[Cite as *State v. Kelly*, 2012-Ohio-523.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-P-0049**
- vs -	:	
RONALD G. KELLY,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2009 CR 0689.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Margaret E. Amer, Robey & Robey, 14402 Granger Road, Cleveland, OH 44137 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Ronald G. Kelly, appeals from the judgment of conviction entered by the Portage County Court of Common Pleas, after trial by jury, on one count of felonious assault, one count of felony murder, and one count of assault. For the reasons that follow, we affirm.

{¶2} On the early morning of November 15, 2009, appellant left a fraternity party at Kent State University at around 2:00 a.m. with his friends, Adrian Barker and Glenn Jefferson. The trio got into Jefferson's white Honda Civic. At approximately the

same time, four Kent State students—Christopher Kernich, Bradley Chelko, Dave Clements, and Christopher Pataky—were on their way home after an evening of drinking and socializing. As Jefferson's car was beginning to exit the lot, Kernich, Chelko, Clements, and Pataky were passing the parking lot on foot. Testimony indicated that Jefferson's Honda left the lot quickly and nearly hit one of the walkers as it exited. The near-miss prompted a member of the group to shout some "unfriendly" words at the car as it pulled out onto the street. As a result of the group's exclamation, Jefferson pulled the car over and parked in a lot further up the street.

{¶3} In the meantime, Kernich, Chelko, Clements, and Pataky continued walking in the direction of the parked vehicle. As the group passed Jefferson's parked car, appellant and Barker exited the vehicle. Appellant shoved Chelko into the Honda's rear bumper then punched him in the face, knocking him to the ground.

{¶4} The state presented multiple witnesses who testified that, after appellant knocked Chelko down, he then "squared off" with Kernich. As appellant and Kernich "danced" in the street, each in a fighting posture, there was testimony that Barker, running at a full sprint, blindsided Kernich with a punch to the head. It appeared Kernich collapsed to the ground unconscious, cracking his head on the pavement. Witnesses testified that appellant and Barker then commenced kicking and stomping the defenseless Kernich in the head. Kernich passed away as a result of injuries he sustained from the attack.

{¶5} Conversely, appellant testified that he and Chelko were brawling in the street, with Chelko making continued efforts to tackle him. Once the fight with Chelko ended, appellant testified he turned around only to find Kernich on the ground, the

apparent victim of Barker's fury. Appellant asked Barker why he stomped Kernich, to which Barker did not respond. Appellant testified he never stomped or kicked Kernich.

{¶6} After the dire consequences of the attacks became clear, Jefferson went to retrieve his vehicle and ripped off its temporary tags to avoid identification. Jefferson picked up appellant and the duo drove to where Barker was situated, surrounded by concerned civilians attempting to detain him. Appellant exited the vehicle in an effort to reason with the angry crowd and collect his friend. Very quickly thereafter, the police arrived and bystanders pointed out appellant and Barker, who were detained and eventually arrested. Kernich was quickly transported to the trauma center at Akron City Hospital where, several days later, he was pronounced dead.

{¶7} On November 19, 2009, the Portage County Grand Jury indicted appellant for felonious assault, a felony of the second degree, in violation of R.C. 2903.11(A)(1). After Kernich was pronounced dead, the grand jury filed a supplemental indictment charging appellant with two counts of murder in violation of R.C. 2903.02(A) and (B). Three additional misdemeanor assault charges were included in a supplemental indictment, alleging assault on Chelko and Clements, both injured in the large street fight, and one Stephen Manyo, whose purported assault took place prior to the large street fight. The Manyo assault case was subsequently severed and ordered to be tried separately. On March 5, 2010, the grand jury filed an amended supplemental indictment to reflect the certified date of Kernich's death.

{¶8} The matter proceeded to trial where a jury returned a guilty verdict on the felonious assault and felony murder of Kernich, as well as the assault on Chelko. The jury acquitted appellant on purposeful murder and the separate assault on Clements.

The trial court concluded that the felony murder and felonious assault were allied offenses of similar import. The state elected sentencing to be on the felony murder conviction. The trial court sentenced appellant to 15 years to life in prison for the murder of Kernich and a concurrent term of six months in jail for the Chelko assault.

{¶9} Appellant now appeals and files seven assignments of error.

Jury Instructions

{¶10} Appellant's first assignment of error states:

{¶11} "The appellant was denied his rights to due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments when the court committed plain, prejudicial error by charging the jury on negligence as part of the instructions for felonious assault, murder and felony-murder."

{¶12} Appellant contends he was denied a fair trial when the trial court instructed the jury on the test for foreseeability as part of the felonious assault, murder, and felony murder instructions. Felonious assault and, in this case, felony murder, require a defendant to act knowingly; murder requires purposeful action. Appellant argues, however, that the instructions on the test for foreseeability allowed the jury to find him guilty of felony murder for mere negligence. Stated differently, appellant contends the instruction allowed the jury to find him guilty without the requisite mens rea for felony murder. The instruction on felony murder (count three) given to the jury provides, in relevant part:

{¶13} "Before you can find Ronald Kelly guilty of Felony Murder you must find beyond a reasonable doubt that on or about the 21st day of November, 2009, and in

Portage County, Ohio, Ronald Kelly caused the death of Christopher Kernich as a proximate result of committing Felonious Assault.

{¶14} "The State charges that Ronald Kelly caused the death of Christopher Kernich. Cause is an essential element of the offense. Cause is an act which in a natural and continuous sequence directly produces the death of Christopher Kernich and without which it would not have occurred. * * * *The test for foreseeability is not whether a person should have foreseen the injury exactly as it happened to the specific person*. *The test is whether under all the circumstances a reasonable careful person would have anticipated that an act or failure to act would likely cause some injury*." (Emphasis added.)

{¶15} An appellate court reviews a trial court's decision to give the jury a particular set of instructions under an abuse of discretion standard. *State v. Martens*, 90 Ohio App.3d 338, 343 (1993). If, however, the jury instructions incorrectly state the law, then an appellate court will conduct a de novo review to determine whether the incorrect jury instruction probably misled the jury in a manner materially affecting the complaining party's substantial rights. *State v. Kovacic*, 11th Dist. No. 2010-L-018, 2010-Ohio-5663, ¶ 17.

{¶16} Appellant relies on the Eighth Appellate District's holding in *State v. Jacks*, 63 Ohio App.3d 200, 203 (1989), where the court reversed a defendant's murder conviction due to the trial court's instruction on the meaning of "foreseeability." Even though the jury was also instructed on the definition of "purposefully," the court was unable to conclude that, beyond a reasonable doubt, the "instruction did not lead the jury to find the defendant guilty of murder based upon a lesser mens rea." *Id*. at 205.

