[Cite as *State v. Powell*, 2009-Ohio-2822.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2007-L-187**
- vs -	:	
THOMAS POWELL,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 06 CR 000868.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Joshua S. Horacek,* Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Derek Cek, 2725 Abington Road, #102, Fairlawn, OH 44333 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Thomas Powell appeals from a judgment of the Lake County Court of Common Pleas convicting him of felonious assault and sentencing him to two years in prison in connection with a bar fight. On appeal, he claims his conviction is not supported by sufficient evidence and against the manifest weight of the evidence. He argues the trial court committed plain error in not instructing the jury on lesser offenses of aggravated assault and simple assault. He also complains his trial counsel failed to

provide effective assistance and the trial court's sentence is contrary to law. For the following reasons, we affirm.

{¶2} **Substantive and Procedural History**

{¶3} This criminal matter arose from a bar fight at the Scorcher's Bar in Eastlake, Ohio, on Thanksgiving eve in 2006. The state alleged that during the fight Mr. Powell struck John Bennett at the back of his head with a beer glass, causing a two-inch laceration which required eight sutures to close. Mr. Powell's friend, Robert Iuliani, also struck Mr. Powell on his back with a pool stick, for which Mr. Iuliani was charged in a separate case.

{¶4} Mr. Powell was indicted on May 4, 2007, of felonious assault in violation of R.C. 2903.11(A)(1), a felony of the second degree. At the jury trial held on August 28, 2007, the state presented five witnesses.

{¶5} The victim, Mr. Bennett, testified that on the evening of November 23, 2006, he went to the Scorcher's Bar to pick up his girlfriend, Alisha Mramor, a bartender there. While waiting for her to finish her shift, he played pool with Mr. Iuliani. After Ms. Mramor finished her shift, they stayed at the bar and played pool together.

{¶6} Mr. Powell, sitting at a bar chair nearby, began to heckle Ms. Mramor over her shots. The conflict escalated to the point where Mr. Powell swore at her and called her an obscene name. Mr. Bennett confronted Mr. Powell, asked him to apologize and attempted to end the confrontation by offering to shake his hand. Instead, Mr. Powell challenged Mr. Bennett to go outside and fight. Mr. Bennett refused, and, as he turned around and walked away, he felt an impact on the back of the head, which felt as if it was punched. Mr. Bennett grabbed his head and saw blood in his hand. He

immediately turned around and went after Mr. Powell, who was coming toward him at the same time.

{¶7} Mr. Bennett testified that they started to fight and both fell to the ground. Mr. Bennett was on top of Mr. Powell and they exchanged punches. Mr. Bennett was then hit across the shoulder blade with a pool stick from behind.

{¶8} After the fight was broken up, Mr. Powell ran out the front door. Mr. Bennett was completely covered in blood, as if "a pitcher of blood" was poured over his head. He asked a bartender to call an ambulance to take him to the hospital.

{¶9} The hospital staff cleaned and sutured his head wound. Mr. Bennett testified that "the nurse said she thought she seen [sic] glass particles when she washed it out with some kind of saline." He had a headache for a week afterwards and still has a scar from the injury, which has a "weird numb feeling." He testified that he is "100 percent positive" that his head laceration was not caused by the pool stick because he was not hit with a pool stick until he and Mr. Powell were down on the ground and his head was already bleeding.

{¶10} Alisha Mramor, Mr. Bennett's girlfriend and a bartender at the Scorcher's Bar, testified next. She testified that when she was playing pool, she and Mr. Powell exchanged obnoxious comments with each other. When he called her an obscene name, her boyfriend, Mr. Bennett, approached Mr. Powell and said "Please don't disrespect my girlfriend." Mr. Powell responded by saying: "Let's take this outside." Mr. Bennett said "I am not going to fight with you," and proceeded to walk away. As Ms. Mramor also started to walk away, she heard a "thud." When she turned around, she saw her boyfriend grab his head and said to Mr. Powell "I am going to kill you."

{¶11} She testified that she saw glass on the floor and Mr. Bennett's head gushing with blood, but she did not see what was employed to cause Mr. Powell's injury. She, however, saw Mr. Powell's friend, Mr. Iuliani, "whack" Mr. Bennett with a pool stick over his back when Mr. Bennett was on top of Mr. Powell while both were on the ground fighting.

