[Cite as *State v. Loughman*, 2011-Ohio-1893.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 10AP-636
v.	:	(C.P.C. No. 09CR-03-1738)
Lori A. Loughman,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on April 19, 2011

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

Howard Legal LLC, and *Felice Howard,* for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Defendant-appellant, Lori A. Loughman, appeals from a judgment of the Franklin County Court of Common Pleas finding her guilty, pursuant to jury verdict, of two counts of murder in violation of R.C. 2903.02. Because (1) the prosecution did not engage in conduct that deprived defendant of a fair trial, (2) legally sufficient evidence and the manifest weight of the evidence support defendant's convictions, (3) defendant was not denied the effective assistance of counsel, but (4) the trial court's judgment entry

should have reflected defendant's two murder convictions merged for purposes of sentencing, we affirm in part and reverse in part.

I. Facts and Procedural History

{¶2} The state indicted defendant on March 24, 2009 on two counts of murder, one for purposely causing the death of the victim, and the other for causing the death of the victim as a proximate result of committing or attempting to commit felonious assault. The charges stemmed from an incident that occurred at defendant's apartment on March 14, 2009.

{¶3} According to the state's evidence, defendant had known the victim for almost ten years and described him as her best friend. On the evening of March 14, 2009, the victim went to defendant's apartment with plans to stay there that night. They went to the grocery store, made dinner, and started to watch a movie. They were both drinking wine, and defendant was taking prescription medications that required her to avoid alcohol.

{¶4} Defendant had a history of self-mutilation and, as the two watched the movie, defendant showed the victim the self-inflicted wounds on her wrists. The victim tried to comfort her and tell her everything would be okay, but defendant had the "overwhelming feeling to hurt" herself again. (Tr. 371.) Defendant remembered going to the kitchen, though she could not remember why, and coming back to the living room with a knife. She remembered being near the edge of the couch where the victim was sitting and wanting to cut herself. The victim tried to take the knife from her. Defendant's next clear memory was being on top of the victim, seeing "his face and it just wasn't there anymore," and seeing the knife in his chest. (Tr. 264, 266, 374.) Although she does not

remember doing so, defendant twice called 911 that evening but disconnected both calls without stating her name or location.

{¶5} When police arrived, they knocked on the locked door to defendant's residence but received no response. They eventually heard a female voice inside screaming for help, so the officers kicked in the door to enter the apartment. They found defendant with her arms wrapped around the victim who was seated on either the floor or the couch. The victim's "eyes looked lifeless," defendant was upset, emotional and crying, and the officers saw "a lot of blood on both of them." (Tr. 41-42.) Defendant would not respond when the officers asked her to step away from the victim, so they physically removed her from him. The officers put defendant in the back of a cruiser where they posed some questions to her, but defendant was unresponsive to their questions.

{¶6} In moving a portion of the couch to assist the victim, one of the officers saw a knife lying on the floor. The results of police crime lab DNA testing on the knife revealed the victim's DNA on the blade and both the victim's and defendant's DNA on the handle of the knife. The knife cut through the victim's fourth rib, causing a two-inch deep laceration into his heart that resulted in his death.

{¶7} Police took defendant to the hospital to treat a laceration on her leg and then to Columbus police headquarters to interview her. In her initial interview, defendant was able to recall everything that occurred up until the incident but said her next recollection was her being in the back of a police cruiser. The detectives ended the interview when they felt defendant would not provide any additional information. After defendant filled out paperwork, defendant indicated to the detectives she again wanted to talk. Defendant provided more information during her second interview, and although she

maintained she did not remember what happened after she came back into the living room with the knife, she insisted what occurred was an accident.

{¶8} Prior to trial, the court ordered defendant to submit to a psychiatric evaluation to determine her competency to stand trial; she was determined to be competent. Defendant also entered a plea of not guilty by reason of insanity, but the court-ordered psychiatric evaluation determined defendant was able to know the wrongfulness of her conduct at the time of the offense. Defendant's trial began May 17, 2010, and at the conclusion of the trial the court instructed the jury both on the lesser included offense of reckless homicide and the defense of accident. The jury returned verdicts finding defendant guilty of both counts of murder charged in the indictment.

II. Assignments of Error

{¶9} Defendant appeals, assigning the following errors:

FIRST ASSIGNMENT OF ERROR

> The trial court violated Lori Loughman's right against Double Jeopardy in violation of the Fifth Amendment to the United States Constitution Section 10, Article I of the Ohio Constitution and R.C. when it failed to merge the two guilty verdicts into one conviction and one resulting sentence.