{¶17} Initially, we must note this is not a model instruction—the use of "some injury" in the instruction is troubling ("whether under all the circumstances a reasonably careful person would have anticipated that an act or failure to act would likely cause some injury"). When it is necessary to include this civil negligence instruction, it must be modified to be consistent with the facts and required elements. The more accurate statement would be "serious bodily harm." *See State v. Jeffers*, 11th Dist. No. 2007-L-011, 2008-Ohio-1894, ¶ 44 ("[h]ad the instruction been given as 'where the risk of *serious physical harm* is present,' it would have been a more accurate statement of the law"). "Some injury" has no place in this case. The risk here is that the jury may be misled to think, with respect to the issue of foreseeability, that if the defendant simply intended "some injury," any resultant injury or death must be considered "foreseeable." The Ohio Supreme Court in *State v. Burchfield*, 66 Ohio St.3d 261 (1993) echoes this same concern:

{¶18} "We are concerned, however, with the use of the OJI foreseeability instruction in this case. While OJI is widely used in this state, its language should not be blindly applied in all cases. The usefulness in murder cases of the foreseeability instruction is questionable, especially given its potential to mislead jurors. While the use of that instruction would not have led to our reversal of the conviction in this case, its unnecessary inclusion would have made the question closer than it need have been. The OJI foreseeability instruction should be given most cautiously in future murder cases." *Id*. at 263.

{¶19} The instruction on foreseeability was unnecessary in the context of the felony murder charge and should not have been used. The Portage County appellate

prosecutor, during oral argument, explicitly acknowledged that the use of the foreseeability instruction including "some injury" was a categorically incorrect statement of the law as it applied to this case. Its use in future murder cases must be limited to those cases where foreseeability as an aspect of "knowledge" or other mens rea is at issue. When it is necessary, it must be modified to be consistent with the appropriate criminal standard, as opposed to that of civil negligence.

{¶20} However, given the totality of the instructions and the facts of this case, we conclude that the conviction was ultimately based on the correct standard of law. First, the issue of "some injury" was not at issue in this case as it pertained to the felonious assault and felony murder charges. At trial, appellant claimed he did not kick or stomp on the decedent at all. He claimed it was someone else. Conversely, the state's witnesses who testified on this point were all consistent in their observation that appellant stomped the victim multiple times while he lay unresponsive on the pavement. Despite multiple permutations from various state witnesses, there was *no* testimony that appellant only kicked the victim once, or only had a slight degree of contact with the victim. Therefore, the jury members had only two choices: (1) they could believe appellant—that he did not have contact with the victim, or (2) they could believe that appellant aggressively stomped the defenseless victim. There was no third alternative. In other words, with respect to the felonious assault charge, and therefore the felony murder charge, there was no issue whether appellant intended "some injury" or "serious physical harm" to the victim.

{¶21} Further, we note the similarity between the legal concepts of "knowingly" and "foreseeability":

{¶22} "The legal concept of 'knowingly' incorporates the scienter requirement that one ought to know one's actions will 'probably cause certain results.' The concept of reasonable probability literally embraces the concept of foreseeability. Rather than reduce the state's burden, the instructions ostensibly provide clarity into the meaning and import of 'probabilities,' i.e., a term necessarily built into the definition of the mens rea requirement for the underlying crime." *State v. Magnusson*, 11th Dist. No. 2006-L-263, 2007-Ohio-6010, ¶ 51.

{¶23} Indeed, the jury, unable to enter the mind of another, is required to consider common-sense, causal probabilities in considering whether the defendant acted "knowingly."

{¶24} Additionally, in considering whether the jury was misled, we must consider the totality of the instructions given by the court: "a single jury instruction must not be considered in isolation but must be viewed in the context of the instructions as a whole." *State v. Crain*, 11th Dist. No. 2001-L-147, 2003-Ohio-1204, ¶ 41, citing *State v. Price*, 60 Ohio St.2d 136 (1979), paragraph four of the syllabus. In considering whether an instruction on causation constitutes prejudicial error, the totality of the instructions and the closing argument of the prosecution must be examined. *Id*. at ¶ 41.

{¶25} The instructions demonstrate that the jury was adequately educated that the law requires the state to prove appellant "knowingly caused serious bodily harm." Before appellant could be convicted of felony murder, the jury first had to determine appellant's guilt on the charge of felonious assault. The instruction on this charge properly included the correct standard:

{¶26} "Before you can find that the defendant was committing Felonious Assault, you must find beyond a reasonable doubt that on or about the 15th day of November, 2009, and in Portage County, Ohio, Ronald Kelly knowingly caused *serious physical harm* to Christopher Kernich.

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

{¶28} "Since you cannot look into the mind of another, knowledge is determined from all the facts and circumstances in evidence. You will determine from these facts and circumstances whether there existed at the time in the mind of Ronald Kelly an awareness of the probability that Ronald Kelly would cause serious physical harm to Christopher Kernich." (Emphasis added.)

{¶29} Moreover, the prosecutor specifically used the term "knowingly" as the standard in the state's closing argument. Thus, viewing the instructions in its entirety in the present case, and with the recognition that the appropriate concept of foreseeability is necessarily built into the legal definition of "knowingly," we find there to be no reversible error with the instructions.

{¶30} Finally, we note this very same foreseeability instruction was recently addressed in *State v. Barker*, 11th Dist. No. 2010-P-0044, which centered on Adrian Barker's conviction arising from the same unfortunate events. Those instructions for felony murder were identical to the italicized portion of the above instructions to which appellant objects and also included the identical definition of "knowingly" as the case

sub judice. Echoing the themes of *Magnusson* and *Crain*, *supra*, we concluded that, given the full instructions and the necessity of considering probabilities while deliberating, the trial court did not commit reversible error in giving the foreseeability instruction. *Id*. at ¶ 118. However, we noted on remand in that case that the instruction was not an accurate statement and should be revised for any retrial.[1]

{¶31} Thus, the instruction on "foreseeability" simply did not belong in either case. However, as the Ohio Supreme Court determined in *Burchfield, supra*, in this particular case it does not warrant reversal.

{¶32} Appellant also alleges prejudicial error with the foreseeability instruction for murder (count two) in his assignment of error. This argument seems to have been abandoned at oral argument. In any respect, the murder instruction will not be reviewed. The jury acquitted appellant on this count. We note that "when there is no case in controversy or any ruling by an appellate court that would result in an advisory opinion, there will be no appellate review unless the underlying legal question is capable of repetition yet evading review." *State v. Bistricky*, 51 Ohio St.3d 157, 158 (1990). (Citations omitted). Here, any error with respect to the murder instruction has ceased to exist because principles of double jeopardy preclude retrial of appellant on this count. *See, e.g., State v. Johnson*, 11th Dist. No. 2004-L-215, 2006-Ohio-4540, ¶ 36 ("[a]ppellant was acquitted of the rape and kidnapping charges which allegedly occurred on March 25, 2004 and thus his argument is fundamentally moot").

