[Cite as *State v. Blair*, 2016-Ohio-2872.]

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

STATE OF OHIO,	:	
	:	Case No. 14CA33
Plaintiff-Appellee,	:	
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
IRA D. BLAIR, JR.,	:	
	:	
Defendant-Appellant.	:	**Released: 04/27/16**

APPEARANCES:

Timothy Young, Ohio State Public Defender, and Eric M. Hedrick, Assistant State Public Defender, Columbus, Ohio, for Appellant.

Kevin A. Rings, Washington County Prosecuting Attorney, and Nicole Tipton Coil, Assistant Prosecuting Attorney, Marietta, Ohio, for Appellee.

McFarland, J.

{¶1} Ira D. Blair, Jr. appeals from the judgment entry of conviction entered on October 9, 2014 in the Washington County Court of Common Pleas. Appellant was convicted of murder, R.C. 2903.02(B), felonious assault, 2903.11(A)(1), and burglary, R.C. 2911.12(B) & (E), after a five-day jury trial. Appellant contends he was denied a fair trial and due process of law due to the trial court's errors in permitting improper opinion testimony and incomplete jury instructions. Appellant also contends he received ineffective assistance of counsel. Upon review, we find no merit to

Appellant's four assignments of error. Accordingly, we affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

{¶2} On April 25, 2013, Appellant was indicted for a fourth-degree felony burglary which allegedly occurred at 423 Third Street, Marietta, Ohio, at the residence of Ali Martin. On July 2, 2013, Appellant was indicted for the felony-murder predicated on felonious assault of Frank Stephens, occurring at 139 Groves Avenue, Marietta, Ohio. The indictments stem from circumstances which occurred on or about April 1 and 2, 2013. On those dates, Appellant had been staying at a trailer owned by Richard Haught, located at 139 Groves Avenue.

{¶3} On the morning of April 2, 2013, David Martin found Appellant in his daughter Ali Martin's apartment at 423 Third Street.[1] After unsuccessfully trying to awaken Appellant, Mr. Martin called the police at about 9:30 a.m. Authorities arrived at the apartment to discover Appellant sleeping on a couch. Appellant had blood on his face, pants, and hands. He smelled intoxicated. When the officers were able to rouse Appellant, he told them he was in the apartment by permission and that he had fallen. Appellant was taken to a hospital for treatment of his injuries.

[1] At trial, the testimony of David Martin indicated Ali's residence, a small apartment, was actually owned by David Martin's mother.

{¶4} Later, around 12:30 p.m. on April 2, 2013, officers were dispatched to Richard Haught's trailer on Groves Avenue. Frank Stephens was found dead, apparently beaten to death, on the living room floor. After further investigation of both incidents, Appellant was indicted as set forth above and proceeded to a jury trial.

{¶5} At trial, the State's theory was that Appellant had beaten Stephens to death and, in his intoxicated state, had broken into Ali Martin's apartment to rest and regroup. The defense theory was that Richard Haught and the decedent had gotten into a fight while drunk and that Appellant had unsuccessfully tried to break up the fight. When unable to separate the other two men, Appellant left and stumbled over to Ali Martin's apartment where he had permission to stay overnight. The defense suggested that Richard Haught, also now deceased at the time of trial, had killed his friend Stephens.

{¶6} During the five-day trial, the State called many witnesses from the Marietta Police Department, the Washington County Sheriff's Department, the Ohio Bureau of Criminal Identification and Investigation (BCI), and utilized many exhibits. All law enforcement witnesses testified as to their background, training, employment and experience. The law

enforcement witnesses also testified as to the authenticity and accuracy of photographs and the chain of custody of other evidence offered.

{¶7} Sergeant Rodney Hupp of the Marietta Police Department testified he was dispatched to 423 Third Street on April 2, 2013 to investigate a possible burglary. David Martin showed him a door leading to the second floor apartment. The door had been kicked open and the trim around the doorway and lock had been broken loose. Martin took Hupp to an upstairs room where his daughter Ali lived. Appellant was asleep on a couch. Sgt. Hupp testified Appellant had a "messed-up appearance," blood crusted on his face, and blood on his pants and hands. His hands were injured. Appellant also had a wound on the right side of his head, near the corner of his eye. Appellant smelled and appeared very intoxicated.

{¶8} Sgt. Hupp testified Appellant was disoriented, but stated he was in Ali Martin's apartment with permission. Appellant indicated to Hupp he had walked to the apartment and had fallen down on his way, causing his injuries. Sgt. Hupp requested a squad to take Appellant to the hospital while he stayed at the apartment for further investigation. Hupp found a debit card with the name "Kimberly Alden" on the porch.[2]

[2] Appellant has two sons, ages 6 and 8 at the time of trial. Kimberly Alden is the mother of Appellant's younger son.

{¶9} Later in the day, Sgt. Hupp was dispatched to Richard Haught's trailer on Groves Avenue. Upon arrival, Haught directed him inside where a man's body was lying on the floor beside the couch. It looked like a struggle had occurred inside the trailer. Sgt. Hupp determined the man on the floor was deceased, and he called for a squad. Sgt. Hupp observed no signs of violence on Haught, although Haught appeared highly intoxicated. Sgt. Hupp then recalled that when trying to rouse Appellant in Ali Martin's apartment earlier in the day, Appellant had first given his address as 139 Groves Avenue. Thinking there could be a connection, Hupp dispatched another officer to the hospital for further investigation of Appellant.

{¶10} Ali Martin acknowledged she had a drug problem and denied giving Appellant permission, directly or through another person, to enter or stay in her apartment. Because of her problems, Ali testified her father, David Martin, checked on her daily. She was not allowed to have anyone stay with her at her apartment. On April 1, 2013, Ali was in Columbus, Ohio, with Trent Mason, Appellant's friend. On cross-examination, Ali admitted that she was in Columbus using heroin, and that she was aware that one of Trent's friends wanted to stay in her apartment.

{¶11} Officer Alan Linscott, a Marietta policeman, testified he followed the emergency squad which transported Appellant to Marietta

Memorial Hospital. While there, he took photographs of Appellant's injuries and questioned him about entering Martin's apartment. He testified Appellant never reported being assaulted.

{¶12} Officer Linscott testified he left the hospital for about 30 minutes to go to the police station. While there, he received a phone call reporting a bloody unconscious person on Groves Avenue. Linscott then dispatched Sgt. Hupp to the Groves Avenue address. After a brief discussion, Hupp advised Linscott to go back to the hospital because they thought there was a connection between the two incidents. Linscott identified Exhibits B1-10, which included photographs of Martin's apartment and the door and broken lock.

{¶13} Linscott also identified Exhibits C1-23, pictures of Appellant's hands, face, body, and shoes. Linscott identified a photograph of Appellant's pants showing blood and dirt. State's Exhibit D consisted of Appellant's pants that Linscott submitted as evidence. Linscott testified the photographs fairly and accurately reflected Appellant's physical condition at the hospital on April 2, 2013.

{¶14} The State next played Exhibit E, a recorded statement between Officer Linscott and Appellant. In the statement, the jury heard Appellant advise Linscott that he had permission to stay at Martin's apartment and

when he arrived, the door was already forced open. In the statement, Appellant informed he saw trim lying by the front door, but it didn't look like anyone had broken in. He went inside and laid down.

{¶15} The next witness was Alan Barth who testified Richard Haught was his neighbor and friend. On April 1,2013, Richard Haught, Frank Stephens, Appellant and Barth had been playing a drinking game with vodka and beer. Haught was very drunk, Stephens was passed out, and Appellant was wide awake. Barth left around 1:30 a.m. on April 2, 2013 because he had to work in the morning. The other three men remained. Barth said goodbye to Appellant and Appellant gave him a fist bump as he left.

{¶16} Barth testified he went to work at a local restaurant and finished his shift the next day, April 2, 2013, around 11:00 a.m. He went to the house of another neighbor and friend, Ralph Hardie. While there, Barth received a call from Haught who excitedly told him, "Frank's dead. Are you coming up?" When Barth arrived at Haught's trailer, he saw Stephens lying on the floor with his mouth open. Barth called 911.

{¶17} On cross-examination, Barth further elaborated that when he arrived at Haught's trailer, Haught came out wearing only black boxer shorts. Haught said to Barth: "I got to get out of here, I got to get out of

here." Barth told him: "Richard you cannot leave here. You've got a dead body at your trailer."

