[Cite as *State v. Darby*, 2011-Ohio-3816.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-416 (C.P.C. No. 09CR-04-2461)
Nicole Darby,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 4, 2011

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Todd W. Barstow, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, Nicole Darby ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas, entered upon a jury verdict convicting her of one count of felonious assault with a three-year firearm specification. For the following reasons, we affirm.

{¶2} On April 18, 2009, Adriane Mankins ("Ms. Mankins"), was involved in a dispute with her boyfriend. During the dispute, Ms. Mankins threw several dishes into the street in front of her residence, located at 40 North Mill Street, in Columbus, Ohio. As a result of the disturbance, someone called the police, who responded to the area and ordered Ms. Mankins to clean up the broken dishes. As Ms. Mankins was cleaning up the dishes in the street, appellant, who lived at 36 North Mill Street, was standing on her front stoop. Suspecting that appellant had been the one to call the police, Ms. Mankins asked appellant why she had called the police. A verbal confrontation ensued and when the confrontation escalated, appellant pulled out a gun and shot at Ms. Mankins, striking her in the stomach, leg, and back. As a result of the gunshot wounds, Ms. Mankins is permanently paralyzed.

{¶3} Appellant was indicted on April 27, 2009 on one count of attempted murder and one count of felonious assault. Both counts were indicted with three-year firearm specifications. A jury trial was commenced on March 1, 2010. The State of Ohio ("the State") introduced the testimony of Detective James McCoskey, Detective Dana Crum, Ms. Mankins, and Iris Mankins ("Iris").

{¶4} According to the State's evidence, Ms. Mankins suspected appellant of calling the police about the disturbance involving the broken dishes. As a result, Ms. Mankins was angry. While standing in the street in front of appellant's house, Ms. Mankins began yelling at appellant, who was standing in her own doorway. Ms. Mankins' sister, Iris, arrived during the argument. Iris asked Ms. Mankins what was going on, and Ms. Mankins stated she was tired of appellant being in her business. Iris held on to her nieces, Ms. Mankins' children, while the altercation was occurring. Ms. Mankins was

calling appellant names such as "fat bitches" and challenging appellant to come outside and fight. (Tr. 99.) Ms. Mankins proceeded to take off her shirt, wearing only a bra and boxer shorts, as well as socks and shoes.

{¶5} The argument became more intense and Ms. Mankins moved to the sidewalk in front of appellant's residence. Appellant was on the front stoop, standing in her doorway. State's exhibit Nos. 1, 2, 3, 4, 5, and 6 portray appellant's front stoop. The stoop is a small concrete slab with four steps and a black, iron-looking guardrail that runs parallel to the front door. The stoop is uncovered.

{¶6} Appellant pulled out a black gun and pointed it at Ms. Mankins, calling Ms. Mankins either "an ignorant bitch or a stupid bitch." (Tr. 102.) Then, without warning, appellant shot Ms. Mankins in the leg and stomach. Ms. Mankins was trying to run away when she was hit in the back by another shot. Ms. Mankins fell to the ground, knocking out her tooth. She was unable to get up after she fell.

{¶7} Ms. Mankins was transported to the hospital, where she remained for four and one-half months. Due to her injuries, she testified she will be confined to a wheelchair for the rest of her life and is paralyzed from the chest down.

{¶8} Appellant was arrested following the shooting and interviewed by Detective McCoskey. During the interview appellant admitted that she shot Ms. Mankins during a confrontation in which Ms. Mankins had challenged her to a fistfight. She also admitted that she knew what she had done was wrong. Police later recovered five spent shell casings near appellant's stoop.

{¶9} At trial, Ms. Mankins denied possessing any weapons but admitted she had wanted to fight appellant. Ms. Mankins also denied having previous arguments with appellant.

{¶10} Appellant's evidence presented at trial differed somewhat from the evidence presented by the State. Appellant presented testimony from the following witnesses: Detective McCoskey, Taisa Darby, Ernest Holloway, Victoria Evans, Michael Ward, and Alycia Radford. Appellant also testified on her own behalf. Appellant's evidence set forth the following.

{¶11} Appellant and Ms. Mankins had experienced problems off and on for a few months. Ms. Mankins sometimes engaged in name-calling and had previously threatened appellant several months before the shooting. Because of those threats, appellant filed two complaints against Ms. Mankins with the Columbus police. Fearing for her safety, appellant had also purchased a handgun.

