[Cite as *State v. Keil*, 2017-Ohio-593.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	Case No. 16CA28
COREY KEIL	:	
Defendant-Appellant	:	
	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Richland County Court of Common Pleas, Case No. 2015CR1037D
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	February 1, 2017

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
DANIEL ROGERS Richland County Prosecutor 38 South Park Street Mansfield, OH 44902	JOHN C. O'DONNELL, III 10 West Newlon Place Mansfield, OH 44902

Gwin, P.J.

{¶1} Appellant Corey Keil ["Keil"] appeals his conviction and sentence after a jury trial in the Richland County Court of Common Pleas on one count of felonious assault.

Facts and Procedural History

{¶2} On January 14, 2016, a Richland County Grand Jury indicted Keil on one count of Felonious Assault, a second-degree felony pursuant to R.C. 2903.11(A)(2).

{¶3} On December 8, 2015, Keil and his brother Izak Williams were passengers in a tan 1998 Ford Taurus car being driven by the boys' mother. Keil's vehicle was inadvertently in a left turn lane and veered back into the through lane. Keil's mother did not see a red van driven by Ronald Earles and occupied by Earles' eleven-year-old autistic son. In response to being cut off and nearly struck, Earles honked his horn at Keil's car.

{¶4} As Earles' van continued behind Keil's car Earles observed Keil's mother driving ten to fifteen miles per hour below the posted 35 mph speed limit. The two vehicles stopped at the red light at the intersection of Trimble Road and Marion Avenue. When the light turned green, Keil's car did not move for ten to fifteen seconds, causing Earles to honk his horn a second time.

{¶5} As Keil's car continued to travel below the posted speed limit on Trimble Road, Earles went into a turning lane and passed the car. After passing, Earles stopped his van at the intersection of Trimble Road and Millsboro Road due to traffic build up in both directions caused by a crane in the road. Keil's car stopped behind Earles' van and Keil and his brother yelled "fucking move" at Earles. After yelling at Earles, Keil and his brother began throwing soda cups at Earles' van.

{¶6} As Earles stepped out of his van to speak with Keil and Williams, the pair rushed at Earles. Earles, a carrying a concealed weapons permit holder, reached back inside his van to retrieve his Smith and Weston .9 mm handgun. However, before Earles could get both feet out of his van and point his gun, Keil and Williams began punching him, causing Earles to lose control of his handgun. As Earles wrestled Williams to the ground, Keil picked up Earles' handgun from the ground. Keil then struck Earles in the head with the handgun. After striking Mr. Earles in the head Keil walked back towards his mother's car carrying Earles' gun.

{¶7} Earles suffered a cut and chipped bone in his elbow when he wrestled Williams to the ground and a cut to his head when Keil struck him with Earles' gun.

{¶8} Richland County Sheriff Steve Sheldon, who was driving on Trimble Road in his unmarked 2004 Ford Explorer, observed stopped traffic and people outside their cars near the intersection of Trimble and Millsboro. Sheriff Sheldon activated his emergency lights and stayed in the middle lane to investigate. Sheriff Sheldon observed Keil, Keil's mother, and Williams walking towards Keil's mother's car and a bloody Earles walking back towards his van.

{¶9} Tammie Wilson, who was parked directly across from Keil's car and observed the entire incident, advised Sheriff Sheldon that Keil had a gun. Sheriff Sheldon displayed his gun, stood behind the door of his vehicle for safety, and requested back up. Officers from the Mansfield Police Department ("MPD"), Richland County Sheriff's Office ("RCSO") and Lexington Police Department arrived on scene to assist Sheriff Sheldon.

{¶10} Sheriff Sheldon observed Keil holding Earles' handgun and ordered Keil to place the gun on the hood of Sheriff Sheldon's ear. Sheriff Sheldon then ordered Keil to

place his hands on the trunk of Keil's car and Williams to place his hands on the hood of Keil's car. MPD Officers Williams and Gearhart handcuffed Keil, Keil's mother, Williams, and Mr. Earles, and cleared Keil's car and Earles' van.