{¶18} The next State's witness was Officer Jon Jenkins, an agent with BCI. Jenkins testified he conducted an initial interview with Appellant at the hospital. Afterwards, Jenkins was concerned that Appellant was not telling the truth because he failed to mention that Frank Stephens was at the trailer the night before. Also, Jenkins testified, Appellant's injuries did not seem consistent with falling. Jenkins identified State's Exhibit G, a photograph of Appellant's palms which showed no injuries.

{¶19} Jenkins testified he conducted Appellant's interrogation at the hospital. Jenkins testified almost immediately after Appellant was advised that Frank Stephens was dead, Appellant began describing a fight between Stephens and Haught. Appellant indicated Haught was "whaling" on Stephens in the trailer. Appellant told Jenkins he tried to break it up and ended up leaving the trailer. Jenkins testified Appellant never reported being hit, and he specifically stated he did not strike anyone else. The State then played Exhibits E, the recorded interview, and F, the recorded interrogation of Appellant with Jenkins, Detective Ryan Huffman, and Officer Linscott. Jenkins further testified Appellant had a noticeable reaction upon being informed that Stephens was dead.

{¶20} On cross-examination, Jenkins acknowledged he never attempted to speak to Richard Haught. Jenkins admitted he did not know whether or not Appellant was under the influence of medications or alcohol at the time they interviewed and interrogated him. Jenkins also admitted he could not know the impact Appellant's head injury had on him while he answered the questions.

{¶21} The next witness was Shane Hanshaw, a crime scene agent from BCI. The trial court declared Hanshaw an expert in the field of blood stain evidence collection and analysis. Hanshaw testified on April 2, 2013, he investigated the interior and exterior of the trailer on Groves Avenue where the deceased was located. Hanshaw found blood on the floor inside. Hanshaw identified Exhibits H1-24, various photographs of the trailer's interior, Stephens lying on the floor, and other evidence including blood stains, blood patterns on the wall, and Appellant's blue jeans.

{¶22} Detective Aaron Nedef testified he found cigarettes, a lighter, and Appellant's black and gray cell phone at the railroad tracks near Groves Avenue. He identified these items as State's exhibits I, J, and K.

{¶23} Detective Scott Parks of the Washington County Sheriff's Department testified to his special training and certifications in extracting digital evidence from electronic media in a forensically sound manner so

that nothing is changed. Parks is able to extract information from cell phones, computers, flash drives, CDs, etc. Parks identified State's exhibit K, Appellant's cell phone, which Parks analyzed. He also identified State's Exhibit L, a multi-page document showing Appellant's history of calls and text messages. Parks testified Ali Martin's phone number never appeared in Appellant's phone history.[3]

{¶24} David Ross, a forensic scientist with BCI, identified State's Exhibit M, a report that he prepared with his findings. Ross had performed blood testing on Appellant's blue jeans, State's Exhibit D. Ross found the presence of blood.[4]

{¶25} Hallie Garafolo, another forensic scientist in the DNA unit of BCI, identified State's Exhibit N, a copy of a DNA report she issued, summarizing her findings from DNA testing. Ms. Garafalo testified the original report analyst was unavailable to testify due to medical leave, so Garafolo reviewed the evidence and data, performed her own independent analysis, and issued her own findings and conclusions, which were in

[3] Parks also testified regarding various text messages on Appellant's phone, which appeared to contradict some of Appellant's statements to officers.

[4] The trial court next conducted a voir dire of Detective Ryan Huffman. Huffman testified that Stephanie Herron, a crime scene agent from BCI, assisted him in processing the burglary scene on Third Street and collection of evidence from Appellant's body. The State obtained a warrant authorizing the collection of DNA samples to be submitted from Appellant. Ms. Herron took the samples and Huffman assisted her. The samples were then secured in evidence envelopes and placed in evidence lockers. Herron was unavailable at the time of trial. At this point, Appellant offered contradictory evidence. However, the trial court found the chain of custody had been established.

agreement with the previous findings by the previous analyst. Ms. Garafalo testified she performed an analysis on cuttings taken from Appellant's blue jeans, samples collected by Mr. Ross. She testified the blood stains that she saw on the cuttings from the pants came from Frank Stephens.

{¶26} The next State's witness was Lee Lehman, a forensic pathologist employed by the Montgomery County coroner's office. Lehman testified he performed autopsy of Frank Stephens' body on April 3, 2013. Lehman determined the cause of Stephens' death was multiple blunt and sharp force injuries. Lehman also prepared a written report of his findings, identified as State's Exhibit O. Lehman also identified State's Exhibit Q1-23, which depicted the condition of Stephens' body when he examined it. Lehman described the various injuries on Stephens' head and face, depicted in the photos. Lehman testified Stephens suffered a cervical spine fracture; 21 separate rib fractures; a rupture in his abdomen, specifically in the artery to the left kidney. There were also three stab injuries behind Stephens' ear and three on the right side of his face.

{¶27} Dr. Lehman also reviewed Exhibits C-1, C-12, and C-13, photographs of Appellant's hands. Dr. Lehman opined to a reasonable degree of medical certainty that the bruises shown in C-1, over the knuckle,

were caused by a hard hit, like a fist. Lehman testified the other bruises could be either defense injuries or the result of being struck by another.

{¶28} Dr. Lehman testified Stephens' bled to death. He opined to a reasonable degree of medical certainty that Stephens died as a result of multiple trauma to his head, chest, and abdomen. The blows causing the injuries were administered with force. Lehman also testified Stephens' injuries could be the result of kicking or stomping as well as blows with a hand or fist.

{¶29} Detective Ryan Huffman testified he went to the Groves Avenue crime scene with Agent Jenkins. Huffman observed Richard Haught smelled intoxicated but did not have any injuries or marks on his face or hands, except one older scab wound on his hand. Huffman testified he and Jenkins went to the hospital to see Appellant. By contrast, Appellant's hands were extremely red, extremely swollen, with small cuts and lacerations.

{¶30} Huffman reiterated prior testimony that Appellant initially denied knowledge or involvement with Frank Stephens; that when he learned Stephens was dead, he became pale and started breathing hard; and that upon learning Stephens was dead, his recitation of the recent events changed. Huffman testified Appellant's version of the event changed by

indicating that Haught and Stephens were fighting and Appellant tried, unsuccessfully, to break it up. Huffman also testified Appellant explained his injuries were from falling down by railroad tracks and then falling on a bridge on his way to Ali Martin's apartment. Huffman testified Appellant adamantly denied being struck by anyone or striking anyone himself.

{¶31} Detective Huffman testified he was standing beside Agent Herron, assisting her, when she was taking the DNA swabs. Once she used them, they were handed to him and he logged them into evidence. Huffman identified State's Exhibit R, an evidence envelope containing the DNA swabs sent to BCI for testing.

{¶32} Sergeant Greg Nohe testified he was dispatched to the Groves Avenue address and assisted with collection of evidence. Nohe observed Stephens and noted injuries on nearly every part of his body. He testified Stephens was lying on broken glass.

{¶33} Nohe interviewed Alan Barth and Richard Haught. Nohe testified Barth and Haught were potential suspects because they had been the last people to see Stephens alive. Based on previous interaction with Haught, Nohe described Haught as being a 53-year-old alcohol dependent person. He testified Haught appeared highly intoxicated at the time of his interview, but was cooperative, and did not attempt to leave the area.

{¶34} Nohe testified he visually and physically inspected Haught's hands. Haught did not have appear to have been involved in a physical altercation. Nohe identified State's Exhibit T1-T5, photographs of Mr. Haught's physical condition on that morning. Like Huffman, Nohe testified the only noticeable injury was an old scab. He specifically testified Haught did not appear to have the strength, stamina, or endurance to inflict the beating that Stephens received.

{¶35} Nohe acknowledged that Haught, physically, could have wielded a baseball bat or other instrument, but opined the evidence did not support that as having happened. Nohe testified they did not take DNA samples from Haught because the death occurred in his trailer and that his DNA being present there would not be an inconsistency.

