[Cite as *State v. Miller,* 2011-Ohio-952.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 10AP-632
v.	:	(C.P.C. No. 09CR09-5716)
Danisha R. Miller,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 3, 2011

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

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

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Defendant-appellant, Danisha R. Miller, appeals from the judgment of the Franklin County Court of Common Pleas convicting her of one count of aggravated assault, a fourth-degree felony, in violation of R.C. 2903.12.

{¶2} The conviction herein arises out of a physical altercation between appellant and Keaira Cooper that occurred on September 12, 2009. On this date, David Crockett, a close friend of Keaira's husband, James Cooper, was at Keaira and James's house to watch a football game. At the time of this incident, appellant was David's girlfriend, and though appellant and Keaira knew each other, Keaira testified appellant was not welcome at her house because appellant always brought "drama." (Tr. 76.)

{¶3} Shortly after the game began, James and David were watching the game in the basement, and Keaira was watching the game upstairs while talking to her mother on the phone. Keaira heard a bang on the door and looked out to see appellant walking back to David's truck. Keaira heard another knock, and this time went outside where she met appellant in the front of the house. The two began to argue about why appellant was there. Keaira testified that she did not remember who started the altercation, but described that she and appellant started fighting and hitting each other.

{¶4} According to Keaira, James came outside and pulled her off of appellant, and they went into the house. When Keaira and James went back outside appellant and David were standing by David's truck, and appellant said, "Ha, ha, that's why I fucked your wife up." (Tr. 101.) James then went back into the house and returned with a gun that he fired into the ground. At this time, appellant and David left and James and Keaira went to the hospital seeking treatment for Keaira's injuries which consisted of a laceration to her right cheek that required 23 stitches, a cut to her nose that required one to three stitches, and a cut to her forehead. Keaira was interviewed by the police the night of September 12, 2009, and told the police that she had fired the gun. At trial, Keaira

testified that she told the police this because James had a criminal background and she feared he would be in trouble if they knew he had the gun.

{¶5} According to James, he and David had been friends for 25 years, and David came to his house the night of September 12, 2009 to watch a football game. James was supposed to take David home after the game, but during the game he was interrupted by a phone call from Keaira's mother telling him to get outside. James ran outside to see Keaira on top of appellant. James testified there was blood everywhere and appellant was yelling, "Yeah, bitch, that's why I fucked you up." (Tr. 165.) James yelled at appellant and David to leave and then went into the house to get his gun. James testified he fired the gun into the ground to get appellant and David to leave. James also stated he saw a pair of scissors in the grass. Additionally, James testified that initially he told the police that he had fired the gun, but when the interviewing officer told James that Keaira said she fired it, James just said "okay," and let it go. (Tr. 192.)

{¶6} According to David, appellant was going to pick him up from James's house, and she was supposed to call when she was on her way. David testified that during the game, James got a call from Keaira's mother and then James ran upstairs. David followed shortly thereafter and went outside to see Keaira on top of appellant and Keaira hitting appellant with a black object. Because James was just standing there watching the two women fight, David testified he pulled Keaira off of appellant. According to David, when James came out of the house with the gun, James pointed it at appellant, but then fired it in the air.

{¶7} Appellant testified on her own behalf. Appellant described that she was supposed to pick David up, and though she tried calling James to let him know she was

on her way, James did not answer. Therefore, when she got to the house, she went and knocked on the door. According to appellant, Keaira came out yelling and asking why appellant was there which prompted appellant to go back to the car. Appellant testified that Keaira then opened the car door and punched her "seven times," and proceeded to pull her out of the car. (Tr. 333.) Though she did not know what it was, appellant believed Keaira hit her with something that was in her hand.

{¶8} Appellant testified that at some point she grabbed something out of her pocket to keep Keaira off of her, but she did not know what it was that she grabbed. When interviewed by the police, appellant told them, "I grabbed something, and that's all I'm going to say about that." (Tr. 357.) According to appellant, when James came outside with the gun, he pointed it at her and then fired into the air. Appellant was treated at the hospital five days later, and suffered a slight concussion and injuries to her hand and right eye.

{¶9} Police responded to a call of a "cutting or stabbing" at Keaira's house where they observed blood in the home as well as outside in the front of the house. Among things recovered from the scene were a gun and a single shell casing that was found in the lawn.

