[Cite as *State v. Palmer*, 2013-Ohio-5970.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 12AP-460 (C.P.C. No. 11CR-1077)
v.	:	(REGULAR CALENDAR)
Anthony M. Palmer,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on April 4, 2013

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

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

BRYANT, J.

{¶1} Defendant-appellant, Anthony M. Palmer, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to a jury verdict, of felonious assault in violation of R.C. 2903.11, with a firearm specification pursuant to R.C. 2941.145. Because the court did not err in instructing the jury, defendant did not receive ineffective assistance of counsel, and the manifest weight of the evidence supports the jury's verdict finding defendant guilty of felonious assault with a firearm specification, we affirm.

I. Facts and Procedural History

{¶2} On April 18, 2010 around 2:30 a.m., Angela Hudson, her boyfriend, Richard Wilson, and her cousins, Quentin Green, Dexter Jackson, and Porche Simmons, left a bar and entered Toros Motorcycle Club, an after-hours establishment. Defendant also arrived

at Toros around 2:30 a.m. with his girlfriend, Angel Johnson, to meet his friends, Juan Stewart and "Lucky." On the dance floor inside Toros, Green and Jackson bumped into Stewart, and a verbal altercation ensued among them. Stewart pulled out a gun and pointed it at Jackson and Green. Wilson attempted to defuse the situation and removed Jackson and Green from the dance floor. At the same time, Lucky took Stewart's gun and gave it to defendant, who placed it in his waistband. Following the altercation, Hudson, Green, Jackson, and Simmons exited the bar and waited by their cars while Wilson used the restroom. Defendant also left the bar and approached Jackson; a verbal disagreement arose. From that point, recollections of the event differ markedly.

{¶3} According to Hudson and Green, defendant approached Jackson with a gun in his hand and told Jackson to "[t]alk that shit now." (Tr. 93; 246.) When Hudson intervened between defendant and Jackson, defendant pointed the gun to the bridge of Hudson's nose and pulled the trigger, causing the gun to make a clicking noise. Defendant then waved the gun in the air and stated he was going to have sex with one of them or he would shoot them. Defendant demanded they empty their pockets and reached into Jackson's pocket from which he removed $7 in cash. Hudson ran back to the bar and called 911.

{¶4} Wilson stated that while he was using the restroom, he was informed that his companions were being robbed outside the bar. He ran from Toros to the parking lot and confronted defendant. After defendant pointed the gun at him and demanded money, Wilson grabbed the gun and pulled defendant to the ground with the gun. Defendant separated himself from Wilson and struck Wilson on his ear with the gun. Wilson fell from the force of the impact; defendant ran to his car and exited the parking lot.

{¶5} Defendant, in contrast, denied brandishing a gun as he exited Toros. He testified that he and Johnson were walking to their car, partially blocked by the two cars in which Hudson, Jackson, Green, and Simmons arrived, when Jackson began to verbally spar with defendant. Defendant sent Johnson to start their car while he held the gun up to, but did not point it at, Jackson and stated, "Man, you ain't got one of these, you trying to fight me, what is wrong with you?" (Tr. 355-56.) Defendant denied ever pointing a gun at anyone or causing the gun to make a clicking noise. Defendant additionally denied demanding money from anyone.

{¶6} After Johnson told defendant that he should get in the car and leave, Wilson grabbed defendant and began wrestling with him. Defendant broke free of Wilson's grip and struck Wilson with the gun as Wilson again approached him. Hearing police sirens approaching, defendant ran to his car and left the scene with Johnson.

{¶7} A 17 count indictment filed February 24, 2011 charged defendant with 5 counts of aggravated robbery, 10 counts of robbery, and 2 counts of felonious assault, all of which carried a firearm specification. Trial began on April 3, 2012, and at the conclusion of trial on April 5, 2012, defendant requested a self-defense instruction. The court instructed the jury on the elements of deadly force self-defense. Following deliberation, the jury returned verdicts on April 6, 2012 finding defendant guilty of felonious assault of Wilson with a firearm specification, but not guilty of all other counts. At the sentencing hearing on May 11, 2012, the trial court imposed on defendant a term of three years of incarceration for the felonious assault, to run consecutively with a term of three years for the firearm specification.

