[Cite as *State v. Hancher*, 2010-Ohio-2507.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 23515
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-CR-3039/2
v.	:	
	:	
ROBERT HANCHER, IV	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 4th day of June, 2010.

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FAIN, J.

{¶ 1} Robert Hancher IV was convicted after a jury trial in the Montgomery County Court of Common Pleas of Murder, in violation of R.C. 2903.02(B). The court sentenced him to fifteen years to life in prison.

{¶ 2} On appeal, Hancher contends that the trial court should have suppressed statements that he made to the police, that his conviction is not supported by sufficient evidence and is against the manifest weight of the evidence, that the trial court should have instructed the jury on the offenses of Voluntary Manslaughter and Involuntary Manslaughter, and that the court should have granted a mistrial due to prosecutorial misconduct.

{¶ 3} We conclude that Hancher was not subjected to a custodial interrogation at the police station and, consequently, the police were not required to advise him of his rights pursuant to *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. The trial court thus did not err in overruling his motion to suppress. We further conclude that Hancher's conviction was based on sufficient evidence and was not against the manifest weight of the evidence. In light of the evidence presented, the trial court properly elected not to instruct the jury on Voluntary Manslaughter and on Involuntary Manslaughter. Finally, although the prosecutor made improper comments and used leading questions during his examination of witnesses, the prosecutor's conduct, both considered separately and cumulatively, did not deprive Hancher of a fair trial or necessitate a mistrial. Accordingly, Hancher's conviction is Affirmed.

I

{¶ 4} The State's evidence at trial established the following facts:

{¶ 5} Late in the evening of February 1, 2008, Robert Hancher; his half-brother, Antonio Gomez; his girlfriend, Grace Agullana; his friend, Robert (Tyler)

Kleekamp; Agullana's cousin, Megan Hayes; Timothy (T.J.) Bradley; and two female friends of Agullana (Stacy Kinsel and a woman identified only as "Michelle") gathered at Meercat's Bar, located at 1227 Wilmington Pike in Dayton, Ohio. Hancher called his friend, Paul Credlebaugh, to join them; Credlebaugh came with two other individuals, who left at about 11:30 p.m. Hayes invited Paul Day to come to Meercat's. Day came and later called his friend, Stephen Sipos, who met Day at Meercat's.

{¶ 6} While in Meercat's, the group gathered at tables and at the bar. Hayes and Kinsel went behind the bar and served free mixed drinks to their friends. At one point, Sipos "made a pass" at Agullana. Agullana informed Hancher, who told Sipos that Agullana was his girlfriend. Sipos "brushed it off," and no confrontation occurred in the bar.

{¶ 7} Shortly before 2:00 a.m., the establishment's owner announced that the bar would be closing. Hancher, Gomez, and Agullana left Meercat's by the establishment's back door. Sipos came out of the back door soon thereafter and began "exchanging words" with Hancher in the parking lot located behind Meercat's and several other businesses. Sipos and Hancher grabbed each other. Kleekamp exited the bar from the back door and approached the two men. When Credlebaugh left the bar, Kleekamp was standing behind and within reaching distance of Sipos. Credlebaugh saw that Hancher was "pretty heated" over something and asked him what was going on. Hancher responded that Sipos had said something about his (Hancher's) girlfriend. Credlebaugh told Hancher to "let it slide," but Hancher said that he would not let it slide.

{¶ 8} Kleekamp "sucker punched" Sipos from behind, hitting him in the face. Sipos fell to the ground on his stomach. Hancher and Kleekamp began kicking Sipos repeatedly in the face and on his head. Credlebaugh stated that Hancher "was kicking [Sipos] hard, but nothing like the way [Kleekamp] was." Gomez punched Sipos in the head once and encouraged the assault. Credlebaugh stated that he approached and tried to pull Hancher and Kleekamp away from Sipos. Hancher eventually stopped kicking Sipos. Credlebaugh grabbed Kleekamp by his sweatshirt and pulled him off of Sipos. Credlebaugh yelled at the group to go to the car. Throughout the assault, Sipos did not try to defend himself and appeared to be unconscious.

{¶ 9} As Credlebaugh went to check on Sipos' condition, Kleekamp returned and stomped down on the back of Sipos' head with his foot. Kleekamp then went to his car and sped away to Gomez's nearby apartment with Hancher, Gomez, Agullana, and Kinsel. At that time, Sipos was still breathing, but unconscious. Credlebaugh observed that Sipos' face and head were covered in blood. Credlebaugh left the parking lot and walked to Gomez's apartment.

{¶ 10} Soon thereafter, Hayes and Day left Meercat's by the back door and saw someone on the ground in the parking lot. They approached and observed Sipos lying face down with blood around his face. Sipos was breathing "really weird," as if he were gurgling blood. They tried unsuccessfully to turn him over. Day called 911 and waited nearby for emergency assistance to arrive. Hayes went back inside Meercat's and told Michelle and Bradley about Sipos; the three left through Meercat's front entrance and walked to Gomez's apartment.

