**[Cite as *State v. Bragg*, 2010-Ohio-6488.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

---

JOURNAL ENTRY AND OPINION
**No. 93650**

---

**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**NORRIS L. BRAGG**

[redacted] DEFENDANT-APPELLANT

**JUDGMENT:**
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-519357

**BEFORE:** Blackmon, P.J., Boyle, J., and Jones, J.

**RELEASED AND JOURNALIZED:** December 23, 2010

**ATTORNEY FOR APPELLANT**

Thomas Rein
526 Superior Avenue
Leader Building, Suite 940
Cleveland, Ohio 44114

**ATTORNEYS FOR APPELLEE**

William D. Mason
Cuyahoga County Prosecutor

Joseph Patituce
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

PATRICIA ANN BLACKMON, P.J.:

**{¶ 1}** Appellant Norris L. Bragg appeals his conviction and assigns the following errors for our review:

> **"I. The state failed to present sufficient evidence that Appellant committed this crime."**
>
> **"II. Appellant's conviction is against the manifest weight of the evidence."**

**"III. Appellant was denied a fair trial by the assistant prosecutor's questions and the police officers' improper comments."**

**"IV. Appellant was denied effective assistance of counsel as guaranteed by Section 10, Article I, of the Ohio Constitution and the Sixth and Fourteenth Amendments to the United States Constitution when counsel failed to object to the assistant prosecutor's questions and the police officers' improper comments."**

**{¶ 2}** Having reviewed the record and pertinent law, we affirm in part and reverse in part. The apposite facts follow.

**{¶ 3}** On January 22, 2009, a Cuyahoga County Grand Jury indicted Bragg on four counts of felonious assault relating to the stabbing of brothers Trevis and Shannon Pinkney. Bragg pleaded not guilty at his arraignment. Several pretrials were conducted, and on June 15, 2009, a jury trial commenced.

## Jury Trial

**{¶ 4}** At trial, the evidence established that Bragg and the Pinkney Brothers were contractors of Road Link, a tractor-trailer company that transports hazardous materials locally and nationally. As contractors for Road Link, each men either personally drove a tractor-trailer delivering cargo for Road Link, or hired other drivers to deliver the cargo. On December 6, 2008, Road Link held a mandatory safety meeting at the Holiday Inn in Independence, Ohio.

**{¶ 5}** On December 6, 2008, Trevis Pinkney attended Road Link's mandatory safety meeting with his brother Shannon. Reynaldo Figueroa, who had recently began driving for them, also attended the meeting. Figueroa recently stopped working for Bragg. Bragg began spreading rumors that Pinkney had influenced Figueroa's decision to leave. Bragg had also complained to Road Link's management in an attempt to get Pinkney and Figueroa fired.

**{¶ 6}** After the safety meeting had concluded, Pinkney waited in the hotel's parking lot in an effort to talk with Bragg about the rumors he was spreading. Pinkey approached Bragg as he exited the hotel and indicated that he wanted to talk with him about stopping the rumors. Pinkey testified that as he approached, he saw that Bragg was holding a knife. Pinkney stated that when his brother, Shannon, saw the knife, he pushed Bragg away, but Bragg began stabbing Shannon. Pinkney punched Bragg, who fell to the ground, then kicked him, but Bragg got back up and proceeded to stab him on the leg, back, and head.

**{¶ 7}** Pinkney testified that after stabbing them, Bragg got in his car and drove away. Pinkney was subsequently transported to Metro Health Hospital, where he was treated for stab wounds to his head, groin, and back.

**{¶ 8}** Shannon Pinkney was present when his brother approached Bragg to talk about the rumors. Shannon testified that as his brother approached

Bragg, he observed Bragg pulling out a knife. Shannon stepped between Bragg and his brother and Bragg stabbed him in the arm. Shannon also was treated at Metro Health Hospital for stab wounds.