{¶12} Nikki Tomino, also a bartender at Scorcher's and a friend of Ms. Mramor, was not working that night but was at the bar playing pool with Ms. Mramor. She testified she watched the entire confrontation. She heard Mr. Bennett say to Mr. Powell "don't disrespect my girlfriend." Upon hearing that, Mr. Powell asked Mr. Bennett if he wanted to take it outside. Mr. Bennett refused and turned around to walk away. She then saw Mr. Powell pick up a 23-ounce beer glass, which she described as "very, very thick *** [and] not just like a normal glass," and hit Mr. Bennett in the back of his head. She immediately saw him bleeding from the back of his head. She described it as a "blood bath." She then saw another individual "cracking" a pool stick over Mr. Bennett's back. Ms. Tomino called 911, and, when the police arrived, Mr. Powell ran out of the bar and down a street. She pointed him out to the officers as the assailant.

{¶13} When Ms. Tomino was asked why she was certain Mr. Bennett's head injury was not caused by the pool stick, she explained that "I saw the cut on his head and a pool stick would not do that, and he had the cut on his head before the pool stick was broke [sic] over his back."

{¶14} Officer Hurst testified that when she arrived at the scene of the incident, two officers already at the scene pointed out Mr. Powell to her, as he was running down the street. She chased after him in her patrol car and caught him in the back yard

behind a building as he was running through the woods. She described his demeanor as "belligerent" and "uncooperative."

{¶15} After taking Mr. Powell into custody, Officer Hurst returned to the bar to further investigate the incident. The owner of the bar came to her patrol car and identified Mr. Powell as the person who struck Mr. Bennett with a "glass bottle." She transported Mr. Powell to the hospital to treat the injury on his face sustained from the fight.

{¶16} At the hospital, where Mr. Bennett was also being treated, she took photographs of Mr. Bennett's injuries. Officer Hurst testified Mr. Bennett had a two-to-two-and-half inch laceration on the top of his head, which Mr. Bennett told her was caused by being struck with a bottle. Mr. Bennett also had a four-inch welt on his shoulder, which Mr. Bennett told her was from being struck with a pool stick.

{¶17} Officer Formick, the last witness for the state, testified that he surveyed the scene in the evening of the incident. He observed both blood and glass on the floor in the bar's game area. He also testified that another officer had recovered four pieces from a broken pool stick from the scene and turned them over to him.

{¶18} The defense offered a different account of what transpired that evening. It claimed Mr. Powell did not strike Mr. Bennett at all with any object; instead, the defense claimed Mr. Powell's injury was caused by Mr. Iuliani, who smashed Mr. Bennett over the head with a pool stick, which broke into four pieces. The defense presented one witness to support its account.

{¶19} Jamie Pickwick, a friend of Mr. Powell, was at the bar that evening with several of Mr. Powell's friends, including Mr. Iuliani. She testified that Ms. Mramor was

acting “cocky” toward Mr. Powell; the two exchanged nasty words; and Ms. Mramor said she was going to go get her boyfriend to “kick his ass.” Ms. Pickwick went to the bar owner to complain about Ms. Mramor. When she finished talking to the owner and turned around, she saw Mr. Powell and Mr. Bennett standing nose to nose arguing and then Mr. Bennett punching Mr. Powell in the face. Both of them ended up on the ground and Mr. Bennett was on top of Mr. Powell “beating the crap” out of him. At this point, Mr. Powell’s friend, Mr. Iuliani, “came from the opposite direction from where our table was [where] we were sitting by the front [,] and whacked [Mr. Bennett] *** with a pool stick.” She testified she did not see Mr. Powell throw any object at Mr. Bennett.

{¶20} Upon cross-examination, she admitted she never gave the police a statement of her eyewitness account. She also admitted she had been previously convicted of an offense relating to fraudulent credit card use.

{¶21} Following trial, the jury found Mr. Powell guilty of felonious assault. On September 11, 2007, he, through a different counsel from the county public defender’s office, filed a Motion for Acquittal [or] in the Alternative Motion for New Trial. Attached to the motion are affidavits obtained from Dr. Mandac, who treated Mr. Powell at the hospital that night, and Dr. Bligh-Glover, who was not involved in his treatment.

{¶22} Dr. Mandac’s affidavit stated he treated Mr. Bennett on November 24, 2006. He stated that he explored the wound and found no foreign body; the laceration on the rear of Mr. Bennett’s head appeared to be a blunt force trauma; and that it is “consistent with a blow from a beer bottle or a cue stick, or some other object.”

{¶23} Dr. Bligh-Glover’s affidavit stated that his review of the photographs of Powell’s injury shows that the wound was “due to blunt force trauma, not sharp force

trauma." He stated that "[t]he injury is consistent with, but not limited to an injury from a pool cue."

{¶24} The trial court denied the motion for a new trial. A day after, Mr. Powell filed a supplement to his motion, which consisted of the affidavit of Nurse Deana Munich, who stated that she was Mr. Bennett's treating nurse on the evening of November 24, 2006. She stated she did not do anything to clean the wound and did not believe anyone else in the emergency room touched or cleaned the wound other than Dr. Mandac. She also stated she did not remember seeing any glass in the wound.