{¶ 11} Brian Rinderle, the bouncer for nearby Taggart's Pub, had observed Kleekamp, Hancher and others yelling to a woman to get into Kleekamp's car and, after she got in, saw the car leave the Meercat's parking lot and speed away down Wilmington Pike. Rinderle and a security guard for Taggart's went to the back of Meercat's and discovered Sipos. The security guard contacted the police and learned that the police had already been notified of the assault. Rinderle and the security guard also waited for the police to arrive.

{¶ 12} Dayton Police Officers John Howard and Dave Kluwan responded to the calls. Howard observed Day standing in the parking lot by the Pony Keg (another business that shared the parking lot with Meercat's); Day was waving his arms to get the officers' attention. Day advised Howard that his friend had been beaten, and he pointed the officers to Sipos's location. Medics arrived a few minutes later and transported Sipos to Miami Valley Hospital. Sipos died at the hospital.

{¶ 13} At Gomez's apartment, Hancher and Kleekamp bragged about how they had beaten Sipos. According to Credlebaugh, Hancher said, "I showed him" and "I beat the hell out of the guy." When Hayes, Michelle, and Bradley arrived at Gomez's apartment, they informed the group that Sipos had died. Credlebaugh told Hancher that he was "done with [him]" and left the apartment. Hancher and Kleekamp began to discuss fleeing to Florida.

{¶ 14} Hancher, Kleekamp, Agullana, Hayes, and Bradley left Gomez's apartment and drove in Kleekamp's car to Hancher's father's house near downtown Dayton. Hancher went inside to ask his father for money so that he could go to

Florida. Hancher was unable to obtain money from his father, and he returned to the car. Kleekamp decided to drive to his uncle's house so that he could ask for money to go to Florida. Along the way, they took Hayes to her mother's home. Hayes tried to convince Agullana to come with her, too, but Agullana remained in the car. When Hayes got out of the vehicle, Hancher told her "not to tell anybody."

{¶ 15} Kleekamp and Hancher continued to talk about running to Florida as they drove to Kleekamp's uncle's home. After Kleekamp talked with his uncle, the uncle called the police.

{¶ 16} When the police arrived at Kleekamp's uncle's residence, Kleekamp, Hancher, Agullana, and Bradley went to the police station and provided statements. Kleekamp orally consented to the search of his vehicle and signed a form reflecting that consent. The police took photos of Kleekamp and Hancher and obtained Kleekamp's shoes and Hancher's boots and jeans; the police later obtained the jeans and polo shirt that Gomez had been wearing. Sipos's blood was found on Kleekamp's shoes, Hancher's boots, Hancher's jeans, and Gomez's shirt.

{¶ 17} Hancher was indicted for Murder, based on his having caused Sipos's death as a proximate result of committing Felonious Assault. (Kleekamp was similarly indicted for Murder. Gomez was indicted for Involuntarily Manslaughter.) Hancher subsequently moved to suppress the statements that he made to police and any evidence that was seized. In a separate motion, he requested a separate trial from his co-defendants, citing *Bruton v. United States* (1968), 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476. After a hearing, the trial court overruled the motion to suppress. The court also denied Hancher's motion for a separate trial.

{¶ 18} At the joint trial, before opening statements, Gomez pled guilty to Involuntary Manslaughter. Hancher again moved for separate trials; this motion was also denied.

{¶ 19} Hancher testified on his own behalf at trial. According to his testimony, shortly before 2:00 a.m., Sipos exited Meercat's and approached Hancher and Agullana in the parking lot, using obscene hand gestures and saying "Where the fuck you going?" Sipos grabbed Hancher by the front of his shirt, and Hancher grabbed Sipos. Sipos punched Hancher, causing Hancher to fall to the ground. Hancher weighed approximately 160 pounds compared to Sipos's weight of approximately 300 pounds.

{¶ 20} After Hancher fell, "someone" punched Sipos from behind, causing Sipos to fall on top of Hancher. While the two were on the ground, Sipos hit Hancher on the back of his head. Hancher was able to get away from Sipos. Both men got up. Hancher was "discombobulated" and had been "damn near knocked *** out." Sipos left Hancher alone and headed toward the cars, apparently looking for the person who had hit him from behind.

{¶ 21} As Hancher was "gathering [his] senses," Sipos again directed his attention to Hancher and "bulldozed" over him. The two men again fought on the ground. Hancher was able to get on top of Sipos with Sipos on his back. At this point, other individuals started kicking Sipos's head. Hancher heard Credlebaugh say, in an angry voice, "Oh, you mother fucker." Upon getting kicked, Sipos relaxed his arms and Hancher was able to get up. Hancher located one of his (Hancher's) shoes, which had fallen off, and left the parking lot with Kleekamp, Gomez, Kinsel,

and Agullana. Hancher denied that he had kicked Sipos. He also stated that he did not see Kleekamp strike or kick Sipos; he did not know if Kleekamp had been involved in the fight.

{¶ 22} After hearing the State's evidence and Hancher's testimony, the jury found Hancher guilty of Murder, as charged in the indictment. From his conviction and sentence, Hancher appeals.

II

{¶ 23} Hancher's First Assignment of Error states:

{¶ 24} "THE TRIAL COURT ERRED IN DENYING HANCHER'S MOTION TO SUPPRESS."

