[Cite as *State v. Marbury*, 2004-Ohio-1817.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 19226

vs. : T.C. CASE NO. 99-CR-3532

CEDRIC J. MARBURY : (Criminal Appeal from Common Pleas Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 9th day of April, 2004.

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GRADY, J.

{¶1} Defendant, Cedric Marbury, appeals from his conviction for felonious assault and kidnaping, both with gun specifications, and the resulting terms of imprisonment the trial court imposed.

{¶2} Evidence which the State introduced at trial demonstrates that on the afternoon of October 13, 1999, as Terry Bell drove down Haney Road in Trotwood on his way to the Dairy Mart located at the corner of Wolf and Haney, he

observed Defendant inside his garage. Bell stopped and called out to Defendant, and the two men talked about the ongoing feud between Defendant and Bell's family. Following this conversation, Bell went on the Dairy Mart where he purchased an item for a cook-out at the home of Jimmy Keith.

{¶3} After Keith informed Bell that he had purchased the wrong item for their cookout, Bell returned to the Dairy Mart. As Bell drove past Defendant's house, Defendant ran out into the middle of the street and flagged Bell down. When Bell stopped, Defendant approached the vehicle, reached inside, and turned off the engine. As Bell started to exit the vehicle, Defendant reached behind his back and pulled a gun, then pointed it inside the vehicle and shot Bell. The bullet struck Bell's spine, paralyzing him from the waist down. Defendant then punched Bell and told him to move over in the seat because he was going to kidnap and kill him.

{¶4} Defendant got into the driver's seat of Bells' vehicle, started the car, and began to drive away. Bell and Defendant then fought over control of the car. At the intersection of Haney and Wolf, in front of the Dairy Mart, Bell was able to force the car over into the curb. Bell then crawled out the passenger door and fell onto the street, where he tried unsuccessfully to stop passing motorists. Meanwhile, Defendant exited the vehicle and began hitting and kicking Bell.

{¶5} The manager of the Dairy Mart, Charles Eagle, and his employee, Rhiannon Vonada, notice a car parked at an odd

angle near the intersection, and two men fighting. They also observed Bell fall out of the passenger door onto the street. Eagle and Vonada recognized Bell as a man who had been in their store earlier. Eagle and Vonada watched Bell drag himself to the center of the street and saw Defendant pursue him and stomp and kick Bell as he lay in the street. Eagle called police and then went outside and told Defendant, Marbury, whom he recognized as one of his regular customers, that police were on their way. Vonada observed Defendant walk over to the car, retrieve something from the passenger floor, stick it in his front waistband underneath his shirt, and then walk away down Haney Road. Eagle remained with Bell until police and paramedics arrived.

{¶6} Defendant's evidence portrays a much different version of events, suggesting that Bell was the initial aggressor and initiated the confrontation with Defendant.

{¶7} According to Defendant's evidence, he was in his garage when Bell parked his vehicle in the street across the bottom or apron of Defendant's driveway. Bell argued with and threatened Defendant. As Defendant walked down his driveway toward Bell's vehicle, Bell pulled a gun and pointed it at Defendant, who responded by yelling "gun" and jumping into the vehicle on top of Bell in order to protect himself. Bell and Defendant physically struggled for control of the gun as the vehicle slowly rolled down the street. During that struggle the gun discharged. The two men continued fighting until Defendant finally gained

control over the gun at the intersection of Haney and Wolf. Defendant then exited the vehicle and walked back home.

{¶8} Defendant was indicted on one count of felonious assault, R.C. 2903.11(A)(2), and one count of kidnaping, R.C. 2905.01(B)(1). Both charges included a gun specification. R.C. 2941.145. Pursuant to a plea agreement, Defendant pled no contest to the felonious assault charge and was found guilty. In exchange, the State dismissed the kidnaping charge and both gun specifications. Prior to sentencing, however, Defendant moved to withdraw his plea. Following a hearing, the trial court granted Defendant's motion and allowed him to withdraw his plea.

{¶9} This matter proceeded to a jury trial. At the conclusion of the trial the jury found Defendant guilty on both charges and the gun specifications. The trial court sentenced Defendant to concurrent prison terms of seven years for felonious assault and five years for kidnaping. The trial court merged the two gun specifications and imposed one additional and consecutive three year prison term, for a total sentence of ten years.

