[Cite as *State v. Bailey*, 2015-Ohio-2144.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case Nos. 14CA3427 14CA3428
vs.	:	
ALLEN M. BAILEY,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Timothy Young, Ohio Public Defender, and Francisco E. Luttecke, Assistant Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215

COUNSEL FOR APPELLEE: Matthew S. Schmidt, Ross County Prosecuting Attorney, and Cynthia G. Schumaker, Ross County Assistant Prosecuting Attorney, 72 North Paint Street, Chillicothe, Ohio 45601

CRIMINAL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED:5-29-15
ABELE, J.

{¶ 1} This is a consolidated appeal from two Ross County Common Pleas Court judgments of conviction and sentence. A jury found Allen M. Bailey, defendant below and appellant herein, guilty of (1) felonious assault in violation of R.C. 2903.11, and (2) complicity to bribery in violation of R.C. 2921.02 and R.C. 2923.03.

{¶ 2} Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT VIOLATED ALLEN M. BAILEY'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN IT FAILED TO GIVE THE JURY AN INSTRUCTION AS TO THE INFERIOR-DEGREE OFFENSE OF AGGRAVATED ASSAULT."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT VIOLATED ALLEN M. BAILEY'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN IT ALLOWED THE ADMISSION OF IRRELEVANT AND OVERLY PREJUDICIAL PORTIONS OF TELEPHONE RECORDINGS."

THIRD ASSIGNMENT OF ERROR:

"TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION."

{¶ 3} On April 29, 2013, Chillicothe City Police Officers responded to a report that an individual had been assaulted. When they arrived at the scene, they found the victim, Curtis Julius, unconscious and laying in a puddle of blood in the middle of the street. A subsequent investigation led officers to believe that appellant and another individual, Taylor DeLong, caused Julius' injuries.

{¶ 4} On May 17, 2013, a Ross County Grand Jury returned an indictment that charged appellant with felonious assault. While appellant awaited trial in jail, he engaged in several telephone conversations with his friend, Ashleigh Davis. All calls were recorded. During these calls, appellant and Davis discussed giving Julius money in exchange for Julius' written statement that appellant did not cause Julius' injuries on April 29, 2013 and for his agreement not to testify at trial.

{¶ 5} On July 12, 2013, a Ross County Grand Jury returned an indictment that charged appellant with complicity to bribery in violation of R.C. 2921.02 and R.C. 2923.03. The trial

court subsequently consolidated the bribery and felonious assault charges for trial.

{¶ 6} At the November 13 and 14, 2013 jury trial, Derrick Holsinger stated that he met appellant while they both were housed in the Ross County Jail. Holsinger testified that appellant discussed the April 29 incident with him and told Holsinger that appellant "wished he'd a killed [sic] the dude." Holsinger stated that appellant explained that he had Julius "in a headlock and he kicked him in the face [be]cause he had a cast on his leg." Holsinger further testified that appellant told Holsinger that appellant was attempting to convince Julius not to testify that appellant caused the injuries.

{¶ 7} Ashleigh Davis testified that on April 29, she and appellant, along with other friends, drove to a house to pick up Taylor DeLong. Davis stated that when they arrived, appellant went inside while the others remained in the car. Davis testified that when appellant exited the house, he and Julius started fighting. Davis explained the remaining circumstances surrounding the fight as follows: (1) Julius grabbed appellant's leg; (2) appellant put Julius in a headlock; (3) DeLong pulled Julius away from appellant; (4) DeLong and Julius started fighting; (5) Julius escaped the confrontation and ran down the street; (6) appellant and DeLong ran after Julius; and (7) once appellant and DeLong caught up to Curtis, they started kicking Julius in the head. Davis stated that even though appellant recently had surgery on his leg and wore a "boot," he could run and kick Julius in the face.

