[Cite as *State v. Markley*, 2015-Ohio-1890.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
MARION COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 9-14-39**

v.

SHEILA J. MARKLEY, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Marion County Common Pleas Court
Trial Court No. 14-CR0300

Judgment Affirmed

Date of Decision: May 18, 2015

APPEARANCES:

Robert C. Nemo **for Appellant**

Brent W. Yager **for Appellee**

PRESTON, J.

{¶1} Defendant-appellant, Sheila J. Markley ("Markley"), appeals the October 1, 2014 judgment entry of sentence of the Marion County Court of Common Pleas. For the reasons that follow, we affirm.

{¶2} At 5:30 a.m. on June 14, 2014, the Marion City Fire Department received a report about a fire in the backyard of a residence at 456 East Mark Street, Marion, Ohio. (Sept. 23, 2014 Tr., Vol. I, at 105-106, 132-133). Daren Neuenschwander ("Neuenschwander") and Sean Lester ("Lester") of the Marion City Fire Department responded to the fire. (*Id.* at 106, 132-134). While Neuenschwander was extinguishing the fire, Markley pulled and fired a gun in the direction of Neuenschwander. (*Id.* at 108-109).

{¶3} On June 26, 2014, the Marion County Grand Jury indicted Markley on one count of felonious assault in violation of R.C. 2903.11(A)(2), a second-degree felony, with a related firearm specification. (Doc. No. 2).

{¶4} On June 30, 2014, Markley entered a plea of not guilty at arraignment. (Doc. No. 8). On July 2, 2014, Markley entered a written plea of not guilty by reason of insanity. (Doc. No. 15). That same day, she filed a motion requesting the trial court to order an evaluation of her mental condition under R.C. 2945.371. (Doc. No. 16).

{¶5} On July 7, 2014, the trial court granted Markley's motion requesting a mental-condition evaluation under R.C. 2945.371. (Doc. No. 21). On August 19, 2014, the trial court found Markley competent to stand trial after a hearing on August 14, 2014. (Doc. No. 29). On September 10, 2014, Markley withdrew her not-guilty-by-reason-of-insanity plea. (Doc. No. 50).

{¶6} On September 22, 2014, the State filed a request for the following jury-view instructions:

1. Familiarize themselves with the entire backyard at 456 East Mark Street, Marion, Ohio.
2. View the white dots and white hashes on the pavement in the parking lot just east of 456 East Mark Street, Marion, Ohio.
3. Look at and examine hole in the siding at 470 East Mark Street, Marion, Ohio just east of the parking lot.
4. Look at line of sight from white dot B closest to the fence to the hole in the siding at 470 East Mark Street, Marion, Ohio.

(Doc. Nos. 80).

{¶7} On September 23-24, a jury trial was held. At trial, a jury view was held. (Sept. 23, 2014 Tr., Vol. I, at 126-127). The jury found Markley guilty on September 24, 2014. (Doc. No. 86); (Sept. 24, 2014 Tr., Vol. II, at 497-498). On September 29, 2014, the trial court sentenced Markley to two years in prison as to

the count of the indictment and three years in prison as to the firearm specification, to be served consecutively. (Doc. No. 96).

{¶8} The trial court filed its judgment entry of sentence on October 1, 2014, and Markley filed her notice of appeal on October 22, 2014. (Doc. Nos. 96, 106). Markley raises three assignments of error for our review. For ease of our discussion, we elect to address Markley's third assignment of error first, followed by her first and second assignments of error.

Assignment of Error No. III

The guilty verdicts against appellant were against the manifest weight of the evidence.

{¶9} In her third assignment of error, Markley argues that her convictions were against the manifest weight of the evidence. In particular, Markley argues that the State failed to prove that she "knowingly shot at Neuenschwander, believing the bullet would hit him and cause him injury" "when she fired her gun." (Appellant's Brief at 22).

{¶10} In determining whether a conviction is against the manifest weight of the evidence, a reviewing court must examine the entire record, "'weigh[ ] the evidence and all reasonable inferences, consider[ ] the credibility of witnesses and determine[ ] whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *State v. Thompkins*, 78

Ohio St.3d 380, 387 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). A reviewing court must, however, allow the trier of fact appropriate discretion on matters relating to the weight of the evidence and the credibility of the witnesses. *State v. DeHass*, 10 Ohio St.2d 230, 231 (1967). When applying the manifest-weight standard, "[o]nly in exceptional cases, where the evidence 'weighs heavily against the conviction,' should an appellate court overturn the trial court's judgment." *State v. Haller*, 3d Dist. Allen No. 1-11-34, 2012-Ohio-5233, ¶ 9, quoting *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, ¶ 119.

