[Cite as *State v. Ruark*, 2011-Ohio-2225.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 10AP-50
v.	:	(C.P.C. No. 08CR07-5109)
Robert J. Ruark,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 10, 2011

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Yeura R. Venters, Public Defender, and *John W. Keeling*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendant-appellant, Robert J. Ruark ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which convicted him of murder, felonious assault, and tampering with evidence. For the following reasons, we affirm.

{¶2} The Franklin County Grand Jury indicted appellant on crimes stemming from a July 4, 2008 shooting. Specifically, he was indicted on two counts of murder in

the death of Chad Wolford. He was also indicted for tampering with evidence and the attempted murder and felonious assault of Aaron Beckhon and Christopher Starr. Each count contained a firearm specification. Appellant pleaded not guilty and invoked his right to a jury trial.

{¶3} Before trial, the court mentioned being informed that appellant wanted a new attorney. Defense counsel stated that there had been "some issues" between appellant and him, but he assured the court that appellant did not want a new attorney. (Tr. Vol. VI, 2.)

{¶4} Also before trial, plaintiff-appellee, the state of Ohio ("appellee"), filed a motion in limine asking the court to bar evidence of Beckhon's participation in altercations unrelated to the July 4, 2008 shooting. These altercations were against appellant, appellant's girlfriend, and appellant's family, and defense counsel argued that they were relevant to appellant's self-defense claim and would rebut testimony that Beckhon was a "peacemaker" during the shooting. (Tr. Vol. VIII, 145.) Defense counsel also suggested that the altercations indicated that Beckhon had a "vendetta" against witnesses for the defense. (Tr. Vol. VIII, 144.)

{¶5} The trial court expressed doubt as to whether these other altercations were relevant. Defense counsel declined to elaborate on the issue, and instead suggested that if he could not cross-examine Beckhon about the other incidents, he would subpoena Beckhon for his case-in-chief. In response, the court said it was going to sustain appellee's motion in limine "at this point in time" because it was unable to determine the relevance of the other altercations until defense counsel brought the

issue up again in his case-in-chief. (Tr. Vol. VIII, 148.) The court asked defense counsel if he wanted to proffer any evidence, and defense counsel said, "No. I'm fine. As long as you make [Beckhon] available to me." (Tr. Vol. VIII, 149.) The court agreed to that request, but reiterated that it was granting appellee's motion in limine because defense counsel laid no "foundation as to why these specific unrelated acts are relevant." (Tr. Vol. VIII, 148.)

{¶6} The jury trial commenced, and the prosecution called Beckhon to testify. Beckhon admitted that he had prior felony convictions. He also testified as follows. Before the shooting occurred on July 4, 2008, Beckhon had been out drinking with his friends Christopher Starr, Chad Wolford, and Wolford's fiancée, Katie Adams. The group eventually ended up at his house at 2613 Osceola Avenue. Later that night, Starr was outside talking on his cell phone when a car, occupied by appellant's brother, Dylan, and sister, Nicki, ran over Starr's foot while pulling into the driveway of appellant's mother, Jeni Ruark, who lived next door. Wolford and Starr confronted Dylan and Nicki. The fight turned physical and included Wolford hitting Nicki. One of Beckhon's friends kicked the car. Beckhon, who was outside during part of the confrontation, and who claimed to have a good relationship with the Ruarks, told Jeni that he would pay for damages to the car.

{¶7} After Beckhon calmed everyone down, he went back inside his house. Sometime later, he heard several gunshots outside. Beckhon went outside and saw that appellant had arrived at Jeni's house in his white Nissan Maxima and was on Jeni's front porch demanding to know who hit his sister. Beckhon knew appellant because

they were once neighbors on a different street, and appellant frequently visited Jeni's house. Wolford admitted to hitting appellant's sister, and another fistfight ensued—this one involving appellant and Dylan on one side, and Wolford and Starr on the other. In an effort to break up the fight, Beckhon pulled Starr off of Dylan.