{¶33} Appellant's first assignment of error is without merit.

1. *Barker* was remanded not due to the instruction on foreseeability, but rather the trial court's failure to instruct on lesser included offenses—prejudicial error in that case.

Rebuttal Evidence

{¶34} Appellant's second assignment of error states:

{¶35} "The appellant was denied his rights to due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments when the court committed plain, prejudicial error in allowing the state to call rebuttal witnesses to testify that appellant committed a similar assault."

{¶36} In this case, appellant took the witness stand in his own defense. Appellant testified to an incident that also occurred on November 14, 2009, at a fraternity party, prior to the large street fight that resulted in Kernich's death. The earlier incident involved an alleged assault on party-goer Stephen Manyo. Although appellant was formally charged with assault on Manyo, this charge was severed from the indictment and was to be tried separately. Nonetheless, on direct examination, appellant voluntarily testified that Barker and Manyo got into a brawl at a party during which Barker assaulted Manyo. During this portion of his testimony, appellant claimed that he tried to calm Barker down, telling him to relax in an effort to defuse the situation. Appellant professed that notwithstanding his efforts, Barker and Manyo fell to the ground and began punching each other. On cross-examination, appellant affirmed that he did not kick or punch Manyo and, in fact, had no physical contact with Manyo. Appellant's testimony with regard to this specific incident on the night in question was apparently designed to convince the jury that he tried to be the peace-keeper, while insinuating that Barker was the one who easily lost his composure during the incident in question.

{¶37} On rebuttal, the state called Manyo who testified he was punched and injured by appellant during the earlier fight. Manyo testified it was apparent that appellant wanted to hurt him. The state also called Terese Gall, who witnessed the earlier fight and corroborated Manyo's version of events. The apparent purpose of these rebuttal witnesses was two-fold. First, it provided rebuttal evidence to the contention that appellant had a character trait of being a peace-keeper on that particular evening. The court admitted the rebuttal evidence apparently for this purpose, stating on the record at side-bar, with some ambiguity, that Evid.R. 404 allowed the evidence. Second, the evidence impeached appellant's testimony on a material matter since he had claimed under oath, just a day earlier, that he was a peace-keeper that night and did not have any physical contact with Manyo. To this point the court gave a limiting instruction on impeachment, which suggests that the court also admitted the evidence under Evid.R. 616, which governs the various forms of impeachment. Appellant claims the calling of these rebuttal witnesses constituted prejudicial error.

{¶38} A court's evidentiary rulings are reviewed under an abuse of discretion standard. *State v. Poling*, 11th Dist. No. 2008-A-0071, 2010-Ohio-1155, ¶ 19, citing *State v. Sweeney*, 11th Dist. No. 2006-L-252, 2007-Ohio-5223, ¶ 22. Even where a court abuses its discretion in the admission of evidence, we must review whether the defendant suffered material prejudice due to the ruling. *Id*. As the record seems to indicate the court admitted the evidence under Evid.R. 404 and Evid.R. 616, both will be addressed.

{¶39} Evid.R. 404(A) provides a general rule of inadmissibility regarding character evidence: "Evidence of a person's character or a trait of character is not

admissible for the purpose of proving action in conformity therewith on a particular occasion." This is generally labeled the "propensity rule." The propensity rule is subject to three enumerated exceptions, including Evid.R. 404(A)(1), that allow the accused to introduce evidence of his character: "Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same is admissible." Therefore, a defendant may, at his discretion, testify to a specific character trait in order to raise the inference that he acted in conformity with that trait. However, doing so "opens the door" to allow the prosecution to "rebut the same [trait]" by offering rebuttal evidence. The Staff Notes to Evid.R. 404(A)(1) illustrate this point:

{¶40} "The basic rule is that the defendant may, at his option, offer evidence of his good character as proof that he did not commit the act charged because such conduct is not in accord with his character. This is often denominated the 'mercy defense.' If the accused offers evidence of his good character, then and only then, can the prosecution offer evidence of the bad character of the accused."

{¶41} "'Rule 404(A) sets forth three exceptions *where the exclusionary rule will not apply* to character used to prove conforming conduct. First [in Evid.R. 404(A)(1)], the accused in a criminal case may seek to introduce pertinent evidence of his good character in order to raise the inference that on a particular occasion involving the crime for which he is charged, he acted in conformity with his good character and did not commit the operative facts of the crime.'" (Emphasis sic.) *State v. Bozeman*, 12th Dist. No. CA2008-10-248, 2009-Ohio-3677, ¶ 43, quoting Weissenberger's Ohio Evidence Courtroom Manual 73 (2008).

{¶42} This is exactly what occurred in the case sub judice. Appellant offered evidence of his good character on direct examination to raise the inference that he did not commit the crime charged because such conduct was not in accord with his character on the night in question. Appellant argues that because he did not testify that on a particular occasion he acted in conformity with a pertinent character trait, he did not open the door for the state to introduce rebuttal evidence of appellant's bad character or violent propensities. However, appellant very clearly testified to being a peaceful individual on a specific occasion while simultaneously insinuating that it was his former friend, Barker, who possessed the character trait of a ruffian that specific evening. Appellant, therefore, opened the door to allow the prosecution to rebut the inference that appellant was a peaceful individual.

{¶43} Appellant introduced this prior, specific episode on his own accord, claiming that Barker was responsible for the assault on Manyo and that appellant was essentially an innocent bystander. Appellant's version of the Kernich assault, which resulted in the felony murder charge, was that Barker was responsible for the assault and appellant was an innocent bystander. In this fashion, appellant was using reverse-propensity logic in an attempt to convince the jury that Barker was the sole assailant at the party against Manyo, then once more at the large street fight against Kernich. The state's witnesses on this point were used to rebut that inference.

{¶44} Similar cases involving rebuttal witnesses have been addressed by other courts. In *State v. Bozeman*, 12th Dist. No. CA2008-10-248, 2009-Ohio-3677, ¶ 2, the defendant, charged with rape, testified on direct examination that he had never had sex with the accuser, or any minor child. When questioned by the state on cross-

examination, the defendant denied engaging in sexual activity with the two rebuttal witnesses. *Id*. at ¶ 17-35. The state then called the rebuttal witnesses, who testified about the sexual contact between them and the defendant, in direct contradiction to both the defendant's character and credibility. *Id*. at ¶ 36. The Twelfth District concluded: "At that point, it would have been unfair to blindly accept appellant's assertion and prohibit the state from presenting rebuttal evidence on the issue." *Id*. at ¶ 44, citing *State v. Fannin*, 4th Dist. No. 98CA2456, 1999 Ohio App. LEXIS 2906 (June 11, 1999), *2. *See also State v. Banks*, 71 Ohio App.3d 214, 219 (1991).