{¶10} On September 22, 2009, appellant was indicted by a Franklin County Grand Jury for one count of felonious assault and one count of possessing criminal tools. A jury trial commenced on June 1, 2010, and appellant raised the affirmative defense of self-defense. After deliberations, the jury found appellant not guilty of felonious assault, but guilty of the inferior-degree offense of aggravated assault. The jury also found appellant not guilty of possession of criminal tools. A presentence investigation was ordered, and a

sentencing hearing was held on June 25, 2010. At this time, the trial court imposed an 18-month term of incarceration, and awarded 28 days of jail time credit. The trial court also ordered appellant to pay restitution in the amount of $2,000 in favor of Keaira and court costs in the amount of $2,524.

{¶11} This appeal followed, and appellant brings the following four assignments of error for our review:

> [1.] The court committed plain error when it both allowed the prosecution to repeatedly misstate the standard for preponderance of the evidence and failed to define the term in its jury instructions, depriving Danisha Miller of her rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Section Sixteen of Article One of the Ohio Constitution and in violation of Ohio Revised Code Section 2901.05 and Criminal Rule 30.
>
> [2.] The jury's inconsistent verdict, finding Danisha Miller not guilty of Felonious Assault but guilty of Aggravated Assault, violated Danisha Miller's protection against double jeopardy and right to due process in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Section Ten of Article One of the Ohio Constitution.
>
> [3.] The prosecutorial misconduct in the State's closing and rebuttal arguments violated Danisha Miller's rights to a fair trial and due process guaranteed by the Fourteenth Amendment to the United States Constitution and Sections Ten and Sixteen of Article One of the Ohio Constitution.
>
> [4.] Danisha Miller received ineffective assistance of counsel based on the record before this Court when her counsel failed to object to both (1) the prosecution's multiple misstatements of the law and (2) the court's failure to define the applicable evidentiary standards in violation of her right to counsel and due process guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

{¶12} In her first assignment of error, appellant contends the jury was not properly instructed with respect to the burden of proof required to establish the affirmative defense

of self-defense. The trial court gave the appellant's requested jury instruction on self-defense, which directed the jury that to establish self-defense, appellant had to prove by a preponderance of the evidence that (1) she was not at fault in creating the situation; (2) she had an honest belief that she was in imminent danger of death or great bodily harm and that her only means of escape from such danger was in the use of such force; and (3) she did not violate any duty to retreat or avoid the danger.

{¶13} Though the trial court instructed the jury that appellant had to establish self-defense by a preponderance of the evidence, appellant asserts the jury instructions were incomplete because they failed to further define the phrase "preponderance of the evidence." Additionally, appellant asserts the trial court erred by permitting the state to inaccurately define that term during closing arguments. The comments during closing arguments with which appellant takes issue are as follows:

> Let's get into that, preponderance of the evidence. It's more than 50 percent, 51 percent. Let's say half of you guys believe that Keaira started the fight, and the other half of you believe that [appellant] started the fight. That's equal. That's not 51 percent. So then you don't even get to that.
>
> You heard Ms. Cooper say, "I don't know who started the fight. We just started fighting." They're the only two people outside. One person is saying one thing, the other person is saying another. That's not a preponderance. There's no evidence to suggest who started the fight.

(Tr. 438-39.)

{¶14} Appellant also challenges the following statement made during the state's rebuttal in which the prosecutor stated, "If you think they're mutually fighting or you can't agree about who started the fight, then self-defense is not available for you to consider.

Why? Because you cannot find under the first prong, or the first element, self-defense." (Tr. 489-90.)

{¶15} Appellant argues the trial court's failure to define preponderance of the evidence coupled with the state's inaccurate examples of the same given during closing arguments led the jury to believe that to decide an issue of contested fact it could simply count the number of witnesses presented on each side of an issue.

{¶16} Initially, we recognize that appellant failed to object to the instructions that were given to the jury before the jury retired to consider its verdict and, also, failed to request any of the additional instructions it now claims were needed. Thus, appellant has waived the alleged errors in the jury instructions. *State v. Montgomery* (Sept. 26, 2000), 10th Dist. No. 99AP-1198, citing Crim.R. 30(A); *State v. Stallings*, 89 Ohio St.3d 280, 292, 2000-Ohio-164. Similarly, appellant failed to object to any portion of the closing arguments. A failure to object to the prosecution's closing argument, absent plain error, constitutes a waiver. *State v. Slagle* (1992), 65 Ohio St.3d 597, 604.