{¶11} The criminal offense of felonious assault is codified in R.C. 2903.11, which provides, in relevant part: "No person shall knowingly * * * [c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon * * *." R.C. 2903.11(A)(2). Markley argues only that the State failed to prove that she *knowingly* attempted to cause physical harm to Neuenschwander. Therefore, we will address only the "knowingly" element of the offense. *See State v. Ayala*, 3d Dist. Union No. 14-13-22, 2014-Ohio-2576, ¶ 26.

{¶12} "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B). "It is a fundamental

principle that a person is presumed to intend the natural, reasonable and probable consequences of his voluntary acts." *State v. Johnson*, 56 Ohio St.2d 35, 39 (1978). "Intent can be determined from the surrounding facts and circumstances." *State v. Seiber*, 56 Ohio St.3d 4, 13-14 (1990), citing *Johnson* at 38 and *State v. Robinson*, 161 Ohio St.3d 213 (1954), paragraph five of the syllabus.

{¶13} The State presented testimony from nine witnesses during the trial. Neuenschwander was called as the State's first witness. (Sept. 23, 2014 Tr., Vol. I, at 129). Neuenschwander testified that he and Lester were dispatched to 456 East Mark Street on June 14, 2014 to investigate a fire. (*Id.* at 132-133). According to Neuenschwander, he determined that the fire was an unauthorized fire and that it needed to be extinguished. (*Id.* at 135-136). He testified that Markley was standing next to the fire but was uncooperative with his efforts to investigate and extinguish the fire. (*Id.* at 136-138). Specifically, Neuenschwander testified that Markley "kept stepping in front of where [he] was trying to spray" and that "[e]very time [he] moved the nozzle over to hit another section of the fire, she'd step in front of it." (*Id.* at 138). Because of Markley's actions, Neuenschwander testified that he then "raised the nozzle above the fence, and [he] kind of was shooting above the fence and let it rain drop down onto the fire." (*Id.*). At that point, he testified that he heard Markley say "you have one second to stop" and that he saw "a red laser light come across the ground at [him],

and a shot fired." (*Id.* at 139). Specifically, he testified that when he saw the red laser light, he "saw [Markley's] arm and [sic] come up at [him]" and saw that she was aiming a gun at him. (*Id.*). After Markley fired the gun, Neuenschwander testified that he heard Lester yell "gun," and Neuenschwander ran behind the fire engine for protection. (*Id.*). Neuenschwander testified that he was "terrified" and "started feeling [himself] thinking [he] was shot." (*Id.* at 139-140). Neuenschwander testified that he did not see Markley move the gun over to shoot into the ground. (*Id.* at 140).

{¶14} On cross-examination, Neuenschwander reiterated that he heard Markley say "[y]ou have one second to stop" and then "the shot was fired." (*Id.* at 173). According to Neuenschwander, he saw the red laser light from Markley's gun pointed at him, saw Markley's arm raised at him, heard the gun fire, and heard Lester yell "gun." (*Id.* at 173-174). However, Neuenschwander testified that he did not see the gun "flash" when Markley fired it. (*Id.* at 175). He further testified, "Before I even had a chance to run, the shot was fired. It happened so quickly, the laser light, and bam." (*Id.* at 176).

{¶15} The State next called Lester to testify. (*Id.* at 184). He testified that at the time the shot was fired, he was standing midway down the fire engine, on the driver's side, to activate the pump to the booster hose for Neuenschwander to begin extinguishing the fire. (*Id.* at 190). Lester stated that he was no more than

20 feet from Neuenschwander and Markley at that time. (*Id.*). According to Lester:

> After I've got my pressure set, I turned to observe what's going on. And I at that time see [Markley] standing in front – or trying to stand in front of where [Neuenschwander is] trying to put the fire out with the water. Approximately I would say a minute goes by. And as she's standing there, [Neuenschwander] then starts to put water over and around her as best he can.
>
> I happened to observe her hand coming up. When her hand was approximately halfway up, it appeared – there appeared to be a gun in her hand. About that time she brings it up to approximately level. From my vantage point it appears to be pointing at [Neuenschwander]. I at that time shouted, gun. Within a split second there was a gun shot.

(*Id.* at 191). Lester further testified that, from his vantage point, it appeared that Markley was pointing the gun at Neuenschwander and that he did not see her point it in any other direction. (*Id.* at 192-193). Lester stated, "I heard the gun discharge and saw a puff of smoke." (*Id.* at 193). According to Lester, he "looked towards" Neuenschwander and saw him drop the hose and run "towards the back of the truck," and Lester ran around the front of the truck to meet up with

Neuenschwander to make sure he was okay. (*Id.* at 193-194). Lester testified that he and Neuenschwander were checking Neuenschwander to see if he had been shot because they "didn't know whether he had been hit or not." (*Id.* at 194).

