[Cite as *State v. Moody*, 2010-Ohio-3272.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

JEREMY K. MOODY

Defendant-Appellant

JUDGES:
Hon. Julie A. Edwards, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 09 CA 90

O P I N I O N
(NUNC PRO TUNC)

CHARACTER OF PROCEEDING: Criminal Appeal from the Court of Common Pleas, Case No. 09 CR 47

JUDGMENT: Affirmed in Part; Reversed in Part and Remanded

DATE OF JUDGMENT ENTRY: July 12, 2010

APPEARANCES:

For Plaintiff-Appellee

KENNETH W. OSWALT
PROSECUTING ATTORNEY
EARL L. FROST
ASSISTANT PROSECUTOR
20 South Second Street, 4th Floor
Newark, Ohio 43055

For Defendant-Appellant

SCOTT D. SCHOCKLING
5073 Bixby Road
Groveport, Ohio 43125

Wise, J.

{¶1} Appellant Jeremy K. Moody appeals his conviction and sentence entered on June 18, 2009, in the Licking County Court of Common Pleas on one count of Felonious Assault following a trial by jury.

{¶2} Appellee is State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶3} On January 17, 2009, Appellant Jeremy Moody was at Tristan's, a sports bar in Newark, Ohio. Appellant was wearing a blue jacket with the insignia of the University of Michigan on the back. Kevin Humphrey, another patron at the bar, made a comment about Appellant's jacket, which resulted in an altercation between the two. (T. at 78-79). At one point during this altercation, Humphrey was struck with a beer bottle or a beer mug. At trial, Humphrey admitted that he was attacked by two individuals, and that he did not know who hit him with the bottle or glass. (T. at 85-86). Appellant also sustained injuries in an altercation. He told the police that someone hit him with a beer bottle. (T. at 94).

{¶4} As a result of the above events, the Licking County Grand Jury charged Appellant with one count of felonious assault.

{¶5} This matter was tried before a jury, which found him guilty of the offense. The trial court sentenced Appellant to five (5) years imprisonment. It also imposed an additional one-year prison term since he was on post-release control, resulting in an actual sentence of six (6) years. The trial court also ordered Appellant to pay restitution. (Sent. T. at 8).

{¶6} Appellant now appeals, assigning the following errors for review:

ASSIGNMENTS OF ERROR

{¶7} "I. TRIAL COUNSEL'S FAILURE TO MOVE FOR ACQUITTAL CONSTITUTES INEFFECTIVE ASSISTANCE SINCE THE STATE DID NOT ESTABLISH A NEEDED ELEMENT OF THE OFFENSE OF FELONIOUS ASSAULT.

{¶8} "II. THE JURY VERDICT FINDING MOODY GUILTY OF FELONIOUS ASSAULT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶9} "III. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ORDERED RESTITUTION SINCE MOODY LACKS THE ABILITY TO PAY."

I.

{¶10} In his first assignment of error, Appellant argues that he was denied the effective assistance of counsel. We disagree.

{¶11} Our standard of review is set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Ohio adopted this standard in the case of *State v. Bradley* (1989), 42 Ohio St.3d 136. These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. First, we must determine whether counsel's assistance was ineffective; i.e., whether counsel's performance fell below an objective standard of reasonable representation and whether counsel violated any of his or her essential duties to the client.

{¶12} If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different. *Id.* at 141-142. Trial counsel is entitled to a strong

presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie,* 81 Ohio St.3d 673, 675, 1998-Ohio-343. Tactical or strategic trial decisions, even if ultimately unsuccessful, will not substantiate a claim of ineffective assistance of counsel. *In re M.E.V.,* 10th Dist. No. 08AP-1097, 2009-Ohio-2408, ¶ 34.

{¶13} Appellant specifically cites trial counsel's failure to move for acquittal in this matter.

{¶14} Upon review of the records, we cannot say that Appellant's counsel's performance fell below the standard.

{¶15} A Crim.R. 29 motion is asserted to test the sufficiency of the evidence. Pursuant to Crim.R. 29(A), a trial court is required to order an acquittal of "one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses." See *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 263.