{¶12} On the day of the shooting, appellant was standing in her doorway with the door open. Ms. Mankins accused appellant of calling the police. Appellant denied it. Ms. Mankins accused appellant of "always [being] in her business." (Tr. 233.) Appellant and Ms. Mankins continued their verbal confrontation and Ms. Mankins called appellant various names. At some point appellant moved outside onto her stoop. Ms. Mankins wanted to fight appellant, but appellant had previously advised her that she recently had back surgery and that she was not going to fight anyone.

{¶13} After appellant called Ms. Mankins a name, Ms. Mankins took off her shirt and charged at appellant. At that time, appellant was on her stoop. Appellant backed into the corner of the brick wall. Although she described appellant as getting close to her,

appellant could not say how close. However, she admitted Ms. Mankins was not on the stoop, nor was she at the base of the stairs. Nevertheless, appellant believed Ms. Mankins was going to jump the railing and punch her. Appellant then pulled out her gun and shot Ms. Mankins because Ms. Mankins was charging her and she was in fear for her safety, although appellant testified she never saw Ms. Mankins with a weapon. She also testified that she did not want to shoot Ms. Mankins. After shooting Ms. Mankins, appellant called 911 and advised that she had shot a girl.

{¶14} Appellant's friend, Ernest Holloway, also known as "KC," testified he was at appellant's residence on the day of the shooting and he was the one who used appellant's phone to call police when Ms. Mankins was throwing dishes into the street because he was worried about driving over the glass in the street and getting a flat tire.

{¶15} On March 8, 2010, the jury returned a guilty verdict on the felonious assault count and further found appellant guilty of the firearm specification. However, the jury could not reach a verdict with respect to the attempted murder count. A mistrial was declared as to that count. On March 31, 2010, a sentencing hearing was held. The trial court imposed a total sentence of eight years of incarceration. This timely appeal now follows and raises three assignments of error for our review:

> I. APPELLANT WAS DEPRIVED OF HER RIGHT TO BE PRESENT AND TO THE PRESENCE AND ASSISTANCE OF HER COUNSEL DURING A CRITICAL STAGE OF HER JURY TRIAL, AND HER RIGHT TO DUE PROCESS AND A FUNDAMENTALLY FAIR JURY TRIAL AS REQUIRED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTIONS FIVE, TEN AND SIXTEEN OF THE OHIO CONSTITUTION AND CRIMINAL RULE 43(A).

> II. THE TRIAL COURT ERRED BY FAILING TO CORRECTLY INSTRUCT THE JURY ON THE PROPER STANDARD FOR SELF DEFENSE.
>
> III. APPELLANT'S TRIAL COUNSEL WAS INEFFECTIVE, THEREBY DENYING HER THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS.

{¶16} In her first assignment of error, appellant asserts she was deprived of due process, a fair jury trial, and the right to be present and assisted by counsel during a critical stage of her jury trial. Specifically, appellant objects to the manner in which questions from the jury were handled during their deliberations. Appellant argues that the record does not reflect that she was present during the time period when counsel and the court reviewed questions presented by the jury and formulated responses to said questions. Appellant further submits that the record fails to indicate that her presence was waived or that she was consulted or even made aware of the questions presented by the jury.

{¶17} A defendant in a criminal case has the right to be present at all stages of the proceedings, including during a communication between the trial judge and the jury regarding the judge's instructions given in response to a request from the jury. *Columbus v. Bright* (June 21, 1984), 10th Dist. No. 83AP-857. "[I]t is the right and privilege of a defendant to be present when a jury, during its deliberations on a verdict in a felony case, returns to the courtroom for further instructions from the trial judge as to the law, where [the] accused is affected by such instructions." Id.