{¶17} We may address plain errors or defects affecting substantial rights, although they were not brought to the attention of the trial court. Crim.R. 52(B). We cannot find plain error unless we find that, but for the error, the outcome of the trial would clearly have been different. *State v. Moreland* (1990), 50 Ohio St.3d 58, 62, citing *State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of the syllabus; *State v. Underwood* (1983), 3 Ohio St.3d 12, syllabus. The plain error rule is to be invoked only in exceptional circumstances to avoid a clear miscarriage of justice. *Long* at paragraph three of the syllabus.

{¶18} A criminal defendant has a right under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution to be afforded a meaningful opportunity to present a complete defense to a properly instructed jury. *State v. Smith*, 10th Dist. No. 04AP-189, 2004-Ohio-6608, ¶22, citing *Barker v. Yukins* (C.A.6, 1999), 199 F.3d 867, 875, citing *California v. Trombetta* (1984), 467 U.S. 479, 485, 104 S.Ct. 2528, 2532. Our duty as an appellate court is to review the instructions as a whole, and, if taken in their entirety, the instructions fairly and correctly state the law applicable to the evidence presented at trial, reversible error will not be found merely on the possibility that the jury may have been misled. *State v. Shepard*, 10th Dist. No. 07AP-223, 2007-Ohio-5405, ¶7; *Wozniak v. Wozniak* (1993), 90 Ohio App.3d 400, 410.

{¶19} Appellant contends the trial court should have instructed the jury on the definition of preponderance as provided in Ohio Jury Instructions. Specifically, it is appellant's contention that the instruction should have included the following: (1) that preponderance of the evidence is "the greater weight of the evidence; that is, evidence that you believe because it outweighs or overbalances in your minds the evidence opposed to it"; (2) that preponderance of the evidence is "evidence that is more probable, more persuasive, or of greater probative value"; and (3) a warning that "[i]t is the quality of the evidence that must be weighed. Quality may or may not be identical with (quantity) (the greater number of witnesses)." (Appellant's brief at 3, quoting 2-CR 417 OJI CR 417.29.)

{¶20} In the matter before us, the trial court instructed the jury as follows:

> You should not decide any issue of fact merely on the basis of the number of witnesses that testify on each side of an issue. Rather, the final test in judging evidence should be the force and the weight of the evidence, regardless of the number of witnesses on each side who testified to an issue. The testimony of one witness, if believed by you, is sufficient to prove any fact.

(Tr. 505.)

{¶21} The jury was also instructed that the burden of proving the affirmative defense of self-defense by a preponderance of the evidence was upon appellant. The trial court stated:

> In determining whether the defense of self-defense has been proven by a preponderance of the evidence, you should consider all of the evidence bearing upon the affirmative defense regardless of who produced it.
>
> If the weight of the evidence is equally balanced, the Defendant has failed to establish the affirmative defense of self-defense.

(Tr. 511-12.)

{¶22} Thus, the record reflects that contrary to appellant's argument the jury was instructed that weight of the evidence was not identical with the number of witnesses testifying on each side of an issue. Additionally, the jury was instructed that the weight of the evidence had to be more than equally balanced in order to establish the affirmative defense of self-defense. We find it to be of no consequence that these two instructions were not given immediately after one another because our duty as an appellate court is to review the instructions as a whole, and determine if taken in their entirety the instructions fairly and correctly state the law applicable to the evidence presented at trial. *Shepard*. When in their entirety the instructions fairly and correctly state the law applicable to the

evidence presented at trial, reversible error will not be found merely on the possibility that the jury may have been misled. Id.

{¶23} In the case before us, the jury was instructed that self-defense was to be established by something more than evidence that was equally balanced, i.e., the greater weight of the evidence, and the jury was instructed that it should not decide any issue of fact merely on the basis of the number of witnesses that testify on each side of an issue. While it may be argued that the instruction regarding the preponderance of the evidence could have been more extensive, we find that when taken as a whole, the jury instructions were sufficiently clear to enable the jury to understand appellant's burden of proof on the issue of self-defense.

{¶24} Accordingly, we do not find error in the given jury instructions, let alone that had additional language been used to define a preponderance of the evidence that the outcome of the trial would clearly have been different so as to constitute plain error.