{¶8} Meanwhile, Beckhon heard someone yell something about a gun, and he saw appellant firing a gun that may have been a shotgun. Jeni shouted, " 'Robby, stop!' " (Tr. Vol. VIII, 210.) Appellant continued firing. Wolford, Beckhon, and Starr were hit by the gunshots. Wolford and Beckhon walked toward Wolford's Jeep, and Wolford collapsed. Wolford was placed in Beckhon's car so that he could be taken to a hospital, but the police had arrived by that time.

{¶9} Beckhon was transported to the hospital and treated for multiple gunshot wounds. A detective interviewed him at the hospital. He told the detective that he worked at Worthington Cylinders, although this was untrue because he had been fired. He also told the detective that appellant was the shooter and that appellant was using a handgun.

{¶10} Before cross-examination, the court indicated that, given Beckhon's testimony that he got along with the Ruarks, it would allow defense counsel to ask about an altercation the witness had with a cousin of appellant's girlfriend prior to the shooting. The court noted that it would still have to consider "item by item" the admissibility of other altercations involving Beckhon and not related to the shooting. (Tr. Vol. IX, 277.)

{¶11} During cross-examination, defense counsel asked if Beckhon recalled an incident, prior to the July 4, 2008 shooting, when he shot at a vehicle belonging to a

cousin of appellant's girlfriend as it drove away from Jeni's driveway, and Beckhon said no. Defense counsel asked if Beckhon recalled being questioned by the police about that previous incident, and Beckhon said no.

{¶12} Next, Adams testified for the prosecution. Her testimony about events leading up to the July 4, 2008 shooting tracked that of Beckhon. She added that Wolford was the one who kicked the car occupied by Nicki and Dylan. She also saw the shooting. At trial, she identified appellant as the shooter, and she said he fired a shotgun.

{¶13} When Adams called 911 after the shooting, however, the dispatcher asked Adams who shot Wolford, and Adams responded "I don't know." (Tr. Vol. XII, 1034.) She also told an officer who responded to the scene that she hoped Beckhon would be able to identify the shooter, and she asked if suspects were going to be tested for gunshot residue. Nevertheless, when she was interviewed by detectives about the incident, she described the shooter as a white male with dark hair and wearing a black shirt, and she stated that the shooter was not involved in the first fistfight. Adams was never asked to pick the shooter out of a line-up or photo array prior to trial.

{¶14} On cross-examination, defense counsel asked, "you didn't see anybody with a gun * * * , did you?" Adams said, "I did when I walked out onto the porch." (Tr. Vol. XII, 1063.) Defense counsel wanted to know whom she saw, and Adams pointed to appellant.

{¶15} Damaris Elkins testified that she saw the July 4, 2008 incident from her bedroom window. She first saw Beckhon break up a fight and instruct his friends to

leave his neighbors alone. Next, she saw a white Maxima arrive at the scene, and she knew that Jeni's son typically drove that car. Thereafter, she witnessed the shooting that ultimately occurred. She testified that she could not see the shooter's face, but that the shooter was wearing a white or light colored shirt. She called 911 after the shooting. During that phone call, which was admitted into evidence, Elkins told the dispatcher that someone had "just shot another guy" and "went in the house." She described the shooter to the dispatcher as a "white boy, [who] lives across the street, and he drives a white Maxima." (Tr. Vol. IX, 391.)

{¶16} Officer Kareem Kashmiry responded to the scene of the shooting and testified as follows. Kashmiry ordered Beckhon and his friends to wait for the medics to arrive instead of transporting Wolford to the hospital themselves. Other officers arrived, and they secured a perimeter around Jeni's house. Two officers pounded on the front door and announced their presence. Although the officers heard "people inside the home rushing around," nobody came to the door. (Tr. Vol. VIII, 109.) The officers determined that there was a "barricade" situation in the house, so they called the S.W.A.T. team. (Tr. Vol. VIII, 110.) After the S.W.A.T. officers arrived, negotiators convinced those inside Jeni's house, including appellant, to exit the residence.

