT A COMPLETE DEFENSE

ASSIGNMENT OF ERROR #7

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 10, 16 OF THE OHIO CONSTITUTION

ASSIGNMENT OF ERROR #8

APPELLANT'S MAXIMUM AND CONSECUTIVE SENTENCES FOR MURDER AND WUD VIOLATED THE PROVISION AGAINST EX POST FACTO LAWS AND HIS DUE PROCESS RIGHTS CONTAINED IN THE OHIO AND U.S. CONSTITUTIONS

{¶16} For ease of analysis, we address appellant's assignments of error out of order. In his third assignment of error, appellant contends the trial court erred by disqualifying his original attorney. We disagree.

{¶17} Attorney, James D. Owen, originally represented appellant. Shortly before trial, however, Owen ceased representing appellant. The record is not clear whether the trial court disqualified Owen or whether Owen voluntarily withdrew from the representation. At a hearing on the matter, the trial court noted that Owen had conflicts, but did not elaborate. The trial court indicated to appellant that Owen "doesn't have a choice here[,] [h]e has to get off the case." (Tr. 2.) An entry filed after the hearing provides no further insight into the reason why new defense counsel was necessary. The trial court appointed new counsel and allowed a significant amount of time for new counsel to prepare for trial. Appellant did not object and approved of his newly-appointed counsel. The entry continuing the trial states, in part, that "defense counsel has a conflict—new counsel just appointed." (R. 206.)

{¶18} Appellant now contends that the trial court improperly disqualified his original counsel without first conducting a hearing to gather evidence of the alleged conflict of interest. Appellant did not raise this issue in the trial court, and therefore, waived all but plain error. *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 1997-Ohio-401.

{¶19} Under Crim.R. 52(B), plain errors affecting substantial rights may be noticed by an appellate court even though they were not brought to the attention of the trial court. To constitute plain error, there must be: (1) an error, i.e., a deviation from a legal rule, (2) that is plain or obvious, and (3) that affected substantial rights. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 2002-Ohio-68. Even if an error satisfies these prongs, appellate courts are not required to correct the error. Appellate courts retain discretion to correct plain errors. Id.; *State v. Litreal*, 170 Ohio App.3d 670, 2006-Ohio-5416, ¶12. Courts are to notice plain error under Crim.R. 52(B) "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Barnes*, quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus.

{¶20} At the hearing addressing Owen's representation of appellant, appellant stated that he had some knowledge of the circumstances surrounding Owen's conflict and he agreed to the appointment of new counsel. He did not object to the termination of Owen's representation, nor did he request further hearing on the matter. On this record, we cannot say the trial court plainly erred by ordering or permitting Owen to withdraw as appellant's counsel and by appointing new counsel. Accordingly, we overrule appellant's third assignment of error.

{¶21} Appellant contends in his fifth assignment of error that the trial court erred by refusing to admit a taped 911 call regarding the shooting. He claims that the person

on the tape identified someone shooting in the parking lot who wore clothes different than those worn by appellant.

{¶22} 911 calls are generally admissible as excited utterances or present sense impressions. See *State v. Gray*, 10th Dist. No. 06AP-15, 2007-Ohio-1504, ¶11; *State v. Holloway*, 10th Dist. No. 02AP-984, 2003-Ohio-3298, ¶31. Assuming, without deciding, that the trial court erred by refusing to admit the 911 call, we nevertheless conclude that appellant was not prejudiced by the exclusion of this evidence. See *State v. Fisher*, 10th Dist. No. 01AP-1199, 2002-Ohio-3324, ¶12 ("In order to reverse a criminal conviction, the accused must show the trial court abused its discretion in the admission or exclusion of the evidence in question and that he has been materially prejudiced."). (Emphasis omitted.)

{¶23} Appellant sought to admit the 911 call to show that another person fired a gun in the parking lot at the time of the shooting. However, there was other evidence presented to the jury that supported appellant's claim. First, appellant testified that Norton fired a gun at him. Second, the bullet that hit Danielle Hogg was fired by a different gun than the gun that shot Willis. Based on this and other ballistic evidence, the state's firearms examiner testified that there were at least two guns fired at the scene.

{¶24} Because there was other substantial evidence that indicated the presence of another shooter in the parking lot, any error by the trial court in excluding the 911 call did not materially prejudice appellant. Accordingly, we overrule his fifth assignment of error.

{¶25} Appellant contends in his fourth assignment of error that the trial court erred by failing to sua sponte declare a mistrial. We disagree.