SECOND ASSIGNMENT OF ERROR

> Prosecutorial misconduct at trial and during closing arguments unconstitutionally undermined the fairness of Lori Loughman's trial.

THIRD ASSIGNMENT OF ERROR

> The state's evidence is not sufficient to sustain Lori Loughman's convictions for murder.

FOURTH ASSIGNMENT OF ERROR

> Lori Loughman's convictions are against the manifest weight of the evidence.

FIFTH ASSIGNMENT OF ERROR

> Lori Loughman was denied the effective assistance of counsel as guaranteed by the United States and Ohio Constitutions.

III. First Assignment of Error – Merger of Sentences under R.C. 2941.25

{¶10} Defendant's first assignment of error asserts the trial court violated the Double Jeopardy Clauses in the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, when it failed to merge defendant's two guilty verdicts for sentencing.

{¶11} At the sentencing hearing, the prosecution noted "the two sentences would merge" and elected to have the court sentence defendant under Count Two of the indictment. (June 3, 2010 Tr. 9.) The trial court stated it considered all the information it was required to consider and defendant would "be serving a life sentence for Counts One and Two. They merge together, but I'm going to reflect here for Count Two." (Tr. 11.) The court's judgment entry, however, imposed 15 years to life on each count, ordering them to be served concurrently.

{¶12} "The federal and state constitutions' double jeopardy protection guards citizens against cumulative punishments for the 'same offense.' " *State v. Hall,* 10th Dist. No. 05AP-957, 2006-Ohio-2742, ¶16, citing *State v. Moss* (1982), 69 Ohio St.2d 515, 518. Ohio's multiple counts statute, R.C. 2941.25, consistent with those provisions, states that where a defendant's same conduct "can be construed to constitute two or more allied

offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one."

{¶13} Here, both of defendant's murder convictions stem from a single stab wound to the victim's heart. The state properly concedes defendant's two murder convictions should merge under R.C. 2941.25. See *State v. Huertas* (1990), 51 Ohio St.3d 22, 28 (noting that under R.C. 2941.25 and the Double Jeopardy Clauses of Ohio and United States Constitutions defendant could not be sentenced on two counts of aggravated murder arising out of a single killing but rather would be given a single life sentence).

{¶14} Although the trial court properly stated at the sentencing hearing the two counts of murder merged for purposes of sentencing, the judgment entry wrongly sentenced defendant on each conviction. Accordingly, we sustain defendant's first assignment of error and remand this matter to the trial court with instructions to amend the judgment entry to properly reflect merger of the two murder counts for purposes of sentencing.

IV. Second Assignment of Error - Prosecutorial Misconduct

{¶15} Defendant's second assignment of error contends multiple instances of prosecutorial misconduct deprived her of a fair trial. The test for prosecutorial misconduct is whether the prosecution's conduct was improper, and if so, whether the conduct prejudicially affected substantial rights of the accused. *State v. Smith* (1984), 14 Ohio St.3d 13, 14. " '[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.' " *State v. Wilkerson,* 10th Dist. No. 01AP-1127, 2002-Ohio-5416, ¶38, quoting *Smith v. Phillips*

(1982), 455 U.S. 209, 219, 102 S.Ct. 940, 947. Prosecutorial misconduct thus is not grounds for reversal unless the defendant has been denied a fair trial. *State v. Maurer* (1984), 15 Ohio St.3d 239, 266.

A. *Alleged Prosecutorial Misconduct During Trial*

{¶16} Defendant contends the first instance of prosecutorial misconduct occurred when the state attempted to present evidence of a rift between defendant and the victim. Dr. Denney, a lifelong friend of the victim, testified defendant and the victim "were closer friends earlier on, and then later I would say that there was just more distance and * * * how can I say this? I really kind of didn't want to have anything to do with Lori about five years ago or so, and so he really did not." (Tr. 184.) Defendant objected and, after a side bar, the court sustained the objection, stating it did not believe the victim's state of mind was relevant. The prosecution then asked if defendant was welcome at Dr. Denney's house; defendant again objected, and the court sustained the objection. (Tr. 189.)