{¶11} Officer Jodie Williams made contact with Earles. Officer Williams observed a laceration on Earles' head, blood on Earles' elbow, hands and shirt, dirt on Earles' hands and arm, blood splatter on both sides of the front driver's side door of Earles' van, and handprints on the front driver's side window of Earles' van. Officer Williams obtained an oral statement from Earles regarding the incident. Earles subsequently reported to MPD and provided a taped statement describing the incident.

{¶12} Officer Williams then made contact with Keil and Mr. Williams to get their version of events. Keil and Williams, who had been placed in separate cruisers both told Officer Williams that they were involved in a road rage incident with Earles that they both punched Earles, and that Keil grabbed Earles handgun and struck Earles in the head with it. Keil and Williams were arrested and transported to Richland County Jail.

{¶13} Officer Williams also obtained statements from Tammie Wilson, John Northrup and David Schindler.

{¶14} Mr. Northrup, who was driving on Trimble Road at the time of the incident, observed two young men and a woman beating up another man next to the driver's side of a red van, but could not positively identify any of the participants.

{¶15} Mr. Schindler observed the incident while sitting in his car in a parking lot approximately fifty yards away and mistakenly identified Izak Williams rather than Keil as the person whom grabbed Earles' gun and struck Mr. Earles.

{¶16} Earles, who declined medical attention immediately following the incident, went to the Third Street Clinic several months later for X-rays. The X-rays revealed the chipped bone in Earles' elbow that he suffered when he took Mr. Williams to the ground.

{¶17} The jury found Keil guilty Felonious Assault. Following the jury's verdict, the Trial Court ordered a Pre-Sentence Investigation (hereinafter "PSI") and scheduled a Sentencing Hearing for April 4, 2016.

{¶18} On March 18, 2016, Keil filed a "Motion for Judgment of Acquittal" with the Trial Court pursuant to Ohio Crim.R. 29(C). On March 25, 2016, the Trial Court overruled Keil's Motion for Judgment of Acquittal.

{¶19} On April 25, 2016, the Trial Court sentenced Keil to four years community control.

Assignments of Error

{¶20} Keil raises three assignments of error,

{¶21} "I. DEFENDANT/APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

{¶22} "II. DEFENDANT/APPELLANT'S CONVICTION FOR FELONIOUS ASSAULT WAS CONTRARY TO THE WEIGHT OF THE EVIDENCE.

{¶23} "III. THE TRIAL COURT COMMITTED PLAIN ERROR BY ADMITTING HEARSAY STATEMENTS AND DEFENDANT/APPELLANT'S STATEMENT."

{¶24} For ease of discussion, we shall address Keil's assignments of error out of sequence.

II.

{¶25} In his second assignment of error, Keil contends that his conviction is not supported by sufficient evidence and is against the manifest weight of the evidence.

{¶26} Our review of the constitutional sufficiency of evidence to support a criminal conviction is governed by *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), which requires a court of appeals to determine whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id.; see also *McDaniel v. Brown*, 558 U.S. 120, 130 S.Ct. 665, 673, 175 L.Ed.2d 582(2010) (reaffirming this standard); *State v. Fry*, 125 Ohio St.3d 163, 926 N.E.2d 1239, 2010–Ohio–1017, ¶146; *State v. Clay*, 187 Ohio App.3d 633, 933 N.E.2d 296, 2010–Ohio–2720, ¶68.

{¶27} Weight of the evidence addresses the evidence's effect of inducing belief. *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1997). Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue, which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief." Id. at 387, 678 N.E.2d 541, *quoting* Black's Law Dictionary (6th Ed. 1990) at 1594.