{¶26} On the first Friday of appellant's trial, someone killed Tyrell Davis. Both the state and appellant had listed Davis as a potential witness. On the following Monday, a juror reported to the trial court's bailiff that her granddaughter told her that a witness in an ongoing case had been shot. The juror stopped her granddaughter from saying anything further about the shooting.

{¶27} The trial court questioned the juror about what had occurred. The juror explained the situation and told the trial court that she could still be fair and impartial. Neither the state nor appellant requested the dismissal of the juror. Appellant's counsel agreed that the juror did not appear to be tainted. The trial court allowed the juror to remain on the jury.

{¶28} After a lunch break, another juror approached the bailiff and reported that the juror and two other jurors were walking through courthouse security and overheard security personnel mention something about a shooting on Friday. The trial court separately questioned each of the jurors about what they had heard. In essence, the jurors explained that they overheard a security guard mention that a witness in this case had been killed on Friday. The jurors stated that the information would not influence them and that they could still be fair and impartial.

{¶29} After the trial court questioned the jurors, appellant's counsel stated that "[appellant] would like to go forward. We haven't heard anything to say that they can't be fair and they won't listen to the evidence." (Tr. 501.) The trial court then asked the parties "Okay. So there's no requests for mistrial or anything? You guys want to proceed with the jury as is?" (Tr. 502.) The prosecutor and appellant's counsel agreed to proceed. Therefore, the trial court continued with the trial. Appellant now contends that

the continuation of the trial after the four jurors learned of the witness' death deprived him of a fair and impartial jury. We disagree.

{¶30} Appellant did not request a mistrial. In fact, both appellant's counsel and the prosecutor wanted to proceed with the trial. A trial court may grant a mistrial sua sponte when there is manifest necessity for the mistrial or when the ends of public justice would otherwise be defeated. *Cleveland v. Walters* (1994), 98 Ohio App.3d 165, 168. The failure to grant a mistrial sua sponte is judged under a plain error standard. *State v. Jones* (1996), 115 Ohio App.3d 204, 207.

{¶31} Appellant claims that the implication of Davis' death would be clear to the jurors: that a witness had paid with his life for his willingness to testify against him, and that this implication deprived appellant of a fair and impartial jury. We disagree.

{¶32} Both the state and appellant named Davis as a potential witness. In fact, appellant's trial counsel stated early on in the trial that Davis was a key positive witness for appellant. Additionally, the trial court's questioning of the jurors did not disclose Davis' role as a witness. Thus, the jurors had no reason to believe that Davis was killed because of his willingness to testify against appellant. More importantly, each juror that learned of Davis' death told the trial court that the information would not impact their deliberations and that they could remain fair and impartial. A juror's belief in his or her impartiality is not inherently suspect and may be relied upon by the trial court. *State v. Phillips* (1995), 74 Ohio St.3d 72, 89. There was also no evidence in the record to contradict the jurors' statements that they could remain fair and impartial. Finally, appellant's counsel also believed these jurors could be fair and impartial, informing the trial court that "[w]e haven't heard anything to say that they can't be fair and they won't listen to the evidence." (Tr. 501.)

{¶33} The trial court properly questioned each juror about the outside information and allowed them to continue as jurors, determining that the information would not impair their ability to be fair and impartial. Appellant's counsel, as well as the state, wanted the trial to continue with the empanelled jury and did not request a mistrial. Under these circumstances, we cannot say that the trial court erred, let alone plainly erred, in failing to sua sponte declare a mistrial. *State v. Keith* (1997), 79 Ohio St.3d 514, 528. Accordingly, we overrule appellant's fourth assignment of error.

{¶34} Appellant contends in his first assignment of error that the trial court erred by failing to instruct the jury on self-defense. We disagree.

{¶35} Early in the trial, appellant's counsel suggested that appellant acted in self-defense. For example, during voir dire, trial counsel questioned potential jurors about their beliefs in self-defense. (Tr. 125.) However, during his direct examination, appellant testified that "[h]e [Willis] had his finger on the trigger when he was pulling it out, so me grabbing his hand squeezed the gun, squeezed a round off." (Tr. 723-24.) He further specifically denied intentionally shooting Willis, claiming that "I said we were struggling over the gun and [Willis] may have been shot during the process." (Tr. 777.) He never testified that he purposefully shot Willis in self-defense.