**{¶ 9}** Figueroa had worked for Bragg for about four months, but left to work for the Pinkney brothers, because Bragg would not pay him in a timely manner. On December 6, 2008, Figueroa also attended the safety meeting at the Holiday Inn. After the meeting, Figueroa and the Pinkney brothers were planning to have lunch, but Trevis Pinkney stopped to talk with Bragg. A scuffle ensued when Trevis Pinkney approached Bragg. Figueroa testified that Bragg had a knife and that he observed Bragg stab Shannon. Figueroa fled to the safety of his car after Bragg stabbed Shannon.

**{¶ 10}** Anthony Matejka testified that he works as a dispatcher for Road Link and was previously an owner operator of a tractor-trailer that he used to haul materials for the company. Matejka had sold his tractor-trailer to the Pinkney brothers and they were making payments to him. Matejka also attended the safety meeting and that the Pinkney brothers were supposed to make a payment after the meeting. Matejka testified that he did not see the altercation between Bragg and the Pinkney brothers. Matejka testified that during the safety meeting, Bragg told him that he had some issues with two local drivers, which he would take care of after the meeting.

**{¶ 11}** Officer John Kingzett of the Independence Police Department testified that on December 6, 2008, he was dispatched to the Holiday Inn on report of a stabbing. Officer Kingzett arrived and that Bragg had already left the scene. Officer Kingzett testified that the Pinkney brothers had stab wounds.

**{¶ 12}** Sergeant Brad Borowy of the Independence Police Department testified that he received a report of a stabbing at the Holiday Inn, and that the assailant had fled in a car. Sergeant Borowy provided backup for the officer who stopped Bragg's vehicle on the interstate. Sergeant Borowy testified that Bragg's mouth was bleeding and his hands were covered with blood.

**{¶ 13}** Sergeant Borowy testified that when he asked Bragg about the knife, Bragg told him that it was self defense and that he did not know the location of the knife. Sergeant Borowy testified that Bragg later admitted that he had thrown the knife out of his car window and then later told them where to find the knife.

**{¶ 14}** Jeremy Grabowski of the Cuyahoga Heights Police Department testified that the Independence Police Department requested mutual aid in apprehending Bragg after he fled from the scene of the stabbing. Officer Grabowski found the knife near the exit ramp of Interstate 77 North and Rockside Road.

**{¶ 15}** Bragg took the stand in his own defense. Bragg testified that he was not looking for a fight on the day in question. Bragg testified that he learned from another driver that Trevis Pinkney indicated that he was going to put an end to him talking about them stealing his driver. Bragg admitted that he did stab the Pinkney brothers, but testified that it was the Pinkney brothers who attacked him, and that he acted in self defense, because they were kicking and stomping him while he was on the ground.

**{¶ 16}** Michael Thomas testified that on December 6, 2008, he attended the safety meeting at the Holiday Inn, in Independence, Ohio. Thomas testified that as he was leaving the meeting, he was talking with Trevis Pinkney, who indicated that he wanted to talk with Bragg. Thomas testified that as Bragg exited the hotel, Trevis Pinkney approached him, the two began arguing, another individual approached, and a scuffle ensued.

**{¶ 17}** Thomas testified that Trevis Pinkney hit Bragg, who fell to the ground, then Trevis Pinkney kicked him in the face. Thomas saw the knife as Bragg was getting up from the ground. Thomas then saw Trevis Pinkney bleeding from his head.

**{¶ 18}** The jury returned guilty verdicts on three of the four counts of felonious assault. The trial court sentenced Bragg to concurrent prison terms of six years for each count.

## Sufficiency of Evidence

**{¶ 19}** In the first assigned error, Bragg argues the state failed to present sufficient evidence to sustain the conviction.

**{¶ 20}** The sufficiency of the evidence standard of review is set forth in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus as follows:

> **"Pursuant to Criminal Rule 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."**

**{¶ 21}** *Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, in which the Ohio Supreme Court held:

> **"An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence submitted 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. (*Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)"**

**{¶ 22}** In the instant case, Bragg contends the evidence was insufficient to support the felonious assault convictions. We disagree.