{¶28} When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "'thirteenth juror'" and disagrees with the fact finder's resolution of the conflicting

testimony. Id. at 387, 678 N.E.2d 541, *quoting Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). However, an appellate court may not merely substitute its view for that of the jury, but must find that "'the jury 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*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720–721 (1st Dist. 1983). Accordingly, reversal on manifest weight grounds is reserved for "'the exceptional case in which the evidence weighs heavily against the conviction.'" Id.

> "[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts.
>
> * * *
>
> "If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment."

Seasons Coal Co., Inc. v. Cleveland, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, *quoting* 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978).

{¶29} The elements of felonious assault are set forth in R .C. 2903.11, which provides in pertinent part:

{¶30} (A) No person shall knowingly:

* * *

(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.

{¶31} R.C. 2923.11(A) 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."

{¶32} "Physical harm to persons" means "any injury, illness, or other physiological impairment, regardless of its gravity or duration." R.C. 2901.01(A)(3).

{¶33} In the case at bar, Keil testified that he picked the handgun up off the ground were it had fallen and hit Earles on the head with it. (2T. at 264; 266-268). Keil admits that this caused a laceration on Earles' head. (2T. at 279).

{¶34} Viewing the evidence in the case at bar in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that Keil had caused physical harm to another by means of a deadly weapon.

{¶35} We hold, therefore, that the state met its burden of production regarding felonious assault and, accordingly, there was sufficient evidence to support Keil's conviction.

Self-defense.

{¶36} Self-defense is a "confession and avoidance" affirmative defense in which appellant admits the elements of the crime but seeks to prove some additional element that absolves him of guilt. *State v. White*, 4th Dist. Ross No. 97 CA 2282, 1998 WL 2282 (Jan. 14, 1998). The affirmative defense of self-defense places the burden of proof on a

defendant by a preponderance of the evidence. *In re Collier*, 5th Dist. Richland No. 01 CA 5, 2001 WL 1011457 (Aug. 30, 2001), *citing State v. Caldwell*, 79 Ohio App.3d 667, 679, 607 N.E.2d 1096 (4th Dist. 1992).

{¶37} In the case at bar, the jury was instructed on self-defense. Thus, Keil admitted he caused Earles injuries but that he did so in an attempt to protect himself from Earles attack.

> The elements of self-defense differ depending on whether the defendant used deadly or non-deadly force to defend himself. *State v. Densmore,* 3d Dist. Henry No. 7–08–04, 2009–Ohio–6870, ¶ 25. Deadly force is "'any force that carries a substantial risk that it will proximately result in the death of any person.'" Id. at ¶ 28, quoting R.C. 2901.01(A)(2). Courts have concluded that using even "a small knife on another person's body" constitutes "deadly force." Id., *citing Struthers v. Williams*, 7th Dist. Mahoning No. 07 MA 55, 2008–Ohio–6637, ¶ 13, *State v. Skinner*, 9th Dist. Lorain No. 06CA009023, 2007–Ohio–5601, ¶ 19, *State v. Sims*, 8th Dist. Cuyahoga No. 85608, 2005–Ohio–5846, ¶ 17, and *State v. Hansen*, 4th Dist. Athens No. 01CA15, 2002–Ohio–6135, ¶ 29. *See also State v. Harding*, 2d Dist. Montgomery No. 24062, 2011–Ohio–2823, ¶ 15 ("Stabbing a victim (or victims) with a knife constitutes the use of deadly force. * * * Consequently, to satisfy his burden, Harding had to meet the standard for self-defense through the use of deadly force."), *citing Sims* at ¶ 17, *Densmore* at ¶ 28, and *Hansen* ¶ 29. Here, Bagley does not dispute that he used a folding Tac Force knife to cut Fletcher's throat. (See

Appellant's Brief at 7, 16–17); (June 4–5 and 13, 2013 Tr., Vol. Two, at 232–233).

State v. Bagley, 3rd Dist. Allen No. 1-13-31, 2014-Ohio-1787, ¶15. *Accord, State v. Melendez,* 8th Dist. Cuyahoga No. 97175, 2012-Ohio-2385, ¶27; *State v. Harding,* 2nd Dist. Montgomery No. 24062, 2011-Ohio-2823, ¶15.