{¶25} On October 16, 2007, Mr. Powell was sentenced to two years in prison. On November 7, 2007, Mr. Powell filed the instant appeal, challenging his conviction and sentence. His motion to stay the execution of his sentence during the pendency of his appeal was denied by this court.

{¶26} Mr. Powell now appeals, assigning the following assignments of error:

{¶27} "[1.] The trial court's decision finding appellant guilty beyond a reasonable doubt is not supported by sufficient evidence.

{¶28} "[2.] The trial court's decision finding appellant guilty beyond a reasonable doubt is against the manifest weight of the evidence.

{¶29} "[3.] The trial court committed plain error by failing to give jury instructions on aggravated assault and simple assault.

{¶30} "[4.] Appellant was denied the right to counsel by ineffective assistance of his trial counsel.

{¶31} "[5.] The trial court's sentence was contrary to law."

{¶32} **Sufficiency of Evidence**

{¶33} When reviewing a challenge as to the sufficiency of the evidence, a reviewing court examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. "[T]he pertinent inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id.

{¶34} This question involves a question of law and does not permit us to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175. "'Sufficiency' is a term of art meaning the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Thompkins*, 78 Ohio St.3d 380, 286.

{¶35} Mr. Powell was convicted of felonious assault in violation of R.C. 2903.11(A)(1), which states that "[n]o person shall knowingly *** [c]ause serious physical harm to another. ***"

{¶36} Mr. Powell argues that the state did not present sufficient evidence to prove (1) he was the individual that caused the injury on the victim's head; (2) the victim sustained serious physical harm; or (3) he knowingly caused serious physical harm to the victim.

{¶37} Regarding his first claim, the state presented an eyewitness account by Ms. Tomino. She testified when Mr. Bennett turned around and walked away from Mr. Powell after refusing to go outside and fight, she saw Mr. Powell pick up a beer glass and throw it at the back of Mr. Bennett's head. Mr. Bennett testified that as he walked

away from Mr. Powell, he felt an impact on the back of his head, as if it was punched, and blood gushed from the area immediately.

{¶38} Ms. Mramor also testified that as she walked away with Mr. Bennett from Mr. Powell, she heard a "thud" and, when she turned around, she saw Mr. Bennett grab his head and go after Mr. Powell, saying "I am going to kill you." She testified that she saw glass on the floor and Mr. Bennett bleeding profusely.

{¶39} When assessing the sufficiency of the evidence, the reviewing court does not weigh the credibility of the witnesses and instead looks at the evidence in the light most favorable to the prosecution. *State v. Feliciano* (1996), 115 Ohio App.3d 646, 652. Applying the proper standard to the evidence the state presented in this case, we conclude sufficient evidence existed to show the identity of the individual who caused the injury in the back of the victim's head.

{¶40} As to Mr. Powell's contention that the victim did not sustain serious physical harm, R.C. 2901.01(A)(5) defines "serious physical harm" as, in pertinent part:

{¶41} "(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

{¶42} "(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

{¶43} "(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain."

{¶44} Here, the state's evidence of serious physical harm includes Ms. Tomino's testimony that Mr. Powell threw a "very thick" 23-ounce beer glass at the back of the

victim's head; photographs taken at the emergency room showing a very sizable gash on the back of the victim's head requiring eight sutures; and the victim's testimony that he had a headache for a week afterwards and still has a scar, which has a "weird numb feeling."

{¶45} We find the state produced sufficient evidence upon which the jury could find that Mr. Powell caused serious harm to the victim with the meaning of R.C. 2901.01(A)(5). See, e.g., *State v. Henricks*, 6th Dist. No. WD-05-051, 2006-Ohio-6181 (sufficient evidence existed to prove the element of serious physical harm where the victim suffered a small laceration to the back of her head when her husband struck her in the head with a skillet, and she suffered severe headaches and disorientation after the injury). See, also, *State v. Whittsette*, 8th Dist. No. 85478, 2005-Ohio-4824, ¶20 (the court surveyed cases where sufficient evidence existed to show serious physical harm).

{¶46} Finally, Mr. Powell argues even if the state presented sufficient evidence to prove he was the assailant and that Mr. Bennett sustained serious physical harm, the state failed to show he knew his conduct would cause serious harm to Mr. Bennett.

{¶47} The felonious assault statute, R.C. 2903.11(A)(1), prohibits a person from "knowingly" causing serious physical harm to another. R.C. 2901.22(B) defines "knowingly" as follows:

{¶48} "(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶49} Mr. Powell argues that the state did not demonstrate that it was his "purpose" to cause serious physical harm. He misreads the statute, because the mental state of "knowingly" does not require the offender to have the specific intent to cause a certain *result* -- that is the mental state of "purposely" as defined by R.C. 2901.22(A) ("A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature"). *State v. Huff* (2001), 145 Ohio App.3d 555, 563.