{¶ 8} After the fight, appellant and DeLong entered Davis' car and drove away. While in the car, appellant repeatedly stated, "we didn't start this, we didn't start this." Davis explained that appellant wanted all of the occupants in the car to state that he and DeLong did not start the altercation. The next day, appellant told Davis to tell the others that Julius started the fight and

that appellant could not have caused any damage because he had surgery on his leg. Davis stated that appellant also told her to state that DeLong kicked Julius in the face.

{¶ 9} Davis testified that a few days after the fight, she spoke with a detective and told him the story appellant wanted her to tell. She stated that she initially lied because she was afraid of appellant. She stated that "he's violent," "he was always yelling at me and just intimidating me," and she "was terrified of him."

{¶ 10} Davis testified that she spoke to appellant while he was in jail. She stated that appellant told her to find Julius and give him money in exchange for Julius' signed and notarized statement that appellant did not start the fight and that Julius did not want charges brought against appellant. Davis testified that appellant told her to ask Julius to write:

> "I, Curtis Julius, do not think Allen Bailey is the one that attacked me. I do not want charges brought on him. I talked to some of my good friends that were there and they told me he is not the one that did it and I have thoughts about it and I only remember Taylor DeLong coming at me."

Davis stated that appellant told her that once she had the statement, she should give the statement to the prosecutor, the judge, and appellant's lawyer.

{¶ 11} Davis testified that she spoke with Julius and asked him what he wanted in exchange for the statement. She stated that she and Julius agreed that she would give him $300 for his statement. Davis explained that Julius wrote the statement, but he was unable to have the statement notarized due to his lack of proper identification. Davis stated that she gave Julius $80 so that he could obtain proper identification.

{¶ 12} When she reported to appellant that she did not have a notarized statement from Julius, but that she did give Julius $80 so that he could obtain proper identification, appellant was

not pleased. Appellant told Davis that she was a "dumb motherfucker," a "stupid ass bitch," and used numerous profanity-filled verbal assaults to describe his displeasure with Davis' inability to obtain the notarized statement.

{¶ 13} Michelle Frankel testified that she witnessed appellant, Julius, and DeLong fighting. Frankel indicated that appellant and Julius wrestled in the front yard and, at some point, appellant started to "let [Julius] up but [Julius] was like trying to attack [appellant] a little bit so [appellant] was holding him down." Frankel believed appellant had been trying to end the fight and held Julius in a headlock in an attempt to diffuse the situation. Frankel stated that appellant released Julius, then Julius grabbed appellant by his booted leg. Once Julius extricated himself, DeLong and Julius fought. Frankel stated that DeLong knocked out Julius, which caused Julius to fall to the ground. After Julius fell to the ground, appellant and DeLong kicked Julius in the head. Frankel testified that appellant used his booted leg to kick Julius in the head and that he did not appear to have trouble walking.

{¶ 14} Kelly Peters, DeLong's mother, testified that she witnessed appellant jump on Julius and saw appellant and Julius wrestling in the front yard. Appellant asked Julius "if they were done fighting," but Julius tried to grab appellant by the ankle and the fight continued. Peters stated that DeLong "jerked" Julius from appellant's hold, and DeLong and Julius continued fighting. She stated that both DeLong and appellant stomped and kicked Julius' head. Peters testified that appellant kicked Julius with his booted leg.

{¶ 15} Julius testified that appellant started the fight. Julius explained that appellant "approached [him] about something, then [Julius] said a word back to [appellant], and we just went at it with each other." Julius did not recall what words they exchanged, but stated that he and

appellant were throwing punches and both eventually hit the ground. Julius stated that appellant placed him in a headlock and once he extricated himself from the headlock, he started "back pedaling" and appellant and DeLong charged after him. Julius stated that they continued fighting in the street. Julius testified that he recalls hitting the ground, and his next memory is waking up in the hospital. Julius also stated that Davis contacted him and informed him that she would pay him if he did not testify against appellant. Julius stated that he planned to "scam" the money, i.e., take the money but still testify against appellant.