{¶38} "Deadly force" means any force that carries a substantial risk that it will proximately result in the death of any person. R.C. 2901.01(A)(2).

{¶39} In the case at bar, Keil used a handgun to bludgeon Earle. Consequently, to satisfy his burden of proof Keil had to meet the standard for self-defense using deadly force.

{¶40} To establish self-defense through the use of deadly force, "a defendant must prove the following elements: (1) that the defendant was not at fault in creating the situation giving rise to the affray; (2) that the defendant had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) that the defendant did not violate any duty to retreat or avoid the danger." *State v. Barnes*, 94 Ohio St.3d 21, 24, 2002–Ohio–68, 759 N.E.2d 1240, *citing State v. Robbins*, 58 Ohio St.2d 74, 388 N.E.2d 755(1979). "[T]he elements of self-defense are cumulative. * * * If the defendant fails to prove any one of these elements by a preponderance of the evidence he has failed to demonstrate that he acted in self-defense." *State v. Jackson,* 22 Ohio St.3d 281, 284, 490 N.E.2d 893(1986).

{¶41} In the case at bar, Keil testified that during the verbal altercation that occurred on the street, Earles walked back to his van. 2T. at 264. Keil and his brother

"kind of looked at each other, wondering if he was leaving. We didn't know what was going on at that point." 2T. at 264. Clearly, this gave Keil the opportunity to retreat to his mother's vehicle thus ending the confrontation. Thus, the jury could have found that Keil violated his duty to retreat and therefore his self-defense argument failed.

{¶42} Keil testified that Earle returned and pointed the gun at both Keil and Keil's brother. 2T. at 264. However, the threat ended when Earle was disarmed and the handgun fell to the ground. Keil testified that he picked up the handgun from the ground and proceeded to hit Earle in the head with the object. Therefore, the jury could have found that Keil's use of deadly force at that point was disproportionate to the threat that he or his brother were facing at that point in time.

Aggravated Assault.

{¶43} In the case at bar, the jury was instructed on aggravated assault. Aggravated assault, an inferior degree offense of felonious assault, is defined as follows:

> No person, while under the influence of sudden passion or in sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly:
>
> Cause serious physical harm to another or to another's unborn.

R.C. 2903.12. In *State v. Owens,* 5th Dist. Richland No. 2004-CA-87, 2005-Ohio-4402 this Court noted where there is sufficient evidence on the issues of self-defense and aggravated assault, the court must charge the jury on both, when so requested. *Accord,* State *v. Ervin*, 75 Ohio App.3d 275, 599 N.E.2d 366(8th Dist. 1991). In most cases, an aggravated assault instruction is incompatible with an instruction on self-defense, so that

both cannot be given together. *State v. Beaver*, 119 Ohio App.3d 385, 397, 695 N.E.2d 332(11th Dist. 1997). However, an aggravated assault instruction could be given in a self-defense case, where circumstances are such that the defendant exceeded the amount of force necessary for his defense, out of passion or rage. *Owens,* ¶31.

{¶44} To determine whether sufficient evidence of serious provocation exists, a trial court must employ a two-part inquiry. First, the court must objectively determine whether the alleged provocation is reasonably sufficient to bring on a sudden passion or fit of rage. *State v. Mack,* 82 Ohio St.3d 198, 201, 694 N.E.2d 1328. "'If this objective standard is met, the inquiry shifts to a subjective standard, to determine whether the defendant in the particular case 'actually was under the influence of sudden passion or in a sudden fit of rage.'" Id. (*quoting State v. Shane,* 63 Ohio St.3d 630, 634-45, 590 N.E.2d 272).