{¶18} In the instant case, the jury presented five questions to the court during its deliberations, three of which are at issue in this appeal. The first and second questions

concerned substantive issues relating to the self-defense instruction. The trial court's answer to the first question reiterated the information contained in the jury instructions establishing that appellant had the burden of proof, by a preponderance of the evidence, to prove the elements of self-defense. The trial court's answer to the second question directed the jurors to the portion of the jury instructions which set forth the law regarding the duty to retreat and informed the jurors it was their job to determine whether or not appellant had violated that duty. The third question concerned a substantive question regarding the order of the charges upon which the jurors were to deliberate. The trial court's response correctly informed the jurors they were to first consider the charge of felonious assault before moving on to the lesser-included offense of aggravated assault, and they should only consider the aggravated assault offense in the event they determined appellant was either not guilty of the felonious assault, or they were unable to agree on that charge.

{¶19} The transcript of the proceedings clearly demonstrates that counsel for appellant, as well as the assistant prosecuting attorney, were present when the trial judge placed its proposed answers to the three jury questions on the record prior to bringing in the jury to be instructed orally. Appellant's trial counsel was given an opportunity to object to the proposed answers for all three questions, but he declined to do so. Furthermore, with respect to one of the questions, the transcript clearly states that the question and answer had been discussed with counsel. Thus, counsel participated in formulating the responses to the jury questions and had the opportunity to object to the court's responses. However, appellant contends there is nothing in the record which reflects that she herself was present during this procedure. Because the record is silent on this,

appellant argues her convictions should be reversed and this matter should be remanded for a new trial. We disagree.

{¶20} In support of her position, appellant relies upon two cases from this appellate district in which we reversed the defendants' convictions based upon the trial court's deficient procedures in answering questions raised by a deliberating jury. In *State v. Wade*, 10th Dist. No. 03AP-774, 2004-Ohio-3974, we reversed the convictions after finding we were unable to determine from the record whether the defendant and his counsel were present during the preparation of certain answers. In *State v. Sales*, 10th Dist. No. 02AP-175, 2002-Ohio-6563, we found nothing in the transcript which would indicate the presence of the defendant or his counsel when the trial court was contemplating its response to the jury question or when it provided its response to the jury, and thus we determined the trial court appeared to have addressed the questions without input from either counsel and in the complete absence of defense counsel or the defendant. However, the circumstances in the instant case are distinguishable from *Wade* and *Sales*. Instead, we find this case to be more in line with *State v. Chinn*, 85 Ohio St.3d 548, 1999-Ohio-288.

{¶21} In *Chinn*, the Supreme Court of Ohio rejected the defendant's request for a new trial on the grounds that the record did not indicate that the defendant and his counsel were present during communications between the trial court and the jury. The Supreme Court of Ohio refused to presume that the defendant and his counsel were not present, finding, " 'the record must *affirmatively* indicate the absence of a defendant or his counsel during a particular stage of the trial.' " (Emphasis sic.) Id. at 568, quoting *State v. Clark* (1988), 38 Ohio St.3d 252, 258.

{¶22} Here, the record does not affirmatively prove that appellant was absent from the proceedings addressing the questions from the jury. The transcript does not say one way or another whether appellant was present during the discussions involving the jury questions. Yet, the transcript is consistent in that it never indicates whether appellant was physically present during each proceeding throughout the course of this action.

{¶23} For example, the transcript is silent as to appellant's presence before each witness' testimony, despite the fact appellant was identified in open court by at least three witnesses, as well as prior to opening statements, even though it is quite apparent that appellant was indeed present, as she was addressed by name by defense counsel in his opening statement. Thus, we cannot draw any conclusion from the transcript's failure to mention whether appellant was present when the trial court addressed the jury questions. Moreover, we cannot say that the transcript affirmatively indicates appellant's absence by its silence. Appellant has failed to meet her burden of showing error by referencing matters in the appellate record which affirmatively demonstrate she was not present. See *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197.

{¶24} In addition, even if we assumed, for the sake of argument, that appellant was absent during the proceedings at issue, it is undisputed that appellant's trial counsel was present during those discussions. By not objecting to appellant's asserted absence, appellant has forfeited all but plain error. We find no plain error here.

{¶25} Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." We notice plain error " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *State v. Barnes,* 94 Ohio St.3d 21, 24, 2002-Ohio-68,

quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus. "By its very terms, the rule places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial." *Barnes* at 27. Under the plain error standard:

> First, there must be an error, i.e., a deviation from a legal rule. * * * Second, the error must be plain. To be "plain" within the meaning of Crim.R. 52(B), an error must be an "obvious" defect in the trial proceedings. * * * Third, the error must have affected "substantial rights." We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial.