{¶17} The prosecution established that S.W.A.T. officers entered Jeni's house, and one of them saw a hole in the ceiling of the kitchen. He looked through the hole and found part of a shotgun. Crime scene investigators retrieved the remaining parts of the shotgun in the attic. The investigators found drug paraphernalia in Jeni's bedroom. In her living room, they found drugs, which the parties stipulated to be marijuana.

Appellant's left hand tested positive for gunshot residue. Finally, someone from the coroner's office confirmed that Wolford died from his gunshot wounds.

{¶18} After appellee rested its case, defense counsel did not call any witnesses on appellant's behalf. During closing argument, the prosecutor mentioned that police found drugs and drug paraphernalia in Jeni's house. Defense counsel noted during his closing argument that there was no proof that the drugs and drug paraphernalia in Jeni's house belonged to appellant.

{¶19} Afterward, the jury found appellant not guilty of murdering Wolford through a purposeful killing, but guilty of murder as a proximate result of the commission of felonious assault. The jury also found appellant guilty of felonious assault upon Beckhon, but there was a hung jury on the felonious assault of Starr. The jury found appellant not guilty of the attempted murder counts pertaining to Beckhon and Starr. Lastly, appellant was found guilty of tampering with evidence and all firearm specifications that attached to the counts for which he was convicted.

{¶20} Appellant appeals, raising the following assignments of error:

> [I.] THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE DEFENDANT WHEN THE EYEWITNESS EVIDENCE PRESENTED ON BEHALF OF THE STATE WAS INSUFFICIENT TO SUSTAIN THIS FINDING BY PROOF BEYOND A REASONABLE DOUBT AND THE JUDGMENT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED.
>
> [II.] THE TRIAL COURT VIOLATED THE DEFENDANT'S CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WHEN IT PROHIBITED THE DEFENDANT FROM CROSS-EXAMINING THE STATE'S WITNESS

> REGARDING THEIR MOTIVES TO FALSELY ACCUSE THE DEFENDANT.
>
> [III.] THE TRIAL [COURT] ERRED WHEN IT DID NOT INQUIRE INTO THE DEFENDANT'S REQUEST FOR [sic] NEW COUNSEL OR MAKE ANY SUCH INQUIRY PART OF THE RECORD.
>
> [IV.] IT WAS PLAIN ERROR TO PRECLUDE THE DEFENDANT FROM MENTIONING BAD ACT EVIDENCE ASSOCIATED WITH THE WITNESSES FOR THE STATE BUT TO THEN ALLOW THE STATE TO USE OTHER BAD ACT EVIDENCE AGAINST THE DEFENDANT IN AN ATTEMPT TO PORTRAY HIM AS A BAD PERSON WHO DESERVES TO BE CONVICTED.
>
> [V.] THE DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I, OF THE OHIO CONSTITUTION.

{¶21} In his first assignment of error, appellant argues that his convictions are based on insufficient evidence because Beckhon and Adams were not credible when they implicated him in the July 4, 2008 shooting. Questions of witness credibility are irrelevant to the issue of whether there is sufficient evidence to support a conviction, however. See *State v. Preston-Glenn*, 10th Dist. No. 09AP-92, 2009-Ohio-6771, ¶38. "In determining whether a conviction is based on sufficient evidence, we do not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Smith*, 10th Dist. No. 08AP-736, 2009-Ohio-2166, ¶26, citing *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, and *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79. Thus, appellant has not raised a proper sufficiency of the evidence challenge.

{¶22} In any event, Beckhon's and Adams' testimonies, identifying appellant as the shooter, were alone sufficient to support appellant's convictions for murder and felonious assault. And, because the jury could have reasonably inferred that, after the shooting, appellant hid the gun in the attic of Jeni's house, sufficient evidence supports the tampering with evidence conviction. See *State v. Wright*, 10th Dist. No. 09AP-207, 2009-Ohio-6773, ¶25-30.