{¶17} The trial court later instructed the jury "not to speculate as to why the court sustained an objection to any question or what the answer to that question might have been." (R. 143.) It reinforced the instruction by advising the jury not to "draw any inference or speculate on the truth of any suggestion included in a question that was not answered." (R. 143.) The jury is presumed to follow the court's instruction. *State v. Raglin*, 83 Ohio St.3d 253, 264, 1998-Ohio-110, citing *State v. Goff*, 82 Ohio St.3d 123, 135, 1998-Ohio-369. Because the court sustained defendant's objections to the questions and instructed the jury concerning the effect of the sustained objections, defendant fails to demonstrate the necessary prejudice. See *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, ¶94 (concluding prosecution's reference to the subject matter of a suppression

hearing lacked prejudicial effect because the court sustained defendant's objection to the reference).

{¶18} Defendant did not object to the remaining instances of prosecutorial misconduct asserted, so any error is forfeited, absent plain error. *State v. Diar,* 120 Ohio St.3d 460, 2008-Ohio-6266, ¶139; *State v. Saleh,* 10th Dist. No. 07AP-431, 2009-Ohio-1542, ¶68. A court recognizes plain error with the utmost caution, under exceptional circumstances, and only to prevent a miscarriage of justice. Id. We may reverse only when the record is clear that defendant would not have been convicted in the absence of the improper conduct. *State v. Williams*, 79 Ohio St.3d 1, 12, 1997-Ohio-407.

{¶19} Defendant contends the state mischaracterized the evidence during her cross-examination, pointing to where the prosecution asked her if she remembered "telling the police that [she] wanted [the victim] to stop saying everything's all right because it wasn't?" (Tr. 389.) When defendant denied making the statement, the prosecution asked her if she remembered it being on the tape recording of her second interview with detectives played at trial the day before; defendant said no. The prosecution continued by asking, "If it's on the tape, that tape was accurate, so whatever's on that tape is what you said, correct?" (Tr. 389-90.)

{¶20} Initially, the prosecution's questions regarding defendant's prior taped statement were proper impeachment and cross-examination under the rules of evidence. Evid.R. 611, 613. Moreover, the portion of the interview the prosecution referenced involved the detective's saying to defendant, "You want him to stop saying everything's all right because everything's not alright," to which defendant responded, "Yeah, everything's not all right." (Tr. 290-91.) Although the prosecutor's question was not a verbatim

recitation of defendant's statement to police, the substance of the prosecution's questions was based in the taped interview. *State v. Tumbleson* (1995), 105 Ohio App.3d 693, 700, citing *State v. Campbell*, 69 Ohio St.3d 38, 51, 1994-Ohio-492, cert. denied, 513 U.S. 913, 115 S.Ct. 289 (noting that although "the prosecutor's comment[] may not have been the best choice of words, it is implausible that the jury determined its verdict based upon these isolated remarks"). Defendant failed to demonstrate how the statement, even if error, affected a substantial right.

{¶21} Defendant also claims the prosecution attempted intentionally to mislead the jury when on cross-examination it asked defendant whether, in the trial being held 14 months after the incident, she was "now trying to tell the jury that it was an accident." (Tr. 408.) Defendant responded, "No, I'm not trying to tell them now. I've always thought that." (Tr. 408-09.) The prosecution responded by asking whether defendant had any memory to support her theory, and defendant stated she remembered wanting to hurt herself.

{¶22} The substance of the prosecution's questions was not improper, as the state properly could explore defendant's primary defense, accident. Nor was the question prejudicial, as it arguably allowed defendant to emphasize she never varied from her version of events. Finally, defendant does not suggest how, in the absence of the prosecution's questions, the jury's verdict would have differed.

B. *Alleged Prosecutorial Misconduct During Closing Argument*

{¶23} Defendant asserts the prosecution's first instance of misconduct during closing argument occurred when the prosecution improperly vouched for its case and expressed an opinion about defendant's guilt in response to defendant's closing argument. Because defendant did not object to any portion of the state's closing

argument, we review for plain error. Moreover, because the trial court instructed the jury the closing arguments were not evidence, we presume the jury followed the instruction and did not consider the closing arguments as evidence. *State v. Trewartha*, 10th Dist. No. 05AP-513, 2006-Ohio-5040, ¶21, citing *Raglin*.

{¶24} The prosecution is entitled to a certain degree of latitude in summation. *State v. Grant* (1993), 67 Ohio St.3d 465, 482, citing *State v. Richey* (1992), 64 Ohio St.3d 353, 362. The prosecution "may draw reasonable inferences from the evidence presented at trial, and may comment on those inferences during closing argument." *State v. Treesh*, 90 Ohio St.3d 460, 466, 2001-Ohio-4, citing *State v. Smith*, 80 Ohio St.3d 89, 111, 1997-Ohio-355. We review the prosecution's summation in its entirety to determine if the allegedly improper remarks prejudicially affected defendant's substantial rights. Id.; *State v. Smith*, 87 Ohio St.3d 424, 442, 2000-Ohio-450, citing *Smith,* 14 Ohio St.3d at 14.