Id.

{¶26} Therefore, plain error is not present unless, but for the error complained of, the outcome of the trial would have been different. *Long* at paragraph two of the syllabus; *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, ¶78.

{¶27} "An accused's absence, however, does not necessarily result in prejudicial or constitutional error." *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶90. " '[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.' " Id., quoting *Snyder v. Massachusetts* (1934), 291 U.S. 97, 107-08, 54 S.Ct. 330, 333. Thus, where a defendant's absence is improper, such absence can still constitute harmless error where no prejudice is suffered. See generally, *State v. Coleman*, 10th Dist. No. 10AP-265, 2011-Ohio-1889.

{¶28} Recently, in *Coleman*, we found that where the defendant waived his counsel's physical appearance during jury deliberations, but counsel was consulted via telephone regarding a question from the jury and also approved the answer to be given to

the jury, the trial court's procedure was nothing more than harmless error, despite the fact there was no indication in the record that the defendant was present for the telephone conference or even informed of the existence of the question. Citing to *State v. Franklin*, 97 Ohio St.3d 1, 18, 2002-Ohio-5304, and *State v. Taylor*, 78 Ohio St.3d 15, 25, 1997-Ohio-243, we determined in *Coleman* that "when a defendant's counsel is present via telephone and consulted concerning the answer to be given, any error regarding the defendant's absence is harmless error." Id. at ¶48. See also *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, ¶49-52 (defendant's proposition of law was overruled where defendant complained he was not present for two conferences regarding proposed jury instructions and claimed he would have provided "invaluable" assistance to his counsel because he failed to advance any argument that his absence prevented a fair trial).

{¶29} While trial counsel in the case subjudice participated in person, rather than via telephone, like in *Coleman*, it is undisputed that trial counsel did participate in the proceedings at issue, although such participation may arguably have been without the presence of the accused. Nevertheless, like in *Coleman*, appellant has not demonstrated prejudice or shown how her presence would have altered or influenced the trial court's responses to the jury questions. Furthermore, the trial court's responses to the jury's questions were proper responses and were not confusing or misleading. Thus, we cannot say that the procedure was anything other than harmless error.

{¶30} Accordingly, we overrule appellant's first assignment of error.

{¶31} In her second assignment of error, appellant contends the trial court erred by failing to give the jury the proper self-defense instructions. Appellant contends the trial court gave the "wrong" instruction on self-defense.

{¶32} Under Ohio law, self-defense is an affirmative defense which must be proven by the accused by a preponderance of the evidence. See R.C. 2901.05(A); *State v. Smith*, 10th Dist. No. 04AP-189, 2004-Ohio-6608, ¶16. To establish self-defense through the use of deadly force, "a defendant must prove the following elements: (1) that the defendant was not at fault in creating the situation giving rise to the affray; (2) that the defendant had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) that the defendant did not violate any duty to retreat or avoid the danger." *State v. Barnes* at 24, citing *State v. Robbins* (1979), 58 Ohio St.2d 74. "[T]he elements of self-defense are cumulative. * * * If the defendant fails to prove *any one* of these elements by a preponderance of the evidence he has failed to demonstrate that he acted in self-defense." (Emphasis sic.) *State v. Jackson* (1986), 22 Ohio St.3d 281, 284.

{¶33} Effective September 9, 2008, R.C. 2901.05 was amended to provide a rebuttable presumption of self-defense under certain circumstances. Sometimes referred to as the "Castle Doctrine," R.C. 2901.05(B)(1) provides:

> * * * [A] person is presumed to have acted in self defense or defense of another when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used is in the process of unlawfully and without privilege to do so entering, or has unlawfully and without privilege to do so entered, the residence or vehicle occupied by the person using the defensive force.

{¶34} In the instant case, appellant argues, in essence, that the jury should have been given the additional instruction on self-defense as set forth in R.C. 2901.05(B)(1). Appellant submits that because she was being attacked on her front stoop, which she

argues constitutes part of her residence, the jury should have been instructed that she was presumed to have been acting in self-defense and therefore the burden was on the State to rebut that presumption by a preponderance of the evidence. However, we disagree.