{¶ 25} Hancher argues that the trial court erred in overruling his motion to suppress statements he made to Detective Kristen Beane and Detective Daniel Hall at the Dayton Police Department Safety Building on the date of the incident. Hancher contends that he was in custody during that interview and that the police failed to advise him of his *Miranda* rights prior to questioning him or seizing his clothing.

{¶ 26} The need for *Miranda* warnings is triggered by custodial interrogation. *Berkemer v. McCarty* (1984), 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317. The State may not use any statements made during a custodial interrogation unless it "demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, supra, 384 U.S. at 444. A determination whether a custodial interrogation has occurred requires the use of an objective standard of "how a reasonable man in the suspect's position would have

understood his situation." *Berkemer v. McCarty*, supra, 468 U.S. at 442. "[I]n order for a court to conclude that a suspect is in custody, it must be evident that, under the totality of the circumstances, a reasonable man in the suspect's position would feel a restraint on his freedom of movement fairly characterized as that degree associated with a formal arrest to such extent that he would not feel free to leave." Id.

{¶ 27} With this standard in mind, we turn to the following evidence, which we adduced from the testimony of Detective Beane, Detective Hall, and Sergeant White given at the hearing on the motion to suppress. Hancher did not testify.

{¶ 28} Dayton Police Officers were dispatched to a call regarding an assault on Wilmington Avenue. Dayton Police Homicide Supervisor, Sergeant Gary White, was also dispatched to Meercat's Bar. By the time he arrived at the scene, the victim of the assault, Sipos, had already been removed from the scene by EMTs. White assigned Detective Hall to the parking lot scene and Detective Beane was assigned to interview witnesses at the scene.

{¶ 29} Beane interviewed two witnesses, and Hall conducted an investigation of the scene. In the meantime, Dayton Police Dispatch informed White that he should respond to an apartment on Coach Drive in Kettering, Ohio, to contact possible witnesses to the incident. White instructed uniformed officers to respond to that location. White also went to the Kettering address, as did Beane following her witness interviews. Hall returned to the Dayton Police Department Safety Building.

{¶ 30} Ultimately, it was determined that Kleekamp's uncle, Jim Kleekamp, had called the Kettering Police, who in turn notified the Dayton Police Department

that there were possible witnesses to the assault at the Kettering apartment.

{¶ 31} Upon arriving at the Kettering residence, White and Beane noticed five or six marked police cruisers present in the parking lot without their overhead lights on. There were also several uniformed police officers in the apartment. Also present in the apartment were Kleekamp, his uncle, Hancher, Agullana and Bradley. At that point, White did not know whether the persons in the apartment were suspects or witnesses. Therefore, Tyler Kleekamp, Hancher, Agullana and Bradley were asked to go downtown for interviews. None of the four said that they did not want to go downtown; according to the testimony, it was agreed that they would all proceed downtown for further interviews.

{¶ 32} The four individuals were then placed in four different cruisers and transported downtown. Of the four, only Kleekamp was placed in handcuffs. According to his escorting officer, the use of handcuffs was merely precautionary and was based solely on his decision to use the cuffs for "officer safety."

{¶ 33} The four individuals were escorted into the Safety Building and placed in separate interview rooms. The doors to the rooms were left open, without a guard, but were in direct line of sight of the officers. Detectives Hall and Beane then conducted interviews of the four. They spoke to Hancher at about 6:30 a.m. Detective Hall asked Hancher about some redness and swelling around Hancher's left eye, about which Hancher appeared unaware. Hall then escorted Hancher to a bathroom, where he was able to observe his face in a mirror. Hall also observed what appeared to be drops of blood on Hancher's shoes and pants and asked Hancher if he would turn those items over to the police. Hancher stated that he

would agree to turn over the items "as long as [he had] a pair of pants to wear" home. Hall found a pair of pants and gave those to Hancher. The interview with Hancher took about twenty minutes. After their interviews, the four were permitted to leave and were provided transportation home.

{¶ 34} Although we regard this as a close issue, upon this record, we conclude that Hancher was not subjected to a custodial interrogation. The contact with the police was not triggered by a police investigation, but by Jim Kleekamp's call to the police. The four individuals did not attempt to leave the apartment before the arrival of the police, and then they agreed to go to downtown Dayton for interviews. There is no evidence that Hancher was handcuffed, or that he saw Kleekamp in handcuffs. While at the police station, Hancher was placed in an interview room, and the door to the room remained open. Hancher, though "somewhat defiant," cooperated with the police, and there is no evidence to indicate that his statements, and the surrender of his clothing, were other than voluntary.

{¶ 35} Based upon the totality of the circumstances, the trial court determined that Hancher was not subjected to custodial interrogation necessitating the use of *Miranda* warnings. We agree, and conclude that the trial court did not err by overruling Hancher's motion to suppress.

{¶ 36} The First Assignment of Error is overruled.

III

{¶ 37} Hancher's Second Assignment of Error states:

{¶ 38} "THE TRIAL COURT ERRED IN UPHOLDING THE JURY'S

CONVICTION FOR MURDER BECAUSE THE CONVICTION WAS AGAINST THE WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

{¶ 39} In this assignment of error, Hancher contends that his conviction for murder was based on insufficient evidence and was against the manifest weight of the evidence.