{¶16} On cross-examination, Lester testified that he could not hear the exchange between Neuenschwander and Markley due to the loud noise the fire engine emits when its water pressure is raised. (*Id.* at 211). Lester testified that he witnessed the incident from the side. (*Id.* at 215-216). He again averred that he saw Markley raise the gun at Neuenschwander and that he yelled "gun" when he saw the gun in Markley's hand. (*Id.* at 214). He confirmed that Markley fired the gun one or two seconds after he yelled "gun." (*Id.*). He testified that he saw a puff of smoke when Markley fired the gun because he was looking at the gun. (*Id.* at 215).

{¶17} Next, Rob Musser ("Musser") of the Marion Police Department testified that he was dispatched to the scene on June 14, 2014. (*Id.* at 220). He testified that, when he encountered Neuenschwander, Neuenschwander "was pretty shaken. He was flushed, he was white. He actually could barely talk and tell me what was going on." (*Id.* at 224). According to Musser, he asked Neuenschwander to show him where he was standing and where Markley was standing when the incident happened so that he could "ascertain the line of fire." (*Id.* at 225). Musser testified that he then "drew an imaginary line back to look for

a bullet" and located the bullet lodged in the siding of the residence at 470 East Mark Street, which is across a parking lot from 456 East Mark Street. (*Id.* at 225, 229). He testified that he could tell that the bullet hole in the residence at 470 East Mark Street happened "recently because all the small pieces of insulation were still right there." (*Id.* at 235).

{¶18} On cross-examination, Musser testified that he "pulled out the – what [he] thought was the [entire] bullet," but he could not "say that it didn't – a piece didn't chip off or whatever." (*Id.* at 247). He testified that the bullet he recovered from the residence at 470 East Mark Street was missing a portion from one side. (*Id.* at 248). Musser testified that he did not recall if he looked to see if a piece of the bullet chipped off. (*Id.* at 247). During the trial court's examination, Musser testified that he did not look for any ricochet markings in the parking lot. (*Id.* at 250).

{¶19} The State called Allen Roberts ("Roberts"), who resides at 470 East Mark Street and witnessed the June 14, 2014 incident. (Sept. 24, 2014 Tr., Vol. II, at 351). Roberts testified that he was awakened by the sound of the fire engine and looked out his window to see where the noise was coming from. (*Id.* at 352). According to Roberts, he saw Neuenschwander "with a hose pointed toward [Markley's] fence" and saw the fire. (*Id.* at 353). He testified that he was watching Neuenschwander trying to put the fire out "[a]nd all of a sudden [he]

heard a pop." (*Id.*). Roberts initially thought that the pop was made by trash blowing up in the fire. (*Id.*). After the pop, he saw Neuenschwander drop his hose and run to the front of the fire engine, but saw Markley continue to stand near the fire. (*Id.* at 353-354). At the time, he was concerned that Markley would be injured because the fire "could blow up" since he initially thought that the pop was caused by trash exploding in the fire. (*Id.* at 354). Roberts then saw Markley walk toward her house, saw Neuenschwander and Lester on their phones, and then saw the police arrive. (*Id.*). According to Roberts, he later learned that the police were searching for a bullet, which was found lodged in the siding of his residence. (*Id.* at 355-356).

{¶20} On cross-examination, Roberts testified that he did not hear any discussion or talking between Neuenschwander and Markley over the sound of the fire engine. (*Id.* at 368).

{¶21} The State called Michael Kindell ("Kindell") of the Marion Police Department, who testified that he was dispatched to the scene on June 14, 2014 and transported Markley from the scene to the Marion Police Department. (*Id.* at 311, 323).

{¶22} On cross-examination, Kindell testified that Markley told him that she fired the gun away from Neuenschwander and was not trying to hit him. (*Id.*

at 326). He further testified that Markley told him that she had years of firearms training and that she had a concealed-carry permit. (*Id.*).

{¶23} The State called Michael Shade ("Shade") of the Marion Police Department, who testified that he was also dispatched to the scene on June 14, 2014 and that he discovered Markley's gun, which was "on a shelving unit along the west wall in the [k]itchen on a bag of rice in sight." (*Id.* at 329, 331-332). He testified that there were five bullets in Markley's gun—"there w[ere] four live rounds in there and also a spin casing." (*Id.* at 332). He testified, "When the bullet was found, it was five to six feet off of the ground, 150 to 200 feet away." (*Id.* at 334). Shade also testified that Markley told him that "she activated the red laser that's on the gun" and that "she said she fired a shot into the ground." (*Id.* at 333). Because of the location where the bullet was found and Markley's statement that the bullet must have ricocheted, Shade testified that he "told [Markley] that [he] questioned if it would be a ricochet." (*Id.*).

{¶24} On cross-examination, Shade testified that Markley was insistent during her interview with law enforcement officers at the Marion Police Department that she did not try to hurt Neuenschwander or Lester. (*Id.* at 335).