{¶16} When reviewing a case to determine if the record contains sufficient evidence to support a criminal conviction, we must "examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. See, also, *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶17} A motion for judgment of acquittal pursuant to Crim.R. 29 should be denied "if the evidence, viewed in the light most favorable to the government, is such that 'a reasonable mind might fairly find guilt beyond a reasonable doubt.' " *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 263, *State v. Catlett* (July 24, 1981), 6th Dist. No. L-80-312.

{¶18} "The failure to assert a Crim.R. 29 motion is not, per se, ineffective assistance of counsel." *State v. Shaffer,* 11th Dist. No. 2002-P-0133, 2004-Ohio-336, at paragraph 33. See also, *Defiance v. Cannon* (1990), 70 Ohio App.3d 821, 826-827 (held defense counsel's failure to make a Crim.R. 29 motion for acquittal is not ineffective assistance of counsel where such a motion would have been futile).

{¶19} In the case sub judice, the State presented evidence such that reasonable minds could reach different conclusions as to whether each material element of the crime of felonious assault had been proven beyond a reasonable doubt. See *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23.

{¶20} At trial, the State presented a videotape of the altercation (T. at 58-59), testimony from the bartender who cleaned up the broken glass from the broken beer mug (T. at 64-65), testimony from another bar patron who witnessed the incident (T. at 71-74), as well as testimony from the victim (T. at 78-81) and one of the victim's friends who was with the victim that night and saw Appellant strike him in the face with the beer mug. (T. at 89).

{¶21} Based on the foregoing, even if counsel had made a Crim.R. 29 motion for acquittal, such motion would have been denied. As such, Appellant has failed to

establish prejudice. In other words, had counsel made such motion, the outcome of the case would not have been different.

{¶22} Appellant's first assignment of error is overruled.

II.

{¶23} In his second assignment of error, Appellant argues that his conviction is against the manifest weight of the evidence. We disagree.

{¶24} A manifest-weight challenge questions whether the state has met its burden of persuasion. *State v. Thompkins* (1997), 78 Ohio St.3d 380, (Cook, J., concurring). In making this determination, we do not view the evidence in the light most favorable to the prosecution. Instead, we must "review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins,* supra, 78 Ohio St.3d at 387. (Quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175).

{¶25} In the case sub judice, Appellant was convicted of felonious assault. The elements of felonious assault are set forth in R .C. §2903.11, which provides in pertinent part:

{¶26} "(A) No person shall knowingly:

{¶27} " * * *

{¶28} "(2) Cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordinance, as defined in section 2923.11 of the Revised Code."

{¶29} As set forth above, the State presented a videotape of the altercation (T. at 58-59), testimony from the bartender who cleaned up the broken glass from the broken beer mug (T. at 64-65), testimony from another bar patron who witnessed the incident (T. at 71-74), as well as testimony from the victim (T. at 78-81) and one of the victim's friends who was with the victim that night and saw Appellant strike him in the face with the beer mug. (T. at 89).

{¶30} Appellant argues that the State failed to present sufficient evidence that the beer mug in this case constituted a "deadly weapon" or that the victim sustained "serious physical harm" pursuant to the felonious assault statute.

{¶31} As to Appellant's contention that the victim did not sustain serious physical harm, R.C. §2901.01(A)(5) defines "serious physical harm" as, in pertinent part:

{¶32} " * * *

{¶33} "(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

{¶34} "(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

{¶35} "(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain."

{¶36} Here, the State's evidence of serious physical harm included the victim's testimony that he suffered several cuts on his face, for which he sought medical treatment. (T. at 81-84, 85). He testified that his cuts required stitches and that he has scars as a result of such cuts. (T. at 83-84). He further testified that he suffered

residual pain and that such injuries affected his ability to eat and brush his teeth. Id. He also stated that he suffered bruises and swelling as a result of the assault. (T. at 84). He testified that on a ten-point scale, his pain was a 6 to 8. (T. at 83).