{¶50} "Instead, whether a person acts knowingly can only be determined, absent a defendant's admission, from all the surrounding facts and circumstances, including the doing of the act itself." Id. (citation omitted). "Because the intent of an accused person is only in his mind and is not ascertainable by another, it *** must be determined from the surrounding facts and circumstances." Id., quoting *State v. Adams* (1995), 4th Dist. No. App. 94CA2041, 1995 Ohio App. LEXIS 1924.

{¶51} "The test for whether a defendant acted knowingly is a subjective one, but it is decided on objective criteria. *** However, if a given result is *probable*, a person will be held to have acted knowingly to achieve it because one is charged by the law with knowledge of the reasonable and probable consequences of his own acts." (Emphasis added.) *State v. Dixon*, 8th Dist. No. 82951, 2004-Ohio-2406, ¶16, quoting *State v. McDaniel* (May 1, 1998), 2d Dist. No. 16221, 1998 Ohio App. LEXIS 2039.

{¶52} Here, the jury viewed the photographs of the victim's injury, which showed a deep two-inch laceration in the back of his head. Furthermore, the victim and another witness testified that the head wound immediately gushed with blood. A witness

testified that Mr. Powell picked up a 23-ounce beer glass, “which is very, very thick” and “not just like a normal glass,” and threw it at the back of the victim’s head, after he challenged the victim to fight outside without success. To act “knowingly”, Mr. Powell need not have intended to cause the result. Rather, for the law to hold him to have acted “knowingly,” it is only necessary that the serious physical harm is a “reasonable and probable” result of his action. *Dixon* at ¶16. Therefore, if the testimony presented by the state is believed by the jury, the jury could find Mr. Powell knowingly caused serious physical harm by throwing a thick beer glass at the back of the victim’s head.

{¶53} Viewing the evidence in a light most favorable to the prosecution, we conclude a rational trier of fact could have found that the essential elements of felonious assault were proven beyond a reasonable doubt.

{¶54} **Manifest Weight**

{¶55} Mr. Powell argues next that his conviction is against the manifest weight of the evidence.

{¶56} “Unlike sufficiency of the evidence, manifest weight of the evidence raises a factual issue. ‘The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.’” *State v. Higgins*, 11th Dist. No. 2005-L-215, 2006-Ohio-5372, ¶35, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶57} The reviewing court must defer to the actual findings of the trier of fact as to the weight to be given the evidence and the credibility of the witnesses. This is because in assessing the witnesses' credibility, the trier of fact had the opportunity to observe the witnesses' demeanor, body language, and voice inflections. *State v. Miller* (Sept. 2, 1993), 8th Dist. No. 63431, 1993 Ohio App. LEXIS 4240, *5-6. Thus, the trier of fact is in a much better position to evaluate the credibility of witnesses than a reviewing court. Id. at *6. Furthermore, a factfinder is free to believe all, some, or none of the testimony of each witness appearing before it. *State v. Thomas*, 11th Dist. No. 2004-L-176, 2005-Ohio-6570, ¶29. Finally, "[t]he discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Fritts*, 11th Dist. No. 2003-L-026, 2004-Ohio-3690, ¶23, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶58} In this case, the state presented an eyewitness, Ms. Tomino, a bar employee and a friend of the victim's girlfriend, who testified she saw Mr. Powell pick up a "very thick" 23-ounce beer glass and hit the victim at the back of his head and saw profuse bleeding from the wound. The state also presented circumstantial evidence consisting of the victim's testimony that he felt an impact on the back of his head as he was walking away from Mr. Powell after refusing to fight, and that he turned around and saw Mr. Powell coming toward him. For the defense, Ms. Pickwick, a friend of Mr. Powell, testified she did not see him throw any object at Mr. Bennett, although she saw Mr. Iuliani hit Mr. Bennett with a pool stick during the scuffle.

{¶59} A conviction is not against the manifest weight of the evidence merely because there is conflicting evidence before the trier of fact. *State v. Urbin*, 148 Ohio

App.3d 293, 2002-Ohio-3410, ¶26. In finding Mr. Powell was the individual who threw an object at the victim causing the injury on his head, the jury weighed the conflicting evidence and assessed the credibility of the witnesses, and we will defer to the jury for that assessment.