{¶45} In examining whether the provocation is reasonably sufficient to bring on a sudden passion or fit of rage, the Ohio Supreme Court has provided the following guidance: "'[p]rovocation, to be serious, must be reasonably sufficient to bring on extreme stress and the provocation must be reasonably sufficient to incite or to arouse the defendant into using deadly force.'" Id. at 200, 590 N.E.2d 272 (quoting *Deem,* paragraph five of the syllabus. "[T]he provocation must be 'sufficient to arouse the passions of an ordinary person beyond the power of his or her control.'" Id. (*quoting Shane,* 63 Ohio St.3d at 634-35, 590 N.E.2d 272).

{¶46} Generally, neither words alone nor fear itself will constitute evidence of serious provocation. "[W]ords alone will not constitute reasonably sufficient provocation to incite the use of deadly force in most situations" *Shane,* 63 Ohio St.3d at 634-35, 590

N.E.2d 272,277; and "[f]ear alone is insufficient to demonstrate the kind of emotional state necessary to constitute sudden passion or fit of rage." *Mack,* 82 Ohio St.3d 198, 201, 694 N.E.2d 1328. Cases have held that a victim's simple pushing or punching does not constitute sufficient provocation to warrant an aggravated assault instruction. See, also, *State v. Koballa,* 8th Dist. Cuyahoga No. 82013, 2003-Ohio-3535 (concluding that sufficient provocation did not exist when the victim grabbed the defendant by the testicles and the arm); *State v. Poe,* 4th Dist. Jackson No. 00CA90, 2000-Ohio-1966 (concluding that the victim's conduct in approaching the defendant with a hammer and stating "come on" did not constitute sufficient provocation). *State v. Pack*, 4th Dist. Pike No. 93CA525, 1994 WL 274429(June 20, 1994) ("We find that a mere shove and a swing (which appellant by his own testimony ducked) are insufficient as a matter of law to constitute serious provocation reasonably sufficient to incite or arouse appellant into using deadly force."). *State v. Perry, supra*.

{¶47} In the case at bar, Earle was no longer in possession of any deadly weapon at the time Keil struck him with the handgun. The struggle between Earle and Keil had ended. The struggle between Earle and Williams amounted to punching and wrestling, both of which are insufficient provocation for the use of deadly force.

{¶48} As an appellate court, we are not fact finders; we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent and credible evidence, upon which the fact finder could base his or her judgment. *Cross Truck v. Jeffries*, 5th Dist. Stark No. CA–5758, 1982 WL 2911(Feb. 10, 1982). Accordingly, judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest

weight of the evidence. *C.E. Morris Co. v. Foley Construction*, 54 Ohio St.2d 279, 376 N.E.2d 578(1978). The Ohio Supreme Court has emphasized: "'[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts. * * *.'" *Eastley v. Volkman,* 132 Ohio St.3d 328, 334, 972 N.E. 2d 517, 2012-Ohio-2179, *quoting Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, *quoting* 5 Ohio Jurisprudence 3d, Appellate Review, Section 603, at 191–192 (1978). Furthermore, it is well established that the trial court is in the best position to determine the credibility of witnesses. *See, e.g., In re Brown*, 9th Dist. No. 21004, 2002–Ohio–3405, ¶ 9, *citing State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212(1967).

{¶49} Ultimately, "the reviewing court must determine whether the appellant or the appellee provided the more believable evidence, but must not completely substitute its judgment for that of the original trier of fact 'unless it is patently apparent that the fact finder lost its way.'" *State v. Pallai*, 7th Dist. Mahoning No. 07 MA 198, 2008-Ohio-6635, ¶31, *quoting State v. Woullard*, 158 Ohio App.3d 31, 2004-Ohio-3395, 813 N.E.2d 964 (2nd Dist. 2004), ¶ 81. In other words, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. Mahoning No. 99 CA 149, 2002-Ohio-1152, at ¶ 13, *citing State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125(7th Dist. 1999).

{¶50} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212(1967),

paragraph one of the syllabus; *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶118. *Accord, Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Marshall v. Lonberger*, 459 U.S. 422, 434, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983).