{¶25} Further, a jury can be presumed to have followed a trial court's instructions. *State v. Cook*, 10th Dist. No. 09AP-316, 2010-Ohio-2726, ¶45, citing *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190. Thus, assuming without deciding that the prosecutor's comments regarding what constitutes "preponderance of the evidence" were improper and susceptible to objection, the trial court's instruction on this issue removed any potential prejudice, and we cannot say that but for the error, the outcome of the trial would clearly have been otherwise. *Moreland*.

{¶26} For the forgoing reasons, appellant's first assignment of error is overruled.

{¶27} In her second assignment of error, appellant contends her constitutional rights were violated because the jury's verdict of not guilty of felonious assault but guilty of

aggravated assault are inconsistent. This is so, according to appellant, because the jury was "confusingly presented" with two verdict forms, one that indicated the jury was finding appellant not guilty of felonious assault, but guilty of aggravated assault, and another that indicated the jury was finding appellant not guilty of both offenses. (Appellant's brief at 6.)

{¶28} Felonious assault is defined in R.C. 2903.11, which provides, in pertinent part:

> (A) No person shall knowingly do either of the following:
>
> (1) Cause serious physical harm to another or to another's unborn;
>
> (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

{¶29} Aggravated assault is defined in R.C. 2903.12, and provides in relevant part:

> (A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly:
>
> (1) Cause serious physical harm to another or to another's unborn;
>
> (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code.

{¶30} Appellant is correct that the offense of aggravated assault is not a lesser-included offense of the offense of felonious assault. Instead, the offense of aggravated assault is an inferior degree of felonious assault because its elements are identical to or contained within the offense of felonious assault, coupled with the additional presence of

one or both mitigating circumstances of sudden passion or a sudden fit of rage brought on by serious provocation occasioned by the victim. *State v. Stewart*, 10th Dist. No. 10AP-526, 2011-Ohio-466, ¶7, citing *State v. Logan*, 10th Dist. No. 08AP-881, 2009-Ohio-2899, fn.1, citing *State v. Deem* (1988), 40 Ohio St.3d 205. In other words, aggravated assault is the same conduct as felonious assault but its nature and penalty are mitigated by provocation. Id., citing *State v. Scott* (Mar. 27, 2001), 10th Dist. No. 00AP-868. A defendant bears the burden of proving the mitigating factor by a preponderance of the evidence. *State v. Rhodes* (1992), 63 Ohio St.3d 613, syllabus.

{¶31} In support of her position that the verdicts herein are inconsistent, appellant primarily relies on *State v. Ruppart*, 187 Ohio App.3d 192, 2010-Ohio-1574, in which the Eighth District Court of Appeals found plain error where the jury was instructed that they should first consider the charge of felonious assault and only consider the charge of aggravated assault if they found the defendant not guilty of felonious assault. The reasoning in *Ruppart*, and the cases upon which it relied, was that based on the jury instructions in *Ruppart*, in order to find the defendant not guilty of felonious assault but guilty of aggravated assault the jury had to find that the state failed to prove an element of felonious assault beyond a reasonable doubt. Since the offenses of felonious assault and aggravated assault contain the same elements, the court reasoned that such a result is inconsistent, and, therefore, the jury instructions in that case rose to the level of plain error.

{¶32} We, however, are presented with a matter quite unlike *Ruppart*. Here, the trial court instructed the jury as follows:

> If you find that the State proved beyond a reasonable doubt that the Defendant knowingly caused serious physical harm to Keaira Cooper and/or caused or attempted to cause physical harm to Keaira Cooper by means of a deadly weapon, and you find that the Defendant failed to prove by a preponderance of the evidence that she acted while under the influence of sudden passion or in a sudden fit of rage brought on by serious provocation occasioned by the victim that was reasonably sufficient to incite the Defendant into using deadly force, then you must find the Defendant guilty of felonious assault.
>
> If you find that the State proved beyond a reasonable doubt that the Defendant knowingly caused serious physical harm to Keaira Cooper and/or caused or attempted to cause physical harm to Keaira Cooper by means of a deadly weapon, and you find that the Defendant proved the mitigating circumstance that she was under the influence of sudden passion or in a sudden fit of rage by a preponderance of the evidence, then you must find the Defendant guilty of aggravated assault.
>
> If you find that the State failed to prove that the Defendant knowingly caused serious physical harm to Keaira Cooper and/or caused or attempted to cause physical harm to Keaira Cooper by means of a deadly weapon, then you must find the Defendant not guilty of felonious assault and not guilty of aggravated assault.
>
> If the Defendant fails to prove the mitigating circumstance by a preponderance of the evidence, the State must still prove to you beyond a reasonable doubt all the elements of the offense of felonious assault before you can find the Defendant guilty of that offense.