{¶25} During the trial court's examination, Shade testified that he did not examine the parking lot to determine whether there were any markings from the bullet striking the pavement. (*Id.* at 336). Shade also testified that he does not

have any specific training in identifying ricocheting bullets—that is, Shade testified that the only training he has related to ricocheting bullets is active-shooter training, which trained him to "stay away from the halls [sic] because shots that come off walls will tend to stay along the wall." (*Id.*).

{¶26} The State called Michael Woods ("Woods") of the Marion City Police Department, who testified that he arrested Markley on June 14, 2014, and at the time he was placing her in handcuffs, she stated to him that "she just wanted them to stop spraying water at [her]." (*Id.* at 409, 413). Woods also testified that Markley stated to him that she knew she was "going to jail" or that she knew she was "in trouble" and reiterated that she "just wanted them to stop spraying water." (*Id.* at 414).

{¶27} On cross-examination, Woods testified that Markley was consistent in her description of the events during her interview with him at the Marion Police Department. (*Id.* at 425). Woods identified State's Exhibit 10 as Markley's interview at the Marion Police Department, which was subsequently played for the jury. (*Id.* at 419-421).

{¶28} The State also offered the testimony of Bob Peterson, an investigator with the Marion County Prosecutor's Office. (*Id.* at 377). Peterson testified that he was asked to return with Neuenschwander and Lester to 456 East Mark Street in September 2014 to "recreate" the scene. (*Id.* at 379). Peterson testified that the

bullet was located "five feet, five and one half inches" off of the ground in the siding of the residence at 470 East Mark Street. (*Id.* at 390). Peterson further testified that he looked for ricochet markings on the pavement of the parking lot. (*Id.* at 397). Specifically, Peterson testified that he walked "around the scene, looking at everything [he] could see out as far as 20 feet (indicating) in any direction from where – between the fire or Mr. Neuenschwander said he was standing, looking for anything, any gouges." (*Id.* at 403). Peterson testified that he was a "close quarter battle" instructor, which provided him with "a lot of firearms training." (*Id.* at 398). Peterson testified that he has been trained and provided training to others "in how to skip rounds in a tactical sense"—that is, to "shoot around objects." (*Id.* at 399). However, Peterson testified that, while he does not have any specific training in identifying what types of marks would be left on pavement from a bullet, he has "[a] lot of practical experience." (*Id.* at 400). Peterson identified State's Exhibit 7 as a sketch that he prepared of the scene. (*Id.* at 389).

{¶29} On cross-examination, Peterson testified that cars driving over, and people walking across, the pavement in the parking lot would affect the integrity of the pavement and any mark that may have been left in the pavement. (*Id.* at 407-408).

{¶30} The State called Kevin Kramer, a forensic scientist in the firearms section with the Ohio Bureau of Criminal Investigation ("BCI"). (Sept. 23, 2014 Tr., Vol. I, at 253). As a forensic scientist in the firearms section of BCI, Kramer testified that he examines firearms for operability or for function, that he tests firearms, and that he identifies bullets or fired cartridge cases as being fired by a particular firearm. (*Id.* at 254). Based on his training and experience, Kramer was qualified as an expert witness in the area of firearms examination. (*Id.* at 256). Kramer identified State's Exhibits 4, 5, and 6 as the bullet recovered from the residence at 470 East Mark Street, Markley's gun, and Kramer's report on the gun, respectively. (*Id.* at 258, 266). Kramer testified that he compared the bullet with other bullets fired from Markley's gun, but "could neither identify nor eliminate this fired bullet as having been fired by this firearm" "due to the damage sustained by the bullet." (*Id.* at 264, 265). However, he testified that the "bullet is the correct caliber, it's a .38 caliber bullet, the same – it's a nominal caliber that is the same as the specific caliber – the revolver is specifically a .38 special." (*Id.* at 265).

{¶31} On cross-examination, Kramer confirmed that a portion of the bullet recovered from the residence at 470 East Mark Street is missing. (*Id.* at 271-272). He testified that the missing piece of the bullet would be wherever the bullet hit. (*Id.* at 273).

{¶32} During the trial court's examination, Kramer testified that the gun's laser, if sighted properly, is used to help the shooter aim at a target. (*Id.* at 275).

{¶33} After the State presented its witnesses, it moved to admit its exhibits and rested. (*Id.* at 431). State's Exhibits 4, 5, 6, and 10, among others, were admitted without objection. (*Id.* at 432-436, 439-441). Markley objected to State's Exhibit 7 (the sketch), which was redacted, and admitted over Markley's objection. (*Id.* at 436-439). Next, Markley made a Crim.R. 29(A) motion to acquit, which the trial court denied. (*Id.* at 441-442).