{¶23} Next, appellant argues that his convictions are against the manifest weight of the evidence. We disagree.

{¶24} In determining whether a verdict is against the manifest weight of the evidence, we sit as a " 'thirteenth juror.' " *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. Thus, we review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. Id. Additionally, we determine "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." Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. We reverse a conviction on manifest weight grounds for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶10, quoting *State v. Long* (Feb. 6, 1997), 10th Dist. No. 96APA04-511.

{¶25} Appellant first claims that because Adams had no opportunity to identify him from a pre-trial photo array or line-up, the jury could not reasonably rely upon her in-court identification of him as the shooter. But Adams unequivocally implicated appellant at trial from her recollection of the July 4, 2008 shooting. In addition, Adams made the identification under the safeguards of a trial: she provided it under oath, and it was subject to cross-examination. Thus, appellant has not proven that Adams' in-court identification was unreliable just because she was not previously asked to make a pre-trial identification from a photo array or line-up.

{¶26} Appellant also argues that, because Adams was Wolford's fiancée, she was motivated to identify as the shooter whoever was charged with Wolford's murder, regardless of whether that person was guilty or not. The jury could have concluded, however, that Adams' relationship with Wolford provided her an extra incentive to correctly identify his killer.

{¶27} Furthermore, appellant contends that Adams' statements to police and detectives establish that she did not actually see the shooter. He notes that Adams told detectives that the shooter was wearing a black shirt, in contrast to Elkins' claim that the shooter was wearing a white or light-colored shirt. He also asserts that had Adams actually seen the shooter, she would not have told police that she hoped Beckhon could identify the shooter or suggested that the police use gunshot residue testing to identify the shooter. But given that Adams told the detectives that the shooter was a white male who was not involved in the first fistfight, it was reasonable for the jury to conclude that

Adams saw the shooter and that this description of the shooter matched appellant, in corroboration with her in-court identification.

{¶28} Next, appellant argues that Beckhon was not credible because his statement to police that the shooter was firing a handgun conflicted with his testimony that a shotgun was used. It was within the province of the jury, as the trier of fact, to accept Beckhon's explanation that he was simply mistaken in initially believing that appellant was firing a handgun. And Beckhon's identification of appellant as the shooter was particularly reliable given that Beckhon knew appellant prior to the incident. See *State v. Monford*, 190 Ohio App.3d 35, 2010-Ohio-4732, ¶113.

{¶29} Moreover, the jury could have reasonably placed no significance on appellant's challenges to Beckhon's and Adams' testimonies given that the witnesses corroborated each other on the ultimate issue of the case, i.e., that appellant was the shooter. Likewise, other evidence corroborated Beckhon's and Adams' testimonies. Specifically, Elkins told the 911 dispatcher that the shooter drove a white Maxima, which is the car that appellant typically drove, and appellant had gunshot residue on his left hand.

{¶30} In the final analysis, the trier of fact is in the best position to determine witness credibility. *State v. Cameron*, 10th Dist. No. 10AP-240, 2010-Ohio-6042, ¶43. The jury accepted corroborating evidence proving that appellant was the shooter in the July 4, 2008 incident, and appellant has not demonstrated a basis for disturbing the jury's conclusion. Accordingly, we hold that appellant's convictions are not against the

manifest weight of the evidence. Having also concluded that sufficient evidence supports appellant's convictions, we overrule his first assignment of error.

{¶31} In his second assignment of error, appellant argues that the trial court interfered with his right to cross-examine Beckhon. We disagree.