(Tr. 509-11.)

{¶33} Thus, unlike *Ruppart*, the trial court here did not instruct the jury that it was to consider the offense of aggravated assault only if it first found appellant not guilty of felonious assault. Moreover, a full reading of *Ruppart* requires a result contrary to that sought by appellant. *Ruppart* cites with approval language from the Ohio Jury

Instructions regarding the inferior-degree offense of aggravated assault, and said language is almost verbatim to that used in the jury instructions given in the case sub judice. Therefore, we find the jury was properly instructed as to the offense of felonious assault and the inferior-degree offense of aggravated assault. As such, we do not find that the jury was presented with "confusing" verdict forms, nor that it reached inconsistent verdicts in this case.

{¶34} Accordingly, appellant's second assignment of error is overruled.

{¶35} In her third assignment of error, appellant contends prosecutorial misconduct based on the prosecutor's comments made during the state's closing and rebuttal arguments.

{¶36} The test for prosecutorial misconduct is whether the prosecution's conduct was improper and, if so, whether the conduct prejudicially affected the defendant's substantial rights. *State v. Jennings*, 10th Dist. No. 09AP-70, 2009-Ohio-6840, ¶102, citing *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.' " Id., quoting *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. As such, prosecutorial misconduct is not grounds for reversal unless the defendant has been denied a fair trial. Id., citing *State v. Maurer* (1984), 15 Ohio St.3d 239, 266.

{¶37} Appellant failed to object to any instances of the claimed misconduct and, therefore, has waived all but plain error review on these claims. *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, ¶139; *State v. Saleh*, 10th Dist. No. 07AP-431, 2009-Ohio-1542, ¶68.

{¶38} Appellant first challenges the prosecutor's comments regarding the preponderance of the evidence as outlined in our disposition of appellant's first assignment of error. We have already determined these comments, even if improper, did not rise to the level of plain error.

{¶39} Appellant next contends the prosecutor acted as a witness and "amateur medical expert" when discussing the allegation that injuries sustained by appellant were caused by an object such as a gun. The fallacy with appellant's contentions is that she has taken the prosecutor's comments out of context.

{¶40} Appellant first challenges the prosecutor's statement, "[Keaira] might have packed a mighty punch to create those injuries, but it's not a gun." (Tr. 435.) When read in context, it is clear the prosecutor was summing up the state's evidence that the testimony indicated the presence of one gun that was in the possession of James, such that appellant's injuries would not have been inflicted by an object.

{¶41} Appellant next contends the prosecutor was testifying as an expert witness when he said appellant could not have sustained injuries from a gun because they "would have swelled up overnight." (Tr. 441.) Here, the prosecutor was demonstrating that photographs of appellant taken the day after the incident showed swelling to appellant's right eye, but none to the left eye; yet, appellant testified that she was in the driver's seat of the car when Keaira began punching her. Thus, the prosecutor stated:

> If you're sitting in a car, her left eye is going to be punched out. Look at her left eye. Does that look like it's been struck seven times with an object prior to getting out of the car? No. Because that's not what happened. And this is the next day. It would have swelled up overnight.

(Tr. 441.)

{¶42} Lastly, appellant challenges the prosecutor's reference in closing arguments that she has worn glasses since she was 17 months old, and "never put my glasses on the floor. My mom would have killed me. You don't want to break them." (Tr. 494.) This statement stems from a photograph of Keaira's living room showing Keaira's glasses in a closed position on the floor. When asked at trial, Keaira testified she did not know how the glasses ended up there and that she would not intentionally have left them there. Nonetheless, in closing arguments, appellant's counsel argued the positioning of Keaira's glasses was important because it suggested Keaira knew she was going to fight:

> Keaira, when she answered the door the first time, placed her glasses on the floor. That's important. Why are her glasses neatly folded on the floor if she was sitting in the recliner across the room, talking to her mother, watching the game?
>
> Because when she realized there was a knock on the door and it was [appellant], she knew she was going to fight. She took her glasses off and got ready, grabbed her gun and went outside. Why? Again, because she wanted to fight [appellant].