{¶25} During her closing remarks, defendant theorized the stabbing accidentally occurred when the victim stood up to take the knife from defendant; a struggle ensued, during which the knife went into the victim's heart. Defendant's oral argument concluded with the statement, "I would suggest based on the facts, based on Lori, based on what happened, as she stands charged for those specific charges, she's not guilty; and I would respectfully ask you to return that verdict." (Tr. 486.)

{¶26} In response to defendant's closing argument, the prosecution stated it did not "have theories. What I have are the facts and the truth." (Tr. 487.) The prosecution continued by stating, "Common sense and reason will tell you that Lori Loughman is guilty. She is guilty of purposeful murder, and she is guilty of felony murder based upon the felonious assault. * * * There's no evidence whatsoever to support recklessness, and

there is no evidence whatsoever to support accident." (Tr. 487.) The state contends the prosecution's comments were proper because they responded to defendant's closing argument.

{¶27} Prosecutors "may not express their personal beliefs or opinions regarding the guilt of the accused, and they may not allude to matters not supported by admissible evidence." *State v. Lott* (1990), 51 Ohio St.3d 160, 166. " 'Where opinions [on guilt] are expressed on facts outside the evidence, or are predicated on inferences based on facts outside the evidence, such opinions have not been countenanced and the judgments in those cases have been reversed upon appeal.' " Id., quoting *State v. Stephens* (1970), 24 Ohio St.2d 76, 83.

{¶28} The prosecution's comments here do not include facts from outside the record. To the contrary, after making the contested statement, the prosecution told the jury, "So when you look at the evidence, look at the evidence and the facts, and use that in determining your verdict." (Tr. 487.) Although the prosecution arguably crept outside the bounds of proper argument in claiming it had the "truth," any error reflected in the statement was not so great as to " 'permeate[] the entire atmosphere of the trial.' " *Tumbleson* at 699, quoting *United States v. Warner* (C.A.6, 1992), 955 F.2d 441, 456, cert. denied, 505 U.S. 1227, 112 S.Ct. 3050. Indeed, defendant fails to suggest how, absent the statement, the outcome of the trial would have been different.

{¶29} Defendant further claims the prosecution improperly alluded to a rift between defendant and the victim when it stated, "Well, [the victim] had been on this merry-go-round before. * * * He was getting fed up with it. It could equally be the case that he was done. I can't take this anymore. You know, I've been your friend. * * * I just can't

do this anymore." (Tr. 489.) Defendant argues no facts in evidence supported the state's theory.

{¶30} In cross-examining defendant, the prosecution asked her whether the victim was beginning to distance himself from her because of her issues; defendant said no. Defendant added, however, she cut herself one to two weeks prior to the night of the incident, admitted she had not seen the victim for maybe a week, and told police on the night of the incident more time than that had passed since she last saw the victim.

{¶31} Defendant's statements undermine her earlier indication she saw the victim two to three times a week. The prosecution's hint at a rift was a fair inference from defendant's own inconsistent testimony. The statement was not improper, did not affect defendant's substantial rights, and, even if error, did not rise to the level of plain error.

{¶32} Defendant also contends the state misstated the evidence when the prosecution in closing argument argued, "But the defendant herself has repeatedly said there was no struggle. They didn't struggle. * * * There's nothing to substantiate that." (Tr. 493.) The prosecution continued, noting a couple of broken wine glasses were at the scene but "[w]e don't know when the glasses were broken, * * * they were on the floor and she was supposedly crawling around on the floor underneath. Might explain the cut on her leg as well. She was wearing shorts." (Tr. 493.)

{¶33} Other evidence pertaining to a struggle was ambiguous. Two of the officers who arrived at the scene stated broken stemware was on the floor, the scene was in disarray, and signs of a struggle were apparent. Other evidence, however, not only indicated officers knocked over a potted plant and ripped plastic covering off a door trying to take defendant out the back of the apartment. The evidence also pointed to

medics moving furniture around when they arrived. Such evidence may explain, in part, the condition of the room. When further considered, defendant testified she had no memory of a struggle, we cannot say the prosecution's argument suggesting no struggle was not a plausible inference from the evidence.