{¶34} As its witness, the defense called Tracy Reveal ("Reveal") of the Corrections Training Academy. (*Id.* at 338). Reveal identified Defendant's Exhibits 1 and 2 as Markley's training file from her employment as a corrections officer with the Ohio Department of Rehabilitation and Correction. (*Id.* at 339, 342-343). Specifically, Reveal testified that those exhibits reflect Markley's firearm training from 1995-2012. (*Id.* at 340-341).

{¶35} On cross-examination, Reveal testified that the exhibits reflect that Markley "was initially certified in firearms for the .38 revolver and the 870 shotgun" in 1995. (*Id.* at 345).

{¶36} Thereafter, the defense moved to admit Defendant's Exhibits 1 and 2, which were admitted over the State's objection. (*Id.* at 442, 447). Markley renewed her Crim.R. 29 motion, which the trial court denied. (*Id.* at 447). The

State did not present any witnesses on rebuttal, and the matter was submitted to the jury, which found Markley guilty as to the charge in the indictment. (*Id.* at 497-498).

{¶37} Markley's felonious-assault conviction is not against the manifest weight of the evidence. A jury could conclude that the evidence presented at trial demonstrated that Markley knowingly attempted to cause physical harm to Neuenschwander. Neuenschwander testified that he heard Markley say "you have one second to stop," saw a red laser light come across the ground at him, saw Markley's arm raised at him, saw her aiming a gun at him, and heard the gun fire. (Sept. 23, 2014 Tr., Vol. I, at 139, 173-174, 176). Although Neuenschwander did not see the gun "flash," he averred that he saw Markley raise her arm and point the gun at him and did not see her move the gun or shoot into the ground. (*Id.* at 139, 173-175). Because of Markley's actions, Neuenschwander thought he had been shot. (*Id.* at 139-40). Lester's testimony supports Neuenschwander's version of events. Lester was standing no more than 20 feet from Neuenschwander and Markley and saw Markley point her gun at Neuenschwander, heard the gun shot, and saw a puff of smoke. (*Id.* at 190-191). Lester did not see Markey point the gun in any other direction. (*Id.* at 192-193). Like Neuenschwander, Lester also thought that Neuenschwander had been shot. (*Id.* at 194).

{¶38} Nonetheless, Markley argues that the State failed to present evidence that she *knowingly* attempted to cause Neuenschwander physical harm. In support of her argument, Markley points to the statements that she provided law enforcement officers after the incident that she did not intend to harm Neuenschwander and that she merely shot into the ground to scare him. Markley bolsters her argument that she did not intend to harm Neuenschwander by pointing to the ricochet evidence presented at trial and her firearms training. More precisely, because of her firearms training, she avers that she is skilled enough to be able to shoot near a person and not hit them. She further avers that the ricochet evidence demonstrates that she shot into the ground and did not intend to harm Neuenschwander. Markley also argues that Peterson's "reenactment" further caused the jury to lose its way. However, Markley's arguments regarding the "reenactment" and ricochet are underwhelming to the evidence that the State presented at trial that she knowingly attempted to cause physical harm to Neuenschwander and do not negate that she committed felonious assault.

{¶39} Although Markley does not challenge the sufficiency of the evidence against her, case law regarding sufficient evidence of the knowing-element of felonious assault in instances where a gun is discharged in the direction of another person is insightful to our analysis.

{¶40} First, while the Supreme Court of Ohio has held that "[t]he act of pointing a deadly weapon at another, without additional evidence regarding the actor's intention, is insufficient evidence to convict a defendant of the offense of 'felonious assault' as defined by R.C. 2903.11(A)(2)," Markley did more than point her gun at Neuenschwander. *State v. Brooks*, 44 Ohio St.3d 185, 192 (1989). In addition to pointing her gun at Neuenschwander, she fired the gun and, just before she fired the gun, she warned Neuenschwander that "you have one second to stop." *See State v. Kehoe*, 133 Ohio App.3d 591, 599-600 (12th Dist.1999) ("The act of pointing a deadly weapon at another 'coupled with a threat, which indicates an intention to use such weapon,' is sufficient evidence to support a conviction for felonious assault."), quoting *State v. Green*, 58 Ohio St.3d 239 (1991), syllabus.

