[Cite as *State v. Church*, 2012-Ohio-3877.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-04-070
	:	O P I N I O N
- vs -		8/27/2012
	:	
JEFFREY D. CHURCH,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2010-04-0692

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HUTZEL, J.

{¶ 1} Defendant-appellant, Jeffrey Church, appeals his conviction in the Butler County Court of Common Pleas for felonious assault.

{¶ 2} On May 26, 2010, appellant was indicted on one count of felonious assault in violation of R.C. 2903.11(A)(1). The charge stemmed from allegations that on April 17, 2010,

in a motel room in Fairfield, Ohio, appellant punched his then girlfriend, Yvonne Lawson, stomped her with his feet, hit her with the motel room phone receiver, and whipped her with the buckle of his belt, causing her serious physical harm. A jury trial was held on February 7-9, 2011. Appellant was found guilty as charged and was sentenced to five years in prison.

{¶ 3} Appellant appeals, raising five assignments of error. The second and third assignments of error will be addressed first and together.

{¶ 4} Assignment of Error No. 2:

{¶ 5} THERE WAS INSUFFICIENT EVIDENCE TO CONVICT DEFENDANT-APPELLANT OF FELONIOUS ASSAULT.

{¶ 6} Assignment of Error No. 3:

{¶ 7} THE MANIFEST WEIGHT OF THE EVIDENCE DID NOT SUPPORT A FINDING OF GUILT AGAINST THE DEFENDANT-APPELLANT FOR FELONIOUS ASSAULT.

{¶ 8} Appellant argues that his conviction for felonious assault was supported by insufficient evidence and was against the manifest weight of the evidence because the state failed to establish he caused Lawson serious physical harm.[1] In support of his argument, appellant asserts that while Lawson suffered extensive bruising and swelling on her face, and bruising and superficial rug burns on her legs and back, she was not admitted at the hospital, did not receive sutures, and did not suffer any broken bones, lacerations, or long term physical impairment.

{¶ 9} Whether the evidence presented is legally sufficient to sustain a verdict is a

1. Appellant moved for a judgment of acquittal under Crim.R. 29(A) at the end of the state's case. The motion was denied, and appellant presented one witness in his defense. Appellant never renewed his Crim.R. 29(A) motion. However, a defendant's failure to renew a motion for judgment of acquittal at the close of all evidence does not waive a challenge to the sufficiency of the evidence on appeal; rather, as in a nonjury trial, the defendant preserves his right to object to the alleged insufficiency of the evidence by entering a not guilty plea. *See State v. Blake*, 12th Dist. No. CA2011-07-130, 2012-Ohio-3124.

question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). An appellate court, in reviewing the sufficiency of the evidence supporting a criminal conviction, examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Layne*, 12th Dist. No. CA2009-07-043, 2010-Ohio-2308, ¶ 23. After examining the evidence in a light most favorable to the prosecution, the appellate court must then determine if "any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶ 10} In determining whether a conviction is contrary to the manifest weight of the evidence, an appellate court must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of witnesses to decide whether the jury clearly lost its way in resolving evidentiary conflicts and created such a manifest miscarriage of justice that the conviction must be reversed. *Layne* at ¶ 24. This discretionary power is to be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. *Id.* A determination that a conviction is supported by the manifest weight of the evidence will also be dispositive of the issue of sufficiency. *State v. Rodriguez*, 12th Dist. No. CA2008-07-162, 2009-Ohio-4460, ¶ 62.

{¶ 11} R.C. 2903.11(A)(1) prohibits a person from knowingly causing another serious physical harm. R.C. 2901.01(A)(5) defines "serious physical harm to persons" as meaning any of the following:

> (a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;
>
> (b) Any physical harm that carries a substantial risk of death;
>
> (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

> (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;
>
> (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.

{¶ 12} Lawson testified that during the attack, which lasted almost two hours, appellant struck her in the chest and the back with a belt, kicked her on the lower back, bit her on the arm, struck her in the face with the phone receiver, and choked her. She remembered going in and out of consciousness while she was being choked. Although she refused medical treatment at the scene, she later went to the emergency room (E.R.) of Mercy Hospital where she was given a prescription for pain medication. That evening, she told the E.R. nurse that on a scale of one to ten, her pain level was a ten. The E.R. nurse testified that given the extensive bruising on Lawson's face and the severity of the injuries, Lawson's injuries were in the nurse's "top two injuries."