{¶36} Nohe further testified Barth provided a voluntary statement and did not seem to be hiding anything. Barth was also examined for injuries which would indicate a physical altercation but nothing indicated an altercation, or that Barth was present at the trailer at the time of Stephens' death. Nohe directed Haught's clothes seized. A pair of pants found in

close proximity to Stephens' body did not have any visible blood patterns or stains on them.[5]

{¶37} Nohe also reviewed Appellant's phone record and noted heavy activity or volumes of calls around 3:30 a.m. to various people including Trent Mason and Kimberly Alden. Nohe pointed out the phone log contradicted Appellant's statements given to officers. Nohe noted a message from Trent Mason stating "Dude, why did you kick my fucking door in?"[6]

{¶38} On cross-examination, Nohe testified Haught explained to him that he left the trailer while the "arguing" was going on because he "didn't want to see it." While walking around outside in the dark, he fell in a ditch. When Haught returned, he thought Stephens was sleeping. Nohe testified Haught told him he took his wet jeans off when he entered the door and "that's where they fell." Nohe admitted he had nothing to support Haught's statement that he left the apartment during the fight. Nohe testified he had tried to interview Haught a second time, through an attorney, but the interview never took place.

{¶39} Nohe further admitted there was no proximate time of death, and that Haught had the opportunity during a 6-7 hour time span to dispose

[5] Nohe also testified Haught had a burn barrel on his premises. He had checked the phone logs at the police department and could not determine that Barth had made any report. Barth had earlier testified that he called to report Haught was burning something on the evening on April 2, 2013.
[6] This contradicts Appellant's statement that he had been given permission to be in Ali Martin's apartment.

of anything in the house. Nohe admitted he did not rule out that Haught may have had some culpability, and he would not rule out that Haught may have kicked or stomped Stephens. However, Nohe testified he believed Appellant clearly threw punches as the evidence on his hands was consistent with injuries on Stephens. On redirect, Nohe testified he had no evidence to justify or support charging Haught with a criminal offense.

{¶40} The next witness was Joseph Bigley, a combative instructor and certified bodyguard. He testified he had over 21 years of martial arts experience. Bigley's testimony will be discussed in detail below. After Bigley testified, the State offered its exhibits and rested.

{¶41} The defense case began with Dr. Roger Anderson who testified he reviewed photographs of Appellant's hands. In his opinion, the photographs showed minor bruising, and it was not possible to say if the bruising occurred from the hand striking someone else or being struck. He also reviewed photographs of injury to Appellant's head and opined it was impossible to say what object might have inflicted it. Anderson testified to a reasonable degree of medical certainty that the cause was completely indeterminate. Dr. Anderson testified that the hand injuries were consistent with someone having falling down. On cross-examination, Dr. Anderson admitted he reviewed only Appellant's ER records.

{¶42} Ralph Hardie next testified for the defense. Hardie testified he was 56-years old and had worked for WASCO for 33 years.[7] Hardie testified he knew the four men involved in the events at Haught's trailer. Hardie lived with Stephens at the time he died.

{¶43} Hardie testified on April 2, 2013, Richard Haught called him and told him Stephens was dead. Hardie told Haught to call 911. Hardie testified the day before, Haught and Stephens got into an argument and Hardie got between them to stop it. The next day as Stephens, Haught, and Alan Barth were leaving Hardie's house, Hardie told Stephens not to go with them because he was worried Stephens would get beaten again.

{¶44} Hardie further testified during the night, before he learned Stephens was dead, someone named "Mike" came to his house to get his phone. Hardie was asleep on the couch with the lights off. He gave permission to use his phone, but he did not see who "Mike" was. On cross-examination, Hardie testified he didn't know if "Mike" could have been someone named "Spike."

{¶45} The defense case concluded with Appellant's testimony. Appellant informed the jury he grew up in Washington County, was a high school graduate, and had two young children. He had worked construction

[7] According to http://www.wascoinc.org, WASCO, Inc. is a non-profit organization in Washington County, Ohio, dedicated to providing vocational opportunities and habitation services to Washington County adults with developmental disabilities.

and logging. Appellant acknowledged he had a heroin problem and had a previous felony conviction for tampering with evidence. Appellant explained some of his friends call him "Spike."

{¶46} Prior to April 2013, Appellant had been living for a few weeks with Richard Haught.[8] Appellant did not really know Haught because Haught was in and out a lot. Haught drank alcohol every day. Appellant met Frank Stephens through Haught and had seen him about 3 times.

{¶47} Appellant explained when he was interviewed by the police at the hospital, he was disoriented. He admitted he was not completely truthful. He testified on April 1, 2013, he used heroin so he wouldn't be sick in front of his son. He went to his son's ball practice at 6:00 p.m. Around 7:00 p.m., he went back to Groves Avenue. He was home alone for 2-3 hours until Haught, Barth and Stephens showed up. They brought vodka. Appellant was in the back bedroom watching a TV baseball game. He testified at some point, he and Alan Barth played a drinking game. Then Barth left.

{¶48} Appellant testified he "hung out" in the kitchen area, texting Kimberly Alden and Trent Mason, a person he had known since he was

[8] Appellant testified he did not have a place to stay at the time and his friend, Haught's granddaughter, helped him get connected with Haught, who allowed him to stay at his trailer.

younger.[9] He also knew Ali Martin. Appellant testified Ali Martin lied when she testified he had never been to her apartment.

{¶49} Appellant testified at some point, Stephens and Haught began yelling and fighting while he was in the kitchen. He didn't know why. Stephens was on the couch and fell to the floor because Haught was hitting him. Appellant ran from the kitchen to the living room while Stephens was on the couch, but by the time he got there, Stephens had fallen to the floor. Haught was still hitting Stephens.

{¶50} Appellant got between the two and put his back to Haught because he didn't want to get hit in the face. Haught hit him a few times in the shoulder, arm, and back and then across his face. It was a hard hit and he went to the ground backwards. At that point, Stephens was on the ground. Appellant put his hand up and was struck again. He was hit three times at least. He has a scar on the side and rear of his head.

{¶51} When Appellant was able to get up, he stumbled to Haught's bedroom to get his jacket, cigarettes, and phone to leave. Haught was sitting on the corner of his bed, fist bunched, rocking and breathing hard. He looked mad. Appellant said "What the fuck is your problem?" Haught didn't say a word or look at him.

[9] Appellant later testified he spent much of the day on his phone trying to get heroin.

{¶52} Appellant testified he walked outside and started trying to find a place to stay. He called Kimberly Alden, his cousin Mike, and Trent Mason. Mason told him he could stay at Ali Martin's apartment, but Appellant wanted to hear it from Ali so she got on the phone and gave him permission. Then Trent got back on the phone and told Appellant how to get in.

{¶53} Appellant testified he walked down the hill to the railroad tracks, fell on railroad ties and slid on a gravel embankment. He waited for a train to go by and then walked back across. Appellant testified Ralph Hardie's house was nearby. He walked there and asked to use the phone. Hardie asked "who is it" and then gave permission. Appellant testified Hardie may have mistaken him for "Mike." Still disoriented, Appellant walked to Ali Martin's apartment where he had been the day before. He used Kim Alden's debit card to try to open the door. When it wouldn't work, Appellant grabbed the door, shoved it, and broke the trim.

{¶54} Appellant testified he felt exhausted and his head hurt. When he got inside, he went to the bathroom, looked at the mirror, and realized his head wound was significant. He tried to wipe the blood off.

{¶55} Appellant admitted he was untruthful when he told the officers that the trim was already broken and that he went inside to check the place

out. He testified he did not tell them he had permission to be there because he was scared he would get into trouble for breaking the trim.[10]

{¶56} Appellant testified he stayed and went to sleep because he expected to see Trent and Ali in the morning. He knew they'd be upset about the trim, but he could pay for it. Officers woke him and sent him to the hospital. When the officers came back, he thought he was being investigated about burglary.

{¶57} Appellant testified he never told the officers initially or until his court testimony that someone else hit him in the side of the head, because he didn't want anyone else to get in trouble for hitting him. Appellant continued to deny hitting anyone, although he understood his swollen hand suggested otherwise.

{¶58} Appellant testified he doesn't know why he didn't initially mention Stephens being at the trailer when questioned. He testified it was a shock to hear that Stephens was dead, that after he had left the trailer, the fight had escalated to that point. Appellant testified he was upset because he thought he could have stopped it. Appellant testified he didn't know how it happened, but he immediately thought of Haught because Haught and Stephens were the only persons present when Appellant left.

[10] Appellant also admitted he lied about not drinking vodka the night before.

{¶59} He testified he lied to the police and made bad choices that night. He reiterated he did not hit or kill Frank Stephens though he had used heroin and been drinking. He testified he barely knew Stephens and had no reason to argue with him.