{¶45} Similarly, in *State v. Jones*, 5th Dist. No. CA-8680, 1992 Ohio App. LEXIS 563 (Feb. 10, 1992), the defendant, charged with violating a protective order, testified on direct examination that he did not use any drugs. *Id*. at *2. As a rebuttal witness, the state called appellant's daughter, who testified that she had seen her father smoking marijuana. *Id*. The court concluded that "the trial court did not err in allowing the testimony of appellant's daughter. Once the appellant 'opened the door' by presenting evidence of his good character, on rebuttal the State can then present evidence to rebut the evidence of the accused's good character." *Id*. at *3.

{¶46} Next, the evidence impeached appellant's testimony on a material matter. By voluntarily offering his testimony, appellant's credibility with regard to a material fact became an appropriate issue for rebuttal.

{¶47} Methods of impeachment are detailed in Evid.R. 616. Specifically, Evid.R. 616(C) provides an avenue for attacking the credibility of a witness and involves situations whereby the opposing side wishes to offer evidence that specifically contradicts or rebuts previous testimonial evidence: "Facts contradicting a witness's

testimony may be shown for the purpose of impeaching the witness's testimony." The rule also states that extrinsic evidence is not permitted if "offered for the sole purpose of impeachment" unless permitted by the other evidence rules allowing for extrinsic evidence, or by the common law of impeachment, provided it does not conflict with the other rules.[2]

{¶48} This method of impeachment, known as "specific contradiction," allows for evidence that contradicts a witness's testimony to be introduced for the purpose of impeaching the witness's testimony. This idea is specifically reflected in the Staff Notes to Evid.R. 616(C): "[C]ontradiction may involve the testimony of one witness that conflicts with the testimony of another witness (called 'specific contradiction')." Stated differently, "'[an] appropriate impeachment by contradiction includes presenting "testimony by another witness that (if credited) rebuts or undercuts or limits, or raises doubts about * * * the testimony by an earlier witness * * * even though it amounts to 'extrinsic evidence.'"'" (Citations omitted.) *State v. Smith*, 10th Dist. No. 04AP-726, 2005-Ohio-1765, ¶ 38. *See also State v. Portis*, 10th Dist. No. 01AP-1458, 2002-Ohio-4501.

{¶49} Appellant argues that the rebuttal evidence was purely collateral as it had nothing to do with the street fight involving the victim or the charges in the case. Indeed, it is well-founded that "'a witness may not be impeached by evidence that merely contradicts his testimony on a matter that is collateral and not material to any issue in the trial.'" (Citation omitted.) *State v. Boggs*, 63 Ohio St.3d 418, 422 (1992).

2. According to the Staff Notes, "[t]he phrase 'not in conflict with these rules' is intended to ensure that this provision is not used to circumvent the prohibition on the admissibility of extrinsic evidence of specific acts found in Evid.R. 608(B)."

The danger of not following such a rule is that a barrage of witnesses could testify to non-material issues, unnecessarily delaying the proceedings by creating mini-trials that could last for days.

{¶50} However, "[e]vidence relevant upon the question of credibility, especially of an interested witness, is in no sense collateral, but goes directly to the weighing of his testimony * * *." *Harper v. State*, 106 Ohio St. 481, 485 (1922). *See also State v. Porter*, 14 Ohio St.2d 10, 13 (1968). Appellant's denial of any involvement in both the Manyo assault and the Kernich assault, together with his placement of blame squarely on Barker, made both incidents a material factor in the case.

{¶51} Here, appellant testified that he had no contact with Manyo at the party. The state's witnesses specifically contradicted this point by testifying that appellant punched Manyo at the party. This testimony very obviously raised doubts about appellant's version of events, thereby impeaching appellant.

{¶52} Thus, the court did not abuse its discretion under either rule in allowing rebuttal witnesses to testify. Appellant opened the door by testifying to his peaceful nature and his version of events on direct examination, putting both his character and credibility at issue for rebuttal.

{¶53} Appellant additionally argues that, even assuming he did open the door, the evidence would be excluded under Evid.R. 403(A), which states: "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

{¶54} Here, the defense made the assertion that appellant was peaceful and Barker was hot-headed on the night in question, raising the prior incident at the

fraternity party to fully illustrate this point. If the jury followed the inference of appellant as peaceful and Barker as the aggressor, appellant could have been acquitted. Thus, the probative value of the rebuttal evidence was significant.

{¶55} Further, there was hardly a danger of unfair prejudice by admitting the evidence. We note the pivotal term is "unfair," as stressed by the Ohio Supreme Court:

{¶56} "As a legal term, 'prejudice' is simply 'damage or detriment to one's legal rights or claims.' Black's Law Dictionary (8 Ed.1999) 1218. Thus, it is fair to say that all relevant evidence is prejudicial. That is, evidence that tends to disprove a party's rendition of the facts necessarily harms that party's case. Accordingly, the rules of evidence do not attempt to bar all prejudicial evidence -- to do so would make reaching any result extremely difficult. Rather, only evidence that is unfairly prejudicial is excludable." *State v. Crotts*, 104 Ohio St.3d 432, 2004-Ohio-6550, ¶ 23.

{¶57} Appellant was aware that the state was standing by with rebuttal evidence. At sidebar, just before appellant took the stand in his own defense, the prosecution stated that it literally had Manyo sitting in the hallway, ready to testify as a rebuttal witness. Nonetheless, appellant testified to the events at the fraternity party. As explained by one commentary: "[W]hen evidence of an accused's trait of character is offered by the accused, the risk of prejudice is minimal * * *. By allowing the defendant to choose whether or not to admit such evidence, the risks of prejudice and other possible dangers are subsumed in the decision to use the evidence." Weissenberger's Ohio Evidence Treatise 141 (2009).

{¶58} To accept appellant's interpretation of the rule would encourage any defendant to take the stand and fabricate testimony about a material issue, with virtually no opportunity for rebuttal. The goal is to search for the truth, not to suppress it.

{¶59} Appellant's second assignment of error is without merit.

Prosecutorial Misconduct

{¶60} Appellant's third assignment of error states:

{¶61} "The appellant was denied his constitutional right to a fair trial under the Sixth and Fourteenth Amendments because of prosecutorial misconduct at trial and during closing argument."