II. Assignments of Error

{¶8} Defendant assigns four errors:

> First Assignment of Error: The court committed plain error by not instructing the jury regarding when the use of non deadly force is justified either in self-defense or in the defense of others.
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> Second Assignment of Error: Counsel's failure to request an instruction on self-defense by means of less than deadly force, or to object to the omission of such an instruction, constitutes ineffective assistance of counsel.
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> Third Assignment of Error: Counsel's complete failure to argue self-defense in closing argument constitutes ineffective assistance of counsel.
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> Fourth Assignment of Error: Appellant's felonious assault conviction was against the manifest weight of the evidence.

III. First Assignment of Error—Erroneous Jury Instruction

{¶9} Defendant's first assignment of error asserts the trial court should have instructed the jury on self-defense using non-deadly force, in addition to the given

instruction on self-defense using deadly force. Because defendant neither requested the non-deadly force instruction nor objected to the instruction as provided, our review is limited to whether the trial court committed plain error. Crim.R. 30(A); Crim.R. 52(B). *See also State v. New*, 10th Dist. No. 92AP-904 (Sept. 20, 1994); *State v. Chlebowski*, 8th Dist. No. 60808 (May 28, 1992).

{¶10} Crim.R. 52(B) places three limitations on a reviewing court's ability to correct an error despite the absence of a timely objection at trial. *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). Initially, the trial court must have deviated from a legal rule. *State v. Hill*, 92 Ohio St.3d 191, 200 (2001) (noting the "first condition to be met in noticing plain error is that there must be error"). Next, the error must have been obvious. *Barnes* at 27 (stating that "[t]o be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings"), quoting *State v. Sanders*, 92 Ohio St.3d 245, 257 (2001). Lastly, the error must have affected the outcome of the trial. *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph two of the syllabus (stating no plain error exists unless "but for the error, the outcome of the trial clearly would have been otherwise"). "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id.* at paragraph three of the syllabus. *See also Barnes* at 27 (noting that appellate courts have discretion to find plain error even if all three prongs are met).

{¶11} The trial court is responsible for providing all instructions relevant and necessary for the jury to weigh the evidence and ascertain the facts. *State v. Moody*, 10th Dist. No. 98AP-1371 (Mar. 13, 2001), citing *State v. Comen*, 50 Ohio St.3d 206 (1990), paragraph two of the syllabus. "[I]f there is sufficient evidence on the issue of self-defense involving non-deadly force * * *, the trial court must instruct the jury on that defense." (Footnote deleted.) *State v. Griffin*, 2d Dist. No. 20681, 2005-Ohio-3698, ¶ 16, citing *State v. Ervin*, 75 Ohio App.3d 275, 279 (8th Dist.1991). *See also State v. Keith*, 10th Dist. No. 08AP-28, 2008-Ohio-6122, ¶ 21, citing *State v. Smith*, 10th Dist. No. 01AP-848, 2002-Ohio-1479, and *State v. Melchior*, 56 Ohio St.2d 15 (1978), paragraph one of the syllabus. R.C. 2901.01(A)(2) provides that deadly force is "any force that carries a substantial risk that it will proximately result in the death of any person." Pursuant to R.C. 2901.01(A)(8), a substantial risk is "a strong possibility, as contrasted with a remote or

significant possibility, that a certain result may occur or that certain circumstances may exist."

{¶12} To establish self-defense using deadly force, defendant must prove by a preponderance of the evidence: (1) he was not at fault in creating the situation giving rise to the altercation; (2) he had a bona fide belief that he was in imminent danger of bodily harm and his only means of escape from such danger was the use of force; and (3) he did not violate any duty to retreat or avoid the danger. *Barnes* at 24, citing *State v. Robbins*, 58 Ohio St.2d 74 (1979), paragraph two of the syllabus. In contrast, to establish self-defense using non-deadly force, defendant must prove by a preponderance of the evidence: (1) he was not at fault in creating the situation giving rise to the altercation; and (2) he had reasonable grounds to believe, and an honest belief, even though mistaken, that he was in imminent danger of bodily harm and his only means to protect himself from such danger was by the use of force not likely to cause death or great bodily harm. *State v. D.H.*, 169 Ohio App.3d 798, 2006-Ohio-6953 (10th Dist.), *aff'd*, 120 Ohio St.3d 540, 2009-Ohio-9, citing *State v. Hansen*, 4th Dist. No. 01CA15, 2002-Ohio-6135, ¶ 24, and *Griffin* at ¶ 18.