{¶51} The jury as the trier of fact was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Craig*, 10th Dist. Franklin No. 99AP-739, 1999 WL 29752 (Mar 23, 2000) *citing State v. Nivens*, 10th Dist. Franklin No. 95APA09-1236, 1996 WL 284714 (May 28, 1996). Indeed, the jury need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver,* 10th Dist. Franklin No. 02AP-604, 2003-Ohio-958, ¶21, *citing State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964); *State v. Burke,* 10th Dist. Franklin No. 02AP-1238, 2003-Ohio-2889, *citing State v. Caldwell*, 79 Ohio App.3d 667, 607 N.E.2d 1096 (4th Dist. 1992). Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks,* 61 Ohio St.3d 259, 272, 574 N.E.2d 492 (1991), paragraph one of the syllabus, *superseded by State constitutional amendment on other grounds as stated in State v. Smith, 80 Ohio St.3d 89, 102 at n.4, 684 N.E.2d 668 (1997).*

{¶52} In the case at bar, the jury heard the witnesses, viewed the evidence and heard Keil's arguments concerning his claim of self-defense and provocation.

{¶53} We find that this is not an "'exceptional case in which the evidence weighs heavily against the conviction.'" *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1997), *quoting Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717. The jury neither lost his way nor created a miscarriage of justice in convicting Keil of the charge.

{¶54} Based upon the foregoing and the entire record in this matter, we find Keil's conviction is not against the sufficiency or the manifest weight of the evidence. To the contrary, the jury appears to have fairly and impartially decided the matters before them. The jury as a trier of fact can reach different conclusions concerning the credibility of the testimony of the state's witnesses and Keil and his arguments. This court will not disturb the jury's finding so long as competent evidence was present to support it. *State v. Walker*, 55 Ohio St.2d 208, 378 N.E.2d 1049 (1978). The jury heard the witnesses, evaluated the evidence, and was convinced of Keil's guilt.

{¶55} Finally, upon careful consideration of the record in its entirety, we find that there is substantial evidence presented which if believed, proves all the elements of the crime of felonious assault for which Keil was convicted.

{¶56} Keil's second assignment of error is overruled.

III.

{¶57} In his third assignment of error, Keil contends that the trial court erred in admitting the statements attributed to him and his brother Izak Williams during Keil's jury trial. Keil concedes that he did not object to the statements during his trial.

{¶58} "[F]orfeiture is the failure to timely assert a right or object to an error, and * * * 'it is a well-established rule that "an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not

call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *State v. Rogers*, 143 Ohio St.3d 385, 2015–Ohio–2459, 38 N.E.3d 860, ¶ 21.

{¶59} The accused may raise a forfeited claim on appeal through Crim.R. 52(B). Pursuant to Crim.R. 52(B), "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

{¶60} The Court in *Rogers* reaffirmed that even if an accused shows the trial court committed plain error affecting the outcome of the proceeding, the appellate court is not required to correct it. Id. at ¶ 23. The Supreme Court stated:

> [W]e have "admonish[ed] courts to notice plain error 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.'" *Barnes* at 27, 94 Ohio St.3d 21, 759 N.E.2d 1240, *quoting State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

Rogers at ¶ 23; Accord, *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002); *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus; *State v. Perry*, 101 Ohio St.3d 118, 120 802 N.E.2d 643(2004).

{¶61} The defendant bears the burden of demonstrating that a plain error affected his substantial rights. *United States v. Olano*, 507 U.S. at 725,734, 113 S.Ct. 1770, 123 L.Ed.2d 508(1993); *State v. Perry*, 101 Ohio St.3d 118, 120 802 N.E.2d 643(2004).

{¶62} Even if we assume arguendo that plain error occurred, Keil has failed to demonstrate that the plain error affected his substantive rights.

{¶63} In the case at bar, John Northrup a witness to the incident testified that Izak Williams said "I'm not afraid of no gun neither…" 1T. at 169.