{¶ 16} Appellant testified that Julius started the fight, that he did not kick Julius in the head, and that he could not have kicked Julius in the head because his recent surgery required him to use crutches. Appellant claimed that he did not tell Ashleigh to offer money to Julius in exchange for Julius' notarized statement.

{¶ 17} The state presented Davis as a rebuttal witness. Davis testified that appellant's crutches were in her vehicle and that appellant did not use them during the fight. She further stated that appellant devised the bribery scheme. Davis testified that appellant's plan was that Julius would receive money for stating that appellant did not hit him and for refusing to testify against appellant.

{¶ 18} After hearing the evidence, the jury found appellant guilty of felonious assault and complicity to bribery. The trial court sentenced appellant to serve six years in prison for the felonious assault offense and twenty-four months in prison for the complicity to bribery offense. This appeal followed.

I

{¶ 19} In his first assignment of error, appellant asserts that the trial court erred by failing

to give the jury an aggravated assault instruction. Appellant contends that the record contains sufficient evidence that he was seriously provoked because the victim's attack on appellant's "surgically-repaired, booted leg, that had only recently had pins removed from it," provoked appellant into a sudden fit of rage.

{¶ 20} Initially, we observe that appellant did not request the trial court to give the jury an aggravated assault instruction. Crim.R. 30(A) explains: "On appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection." Thus, a defendant's failure to request a particular instruction forfeits all but plain error. State v. White, — Ohio St.3d —, 2015-Ohio-492, — N.E.2d —, ¶57, citing State v. Davis, 127 Ohio St.3d 268, 2010-Ohio-5706, 939 N.E.2d 147, ¶24; State v. Steele, 138 Ohio St.3d 1, 2013-Ohio-2470, 3 N.E.2d 135, ¶¶29-30; State v. Eafford, 132 Ohio St.3d 159, 2012-Ohio-2224, 970 N.E.2d 891, ¶11; State v. Bundy, — Ohio App.3d —, 2012-Ohio-3934, 974 N.E.2d 139, ¶65 (4th Dist.). Plain error exists when the error is plain or obvious and when the error "affect[s] substantial rights." Crim.R. 52(B). The error affects substantial rights when but for the error, the outcome of the proceeding would have been different. White at ¶57. Courts ordinarily should take notice of plain error "with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice." State v. Gardner, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, ¶78. In the case sub judice, we do not believe that plain error exists.

{¶ 21} Generally, a trial court has broad discretion to decide how to fashion jury instructions. A trial court must not, however, fail to "fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its

duty as the fact finder." E.g., State v. Comen, 50 Ohio St.3d 206, 553 N.E.2d 640 (1990), paragraph two of the syllabus. Additionally, a trial court may not omit a requested instruction, if such instruction is "'a correct, pertinent statement of the law and [is] appropriate to the facts * * *.'" State v. Lessin, 67 Ohio St.3d 487, 493, 620 N.E.2d 72 (1993), quoting State v. Nelson, 36 Ohio St.2d 79, 303 N.E.2d 865, paragraph one of the syllabus (1973).

{¶ 22} Aggravated assault is an inferior degree of felonious assault. The two offenses are identical, except aggravated assault contains serious provocation as a mitigating factor.[1] State v. Deem, 40 Ohio St.3d 205, 210-211, 533 N.E.2d 294, 299 (1988). Thus, in a trial for felonious assault, a trial court must give the jury an aggravated assault instruction if the defendant presents sufficient evidence of serious provocation such that a jury could both reasonably acquit the defendant of felonious assault and convict the defendant of aggravated assault. State v. Mack, 82 Ohio St.3d 198, 200, 694 N.E.2d 1328 (1998); Deem, 40 Ohio St.3d at 211; State v. Shane, 63 Ohio St.3d 630, 632, 590 N.E.2d 272, 274-275 (1992). A defendant is not, however, entitled to an aggravated assault instruction simply because "some evidence" shows that the defendant may have acted under serious provocation. Shane, 63 Ohio St.3d at 633. "To require an instruction * * * every time 'some evidence,' however minute, is presented going to [serious provocation] would mean that no trial judge could ever refuse to give" the jury an aggravated assault instruction as an

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[1] R.C. 2903.11(A)(1) defines the offense of felonious assault as charged in the case at bar and states: "No person shall knowingly * * * [c]ause serious physical harm to another * * *."