{¶ 40} Sufficiency and manifest weight challenges are separate and legally distinct issues. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. "While the test for sufficiency requires a determination of whether the State has met its burden of production at trial, a manifest weight challenge questions whether the State has met its burden of persuasion." Id. at 390.

{¶ 41} 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 to sustain the verdict as a matter of law. Id. at 386. "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." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 42} In contrast, when reviewing a judgment under a manifest weight standard of review "'[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 [factfinder] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which evidence weighs heavily against the conviction.'" *Thompkins*, 78 Ohio St.3d at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 43} The indictment in this case charged that Hancher "did cause the death of another, to wit: STEPHEN SIPOS, as a proximate result of the offender's committing or attempting to commit an offense of violence, to wit: FELONIOUS ASSAULT, in violation of R.C. 2903.11(A)(1), a felony of the SECOND DEGREE ***." R.C. 2903.11(A)(1) provides that "[n]o person shall knowingly *** cause serious physical harm to another." "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B).

{¶ 44} First, Hancher argues that the State failed to present sufficient evidence that his "intent" was to cause serious harm to Sipos. Although Hancher does not dispute that Sipos's death was caused by blunt force injuries to the head and neck, he asserts that "it does not follow that just because Hancher punched or even kicked Sipos and Sipos later died, that Hancher's blows were made with an *intent* to cause *serious* physical harm as that term is defined in the Revised Code." Hancher argues that his lack of intent to cause serious physical harm is demonstrated by the coroner's testimony that Sipos's external injuries consisted of a split lip, a broken nose, and cuts above one eyebrow and his left ear, and by Sipos's

lack of a broken skull, noticeable brain injury, broken bones (other than the nose), and damage to vital organs.

{¶ 45} Contrary to Hancher's assertions, the State was not required to prove that he kicked and punched Sipos with the "intent" to cause serious physical harm. Rather, the State had the burden of proving that Hancher was aware that his conduct would probably cause serious physical harm to Sipos. R.C. 2901.22(B).

{¶ 46} On this record, we have no difficultly finding that the State presented sufficient evidence that Hancher knowingly caused serious physical harm to Sipos, which proximately resulted in Sipos's death. Credlebaugh, who stated that he had known Hancher his whole life and had been a very close friend of Hancher in February 2008, testified that he observed Hancher's assault of Sipos. According to Credlebaugh, after Hancher stated that he was "not going to let [Sipos's comments] slide," Kleekamp and Hancher simultaneously swung with their fists at Sipos's head. Although Credlebaugh described Hancher's punch as a "jab," the combination of Hancher's blow with Kleekamp's punch caused Sipos to fall to the ground. Credlebaugh then observed Hancher repeatedly "kicking [Sipos] hard" with his boots; all of the blows were to Sipos's head. Credlebaugh pulled Hancher away from Sipos. Credlebaugh further testified that Hancher had bragged about "beat[ing] the hell out of" Sipos, upon returning to Gomez's apartment after the altercation.

{¶ 47} Hancher's girfriend, Agullana, did not see Hancher punch Sipos. However, she testified that, after Sipos was lying on the ground, Hancher was "bringing his foot back and kicking" Sipos. Agullana stated that the multiple kicks were "hard" and directed to Sipos's head. Both Credlebaugh and Agullana stated

that Sipos did not react or do anything physically while he was on the ground being kicked.

{¶ 48} Dr. Kent Harshbarger, forensic pathologist and deputy coroner for Montgomery County, conducted Sipos's autopsy. Dr. Harshbarger indicated that Sipos had suffered "multiple significant blows," and he identified at least ten separate impacts to Sipos's scalp. He stated that nearly all of Sipos's scalp had hemorrhage or blood loss due to blunt force injury. He opined to a reasonable degree of medical certainty that Sipos had died from blunt force injuries of the head and neck.

{¶ 49} The State's evidence, if believed, was sufficient to demonstrate that Hancher knowingly caused serious physical harm to Sipos and that Sipos died as a result of the Felonious Assault. Upon review of the evidence in the record, we cannot say that the jury "lost its way" when it found Hancher guilty of Murder, as charged in the indictment.

{¶ 50} Hancher further claims that there was no evidence that he aided or abetted his co-defendants in committing Felonious Assault. R.C. 2923.03(A)(2), the complicity statute, provides: "No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following: * * * (2) Aid or abet another in committing the offense." A person who is complicit in an offense may be charged and punished as if he were the principal offender, and a charge of complicity may be stated under R.C. 2923.03 or in terms of the principal offense. R.C. 2923.03(F). "To support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the

commission of the crime, and that the defendant shared the criminal intent of the principal. Such intent may be inferred from the circumstances surrounding the crime." *State v. Johnson*, 93 Ohio St.3d 240, 245, 2001-Ohio-1336; *State v. Wilson*, Montgomery App. No. 22581, 2009-Ohio-525, ¶27.