{¶10} Defendant timely appealed to this court. His appellate counsel filed an *Anders* brief, *Anders v. California* (1967), 386 U.S. 738, claiming that he could not find any meritorious issues for appellate review. We concluded, however, that at least one potential issue for appeal was not frivolous, and accordingly we set aside the *Anders* brief and appointed new appellate counsel for

Defendant. *State v. Marbury* (June 20, 1003), Montgomery App. No. 19226. This matter is now before the court for disposition on the merits of Defendant's appeal.

FIRST ASSIGNMENT OF ERROR

{¶11} "THE APPELLANT WAS DEPRIVED OF DUE PROCESS OF LAW AND A FAIR TRIAL BY THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THE ISSUE OF SELF-DEFENSE."

{¶12} Defendant argued that he acted in self-defense when he tried to take Bell's gun away from him. If the jury agreed, the finding would relieve Defendant of criminal liability on the charge of felonious assault arising from the gunshot injury Bell suffered when, according to Defendant, the gun accidentally discharged in the course of their struggle.

{¶13} The burden of proof for an affirmative defense is the preponderance of evidence standard, and the burden is on the accused who pleads self-defense. R.C. 2901.05(A). "To establish self-defense, the following elements must be shown: (1) the (accused) was not at fault in creating the situation giving rise to the affray; (2) the (accused) has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) the (accused) must not have violated any duty to retreat or avoid the danger." *State v. Melchior* (1978), 56 Ohio St.2d 15, 20-21. (Citations omitted.)

{¶14} The trial court instructed the jury on self-

defense per *Melchior*. The Defendant requested a further instruction with respect to the third prong of *Melchior*; that he had no duty to retreat from the affray because he was on his own property. The trial court declined to give the instruction the Defendant requested. Defendant argues that the trial court abused its discretion.

{¶15} The State argues that any error was harmless because Defendant was not entitled to a self-defense instruction. The State points out that the felonious assault charge to which the self-defense claim relates arises from the victim's gunshot injury. Because the Defendant claims that the gun fired accidentally in the course of his struggle with the victim, according to the State the Defendant's claim of accident negates his right to argue self-defense.

{¶16} Implicit in the State's argument is a view that, because a person's use of force in self-defense is necessarily a purposeful act, force that occurs accidentally doesn't qualify for self-defense. We agree with that view. However, Defendant didn't claim that he shot the victim in self-defense. Rather, he claims that he jumped into the victim's car to take his gun away in order to defend himself from being shot. The fact that the gun discharged accidentally in the course of that affray, as Defendant claims, does not negate his right to claim self-defense with respect to the force he used that led to the claimed accidental discharge.

{¶17} With respect to the particular "no duty to retreat" instruction Defendant requested, we find no abuse of discretion in the trial court's refusal to give it. Defendant asked the court to instruct the jury that "if you find the defendant was on his own property at the inception of the incident alleged in the indictment, there was not [a] legal duty to retreat, escape or withdraw imposed on this Defendant."

{¶18} The instruction Defendant requested relates to the general principle recognized many years ago in *State v. Peacock* (1883), 40 Ohio St. 333, that one has no duty to retreat from his "home." The rule also applies with respect to an equivalent abode. See *State v. Jackson* (1986), 22 Ohio St.3d 281; *State v. Williford* (1990), 49 Ohio St.3d 247.

{¶19} The rule that one who is attacked or threatened with attack has no duty to retreat from his home is founded on two concerns. One is that the home is a sanctuary from harm, such that being in the home confers an exception to the duty to retreat from harm that might be inflicted there. The other is that, being a confined space in most circumstances, an actor's ability to retreat is greatly diminished when he is inside his home.

{¶20} Defendant was not in his "home" when he was allegedly threatened by the victim and used force to repel the threat. He was outside his home, on the driveway. Courts have held that the exception to the no duty to

retreat rule does not then apply, because the actor is neither in his home nor is his home being attacked. *State v. Moore* (1994), 97 Ohio App.3d 137; *Cleveland v. Hill* (1989), 63 Ohio App.3d 194. The same might not apply, however, when the defendant is on the porch steps, *State v. Jackson* (1986), 22 Ohio St. 281, or standing at his own doorstep, *State v. Reid* (1965), 3 Ohio Ap.2d 215.

{¶21} On this record, we cannot find that the trial court abused its discretion when it denied Defendant's requested instruction that he had no duty to retreat because he was "on his own property." The place from which he launched his attack to repel the use of force the victim allegedly threatened to use against him was not within or at his abode, such that he had a right to repel the force without instead retreating from it.