**{¶ 23}** R.C. 2903.11 states in pertinent part as follows:

> **"(A) No person shall knowingly do either of the following: (1) Cause serious physical harm to another or to another's**

**unborn; (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance * * *."**

**{¶ 24}** Here, it is undisputed that both victims were stabbed, suffered serious injuries, and had to receive medical attention. In addition, Bragg admitted stabbing the two victims. A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result. *State v. Andrews*, Cuyahoga App. No. 93104, 2010-Ohio-3864. See, also, R.C. 2901.22(B). As such, the state produced sufficient evidence to sustain the convictions for felonious assault.

**{¶ 25}** Nonetheless, Bragg claims he acted in self defense. However, "[a] defendant may be convicted of a crime in accordance with due process strictures upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, quoting *Jackson v. Virginia* (1979), 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560. "Thus, the due process 'sufficient evidence' guarantee does not implicate affirmative defenses, because proof supportive of an affirmative defense cannot detract from proof beyond a reasonable doubt that the accused had committed the requisite elements of the crime." Id., quoting *Caldwell v. Russell* (C.A.6, 1999), 181 F.3d 731, 740, abrogated on other grounds by the Antiterrorism and Effective Death Penalty Act, Section 2261 et seq., Title 28, U.S.Code (see *Mackey v.*

*Dutton* (C.A.6, 2000), 217 F.3d 399, 406). See, also, *Allen v. Redman* (C.A.6, 1988), 858 F.2d 1194, 1196-1198.

**{¶ 26}** Consequently, viewing the evidence in the light most favorable to the state, any rational trier of fact could have found that the state proved all of the essential elements of the instant charges beyond a reasonable doubt. Thus, the trial court properly denied Bragg's motion for acquittal. Accordingly, we overrule the first assigned error.

**Manifest Weight of the Evidence**

**{¶ 27}** In the second assigned error, Bragg argues his convictions were against the manifest weight of the evidence.

**{¶ 28}** In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

> **"The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. Id. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive-the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be**

**against the manifest weight of the evidence. Id. at 387, 678 N.E.2d 541. '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 factfinder's resolution of the conflicting testimony.' Id. at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."**

**{¶ 29}** In the instant case, although Bragg claims that he acted in self defense, the evidence is to the contrary. At trial, Officer Kingzett, who responded to the scene of the crime, testified in pertinent part as follows:

**"Q. I want to take you back to the scene of the felonious assault. Did anyone ever approach you or speak to you and tell you that the victims, Trevis and Shannon Pinkney, had weapons?**

**A. No.**

**Q. Did anyone ever approach you and say that Trevis and Shannon Pinkney started the fight?**

**A. No.**

**Q. Is that something you would have looked for when assessing the situation?**

**A. Absolutely.**

**Q. Why is that important in determining who started the fight?**

**A. Well, it's important to determine who is working in self-defense."** Tr. 348.

**"* * ***

**"Q. Officer, you said no one gave you any facts or that the incident happened in any other way than what the Pinkneys said?**

**"A. Yes.**

**"Q. You talked to people, you also talked to Ricky Brooks, Robert Forster?**

**"A. Correct.**

**"Q. Robert Forster works for Road Link, he wasn't friends with anyone, he was the boss, so to speak?**

**"A. Correct.**

**"Q. None of these people told you the story of the situation happened any different other than what the Pinkneys said?**

**"A. No, nobody else said anything differently.**

**"Q. In your experience as a police officer, what does it indicate to you when no one is stepping forward to contradict the evidence on the scene?**

**"A. That it didn't happen any other way.**

**"Q. Officer, you were asked a lot of questions about one-on-three, or three-on-one attacks. Based on your training and expertise as a police officer, what would actually have happened to Norris Bragg if the Pinkneys had attacked him with brass knuckles?**

**"A. If the Pinkneys had brass knuckles on at the time, his face would be a mess or depending on what the brass knuckles would have hit.**

**"Q. It would have been more than just bleeding from the mouth, correct?**
**"A. Yeah, I believe so.**

**"Q. What if Mr. Bragg reported that he was being attacked with knives as he reported to Sergeant Borowy?**

**"A. There would be cuts.**

**"Q. Cuts. We are talking serious injury or death if three people attacked him like that, correct?**

**"A. Correct.**

**"Q. But here, the evidence only is that the two Pinkney brothers, Trevis and Shannon, are the only ones who have suffered cuts and serious injuries?**