{¶60} As to whether the victim sustained serious physical harm, the state's evidence consisted of the photographs of the victim taken at the hospital depicting a two-inch laceration at the back of his head and the victim's testimony that he suffered headaches and a scar which continued to have a "weird numb feeling." The transcript also reflected the trial court had properly instructed the jury on the statutory definition of "serious physical harm." Consequently, we will not disturb the jury's finding that the victim suffered serious physical harm from the incident. See, e.g., *State v. Brown*, 9th Dist. No. 04CA008510, 2005-Ohio-2141, ¶16 (the manifest weight of the evidence shows serious physical injury where the defendant quickly walked towards his victim and hit him in the head with a handgun, causing a wide cut in the victim's head, which bled profusely). Our review indicates this case is not one of the exceptional cases in which the evidence weighs heavily against the conviction, and therefore, we refuse to exercise our discretionary power to grant a new trial. Mr. Powell's second assignment of error is overruled.

{¶61} **Whether Instructions on Lesser Offenses Were Warranted**

{¶62} In his third assignment of error, Mr. Powell argues the trial court erred in failing to instruct the jury on aggravated assault and simple assault. As his counsel did not object to the trial court's instructions on felonious assault only, he argues the trial court committed plain error.

{¶63} A trial court "must give all instructions that are relevant and necessary for the jury to weigh the evidence and discharge its duty as the factfinder." *State v. Cornwell* (1999), 86 Ohio St.3d 560, 567, quoting *State v. Joy* (1995), 74 Ohio St.3d 178, 181.

{¶64} Here, the record reflects Mr. Powell's counsel neither requested instructions on the lesser offense of aggravated assault or simple assault, nor objected to the court's instruction on felonious assault only. A defendant's failure to request a jury instruction at trial waives all error but plain error. See *State v. Goodwin*, 84 Ohio St.3d 331, 347. An alleged error constitutes plain error only if the error is obvious and, but for the error, the outcome of the trial clearly would have been different. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶108. Crim.R. 52(B) provides that the court may consider errors affecting substantial rights even though they were not brought to the attention of the trial court. "Plain error is an obvious error *** that affects a substantial right." *Yarbrough* at ¶108.

{¶65} "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." *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus.

{¶66} Regarding when a jury should be instructed on lesser offenses, in *State v. Deem* (1988), 40 Ohio St.3d 205, the court stated:

{¶67} "Pursuant to R.C. 2945.74 and Crim.R. 31(C), a jury may consider three groups of lesser offenses on which, *when supported by the evidence at trial*, it must be charged and on which it may reach a verdict: (1) attempts to commit the crime charged,

if such an attempt is an offense at law; (2) inferior degrees of the indicted offense; or (3) lesser included offenses." (Emphasis added.) Id. at paragraph one of syllabus.

{¶68} We consider first Mr. Powell's claim that the trial court committed plain error in not instructing the jury on aggravated assault, defined in R.C. 2903.12 as follows:

{¶69} "(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:

{¶70} "(1) Cause serious physical harm to another ***."

{¶71} In *Deem*, the court was confronted with the identical issue of whether a defendant indicted of felonious assault was entitled to jury instructions on aggravated assault. In resolving the issue, the court first determined that "as statutorily defined, the offense of aggravated assault is an inferior degree of the indicted offense -- felonious assault -- since its elements are identical to those of felonious assault, except for the additional mitigating element of serious provocation." Id. at 210-211.

{¶72} "Thus, in a trial for felonious assault, where the defendant presents sufficient evidence of serious provocation (such that a jury could both reasonably acquit defendant of felonious assault and convict defendant of aggravated assault), an instruction on aggravated assault (as a different degree of felonious assault) *must* be given." (Emphasis original.) Id. at 211.

{¶73} The court in *Deem*, however, concluded that the defendant there did not present sufficient evidence of provocation to warrant an instruction on aggravated assault. Id. The court stressed that:

{¶74} "Provocation, to be serious, must be reasonably sufficient to bring on extreme stress and the provocation must be reasonably sufficient to incite or to arouse the defendant into using deadly force. In determining whether the provocation was reasonably sufficient to incite the defendant into using deadly force, the court must consider the emotional and mental state of the defendant and the conditions and circumstances that surrounded him at the time." Id. at 211, quoting *State v. Mabry* (1982), 5 Ohio App.3d 13, paragraph five of the syllabus.

{¶75} Here, we first note that Mr. Powell's position on appeal, that the trial court should have instructed the jury on aggravated assault because he presented evidence of provocation, is inconsistent with his claim at trial that he did not strike the victim with any object.