{¶13} The deadly force self-defense instruction thus is more difficult to establish, since the non-deadly force instruction requires only a reasonable belief that the application of force was necessary for protection and carries no duty to retreat. *State v. Vu*, 10th Dist. No. 09AP-606, 2010-Ohio-4019, ¶ 11, citing *Hansen* at ¶ 24. A defendant, however, cannot establish self-defense using non-deadly force if he or she uses force greater than that reasonably necessary to defend against the imminent use of unlawful force. *State v. McGowan*, 10th Dist. No. 08AP-55, 2008-Ohio-5894, ¶ 26, quoting *State v. Puckett*, 10th Dist. No. 06AP-330, 2006-Ohio-5696, ¶ 22. *See also Akron v. Dokes*, 31 Ohio App.3d 24, 25 (9th Dist.1986).

{¶14} Relying on *State v. Triplett*, 192 Ohio App.3d 600, 2011-Ohio-816 (8th Dist.), defendant contends the trial court committed plain error in failing to instruct on the use of non-deadly force even if death results from the force the defendant applied. In *Triplett*, the defendant was convicted of felonious assault for punching the victim a single time, causing the victim to fall, hit his head, and die. *Id.* at ¶ 1, 16. The appellate court found plain error because the trial court focused on the ultimate result of the act instead

of the nature of the force used: whether the force the defendant used presented a substantial risk of causing death. *Id*. at ¶ 12, 16.

{¶15} Contrary to defendant's contentions, the force he used is not comparable to a single punch. *See Triplett* at ¶ 16 (observing that "the facts of the case should dictate whether the nondeadly-force instruction is required"). Here, defendant struck Wilson with a deadly weapon on the side of his head, resulting in significant loss of blood, requiring 15 to 20 stitches to his ear, and causing permanent disfigurement. See R.C. 2923.11(A) (defining a deadly weapon to be "any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon"); *see also State v. Marshall*, 61 Ohio App.2d 84, 86 (10th Dist.1978) (noting "[a] gun may inflict death in two ways: (1) in the manner for which it was designed by firing a bullet; (2) by being used as a bludgeon").

{¶16} Where a weapon or instrument is used in the commission of a felonious assault, the court generally does not err in providing only an instruction on deadly force self-defense. *Vu* at ¶ 17-19. *See also State v. Ford*, 10th Dist. No. 88AP-503 (May 6, 1989) (determining trial court's deadly force self-defense instruction proper because defendant used a beer mug as a deadly weapon and with deadly force); *State v. Wagner*, 11th Dist. No. 99-L-043 (July 14, 2000) (concluding the deadly force self-defense instruction appropriate because "a broken wineglass, when used as a weapon toward someone's head, carries a substantial risk of death"); *State v. Allen*, 8th Dist. No. 76672 (Nov. 30, 2000) (deciding deadly force self-defense instruction proper where defendant struck victim in the mouth with an unknown object, requiring victim to receive eight stitches and a dental procedure); *State v. Kewer*, 9th Dist. No. 07CA009128, 2007-Ohio-7047, ¶ 7-9 (noting that "when a defendant has used a weapon to inflict serious harm on the victim, courts have found no error in denying an instruction on non-deadly force"); *State v. Robinson*, 4th Dist. No. 10CA6, 2010-Ohio-6579, ¶ 30. Because defendant's act of using a deadly weapon as a bludgeon carried a substantial risk of death, the trial court did not err in providing only the deadly force self-defense instruction.

{¶17} Accordingly, we overrule defendant's first assignment of error.

IV. Second and Third Assignments of Error—Ineffective Assistance of Trial Counsel

{¶18} Defendant's second and third assignments of error contend his trial counsel was ineffective because counsel failed to request a non-deadly force self-defense instruction and to argue self-defense in closing argument.