{¶34} Defendant next claims nothing supported the prosecution's statement that defendant was crawling around on the floor of the apartment. One of the officers stated that, when they entered the apartment, they saw "a man slumped up against the couch kind of facing the TV with his butt on the ground, and there was a woman laying on top of him with her arms wrapped around him." (Tr. 41.) Pictures from the night of the incident depict broken stemware on the floor and defendant wearing shorts. The prosecution's statements were reasonably based on the evidence. Even if error, they fall short of plain error because they cannot be said to have affected the outcome of the trial.

{¶35} Defendant further asserts the prosecution improperly appealed to the jury's emotion when it said, "And maybe it's most telling when they asked for his parents' names so they could contact them. She refused to provide that information." (Tr. 497.) See *State v. King*, 11th Dist. No. 2009-P-0040, 2010-Ohio-3254, ¶94 (noting "[a] prosecutor may not invoke the community's abhorrence to certain actions or nebulous expectations a defendant's conduct failed to meet in an attempt to sway the jury's judgment").

{¶36} Police stated that when they placed defendant in the cruiser, they asked her questions such as her name, who she was, who the male was, what happened, and what her social security number was; she was unresponsive to their questions and

refused to cooperate in any way. During defendant's cross-examination, the prosecution asked defendant if she remembered refusing to tell the officers the names of the victim's parents so the police could contact them; she said she did not. When the prosecution asked if she knew the names, she said she did, prompting the prosecution to inquire, "So you could have provided that information to them?" (Tr. 407.) Defendant responded, "Yes, I probably could have, yes." (Tr. 407.)

{¶37} Even if the prosecution's remarks were an improper appeal to the jury's emotions, the comment was brief, in closing argument, and was an "isolated incident in an otherwise properly tried case." *State v. Keenan* (1993), 66 Ohio St.3d 402, 410; *Treesh* at 464, citing *Smith,* 14 Ohio St.3d at 15 (concluding "[a]n improper comment does not affect a substantial right of the accused if it is clear beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments"). In light of the evidence presented, the comment could not have affected the outcome of the trial.

{¶38} Defendant lastly asserts the prosecution improperly vouched for the credibility of its own witness when it said in closing, "Did the police officer have a motive to lie? No. They wanted to get to the truth." (Tr. 491.) Prosecutors may not properly express their personal belief as to the credibility of witnesses. *State v. Jackson,* 107 Ohio St.3d 53, 2005-Ohio-5981, ¶117. They vouch for a witness when they imply knowledge of facts outside the record or place their personal credibility in issue. Id.; *State v. Keene*, 81 Ohio St.3d 646, 666, 1998-Ohio-342. A prosecutor may fairly comment on the credibility of witnesses based upon their testimony in open court. *State v. Rodgers,* 11th Dist. No. 2007-T-0003, 2008-Ohio-2757, ¶58.

{¶39} Defendant's closing argument suggested police decided on arrival at the scene that defendant killed the victim, the officers who interviewed defendant were "trying to trap her," and the officers' testimony concerning the scene when they arrived conveniently suited to the state's theory of events. The prosecution made the statement at issue while responding to defendant's remarks, noting that even though "the credibility of the police officers was somewhat attacked by [defense counsel], and their motives, the Judge will read you an instruction on how to judge credibility, and one of those was who has the motive to lie. Did the police have any motive to lie? No." (Tr. 491.)

{¶40} The prosecution may respond to the specifics of defendant's closing argument. Although the prosecution's statement rebutting defendant's remarks may have been inartful and bordered on vouching for police officers' credibility, the substance of the statement, noting no motive to lie, was a reasonable response to suggestions that police lied. In light of the court's instructing the jury members they were "the sole judges of the facts, the credibility of the witnesses and the weight of the evidence," the prosecution's statement, if error, fails to rise to the level of plain error. (R. 143.)

{¶41} "[T]he conduct of a prosecuting attorney during a trial cannot be made a ground of error unless the conduct is so egregious in the context of the entire trial that it renders the trial fundamentally unfair." *State v. McGrath*, 8th Dist. No. 77896, 2002-Ohio-2386, ¶30, citing *State v. Papp* (1978), 64 Ohio App.2d 203, cited with approval, *Maurer*. Even in those instances where the prosecution's conduct may have deviated to some extent from the general rules governing closing argument, they individually and

collectively were not egregious and did not deprive defendant of a fair trial. Accordingly, we overrule defendant's second assignment of error.