{¶60} On cross-examination, Appellant testified he put his hand on the knob and shoved Martin's door open with his shoulder. He doesn't know how a big a footprint got on the door. Appellant maintained that Trent Mason would support his statement that he had permission to be in the apartment.[11]

{¶61} Appellant admitted when he first talked to the officers, he never mentioned anything about ball practice, heroin, or trying to make contact with Trent Mason. He maintained that when Haught beat him, he never hit back. Appellant testified he never thought about calling the police.

{¶62} Appellant testified he didn't want to see Haught get in trouble. Appellant reiterated he was scared, disoriented, and doesn't know why he was initially untruthful. Appellant admitted that at trial was the first time he claimed somebody hit him 3-4 times. Appellant admitted the pants shown to the jury, his voice on the recordings, and the photographs of his hands, arm, and face were accurate.

[11] The record indicates at the time of trial, Trent Mason was incarcerated. He was not called by the defense to testify.

{¶63} On redirect, Appellant testified he never thought to call the police because he had had his own problems with the law and would go out of his way to avoid law enforcement. Appellant insisted he did not believe he was leaving Stephens to die. The defense rested.

{¶64} On rebuttal, the State recalled Detective Huffman. Huffman identified State's Exhibit U-1, a photograph of a partial tread pattern of a tennis shoe. The pattern was found on the door of Ali Martin's apartment. Huffman testified he did not submit the print for forensic analysis because only portions of the tread pattern were visible. Huffman testified the shoes Appellant was wearing had a sharp "V" in the tread pattern, but he could not say with 100 % certainty that it was the same tread pattern as found on the Martin's door. Detective Huffman also gave testimony which disputed Appellant's story that he watched a baseball game in the evening. Huffman also identified State's Exhibit U-2, a photograph of Appellant's back. By way of disputing Appellant's testimony that Haught struck him repeatedly in the back, Huffman testified there was a very old bruise on his lower back and some small bruising higher up.

{¶65} The State also recalled Sgt. Nohe. He testified that while he was at the crime scene on April 2, 2013, Ralph Hardie approached him and advised that Stephens and Haught were drinking heavily at Hardie's house

the night before. Sgt. Nohe testified Hardie never mentioned witnessing Haught assault Frank Stephens the night before. On re-cross, Nohe also acknowledged he never specifically asked Mr. Hardie if he had seen an assault. On redirect, Nohe testified that he did ask Hardie if he had an idea as to who might have killed Stephens, and Hardie responded that he had no idea.

{¶66} Appellant was convicted of all three counts. The court sentenced Appellant to 15-years-to life for the felony murder and 18 months for the burglary to be served concurrently. The felonious assault count was merged into the felony-murder count for purposes of sentencing. This timely appeal followed.

ASSIGNMENTS OF ERROR

> "I. THE TRIAL COURT ERRED WHEN IT PERMITTED AN UNQUALIFIED EXPERT WITNESS TO PROVIDE OPINION TESTIMONY AND OFFER CONCLUSIONS REGARDING THE CAUSATION OF INJURIES TO MR. BLAIR'S HAND, DENYING MR. BLAIR A FAIR TRIAL AND DUE PROCESS OF LAW.
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> II. THE TRIAL COURT ERRED WHEN IT PERMITTED POLICE OFFICERS TO PROVIDE IMPROPER OPINION TESTIMONY, DENYING MR. BLAIR A FAIR TRIAL AND DUE PROCESS OF LAW.
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> III. THE TRIAL COURT ERRED AND DENIED MR. BLAIR A FAIR TRIAL AND DUE PROCESS OF LAW WHEN IT GAVE JURY INSTRUCTIONS ON EXPERT WITNESSES

BUT FAILED TO DELINEATE WHICH WITNESSES WERE TO BE TREATED AS EXPERTS.

IV. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN VIOLATION OF MR. BLAIR'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 10 AND 16, OF THE OHIO CONSTITUTION."

ASSIGNMENT OF ERROR ONE
A. STANDARD OF REVIEW

{¶67} "A trial court has broad discretion in the admission or exclusion of evidence, and so long as such discretion is exercised in line with the rules of procedure and evidence, its judgment will not be reversed absent a clear showing of an abuse of discretion with attendant material prejudice to defendant." *State v. Richardson,* 4th Dist. Scioto No. 14CA3671, 2015-Ohio-4808, ¶ 62, quoting *State v. Green,* 184 Ohio App.3d 406, 2009-Ohio-5199, 921 N.E.2d 276, ¶ 14 (4th Dist.) Absent an abuse of discretion, an appellate court will not disturb a trial court's ruling regarding the admissibility of evidence. *State v. Linkous,* 4th Dist. Scioto No. 12CA3517, 2013-Ohio-5853, ¶ 22, citing *State v. Martin,* 19 Ohio St.3d 122, 129, 483 N.E.2d 1157 (1985). To constitute an abuse of discretion, the trial court's decision must be unreasonable, arbitrary, or unconscionable. *State v. Adams,* 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶68} The "admissibility of expert testimony is a matter generally within the discretion of the trial judge and will not be disturbed absent an abuse of discretion." *State v Newman*, 4th Dist. Scioto No. 14CA3658, 2015-Ohio-4283,¶ 26, quoting *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 616, 687 N.E.2d 735 (1998); accord *State v. Hartman*, 93 Ohio St.3d 274, 285, 754 N.E.2d 1150 (2001). Generally, an abuse of discretion includes a situation in which a trial court did not engage in a " 'sound reasoning process.' " *Newman, supra,* citing *State v. Morris,* 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14, quoting *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). We further observe that "[a]buse-of-discretion review is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court." *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34.

B. LEGAL ANALYSIS

{¶69} In the case sub judice, the trial court declined to qualify Mr. Bigley as an expert. Under the first assignment of error, Appellant specifically phrases its contention that the trial court abused its discretion when it permitted Joseph Bigley to offer his professional opinion and conclusion "that the condition of Mr. Blair's hand demonstrated that he

struck Mr. Stevens." Appellant contends although the trial court purported to limit Mr. Bigley's testimony to lay testimony, in actuality it permitted him to testify as an expert. Appellant's brief states:

> "Bigley characterized himself as a 'combative instructor' and a 'certified body guard.' When asked for his experience, Mr. Bigley cited 21-plus-years as a martial artist, including 'approximately 24 fights' as a competitor. As for training, he stated that he was a graduate of the Executive Protection Institute. He also stated that he has worked as a bouncer, has escorted clients for MTFV, has taught hand to hand combat to 'Sheriff's Department CO's,' and led conditioning training for pre-boot camp Marines."

{¶70} Appellant argues the trial court failed to act as a gatekeeper and Mr. Bigley's testimony failed to meet the requirements of Evid.R. 702 and both the reliability and relevance requirements as set forth by the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993).[12] Appellant asserts: "The testimony was wholly unreliable because, even though Mr. Bigley was addressing a disputed factual issue, his opinion was unscientific anecdotal conjecture rather than the required application of tested principles."

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[12] In *Terry v. Caputo*, 115 Ohio St.3d 351, 2007-Ohio-5023, 875 N.E.2d 72, the Supreme Court of Ohio summarized as follows: "The United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993), interpreted Fed.R.Evid. 702, the federal version of Evid.R. 702, as vesting the trial court with the role of gatekeeper. (Internal citation omitted.) This gatekeeping function imposes an obligation upon a trial court to assess both the reliability of an expert's methodology and the relevance of any testimony offered before permitting the expert to testify. We adopted this role for Ohio trial judges in *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607 (1998). *Caputo, supra*, at ¶ 24.

{¶71} Evid.R. 104(A) requires trial courts to determine whether an individual qualifies as an expert witness. *Newman, supra,* at ¶ 27, citing *State v. Hartman,* 93 Ohio St.3d 274, 285, 754 N.E.2d 1150 (2001). The rule states: "Preliminary questions concerning the qualification of a person to be a witness * * * shall be determined by the court." Courts should favor the admissibility of expert testimony when the expert testimony is relevant and meets the Evid.R. 702 criteria. See *State v. Williams,* 4 Ohio St.3d 53, 57, 446 N.E.2d 444 (1983), quoting *State v. Williams*, 388 A.2d 500, 503 (Me.1978) (explaining that the " 'fundamental philosophy' " expressed in the Rules of Evidence generally favors the admissibility of expert testimony when helpful and relevant). Evid.R. 702 permits a trial court to qualify a witness as an expert when the following three criteria are satisfied: (1) the witness's testimony "either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;" (2) the witness is "qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;" and (3) the witness's testimony is "based on reliable scientific, technical, or other specialized information." *Newman, supra,* at ¶ 28.