{¶36} In light of appellant's testimony, the trial court asked whether appellant's counsel still wanted a self-defense jury instruction. Appellant's counsel essentially conceded that appellant's testimony would not support a self-defense instruction. The trial court asked appellant's counsel "[y]ou're basically abandoning the self-defense[?]" Appellant's counsel replied that "I think we're going to have to." (Tr. 810.) Later, the trial court again asked appellant's counsel about the self-defense instruction, and counsel responded that "I was talking to [appellant] just briefly that the accident was—it looks like

that's what we are going to go with, the accident." (Tr. 833.) In response to a similar question from the prosecutor, appellant's counsel replied "[y]eah, I think we're just going to ask for the accident." (Tr. 835.) The trial court instructed the jury on accident, not self-defense, and appellant did not object to the instructions.

{¶37} As a general rule, the failure to object at trial or to request specific jury instructions waives all but plain error with respect to the jury instructions given. *State v. Hartman*, 93 Ohio St.3d 274, 289, 2001-Ohio-1580. Where the failure to request a jury instruction was the result of a deliberate, tactical decision of trial counsel, it does not constitute plain error. *State v. Riley*, 10th Dist. No. 06AP-1091, 2007-Ohio-4409, ¶5, citing *State v. Clayton* (1980), 62 Ohio St.2d 45, 47-48.

{¶38} Here, appellant's counsel withdrew his request for a self-defense instruction and instead sought an accident instruction after appellant testified that Willis was shot as appellant struggled with Willis over the gun. Appellant's testimony was consistent with an accident defense and arguably inconsistent with self-defense. Thus, it is clear that counsel's decision to forgo the self-defense instruction was a deliberate, tactical decision. Therefore, we reject appellant's claim that the trial court's failure to give a self-defense instruction constituted plain error.

{¶39} Moreover, the defenses of accident and self-defense are mutually exclusive concepts. *State v. Wiley*, 10th Dist. No. 03AP-340, 2004-Ohio-1008, ¶25; *State v. Lust*, 10th Dist. No. 04AP-123, 2004-Ohio-6253, ¶23; *State v. Champion* (1924), 109 Ohio St. 281, 286-87. An accident is an event that occurs unintentionally, without purpose. *State v. Powell*, 176 Ohio App.3d 28, 2008-Ohio-1316, ¶24. On the other hand, self-defense is necessarily a purposeful act. Id. Self-defense asserts a justification for the purposeful act. *Wiley* at ¶25.

{¶40} Appellant did not testify that he purposefully shot Willis. He testified that the gun accidentally went off as he struggled with Willis. In light of that testimony, appellant was not entitled to a self-defense instruction because he never alleged that he purposely shot Willis in self-defense. *State v. Florence*, 2d Dist. No. 20439, 2005-Ohio-4508, ¶50 (finding that trial court properly refused to instruct on mutually exclusive defenses of accident and self-defense where defendant testified to shooting victim accidentally, not purposefully).

{¶41} For all these reasons, the trial court did not plainly err by not instructing the jury on self-defense. Therefore, we overrule appellant's first assignment of error.

{¶42} Appellant contends in his sixth assignment of error that the trial court erred by denying his motions to set aside the verdict and for new trial. This assignment of error is based on the arguments appellant asserted in his first and fourth assignment of errors. Having rejected the arguments in those assignments of error, we likewise overrule appellant's sixth assignment of error.

{¶43} We next address appellant's second assignment of error, in which he contends that his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence.[1] Again, we disagree.

{¶44} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins* (1997), 78 Ohio St.3d 380, paragraph two of the syllabus. Therefore, we will separately discuss appellant's sufficiency of the evidence and weight of the evidence arguments.

[1] Appellant also contends in this assignment of error that the trial court erred in denying his Crim.R. 29 motion for acquittal. Reviews of that decision and of the sufficiency of the evidence apply the same standard and, therefore, are properly considered together. *State v. Messer-Tomack*, 10th Dist. No. 07AP-720, 2008-Ohio-2285, ¶7-8.

{¶45} The Supreme Court of Ohio delineated the role of an appellate court presented with a sufficiency of the evidence argument in *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus:

> 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. * * *

{¶46} Whether the evidence is legally sufficient is a question of law, not fact. *Thompkins* at 386. Indeed, in determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781. Consequently, the weight of the evidence and the credibility of the witnesses are issues primarily determined by the trier of fact. *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79; *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. A verdict will not be disturbed unless, after viewing the evidence in the light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh* (2001), 90 Ohio St.3d 460, 484; *Jenks* at 273.

{¶47} In order to convict appellant of murder, the state had to prove beyond a reasonable doubt that appellant purposely caused the death of Richard Willis. R.C. 2903.02(A). A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain

nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature. R.C. 2901.22(A).