{¶41} Moreover, that Markley told law enforcement officers after the fact that she did not try to harm Neuenschwander and fired her gun into the ground does not negate her actions, which demonstrated that she knowingly attempted to cause physical harm to Neuenschwander. Rather, "[f]iring a gun in a person's direction is sufficient evidence of felonious assault." *State v. Jordan*, 8th Dist. Cuyahoga No. 73364, 1998 WL 827588, *12, citing *State v. Mills*, 62 Ohio St.3d 357 (1992) (firing a warning shot and almost hitting the victim constituted felonious assault), *State v. Philips*, 75 Ohio App.3d 785, 792 (2d Dist.1991)

("[I]ntent to cause physical harm to the five individuals could be inferred from his having shot a gun randomly in the direction of each individual."), and *State v. Gregory*, 90 Ohio App.3d 124, 131 (12th Dist.1993). And, "[t]he shooting of a gun in a place where there is a risk of injury to one or more persons supports the inference that appellant acted knowingly." *Gregory* at 131. Therefore, the jury could reasonably infer that Markley knowingly attempted to cause physical harm to Neuenschwander since she fired her gun in Neuenschwander's direction, putting him at risk of injury. In fact, Markley admitted that she showed Neuenschwander the red laser on her gun and fired it within five feet of him. (*See* State's Ex. 10).

{¶42} Based on this statement, and the weighty testimony presented by Neuenschwander and Lester, Markley's argument that she did not knowingly attempt to cause physical harm to Neuenschwander is not compelling compared to the evidence that Markley committed felonious assault.

{¶43} After weighing the evidence and evaluating the credibility of the witnesses, with appropriate deference to the jury's credibility determination, we cannot conclude that the jury, as the trier of fact, clearly lost its way and created a manifest injustice. Therefore, we are not persuaded that Markley's felonious-assault conviction must be reversed and a new trial ordered.

{¶44} For these reasons, Markley's third assignment of error is overruled.

Assignment of Error No. I

The trial court committed numerous evidentiary errors to the prejudice of appellant.

{¶45} In her first assignment of error, Markley argues that the trial court committed numerous prejudicial evidentiary errors. Specifically, Markley argues that the trial court allowed testimony relating to non-expert ricochet evidence that should have been excluded, that the trial court committed plain error in allowing testimony and evidence concerning the reenactment, and that the trial court committed error in allowing markings depicting where Markley, Neuenschwander, and Lester were standing, where the fire engine was parked, and where the bullet hole was found to be viewed by the jury during the jury view. Markley further argues that the cumulative effect of these errors resulted in significant prejudice to her.

{¶46} Generally, the admission or exclusion of evidence lies within the trial court's discretion, and a reviewing court should not reverse absent an abuse of discretion and material prejudice. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶ 62, citing *State v. Issa*, 93 Ohio St.3d 49, 64 (2001).

{¶47} However, "if the party wishing to exclude evidence fails to contemporaneously object at trial when the evidence is presented, that party waives for appeal all but plain error." *State v. Bagley*, 3d Dist. Allen No. 1-13-31, 2014-Ohio-1787, ¶ 53-54, citing *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-

160, ¶ 59-60, *State v. Barrett*, 4th Dist. Scioto No. 03CA2889, 2004-Ohio-2064, ¶ 20, and *State v. Lenoir*, 2d Dist. Montgomery No. 22239, 2008-Ohio-1984, ¶ 19. "Crim.R. 52(B) governs plain-error review in criminal cases." *Id.* at ¶ 55, citing *State v. Risner*, 73 Ohio App.3d 19, 24 (3d Dist.1991). "For there to be plain error under Crim.R. 52(B), the trial court must have deviated from a legal rule, the error must have been an obvious defect in the proceeding, and the error must have affected a substantial right." *Id.*, citing *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). "Under the plain-error standard, the appellant must demonstrate that the outcome of his trial would clearly have been different but for the trial court's errors." *Id.*, citing *State v. Waddell*, 75 Ohio St.3d 163, 166 (1996), citing *State v. Moreland*, 50 Ohio St.3d 58 (1990). "We recognize plain error '"with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice."'" *Id.*, quoting *State v. Landrum*, 53 Ohio St.3d 107, 110 (1990), quoting *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus. Markley concedes that she did not object to the alleged errors, so we apply a plain-error standard of review to her arguments under her first assignment of error.

{¶48} First, Markley argues that the trial court erred by permitting testimony relating to non-expert ricochet evidence—namely, the testimony of Shade and Peterson relating to ricochet. Specifically, she argues that the trial

court erred by not conducting a hearing under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* to qualify Shade and Peterson as expert witnesses. 509 U.S. 579 (1993). Markley's argument is erroneous. Evid.R. 702 governs the admissibility of expert testimony, but it does not bear on Markley's argument. *See Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 610 (1998).

{¶49} The State did not offer Shade or Peterson as expert witnesses and neither expressed a scientific opinion on whether the bullet ricocheted. Indeed, Shade's testimony did not concern *any* scientific matter; rather, his testimony related the conversation regarding ricochet that he had with Markley during her interview at the Marion Police Department subsequent to the June 14, 2014 incident. (*See* Sept. 23, 2014 Tr., Vol. II, at 333-334). Likewise, Peterson's testimony described what he observed about the scene as it appeared in September 2014. (*Id.* at 397-408). Therefore, the trial court was not required to conduct a hearing under *Daubert*.