{¶32} A trial court has discretion to limit the scope of cross-examination. *State v. Treesh*, 90 Ohio St.3d 460, 480-81, 2001-Ohio-4. Therefore, we need not disturb a court's limits on cross-examination absent an abuse of discretion. *State v. Casner*, 10th Dist. No. 10AP-489, 2011-Ohio-1190, ¶11. An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶33} Appellant first argues that the trial court abused its discretion by not allowing him to cross-examine Beckhon about a time, prior to the July 4, 2008 shooting, when he shot at a vehicle belonging to a cousin of appellant's girlfriend as it drove away from Jeni's driveway. The court did allow appellant to cross-examine Beckhon about that incident, however.

{¶34} Next, appellant contends that the trial court abused its discretion by not allowing him to cross-examine Beckhon about other altercations unrelated to the July 4, 2008 shooting. Appellee claims that appellant did not preserve this issue for appeal. It argues that even though the trial court granted the motion in limine it filed seeking the exclusion of testimony about Beckhon's other altercations, appellant was required to seek introduction of the testimony at trial so that the court could make a final ruling on the matter.

{¶35} "At trial it is incumbent upon a defendant, who has been temporarily restricted from introducing evidence by virtue of a motion *in limine*, to seek the introduction of the evidence by proffer or otherwise in order to enable the court to make a final determination as to its admissibility and to preserve any objection on the record for purposes of appeal." *State v. Grubb* (1986), 28 Ohio St.3d 199, 203. Here, appellant did not seek to cross-examine Beckhon on any altercations not related to the July 4, 2008 shooting, other than the one where he shot at the car belonging to a cousin of appellant's girlfriend. At one point, appellant indicated that he would seek to introduce the evidence of the other incidents in his case-in-chief, but he did not do so. Thus, appellant did not obtain a final ruling on the admissibility of these other incidents involving Beckhon. Therefore, appellant's arguments regarding the admissibility of those incidents have not been preserved for appeal. See *State v. Sayler*, 10th Dist. No. 08AP-625, 2009-Ohio-1974, ¶34-35. For all these reasons, we overrule appellant's second assignment of error.

{¶36} In his third assignment of error, appellant argues that the trial court did not sufficiently inquire into his request for new counsel. We disagree.

{¶37} In *State v. Deal* (1969), 17 Ohio St.2d 17, the Supreme Court of Ohio held that "[w]here, during the course of his trial for a serious crime, an indigent accused questions the effectiveness and adequacy of assigned counsel * * * it is the duty of the trial judge to inquire into the complaint and make such inquiry a part of the record." Id. at syllabus. But the court later clarified that this " 'limited judicial duty arises only if the allegations are sufficiently specific; vague or general objections do not trigger the duty

to investigate further.' " *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, ¶68, quoting *State v. Carter* (1998), 128 Ohio App.3d 419, 423, citing *Deal* at 19.

{¶38} In *State v. Erwin*, 10th Dist. No. 09AP-918, 2010-Ohio-3022, ¶11, this court concluded that a defendant's complaint that he " 'did not think [appointed counsel] was looking out for his best interest' " was "too general to require the inquiry contemplated in *Deal*." We noted that the trial court would have been required to engage in a further inquiry if the defendant asserted "specific facts" indicating a "specific breakdown in the attorney-client relationship." *Erwin* at ¶10.

{¶39} Here, before trial, the court mentioned being informed that appellant wanted a new attorney. Appellant's defense counsel generally acknowledged that there had been "some issues" between appellant and him. (Tr. Vol. VI, 2.) But he provided no "specific facts" indicating a "specific breakdown in the attorney-client relationship." In fact, defense counsel assured the court that appellant did not want a new attorney after all.

{¶40} Appellant contends that we cannot rely on the trial court's colloquy with defense counsel because he was not present. But the record suggests appellant's presence, given that, at the conclusion of the hearing, the trial court instructed a sheriff's deputy to "put [appellant] back for right now." (Tr. Vol. VI, 6.) Because there is no affirmative proof in the record that appellant was absent during the discussion about his representation, we shall presume that he was present. See *State v. Shepard*, 10th Dist. No. 07AP-223, 2007-Ohio-5405, ¶13.