{¶22} This is not to say that the Defendant might not have been entitled to a no duty to retreat instruction for other relevant reasons. The retreat rule applies only to the use of deadly force; a defender may use non-deadly force without retreating. *Columbus v. Dawson* (1986), 33 Ohio App.3d 141. The force Defendant used to take away a gun he claims he believed the victim had was non-deadly force. Also, retreat is required only when the defendant can do so in complete safety. *State v. Cassano*, 96 Ohio St.3d, 2002-Ohio-3751. While *Cassano* applied the rule to being in a confined space, where no escape is possible, the exception might also apply when a defendant is threatened with a gun.

Unlike a knife or a club, which present a risk of harm that can be avoided by retreat, running away from a person who brandishes a gun generally offers little or no opportunity for complete safety. *Cassano*.

{¶23} Defendant did not request a no duty to retreat instruction on these other grounds, however. Failure to make the request waives any error in not giving it, except for plain error. *State v. Underwood* (1983), 3 Ohio St.3d 12. Plain error does not exist unless, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Long* (1978), 53 Ohio St.2d 91. On this record, and applying that standard, we find no plain error. Neither do we find that the failure to request those particular instructions prejudiced the defendant to such an extent that, absent the defect, the factfinder would have had a reasonable doubt respecting guilty, such that ineffective assistance of trial counsel is shown. *Strickland v. Washington* (1984), 466 U.S. 668.

{¶24} The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶25} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT BY RULING AN UNAUTHENTICATED, HEARSAY 911 CALL WAS ADMISSIBLE, AS THE COURT DENIED THE APPELLANT HIS SIXTH AMENDMENT AND SECTION 10, ARTICLE 1 OF THE OHIO CONSTITUTION RIGHTS TO CONFRONTATION AND CROSS-EXAMINATION."

{¶26} During the trial the State presented as substantive evidence of what happened a tape recording of a

911 emergency call made by a woman, who is heard to tell police she had just witnessed a shooting. The caller goes on to describe the events she witnessed, but does not identify herself by name. The State claimed that the 911 caller was Christy Roberson, one of its witnesses who testified at trial. During her direct examination, Roberson testified that as she was walking down Haney Road on her way to a friend's house, she heard a loud noise, a big boom, looked up, heard arguing, and then saw a station wagon drive off down the street. When asked by the prosecutor if she recognized her voice on the 911 tape, Roberson did not deny making the 911 call but claimed that she could not say for sure that her's was the voice heard because she didn't specifically remember making the call. Roberson admitted, however, that the address and phone number given by the 911 caller belonged to her. Defendant waived his right to cross-examine Roberson, and she was excused.

{¶27} The lead investigator in this case, Det. Glasser, testified at trial that he had interviewed Christy Roberson for over an hour at the police station and also talked to her in the hallway of the courthouse during this trial. Det. Glasser stated that he recognized the voice on the 911 tape as Christy Roberson's voice. The trial court then admitted the tape of the 911 call, over Defendant's objections, pursuant to hearsay exceptions for present sense impression and excited utterances. The 911 call was then played for the jury.

{¶28} Defendant now argues that because the 911 caller was never identified, there was no proper foundation laid for admitting that hearsay evidence and, furthermore, that he was prevented from cross-examining the caller. Thus, Defendant claims that the trial court's admission of this hearsay was an abuse of discretion that denied him his confrontation rights under the Sixth Amendment to the United States Constitution, and Article I, Section 10 of the Ohio Constitution.

{¶29} The decision whether to admit or exclude evidence rests within the sound discretion of the trial court and its decision in such matters will not be reversed on appeal absent an abuse of discretion and material prejudice. *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 25. An abuse of discretion means more than a mere error of law or an error in judgment. It implies an arbitrary, unreasonable, unconscionable attitude on the part of the court. *State v. Adams* (1980), 62 Ohio St.2d 151.

{¶30} Evid.R. 901 provides in relevant part:

{¶31} "(A) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

{¶32} "(B) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of

authentication or identification conforming with the requirements of this rule:

{¶33} "* * *

{¶34} "(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker."

{¶35} Although Christy Roberson could not confirm that she was the 911 caller, she didn't deny making the call. She simply said that she couldn't be sure it was her voice because she doesn't remember making the call. Roberson admitted that the phone number and address given by the 911 caller belonged to her. Det. Glasser was able to identify the voice on the 911 tape as Christy Roberson's, based upon hearing her voice at other times when he talked to her in person.