{¶ 51} The State provided ample evidence that Hancher acted in concert with Kleekamp in committing a Felonious Assault. As stated above, Credlebaugh testified that Hancher and Kleekamp punched Sipos simultaneously after Sipos approached Hancher and Agullana using obscene language and hand gestures. The two men then, together, repeatedly kicked Sipos in the head while Sipos lay unmoving on the ground; Kleekamp stomped Sipos's head in a "ruthless" manner. The coroner's evidence established that the multiple blows to the head and neck caused Sipos's death. In short, even if Kleekamp struck more serious blows, the State presented sufficient evidence that Hancher aided and abetted Kleekamp in committing Felonious Assault, which resulted in Sipos's death.

{¶ 52} Hancher further contends that, even if he kicked or punched Sipos with an intent to cause serious physical harm, the "overwhelming evidence suggests that the assault was provoked by Sipos to such a degree that it was reasonably sufficient to incite Hancher into using deadly force in a sudden fit of rage." Hancher thus claims that his actions constituted Aggravated Assault, a fourth-degree felony, which does not qualify as a predicate offense for felony murder.

{¶ 53} The Aggravated Assault statute reads, in relevant part: "No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably

sufficient to incite the person into using deadly force, shall knowingly: (1) Cause serious physical harm to another ***." R.C. 2903.12(A). To be "reasonably sufficient," the provocation must be "sufficient to arouse the passions of an ordinary person beyond the power of his or her control." *State v. Shane* (1992), 63 Ohio St.3d 630, 633; *Deem*, 40 Ohio St.3d at 211. In general, mere words do not justify the use of deadly weapon, and "vile or abusive language or verbal threats, no matter how provocative, do not justify an assault or the use of a deadly weapon." *State v. Napier* (1995), 105 Ohio App.3d 713, 723. Classic examples of serious provocation are assault and battery, mutual combat, illegal arrest, and discovering a spouse in the act of adultery. *Shane*, 63 Ohio St.3d at 635. To satisfy the requirements of Aggravated Assault, the defendant also must actually be under the influence of sudden passion or in a sudden fit of rage. See id.; *State v. Moore*, Montgomery App. No. 20005, 2004-Ohio-3398, ¶14.

{¶ 54} Aggravated Assault is an inferior degree of Felonious Assault, since its elements are identical to Felonious Assault, except for the mitigating element of serious provocation. *State v. Deem* (1988), 40 Ohio St.3d 205, 210-11. Hancher bore the burden of persuasion that he acted under the influence of a sudden passion or fit of rage, occasioned by serious provocation by Sipos. *State v. Rhodes* (1992), 64 Ohio St.3d 613, syllabus.

{¶ 55} Hancher argues that "it is almost beyond dispute" that he was subjectively in a sudden fit of rage provoked by the confrontation with Sipos and that the provocation was sufficiently serious to incite him to use deadly force. Hancher did not request jury instructions on Aggravated Assault and Voluntary Manslaughter

and, as discussed infra, the evidence did not support instructions on Voluntary Manslaughter and Involuntary Manslaughter predicated on aggravated assault. Even accepting Hancher's version of events leading to the fight, Hancher's alleged assault of Sipos did not result from serious provocation by Sipos. Although Sipos was quite a bit heavier than Hancher, the initial altercation allegedly stemmed from Sipos's rude words and gestures and a single punch while the two men were "locked up." And, assuming that Sipos reinitiated the fight by "bulldozing" Hancher, Hancher was able to get Sipos on his back, and he (Hancher) did not suffer further punches from Sipos.

{¶ 56} Moreover, neither Hancher nor any other witness testified that Hancher felt a sudden fit of rage, and Hancher denied that he had kicked or punched Sipos. In contrast, the State presented ample evidence that Hancher and Kleekamp struck Sipos and repeatedly kicked Sipos in the head while he lay unresponsive on the ground. The State's evidence that Hancher (and Kleekamp) bragged about assaulting Sipos soon thereafter supports a conclusion that they knowingly caused serious physical harm to Sipos and that Hancher was not acting due to a sudden passion or fit of rage. Hancher's argument that his conduct amounted to no more than Aggravated Assault and, consequently, that his conviction for Murder must be reversed as against the manifest weight of the evidence is without merit. Hancher's conviction for Murder is not against the manifest weight of the evidence.

{¶ 57} The Second Assignment of Error is overruled.

IV

{¶ 58} Hancher's Third Assignment of Error states:

{¶ 59} "THE TRIAL COURT ERRED IN FAILING TO GIVE A CHARGE FOR THE LESSER INCLUDED OFFENSES OF VOLUNTARY AND INVOLUNTARY MANSLAUGHTER."

{¶ 60} In his third assignment of error, Hancher claims that the trial court should have instructed the jury on Voluntary Manslaughter and on Involuntary Manslaughter. The court and counsel discussed the proposed jury instructions in chambers. [1] At that time, Hancher requested instructions on Involuntary Manslaughter and on self-defense. The court rejected both of Hancher's requests. With respect to the requested Involuntary Manslaughter instruction, the court reasoned that Hancher had denied that he had committed any assault (i.e., he asserted that he was only defending himself) and also denied that he had caused Sipos's death.