R.C. 2903.12(A) defines aggravated assault as follows:

(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:

(1) Cause serious physical harm to another * * *.

inferior degree to felonious assault. Id. Instead, "the quality of the evidence offered * * * determines whether a[n aggravated assault] charge should be given to a jury." State v. Wine, 140 Ohio St.3d 409, 2014-Ohio-3948, 18 N.E.3d 1207, ¶26.

{¶ 23} A trial court has discretion to determine whether the record contains sufficient evidence to support an aggravated assault instruction. State v. McFadden, 4th Dist. Washington No. 14CA5, 2014-Ohio-5294, ¶6; State v. Mitts, 81 Ohio St.3d 223, 228, 690 N.E.2d 522 (1998); see Wine at ¶21 (explaining that "[t]he law, the evidence presented, and the discretion of the trial judge play a role in whether lesser-included-offense instructions are appropriate"). Thus, we will not reverse that determination absent an abuse of discretion. An abuse of discretion implies that the court's attitude is arbitrary, unreasonable, or unconscionable. E.g., Sivit v. Village Green of Beachwood, L.P., — Ohio St.3d —, 2015-Ohio-1193, — N.E.2d —, ¶9, citing State v. Adams, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶ 24} To determine whether sufficient evidence of serious provocation exists so as to warrant an aggravated assault instruction, a trial court must (1) objectively determine whether the alleged provocation is reasonably sufficient to bring on a sudden passion or fit of rage, and (2) determine whether the defendant in the particular case actually was under the influence of sudden passion or in a sudden fit of rage. Mack, 82 Ohio St.3d at 201.

{¶ 25} Under the first part of the inquiry, provocation is reasonably sufficient to bring on a sudden passion or fit of rage if it would "arouse the passions of an ordinary person beyond the power of his or her control." Shane, 63 Ohio St.3d at 635. "If insufficient evidence of provocation is presented, so that no reasonable jury would decide that an actor was reasonably provoked by the victim, the trial judge must, as a matter of law, refuse to give" an aggravated

assault instruction." Id. at 634.

{¶ 26} If the evidence shows that the defendant was sufficiently provoked under the objective standard, the inquiry then shifts to whether the defendant actually was under the influence of sudden passion or a sudden fit of rage. When a court determines whether the defendant actually was under the influence of sudden passion or a sudden fit of rage, the court must consider the defendant's emotional and mental state at the time of the incident. Id.

{¶ 27} We observe that "'[e]vidence supporting the privilege of self-defense, i.e., that the defendant feared for his own * * * personal safety, does not constitute sudden passion or a fit of rage'" as contemplated by the aggravated assault statute. State v. Sudderth, 4th Dist. Lawrence No. 07CA38, 2008-Ohio-5115, ¶14, quoting State v. Harris, 129 Ohio App.3d 527, 535, 718 N.E.2d 488 (10th Dist. 1998); accord State v. Perdue, 153 Ohio App.3d 213, 2003-Ohio-3481, 792 N.E.2d 747, ¶12 (7th Dist.). "While self-defense requires a showing of fear, [aggravated assault] requires a showing of rage, with emotions of 'anger, hatred, jealousy, and/or furious resentment.'" Sudderth at ¶14, quoting State v. Levett, 1st Dist. Hamilton No. C-040537, 2006-Ohio-2222, ¶29 (citations omitted). "Fear alone is insufficient to demonstrate the kind of emotional state necessary to constitute sudden passion or fit of rage." Perdue at ¶12.