{¶62} Appellant contends the comments made by the prosecutor during the state's closing argument at trial were improper and prejudicial. "The test regarding prosecutorial misconduct in closing arguments is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant." *State v. Smith*, 14 Ohio St.3d 13, 14 (1984). We initially note that appellant objected to only two comments during closing arguments, waiving all but plain error for the remaining comments to which he now takes exception. "Plain error exists only where the results of the trial would have been different without the error." *State v. Herman*, 11th Dist. No. 2008-P-0067, 2009-Ohio-1318, ¶ 18. (Citations omitted.)

{¶63} Here, appellant has not demonstrated how the outcome of the trial would have been different had the prosecutor not made certain comments during closing argument. In fact, the comments appellant is challenging can be reconciled with the purpose of closing arguments. "'The purpose of closing argument is to summarize the evidence at trial.' Prosecutors and defense counsel are afforded a wide degree of

latitude during closing arguments to address what the evidence has shown and what reasonable inferences may be drawn from that evidence.'" (Citation omitted.) *State v. Thompson*, 2d Dist. No. 23581, 2010-Ohio-4535, ¶ 46, quoting *State v. Black*, 181 Ohio App.3d 821, 2009-Ohio-1629, ¶ 33. "The purpose of closing argument is to persuade the jury and not to present additional evidence." *Id*. at ¶ 91, citing *Xenia v. Myers*, 2d Dist. No. 95-CA-50, 1996 Ohio App. LEXIS 1477 (Apr. 12, 1996). The statements made during closing argument were the prosecutor's recitation of the facts and evidence, with resulting conclusions and arguments. In an effort to discount the defense's version of events, the prosecutor merely highlighted potential flaws and logical inconsistencies. This is the essence of argument.

{¶64} For instance, appellant contends the prosecutor expressed with certainty that appellant was guilty, suggesting she had superior knowledge of the facts of the case: "Find him guilty because that's what he is." But these were the last words of the prosecutor's closing statement—a final statement asking the jury for a guilty verdict based on the evidence summarized throughout the entire closing argument. It is difficult to infer that the prosecutor's knowledge of the case is superior based on this statement. Instead, the state was simply asking the jury to return a guilty verdict based on what the evidence showed.

{¶65} Another portion of the argument to which appellant takes objection is when the prosecutor stated that appellant and his friends pulled over, "lying in wait for unsuspecting victims." However, the prosecutor is characterizing the testimony from trial. While no witness explicitly used the words "lying in wait," there was testimony that

the trio pulled over and waited for the victim's group to walk by the car. Such a characterization of the evidence is proper during closing arguments.

{¶66} As for the comments which garnered an objection, it cannot be concluded that appellant suffered any prejudice. For example, the prosecutor stated that the defense would muddy the waters by diminishing the police investigation and the eyewitness accounts. The prosecutor then stated, "it's the same defense every criminal defense attorney—" before an objection was lodged. The court immediately sustained the objection. Appellant is correct that this comment is not wholly appropriate. However, appellant is incorrect that this rises to the level of prosecutorial misconduct constituting unfair prejudice. When it is clear beyond a reasonable doubt that a jury would have found the defendant guilty even absent the alleged misconduct, the defendant has not been prejudiced; thus, the wrongful conduct must be viewed in the context of the entire trial. *State v. Loza*, 71 Ohio St.3d 61, 78 (1994). This comment, while improper, did not prejudicially affect appellant's right to a fair trial, especially given the weight of the evidence in this case. *See State v. Smith*, 14 Ohio St.3d 13, 14 (1984).

{¶67} Appellant's third assignment of error is without merit.

Ineffective Assistance of Counsel

{¶68} Appellant's fourth assignment of error states:

{¶69} "Appellant was denied his Sixth Amendment right to the effective assistance of counsel when defense counsel failed to perform as a reasonably competent advocate before and during trial."

{¶70} Appellant contends that he was afforded ineffective assistance of counsel when trial counsel (1) did not clarify that a small drop of DNA mixture on appellant's jeans did not necessarily contain the victim's blood, (2) failed to use the services of an independent forensic pathologist, and (3) failed to object to the misconduct of the prosecutor during trial and closing argument.

{¶71} Appellant's trial counsel and appellate counsel are from the same office. Attorney Greg Robey was appellant's counsel both at trial and during oral arguments. Appellant's brief was filed by his office. Therefore, counsel's inherent conflict of interest is obvious—he is attempting to argue that his own incompetence during trial violated his client's Sixth Amendment right to counsel. "[I]n a direct criminal appeal where appointed counsel is the same attorney appointed to represent the defendant at trial, he is presumed to be incapable of effectively arguing that he was ineffective at the trial level." *State v. Leahy*, 6th Dist. No. F-00-011, 2000 Ohio App. LEXIS 6067 (Dec. 22, 2000), *10, citing *State v. Fuller*, 64 Ohio App.3d 349, 356 (1990). *See also State v. Richter*, 11th Dist. Nos. 2003-L-065 and 2003-L-066, 2004-Ohio-6682.

{¶72} While the appellate brief was filed by Attorney Margaret Amer Robey from trial counsel's firm of Robey & Robey, the conflict is not resolved. A conflict of interest still exists even if the trial and appellate attorneys are different, though from the same private law firm. *State v. Lentz*, 70 Ohio St.3d 527, 530 (1994). This issue therefore cannot be adjudicated on direct appeal but, instead, should have been raised in a postconviction relief proceeding pursuant to R.C. 2953.23. The issues of whether the decision not to produce an independent defense expert was below the objective standard of reasonableness or that an independent expert would have produced a

different result at trial cannot be determined on this record. Without the benefit of a postconviction relief proceeding, there is no way to know whether counsel attempted to contact such an expert or, if he did, whether that expert would have given favorable or unfavorable testimony.

{¶73} Appellant's fourth assignment of error lacks merit.

Victim Impact Evidence

{¶74} Appellant's fifth assignment of error states:

{¶75} "Appellant was denied his constitutional rights to due process and a fair trial by an impartial jury under the Fifth, Sixth and Fourteenth Amendments when the state bombarded the jury with victim impact evidence that was immaterial to the issues to be decided."

{¶76} Appellant takes exception to the victim impact evidence adduced during the testimony of the victim's father, who had no direct knowledge about the incident, and during closing argument. Victim impact evidence is that "evidence which describes the personal characteristics of the victim, the emotional trauma suffered by the victim's family, or the family members' opinions and characterizations of the defendant and the crime." *State v. Huertas*, 51 Ohio St.3d 22, 24 (1990), citing *Booth v. Maryland*, 482 U.S. 496, 502 (1987).