**"A. That's correct.**

**"Q. Based on your training and experience, what does it tell you that they are the ones who suffered the wounds, suffered the injuries and Mr. Bragg walked away with just bleeding from the mouth?**

**"A. What does it tell me?**

**"Q. What does it indicate to you as a police officer conducting the investigation?**

**"A. Based on the statements and what I observed, they were acting in self defense.**

**"Q. 'They' being who?**

**"A. The Pinkneys."** Tr. 372-374.

**{¶ 30}** Here, the evidence does not establish that Bragg was acting in self-defense. The eyewitnesses' statements or version of the events, as related to Officer Kingzett, did not contradict the Pinkney brothers' accounts of the assaults. In addition, the two victims, unlike Bragg, suffered serious injuries and had to receive medical attention.

**{¶ 31}** On the contrary, there was no evidence that Bragg sustained wounds that were consistent with one acting in self defense. Further, Bragg fled the scene and attempted to destroy evidence by throwing away the knife as he fled along the interstate. Fleeing the scene and attempting to destroy evidence is not consistent with one acting in self defense.

**{¶ 32}** The determination of weight and credibility of the evidence is for the trier of fact. *State v. Chandler*, 10th Dist. No. 05AP-415, 2006-Ohio-2070, citing *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimonies are credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503.

**{¶ 33}** Further, the trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553. Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, at ¶22; *State v. Hairston*, 10th Dist. No. 01AP-1393, 2002-Ohio-4491, at ¶17. Therefore, Bragg's convictions are not against the

manifest weight of the evidence. Accordingly, we overrule the second assigned error.

**Prosecutorial Misconduct**

**{¶ 34}** In the third assigned error, Bragg argues the prosecutor committed prosecutorial misconduct by eliciting what amounts to testimony regarding the victims' truth and veracity.

**{¶ 35}** In addressing a claim for prosecutorial misconduct, we must determine (1) whether the prosecutor's conduct was improper and (2) if so, whether it prejudicially affected the defendant's substantial rights. *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883. The touchstone of this analysis "is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78. A trial is not unfair if, in the context of the entire trial, it appears clear beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments. *State v. Treesh*, 90 Ohio St.3d 460, 464, 2001-Ohio-4,739 N.E.2d 749.

**{¶ 36}** Preliminarily, we note that Bragg is raising this issue for the first time on appeal. Failure to object at the time of trial waives all but plain error. *State v. Sutton*, Cuyahoga App. No. 90172, 2008-Ohio-3677, citing *State v. Childs* (1968), 14 Ohio St.2d 56, 263 N.E.2d 545. Plain errors are obvious defects in trial proceedings that affect "substantial rights," and "although

they were not brought to the attention of the court," they may be raised on appeal. *State v. Fortson*, Cuyahoga App. No. 92337, 2010-Ohio-2337. See, also, Crim.R. 52(B). To affect substantial rights, "the trial court's error must have affected the outcome of the trial." *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240. Plain error is recognized "only in exceptional circumstances * * * to avoid a miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, 94-95, 372 N.E.2d 804.

**{¶ 37}** In the instant case, the record indicates that defense counsel first elicited the complained of testimony. On cross-examination, the following exchange took place between defense counsel and Officer Kingzett:

> **"Q. You are experienced as an investigating officer. Does it make sense that one person would attack three people?**
>
> **"A. I can't answer to that person. It depends on the personality and what's been going on in the past between the parties, if anything.**
>
> **"Q. Again, would it make sense that one person would attack three people, or would it make more sense that three people would attack one person?**
>
> **"A. I have seen it happen both ways."** Tr. 355.
>
> **"* * *"**
>
> **"Q. The story that you got from Shannon Pinkney and Trevis Pinkney were their stories and their versions, isn't that correct?**
>
> **"A. That was their statements of the incident that occurred."** Tr. 372.