{¶50} Moreover, any evidence of ricochet could have assisted Markley's argument that she did not intend to harm Neuenschwander. Therefore, even if it was error for the trial court to permit ricochet testimony, it did not materially prejudice Markley or affect her substantial rights.

{¶51} Similarly, Markley argues that the trial court failed to conduct a *Daubert* hearing as it related to Peterson's ability and training to set up any type of

reenactment. In particular, Markley argues that "[e]xperiments must be substantially similar between the conditions existing when the experiments are made and those existing at the time of the occurrence in dispute." (Appellant's Brief at 17, citing *St. Paul Fire and Marine, Ins. Co. v. Baltimore & Ohio RR. Co.*, 129 Ohio St. 401 (1935) and *Miller* at 615). Markley's argument is meritless since Peterson did not conduct *any* experiment or "reenactment."

{¶52} Instead, Peterson returned to the scene with Neuenschwander and Lester to place markings at the scene for a jury view depicting where Markley, Neuenschwander, and Lester were standing, where the fire engine was parked, and where the bullet hole was found. Under R.C. 2945.16:

> When it is proper for the jurors to have a view of the place at which a material fact occurred, the trial court may order them to be conducted in a body, under the charge of the sheriff or other officer, to such place, which shall be shown to them by a person designated by the court.

"What the jury observes when viewing a crime scene '"is not considered evidence, nor is it a crucial step in the criminal proceedings."'" *State v. Didion*, 173 Ohio App.3d 130, 2007-Ohio-4494, ¶ 9 (3d Dist.), quoting *State v. Frost*, 2d Dist. Montgomery No. 16564, 1998 WL 864907, *3 (Nov. 13, 1998), quoting *State v. Hopfer*, 112 Ohio App.3d 521, 542 (2d Dist.1996), citing *State v. Richey*, 64 Ohio

St.3d 353, 367 (1992) and *State v. Smith*, 90 Ohio App.3d 177, 180 (12th Dist.1993). Because a jury view is not evidence, but a visual aid "to help the jury better understand the circumstances and put the evidence into perspective," Markley's argument is meritless. *Id.* at ¶ 12.

{¶53} For these reasons, it was not plain error for the trial court to permit testimony relating to non-expert ricochet evidence or to permit testimony and evidence concerning Peterson's marking of the jury view.

{¶54} In addition, Markley argues that the trial court erred by permitting the jury to view the markings Peterson placed on the ground for the jury view. Markley not only fails to provide any citations to authorities in support of her argument, she also fails to articulate any prejudice she claims resulted from the jury view. Markley also argues in this assignment of error without any citations to authorities in support of her arguments that State's Exhibit 10 should have been redacted to remove statements related to ricochet.

{¶55} Consequently, Markley failed to comply with App.R. 16(A)(7), which requires her to include in each assignment of error an argument explaining "the reasons in support of the contentions, with citations to the authorities, statutes, and part of the record on which appellant relies." "[A]n appellate court may disregard an assignment of error pursuant to App.R. 12(A)(2): 'if the party raising it fails to identify in the record the error on which the assignment of error is

based or fails to argue the assignment separately in the brief, as required under App.R. 16(A).'" *Rodriguez v. Rodriguez*, 8th Dist. Cuyahoga No. 91412, 2009-Ohio-3456, ¶ 4, quoting App.R. 12(A). *See also State v. Linzy*, 5th Dist. Richland No. 2012-CA-33, 2013-Ohio-1129, ¶ 33 (refusing to address jury-view prejudice argument for failing to articulate any argument how he was prejudiced), citing *Kremer v. Cox*, 114 Ohio App.3d 41, 60 (9th Dist.1996).

{¶56} Markley further avers that the cumulative effect of these errors prevented her from obtaining a fair trial. "Under [the] doctrine of cumulative error, a conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of a fair trial even though each of the numerous instances of trial court error does not individually constitute cause for reversal." *State v. Spencer*, 3d Dist. Marion No. 9-13-50, 2015-Ohio-52, citing *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, ¶ 222-224 and *State v. Garner*, 74 Ohio St.3d 49, 64 (1995). "To find cumulative error, a court must first find multiple errors committed at trial and determine that there is a reasonable probability that the outcome below would have been different but for the combination of the harmless errors." *State v. Stober*, 3d Dist. Putnam No. 12-13-13, 2014-Ohio-5629, ¶ 15, quoting *In re J.M.*, 3d. Dist. Putnam No. 12-11-06, 2012-Ohio-1467, ¶ 36.

{¶57} Because we found no error as alleged by Markley in this assignment of error, the doctrine of cumulative error does not apply. *State v. Bertuzzi*, 3d Dist. Marion No. 9-13-12, 2014-Ohio-5093, ¶ 110.