{¶77} Appellant did not object to the victim impact evidence at trial. Accordingly, appellant has waived all but plain error. "Plain error is present only if the error is obvious and, but for the error, the outcome of the trial clearly would have been different." *State v. Turner*, 11th Dist. No. 2010-A-0060, 2011-Ohio-5098, ¶ 34, citing *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 108. Here, appellant has not

demonstrated how the outcome of the trial would have been different had the victim impact evidence not been before the jury. Thus, plain error has not been demonstrated.

{¶78} Appellant's fifth assignment of error lacks merit.

Jury Selection

{¶79} Appellant's sixth assignment of error states:

{¶80} "Appellant was denied his right to an impartial jury reflecting a fair cross section of the community in violation of his Sixth and Fourteenth Amendment rights."

{¶81} Appellant argues that, because the venire contained no minorities despite a 4.4% African-American population in Portage County, he did not receive a fair trial by an impartial jury reflecting a fair cross-section of the community.

{¶82} At the onset, we note that appellant failed to offer an objection challenging the jury venire prior to the examination of jurors as required by Crim.R. 24(F).

{¶83} "The prosecuting attorney or the attorney for the defendant may challenge the array of petit jurors on the ground that it was not selected, drawn or summoned in accordance with law. A challenge to the array shall be made *before the examination of the jurors* pursuant to division (A) of this rule and shall be tried by the court." (Emphasis added.) Crim.R. 24(F).

{¶84} The record indicates that trial counsel apparently believed he was making a correct array challenge, albeit in the midst of voir dire. To the extent trial counsel objected to the jury array on the record and in the interest of justice, the merits will be addressed.

{¶85} In *State v. Fulton*, the Ohio Supreme Court adopted the *Duren* test for establishing whether a defendant was denied a right to an impartial jury reflecting a fair cross-section of the community:

{¶86} "In order to establish a violation of the fair representative cross-section of the community requirement for a petit jury array under the Sixth and Fourteenth Amendments to the United States Constitution, a defendant must prove: (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that the representation is due to systematic exclusion of the group in the jury-selection process." *State v. Fulton*, 57 Ohio St.3d 120 (1991), paragraph two of the syllabus, adopting the test set forth in *Duren v. Missouri*, 439 U.S. 357, 364 (1979). *See also State v. Bowles*, 11th Dist. No. 99-L-075, 2001 Ohio App. LEXIS 2145 (May 11, 2001), *6, and *State v. Powell*, 11th Dist. No. 97-L-253, 1998 Ohio App. LEXIS 6358 (Dec. 31, 1998), *21. Appellant is required to satisfy all three of the aforementioned prongs. *State v. McCaleb*, 11th Dist. No. 2002-L-157, 2004-Ohio-5940, ¶ 23, citing *State v. Moore*, 81 Ohio St.3d 22, 28 (1998).

{¶87} We first turn to the second prong of the *Fulton* test—whether the representation of African-Americans in the venire was fair and reasonable in relation to the number of minorities in this classification in Portage County. Specifically, Portage County pools its prospective jurors from its voter registration lists. Appellant argues that the use of these voter registration lists did not provide a fair cross-section of the

community since the system led to the total exclusion of African-Americans and other minorities from the panel, despite a 4.4% African-American population in the county.

{¶88} However, this method of pooling jurors is expressly provided for by law. "Under R.C. 2313.08, when selecting names of individuals to serve on a jury, the jury commissioners may select such names from a list of electors certified by the board of elections, pursuant to R.C. 2313.06." *State v. McCaleb*, 11th Dist. No. 2002-L-157, 2004-Ohio-5940, ¶ 24. Further, the Ohio Supreme Court has consistently upheld the constitutionality of calling jury venires from voter registration lists: "This practice does not systematically exclude [African-Americans] from the jury-selection process." *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 106, citing *State v. Moore*, 81 Ohio St.3d 22, 28 (1998). Appellant therefore has not presented any credible evidence from which we can infer that the number of African-Americans included in jury venires in Portage County is due to systematic exclusion of this racial group in the jury selection process.

{¶89} Furthermore, appellant has not demonstrated that the representation of African-Americans in jury venires is not fair and reasonable in relation to the number of such persons in Portage County. Therefore, we cannot conclude that appellant's Sixth Amendment right to have a jury comprised of a fair cross-section of the community was violated.

{¶90} Appellant's sixth assignment of error is without merit.

Manifest Weight

{¶91} Appellant's seventh and final assignment of error states:

{¶92} "The jury's decision finding appellant guilty of felony-murder was against the manifest weight of the evidence."

{¶93} Appellant contends that the jury's decision in this case was against the manifest weight of the evidence because the victim was "certainly killed by the terrible fall he took" after being blindsided by Barker, and not by any subsequent kicking which the state proved appellant took part in.

{¶94} To determine whether a verdict is against the manifest weight of the evidence, a reviewing court must consider the weight of the evidence, including the credibility of the witnesses and all reasonable inferences, to determine "whether the jury lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). In weighing the evidence submitted at a criminal trial, an appellate court must defer to the factual findings of the jury regarding the weight to be given the evidence and credibility of the witnesses. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus.

{¶95} Further, "[n]o conviction resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the appeal." *Webber v. Kelly*, 120 Ohio St.3d 440, 2008-Ohio-6695, ¶ 6. (Citations omitted.)

{¶96} Appellant particularly argues the causation element is against the weight of the evidence, asserting that the victim's death must have been a proximate result of his head hitting the ground. Therefore, we must first weigh the evidence involving the victim's cause of death.

{¶97} State's witness Dr. George Sterbenz, the Chief Deputy Medical Examiner of Summit County, performed the autopsy of the victim and testified to the cause of death at trial. The doctor concluded that the specific cause of death was cranio-cerebral blunt force trauma due to multiple blows to the head. Dr. Sterbenz testified one of the blows was an unrestrained posterior rotational fall as a result of the victim falling down backwards and hitting his head, while the remainder of the blows were from a moving object such as a fist or foot striking the victim's head. On cross-examination, Dr. Sterbenz cemented his confidence into the record, stating that, with absolute certainty, *the sum total of all the impacts* resulted in the traumatic brain swelling of the victim, which resulted in death. He further testified that the impacts to the left side of the victim's head were blunt force trauma consistent with a kick or stomp and those injuries were consistent with the date and time of the assault.

{¶98} Turning to the identity of the assailant, several eye witnesses from different vantage points testified that appellant kicked or "stomped" the injured victim while he was on the ground.