{¶76} Furthermore, the only evidence of provocation he claims to have introduced at trial consists of Ms. Pickwick's testimony that she saw the victim punch Mr. Powell's face first. However, the transcript reveals that she also testified that, immediately prior to witnessing the victim punching Mr. Powell in the face, she had turned around, with her back to Mr. Powell, and approached the bar owner about the victim's girlfriend's behavior. By her own account, therefore, she did not witness the entire altercation. Thus, her testimony, even if believed by the jury, does not unequivocally establish that the victim struck Mr. Powell first. Rather, this testimony is not inconsistent with testimony presented by the state that Mr. Powell initiated the

altercation by throwing the beer glass at the victim, who then turned around and went after Mr. Powell, saying "I am going to kill you." Therefore, Ms. Pickwick's testimony that she saw the victim strike Mr. Powell first does not constitute sufficient evidence of provocation warranting a jury instruction on aggravated assault. The trial court did not commit an error in not charging the jury on this lesser offense.

{¶77} We next consider whether an instruction on simple assault is warranted. R.C. 2903.13 defines assault as follows:

{¶78} "(A) No person shall knowingly cause or attempt to cause physical harm to another ***.

{¶79} "(B) No person shall recklessly cause serious physical harm to another ****."

{¶80} Assault pursuant to R.C. 2903.13(A) and (B) is a lesser-included offense of felonious assault as defined in R.C. 2903.11(A)(1). *State v. Hartman* (1998), 130 Ohio App.3d 645, 646-647; *State v. Vera*, 8th Dist. No. 79367, 2002-Ohio-974, ¶6; *State v. Hunter*, 2d Dist. No. 2004CA5, 2005-Ohio-443.

{¶81} "[A]n instruction is not warranted every time any evidence is presented on a lesser included offense. There must be 'sufficient evidence' to 'allow a jury to reasonably reject the greater offense and find the defendant guilty on a lesser included (or inferior-degree) offense.'" *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, citing *State v. Shane*, 63 Ohio St.3d 630, 632-633.

{¶82} This court has specifically recognized that although simple assault is a lesser included offense of felonious assault, an instruction is only required if the evidence presented at trial "would reasonably support both an acquittal on the crime

charged and a conviction on the lesser included offense." *State v. Gunther*, 125 Ohio App.3d 226, 240, citing *State v. Thomas* (1988), 40 Ohio St.3d 213, paragraph two of the syllabus. See, also, *State v. Calabrese* (1996), Lake App. No. 95-L-054, 1996 Ohio App. LEXIS 416, *9.

{¶83} Consequently, for a jury instruction on simple assault to be warranted in this case, there must have been sufficient evidence to allow the jury to reasonably reject felonious assault and to find Mr. Powell guilty of simple assault defined in either R.C. R.C. 2903.13(A) or (B), i.e., that the victim's injury was serious, or that he did not knowingly cause the injury by throwing the beer glass at the back of the victim's head.

{¶84} The evidence in this case, including direct and circumstantial evidence, showed Mr. Powell threw a very thick beer glass at the back of the victim's head from a few steps away, shattering the glass and causing a two-inch laceration on the back of the victim's head, which required eight sutures to close. Viewing the totality of the evidence presented at trial, we conclude the jury could not have reasonably found the harm was not serious, as statutorily defined, or that he acted merely recklessly. Accordingly, the court did not error in failing to instruct the jury on the lesser included offenses. In any event, Mr. Powell fails to demonstrate that, but for the alleged failure, the outcome of the trial clearly would have been different. We overrule the third assignment of error.

{¶85} **Ineffective Assistance of Counsel**

{¶86} In his the fourth assignment of error, Mr. Powell complains that he was denied effective assistance of counsel because his trial counsel failed to (1) request proper jury instructions; (2) introduce available expert testimony or object to improper

questions of the witnesses by the state; and (3) object to the prosecutor's improper statements in closing argument.

{¶87} To establish his claim that his counsel provided ineffective assistance, Mr. Powell must demonstrate (1) his counsel was deficient in some aspect of his representation, and (2) there is a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *Strickland v. Washington* (1984), 466 U.S. 668.

{¶88} A threshold issue in a claim of ineffective assistance of counsel is whether there was actual error on the part of appellant's trial counsel. *State v. McCaleb*, 11th Dist. No. 2002-L-157, 2004-Ohio-5940, ¶92. In Ohio, every properly licensed attorney is presumed to be competent and therefore a defendant bears the burden of proof. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. To overcome this presumption, a defendant must demonstrate that "the actions of his attorney did not fall within a range of reasonable assistance." See *State v. Henderson*, 11th Dist. No. 2001-T-0047, 2002-Ohio-6715, ¶14. Counsel's performance will not be deemed ineffective unless and until the performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. *State v. Iacona* (2001), 93 Ohio St.3d 83, 105.

{¶89} Furthermore, decisions on strategy and trial tactics are generally granted a wide latitude of professional judgment and it is not the duty of a reviewing court to analyze the trial counsel's legal tactics and maneuvers. *State v. Gau*, 11th Dist. No. 2005-A-0082, 2006-Ohio-6531, ¶35, citing *Strickland* at 689. Generally, debatable trial

tactics and strategies do not constitute ineffective assistance of counsel. *State v. Philips* (1995), 74 Ohio St.3d 72, 85.