{¶37} In *State v. Walker* (June 18, 1987), Cuyahoga App. No. 52391, the Tenth District Court of Appeals held that where injuries are serious enough to cause a victim to seek medical treatment, a jury may reasonably infer that the force used by a defendant caused serious physical harm. See, e.g., *State v. Henricks,* 6th Dist. No. WD-05-051, 2006-Ohio-6181 (sufficient evidence existed to prove the element of serious physical harm where the victim suffered a small laceration to the back of her head when her husband struck her in the head with a skillet, and she suffered severe headaches and disorientation after the injury).

{¶38} Based on the testimony presented, we find the State produced sufficient evidence upon which the jury could find that Appellant caused serious harm to the victim within the meaning of R.C. §2901.01(A)(5).

{¶39} For purposes of felonious assault, "deadly weapon" has the same meaning as set forth in R.C. §2923.11, which defines a "deadly weapon" as "any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon."

{¶40} An item does not have to be one that kills in order to be a deadly weapon. *In re Smith* (2001), 142 Ohio App.3d 23, 24. No item, no matter how small or commonplace, can be safely disregarded for its capacity to cause death when it is wielded with the requisite intent and force. *Id.,* citing *State v. Deboe* (1977), 62 Ohio App.2d 192, 193-194. The use of a piece of wire fashioned to a sharp point as a

weapon has been found to support a conviction for felonious assault. *State v. Quinones* (Jan. 22, 1990), Richland App. No. CA-2687. See, also, *In re Smith,* supra (a ballpoint pen could be used as a deadly weapon); *State v. Hicks* (1984), 14 Ohio App.3d 25, 26, 469 N.E.2d 992 (a toy gun is capable of inflicting death because of its possible use as a bludgeon).

{¶41} A beer bottle and/or a beer mug or glass has been found to be a deadly weapon in numerous cases. See *State v. Chancey* (Feb. 17, 2000), Cuyahoga App. Nos. 75633 and 76277 (the use of a beer bottle as a weapon has been found to support a conviction for felonious assault.) *State v. Chappell*, Cuyahoga App. No. 79589, 2002-Ohio-676; *State v. Ramos*, (April 5, 2006), 9th District App. 05 CA 8830; *State v. Skidmore*, (August 7, 2000) Twelfth Dist. App. No CA99-12-137; *State v. Fields*, (November 3, 1993), Ninth Dist. App. No. 92CA005487.

{¶42} In the case sub judice, in addition to witness testimony, the jury saw a videotape of the incident. That videotape was sufficient evidence for the jury to find that defendant had used the beer mug as a weapon. Further, it would not have been inappropriate for the jury to conclude from the nature of the beer mug that it was a thing "capable of inflicting death." Accordingly, there was sufficient evidence before the jury for it to find beyond a reasonable doubt that defendant was guilty of felonious assault.

{¶43} Appellant's second assignment of error is overruled.

III.

{¶44} In his third and final assignment of error, Appellant argues that it was error for the trial court to order restitution in this matter because Appellant lacks the ability to pay. We disagree.

{¶45} In the instant case, Appellant was ordered as part of his sentence to pay restitution to the victim in the amount of $2,600.00.

{¶46} This Court has addressed this issue in *State v. Danison,* Ashland App. No. 03COA021, 2003-Ohio-5924. R.C. §2929.18(A)(1) permits a trial court to impose a financial sanction and fine upon an offender who has committed a felony. However, before doing so, pursuant to R.C. §2929.19(B)(6), the trial court is required to consider the offender's present and future ability to pay the amount of sanction or fine. Further, under R.C. §2929.18(E), a trial court may hold a hearing, if necessary, to determine whether the offender is able to pay the sanction or is likely in the future to be able to pay it.

{¶47} This Court has previously determined that there is no mandatory language in the statute for the trial court to conduct a hearing. See *State v. Berry,* Coshocton App. No. 01-CA-26, 2003-Ohio-167*,* at ¶ 21; *State v. Schnuck* (Sept. 25, 2000), Tuscarawas App. No. 2000AP020016, at 1; *State v. Johnston* (July 26, 2000), Ashland App. No. 99COA01333, at 5.