{¶35} As appellant has conceded, because her counsel did not object to the jury instruction provided by the court, and in fact failed to request an instruction premised upon R.C. 2901.05(B)(1) and/or 2901.09(B), we review this issue under the plain error standard. See *Barnes* at 27 (because defendant challenged the jury instruction in the court of appeals but failed to object to it at trial, he thereby forfeited all but plain error). Here, we find no error, let alone plain error.

{¶36} The Supreme Court of Ohio has previously held there is no duty to retreat where a person is attacked in his or her own home. See *State v. Williford* (1990), 49 Ohio St.3d 247; *Jackson* at 284. While under most circumstances a person may not use deadly force if he or she has available a reasonable means of retreat from the confrontation, " '[w]here one is assaulted in his home, or the home itself is attacked, he may use such means as are necessary to repel the assailant from the house, or to prevent his forcible entry, or material injury to his home, even to the taking of life.' " *Williford* at 250, quoting *State v. Peacock* (1883), 40 Ohio St. 333, 334. In amending R.C 2901.09, effective September 9, 2008, the legislature codified specific circumstances under which a person has no duty to retreat. Furthermore, R.C. 2901.05(B)(1) applies if the aggressor is "in the process of unlawfully * * * entering, or has unlawfully * * * entered the residence."

{¶37} In the case sub judice, the evidence does not support an instruction under R.C. 2901.05(B)(1) and/or 2901.09(B) because there was no evidence presented to establish that Ms. Mankins was in the process of unlawfully and without privilege entering appellant's residence. Furthermore, the giving of the standard self-defense instruction itself was even questionable, given the evidence presented at trial.

{¶38} Even without determining whether or not appellant's uncovered front stoop constituted a "porch" that is covered within the definitions of "dwelling" and "residence," it is clear that appellant's own testimony establishes that Ms. Mankins was neither in appellant's residence, nor on the stoop, nor even at the base of the stairs leading to the stoop, nor climbing over the railing to the stoop. In fact, Ms. Mankins was not attempting to enter appellant's residence at all. Instead, she was on the sidewalk outside appellant's residence, unarmed, engaging in a verbal confrontation, and challenging appellant to a fistfight while appellant was standing in her doorway on her front stoop.

{¶39} While appellant claimed Ms. Mankins "charged" towards her, the only evidence presented which points to Ms. Mankins' specific location during this confrontation, other than appellant's general claim that Ms. Mankins was "close," is testimony that Ms. Mankins was either in the middle of the street or on the sidewalk in front of appellant's residence. There was no evidence presented to indicate that Ms. Mankins was in the process of unlawfully entering appellant's residence. Thus, appellant was not entitled to invoke the "Castle Doctrine," nor was she entitled to a presumption of self-defense under R.C. 2901.05(B)(1). See also *State v. Smith* (June 27, 1995), 10th Dist. No. 94APA12-1702 (trial court did not err in omitting a "no duty to retreat from one's

home" instruction where, at the time the defendant shot the victim, the defendant and the victim were standing on or near the sidewalk in front of defendant's residence).

{¶40} Based upon the fact that Ms. Mankins was not in the process of unlawfully entering appellant's residence, the "Castle Doctrine" as set forth in R.C. 2901.05(B)(1) and/or 2901.09(B) is not applicable and the trial court did not err in failing to give a jury instruction involving the "Castle Doctrine."

{¶41} Furthermore, under Ohio law, one is not entitled to use deadly force if he or she has available a reasonable means of retreat from the confrontation. Here, there was no testimony that appellant was unable to retreat through her front door in order to get away from Ms. Mankins. When asked if she was able to move, appellant only responded, "I don't know." (Tr. 237.) Although Ms. Mankins did challenge appellant to a fight, there was no evidence presented to indicate that Ms. Mankins had a weapon of any kind or that she implied she had a weapon. Even if we assume that, despite the guardrail separating the two women, appellant believed she was in imminent danger of death or great bodily harm from Ms. Mankins as she "charged" at her from the sidewalk, once appellant shot Ms. Mankins in the leg and the stomach, the testimony indicates that Ms. Mankins was no longer "charging" appellant, but was instead attempting to escape. Yet appellant shot Ms. Mankins a third time, as she was trying to escape, striking her in the back.