{¶ 13} The following day (April 18, 2010), Lawson was barely able to walk. Upon realizing the extent of her injuries, she went to the police station where she gave a written statement. Sergeant Lori Cresap, who was at the crime scene the day before, was present at the police station. Sergeant Cresap testified that on April 18, Lawson had more injuries; her left eye was completely swollen shut and her right eye was almost swollen shut; and Lawson moved very slowly. Lawson told her that it hurt to stand, she felt pain everywhere, and she had trouble standing, sitting, and walking. Sergeant Cresap felt several knots on the top of Lawson's head.

{¶ 14} On April 20, 2010, three days after the attack, Lawson went back to the E.R., complaining of blurry vision, eye sensitivity to the light, and migraines. She reported that her pain level was now a nine. The E.R. nurse testified that the bruising on Lawson's face and

body was more advanced and obvious.

{¶ 15} The state submitted to the jury three different sets of photographs depicting Lawson's injuries. The first set was taken on the day of the assault on April 17, 2010; the second set was taken the day after the assault (April 18); and the third set was taken the following day (April 19). The photos show numerous bruises on Lawson's body, including the imprint of a belt buckle above her left breast and on her back, a bite mark on her left arm, and rug burns on her knees and shoulders. The photos also show extensive bruising and swelling on her face and the progression of these injuries over three days, as follows.

{¶ 16} Immediately after the attack, Lawson had redness across her face, both her eyes were severely bruised and swollen, and her left eye was almost swollen shut. The next day, the bruising and swelling had progressed and were now covering her entire left cheek. The area around her eyes was deep red in color, her left eye was now completely swollen shut, and her right eye was almost swollen shut. Three days after the attack, Lawson could open her eyes but she had two swollen black eyes and the outside of the whites of each eye had turned red. The swelling and bruising on the left side of her face was darker and extended down to her jaw line.

{¶ 17} Lawson testified that for a few days after the attack, she had blurred vision and could not see because of the swelling on her face and eyes. She also had difficulty walking. She also testified that her injuries took "a good three to four weeks to heal," and that she is still experiencing lasting effects from the attack, to wit: she gets migraines easily, one eye still gets blurry, and the left side of her face where appellant struck her with the phone receiver, protrudes out further than her right side.

{¶ 18} Given the foregoing evidence, Lawson's injuries fall within most of the circumstances constituting serious physical harm as defined in R.C. 2901.01(A)(5). Further, losing consciousness as a result of an assault constitutes serious physical harm. *State v.*

Redwine, 12th Dist. No. CA2006-08-011, 2007-Ohio-6413, ¶ 32 (being choked to the point of unconsciousness constitutes serious physical harm because it causes the victim to be in a state of temporary, substantial incapacity under R.C. 2901.01[A][5]). In addition, "where injuries to the victim are serious enough to cause him or her to seek medical treatment, the finder of fact may reasonably infer that the force exerted on the victim caused serious physical harm as defined by R.C. 2901.01(A)(5)." *State v. Lee*, 8th Dist. No. 82326, 2003-Ohio-5640, ¶ 24.

{¶ 19} After a thorough review of the record, we cannot say that the jury lost its way in finding that Lawson sustained serious physical harm as a result of appellant's attack. We thus find that appellant's felonious assault conviction is not against the manifest weight of the evidence. Our determination that appellant's conviction is supported by the weight of the evidence is also dispositive of the issue of sufficiency. *Rodriguez*, 2009-Ohio-4460 at ¶ 62. Appellant's second and third assignments of error are overruled.

{¶ 20} Assignment of Error No. 1:

{¶ 21} THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT/APPELLANT WHEN IT DENIED HIS MOTION FOR JURY INSTRUCTIONS ASKING FOR LESSER INCLUDED OFFENSE OF ASSAULT.

{¶ 22} Appellant argues that the trial court erred by refusing to instruct the jury on the lesser included offense of assault. Appellant again asserts that given Lawson's temporary bruising and swelling and superficial scrapes and rug burns, she did not suffer serious physical harm. In support of his argument, appellant cites this court's decision in *State v. Brooks*, 12th Dist. No. CA2001-01-001, 2001 WL 1525358 (Dec. 3, 2001).