{¶90} Regarding the trial counsel's decision to neither request instructions on the lesser offenses nor object to the court's instruction on felonious assault only, we note that the defense's theory at trial was that Mr. Powell did not strike the victim with any object at all during the altercation. Therefore, it would appear his counsel's decision not to request instructions on the lesser offenses was part of the trial strategy, and we refuse to use hindsight to second-guess a trial strategy that backfired. *State v. Mason* (1998), 82 Ohio St.3d 144, 157.

{¶91} The second of Mr. Powell's three complaints regarding his trial counsel's performance concerns the failure to present expert testimony to support his claim that the laceration on the victim's head was caused not by a beer glass but by the pool stick wielded by Mr. Iuliani. He refers us to the affidavits of two physicians attached to his motion for a new trial. He claims the expert testimony would have shown that the victim's injury was caused by a pool stick, not a beer glass.

{¶92} Our review of the affidavits indicates that the experts' opinions are inconclusive as to the cause of the injury. Dr. Bligh-Glover's affidavit states that the injury was "consistent with, but not limited to an injury from a pool cue"; Dr. Mandac's affidavit states that "the laceration on the rear of Mr. Bennett's head appears to be a blunt force trauma. It is consistent with a blow from a beer bottle or a cue stick, or some other object." Mr. Powell's trial counsel may well have determined that presenting the expert testimony in this case was not a wise use of limited resources and time, which would appear to be a reasonable tactical decision.

{¶93} Mr. Powell also complains his counsel should have objected when the state asked the victim the question of whether the hospital staff found any foreign objects in his wound. To this question the victim answered: "the nurse said she thought she seen [sic] glass particles when she washed it out with some kind of saline." We note that the medical records admitted as trial exhibits indicate "no foreign body identified" in the wound by the medical staff. Indeed, the defense counsel referenced this testimony in his closing argument, reminding the jury of the apparent inconsistency of the testimony and the medical records. Therefore, the lack of objection by the trial counsel to this testimony appears to have been a legitimate strategy to raise doubt about the victim's honesty, veracity, or recollection.

{¶94} Finally, Mr. Powell complains his counsel should have also objected when the prosecutor asked the eyewitness, Ms. Tomino, whether the victim's injury could have been caused by a pool stick. He claims the prosecutor was asking a lay witness to provide "expert testimony."

{¶95} Our review of the transcript shows that the prosecutor asked the witness if the pool stick could have caused the injury on Mr. Bennett's head, and she answered it was "absolutely impossible" because "I saw the cut on his head and a pool stick would not do that, *and he had the cut on his head before the pool stick was broke [sic] over his back.*" (Emphasis added.) The witness explained it was impossible for the pool stick to have caused the cut because she saw the cut *before* witnessing Mr. Iuliani hit the victim with the stick. Her comment that a pool stick would not cause the kind of injury sustained by the victim may be improper, standing alone. However, the defense counsel's failure to object is not prejudicial in light of the entirety of her testimony.

{¶96} Finally, Mr. Powell argues his trial counsel was ineffective in failing to object to the prosecutor's remark during the closing argument which questioned the credibility of the defense's only witness, Ms. Pickwick.

{¶97} The witness testified that she never gave the police a statement regarding the incident and that she offered to testify for Mr. Powell when she found out he was charged in connection with the incident. Referring to this testimony, the prosecutor commented: "What really happened? She has a conversation with the Defendant a few days after [she found out he was charged], [and] says, wow, you're really in a bind. I'll come try to get you out of it, I'll come testify. Keep me in mind when it comes time for trial, I submit to you, I'll make something up. I'll try to get you out of it. That's exactly what she did."

{¶98} The prosecution is entitled to a certain degree of latitude in its argument. *State v. Woodards* (1966), 6 Ohio St.2d 14. However, an attorney may not express his or her belief or opinion regarding the credibility of a witness. *State v. Jackson* (2001), 92 Ohio St.3d 436.

{¶99} This court has recognized that "a prosecutor should avoid expressing her personal belief as to the credibility of a witness. However, 'it is not improper for a prosecutor to comment upon the evidence in [her] closing argument and to state the appropriate conclusions to be drawn therefrom.'" *State v. Bentley*, 11th Dist. No. 2005-A-0026, 2006-Ohio-2503, ¶95 (internal citations omitted). "A prosecutor may comment fairly on a witness' credibility based upon his or her in-court testimony." Id.