{¶48} Appellant claims that the state failed to present sufficient evidence to prove that he purposely shot Willis. However, appellant's argument is premised on excluding the testimony of Hogg, White, and Tony Pace. Appellant asserts that we should not consider the testimony of these witnesses in a sufficiency analysis because the jury acquitted appellant of felonious assault and aggravated murder. According to appellant, these acquittals demonstrate that the jury did not believe these witnesses, and without these witnesses, the remaining evidence is insufficient to prove that appellant purposely shot Willis.[2] Appellant's argument misconstrues this court's role in analyzing the sufficiency of the evidence. This court's role is to determine whether the state presented sufficient evidence that would, if believed, convince the average mind of the defendant's guilt beyond a reasonable doubt. Thus, we cannot simply exclude the testimony of Hogg, White, or Pace in our analysis. Considering their testimony in a light most favorable to the state, as we must, the state clearly presented sufficient evidence that appellant purposely caused the death of Willis.

{¶49} According to Hogg's testimony, appellant pulled his car into the parking space next to where Willis was standing, got out of his car, and began shooting at Willis. White essentially testified to the same events. Neither witness saw appellant and Willis struggle over a gun. Pace also testified that appellant confessed that he purposely shot Willis. This testimony alone, if believed, is sufficient to prove that appellant purposely caused Willis' death.

---

[2] The jury acquitted appellant on the two counts of felonious assault involving injuries to Hogg and White. The jury also found appellant not guilty of aggravated murder, i.e., purposely killing Willis with prior calculation and design.

{¶50} Appellant's manifest weight of the evidence claim requires a different review. The weight of the evidence concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other. *State v. Brindley,* 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶16. When presented with a challenge to the manifest weight of the evidence, an appellate court, after " 'reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.' " *Thompkins* at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " Id.

{¶51} A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver,* 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21. The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson* (Mar. 19, 2002), 10th Dist. No. 01AP-973; *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553. The trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. *State v. Williams,* 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶58; *State v. Clarke* (Sept. 25, 2001), 10th Dist. No. 01AP-194. Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must also give great deference to the fact finder's determination of the witnesses' credibility.

State v. Covington, 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶28; *State v. Hairston,* 10th Dist. No. 01 AP-1393, 2002-Ohio-4491, ¶74.

{¶52} Appellant argues that his version of events was more credible than the version described by the state's witnesses, in light of the fact that the jury obviously did not believe certain aspects of the state's evidence. He also argues that Norton was the person who killed Willis. We find both arguments unavailing.

{¶53} The fact that the jury acquitted appellant of the felonious assault counts against Hogg or White does not render their testimony less credible, nor does it make his murder conviction less reliable. The evidence supporting the felonious assault counts was not as strong as the evidence supporting the murder count. Hogg did not see who shot her and, therefore, could not say that appellant shot her. In addition, the bullet that hit Hogg was fired from a different gun than the gun that was used to kill Willis. Therefore, the jury had reason to conclude that appellant did not shoot Hogg. White testified that he was standing in between the two cars with appellant and Willis. White was the first person shot. However, Hogg did not see White in that area when the shooting began. Moreover, White did not go to the hospital the day appellant allegedly shot him, nor did he contact authorities until many months after the shooting. Thus, the jury had reason to disbelieve White's testimony that appellant also shot him.

{¶54} Likewise, even if the jury did not believe Pace's testimony that appellant confessed to the premeditated murder of Willis, that does not render appellant's conviction of murder less reliable given the eyewitness testimony of Hogg and White.

{¶55} Finally, the weight of the evidence does not support appellant's claim that Norton killed Willis. The only evidence that Norton killed Willis was appellant's own conjecture. Appellant claimed that during his struggle with Willis, the gun fired and only

hit Willis in the arm and in the groin. He claimed that Norton continued to shoot at him and must have accidentally hit Willis in the chest, killing him. The jury obviously disbelieved this version of events and instead believed White and Hogg's testimony that appellant got out of his car and immediately began shooting at Willis. A conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution's witnesses. *State v. Stewart*, 10th Dist. No. 08AP-33, 2009-Ohio-1547, ¶22.

{¶56} Appellant also argues that Hardy's testimony indicates that Willis was hit with bullets from two different guns, implying that Norton also shot Willis. We disagree. Hardy only concluded that there were at least two guns fired at the scene. This conclusion is supported by the fact that the bullet which hit Hogg was fired by a different gun than the gun that fired the bullets that killed Willis. Finally, appellant contends that testimony from the doctor who performed Willis' autopsy supported his theory that Norton killed Willis. We find no such support in her testimony.

{¶57} Appellant's convictions are supported by sufficient evidence and are not against the manifest weight of the evidence. Accordingly, we overrule his second assignment of error.