V. Third Assignment of Error - Sufficiency of the Evidence

{¶42} Defendant's third assignment of error asserts the evidence was insufficient to establish the requisite mental state for the two murder counts on which the jury rendered guilty verdicts, though defendant concedes the other elements of the offenses. See appellant's brief, 14.

{¶43} Whether evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. Sufficiency is a test of adequacy. Id. The evidence is construed in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Conley* (Dec. 16, 1993), 10th Dist. No. 93AP-387. When reviewing the sufficiency of the evidence, the court does not weigh the credibility of the witnesses. *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79.

{¶44} In order to convict defendant of murder in violation of R.C. 2903.02(A), the state was required to prove, beyond a reasonable doubt, defendant purposefully caused the victim's death. "A person acts purposely when it is his specific intention to cause a certain result." R.C. 2901.22(A). Alternatively, a person acts purposely "when the gist of the offense is a prohibition against conduct of a certain nature," and "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).

{¶45} To convict defendant of murder pursuant to R.C. 2903.02(B), the state had to prove, beyond a reasonable doubt, defendant caused the victim's death as a proximate result of committing or attempting to commit a felonious assault. Felonious assault required the state to prove defendant acted knowingly to cause serious physical harm to another or to cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance. R.C. 2903.11(A). "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B).

{¶46} "The law has long recognized that intent, lying as it does within the privacy of a person's own thoughts, is not susceptible of objective proof." *State v. Garner* (1995), 74 Ohio St.3d 49, 60, citing *State v. Carter*, 72 Ohio St.3d 545, 554, 1995-Ohio-104. Intent thus "can be determined from the surrounding facts and circumstances, and persons are presumed to have intended the natural, reasonable and probable consequences of their voluntary acts." Id.; *State v. Johnson* (1978), 56 Ohio St.2d 35, 39; *State v. Thomas* (1988), 40 Ohio St.3d 213, 217. "[S]uch intent may be deduced from all the surrounding circumstances, including the instrument used to produce death, its tendency to destroy life if designed for that purpose, and the manner of inflicting a fatal wound." *State v. Robinson* (1954), 161 Ohio St. 213, paragraph five of the syllabus. See also *State v. Edwards* (1985), 26 Ohio App.3d 199, 200 (concluding the jury could find defendant had the requisite intent to kill based on "the size of the instrument and the force with which the victim was struck," where defendant, denying any

intention to kill the victim, went to a house, retrieved a banister railing and hit the victim with it).

{¶47} Defendant argues the evidence was insufficient to establish she purposely killed the victim because, during her interview with detectives in the early morning hours after the incident, her answers were equivocal, consisting mostly of "maybe," "possibly," and "probably." The jury, however, was not constrained to defendant's responses during her interview to determine her intent. They could consider the entire set of circumstances surrounding the stabbing and infer intent from those facts. *State v. Grant*, 67 Ohio St.3d 465, 478, 1993-Ohio-171, citing *Hunt v. Charles J. Rogers Transp. Co.* (1955), 164 Ohio St. 329, paragraph three of the syllabus (noting that "[a]lthough inferences cannot be built upon inferences, several conclusions may be drawn from the same set of facts").

{¶48} When viewed in a light most favorable to the prosecution, the state's evidence was sufficient to prove defendant acted purposefully. Defendant and the victim were the only ones in her apartment on the night of the incident. After defendant showed the victim her self-inflicted wounds on her wrists, he consoled her and told her everything would be okay. She did not feel everything would be okay and "got upset because he ha[d] no – he had no idea." (Tr. 263.) She then sensed an "overwhelming feeling to hurt" herself. (Tr. 371.) She went into the kitchen, retrieved a six to eight inch knife and returned to the living room where the victim was seated. She remembered the victim trying to take the knife from her and then recalled "looking at his face and it just wasn't there anymore." (Tr. 266, 372-74.) The victim died from a stab wound through his fourth rib, which lacerated his heart.

{¶49} In her interview with police, defendant stated she did not realize she had the knife until "it was already done," and although she did not remember how the stabbing happened, she remembered the knife "was in his chest." (Tr. 264.) She stated during the interview she wanted to "scare him maybe"; she wanted him to "stand up to" her. (Tr. 286, 287.) Near the end of the interview, when detectives asked her if she intended to hurt him and make him feel her pain, she responded, "[p]robably, yeah." (Tr. 300.)