{¶ 28} In Deem, the court determined that the provocation was not reasonably sufficient to bring on a sudden passion or fit of rage, and thus, an aggravated assault instruction was not warranted. In Deem, the defendant and the victim had been involved in a romantic relationship and the couple subsequently ended their relationship. After a brief attempt to reconcile, each filed criminal charges against the other stemming from different confrontations. One day, the defendant waited in his car at a roadside park for the victim to pass by in her car on her way to

work. After she drove by, the defendant followed her in his car, pulled alongside her, and motioned for her to pull to the road side. At some point, the cars bumped and eventually the defendant forced the victim's car off the road and into a ditch. The defendant stopped his car and went to the victim's car to attempt to convince her to open her window. When she refused, the defendant returned to his car, obtained a hammer, returned to the victim's car and smashed the driver's side window. Witness testimony established that the defendant reached through the broken window and stabbed the victim numerous times. The court concluded, as a matter of law, that the stormy relationship between the parties and the victim's alleged bumping of the defendant's car did not constitute sufficient provocation.

{¶ 29} Subsequent cases have held that a victim's simple pushing or punching does not constitute sufficient provocation to warrant an aggravated assault instruction. State v. Howard, 9th Dist. Summit No. 26897, 2014-Ohio-1334, ¶25 (concluding that "being grabbed on the arm and experiencing a cut in the process would not arouse the passions of an ordinary man beyond the power of his control such that he would be aroused to use deadly force"); State v. Evans, 4th Dist. Scioto No. 05CA3002, 2006-Ohio-2564, ¶64 (stating that "[a]s a matter of law, hitting another person does not constitute sufficient provocation to bring about a sudden passion or fit of rage"); State v. Bryan, 4th Dist. Gallia No. 03CA3, 2004-Ohio-2066 (concluding that victim grabbing defendant and attempting to hit him is not, as a matter of law, serous provocation); State v. Parker, 4th Dist. Washington No. 03CA43, 2004-Ohio-1739, ¶23 (stating that victim throwing plate of spaghetti on defendant did not constitute serious provocation so as to warrant aggravated assault instruction); State v. Koballa, Cuyahoga App. No. 82013, 2003–Ohio–3535 (concluding that sufficient provocation did not exist when the victim grabbed the defendant by the testicles and the

arm); State v. Poe, Pike App. No. 00CA9 (Oct. 6, 2000) (concluding that the victim's conduct in approaching the defendant with a hammer and stating "come on" did not constitute sufficient provocation); State v. Pack (June 20, 1994), Pike App. No. 93CA525 ("We find that a mere shove and a swing (which appellant by his own testimony ducked) are insufficient as a matter of law to constitute serious provocation reasonably sufficient to incite or arouse appellant into using deadly force.").

{¶ 30} In the case at bar, we do not believe that the record contains sufficient evidence of serious provocation such that the trial court plainly erred by failing to give the jury an aggravated assault instruction. Even if appellant's version of the altercation is credible, his testimony shows that he acted not out of a sudden fit of passion or rage, but out of concern for protecting his surgically repaired leg. Defending one's person from injury is not, as a matter of law, sufficient evidence of serious provocation. See Pack; Koballa; Poe.

{¶ 31} Furthermore, appellant did not testify that the victim's conduct actually threw him into a sudden fit of passion or rage. State v. Hamilton, 4th Dist. Scioto No. 09CA3330, 2011-Ohio-2783, ¶76 (determining that aggravated assault instruction not warranted when defendant claimed that he acted in self-defense and not under the influence of sudden passion or in a sudden fit of rage); State v. Ratcliff, Franklin App. No. 01AP–1349, 2002–Ohio–3727 (concluding that evidence the defendant was scared and the victim lunged at the defendant with a knife did not show that the defendant acted under a sudden fit of passion or rage); State v. Johnson, Cuyahoga App. No. 78327 (July 12, 2001) (stating that the evidence failed to show that the defendant acted under a sudden fit of passion or rage when the defendant claimed that he struck the victim in response to the victim's pushes); State v. Maggard, Montgomery App. No. 17198 (June

4, 1999) (concluding that evidence did not show that the defendant acted under a sudden fit of passion or rage when the defendant's testimony was simply that he was afraid and that he shot in self-defense). To the extent appellant claims that he acted out of fear, we again note that "[f]ear alone is insufficient to demonstrate the kind of emotional state necessary to constitute sudden passion or fit of rage." Mack, 82 Ohio St.3d at 201. Thus, after our review of the evidence and the applicable authority, we do not agree with appellant that the trial court plainly erred by failing to instruct the jury that it could convict appellant of aggravated assault.