{¶ 61} "A criminal defendant has the right to expect that the trial court will give complete jury instructions on all issues raised by the evidence." *State v. Williford* (1990), 49 Ohio St.3d 247, 251; *State v. Mullins*, Montgomery App. No. 22301, 2008-Ohio-2892, ¶9. As a corollary, a court should not give an instruction unless it is specifically applicable to the facts in the case. *State v. Fritz*, 163 Ohio App.3d 276, 2005-Ohio-4736, ¶19. The decision to give a requested jury instruction is a matter left to the sound discretion of the trial court, and the court's decision will not be disturbed on appeal absent an abuse of discretion. *State v. Davis*, Montgomery

[1] This in-chambers discussion of the jury instructions was not transcribed. Nevertheless, we have reviewed the video of the discussion, which was on the

App. No. 21904, 2007-Ohio-6680, ¶14.

{¶ 62} Hancher did not request an instruction on Voluntary Manslaughter. Accordingly, we review his claim that the trial court should have given an instruction on Voluntary Manslaughter for plain error. Plain error does not exist unless the error affected the defendant's substantial rights. See *State v. Reid*, Montgomery App. No. 23409, 2010-Ohio-1686, ¶14. "[C]ourts are to notice plain error 'only to prevent a manifest miscarriage of justice.'" Id., quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus.

{¶ 63} Voluntary Manslaughter is an inferior degree of Murder. *State v. Shane*, 63 Ohio St.3d at 632. Thus, a defendant charged with Murder is entitled to an instruction on Voluntary Manslaughter when the evidence presented at trial would reasonably support both an acquittal on the charged crime of Murder and a conviction of the offense of Voluntary Manslaughter. Id.; *State v. Bell*, Montgomery App. No. 22448, 2009-Ohio-4783, ¶51.

{¶ 64} The elements of Voluntary Manslaughter are set forth in R.C. 2903.03(A): "No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another ***." Like Aggravated Assault, Voluntary Manslaughter requires "sudden passion" or "a sudden fit of rage" brought on by "serious provocation."

{¶ 65} When considering whether to give an instruction on Voluntary

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CD-ROM of the trial proceedings.

Manslaughter, the trial court must engage in a two-part analysis. *State v. Miller*, Montgomery App. No. 22433, 2009-Ohio-4607, ¶23. First, the court must determine, using an objective standard, whether there was provocation reasonably sufficient to bring on sudden passion or a sudden fit of rage. Id. If the standard for provocation is met, the court must determine, using a subjective standard, whether the defendant actually was under the influence of a sudden passion or in a sudden fit of rage. *State v. Shane*, 63 Ohio St.3d at 633; *State v. Miller*, supra, at ¶23. "It is only at that point that the '*** emotional and mental state of the defendant and the conditions and circumstances that surrounded him at the time ***' must be considered." *State v. Shane*, 63 Ohio St.3d at 634, quoting *State v. Deem* (1988), 40 Ohio St.3d 205, paragraph five of the syllabus.

{¶ 66} In this case, even assuming that Sipos's use of profanity, his obscene gestures toward Hancher and his physical assaults upon Hancher constituted serious provocation, the trial court could have reasonably concluded that there was insufficient evidence that Hancher subjectively was under the influence of sudden passion or a sudden fit of rage. Hancher testified that he did not know what precipitated Sipos's actions in the parking lot, that he was "surprised" by Sipos's conduct, and that he called for his friends to help him as he was wrestling on the ground with Sipos. Neither Hancher nor any other witness provided testimony that Hancher, in fact, felt a "sudden fit of rage"[2] as a result of Sipos's actions and, as a

[2]We do not imply that a defendant, in proving that he was under the influence of a "sudden fit of rage," must use the quoted words as a talisman; we merely assert that there is nothing in this record to establish that Hancher was, in fact, under the influence of a sudden fit of rage, as a result of qualifying provocation, when he joined in kicking Sipos in the head.

result, used deadly force. To the contrary, Hancher denied that he punched or kicked Sipos and denied that he caused Sipos's death. Accordingly, the trial court did not commit plain error when it failed to instruct the jury on Voluntary Manslaughter.

{¶ 67} Hancher further claims that the trial court erred in denying his request for a jury instruction on Involuntary Manslaughter, under R.C. 2903.04, which states: "No person shall cause the death of another *** as a proximate result of the offender's committing or attempting to commit a felony." The culpable mental state for Involuntary Manslaughter is that of the underlying offense. *State v. Davis*, Clark App. Nos. 2007-CA-71, 2008-CA-55, 2009-Ohio-4583, ¶30. Hancher argues that the jury could have reasonably found that the underlying offense to the homicide was simple or aggravated assault rather than Felonious Assault.

{¶ 68} The Assault statute, R.C. 2903.13, provides, in part:

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

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

{¶ 71} Although Hancher does not specify whether he was relying on R.C. 2903.13(A) or (B), we find neither provision to be applicable in this case. The coroner testified that Sipos suffered extensive hemorrhaging under his scalp as a result of repeated blunt force injuries. Witnesses who observed Sipos on the ground in the parking lot testified that Sipos's face was swollen and covered in blood and that he had difficulty breathing. Thus, the evidence established that Sipos suffered

"serious physical harm," not merely "physical harm" under R.C. 2903.13(A). To the extent that Hancher relied on R.C. 2903.13(B), the evidence demonstrated that Hancher – if he were involved in the assault upon Sipos at all – repeatedly kicked Sipos's head while Sipos was on the ground. This conduct reflected knowing, not reckless, conduct by Hancher. Because Hancher's actions were not reckless, R.C. 2903.13(B) also did not apply.