{¶36} We conclude that this evidence was sufficient to identify the caller and permit the court to conclude that Christy Roberson was the 911 caller. In other words, sufficient evidence was presented to satisfy the threshold showing required by Evid.R. 901(A) that the matter in question is what its proponent claims: in this instance a 911 call made by Christy Roberson.

{¶37} We further conclude, although Defendant does not specifically argue this matter, that the trial court

properly admitted this hearsay evidence (the 911 call was offered by the State to prove the truth of what the caller had said) under the hearsay exception for excited utterances. Evid.R. 803(2). All of the foundational requirements for admission of this 911 call as an excited utterance were satisfied in this case: the existence of a startling or shocking event, the declarant possessed first hand knowledge of that event and was under the stress or excitement caused by the event when her statement was made, and the declarant's statement relates to that startling event. Weissenberger, Ohio Evidence (2004), at 450-460.

{¶38} As a final matter, we note that the United States Supreme Court recently held that, in a criminal case, the indicia of reliability standards which underlied the exceptions to the rule against hearsay are insufficient to protect the specific rights which the Confrontation Clause confers, which can be satisfied only by cross-examination of the declarant, either at trial or in a prior proceeding in which the declaration was made wherein the declarant testified under oath. *Crawford v. Washington* (Mar. 8, 2004), No. 02-9410, 2004WL413301. The court further held, however, that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior (hearsay) statements. The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *Id.*, Fn. 9 (citations omitted).

{¶39} The court admitted evidence of the 911 caller's out-of-court statements as the declaration of Christy Roberson, and there was sufficient evidence from which the jury could find that Roberson was the declarant. Roberson appeared and testified under oath. She was available for cross-examination concerning her declaration, which satisfies the rule set out in *Crawford*. Defendant declined to cross-examine Roberson, waiving his right to complain of a *Crawford* violation.

{¶40} We find no abuse of discretion on the part of the trial court in admitting the 911 call, and no violation of Defendant's confrontation rights.

{¶41} The second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶42} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO GRANT THE APPELLANT'S MOTION(S) FOR MISTRIAL."

{¶43} The decision whether to grant or deny a motion for mistrial lies within the sound discretion of the trial court, and its decision will not be reversed on appeal absent an abuse of discretion that has adversely affected substantial rights of the accused such that a fair trial is not longer possible. *State v. Garner*, 74 Ohio St.3d 49, 1995-Ohio-168; *State v. Glover* (1988), 35 Ohio St. 3d 18; *State v. Reynolds* (1988), 49 Ohio App.3d 27.

{¶44} Defendant moved for a mistrial after the trial court admitted the tape recording of the 911 call into

evidence. According to Defendant, the trial court abused its discretion in admitting this evidence because the caller was not identified, and therefore this 911 call was not properly authenticated. Furthermore, because the 911 caller was not identified, Defendant was deprived of his right to confront and cross-examine the caller and test the reliability of her statements.

{¶45} Hearsay is defined as an out-of-court declaration by a "person." Evid.R. 801(B). That necessarily implies that the declarant must be identified. As we discussed in overruling the previous assignment of error, the evidence presented was sufficient to identify Christy Roberson as the 911 caller. Thus, a proper foundation was laid to satisfy Evid.R. 901(A) for admission of Roberson's 911 call, and that hearsay evidence was properly admitted by the court as an excited utterance pursuant to Evid.R. 803(2). Accordingly, the trial court did not abuse its discretion in admitting the 911 call. Furthermore, because Christy Roberson was identified as the 911 caller and testified at trial, and because Defendant had the opportunity to confront and cross-examine Roberson, which he declined to do, Defendant was not deprived of his Confrontation Clause rights. *Crawford*.

{¶46} In any event, in reviewing the trial transcript and particularly those portions dealing with the admission of the tape recording of the 911 call, we have not discovered any motion for mistrial made by Defendant based

upon the trial court's admission of the 911 call.

{¶47} The third assignment of error is overruled.

FOURTH ASSIGNMENT OF ERROR

{¶48} "APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND NOT SUPPORTED BY SUFFICIENT EVIDENCE."

{¶49} A sufficiency of the evidence argument challenges whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law. *State v. Thompkins,* 78 Ohio St.3d 380, 1997-Ohio-52. The proper test to apply to such an inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259:

{¶50} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant 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."

{¶51} Defendant was convicted of felonious assault in violation of R.C. 2903.11(A)(2), which provides:

{¶52} "No person shall knowingly do either of the

following:

{¶53} "Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

{¶54} "Knowingly" is defined in R.C. 2901.22(B):

{¶55} "A person acts knowingly, regardless of 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."