{¶ 32} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's first assignment of error.

II

{¶ 33} In his second assignment of error, appellant argues that the trial court erred by admitting the recording of his telephone conversations with Ashleigh Davis. In particular, appellant asserts that even though portions of the conversation are relevant to the bribery charge, the parts containing appellant's "abrasive, profanity-filled" statements to Davis are irrelevant and highly prejudicial. Appellant contends that his profanity-filled statements did not prove the bribery charge and served "to cast [appellant] as an unsavory, angry, unlikeable, and most importantly, combative individual." Appellant thus implies that the jury improperly convicted him on the basis of his demeanor displayed in the telephone recordings.

{¶ 34} Our review reveals that appellant did not object at trial to the admission of the telephone recordings. Consequently, our review is again limited to whether the trial court plainly erred by admitting the evidence. E.g., State v. Nicely, 4th Dist. Adams No. 03CA779, 2004-Ohio-3847, ¶22. The admission or exclusion of evidence generally rests within the trial

court's sound discretion. E.g., State v. Crotts, 104 Ohio St.3d 432, 2004-Ohio-6550, 820 N.E.2d 302, ¶25; State v. Noling, 98 Ohio St.3d 44, 781 N.E.2d 88, 2002–Ohio–7044, ¶43. Thus, absent an abuse of discretion, an appellate court will not disturb a trial court's ruling regarding the admissibility of evidence. Id. Generally, an abuse of discretion implies that a court's attitude is unreasonable, arbitrary, or unconscionable. E.g., Adams, supra.

{¶ 35} Generally, all relevant evidence is admissible. Evid.R. 402. Evid.R. 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401 and Evid.R. 402. A trial court must, however, exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403. A trial court has broad discretion when determining whether to exclude evidence under Evid.R. 403(A), and "'an appellate court should not interfere absent a clear abuse of that discretion.'" State v. Yarbrough, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶40.

{¶ 36} Evid.R. 403(A) "manifests a definite bias in favor of the admission of relevant evidence, as the dangers associated with the potentially inflammatory nature of the evidence must substantially outweigh its probative value before the court should reject its admission." State v. White, 4th Dist. Scioto No. 03CA2926, 2004-Ohio-6005, ¶50. Thus, "[w]hen determining whether the relevance of evidence is outweighed by its prejudicial effects, the evidence is viewed in a light most favorable to the proponent, maximizing its probative value and minimizing any prejudicial effect to the party opposing admission." State v. Lakes, 2nd Dist. Montgomery No. 21490, 2007-Ohio-325, ¶22.

{¶ 37} All relevant evidence may be prejudicial in the sense that it "tends to disprove a party's rendition of the facts" and thus, "necessarily harms that party's case." Crotts at ¶23. Evid.R. 403(A) does not, however, "attempt to bar all prejudicial evidence." Id. Instead, the rules provide that only unfairly prejudicial evidence is excludable. Id. "'Evid.R. 403(A) speaks in terms of unfair prejudice. Logically, all evidence presented by a prosecutor is prejudicial, but not all evidence unfairly prejudices a defendant. It is only the latter that Evid.R. 403 prohibits.'" State v. Skatzes, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶107, quoting State v. Wright, 48 Ohio St.3d 5, 8, 548 N.E.2d 923 (1990). "'Unfair prejudice' does "not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis."'" State v. Lang, 129 Ohio St.3d 512, 2011–Ohio–4215, 954 N.E.2d 596, ¶89, quoting United States v. Bonds, 12 F.3d 540 (6th Cir.1993). Unfairly prejudicial evidence is evidence that "might result in an improper basis for a jury decision." Oberlin v. Akron Gen. Med. Ctr., 91 Ohio St.3d 169, 172, 743 N.E.2d 890 (2001), quoting Weissenberger's Ohio Evidence (2000) 85–87, Section 403.3. It is evidence that arouses the jury's emotions, that "'evokes a sense of horror,'" or that "'appeals to an instinct to punish.'" Id. "'Usually, although not always, unfairly prejudicial evidence appeals to the jury's emotions rather than intellect.'" Id. Thus, "[u]nfavorable evidence is not equivalent to unfairly prejudicial evidence." State v. Bowman, 144 Ohio App.3d 179, 185, 759 N.E.2d 856 (12th Dist. 2001).