{¶ 72} As for Aggravated Assault, as stated above, even assuming that Sipos's actions were sufficient to constitute "serious provocation," the evidence does not support a finding that Hancher acted under the influence of a sudden fit of rage. Accordingly, the trial court properly determined that Hancher was not entitled to an instruction on Involuntary Manslaughter based upon Aggravated Assault.

{¶ 73} The Third Assignment of Error is overruled.

V

{¶ 74} Hancher's Fourth Assignment of Error states:

{¶ 75} "THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL FOR PROSECUTORIAL MISCONDUCT."

{¶ 76} In his Fourth Assignment of Error, Hancher claims that numerous instances of prosecutorial misconduct deprived him of a fair trial and that he should have been granted a mistrial.

{¶ 77} "[T]he trial judge is in the best position to determine whether the situation in [the] courtroom warrants the declaration of a mistrial." *State v. Glover* (1988), 35 Ohio St.3d 18, 19. See, also, *State v. Williams*, 73 Ohio St.3d 153, 167,

1995-Ohio-275. This court will not second-guess such a determination absent an abuse of discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, 182. Moreover, mistrials need be declared only when the ends of justice so require and a fair trial is no longer possible. *State v. Franklin* (1991), 62 Ohio St.3d 118, 127, citing *Illinois v. Somerville* (1973), 410 U.S. 458, 462-463, 93 S.Ct. 1066, 35 L.Ed.2d 425.

{¶ 78} In reviewing claims of prosecutorial misconduct, the test is "whether remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused." *State v. Jones*, 90 Ohio St.3d 403, 420, 2000-Ohio-187. "The touchstone of analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" Id., quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 947, 71 L.Ed.2d 78. Where 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 and his conviction will not be reversed. See *State v. Loza* (1994), 71 Ohio St.3d 61, 78, 1994-Ohio-409. We review the alleged wrongful conduct in the context of the entire trial. *State v. Stevenson*, Greene App. No. 2007-CA-51, 2008-Ohio-2900, ¶42, citing *Darden v. Wainwright* (1986), 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144.

{¶ 79} First, Hancher asserts that the prosecutor made a "blatantly improper remark" while Credlebaugh was testifying about how he had witnessed Kleekamp kick Sipos in the head. Credlebaugh testified that Kleekamp "walked up over top of his head and basically put his knee up to his chest and stomped down on the back of his head with everything that he absolutely had. It was the most ruthless thing I've ever seen. It was like watching American History [X]." Kleekamp's attorney

objected to the testimony; the objection was overruled. Immediately afterward, the prosecutor stated, "Judge, I'd object, too." Hancher's counsel objected to the prosecutor's remark. The court sustained the objection, told the jury to disregard the last comment, and asked counsel to approach.

{¶ 80} During the sidebar discussion, Kleekamp's and Hancher's counsel requested a mistrial due to prosecutorial misconduct. They argued that the prosecutor was inflaming the jury and the comment was "completely uncalled for." After taking an evening recess and reviewing a video of the testimony and the prosecutor's remark, the court concluded that the "tone and tenor" of the prosecutor's statement "insinuat[ed] that if someone had evidence that damaging against them, that they would object too." The court found that the prosecutor's comment was "improper," but did not find that the single comment rose to the level of prosecutorial misconduct. The court denied the motions for a mistrial. Upon resumption of proceedings, the court instructed the jury as follows:

{¶ 81} "I will tell [you] that at the close of evidence yesterday, there was an improper comment that was made. I instructed you then and I will instruct you now to ignore that comment.

{¶ 82} "When you are instructed to ignore something, you will treat it as though it never happened. What the attorneys say in this case is not evidence. I will instruct you later on this, but I want to instruct you now, that you will decide this case on the evidence of the case and not statements of counsel."

{¶ 83} Hancher does not "take issue" with the trial court's ruling that this one comment by the prosecutor, alone, did not deprive him of a fair trial, and we find that

the trial court appropriately addressed the matter to prevent any prejudice to the defendants.

{¶ 84} Second, Hancher asserts that the prosecutor engaged in misconduct by repeatedly stating that Hancher and Kleekamp "kicked and stomped Sipos to death." Hancher contends that the prosecutor thereby expressed as fact his opinion of Hancher's guilt. Hancher cites to twelve instances during the trial where the prosecutor referred to Sipos's being stomped and kicked.