{¶64} Officer Jodie Williams of the Mansfield Police Department testified that Izak Williams told her that Keil took the gun from Earles and hit him over the head with it and then both boys proceeded to punch Earles. 1T. at 183. Officer Williams further testified that Keil told her that he did take the gun from Earles, hit him over the head with it and then punched Earles one time. 1T. at 189.

{¶65} Earles testified that Izak Williams said, "That's not the first gun that's been pulled on me before." 1T. at 229.

{¶66} At trial Keil testified that he hit Earles on the head with the handgun. 2T. at 267. He further testified, "My brother did say, he did say, 'I'm not afraid of a gun'". 2T. at 264.

{¶67} In *State v. Harris*, 142 Ohio St.3d 211, 2015-Ohio-166, 28 N.E.3d 1256, the Ohio Supreme Court observed,

> Crim.R. 52(A) defines harmless error in the context of criminal cases and provides: "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Under the harmless-error standard of review, "the *government* bears the burden of demonstrating that the error did not affect the substantial rights of the defendant." (Emphasis sic.) *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 15, *citing United States v. Olano*, 507 U.S. 725, 741, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). In most cases, in order to be viewed as "affecting substantial rights," "'the error must have been prejudicial.' (Emphasis

> added.)" *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, ¶ 7, *quoting Olano* at 734, 113 S.Ct. 1770. Accordingly, Crim.R. 52(A) asks whether the rights affected are "substantial" and, if so, whether a defendant has suffered any prejudice as a result. *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, ¶ 24–25.
>
> Recently, in *Morris*, a four-to-three decision, we examined the harmless-error rule in the context of a defendant's claim that the erroneous admission of certain evidence required a new trial. In that decision, the majority dispensed with the distinction between constitutional and non-constitutional errors under Crim.R. 52(A). Id. at ¶ 22–24. In its place, the following analysis was established to guide appellate courts in determining whether an error has affected the substantial rights of a defendant, thereby requiring a new trial. First, it must be determined whether the defendant was prejudiced by the error, i.e., whether the error had an impact on the verdict. Id. at ¶ 25 and 27. Second, it must be determined whether the error was not harmless beyond a reasonable doubt. Id. at ¶ 28. Lastly, once the prejudicial evidence is excised, the remaining evidence is weighed to determine whether it establishes the defendant's guilt beyond a reasonable doubt. Id. at ¶ 29, 33.

Harris, ¶ 36-37.

{¶68} As discussed in our disposition of Keil's third assignment of error, Keil failed to establish that he was justified in using deadly force to repel Earles. We find that the testimony cited by Keil did not influence the verdict, was harmless beyond a reasonable

doubt and when excised the remaining evidence establishes Keil's guilt beyond a reasonable doubt. Even without the testimony concerning what he and his brother told the police or what the witnesses to the events testified was said, the jury had ample evidence that Keil had bludgeoned Earles with a handgun resulting in a laceration to Earles' head.

{¶69} Keil's third assignment of error is overruled.

I.

{¶70} In his first assignment of error, Keil maintains that he received ineffective assistance of counsel because his trial counsel failed to file a motion to suppress his statements and the statements made by Izak Williams to the police.

{¶71} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180(1993); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373(1989).

{¶72} In order to warrant a finding that trial counsel was ineffective, the petitioner must meet both the deficient performance and prejudice prongs of *Strickland* and *Bradley. Knowles v. Mirzayance*, 556 U.S. 111, 129 S.Ct. 1411, 1419, 173 L.Ed.2d 251(2009).

{¶73} The United States Supreme Court discussed the prejudice prong of the *Strickland* test,

With respect to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., at 694, 104 S.Ct. 2052. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id., at 693, 104 S.Ct. 2052. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id., at 687, 104 S.Ct. 2052.

"Surmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. ——, ——, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689–690, 104 S.Ct. 2052. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id., at 689, 104 S.Ct. 2052; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180

> (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

Harrington v. Richter, __U.S.__, 131 S.Ct. 770, 777-778, 178 L.Ed.2d 624(2011).