{¶ 38} "'Only in rare cases are an accused's own actions or language unfairly prejudicial.'" State v. Blevins, 4th Dist. Scioto No. 10CA3353, 2011-Ohio-3367, ¶32, quoting State v. Lee, 10th Dist. Franklin No. 06AP226, 2007-Ohio-1594, ¶7. Thus, a defendant's profanity-laden statements

ordinarily are not unfairly prejudicial when they also contain relevant evidence. State v. Dennison, 10th Dist. Franklin No. 12AP-718, 2013-Ohio-5535, ¶79 (concluding that audio recordings containing defendant's "repeated and frequent use of words deemed by many to be offensive" were not unfairly prejudicial and did not "effectively constitute[] character assassination").

{¶ 39} In the case at bar, we do not believe that the trial court plainly erred by admitting the telephone conversations that contained appellant's profanity-laden statements. Appellant admits that the conversation was relevant to proving the bribery charge. We do not believe that the profanity-filled statements led to an improper basis for appellant's conviction, that the statements served to appeal to the jury's emotions, that they "'evoke[d] a sense of horror,'" or that they "'appeal[ed] to an instinct to punish." Although the statements may have been unfavorable to appellant, we cannot state that they were so unfairly prejudicial that the trial court plainly erred by admitting them.

{¶ 40} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's second assignment of error.

III

{¶ 41} In his third assignment of error, appellant argues that his trial counsel was ineffective for failing to request an aggravated assault jury instruction and for failing to object to the profanity-filled statements contained in the telephone recording.

{¶ 42} The Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution provide that defendants in all criminal proceedings shall have the assistance of counsel for their defense. The United States Supreme Court has generally interpreted this

provision to mean a criminal defendant is entitled to the "reasonably effective assistance" of counsel. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); McMann v. Richardson, 397 U.S. 759, 770, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); State v. Creech, 188 Ohio App.3d 513, 2010–Ohio–2553, 936 N.E.2d 79, ¶39 (4th Dist.).

{¶ 43} To establish constitutionally ineffective assistance of counsel, a defendant must show (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced the defense and deprived him of a fair trial. Strickland, 466 U.S. at 687; State v. Powell, 132 Ohio St.3d 233, 2012–Ohio–2577, 971 N.E.2d 865, ¶85. "In order to show deficient performance, the defendant must prove that counsel's performance fell below an objective level of reasonable representation. To show prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." State v. Conway, 109 Ohio St.3d 412, 2006–Ohio–2815, 848 N.E.2d 810, ¶95 (citations omitted); accord State v. Wesson, 137 Ohio St.3d 309, 2013–Ohio–4575, 999 N.E.2d 557, ¶81. "Failure to establish either element is fatal to the claim." State v. Jones, 4th Dist. Scioto No. 06CA3116, 2008–Ohio–968, ¶14. Therefore, if one element is dispositive, a court need not analyze both. State v. Madrigal, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000) (stating that a defendant's failure to satisfy one of the elements "negates a court's need to consider the other").