{¶99} Christopher Pataky, Kent State student and the victim's friend, was with the victim during the incident and testified that he, Kernich, Chelko, and Clements had been out visiting various bars on November 14, 2009. He testified that while each member of their group had been drinking, no one was particularly drunk. Pataky testified to possibly being "buzzed," but given his size at 6'7" and 255 lbs, and that the drinking took place over a span of about five hours, he stated he was not drunk or seriously impaired.

{¶100} Pataky testified that, while walking home with his friends, he was nearly struck by a white Honda Civic exiting a parking lot on the same side of the street. Pataky testified he yelled at the vehicle, advising the driver that his "piece of shit car" nearly struck him. He testified that, after the comment, the car kept driving and the situation seemed to be alleviated. However, he soon noticed the car was stopped further down East Main Street, parked in a driveway. Pataky testified the group continued down the street toward the car. Pataky and Clements were ahead of the other two members of the group. When they reached the car, Pataky stated he had to walk around it because it was blocking a portion of the sidewalk. After passing the vehicle, he noticed two men—later identified as Barker and appellant—outside of the car. He turned around only to find Chelko knocked down on the ground near the white Honda. He then noticed Kernich in the street with a black male, later identified as appellant, in a fighting posture.

{¶101} Pataky rushed to assist Chelko, who was bleeding and vomiting on the sidewalk. After confirming Chelko was fine, Pataky looked out to the street and witnessed Barker stomping on Kernich's head about 15 yards away. He stated that both appellant and Barker were standing over his friend, who appeared "lifeless." Appellant was on one side of the victim, while Barker was on the other. Pataky ran at Barker and was punched in the mouth. On cross-examination, Pataky was questioned whether he included the fact that appellant was standing over the victim in his initial statement to the police. Pataky testified he added nothing new.

{¶102} Bradley Chelko, Kent State student and the victim's friend, was also with the victim during the incident. He too testified that the white Honda almost hit the group

and that unfriendly words were shouted towards the car. Chelko testified that, while he was walking past the parked car, he was pushed into the bumper and punched by appellant. Chelko stated that he fell to the ground. He finally picked himself up and saw Kernich and appellant squaring off in the street. He testified that Kernich was blindsided and knocked to the ground by a sprinting Barker. He then stated that he witnessed both Barker and appellant kick the helpless Kernich multiple times. He subsequently identified both Barker and appellant at a police line-up, though both arrestees were handcuffed. The defense on cross-examination questioned Chelko's ability to adequately view the incident.

{¶103} The fourth member of the group, David Clements, also testified to the evening's events. He testified that he was not impaired, despite drinking eight or nine beers throughout the course of the evening. His testimony corroborated Pataky's and Chelko's version of events. He stated that he witnessed both appellant and Barker "over" the victim's body. On cross-examination, Clements admitted that he did not state that appellant was standing over the victim in his initial statement to police.

{¶104} Glenn Jefferson, the driver of the white Honda, testified that he met appellant and Barker at a party in Kent around 12:30 a.m. Upon leaving the party at about 2:00 a.m., the trio got into his white Honda. Jefferson testified that when pulling out onto Main Street he saw a group of people walking on the street, and, while he "came close," he did not actually hit anyone with his car. According to Jefferson, some harsh words were exchanged between the walkers and his companions. Jefferson asked, "what the fuck did they say?" He testified that appellant advised him to pull over and he complied. Jefferson testified that once his car stopped, appellant and Barker

jumped out of the vehicle. By the time Jefferson exited, he testified he saw an individual getting up from the ground near the rear of the vehicle. Jefferson stated that, before he could get his bearings on the situation, he was accosted by an unknown male. According to Jefferson, the unidentified male took a swing at him; Jefferson ducked and countered with a punch, which connected; as his alleged attacker fell back, Jefferson testified he kicked the unidentified male's stomach to keep him away. After kicking his purported attacker, Jefferson testified he looked up and saw "Ron [appellant] and Adrian [Barker] stomping some kid on the street."

{¶105} Jefferson testified he especially remembered seeing appellant's leg go up to stomp the victim directly in the head. Jefferson stated he saw appellant stomp the victim's head two times. Jefferson returned to his vehicle, ripped off the temporary tag to avoid being identified, and returned to the scene to pick up his companions. During his testimony, Jefferson admitted he lied to police throughout the course of the investigation to cover for his companions; he initially told police the fight was a result of a group of people threatening the three young men, casting racial slurs, and vandalizing his automobile. On cross-examination, the defense highlighted the "deal" Jefferson made with the government in exchange for his testimony, and the lies Jefferson initially told to police. Jefferson testified that despite his numerous fabrications throughout the course of the investigation and indictment process, he was being completely truthful in his testimony at trial. He lied initially because he did not want to see his "buddies get in trouble."

{¶106} Kent State student Thomas Coleman testified to being on the porch of the Delta Tau Delta house about 50 feet away from the incident. He stated he was a little

"buzzed" from alcohol. He testified that he witnessed a light-skinned black male, later identified as Barker, and a darker-skinned black male wearing a red shirt, later identified as appellant, in the street. He stated he saw the larger, darker-skinned male, appellant, stomping the victim on the ground. Coleman stated that the victim seemed unconscious, lying on the pavement "limp, like a rag doll" while getting kicked in the head by Barker and then stomped by appellant simultaneously and repeatedly. Coleman stated it was unclear from his vantage point where the victim was sustaining the blows, an issue amplified by defense on cross-examination.

{¶107} Wilson Kuzyk was at the same house as Coleman and also witnessed the incident. He stated he ventured out into the street to see about the commotion and came "within arm's length" of appellant. He testified to observing two men, whom he is now able to identify as Barker and appellant, stomping on the victim's head. The defense questioned Kuzyk's line of sight.

{¶108} Carl Belfiore was also at the Delta Tau Delta house and witnessed the fight from the lawn of the house, 35 to 40 feet away. He witnessed the victim's fall to the ground. He stated that after the victim hit the ground, "the bigger black male in the red shirt that Chris was originally fighting"—now identified as appellant—kicked him in the head at least twice. Belfiore stated he was frozen in horror watching the events unfold "like a deer in headlights." On cross-examination, the defense attempted to elicit the point that, in Belfiore's initial statement to the police, he never stated appellant stomped the victim. However, on re-direct examination, Belfiore made it clear that nothing new was added to subsequent statements.

{¶109} Danielle Contrada was also at the Delta Tau Delta house, situated on the front porch, when she heard someone yell, "fight." She stated she turned to see the victim and appellant in the street with their fists up. She witnessed Barker punch the victim and appellant stomp on the victim's face and then his chest. She identified appellant that evening as the "larger build" African-American wearing a bright red shirt.