{¶74} The United States Supreme Court and the Ohio Supreme Court have held a reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Bradley,* 42 Ohio St.3d at 143, 538 N.E.2d 373, *quoting Strickland,* 466 U.S. at 697, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984).

{¶75} Trial counsel's failure to file a suppression motion does not per se constitute ineffective assistance of counsel. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000–Ohio–0448. Counsel can only be found ineffective for failing to file a motion to suppress if, based on the record, the motion would have been granted. *State v. Lavelle*, 5th Dist. Stark No. 07 CA 130, 2008–Ohio–3119, ¶ 47; *State v. Cheatam*, 5th Dist. Richland No. 06–CA–88, 2007-Ohio-3009, ¶ 86. Furthermore, "[w]here the record contains no evidence which would justify the filing of a motion to suppress, the appellant has not met his burden of proving that his attorney violated an essential duty by failing to file the motion." *State v. Drummond*, 111 Ohio St.3d 14, 41, 2006–Ohio–5084, 854 N.E.2d 1038, *quoting State v. Gibson*, 69 Ohio App.2d 91, 95, 430 N.E.2d 954 (8th Dist. 1980). *See also, State v. Suiste*, 5th Dist. Stark No. 2007 CA 00252, 2008–Ohio–5012.

{¶76} A defendant has no constitutional right to determine trial tactics and strategy of counsel. *State v. Cowans*, 87 Ohio St.3d 68, 72, 717 N.E.2d 298(1999); *State v.*

Conway, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶ 150; *State v. Donkers,* 170 Ohio App.3d 509, 867 N.E.2d 903, 2007-Ohio-1557, ¶ 183(11th Dist.). Rather, decisions about viable defenses are the exclusive domain of defense counsel after consulting with the defendant. Id. When there is no demonstration that counsel failed to research the facts or the law or that counsel was ignorant of a crucial defense, a reviewing court defers to counsel's judgment in the matter. *State v. Clayton*, 62 Ohio St.2d 45, 49, 402 N.E.2d 1189(1980), citing *People v. Miller*, 7 Cal.3d 562, 573-574, 102 Cal.Rptr. 841, 498 P.2d 1089(1972); *State v. Wiley*, 10th Dist. No. 03AP-340, 2004- Ohio-1008 at ¶ 21.

{¶77} Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel. *State v. Phillips*, 74 Ohio St.3d 72, 85, 1995–Ohio–171. Even if the wisdom of an approach is questionable, "debatable trial tactics" do not constitute ineffective assistance of counsel. Id. "Poor tactics of experienced counsel, however, even with disastrous result, may hardly be considered lack of due process * * *." *State v. Clayton*, 62 Ohio St.2d 45, 48, 402 N.E.2d 1189 (1980)(*quoting United States v. Denno,* 313 F.2d 364 (2nd Cir.1963), *certiorari denied* 372 U.S. 978, 83 S.Ct. 1112, 10 L.Ed.2d 143.

{¶78} In the case at bar, Keil used Izak Williams' statements made during the altercation to demonstrate that Williams and Keil saw the handgun Earles was holding to bolster Keil's self-defense and aggravated assault claims. 1T. at 229. Keil also testified to his brother's statements at the scene during his testimony at trial. 2T. at 264.

{¶79} As we have indicated in our disposition of Keil's third assignment of error, Keil failed to establish that he was justified in using deadly force to repel Earles. Keil has

likewise failed in his burden to prove that there is a "reasonable probability" that the trier of fact would not have found him guilty without the statements.

{¶80} Upon review, we are unpersuaded that Keil suffered demonstrable prejudice via defense counsel's failure to file a motion to suppress his and Izak Williams' statements.

{¶81} Keil's first assignment of error is overruled.

{¶82} The judgment of the Richland County Court of Common Pleas is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Baldwin, J., concur