{¶58} In his seventh assignment of error, appellant contends he received ineffective assistance of counsel. Specifically, he contends trial counsel: (1) failed to object to the trial court's removal of the self-defense jury instruction; (2) failed to properly investigate the law and facts of appellant's case; (3) argued self-defense in voir dire only to claim accident in closing arguments; (4) failed to move for a mistrial or at least challenge the jurors who had learned of Davis' murder; (5) failed to properly impeach White; (6) failed to properly authenticate the 911 call; (6) failed to object to the trial court placing appellant in isolation; (7) failed to admit Davis' interview with police into evidence;

(8) failed to call certain witnesses; and, (9) failed to object to references to Hogg's pregnancy.

{¶59} In order to prevail on an ineffective assistance of counsel claim, appellant must meet the two-prong test enunciated in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; accord *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-42. Initially, appellant must show that counsel's performance was deficient. To meet that requirement, appellant must show counsel's error was so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Appellant may prove counsel's conduct was deficient by identifying acts or omissions that were not the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. *Strickland* at 690.

{¶60} In analyzing the first prong of *Strickland,* there is a strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. Id. at 689. Appellant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. Id., citing *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158. Tactical or strategic trial decisions, even if ultimately unsuccessful, do not generally constitute ineffective assistance. *State v. Carter* (1995), 72 Ohio St.3d 545, 558.

{¶61} If appellant successfully proves that counsel's assistance was deficient, the second prong of the *Strickland* test requires appellant to prove prejudice in order to prevail. Id. at 692. To meet that prong, appellant must show counsel's errors were so serious as to deprive him of a fair trial, a trial whose result is reliable. Id. at 687. Appellant would meet this standard with a showing "that there is a reasonable probability

that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

{¶62} Counsel was not deficient for failing to object to the trial court's removal of the self-defense instruction or for claiming in his closing argument that appellant acted accidentally, even though he discussed the concept of self-defense in his voir dire. As noted, appellant's trial testimony was inconsistent with a self-defense theory. Thus, trial counsel's decision to forgo self-defense and instead present an accident defense to the jury was a sound, strategic decision. See *State v. Burns* (Aug. 3, 2000), 8th Dist. No. 69676 (counsel not ineffective for presenting accident defense, instead of self-defense, where defendant's testimony supported accident).

{¶63} Appellant also cannot demonstrate that his counsel's pre-trial investigation was deficient. Appellant apparently assumes that a more thorough pre-trial investigation would have caused trial counsel to present an accident defense in the beginning of the case instead of having to switch defense theories in the middle of the trial. However, there is no evidence in the record that demonstrates the steps counsel took during his investigation, what counsel learned in his investigation, or what appellant himself told counsel regarding the events. Additionally, appellant cannot demonstrate that he was prejudiced, as the jury was ultimately presented with an accident defense. The jury simply rejected that defense.

{¶64} In regards to his other claims of ineffectiveness, appellant does not demonstrate how he was prejudiced by: (1) counsel's failure to move for a mistrial or at least challenge the jurors who had learned of Davis' murder, as we have already found no error in the trial court's handling of that situation, and appellant does not explain what

exactly trial counsel should have done; (2) counsel's failure to properly impeach White, as it is clear the jury did not believe portions of his testimony notwithstanding counsel's alleged failure; (3) counsel's failure to properly authenticate the 911 call, as we have already concluded that the exclusion of the call was not prejudicial; (4) counsel's failure to object to the trial court placing appellant in isolation, as this decision could not have impacted the outcome of the trial; (5) counsel's failure to admit Davis' police interview into evidence and to call certain other witnesses, as the record does not reflect what this evidence would have been; and (6) counsel's failure to object to references to Hogg's pregnancy, as again, this minor fact could not have impacted the outcome of the trial. See *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448 ("A defendant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other.").

{¶65} Appellant has failed to demonstrate that he received ineffective assistance of counsel. Accordingly, we overrule his seventh assignment of error.

{¶66} Finally, appellant contends in his eighth assignment of error that the severance remedy chosen by the Supreme Court of Ohio in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, as applied to his case, violated due process and ex post facto principles. We disagree. This court has consistently rejected these arguments in a number of cases. See *State v. Wilson*, 10th Dist. No. 07AP-224, 2007-Ohio-4801, ¶6; *State v. Pigot*, 10th Dist. No. 06AP-343, 2007-Ohio-141, ¶7; *State v. McCoy*, 10th Dist. No. 07AP-955, 2008-Ohio-2461, ¶6. Accordingly, appellant's eighth assignment of error is overruled.

{¶67} Having overruled appellant's eight assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH, P.J., and TYACK, J., concur.