{¶72} In the case sub judice, in its function as gatekeeper, the trial court conducted a hearing on the State's oral motion in limine to have Bigley declared an expert in hand-to-hand combative techniques, due to his extensive martial arts training. Appellant objected regarding Bigley's ability to testify as to the cause of injuries. During the hearing, Bigley ultimately testified he had reviewed three photos of Appellant's hands without being given any information as to the source of injuries and the identification of the individual photographed. Bigley opined as follows:

> 1) The person who was photographed had struck multiple blows with a fair degree of force;
>
> 2) The injuries were a couple of days old because of the bruising;
>
> 3) The bruising was the result of numerous blows being "thrown"; and,
>
> 4) He based his opinions upon his experience in everyday life, training and teaching students, "doing it and living through it."[13]

{¶73} The trial court declined to designate Bigley as an expert witness. In making its ruling, however, the trial court stated Bigley was testifying as follows:

> "[A]bout a life of dedication to this area of defense, fighting, and - - and training, and seeking training and seeking advancement, so he's got perceptions * * * helpful or to a clear understanding of witness' testimony or determination of a fact

[13] From the context, we assume this refers to Bigley's striking others and his suffering the impact of receiving punches or blows from others.

> at issue. * * * It is helpful. I think it comes in. * * * He can testify as to his perceptions that he's - - he's had that and sees deep bruises and long bruises and he's seen changes. * * * [H]e's got a lifetime of exp-experience * * *, but I'm going to let it come in as opinion testimony of a lay person."

{¶74} Later at trial, Appellant raised the issue again. The trial court held:

> "Okay. Again, we discussed at pretrial this morning, we discussed again - - which we discussed several months ago on the record - - Mr. Bigley's testimony. We went over it in detail and I believe the attorneys are on the same page as the Court on this now. Mr. Bigley can testify as to his experience, how he has experienced wounds from certain actions or received wounds from certain actions or inflicted wounds from certain actions. He cannot opine in any way, shape, or form, that these wounds were caused by these actions. His experience does not go that far, but it certainly would - - he can testify as to how he - - it's happened, people can hurt themselves an infinite number of ways."

{¶75} After the trial court reiterated the previous ruling, he asked the parties if that was indeed a fair summary and Appellant's counsel, as well as the State, agreed that it was. Then, when Bigley testified on direct examination at trial, he again explained he was a combative instructor and certified bodyguard. He had been involved in martial arts for over 21 years. He served as an instructor in hand-to-hand and personal combative techniques almost on a daily basis. Specifically Bigley testified from his personal experience, he was familiar with the types of injuries that can occur to one's hands and arms in the course of delivering or administering punches

and blows. He further testified he had suffered these types of injuries and had observed them in others he had worked with.

{¶76} Bigley further testified that at the request of the Marietta Police Department, he reviewed 3 photographs of an unidentified individual's right hand and forearm. Bigley was asked to opine if the injuries on the person's hand in the photographs were consistent with somebody that had administered strikes or blows to another person or object. From his personal experience, Bigley testified he had suffered these types of injuries and had seen them caused to someone else. Bigley described for the jury four types of strikes and related them to the photographs.

{¶77} During his testimony, the trial court interrupted Bigley to caution him once that he was getting away from testifying only about his personal experience. Appellant conducted a vigorous cross-examination. The State followed up with short redirect. Appellant did not re-cross. While it is true that much of Bigley's testimony can be described as "anecdotal," our review of the transcript does not reveal that Bigley "crossed any lines" by rendering a specific opinion, as alleged in Appellant's brief, that the condition of Appellant's hand demonstrated that he struck Mr. Stephens. The record simply does not support Appellant's misleading characterization of Bigley's testimony.

{¶78} Appellant does acknowledge there are limited situations in which it may be permissible for a lay witness to express their opinion in an area in which it would ordinarily be expected by an expert qualified under Evid.R. 702. However, Appellant argues that permitting Mr. Bigley's testimony was completely unreasonable because it is well outside the limited circumstances in which lay witness opinion is proper. Specifically, Appellant points out Bigley did not see Appellant strike anyone or anything, and he never observed or examined Appellant's hand. Appellant asserts Mr. Bigley's knowledge was secondhand and limited to reviewing photographs. He argues the trial court allowed the State to circumvent the qualification requirements of Evid.R. 702, in that "causation of injuries" is a highly complicated area that requires "specialized knowledge within the scope of Evid.R. 702 rather than lay opinion." Again, we note that while Bigley testified about the injuries he saw in the photographs, and injuries he had caused or suffered in his own personal experience, he never testified that the condition of Appellant's hand demonstrated that Appellant struck Frank Stephens.

{¶79} Evid.R. 701 governs opinion testimony by lay witnesses and provides that such testimony "is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2)

helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." We note that "[a] trial court has considerable discretion in admitting the opinion testimony of lay witnesses." *State v. Marshall,* 191 Ohio App.3d 444, 2010-Ohio-5160, 946 N.E.2d 762, ¶ 43 (2nd Dist.). In *State v. McKee,* 91 Ohio St.3d 292, 744 N.E.2d 737 (2001), the Supreme Court of Ohio explained that pursuant to Evid.R. 701:

> "[C]ourts have permitted lay witnesses to express their opinions in areas in which it would ordinarily be expected that an expert must be qualified under Evid.R. 702. * * * Although these cases are of a technical nature in that they allow lay opinion testimony on a subject outside the realm of common knowledge, they still fall within the ambit of the rule's requirement that a lay witness's opinion be rationally based on firsthand observations and helpful in determining a fact in issue. These cases are not based on specialized knowledge within the scope of Evid.R. 702, but rather are based upon a layperson's personal knowledge and experience. *Jones, supra,* at {¶ 106. *McKee,* at 296-297, 744 N.E.2d 737."

{¶80} In the case at bar, we do not believe the trial court abused its discretion by allowing Bigley's lay opinions. In *State v. Orlandi,* 10th Dist. Franklin No. 05AP-917, 2006-Ohio-6039, Orlandi was convicted of assault. On appeal, he contended that the trial court erred by including testimony from a non-expert on the cause of the scar on his face. At Orlandi's trial, a police officer testified that a scar on Orlandi's forehead was a consistent mark as made by the victim's boots. Orlandi objected to the testimony arguing that it required expert testimony and the officer was not an expert.

In *Orlandi,* the court observed that Evid.R. 701 allows the admission of opinion testimony by lay witnesses, in the form of opinions or inferences, if it is limited to those opinions or inferences which are: "(1) rationally based on the perception of the witness and; (2) helpful to a clear understanding of his testimony or the determination of a fact in issue." The appellate court held:

> "[T]he officer was a 14-year veteran with the police department and testified based upon his personal and professional experience that he believed the scar was consistent with being kicked by the heel of the boot. This testimony was rationally based on the perception of the witness and admissible as lay opinion testimony."

{¶81} We will discuss the admissibility of police officers' lay opinion testimony in more detail below. However, we note that Bigley testified to over 20 years' experience as a martial artist, fighting and training. We find that the trial court did not abuse its discretion in allowing Bigley's lay person opinion testimony because he found Bigley's experience and perceptions would be helpful to an understanding of injuries that can occur to one's hands and arms in the course of delivering or administering punches and blows.

{¶82} We also find the record does not support Appellant's contention that during its closing argument, the State urged the jury to adopt the improper opinion testimony of Bigley and vested Bigley with expert

authority before the jury. In closing rebuttal, the State did reference Bigley's testimony by arguing:

> "Joe Bigley came in here and testified, to show you how those injuries have happened to him. Throwing straight punches, curve punches, and most importantly, he described the hammer fist, down and down. Frank Stephens was lying on the ground, and he was repeatedly being struck with a hammer blow, causing the blood to come out of his face and nose. And who has the evidence that they have administered that type of blow? The Defendant."