{¶100} In this case, the prosecutor's attack on the credibility of the defense's witness was based on her admission that she never went to the authorities to provide a

witness statement and that the first time she gave an account of the event was at trial. We find the prosecutor's suggestion that she fabricated her testimony to help her friend goes beyond fair comment on the evidence and verges on the impermissible expression of personal belief as to the witness's credibility.

{¶101} However, this court has stated that where a prosecutor's comments during closing may be improper, "[d]eclining to interrupt the prosecutor's argument with objections, or failing to object *** [is] not deficient performance." *State v. Rodgers*, 11th Dist. No. 2007-T-0003, 2008-Ohio-2757, ¶86, citing *State v. Keene* (1998), 81 Ohio St.3d 646, 668; *State v. McNeill* (1998), 83 Ohio St.3d 438, 450 ("an attorney may reasonably elect not to interrupt opposing counsel's argument"). Therefore, even though these statements by the prosecutor may have gone beyond a fair comment on the witness's testimony, Mr. Powell's counsel was not ineffective for deciding not to object to them. In any event, given the totality of the evidence in this case, we cannot conclude there is a reasonable probability that, but for counsel's failure to object, the result of the trial would have been different. The fourth assignment of error is without merit.

{¶102} **Sentence**

{¶103} In his fifth assignment of error, Mr. Powell asserts that the trial court's imposition of a two-year prison term is contrary to law because it should have imposed community control sanctions on him instead.

{¶104} R.C. 2953.08(G)(2) provides that:

{¶105} "*** The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

{¶106} "(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (D)(2)(e) or (E)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

{¶107} "(b) That the sentence is otherwise contrary to law."

{¶108} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, the Supreme Court of Ohio clarified the confusion in appellate standard of review in sentencing matters after the *Foster* decision and provided the proper standard of review for felony sentencing. It held:

{¶109} "In applying *Foster* to the existing statutes, appellate courts must apply a two-step approach. First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard." Id. at ¶4.

{¶110} The first prong of the analysis provided by *Kalish* instructs that "the appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence. As a purely legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G)." Id. at ¶14.

{¶111} The Supreme Court of Ohio explained that the applicable statutes to be applied by a trial court include the felony sentencing statutes R.C. 2929.11 and R.C. 2929.12, which are not factfinding statutes like R.C. 2929.14. Id. at ¶17. Therefore, as part of its analysis of whether the sentence is "clearly and convincingly contrary to law,"

an appellate court must ensure that the trial court considered the purposes and principles of R.C. 2929.11 and the factors listed in R.C. 2929.12.

{¶112} Applying the first prong of the analysis, the court in *Kalish* concluded that the trial court's sentence in that case was "not clearly and convincingly contrary to law," because the trial court expressly stated that it considered the purposes and principles of R.C. 2929.11 as well as the factors listed in R.C. 2929.12; it properly applied post release control; and the sentence was within the permissible range. Id. at ¶18.

{¶113} After the first prong is satisfied, that is, the sentence is not "clearly and convincingly contrary to law," the appellate court must then engage in the second prong of the analysis, which requires an appellate court to determine whether the trial court abused its discretion in selecting a sentence within the permissible statutory range. Id. at ¶17.

{¶114} Here, Mr. Powell complains that his sentence is contrary to law, and therefore we review it only under the first prong of the *Kalish* analysis, applying the clear and convincing standard.

{¶115} The transcript of the sentencing hearing reflects that prior to sentencing him, the court stated that it has considered the purposes and principles of felony sentencing set forth in R.C. 2929.11, as well as the statutory factors relating to the seriousness and recidivism. It also stated that it has considered the entire record, including the presentence investigation report. It noted the defendant had a prior felony conviction for breaking and entering in 1998 and had served a prison term for the conviction. Because of his prior conviction of a second degree felony, there was a presumption in favor of a prison term. The court stated that the presumption was not

overcome in this case, that a prison term was consistent with the purposes and principles set forth in R.C. 2929.11, and that Mr. Powell was not amenable to community control. The court pointed out that the defendant caused serious physical harm to the victim by using a glass that became a deadly weapon due to the manner in which it was utilized against the victim. The court also pointed out that alcohol abuse contributed to Mr. Powell's commission of the offense.

{¶116} The record reflects that the court considered the requisite statutes and sentenced Mr. Powell to two years of prison term, within the permissible statutory range. Therefore, its sentence is not "clearly and convincingly contrary to law." Mr. Powell's fifth assignment of error is without merit.

{¶117} The judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

{¶118} I respectfully dissent from the majority. My dissenting opinion in Case No. 2008-L-116 confirms my position that the errors occurred during the proceeding, and were the results of ineffective assistance of counsel pursuant to the two prong analysis in *Strickland* at 687, as asserted in appellant's fourth assignment of error.

{¶119} I respectfully dissent.