{¶ 85} We find no misconduct based on the prosecutor's repeated references to Sipos's having been stomped and kicked. The coroner, who testified as the State's first witness, opined that Sipos had died from multiple, serious blows to the head and neck, one of which was consistent with shoe tread. Credlebaugh, the State's second witness, testified that he saw Hancher and Kleekamp repeatedly kick and stomp Sipos in the head. Three of Hancher's citations to the record involved the prosecutor's questions to Credlebaugh about his observations. The prosecutor's subsequent references to Sipos having been kicked and stomped to death in questions to witnesses were reasonably based on evidence already admitted at trial and were not gratuitously mentioned in an effort to inflame the jury. Where the prosecutor did refer needlessly to Sipos having been stomped and kicked, Hancher's counsel objected and the trial court sustained the objection.

{¶ 86} Third, Hancher contends that the prosecutor improperly suggested at least three different times that Hancher's version of events was not true, because no one witnessed Hancher being "pounded and pounded and pounded" against a fence by Sipos. Hancher argues that he did not testify to such events in his testimony, that

the prosecutor was alluding to matters that were not supported by the evidence, and that the prosecutor's conduct denigrated his credibility.

{¶ 87} During the State's case, the prosecutor asked Credlebaugh if he had observed Sipos "pounding and pounding the Defendant Hancher all the way to the fence line." Credlebaugh said, "No." The prosecutor likewise asked Agullana, "Did [Sipos] pound away at Hancher and push him all the way up against the fence line I showed you that picture of?" Agullana responded that she did not remember that. The prosecutor also cross-examined Hancher about whether Sipos had pounded him "over and over and over and over again." Hancher responded that he had been hit one time.

{¶ 88} Although no one, including Hancher, testified that he was repeatedly pounded by Sipos, the prosecutor's questions to witnesses were apparently in response to Hancher's counsel's opening statement, which included the following remarks:

{¶ 89} "Robert [Hancher] went out the bar, left the bar first. Stephen Sipos followed him out, grabbed him. That's were it started, grabbed him. My client backing up, Mr. Hancher backing up. He backed up all the way up to that fence you saw went behind that place when you did the jury view. Notice that fence line? Backed all the way up to that fence, 320-pound man, 6'2", against Hancher at 160, pounding on him. He went down. Hancher – somebody picked him up eventually.

{¶ 90} "* * * *

{¶ 91} "This had nothing to do with some rasslers (sic) or somebody like that inside Meercat's Bar. This was a big drunk picking on a guy 160 pounds and gonna

pound him, at a bar at 2:00 in the morning. Two sides to this. Just keep an open mind till you hear it all. ***"

{¶ 92} In light of Hancher's counsel's opening statement, the State reasonably asked Credlebaugh, Agullana, and Hancher if Sipos "pounded" Hancher to the fence line. We find nothing improper in this line of questioning.

{¶ 93} Fourth, Hancher claims that the prosecutor asked leading and improper questions throughout his direct examinations of the witnesses, sometimes even immediately after being warned by the court not to do so following a sustained objection. We agree with Hancher that the prosecutor asked leading questions of State's witnesses throughout the trial, although not all of the questions challenged on appeal were leading and/or improper. However, Hancher has not demonstrated that he was deprived of a fair trial as a result of those questions. The trial court repeatedly sustained objections to the leading questions, and Hancher never complained that this remedy – the sustaining of his objections – did not go far enough, and that a mistrial should be ordered.

{¶ 94} Fifth, Hancher complains that the prosecutor made a blatantly improper remark during his cross-examination of Hancher. The prosecutor asked Hancher if it was a coincidence that "Sipos' blood and DNA is all over your boots, jeans, Kleekamp's sneakers, and your brother's polo shirt." After Hancher answered, "I can't answer that," the prosecutor remarked, "I know." Hancher's counsel immediately objected. The trial court sustained the objection and ordered the jury to "disregard the last comment."

{¶ 95} Hancher's counsel asked to approach and requested a mistrial based

on the prosecutor's editorializing during his cross-examination of Hancher. (Kleekamp's counsel joined in the motion.) The court ruled that the prosecutor's comment was "improper" and "should not have been made." The court declined to grant a mistrial and asked the prosecutor if he had another area that he wanted to question Hancher about.

{¶ 96} We do not condone the prosecutor's editorial comments during the presentation of evidence, and we agree with the trial court that the prosecutor's comment should not have been made. However, we cannot conclude that Hancher was unfairly prejudiced by the prosecutor's comment. The prosecutor could, and did, argue during the State's rebuttal closing argument: "Hancher's story makes no sense. He can't explain the blood on any of these Defendant's shoes and /or pants or shirt. And he tries to tell you that before any of that blood was around , he and Kleekamp had already disappeared from that scene. And it doesn't make sense. * * * * * " Although the prosecutor should have waited until closing argument to make any comments on the evidence, we cannot say that the outcome of Hancher's trial would have been different absent the prosecutor's improper remark.

{¶ 97} Finally, Hancher claims that the cumulative effect of the prosecutor's improper comments and the leading and improper questions deprived him of a fair trial. Although, as stated above, we agree that the prosecutor made improper remarks and attempted to use leading questions, we do not conclude, upon reviewing the trial as a whole, that the prosecutor's actions affected Hancher's substantial rights and deprived him of a fair trial.

{¶ 98} The Fourth Assignment of Eerror is overruled.

VI

{¶ 99} All of Hancher's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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BROGAN and FROELICH, JJ., concur.

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