{¶83} First we note Appellant did not lodge an objection during the closing rebuttal argument. As such, any alleged error may only be reviewed for plain error. Therefore, we are further governed by Crim.R. 52(B). "To constitute plain error, a reviewing court must find (1) an error in the proceedings, (2) the error must be a plain, obvious or clear defect in the trial proceedings, and (3) the error must have affected 'substantial rights' (i.e., the trial court's error must have affected the trial's outcome)." *State v. Lewis*, 4th Dist. Ross No. 14CA346, 2015-Ohio-4303, ¶ 9, quoting *State v. Dickess*, 174 Ohio App.3d 658, 2008-Ohio-39, 884 N.E.2d 92, ¶ 31 (4th Dist.), citing *State v. Hill*, 92 Ohio St.3d 191, 749 N.E.2d 274 (2001), and *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240. "Furthermore, notice of plain error must be taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice." *Lewis*, *supra*, citing *State v. Landrum*, 53 Ohio St.3d 107, 111, 559

N.E.2d 710 (1990), and *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus. "A reviewing court should notice plain error only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.*

{¶84} We think the above-referenced sentences in closing rebuttal fairly summarized Bigley's testimony. Bigley testified as to how injuries similar to those shown in the photographs had happened to him, and he described the types of punches which would result in similar bruising. Nothing in the portion of closing rebuttal argument that Appellant cites elevates Bigley to expert status or can be said to have seriously affected the fairness, integrity, or public reputation of Appellant's trial.

{¶85} For the foregoing reasons, we overrule Appellant's first assignment of error and affirm the judgment of the trial court.

ASSIGNMENT OF ERROR TWO

A. STANDARD OF REVIEW

{¶86} Because assignment of error two involves Appellant's contention that the police officers in this case gave unfair opinion testimony, we would ordinarily be governed, as set forth in the first assignment of error, by the abuse of discretion standard. However, our review further indicates

Appellant did not lodge objections to the complained of testimony. As such, we are constrained to reviewing Appellant's arguments for plain error.

B. LEGAL ANALYSIS

{¶87} Appellant argues the trial court committed plain error when it permitted police officers not qualified as experts to offer opinions and conclusions as to an ultimate issue, the cause of Mr. Stephens' death. Appellant's theory at trial was that Richard Haught was responsible for the death of Frank Stephens. Appellant contends the police never fully searched Haught's body or fully investigated him. Appellant argues that Sergeant Nohe offered the following improper opinions:

> "It was basically his his - - his—Mr. Haught was 53, approximately a 53 year old man that was probably an alcohol dependent person, based on my previous experience with him. He didn't appear to me, at the particular time, that he had the strength, stamina, or endurance to inflict the kind of injuries, the multiple punches and/or kicks that Mr. Stephens received during this - - this beating that he got."
>
> * * *
>
> "I do not believe that he was wielding anything, based on the fact that Mr.- or, the autopsy results did not reveal any of those facts."

{¶88} Appellant also asserts Detective Huffman offered this improper opinion:

> "The—the amount of force that it would have taken to kill an individual by just beating is extraordinary, and Mr. Haught

> would have had an injury to him, whether it be bruising, cuts, lacerations, or something. And there wa- - didn't exist."

{¶89} In response, the State points to Evid.R. 704 which provides that testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact. The State counters that both Sergeant Nohe and Detective Huffman testified based upon their observations and interactions with Mr. Haught. The State argues that both officers opined, based upon their observations and police experience, that they did not think Mr. Haught was physically capable of inflicting the injuries that Mr. Stephens received. The State concludes that, even were this court to find that the officers' opinions were inadmissible, any error did not rise to the level of plain error. Finally, the State concludes there was other overwhelming evidence of Appellant's guilt.

{¶90} "[I]t is well-settled that a police officer may testify concerning matters that are within his experience and observations that may aid the trier of fact in understanding the other testimony pursuant to Evid.R. 701." *Jones, supra,* at ¶ 108, quoting *State v. Tatum,* 10th Dist. Franklin No. 10AP-626, 2011-Ohio-907, ¶ 17. In *State v. Primeau*, 8th Dist. Cuyahoga No. 97901, 2012-Ohio-5172, the defendant appealed convictions for murder and assault. One of the errors raised was that the trial court erred when it permitted an

officer to testify regarding a medical opinion of Primeau's hand lacerations during the booking process when the officer had no medical expertise. The State argued the officer's testimony was admissible pursuant to Evid.R. 701 because it was his opinion. Evid.R. 701 states that:

> "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

{¶91} Under Evid.R. 701, courts have permitted lay witnesses to express their opinions in areas in which it would ordinarily be expected that an expert must be qualified under Evid.R. 702. *Primeau, supra,* at ¶ 74. *State v. McKee*, 91 Ohio St.3d 292, 2001-Ohio-41, 744 N.E.2d 737. In *McKee,* the issue was whether a drug user could testify about the identity of drugs. The court stated that:

> "Although these cases are of a technical nature in that they allow lay opinion testimony on a subject outside the realm of common knowledge, they still fall within the ambit of the rule's requirement that a lay witness's opinion be rationally based on firsthand observations and helpful in determining a fact in issue. These cases are not based on specialized knowledge within the scope of Evid.R. 702, but rather are based upon a layperson's personal knowledge and experience." Id. at 297.

{¶92} In *Primeau,* the Eighth District Appellate Court found that the officer's testimony fit into the above classification. The appellate court held:

> "In this case, Rutt was testifying as a lay witness describing the photos of Primeau taken during the booking process. His description of the photos was based on his experience as a police officer, his previous investigations of assaults, and his perception of Primeau's lacerations at the time. Therefore, his testimony was properly admitted under Evid.R. 701."

{¶93} As discussed above in *State v. Orlandi*, the Tenth District Appellate Court upheld the trial court's decision to allow the testimony of a police officer that a scar on Orlandi's forehead was consistent with a mark as made by the victim's boots, holding that the testimony was rationally based upon the perception of the witness and admissible as lay witness testimony. In *State v. Coit*, 10th Dist. Franklin No. 02AP-475, 2002-Ohio-7356, when appealing a felonious assault conviction, the defendant argued that the trial court erred by allowing a detective to testify as to the origin of the wound on the victim's leg. At trial, a detective testified that, based upon his experience as a police officer and dealing with injuries caused by blunt objects, the cuts on the victim's leg were consistent with being hit by a brick. Again, citing Evid.R. 701, the court found the detective's lay witness opinion testimony properly admitted. The appellate court observed that "Detective Pappas based his opinion on his experience as a police officer, familiarity with blunt force trauma, and past observations of wounds," and that other courts have allowed police officers to testify pursuant to Evid.R. 701 under similar circumstances. *Coit, supra*, at 40.

{¶94} In *State v. Parker,* 2nd Dist. Montgomery No. 18926, 2002-Ohio-3920, an appeal of burglary and complicity to felonious assault convictions, the detective was permitted to testify under Evid.R. 701 that two wounds were consistent with gunshot wounds that she had seen in the past. At Parker's trial, Detective Beane testified that she interviewed Parker approximately 2 weeks after the alleged incident and observed on Parker's right knee area "two holes that were consistent with gunshot wounds that [she'd] seen in the past." Parker asserted that because Detective Beane was never qualified as a medical expert, she could not testify to the above statement. However, the detective testified that she had twenty-two years of experience on the police force, had experience with victims of gunshot wounds, and was familiar with different types of gunshot wounds. The detective's opinion that Parker's wounds were gunshot wounds was rationally based on her perception and experience as a police officer. Also, the testimony assisted the jury in determining whether Mr. Parker was the alleged attacker. Even though the detective did not opine that gunshot wounds were inflicted on the date of the alleged incident, the healing gunshot wounds did make it more likely that Parker was the victim's attacker, who was shot during the incident. The appellate court found the detective's testimony was proper.

{¶95} Here, the State points out even if the officer's opinion was improper, which it did not concede, Dr. Lehman, who performed the autopsy, also testified he did not see evidence that an object was used to inflict Stephens' injuries. Appellant did not object to Dr. Lehman's testimony or the autopsy report. Both were properly admitted into evidence.

{¶96} We agree that allowing the police officers' testimony did not amount to error, let alone plain error. Plain error, as discussed above, occurs when the error seriously affects the fairness of judicial proceedings. Courts have routinely allowed officers to give lay opinion testimony, based upon their observations and police experience. We do not find that allowing the officers' testimony was an abuse of discretion nor did it seriously affect the fairness of these proceedings. As such, we hereby overrule Appellant's second assignment of error.