{¶ 23} R.C. 2903.13(A) prohibits a person from knowingly causing or attempting to cause physical harm to another. Assault, as defined in R.C. 2903.13(A), is a lesser included offense of felonious assault, as defined in R.C. 2903.11(A)(1). *State v. Nipper*, 12th Dist. No.

CA2002-06-135, 2003-Ohio-4449, ¶ 24; *State v. Thrasher*, 2d Dist. Nos. 2996 and 2997, 1994 WL 12425 (Jan. 21, 1994).

{¶ 24} A jury instruction on a lesser included offense is required only where 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. Wyatt*, 12th Dist. No. CA2010-07-171, 2011-Ohio-3427, ¶ 30. An instruction is not warranted, however, simply because the defendant offers "some evidence" to establish the lesser included offense. *Id.* Instead, "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.'" (Emphasis sic.) *State v. Anderson*, 12th Dist. No. CA2005-06-156, 2006-Ohio-2714, ¶ 11, quoting *State v. Shane*, 63 Ohio St.3d 630, 632-633 (1992). In making this determination, the trial court must consider the evidence in a light most favorable to the defendant. *Wyatt* at ¶ 30. We review the trial court's decision refusing to give a requested jury instruction for an abuse of discretion. *State v. Gray*, 12th Dist. No. CA2010-03-064, 2011-Ohio-666, ¶ 23.

{¶ 25} In light of the evidence of Lawson's injuries, we cannot say that the jury could have reasonably concluded that appellant was guilty only of the lesser included offense of assault, but not of the greater offense of felonious assault. It is clear from Lawson's testimony, the testimony of the E.R. nurse and Sergeant Cresap, and the state's photographs of Lawson's injuries that Lawson sustained serious physical harm as a result of appellant's attack.

{¶ 26} Upon reviewing this court's decision in *Brooks*, we find that it is inapplicable here. In *Brooks*, the victim sustained a broken jaw as a result of being struck in the face. At trial, the state argued that the defendant and another man, "John-John," conspired to assault the victim and that the two men caused serious physical harm to the victim. In contrast, the defense's theory of the case was that the defendant did not conspire with John-John and that

he hit the victim only twice, which did not cause serious physical harm. Based on these theories, the defendant requested a jury instruction on the lesser included offense of assault. The trial court denied the request. The defendant was found guilty of felonious assault.

{¶ 27} The defendant appealed the trial court's denial of his request. This court held that the trial court erred by refusing to instruct the jury on the lesser included offense of assault. *Brooks*, 2001 WL 1525358 at *6. Specifically, this court found that based on the defendant's testimony, the jury could have found that John-John, and not the defendant, was responsible for the victim's serious physical injuries, and that the defendant's involvement ended before John-John's assault of the victim. *Id.* That is, the jury could have reasonably found that the defendant committed an assault but not a felonious assault. *Id.*

{¶ 28} In the case at bar, appellant was the only person who assaulted Lawson. The facts in *Brooks* are therefore distinguishable and its holding is inapplicable here.

{¶ 29} We therefore find that the trial court did not err in refusing to instruct the jury on the lesser included offense of assault. Appellant's first assignment of error is overruled.

{¶ 30} Assignment of Error No. 4:

{¶ 31} THE COURT VIOLATES A DEFENDANT'S RIGHT TO A FAIR TRIAL BY ADMITTING CUMULATIVE AND REPETITIVE PHOTOGRAPHS INTO EVIDENCE.

{¶ 32} Appellant argues that the trial court violated his right to a fair trial by admitting cumulative and repetitive photographs into evidence. The 95 photos challenged by appellant were divided into three sets and depicted Lawson's injuries over the course of three days, and the condition of her clothes and of the motel room following the attack.

{¶ 33} There were no objections at trial to the photos appellant is now challenging on appeal, and therefore he has waived all but plain error with respect to those. *State v. Jones*, 12th Dist. No. CA2009-05-140, 2011-Ohio-2097, ¶ 57. An alleged error does not constitute plain error unless, but for the error, the outcome of the trial clearly would have been different.

Id. "Notice of plain error must be taken with the utmost caution, under exceptional circumstances, and only to prevent a miscarriage of justice." *Id.*

{¶ 34} The admission or exclusion of photographic evidence is left to the discretion of the trial court. *State v. Blankenburg*, 197 Ohio App.3d 201, 2012-Ohio-1289, ¶ 91 (12th Dist.). Under Evid.R. 403, a trial court may reject an otherwise admissible photograph that, because of its inflammatory nature, creates a danger of prejudice that substantially outweighs the probative value of the photograph as evidence, but absent such danger, the photograph is admissible. *State v. Morales*, 32 Ohio St.3d 252, 257 (1987).