{¶41} To conclude, when the trial court asked about the information it received regarding appellant wanting a new attorney, it was not provided with any specific details indicating a breakdown in the attorney-client relationship, and it was even assured that appellant did not want a new attorney. Thus, the trial court was not required to make any additional inquiry into the matter of appellant's representation, and we overrule appellant's third assignment of error.

{¶42} In his fourth assignment of error, appellant argues that the trial court committed plain error by admitting evidence that drugs and drug paraphernalia were found in Jeni's house. We disagree.

{¶43} Because appellant did not object to the drug-related evidence, he forfeited all but plain error. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B.) Plain error exists when there is error, the error is an obvious defect in the trial proceedings, and the error affects substantial rights. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. A court recognizes plain error with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. Id. We now determine whether the trial court committed plain error by admitting the drug-related evidence.

{¶44} Under Evid.R. 404(B), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove" a defendant's criminal propensity. Appellant argues that the drug-related evidence was improper under Evid.R. 404(B), especially considering the absence of any link between him and the evidence. But because the prosecution did

not link appellant to the evidence, its admission does not constitute error under Evid.R. 404(B.) See *State v. Robb*, 88 Ohio St.3d 59, 68, 2000-Ohio-275.

{¶45} Appellant also fails to show that the drug-related evidence affected the outcome of his trial. The prosecution built its case on Beckhon's and Adams' identifications of appellant as the shooter, as well as Elkins' description of the shooter to the 911 dispatcher and the presence of gunshot residue on appellant's hand. Given the minor role that the drug-related evidence played in the trial, and the absence of any link between appellant and the evidence, there is no probability that the jury would have acquitted appellant had the evidence not been admitted. Consequently, we conclude that the trial court did not commit plain error by admitting the drug-related evidence.

{¶46} Next, appellant asserts that the prosecution committed misconduct by introducing the drug-related evidence at trial and commenting on it during closing argument. The test for prosecutorial misconduct is, first, whether the conduct is improper, and second, whether the conduct prejudicially affected the substantial rights of the accused. *State v. Saleh*, 10th Dist. No. 07AP-431, 2009-Ohio-1542, ¶66. Appellant did not raise his prosecutorial misconduct claim at trial and, therefore, forfeited all but plain error. See *State v. Williams*, 79 Ohio St.3d 1, 12, 1997-Ohio-407. Prosecutorial misconduct allows for a reversal under the plain error standard if it is clear that the defendant would not have been convicted in absence of the improper conduct. *Saleh* at ¶68.

{¶47} We need not reverse appellant's conviction for prosecutorial misconduct under the plain error standard. First, "it is not prosecutorial misconduct to introduce

evidence that the trial court has determined to be admissible." *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, ¶187, citing *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶163. Furthermore, as we have already recognized, the drug-related evidence played a minor role in the trial, and thus, there is no probability that the jury would have acquitted appellant had the prosecution not introduced or commented upon the evidence. For all these reasons, we overrule appellant's fourth assignment of error.

{¶48} In his fifth assignment of error, appellant claims that his defense counsel rendered ineffective assistance. We disagree.

{¶49} The United States Supreme Court established a two-pronged test for ineffective assistance of counsel. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. First, the defendant must show that counsel's performance was outside the range of professionally competent assistance and, therefore, deficient. Id., 466 U.S. at 687, 104 S.Ct. at 2064. Second, the defendant must show that counsel's deficient performance prejudiced the defense and deprived the defendant of a fair trial. Id. A defendant establishes prejudice if "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., 466 U.S. at 694, 104 S.Ct. at 2068.

{¶50} Appellant first argues that his defense counsel was ineffective for not objecting to evidence that drugs and drug paraphernalia were found in Jeni's house. But we already concluded that the drug-related evidence was not proscribed by Evid.R. 404(B) and that there is no probability that the jury would have acquitted appellant had

the evidence not been admitted. Therefore, appellant's defense counsel was not ineffective for failing to object to the drug-related evidence.