{¶56} Defendant argues that because his evidence shows that the gun accidentally discharged while he and Bell were struggling, the evidence is insufficient to prove that he "knowingly" caused physical harm to Bell. We disagree.

{¶57} Bell testified at trial that after Defendant flagged him down in the street and he stopped, Defendant reached inside Bell's vehicle and turned the engine off. Defendant then reached behind his back, pulled out a gun, reached back inside the vehicle again, and shot Bell in his lower left side. That evidence, if believed, is sufficient to convince the average mind of Defendant's guilt beyond a reasonable doubt. Viewing Bell's testimony in a light most favorable to the State, as we must do, a rational trier of fact could find that Defendant knowingly caused physical harm to Bell by means of a deadly weapon, and thus is guilty of felonious assault.

{¶58} Defendant was also convicted of kidnaping in violation of R.C. 2905.01(B)(1), which provides:

{¶59} "No person, by force, threat, or deception, or, in the case of a victim under the age thirteen or mentally incompetent, by any means, shall knowingly do any of the following, under circumstances that create a substantial risk of serious physical harm to the victim or, in the case of a minor victim, under circumstances that either create a substantial risk of serious physical harm to the victim or cause physical harm to the victim:

{¶60} "Remove another from the place where the other person is found"

{¶61} Bell testified at trial that after Defendant shot him, Bell asked Defendant to release him to get help. Defendant refused and told Bell to move over in the seat because Defendant was about to kidnap and kill Bell. Defendant then punched Bell, got into the driver's seat of Bell's vehicle, and began driving down the street. At that point Bell and Defendant began struggling over control of the vehicle.

{¶62} Viewing that evidence in a light most favorable to the State, a rational trier of facts could find that all of the elements of kidnaping have been proved beyond a reasonable doubt. Defendant's convictions are supported by legally sufficient evidence.

{¶63} A weight of the evidence argument challenges the believability of the evidence, and asks which of the competing inferences suggested by the evidence is more believable or persuasive. *State v. Hufnagle* (Sept. 6, 1996), Montgomery App. No. 15562, unreported. The proper test to apply to that inquiry is the one set forth in *State v. Martin* (1983), 20 Ohio App.3d 172, 175:

{¶64} "[t]he court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Accord: *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52.

{¶65} The evidence presented by Defendant, particularly his statement to police and the testimony by Latea Darden, creates a conflict with the victim's testimony as to what transpired. Defendant argues that the guilty verdicts are against the manifest weight of the evidence because Bell's testimony is not worthy of belief due to his criminal record, the history of problems between Bell's family and Defendant, and Bell's offer to Defendant in this case to not testify against him in exchange for a large sum of money. The credibility of the witnesses, however, and the weight to be given to their testimony, are matter for the trier of facts to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230.

{¶66} According to Bell, Defendant stopped Bell's vehicle in the street, pulled out a gun, reached Bell's vehicle and shot Bell. Defendant then told Bell that he was going to kidnap and kill him, and Defendant got into Bell's vehicle and began driving down the street. Bell and Defendant physically struggled over control of Bell's vehicle.

{¶67} According to Defendant's evidence on the other hand, Bell was the aggressor and initiated the confrontation with Defendant. Bell parked his vehicle across the apron of Defendant's driveway and began threatening Defendant who was in his garage. As Defendant walked down his driveway toward Bell's vehicle, Bell pulled out a gun and pointed it at Defendant. Defendant then jumped inside Bell's vehicle and struggled with Bell over control of that gun as Bell's vehicle rolled uncontrolled down the street. During that struggle the gun accidentally discharged.

{¶68} This case is a credibility contest: Bell's version of the events versus Defendant's version. One witness, Christy Roberson, corroborated Bell's story. Another witness, Latea Darden, corroborated Defendant's story. In *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288, this court observed:

{¶69} "[b]ecause the factfinder . . . has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the

evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *Id.*, at p. 4.

{¶70} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of facts lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶71} The jury in this case did not lose its way simply because it chose to believe Bell's version of the events rather than Defendant's, which it was entitled to do. In reviewing this record as a whole, we cannot say that the evidence weighs heavily against a conviction, that the jury lost its way, or that a manifest miscarriage of justice has occurred. Defendant's convictions are not against the manifest weight of the evidence.

{¶72} The fourth assignment of error is overruled. The judgment of the trial court will be affirmed.

Judgment affirmed.

FAIN, P.J., and WOLFF, J., concur.

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