{¶58} Markley's first assignment of error is overruled.

Assignment of Error No. II

The appellant was denied her constitutional right to effective assistance of counsel.

{¶59} In her second assignment of error, Markley argues that she was deprived the effective assistance of trial counsel. In particular, Markley argues that her trial counsel failed to request an allocation of funds for an expert witness to confirm that she shot the gun into the ground and that it ricocheted; that her trial counsel failed to object to the reenactment; that her trial counsel failed to object to markings being placed at the scene for the purpose of the jury view; and that her trial counsel failed to object to the statement of the police officer that questioned Markley regarding the ricochet evidence. Markley further argues that the cumulative effect of these errors resulted in her receiving ineffective assistance by her trial counsel.

{¶60} A defendant asserting a claim of ineffective assistance of counsel must establish: (1) the counsel's performance was deficient or unreasonable under the circumstances; and (2) the deficient performance prejudiced the defendant. *State v. Kole*, 92 Ohio St.3d 303, 306 (2001), citing *Strickland v. Washington*, 466

U.S. 668, 687 (1984). In order to show counsel's conduct was deficient or unreasonable, the defendant must overcome the presumption that counsel provided competent representation and must show that counsel's actions were not trial strategies prompted by reasonable professional judgment. *Strickland* at 687. Counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie*, 81 Ohio St.3d 673, 675 (1998). Tactical or strategic trial decisions, even if unsuccessful, do not generally constitute ineffective assistance. *State v. Carter*, 72 Ohio St.3d 545, 558 (1995). Rather, the errors complained of must amount to a substantial violation of counsel's essential duties to his client. *See State v. Bradley*, 42 Ohio St. 3d 136, 141-42 (1989), quoting *State v. Lytle*, 48 Ohio St.2d 391, 396 (1976).

{¶61} Markley failed to demonstrate that her trial counsel was deficient for failing to request an allocation of funds for an expert witness to confirm that she shot the gun into the ground and that it ricocheted. "A decision by trial counsel not to call an expert witness generally will not sustain a claim of ineffective assistance of counsel." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶ 118. *See also State v. Dooley*, 3d Dist. Allen No. 1-10-41, 2010-Ohio-6260, ¶ 16, citing *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, ¶ 118, *State v. Nicholas*, 66 Ohio St.3d 431, 436 (1993), *State v. Thompson*, 33 Ohio St.3d 1, 10-11 (1987), and *State v. Carter*, 72 Ohio St.3d 545, 558 (1995).

{¶62} While Markley avers that an expert witness would have "gone to the scene well before the reenactment occurred" and "would have had the opportunity to examine the parking lot before the scene further deteriorated" to determine if there was a ricochet, she fails to indicate how an expert witness's testimony regarding ricochet would have affected the outcome of trial. *See State v. Young*, 3d Dist. Defiance No. 4-01-18, 2002 WL 129824, *3 (Feb. 1, 2002) ("Nothing in the record indicates how an expert witness would have testified or how such testimony would have affected the outcome of the trial."). Likewise, there is no evidence in the record that an expert witness would have provided favorable testimony. *Mundt* at ¶ 118. Therefore, Markley's trial counsel was not ineffective for failing to call an expert witness.

{¶63} Furthermore, Markley's trial counsel was not ineffective for failing to object to the "reenactment," to markings being placed at the scene for the purpose of the jury view, or to the statement of the law enforcement officer that questioned Markley regarding the ricochet evidence. The "failure to make objections is within the realm of the trial tactics and does not establish ineffective assistance of counsel." *State v. Ray*, 3d Dist. Union No. 14-05-39, 2006-Ohio-5640, ¶ 63, citing *State v. Lockett*, 49 Ohio St.2d 48 (1976), paragraph nine of the syllabus, *rev'd on other grounds, sub nom. Lockett v. Ohio*, 438 U.S. 586 (1978). "Because 'objections tend to disrupt the flow of a trial, [and] are considered

technical and bothersome by the fact-finder,' * * * competent counsel may reasonably hesitate to object in the jury's presence.'" *State v. Hartman*, 93 Ohio St.3d 274, 296 (2001), quoting *State v. Campbell*, 69 Ohio St.3d 38, 53 (1994). Therefore, Markley's trial counsel was not ineffective for failing to object to the "reenactment," to the jury-view markings, or to the law enforcement officer's statement.

{¶64} Further, because we found no error as alleged by Markley in this assignment of error, the doctrine of cumulative error does not apply. *Bertuzzi*, 2014-Ohio-5093, at ¶ 110.

{¶65} For these reasons, Markley's second assignment of error is overruled.

{¶66} Having found no error prejudicial to the appellant herein in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

ROGERS, P.J., concurs.

WILLAMOWSKI, J., concurs in Judgment Only.

/jlr