{¶51} Next, appellant asserts that his defense counsel was ineffective for not objecting to the admission of the 911 call Elkins made after the shooting. Appellant notes that the prosecution introduced the call into evidence as an excited utterance under Evid.R. 803(2), but he contends that it was not admissible under that rule because Elkins did not observe the shooting. See *State v. Huertas* (1990), 51 Ohio St.3d 22, 31 (holding that for a statement to be admissible as an excited utterance, the declarant must have had an opportunity to observe the event mentioned in the statement.) According to appellant, Elkins' testimony that she did not see the shooter's face established that she did not actually observe the shooting. But Elkins stated at trial that she saw the shooting, and her statements during the 911 call confirm this fact.

{¶52} To be sure, it was within the province of the jury to weigh the credibility of Elkins' statements in her 911 call. See *State v. Wallace* (1988), 37 Ohio St.3d 87, 95 (recognizing that the credibility and weight of excited utterances "will, of course, still be judged by the fact-finder"). Nevertheless, Elkins' 911 call was admissible as an excited utterance, and appellant's defense counsel was not required to raise a meritless objection to the admission of that evidence. See *State v. Pariscoff*, 10th Dist. No. 09AP-848, 2010-Ohio-2070, ¶37.

{¶53} Lastly, appellant claims that his defense counsel was ineffective for not filing a motion to suppress Beckhon's and Adams' identification of appellant as the shooter. The failure to file a motion to suppress constitutes ineffective assistance of

counsel if, based on the record, the motion would have been granted. *State v. Watson*, 10th Dist. No. 08AP-932, 2009-Ohio-2234, ¶9.

{¶54} When considering whether to admit identification evidence, the trial court utilizes a two-step analysis. *Neil v. Biggers* (1972), 409 U.S. 188, 198-200, 93 S.Ct. 375, 382. The court initially determines whether the identification procedure was impermissibly suggestive. Id., 409 U.S. at 198-99, 93 S.Ct. at 381-82. If so, the court next must determine if the identification was reliable despite its suggestive character. Id., 409 U.S. at 199, 93 S.Ct. at 382. "[R]eliability is the linchpin in determining the admissibility of identification testimony." *Manson v. Brathwaite* (1977), 432 U.S. 98, 114, 97 S.Ct. 2243, 2253.

{¶55} Here, although the record indicates that Beckhon made this identification from a photo array, there is nothing in the record detailing the pre-trial identification procedure. Thus, we have no basis to determine whether the procedure was impermissibly suggestive or whether the identification was unreliable. Consequently, we decline to review appellant's claim that his defense counsel was ineffective for failing to file a motion to suppress testimony about Beckhon's pre-trial identification. See *Massaro v. United States* (2003), 538 U.S. 500, 504-05, 123 S.Ct. 1690, 1694 (recognizing circumstances where ineffective assistance claims are unreviewable on direct appeal because of inadequacies of the appellate record.)

{¶56} We also conclude that defense counsel was not ineffective for failing to file a motion to suppress Adams' in-court identification of appellant as the shooter, given that we already determined that the identification was reliable. Likewise, we conclude

that defense counsel was not ineffective for failing to seek suppression of Beckhon's in-court identification of appellant as the shooter because the identification was made under the same circumstances determined to have made Adams' in-court identification reliable. And, as we already recognized, the fact that Beckhon knew appellant prior to the shooting made his identification of appellant as the shooter reliable. See *Monford* at ¶113.

{¶57} For all these reasons, we hold that appellant's defense counsel did not render ineffective assistance. Thus, we overrule appellant's fifth assignment of error.

{¶58} In summary, we overrule appellant's five assignments of error. Therefore, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT, P.J., and KLATT, J., concur.