{¶50} The circumstances here are similar to those in *State v. Higgs* (Oct. 7, 1992), 9th Dist. No. 15554, where the defendant stated she was unable to remember stabbing the victim but knew she picked up a knife while she and the victim were fighting. While struggling for control over the knife, the knife inexplicably went through one of the victim's ribs and into his heart. Id. The court concluded the requisite intent was present in *Higgs* because not only did the defendant admit to picking up the knife during the fight, but "the placement of the stab wound, directly to the victims [sic] heart, along with the force necessary to penetrate the rib, evince[d] an intent to kill." Id. See also *State v. Lallathin*, 7th Dist. No. 299, 2003-Ohio-3478, ¶47-49 (noting that although defendant claimed to have blacked out and to not remember the shooting, the evidence demonstrating the defendant took the gun out of his pocket and flipped the safety off allowed the jury to infer defendant acted purposely).

{¶51} As in *Higgs*, the state presented sufficient evidence to support, beyond a reasonable doubt, that defendant purposely caused the victim's death. Not only did she admit she probably wanted to hurt the victim, but she deliberately went to the kitchen, obtained a knife, and returned to the room where the victim was sitting. The victim

ultimately died from a stab wound directly to his heart that was strong enough to cut through a rib.

{¶52} The evidence was also sufficient to prove, beyond a reasonable doubt, defendant knowingly committed felonious assault. Defendant contends the evidence was insufficient because in her interview she said many times she "never meant to hurt" the victim; that what occurred was an accident. (Tr. 292.) Based on the same evidence noted in connection with the other charge, the jury could reasonably find from inferences drawn from the circumstances surrounding the stabbing, and defendant's own remarks during her interview, that defendant was aware her conduct with the knife would result in physical harm or serious physical harm to the victim.

{¶53} Because sufficient evidence supports defendant's convictions for murder, we overrule defendant's third assignment of error.

VI. Fourth Assignment of Error - Manifest Weight of the Evidence

{¶54} Defendant's fourth assignment of error challenges the manifest weight of the evidence. Sufficiency of the evidence and manifest weight of the evidence are distinct concepts; they are "quantitatively and qualitatively different." *Thompkins* at 386. When presented with a manifest weight argument, we engage in a limited weighing of evidence to determine whether sufficient competent, credible evidence permits reasonable minds to find guilt beyond a reasonable doubt. *Conley*. *Thompkins* at 387 (noting that "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony"). In the manifest weight analysis the appellate court considers the credibility of the witnesses and

determines whether 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." Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The jury may take note of any inconsistencies and resolve them accordingly, "believ[ing] all, part or none of a witness's testimony." *State v. Raver,* 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67.

{¶55} Defendant argues the greater amount of credible evidence supports the victim's death as accidental because signs of a struggle over the knife were discovered, defendant admitted she wanted to hurt herself, and her initial demeanor when police arrived on the scene was more consistent with an accident than murder. Defendant also claims the little time the jury spent in deliberation indicates the jury lost its way.

{¶56} Defendant first notes much of the evidence was not particularly favorable to the state's proof of purpose. Two of the first responding officers testified broken wine glasses and the general disarray of the scene possibly indicated a struggle. The coroner could not determine whether the victim was standing or sitting when he was stabbed; nor could the coroner ascertain whether the knife was pushed into the victim's body or whether the victim's body was pushed onto the knife. (Tr. 233.) During her interview, played to the jury, defendant said numerous times she never intended to kill the victim, did not mean to hurt him, and did not remember stabbing him. She said what happened was an accident. One of the officer's who arrived on the scene stated defendant was "very upset, very emotional. She was crying." (Tr. 42.)

{¶57} Defendant further contends the DNA evidence indicates a struggle over the knife because the victim's DNA was the major donor, while defendant's DNA, the minor donor, was on the handle of the knife. The forensic scientist who testified at trial stated bloodstains were on the handle, "which would then indicate how the major donor came into play": the blood on the handle was the victim's, and the other cells on the handle came from defendant. (Tr. 137.) On cross-examination, however, the scientist stated she could not definitely say whether the victim's DNA on the handle was from blood or other cellular material.

{¶58} One inference from the DNA evidence on the knife handle thus could be that the victim and defendant struggled over the knife; another plausible inference could be no struggle occurred, and the victim's DNA came from his blood splattering onto the handle after defendant stabbed him. Similarly, the evidence from the police interview was subject to differing inferences. Although on cross-examination the detective stated the scene reflected signs of a struggle, he stated on redirect examination he never found any evidence to indicate what occurred was anything other than an intentional act. Defendant stated during her interview with police that she probably intended to hurt the victim and make him feel her pain. Corroborating that sentiment, the detective who interviewed defendant immediately following the incident said her demeanor was deceptive: she would sob, but never shed any tears. When in her interview detectives asked her if she thought she was going to get in trouble, she stated she was sure she thought of it. Stating at one point in the interview that she did not "want to remember anything," defendant confirmed at trial she had no memory to support her claim the stabbing was accidental, as

she consistently stated in her interview and at trial she could not remember what occurred between coming into the room with the knife and waking up on top of the victim. (Tr. 394.)