{¶48} R.C. §2929.18 only requires a trial court judge to hold a hearing if there is an objection to the amount of restitution or the ability to pay. Here, appellant's counsel failed to object to either; therefore, the trial court was not required to hold a hearing.

{¶49} Because Appellant did not object to the restitution order in the proceedings below, he has forfeited all but plain error. Pursuant to Crim.R. 52(B), we may notice plain errors or defects affecting substantial rights. “Inherent in the rule are three limits placed on reviewing courts for correcting plain error.” *State v. Payne,* 114 Ohio St.3d 502, 873 N.E.2d 306, 2007-Ohio-4642, at ¶ 15. “First, there must be an

error, i.e., a deviation from the legal rule. * * * Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. * * * Third, the error must have affected 'substantial rights.' We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial." *Id.* at ¶ 16, 873 N.E.2d 306, quoting *State v. Barnes,* 94 Ohio St.3d 21, 27, 759 N.E.2d 1240, 2002-Ohio-68 (omissions in original). We will notice plain error "only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, at paragraph three of the syllabus. And "[r]eversal is warranted only if the outcome of the trial clearly would have been different absent the error." *State v. Hill,* 92 Ohio St.3d 191, 203, 749 N.E.2d 274, 2001-Ohio-141.

{¶50} Before ordering an offender to pay restitution, R.C. §2929.19(B)(6) requires a court to consider the offender's present and future ability to pay the amount of the sanction or fine. When, however, a trial court imposes a financial sanction without any inquiry into the offender's present and future means to pay, the failure to make the requisite inquiry constitutes an abuse of discretion. *State v. Horton* (1993), 85 Ohio App. 3d 268.

{¶51} While the better practice is for a trial court to explain on the record that it considered an offender's financial circumstance, courts have consistently held that a trial court need not explicitly state in its judgment that it considered a defendant's ability to pay a financial sanction. Rather, courts look to the totality of the record to see if this requirement has been satisfied.

{¶52} It has been held that a court complies with Ohio law if the record shows that the court considered a pre-sentence investigation report that provides all pertinent

financial information regarding an offender's ability to pay restitution." *State v. Henderson,* Vinton App. No. 07CA659, 2008-Ohio-2063, at ¶ 7 ("We have explained that the trial court complies with R.C. §2929.19(B)(6) when the record shows that the court considered a pre-sentence investigation report that provides pertinent financial information regarding the offender's ability to pay restitution.")

{¶53} In the case sub judice, the trial court referenced the pre-sentence investigation report but did not make any references to any financial information contained therein. Furthermore, upon making its order of restitution to the victim, the trial court specifically stated on the record that it was "aware of the likelihood that the defendant may not be able to contribute to [restitution]." In the very next sentence, the trial then went on to state:

{¶54} "The court would impose no fine finding that that would be inappropriate. The defendant is determined to be indigent."

{¶55} Based on this information, we find that it was unreasonable for the trial court to conclude that Appellant could eventually pay the restitution order.

{¶56} We therefore find that the record does not support the conclusion that the trial court sufficiently considered Appellant's present and future ability to pay restitution.

{¶57} Accordingly, we sustain Appellant's third assignment of error.

{¶58} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed in part and reversed in part and remanded for further proceedings consistent with the law and this opinion.

By: Wise, J.

Edwards, P. J., and

Delaney, J., concur.

/S/ JOHN W. WISE

/S/ JULIE A. EDWARDS

/S/ PATRICIA A. DELANEY

JUDGES

JWW/d 510

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
JEREMY K. MOODY	:	
Defendant-Appellant	:	Case No. 09 CA 90

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed in part and reversed in part and remanded for further proceedings consistent with the opinion.

Costs to be split evenly between both parties.

/S/ JOHN W. WISE

/S/ JULIE A. EDWARDS

/S/ PATRICIA A. DELANEY

JUDGES