{¶110} Other Kent State students testified for the state in the same fashion.

{¶111} Joseph Starkey testified he was on Main Street at a nearby house when he witnessed men in the middle of the street, looking ready to brawl. He testified that the victim was punched by a lighter-skinned black male—Barker. Once the victim fell to the ground, Starkey stated he saw a black male in a red shirt, later identified as appellant, stomping the victim on the ground.

{¶112} Tyler Martin testified that, on the night in question, he was walking home with two of his friends down East Main Street. Martin testified he witnessed a black male in a red shirt, later identified as appellant, "squared off" with a white male, later identified as the victim. He then saw a second, lighter-skinned black male in a white v-neck shirt, who "sprinted from about 15 yards away and hit [the victim] in the back of the head, a blind shot in the back of the head when he wasn't looking." Martin testified that as soon as the victim got hit, "his whole body went limp, he was completely knocked out." Martin testified that once the victim hit the ground, appellant and Barker started kicking and stomping him in the head and in the chest. Martin stood by motionless, watching in "complete shock." By the end of the assault, Martin testified he was within five or six feet of the assailants and got a good look at each. As police arrived, Martin sought them out immediately to give a statement and provide identification of the

attackers. One of Martin's friends walking with him, Anthony Gallas, also testified to this same version of events.

{¶113} Appellant took the witness stand in his defense and offered a different version of events. Appellant testified that he, Jefferson, and Barker left the party at around 2:00 a.m. Appellant stated he entered Jefferson's white Honda and sat in the front on the passenger's side, with the window rolled down. Appellant testified that, as the car was warming up and maneuvering about the parking lot, a group of four young men began making comments about the poor quality of the automobile. Unfriendly words were exchanged between Jefferson and the group of young men, but appellant stated he said nothing because it was not his car and he did not care.

{¶114} As the car was pulling out, with the nose of the car facing the street, appellant testified that he was punched by someone from outside the vehicle. He was unable to see exactly who hit him, other than the white hand and black sleeve of the attacker. Appellant stated the car then whipped onto the road while appellant asked the other two if they saw the attack that just transpired. He testified that Jefferson expressed outrage at the assault and pulled the car over. Appellant stated that all three jumped out of the Honda. Appellant, now out of the car, asked the group of young men walking on the street who hit him. Appellant repeated the question with no avail, at which point he stated he began towards the Honda to go home. Appellant testified that Jefferson's outrage at the situation grew and he advised appellant not to let it go. At that point, a white male in a black shirt walking with the group of hecklers, later identified as the victim, threw a wrapper towards Jefferson. Appellant expressed his disapproval to the victim's thrown wrapper, to which the victim responded, "well, square

up then." At that point, the victim threw a hook shot towards appellant, which did not connect.

{¶115} Appellant stated he then elected to square off. During the combative dance, appellant stated that he swung at the victim, and the victim swung back at him, with both men moving about one another in an aggressive, yet cautious way. Appellant stated he soon found himself outnumbered, and he had to deal with another male coming from the side, trying to tackle him. Appellant fell, and as he was getting up to turn back to the victim, he witnessed Barker smack the victim's head with all of his might. The victim then fell to the ground. Appellant testified that, before he could respond, the second male came at him again in an effort to tackle him once more. Appellant stated he kicked the second male three or four times in an effort to get him away. After wrestling with this second male, appellant turned around only to find utter chaos—Jefferson was running, the victim was on the ground lifeless, and Barker was standing nearby. Appellant asked Barker why he hit the victim. Appellant stated that before Barker could respond, the commotion from the on-lookers became disruptive, with more people flooding onto the street from nearby houses, bars, and parking lots by the second. Appellant categorically denied ever hitting or stomping the victim.

{¶116} Based on a review of the foregoing, as well as the complete transcript, we find that this is not a case that warrants reversal based on manifest weight. Nothing indicates that the jury lost its way when relying on the evidence such that a manifest miscarriage of justice occurred. The evidence presents two versions of events. The jury, after hearing both sides of the case, elected to believe the state's account over the

defense's account. The jury's verdict will not be disturbed as a result. Appellant's seventh assignment of error lacks merit.

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

THOMAS R. WRIGHT, J., concurs,

MARY JANE TRAPP, J., concurs with Concurring Opinion.

MARY JANE TRAPP, J., concurs with Concurring Opinion.

{¶118} I write separately to further address the Evid.R. 404 analysis as to the admissibility of the rebuttal evidence in this case. While I agree that the rebuttal testimony of Manyo and Gall was admissible, I believe that the extensive testimony regarding the preceding fight was admissible only under Evid.R. 616 rather than Evid.R. 404, and the scope of such testimony should have been limited. This observation as to scope is purely cautionary, as the defense failed to object, and, under a plain error analysis, even if we were to determine that the expanded scope rose to the level of plain error, we cannot find that but for that error, the outcome of the proceeding would have been different. *See State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of the syllabus (under the plain error standard of review, the reviewing court will not reverse unless the outcome of the trial clearly would have been otherwise).

{¶119} Generally, Evid.R. 404 and 405 come into play in two ways. The first use is by the defense when a character witness is called to testify about the defendant's

non-belligerent character. This entitles the state to inquire on cross-examination into relevant, specific instances of conduct to challenge the opinion of the character witness, asking questions such as: "did you know of the 1983 and 1985 assaults?" *See State v. Jackson* (1991), 57 Ohio St.3d 29. The state must take the witness' answer, so extrinsic evidence of the specific act is not admissible.

{¶120} The second use is by the state when a rebuttal witness is called to testify after the defense witnesses testified that the defendant was non-violent. *See, e.g., State v. Manning* (1991), 74 Ohio App.3d 19, 28. Again, it is important to note that Evid.R. 405(A) limits this rebuttal evidence to opinion or reputation evidence. In this case, however, Manyo and Gall were not asked for opinions, nor were they asked about Mr. Kelly's reputation. Rather, they were extensively examined about the preceding fight.

{¶121} While I do not find the Evid.R. 404 approach to be applicable, I do find that the trial court properly admitted the rebuttal testimony of Manyo and Gall for impeachment purposes under Evid.R. 616(C), because it was introduced to counter the account of the preceding events offered by the defendant himself.

{¶122} With that being said, and, as alluded to earlier, I believe that the rebuttal testimony should have been limited to specific contradictions. Mr. Kelly testified that he did not kick or punch Mr. Manyo, thus, rebuttal should have been limited to whether Mr. Kelly did, in fact, punch or kick Mr. Manyo, and, if so, when this occurred. In another case with less overwhelming evidence supporting the verdict, such detailed rebuttal testimony of another earlier assault could give rise to prejudicial error.