ASSIGNMENT OF ERROR THREE

A. STANDARD OF REVIEW

{¶97} The standard of review when it is claimed that improper jury instructions were given is to consider the jury charge as a whole and determine whether the charge misled the jury in a manner affecting the complaining party's substantial rights. *Wray v. Frank*, 4th Dist. Pickaway No. 14CA2, 2015-Ohio-4248, ¶ 31; *Westerville v. Taylor*, 10th Dist.

Franklin No. 13AP-806, 2014-Ohio-3470, ¶ 10, citing *Dublin v. Pewamo Ltd.*, 194 Ohio App.3d 57, 954 N.E.2d 1225, 2011-Ohio-1758, ¶ 28, (10th Dist.), citing *Kokitka v. Ford Motor Co.*, 73 Ohio St.3d 89, 93,1995-Ohio-84, 652 N.E.2d 671. The decision to give or refuse to give jury instructions is within the trial court's sound discretion. *Columbia Gas of Ohio, Inc. v. R.S.V. Inc.*, 7th Dist. Jefferson No. 05-JE-29, 2006-Ohio-7064, ¶ 55; *State v. McCleod* (Dec. 12, 2001), 7th Dist. Jefferson No. 00-JE-8, 2001 WL 1647305, citing *State v. Wolons*, 44 Ohio St.3d 64, 68, 541 N.E.2d 443 (1989). Thus, we will not reverse a verdict on this basis absent a trial court's abuse of discretion. An inadequate instruction that misleads the jury constitutes reversible error. *Taylor, supra,* citing *Marshall v. Gibson*, 19 Ohio St.3d 10, 12, 482 N.E.2d 583 (1985). However, a defendant's "failure to object to improprieties in jury instructions waives error on appeal absent plain error." *State v. Johnson,* 40 N.E.3d 628, 2015-Ohio-3248, ¶ 112, quoting *State v. Canter*, 10th Dist. Franklin No. 01AP-531, 2002 WL 452461 (Mar. 26, 2002), citing *State v. Morrison,* 10th Dist. Franklin No. 01AP-714, 2001 WL 1662020 (Dec. 31, 2001). See also, *State v. Lewis*, 4th Dist. Ross No. 14CA346, 2015-Ohio-4303.

B. LEGAL ANALYSIS

{¶98} "A trial court must give jury instructions that correctly and

completely state the law." *Nist v. Mitchell,* 42 N.E.3d 1206, 2015-Ohio-4032, (9th Dist.), at ¶ 12, quoting *Auer v. Paliath,* 140 Ohio St.3d 276, 2014-Ohio-3632, 17 N.E.3d 561, ¶ 12, quoting *Groob v. KeyBank,* 108 Ohio St.3d 348, 2006-Ohio-1189, 843 N.E.2d 1170, ¶ 32. Requested instructions should be given if they correctly state the law as applied to the facts in the case and if reasonable minds might reach the conclusion sought by the instruction. *Murphy v. Carrollton Mfg. Co.,* 61 Ohio St.3d 585, 591, 575 N.E.2d 828 (1991).

{¶99} Here, Appellant contends the trial court committed plain error when it provided jury instructions on expert witnesses generally, but failed to instruct the jury as to which witnesses were to be treated as experts. While acknowledging that the trial court provided standard Ohio jury instructions on expert witnesses and opinion testimony, Appellant argues a reasonable juror following the court's instructions would treat Mr. Bigley as an expert. Appellant concludes this misled the jury and led to an erroneous verdict.

{¶100} To begin, multiple appellate courts in Ohio have concluded that a trial court need not expressly state a witness is qualified as an expert before the expert offers opinion testimony. *State v. Brown,* 988 N.E.2d 924, 2013-Ohio-1099, ¶ 20. *State v. Waskelis,* 11th Dist. Portage No. 2011-P-

0035, 2012-Ohio-3030, ¶ 64; *State v. Webb,* 6th Dist. Lucas No. L-90-280, 1991 WL 253811 (Nov. 15, 1991); *State v. Skinner,* 2nd Dist. Montgomery No. 11704, 1990 WL 140897 (Sept. 26, 1990); *State v. Washington,* 1st Dist. Hamilton No. C-950371, 1996 WL 164105, *4-5 (Apr. 10, 1996). In our research, we have found several cases where the parties did not request and/or the trial court did not declare a witness to be an expert, although a foundation had been established. See, *State v. Horton,* 9th Dist. Summit No. 26030, 2012-Ohio-3340, *Hillman v. Kosnik,* 10th Dist. Franklin No. 07AP-942, 2008-Ohio-6303.

{¶101} The State directs our attention to *State v. McCall,* 99 Ohio App.3d 409, 650 N.E.2d 959 (1994). In *McCall,* the trial court did not specifically identify for the jury which witnesses were experts and which were not. On review, the Ninth District Appellate Court noted it was clear from the trial transcript, however, that two witnesses qualified as experts, an arson investigator and a polygraphist. The appellate court further observed the court's instruction on expert testimony immediately preceded its instruction on the results of the polygraph exam. The appellate court concluded the trial court did not err in giving the instruction on expert witnesses without specifically stating that it applied to the polygraphist. The appellate court wrote:

> "Moreover, '[w]here a paragraph in a general charge, by itself, is improper and misleading, but when the court's entire charge is considered it is apparent that no prejudicial error resulted, the judgment will not be reversed.' *State v. Porter*, 14 Ohio St.2d 10, 235 N.E.2d 520, (1968), paragraph two of the syllabus. 'Considering the jury charge as a whole, we conclude that any imperfection in the jury instruction on the polygraphist did not amount to plain error. The fourth assignment of error is overruled.' " *McCall, supra*, at 650 N.E.2d at 963.

{¶102} In the case sub judice, the State requested during trial that Shane Hanshaw, a crime scene agent with BCI, be declared an expert in the field of blood spatter or blood stain analysis.[14] Hanshaw was the only witness declared an expert on the record. The trial court later gave these instructions concerning expert witnesses:

> "Now, we've had some experts. One who follows a profession or special line of work, may express his or her opinion because of their education, knowledge, and experience. Such testimony is admitted for whatever assistance it may provide to help you to arrive at a just verdict.
>
> Now questions have been asked of expert witnesses, after they have disclosed the underlying facts or data. It is for you as jurors to decide if such facts or data on which the experts based his or her opinions are true, and you will decide the weight to give this evidence. However, as with other witnesses, upon you alone rests the duty of deciding what weight would be given to the testimony of the experts.

[14] The trial transcript reveals David Ross and Hallie Garafolo, the forensic scientists from BCI, testified as to their education, background, and experience. While they indicated they had testified as experts in other courts, the State did not specifically request that they be declared experts, nor did the trial court do so, sua sponte. Dr. Lehman, the forensic pathologist who performed Stephens' autopsy, and Dr. Anderson, the defense expert, gave opinions stated to be within a reasonable degree of medical certainty. However, neither of these two witnesses were declared experts.

> In determining its weight, you may take into consideration each expert's skill, experience, knowledge, voracity- - that's truthfulness- - familiarity with the facts of the case, and the usual rules for testing credibility and determining the weight to be given to the evidence, or their testimony.
>
> Generally, a witness may not express an opinion; however, a person who has had an opportunity to observe, is permitted to express an opinion. Excuse me. Determining the value of a- - of such opinions, you will consider again, the opportunity that such a witness had to observe the facts and their knowledge and experience on the subject that they testified to. In addition, you will apply the usual rules for testing credibility and determining the weight to be given to the testimony."

{¶103} Our review of the record demonstrates that only one witness was declared an expert during trial. The above instructions regarding expert witness testimony were preceded by an instruction on evaluating the credibility of all witnesses, and the instruction that a juror is free to believe all, part, or none of a witness's testimony. These instructions were followed by the trial court's reiteration that the jurors were to apply the usual rules for testing credibility and determining the weight to be given to an expert's testimony. While we do think it problematic that an instruction was given as to "expert witnesses" when actually only one witness was designated as such to the jurors, we do not find it caused confusion or rises to the level of plain error. The jurors were also instructed as to the usual rules for determining credibility and weighing the evidence. As in *McCall, supra,* when viewing the jury charge as a whole, we do not find that the charge as to expert

witness testimony misled the jury in a manner affecting Appellant's substantial rights or constituting reversible error.