{¶ 44} When considering whether trial counsel's representation amounts to deficient performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Thus, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. "A properly licensed attorney is presumed to

execute his duties in an ethical and competent manner." State v. Taylor, 4th Dist. Washington No. 07CA11, 2008–Ohio–482, ¶10, citing State v. Smith, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel's errors were so serious that he or she failed to function as the counsel guaranteed by the Sixth Amendment. State v. Gondor, 112 Ohio St.3d 377, 2006–Ohio–6679, 860 N.E.2d 77, ¶62; State v. Hamblin, 37 Ohio St.3d 153, 156, 524 N.E.2d 476 (1988).

{¶ 45} To establish prejudice, a defendant must demonstrate that a reasonable probability exists that but for counsel's errors, the result of the trial would have been different. State v. Short, 129 Ohio St.3d 360, 2011–Ohio–3641, 952 N.E.2d 1121, ¶113; State v. White, 82 Ohio St.3d 16, 23, 693 N.E.2d 772 (1998); State v. Bradley, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus. Furthermore, courts may not simply assume the existence of prejudice, but must require the defendant to affirmatively establish prejudice. State v. Clark, 4th Dist. Pike No. 02CA684, 2003–Ohio–1707, ¶22; State v. Tucker, 4th Dist. Ross No. 01CA2592 (Apr. 2, 2002).

{¶ 46} In the case sub judice, we do not believe that appellant has established that counsel performed deficiently or that any alleged deficient performance prejudiced him. With respect to appellant's claim that his trial counsel was ineffective for failing to request an aggravated assault jury instruction, we previously recognized that the failure to request a jury instruction on aggravated assault as an inferior degree to felonious assault is presumed to be a matter of trial strategy. State v. Cottrell, 4th Dist. Ross No. 11CA3241 and 11CA3242, 2012-Ohio-4583, ¶21; State v. Hendricks, 4th Dist. Ross No. 11CA3253, 2012-Ohio-1924. Moreover, as we explained in appellant's first assignment of error, the evidence does not support an aggravated assault instruction. Thus, even if trial counsel performed deficiently by failing to request an aggravated

assault jury instruction, the trial court would not have been obligated to give one. Consequently, appellant cannot show that the result of the proceeding would have been different if trial counsel had requested an aggravated assault jury instruction.

{¶ 47} Additionally, appellant has not shown that his trial counsel rendered ineffective assistance of counsel by failing to object to the profanity-laded telephone recording. Assuming, arguendo, that trial counsel performed deficiently by failing to object, appellant cannot show that the result of the proceeding would have been different but for trial counsel's alleged deficient performance. If counsel had objected, "[i]t is speculative, at best, whether the trial court would have" found that the probative value of challenged evidence was substantially outweighed by the danger of unfair prejudice. State v. Mundt, 115 Ohio St.3d 22, 2007-Ohio-4836, 873 N.E.2d 828 (2007), ¶107. Thus, "'counsel could rarely (if ever) be deemed ineffective for failing to object under Evid.R. 403(A).'" Id., quoting State v. Bays, 87 Ohio St.3d 15, 28, 716 N.E.2d 1126 (1999).

{¶ 48} Furthermore, even had trial counsel objected and the trial court excluded the profanity-laden statements, appellant can only speculate that the result of the proceeding would have been different. As appellant notes, portions of the telephone recording without the profanity are relevant to proving the bribery charge. Thus, if the court had redacted the profanity-laded statements, other statements on the telephone recording help prove the bribery charge. The jury still would have heard the non-profanity-filled statements even if trial counsel had objected and the court sustained the objection. Consequently, appellant cannot show that any deficient performance prejudiced his defense.

{¶ 49} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's third assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee shall recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & McFarland, A.J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

Topics and Issues

Aggravated assault-trial court did not plainly err by failing to give aggravated assault jury instruction when evidence failed to show sufficient provocation; trial court did not plainly err by admitting profanity-filled jailhouse telephone recordings when recordings contained relevant evidence; trial counsel did not render ineffective assistance of counsel by failing to request aggravated assault jury instruction or by failing to object to admission of profanity-filled statements