(Tr. 461.)

{¶43} "[I]solated comments by a prosecutor are not to be taken out of context and given their most damaging meaning." *State v. Whiteside*, 10th Dist. No. 08AP-602, 2009-Ohio-1893, ¶82, citing *State v. Brandy*, 10th Dist. No. 02AP-832, 2003-Ohio-1836, ¶26, citing *Donnelly v. DeChristoforo* (1974), 416 U.S. 637, 647, 94 S.Ct. 1868, 1873. Rather, a closing argument must be viewed in its entirety to determine prejudice. *Whiteside* at ¶26, citing *Brandy*. Moreover, the prosecution is entitled to a certain degree of latitude in summation. *State v. Treesh*, 90 Ohio St.3d 460, 466, 2001-Ohio-4, citing *State v. Grant* (1993), 67 Ohio St.3d 465, 482. The prosecutor may draw reasonable inferences from

the evidence presented at trial, and may comment on those inferences during closing arguments. Id., citing *State v. Smith* (1997), 80 Ohio St.3d 89, 111.

{¶44} Viewed in its entirety, we conclude the prosecutor's closing argument neither materially prejudiced appellant nor denied her a fair trial. Accordingly, appellant's third assignment of error is overruled.

{¶45} In her final assignment of error, appellant contends her trial counsel was ineffective for failing to object to the prosecutor's misconduct during closing arguments, and for failing to object to the trial court's instruction on the preponderance of the evidence.

{¶46} In Ohio, a properly licensed attorney is presumed competent. *State v. Davis*, 10th Dist. No. 09AP-869, 2010-Ohio-4734, ¶12, citing *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. Id., citing *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*, 81 Ohio St.3d 673, 675, 1998-Ohio-343. 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.

{¶47} "The 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 cannot be relied on as having produced a just result." *Strickland v. Washington* (1984), 466 U.S. 668, 686, 104 S.Ct. 2052, 2064. In order to succeed on a claim of ineffective assistance of counsel, appellant must satisfy a two-prong test. First, he must

demonstrate that his trial counsel's performance was deficient. Id., 466 U.S. at 687, 104 S.Ct. at 2064. This requires a showing that his counsel committed errors which were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. If he can show deficient performance, he must next demonstrate that he was prejudiced by the deficient performance. Id. To show prejudice, he must establish there is a reasonable probability that, but for his 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., 466 U.S. at 694, 104 S.Ct. at 2068.

{¶48} Initially, we note that "[a] failure to object**,** in and of itself, does not rise to the level of ineffective assistance of counsel." *State v. Graggs*, 10th Dist. No. 09AP-339, 2009-Ohio-5975, ¶36, quoting *State v. Jackson*, 8th Dist. No. 86105, 2006-Ohio-174, ¶88. Ohio courts have recognized that objections tend to disrupt the flow of a trial and are often considered by the factfinder to be technical and bothersome; hence, competent counsel may reasonably hesitate to object. Id., citing *Jackson*, citing Jacobs, Ohio Evidence (1989), iii-iv; *State v. Campbell*, 69 Ohio St.3d 38, 53, 1994-Ohio-492.

{¶49} Moreover, we have already found in our disposition of appellant's first assignment of error that the jury instructions given in this case were not erroneous and that even if additional language would have been requested, the result of the trial court clearly would not have been otherwise. Further, we found in our disposition of appellant's third assignment of error that the prosecutor's comments in closing arguments did not rise to the level of prosecutorial misconduct. Therefore, we cannot say appellant's counsel was ineffective for failing to object to the prosecutor's remarks during arguments because

an attorney is not ineffective for failing to raise an objection which would have been denied. *State v. Gibson* (1980), 69 Ohio App.2d 91, 95.

{¶50} Nonetheless, even assuming arguendo that appellant's counsel was deficient in failing to object in the two instances about which she complains on appeal, we find that appellant has failed to demonstrate that, but for the alleged errors, there is a reasonable probability that the result of the proceeding would have been different. Thus, appellant's claim that she received ineffective assistance of counsel lacks merit.

{¶51} Accordingly, we overrule appellant's fourth assignment of error.

{¶52} For the forgoing reasons, appellant's four assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BROWN and KLATT, JJ., concur.

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