{¶19} In order to establish a claim of ineffective assistance of counsel, defendant is required to demonstrate: (1) performance of defense counsel was so deficient that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, and (2) defense counsel's errors prejudiced defendant, depriving him of a reliable result from the trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph two of the syllabus. An attorney's performance is ineffective if it falls below an objective standard of reasonable representation. *Bradley*, paragraph two of the syllabus. A defendant can prove prejudice only if "there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *Id.* at paragraph three of the syllabus. Unless defendant demonstrates both deficient performance and prejudice, he cannot establish that his conviction resulted from a breakdown in the adversary process that renders the result unreliable. *Strickland* at 687.

{¶20} "Judicial scrutiny of counsel's performance is to be highly deferential, and reviewing courts must refrain from second-guessing the strategic decisions of trial counsel." *State v. Carter*, 72 Ohio St.3d 545, 558. Further, "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, citing *State v. Thompson*, 33 Ohio St.3d 1, 10 (1987).

A. *Failure to Request Non-Deadly Force Self-Defense Instruction*

{¶21} Defendant's second assignment of error contends defense counsel's performance was deficient because he failed to request a non-deadly force self-defense instruction. This assertion merely " 'recasts one of [defendant's] substantive propositions of law into an ineffective-assistance claim.' " *State v. Petty*, 10th Dist. No. 11AP-716, 2012-Ohio-2989, ¶ 21, quoting *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶ 233. As noted, the trial court did not err in not instructing on non-deadly force self-defense. Defense counsel's performance thus was not ineffective in failing to request a non-deadly

force self-defense instruction that was not appropriately given. *See Hansen* at ¶ 42; *Petty* at ¶ 21 (observing that "[b]ecause the court correctly and adequately instructed the jury, defense counsel's failure to object does not render his assistance ineffective").

B. *Failure to Argue Self-Defense in Closing Argument*

{¶22} Defendant's third assignment of error contends he received ineffective assistance of counsel because defense counsel failed to argue self-defense in closing argument. Although counsel did not explicitly mention "self-defense" during closing argument, defendant does not demonstrate how, given the substance of counsel's argument, the omission fell below an objective standard of reasonable representation or resulted in prejudice.

{¶23} Both the State of Ohio and defense counsel raised the issue of self-defense. During direct examination, defense counsel asked defendant whether he was afraid of Wilson, to which defendant responded, "I was fearing what he would have did to me if he got the gun from me, yes, I was." (Tr. 359.) Defense counsel then asked defendant about his intention in striking Wilson, causing defendant to state he was afraid because Wilson was "charging" at him and, as a result, he "just swung [the weapon] defending myself. I never intended on hurting nobody that night." (Tr. 359-60.)

{¶24} In its closing argument, the state brought up the issue of self-defense, stating, "[T]here is an argument that we know is coming that the Defendant acted in self-defense, he is the true victim in this case, that he was out there and he was just trying to go home." (Tr. 395.) As the state noted, defendant testified "he had to when they got to the parking lot, he had no choice when he saw the group over by the car, he had to go over there, he had to get the gun out, and that he was assaulted, and he was so scared for his life he had no choice but to pistol-whip Richard Wilson." (Tr. 395.) The state argued, "He wants you to believe that he was acting in self-defense when he struck Richard Wilson." (Tr. 395.) The state then listed the elements of self-defense, stating that the jury would receive such elements in the court's jury instruction. (Tr. 395-96.)

{¶25} Despite defendant's contention that defense counsel's closing statement "utterly failed to address the elements of self-defense," counsel's argument in response to the state's comments included statements relating to elements of the defense. (Appellant's brief, at 21.) Counsel initially argued defendant's lack of culpability in creating the

altercation and his bona fide belief in Wilson's imminent use of unlawful force against him. Counsel next characterized defendant's actions as fearful and protective in response to Wilson's "run[ning] up aggressively" toward defendant. (Tr. 402.) Counsel also twice referred to Wilson's actions as an "attack[]" on defendant and stated defendant "never had any intent to * * * hurt anybody" but was "trying to * * * protect himself from being attacked by a 6'7", 6'8" gentleman who grabbed him about to do him bodily harm." (Tr. 405.) Defense counsel lastly argued defendant was attempting to leave the scene before the altercation began, stating defendant was "trying to get in [his] car, sends his girlfriend to the car * * * to try to pull the car up so he could leave." (Tr. 404.)