{¶59} The trial court instructed the jury on the lesser included offense of reckless homicide and also on the defense of accident. The jury, however, found defendant guilty of purposeful murder and murder as a proximate result of felonious assault. Engaging in the limited weighing of the evidence we are permitted, we cannot say the jury clearly lost its way and created such a manifest miscarriage of justice that defendant's convictions must be reversed. The jury heard and saw all the evidence, including defendant's testimony on her own behalf. The jury was in the best position to weigh the credibility of witnesses, especially the credibility of defendant, and they chose, as they may, not to believe defendant's accident theory, especially since defendant could remember the events leading up to and after the stabbing, but could not remember any facts about the stabbing itself. The nature of the wound and weapon, defendant's own statements that she probably wanted to hurt the victim, and the remaining evidence concerning circumstances preceding the stabbing, provided the jury with sufficient, competent, and credible evidence on which to find guilt beyond a reasonable doubt.

{¶60} Defendant nonetheless attaches significance to the jury's deliberating only three hours. That defendant stabbed the victim in the heart largely was uncontroverted; the jury, with the benefit of seeing defendant testify at trial, had only to decide whether she acted with the requisite intent. The length of time the jury deliberated does not lead to the conclusion that a manifest miscarriage of justice occurred. Cf. *State v. Cox*, 12th Dist. No. CA2005-12-513, 2006-Ohio-6075, ¶18, 25 (determining jury did not place undue emphasis on a transcript they received during their deliberations, even though they

deliberated for ten hours before receiving the transcript and three hours after receiving the transcript, as the amount of time spent deliberating before and after did not indicate undue emphasis on the transcript).

{¶61} Because the manifest weight of the evidence supports defendant's convictions, we overrule defendant's fourth assignment of error.

VII. Fifth Assignment of Error - Ineffective Assistance of Counsel

{¶62} Defendant's fifth assignment of error asserts she was deprived of her constitutional right to the effective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, defendant must demonstrate her counsel's performance not only fell below an objective standard of reasonable representation, but also prejudiced her. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus, following *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. Under the first prong, defendant must establish her counsel was deficient, in that counsel made errors so serious that he was not functioning as the "counsel" the Sixth Amendment to the United States Constitution guarantees to her. *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064. If defendant can so demonstrate, she then must establish her counsel's deficient performance prejudiced her, demonstrating counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable. Id. Unless defendant makes both showings, her convictions cannot be said to have resulted from a breakdown in the adversary process that renders the result unreliable. Id.

{¶63} Defendant contends trial counsel was ineffective for failing to object during the state's rebuttal closing argument when the prosecution argued facts not in evidence, vouched for the veracity of an officer, appealed to the jury's emotion and expressed her

own personal belief of defendant's guilt. "Judicial scrutiny of counsel's performance must be highly deferential" as "the challenged action 'might be considered sound trial strategy.' " Id. at 689. The "failure to make objections does not constitute ineffective assistance of counsel *per se,* as that failure may be justified as a tactical decision." *State v. Gumm*, 73 Ohio St.3d 413, 428, 1995-Ohio-24.

{¶64} We determined under defendant's second assignment of error that the prosecution's statements made during her rebuttal closing argument did not affect defendant's substantial rights or deprive her of a fair trial. Accordingly, even if defendant can establish counsel should have objected, she cannot establish the requisite prejudice to demonstrate ineffective assistance of counsel. See *State v. Dennis*, 10th Dist. No. 08AP-369, 2008-Ohio-6125, ¶29.

{¶65} Defendant was not deprived of her constitutional right to effective assistance of counsel. Defendant's fifth assignment of error is overruled.

VIII. Disposition

{¶66} Having sustained defendant's first assignment of error but overruled defendant's remaining assignments of error, we affirm in part, reverse in part, and remand this matter to the trial court with instructions to correct the judgment entry to reflect the merger of defendant's murder convictions for purposes of sentencing.

Judgment affirmed in part and reversed in part; case remanded with instructions.

FRENCH and DORRIAN, JJ., concur.

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