{¶104} Furthermore, as discussed in assignment of error one, nothing in Bigley's testimony or the State's closing rebuttal elevated Bigley to expert status. For the foregoing reasons, the trial court did not commit plain error by failing to instruct the jury as to which witnesses were to be considered experts. We find no merit to Appellant's third assignment of error and it is hereby overruled.

ASSIGNMENT OF ERROR FOUR

A. STANDARD OF REVIEW

{¶105} Criminal defendants have a right to counsel, and this includes a right to the effective assistance from counsel. *State v. Sinkovitz*, 4th Dist. Hocking No. 20 N.E.2d 1206, 2014-Ohio-4492, ¶ 16; citing *McMann v. Richardson*, 397 U.S. 759, 770, 90 S.Ct. 1441, (1970) (Internal citations omitted.) To establish constitutionally ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient, and (2) such deficient performance prejudiced the defense and deprived him of a fair trial. *Sinkovitz, supra*. See, *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984); also see *State v. Issa*, 93 Ohio St.3d 49, 67, 752

N.E.2d 904 (2001); *State v. Goff*, 82 Ohio St.3d 123, 139, 694 N.E.2d 916 (1998).

{¶106} Both prongs of the *Strickland* test need not be analyzed if the ineffective assistance claim can be resolved under one. *Sinkovitz, supra,* at ¶ 17. See, *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000). To establish the latter element (the existence of prejudice) a defendant must show a reasonable probability exists that, but for counsel's alleged error, the result of the trial would have been different. *Sinkovitz, supra*; *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), at paragraph three of the syllabus.

B. LEGAL ANALYSIS

{¶107} A properly licensed attorney is presumed to be competent. *State v. Weddington*, 4th Dist. Scioto No. 15CA3695, 2015-Ohio-5429, ¶ 19. *Bradley, supra,* (holding there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance"). Thus, judicial scrutiny of an attorney's performance must be highly deferential. *Strickland, supra*; *State v. Seiber*, 56 Ohio St.3d 4, 11, 564 N.E.2d 408 (1990). Counsel's strategic decisions and trial tactics will not support a claim of ineffective assistance. *State v. Clayton*, 62 Ohio St.2d 45, 48-49, 402 N.E.2d 1189 (1980); *State v. Lane*, 108 Ohio App.3d 477, 486,

671 N.E.2d 272 (1995) ("Rarely do we find a record in which counsel for either side has made no mistakes. It is much easier to sit back as an 'armchair quarterback' and pick apart counsel's trial strategy after a defeat than to formulate and execute such strategy in the face of all of the factors that enter a trial."). Acquittal is not the test. *State v. Hester,* 45 Ohio St.2d 71, 77, 341 N.E.2d 304 (1976).

{¶108} A failure to object to error is insufficient to sustain a claim of ineffective assistance of counsel. *State v. Mickens,* 10th Dist. Franklin No. 08AP-626, 2009-Ohio-1973, ¶ 29, citing *State v. Hale,* 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864 at ¶ 233, quoting *State v. Holloway,* 38 Ohio St.3d 239, 244, 527 N.E.2d 831, (1988). "Because 'objections tend to disrupt the flow of a trial, [and] are considered technical and bothersome by the factfinder * * * competent counsel may reasonably hesitate to object in the jury's presence.' "(Citation omitted.) *Mickens* at ¶ 29, quoting *State v. Campbell,* 69 Ohio St.3d 38, 53, 1994-Ohio-492, 630 N.E.2d 339. An attorney's decision as to whether or not to object at certain times during trial is presumptively considered a trial tactic or strategy that we will not disturb. *State v. Fisk,* 9th Dist. Summit No. 21196, 2003-Ohio-3149, at ¶ 9; *State v. Phillips,* 74 Ohio St.3d 72, 85, 656 N.E.2d 643, (1995).

{¶109} The Supreme Court of Ohio has recognized that if counsel decides, for strategic reasons, not to pursue every possible trial strategy, the defendant is not denied effective assistance of counsel. *State v. Waters*, 4th Dist. Vinton No. 13CA693, 2014-Ohio-3109, ¶ 22; *State v. Black*, 4th Dist. Ross No. 12CA3327, 2013-Ohio-2105, ¶ 40; *State v. Brown*, 38 Ohio St.3d 305, 319, 528 N.E.2d 523 (1988).

1. Failure to object to Joseph Bigley's testimony.

{¶110} Appellant argues Bigley's testimony was improper under both Evid.R. 701 and Evid.R. 702, as argued at length under the first assignment of error. As such, counsel's failure to maintain an objection to all the testimony of Bigley resulted in significant prejudice to Appellant. Appellant concludes that given the lack of direct evidence of guilt, the State's failure to investigate Richard Haught, and the prejudicial impact of Bigley's testimony, there is a reasonable probability that had counsel objected to Bigley's testimony, the outcome of the trial would have been different.

{¶111} Having previously found that Bigley's testimony was not improper, we disagree. We view trial counsel's failure to object to Bigley's testimony was likely a strategic measure. After a lengthy hearing on the State's motion to have Bigley designated an expert, and further discussion out of the jury's hearing, Appellant's trial counsel knew the testimony was

coming in as lay opinion testimony. To object to Bigley's testimony in front of the jury could possibly have emphasized or elevated the importance of the testimony. Counsel's decision to remain silent was likely a choice to attempt to minimize any impact the testimony may have had. As such, we do not find Appellant was caused significant prejudice by this strategic decision.

2. Failure to object to the police officers' testimony.

{¶112} Similarly, Appellant argues that the police officers' opinion testimony and counsel's failure to object resulted in significant prejudice to Appellant. Appellant's theory was that Mr. Haught was responsible for Stephens' death and the officers' opinions that Mr. Haught could not be responsible caused the prejudice. Again, Appellant concludes that given the lack of direct evidence, the failure to investigate Haught, and the impact of the prejudicial testimony, had defense objected, the outcome would have been different.

{¶113} Again, we must disagree. We find it likely a strategic decision on counsel's part not to highlight or emphasize the officers' testimony in any way by calling further attention to it, by way of objections. Furthermore, we do not necessarily agree with Appellant's contention, throughout the brief, that Haught was not investigated appropriately or that there was a lack of

evidence. And while the evidence in this case is largely circumstantial, Appellant did testify on his own behalf. The jury had the opportunity to hear his version of the events transpiring on April 1, 2013 and April 2, 2013 when he was present at both residences where crimes occurred, observed his demeanor, and found his explanation of the events occurring at both locations not to be credible. We do not find that had trial counsel objected to the officers' opinion testimony that the outcome of this trial would have been different.

3. Failure to request an instruction as to which witnesses were supposed to be treated as experts.

{¶114} Appellant argues this failure resulted in extreme prejudice to him as the jury was left to presume, based on Mr. Bigley's professional credentials in martial arts, that he was an expert witness. Appellant continues to assert that given the lack of direct evidence, the failure to investigate Haught, and the prejudicial impact of the jury being led to believe Bigley was an expert, the outcome of the trial would have been different. Again, we must disagree. As explained above, we do not find there was a failure to investigate Haught nor do we find an absence of overwhelming evidence of Appellant's guilt.

{¶115} Furthermore, as explained above, the trial court was not required to designate which witnesses were experts. The trial transcript

reveals that Agent Shane Hanshaw and Detective Scott Parks were designated as experts for the jury. Because the trial court did specifically designate two witnesses as experts, we cannot assume that simply because Bigley testified as to certain credentials in martial arts that the jury assumed him also to be an expert. As such, we cannot further say that Appellant's trial counsel was deficient for failing to request an instruction as to which witnesses were experts.

{¶116} In fact, Appellant's failure to request the instruction may have been another strategic decision. Although the jurors were instructed at the outset that Appellant did not have to call any witnesses, and further instructed that they were free to believe all, part, or none of the witnesses testimony, perhaps trial counsel did not wish for it to be reemphasized to the jury that the State's case was supported by the testimony of several forensic experts and many law enforcement officers - 17 witnesses total - as compared to the defense case which utilized only the testimony of Appellant, one expert, and a neighbor.

{¶117} For the foregoing reasons, we find no merit to Appellant's claim that he was rendered ineffective assistance. We do not find counsel's performance to be deficient nor do we find Appellant suffered substantial

prejudice. As such, we overrule Appellant's fourth assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington 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 BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Hoover, J.: Concurs in Judgment and Opinion.
Abele, J.: Concurs in Judgment Only.

For the Court,

BY: _____
Matthew W. McFarland, 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.