{¶26} Defendant points to no authority indicating an attorney's failure to specifically mention self-defense or to specifically delineate its elements is outside the scope of trial strategy. Even if we were to conclude that defense counsel entirely refrained from addressing self-defense during closing argument, the decision arguably remains one of trial strategy. *See State v. Burke*, 73 Ohio St.3d 399, 405 (1995) (concluding defense counsel's waiver of closing argument was not demonstrative of ineffective assistance of counsel without more, as it may have been a tactical decision); *State v. Dunlap*, 10th Dist. No. 03AP-481, 2003-Ohio-6830, ¶ 30; *State v. Farrah*, 10th Dist. No. 01AP-968 (Apr. 18, 2002). Absent deviation from the standard of reasonableness, we defer to defense counsel's judgment regarding matters of trial strategy. *State v. Hall*, 10th Dist. No. 04AP-1242, 2005-Ohio-5162, ¶ 40.

{¶27} Because defendant did not demonstrate that his trial counsel's performance fell below an objective standard of reasonable representation, or that but for counsel's alleged substandard performance the result of the trial would have been different, defendant failed to demonstrate trial counsel rendered ineffective assistance of counsel.

{¶28} Accordingly, we overrule defendant's second and third assignments of error.

V. Fourth Assignment of Error—Manifest Weight

{¶29} Defendant's fourth assignment of error asserts his conviction is against the manifest weight of the evidence because defendant established an affirmative defense of self-defense by a preponderance of the evidence.

{¶30} When presented with a manifest weight argument, we weigh the evidence in a manner to determine whether sufficient competent, credible evidence supports the

jury's verdict to permit reasonable minds to find guilt beyond a reasonable doubt. *State v. Conley*, 10th Dist. No. 93AP-387 (Dec. 16, 1993); *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997) (noting that "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a ' "thirteenth juror" ' and disagrees with the factfinder's resolution of the conflicting testimony"), quoting *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. The jury thus may take note of the inconsistencies and resolve them accordingly, "believ[ing] all, part, or none of a witness's testimony." *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶ 21, citing *State v. Antill*, 176 Ohio St. 61, 67 (1964).

{¶31} Defendant argues that the issue of self-defense was not fairly before the jury because the trial court gave the self-defense instruction to the jury out of order, the instruction contained surplus language, and the instruction did not cover non-deadly force self-defense. As noted in addressing the first assignment of error, the trial court did not err in instructing only on deadly force self-defense. Although the court read the self-defense instruction out of order, it nevertheless noted to the jury that it was out of order, informed the jury that the self-defense instruction pertained to the charge of felonious assault against Wilson, and provided a correctly written version of the instructions to the jurors. Nothing indicates the jury lost its way in considering the self-defense instruction.

{¶32} Defendant additionally argues the jury was entitled to consider prior threats against defendant in determining whether defendant acted in self-defense. Citing *State v. McLeod*, 82 Ohio App. 155 (9th Dist.1948), defendant contends the trial court committed prejudicial error in improperly excluding evidence of prior threats, as the jury properly could consider such evidence to determine whether a defendant had a good reason to apprehend danger to himself. *Id.* at 156-57. According to defendant, Green threatened defendant during the altercation on the dance floor and again before he exited the bar. Unlike *McLeod*, however, the testimony in question was not excluded but was before the jury when it determined the charges against defendant. Defendant thus essentially asserts that the jury should have drawn inferences in his favor and not in favor of the state.

{¶33} Such inferences are within the province of the trier of fact, and we will not substitute our judgment for the jury's, despite defendant's contention that the evidence suggests a different conclusion. *State v. Williams*, 190 Ohio App.3d 645, 2010-Ohio-5259, ¶ 21 (10th Dist.), citing *Raver* at ¶ 21, citing *DeHass* at paragraph one of the syllabus. Defendant's is not the exceptional case where the jury lost its way. Because competent, credible evidence supports the jury's verdict finding defendant guilty of felonious assault, we overrule defendant's fourth assignment of error.

VI. Disposition

{¶34} Having overruled defendant's four assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and McCORMAC, JJ., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under the authority of the Ohio Constitution, Article IV, Section 6(C).