{¶42} Assuming, for the sake of argument, that Ms. Mankins initially posed a threat to appellant, at a minimum, any threat of imminent danger had dissipated after appellant's initial shots hit Ms. Mankins in the leg and stomach. There was no justification presented here for continuing to shoot Ms. Mankins in the back as she attempted to run away. See *State v. Harrison*, 10th Dist. No. 06AP-827, 2007-Ohio-2872, ¶25, citing

Jackson ("A defendant is privileged to use as much force as is reasonably necessary to repel the attack."); see also *State v. Butler* (July 11, 1985), 10th Dist. No. 84AP-60 ("The purported claim of self-defense asserted at trial does not bear scrutiny in view of the shooting in the back of a victim moving away from the armed appellant."); and *State v. Johnson*, 6th Dist. No. L-08-1325, 2009-Ohio-3500 (there are limitations to the application of self-defense; it is not available unless the defendant shows the force used to repel the danger was no more than reasonably required by the circumstances, and it is not applicable if the force used is so grossly disproportionate to the danger so as to demonstrate revenge or an evil purpose; if the accused uses a greater degree of force than is necessary under the circumstances, the conduct is not justifiable on the grounds of self-defense). The force used here was disproportionate under the circumstances.

{¶43} Based upon the foregoing, we overrule appellant's second assignment of error.

{¶44} In her third assignment of error, appellant submits her counsel was ineffective in failing to object to the self-defense instruction given by the trial court and in failing to request the proper instruction. We disagree.

{¶45} In Ohio, a properly licensed attorney is presumed competent. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 301. Therefore, the burden of showing ineffective assistance of counsel is on the party asserting it. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie* (1998), 81 Ohio St.3d 673, 675. Additionally, in fairly assessing counsel's performance, there is a strong

presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶101.

{¶46} Trial strategy and even debatable trial tactics do not establish ineffective assistance of counsel. Id. A reviewing court must be "highly deferential to counsel's performance and will not second-guess trial strategy decisions." *State v. Tibbetts*, 92 Ohio St.3d 146, 166-67, 2001-Ohio-132. Strategic choices made after substantial investigation "will seldom if ever" be found wanting. *Strickland v. Washington* (1984), 466 U.S. 686, 681, 104 S.Ct. 2052, 2061. "Because advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment." Id.

{¶47} "[T]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied on as having produced a just result." *Strickland at* 686, 104 S.Ct. at 2061. In order to succeed on a claim of ineffective assistance of counsel, appellant must satisfy a two-prong test. First, she must demonstrate that her trial counsel's performance was deficient. Id. at 687, 104 S.Ct. at 2064. This requires a showing that her counsel committed errors which were "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Id. If she can show deficient performance, she must next demonstrate that she was prejudiced by the deficient performance. Id. To show prejudice, she must establish there is a reasonable probability that, but for her counsel's unprofessional errors, the result of the trial would

have been different. A reasonable probability is one sufficient to erode confidence in the outcome. Id. at 694, 104 S.Ct. at 2068.

{¶48} In the instant case, we do not find that the outcome of the trial would have been different if appellant's counsel had objected to the self-defense instruction presented by the court, and instead requested an instruction informing the jury that there was a rebuttable presumption that appellant had been acting in self-defense when she shot Ms. Mankins. This is because that instruction is not applicable to the facts and circumstances presented here.

{¶49} As we discussed in our analysis of appellant's second assignment of error, the "Castle Doctrine," as set forth in R.C. 2901.05(B)(1) and 2901.09(B), was not applicable to the instant case, and the trial court did not err in failing to give a jury instruction involving the "Castle Doctrine." While such an instruction would unarguably create a rebuttable presumption that appellant was acting in self-defense, and thus shift the burden of proof to the State to demonstrate, by a preponderance of the evidence, that appellant was not acting in self-defense, and consequently require a burden of proof more favorable to appellant than the burden of proof set forth under the standard self-defense instruction, the evidence simply did not support such an instruction. Failure to request an inapplicable instruction does not constitute deficient performance on the part of appellant's trial counsel, nor does it create prejudice. Appellant's trial counsel did not err in declining to request this instruction.

{¶50} Accordingly, we overrule appellant's third assignment of error.

{¶51} In conclusion, we overrule appellant's first, second, and third assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT, P.J., and BROWN, J., concur.