**{¶ 38}** A review of the above exchanges indicates that defense counsel opened the door to elicit the complained of testimony by asserting that the version of the event as reported by the victims and witnesses was highly questionable. Consequently, it is disingenuous to now take issue with the alleged error he invited. In addition, the complained of testimony, portions of which have been quoted at length in addressing the fist assigned error, explains Officer Kingzett's investigative procedure and how he determines who should be charged for the crime.

**{¶ 39}** Further, the testimony regarding the severity of the injuries the Pinkney brothers sustained, as compared to Bragg's minor injuries, that Bragg fled the scene and attempted to destroy evidence, comports with the logical conclusion that an investigating officer would have drawn in similar circumstances. After reviewing the entire trial record, we find the complained of testimony, standing alone, did not affect Bragg's right to a fair trial. Accordingly, we overrule the third assigned error.

**Ineffective Assistance of Counsel**

**{¶ 40}** In the fourth assigned error, Bragg argues he was denied the effective assistance of counsel because defense counsel failed to object to testimony of the police officers.

**{¶ 41}** We review a claim of ineffective assistance of counsel under the two-part test set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104

S.Ct. 2052, 80 L.Ed.2d 674. Under *Strickland*, a reviewing court will not deem counsel's performance ineffective unless a defendant can show his lawyer's performance fell below an objective standard of reasonable representation and that prejudice arose from the deficient performance. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph one of the syllabus. To show prejudice, a defendant must prove that, but for his lawyer's errors, a reasonable probability exists that the result of the proceedings would have been different. Id. at paragraph two of the syllabus. Judicial scrutiny of a lawyer's performance must be highly deferential. *State v. Sallie*, 81 Ohio St.3d 673, 1998-Ohio-343, 693 N.E.2d 267.

**{¶ 42}** In the third assigned error, we addressed the complained of testimony and concluded that it did not affect Bragg's right to a fair trial. Thus, Bragg is unable to overcome the "strong presumption" that defense counsel's performance constituted effective assistance because there is no evidence that the absence of the complained of testimony would have changed the result of the proceedings. Accordingly, we overrule the fourth assigned error.

## Allied Offenses

**{¶ 43}** Sua sponte, we note that Bragg was convicted of two subsections of the felonious assault statute under R.C. 2903.11(A)(1) and (A)(2). R.C. 2903.11 provides:

**"(A) No person shall knowingly do either of the following:**

**"(1) Cause serious physical harm to another * * *;**
**"(2) Cause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance."**

**{¶ 44}** "Serious physical harm to persons" is defined by R.C. 2901.01 and includes "any physical harm that carries a substantial risk of death." R.C. 2901.01(A)(5)(b). In contrast, "physical harm to persons" includes "any injury, illness, or other physiological impairment, regardless of its gravity or duration." R.C. 2901.01(A)(3).

**{¶ 45}** We have previously determined that convictions under these felonious assault subdivisions are allied offenses of similar import where there is a single animus. *State v. Minifee*, Cuyahoga App. No. 91017, 2009-Ohio-3089. See, also, *State v. Goldsmith*, Cuyahoga App. No. 90617, 2008-Ohio-5990. We conclude that Bragg's R.C. 2903.11(A)(1) and (A)(2) felonious assault offenses, arising from his conduct in stabbing Trevis Pinkney, are allied offenses of similar import, committed with the same animus, and they accordingly must be merged pursuant to R.C. 2941.25. See *State v. Brooks*, 2nd Dist. No. 23784, 2010-Ohio-5886.

**{¶ 46}** Consequently, we reverse and vacate Bragg's sentences for felonious assault (deadly weapon) and his sentence for felonious assault (serious harm) against victim Trevis Pinkney, and remand to the trial court

to first merge the above offenses and, pursuant to the State's election, to resentence Bragg accordingly.

**{¶ 47}** Judgment affirmed in part, reversed in part, and the case is remanded for further proceedings consistent with this court's opinion.

It is ordered that appellee and appellant share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

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

---

PATRICIA ANN BLACKMON, PRESIDING JUDGE

MARY J. BOYLE, J., and
LARRY A. JONES, J., CONCUR