{¶ 35} "While the sheer number of photographs admitted may constitute error when they are needlessly cumulative, 'the mere fact that there are numerous photos will not be considered reversible error unless the defendant is prejudiced thereby,' and '[a]bsent gruesomeness or shock value, it is difficult to imagine how the sheer number of photographs admitted can result in prejudice requiring reversal.'" *Blankenburg* at ¶ 96, quoting *State v. DePew*, 38 Ohio St.3d 275, 281 (1988); *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, ¶ 26 (reversal is not required merely because a large number of photos were admitted).

{¶ 36} Upon reviewing the 95 photographs, we hold there was no plain error in admitting them. Twenty photos depicted the condition of the motel room after the attack and illustrated the testimony of a police officer that the room "was in disarray" with "a lot of bloody stuff around the room." The photos showed different parts of the room; some of the photos showed the presence of blood on several items throughout the room.

{¶ 37} The other 75 photos depicted the extent and severity of Lawson's numerous injuries and their dramatic progression over the course of three days, and illustrated the testimony of Lawson, the E.R. nurse, and Sergeant Cresap with regard to the injuries. These photos were taken from different angles and depicted different views of Lawson's injuries.

The majority of them fairly depicted a separate injury, "all of which are a product of Defendant's handiwork. That evidence is damning, but not unfairly prejudicial." *Wade v. Warden, Lebanon Corr. Inst.*, S.D.Ohio No. 3:07CV00346, 2009 WL 8413238, *7 (Nov. 10, 2009).

{¶ 38} The 95 photographs were either scene photos or photographs of Lawson's injuries. We find that the admission of each photo was justified and proper as they gave the jury an "appreciation of the nature and circumstances of the crime." *State v. Evans*, 63 Ohio St.3d 231, 251 (1992). Appellant's fourth assignment of error is accordingly overruled.

{¶ 39} Assignment of Error No. 5:

{¶ 40} APPELLANT'S CONSTITUTIONAL RIGHT TO COUNSEL WAS PREJUDICED BY THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

{¶ 41} Appellant argues that his trial counsel was ineffective for failing to object to any of the 95 photographs presented to the jury by the state. Appellant again asserts that the photographs were repetitive and cumulative.

{¶ 42} To prevail on an ineffective assistance claim, an appellant must show that his trial counsel's performance fell below an objective standard of reasonableness and that appellant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687-688, 693, 104 S.Ct. 2052 (1984); *Layne*, 2010-Ohio-2308 at ¶ 42.

{¶ 43} Regarding the first prong, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland* at 689. There is also a presumption that the challenged action may be "sound trial strategy" that the defendant must overcome. *State v. Gilbert*, 12th Dist. No. CA2010-09-240, 2011-Ohio-4340, ¶ 72. Failure to raise objections "'is not a per se indicator of ineffective assistance of counsel, because counsel may refuse to object for tactical reasons.'" *Layne* at ¶ 49, quoting *State v. Nowlin*, 5th Dist. No. CT2007-0008, 2008-Ohio-2830, ¶ 32.

{¶ 44} Regarding the second prong, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "A defendant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other." *State v. Madrigal*, 87 Ohio St.3d 378, 389 (2000); *Gilbert* at ¶ 73.

{¶ 45} Assuming arguendo that counsel should have objected to some or all of the 95 photographs, we find that appellant cannot meet the prejudice prong under *Strickland* that there exists "a reasonable probability that absent [defense counsel's] errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. Even if some or all of the photographs had been excluded, compelling evidence against appellant still existed.

{¶ 46} The record shows that at the crime scene, and later at the police station, appellant made several statements, to wit: he was a coward; he "fucked up;" what happened that day was not like him; and he took responsibility for what happened to Lawson. Given appellant's incriminating statements, Lawson's description of the attack and the injuries and pain she sustained as a result, and the testimony of the E.R. nurse and Sergeant Cresap, the exclusion of some or all of the 95 photographs would not have changed the outcome of the proceeding.

{¶ 47} Appellant's fifth assignment of error is accordingly overruled.

{¶ 48} Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.