

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 24753

Appellee

v.

TED J. MURPHY

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 08 03 0933

Appellant

DECISION AND JOURNAL ENTRY

Dated: March 17, 2010

BELFANCE, Judge.

{¶1} Defendant-Appellant Ted Murphy appeals from his conviction in the Summit County Court of Common Pleas for felonious assault. For reasons set forth below, we affirm.

I.

{¶2} On August 24, 2007, Mr. Murphy, in celebration of his acceptance into a graduate program, attended a concert at the Barley House by one of his favorite bands, Red Wanting Blue. Three of his friends were also in attendance. Michael Chisnell, along with his wife and several of their friends were also at the performance.

{¶3} Mr. Chisnell and his friends became aware of Mr. Murphy's group as some members of that group appeared to be intoxicated and were more rowdy and outgoing then the rest of the crowd. At one point, Mr. Murphy was spraying beer over the crowd. During the last song, Mr. Murphy began jumping into Mrs. Chisnell. One of Mr. Chisnell's friends, Michael Kimble, warned Mr. Chisnell that Mr. Murphy was getting a little out of hand. After Mr.

Murphy repeatedly bumped into Mrs. Chisnell, Mr. Chisnell decided to switch places with his wife. Mr. Chisnell then took a firm stance in order to absorb any impact from Mr. Murphy and to prevent Mr. Murphy from bumping into his wife.

{¶4} According to Mr. Chisnell, his wife, and friends, out of nowhere, Mr. Chisnell was punched twice in the face. It was eventually determined that Mr. Murphy was the source of the punches. However, according to Mr. Murphy and at least one of his friends, Mr. Chisnell initiated the fight by first pushing Mr. Murphy and then punching him. Mr. Murphy alleges that he was merely defending himself.

{¶5} After being punched, Mr. Chisnell proceeded to look for his glasses, which were knocked off when he was hit. Mr. Chisnell indicated that at the time he felt alright. Mr. Murphy and his group left the bar and Mr. Chisnell and his friends finished listening to the last song. When the concert ended, Mrs. Chisnell drove Mr. Chisnell and Mr. Chisnell's brother and father to the father's home. Mr. Chisnell was supposed to work on the father's computer, but started to not feel well, so Mrs. Chisnell agreed to help. While at the father's house, Mr. Chisnell started experiencing cold sweats, nausea and vomiting. Mr. Chisnell was taken to the hospital. Doctors determined that Mr. Chisnell had a fractured skull and a hematoma requiring immediate surgery. Mr. Chisnell spent four to five days in the hospital and required extensive follow-up care.

{¶6} At the time of the concert, the identity of the person who hit Mr. Chisnell was unknown as no one in Mr. Chisnell's group knew the name of the person who hit him. The only information they had about the individual was his description. Police advised Mr. Chisnell's friends to contact them if they spotted the individual at other Red Wanting Blue concerts. In December 2007, while attending another Red Wanting Blue concert at the Barley House, some of Mr. Chisnell's friends saw the person responsible for the attack on Mr. Chisnell. That

individual was later identified as Mr. Murphy. Mr. Murphy was subsequently arrested and indicted for one count of felonious assault in violation of R.C. 2903.11(A)(1). The first trial ended in a hung jury. The case was subsequently retried and the jury found Mr. Murphy guilty of felonious assault. Mr. Murphy has timely appealed, raising four assignments of error for our review which will be addressed in a manner to facilitate our analysis.

II.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT COMMITTED ERROR IN NOT INCLUDING A JURY INSTRUCTION REGARDING THE LESSER INCLUDED OFFENSE OF ASSAULT UNDER O.R.C. 2903.13(A).”

ASSIGNMENT OF ERROR III

“THE APPELLANT WAS DENIED HIS RIGHTS UNDER THE OHIO CONSTITUTION, ARTICLE I, SECTION 10 AND SIXTH AMENDMENT RIGHT TO COUNSEL AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE OF INEFFECTIVE ASSISTANCE OF COUNSEL.”

{¶7} Mr. Murphy argues that the trial court erred in failing to instruct the jury on the lesser-included offense of assault. Mr. Murphy concedes that his trial counsel did not request a lesser-included offense instruction, nor did he object to the trial court’s failure to give one, and further acknowledges that our review is thus limited to a plain error analysis. “Absent plain error, the failure to object to improprieties in jury instructions, as required by Crim.R. 30, is a waiver of the issue on appeal.” *State v. Underwood* (1983), 3 Ohio St.3d 12, 13.

{¶8} The Supreme Court has stated that:

“[u]nder Crim.R. 52(B), [p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. By its very terms, the rule places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial. First, there must be an error, i.e., a deviation from a 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.” (Internal citations and quotations omitted.) *State v. Barnes* (2002), 94 Ohio St.3d 21, 27.

However, this Court has noted that “[w]hile a trial court does have a duty to include instructions on lesser included offenses [when appropriate], a defendant still retains the right, through counsel, to waive such instructions.” *State v. Pigg*, 9th Dist. No. 24360, 2009-Ohio-2107, at ¶5, quoting *State v. Davis*, 9th Dist. No. 21794, 2004-Ohio-3246, at ¶18, citing *State v. Clayton* (1980), 62 Ohio St.2d 45, 47, at fn. 2. “Given this right to waive jury instructions on lesser included offenses, plain error does not lie where trial counsel failed to request jury instructions on lesser included offenses as a matter of trial strategy.” *Id.* In the context of ineffective assistance of counsel, the Supreme Court of Ohio has stated that the “[f]ailure to request instructions on lesser-included offenses is a matter of trial strategy[.]” *State v. Griffie* (1996), 74 Ohio St.3d 332, 333.

{¶9} Based upon applicable precedent, trial counsel’s decision not to request a lesser-included offense instruction, or to object to its absence, is deemed to be trial strategy. Given that the case had already resulted in one hung jury and that the defense supplied the jury with evidence that Mr. Murphy was acting in self-defense, it was entirely possible that trial counsel believed he could secure an acquittal for Mr. Murphy. See, e.g., *Pigg* at ¶8; *Davis* at ¶18; *State v. Harris* (1998), 129 Ohio App.3d 527, 533 (noting there is a strong presumption that a failure to request a lesser-included offense instruction is trial strategy especially “when the defendant claims self-defense, because an instruction on the lesser offense may confuse the jury with inconsistent theories of the defense and/or reduce the hope of attaining a complete acquittal”). Thus, it is reasonable to conclude that trial counsel’s failure to request an instruction was not conclusively a mistake, even assuming that a lesser-included offense instruction would have

been proper if requested. We recognize that when presented with this issue, it is generally very difficult to discern why trial counsel did not request the lesser-included offense instruction. See *Griffie*, 74 Ohio St.3d at 333 (“The record may reveal that trial counsel did not request a certain jury instruction, but, without more, the court of appeals would have to guess as to why trial counsel did not make the request.”). We also acknowledge that this case presents us with a challenging and unfortunate set of facts. However, we note that our decision on this matter is constrained by the fact that the Supreme Court of Ohio has held that the failure to request a lesser-included offense instruction is a trial strategy, see *Griffie*, 74 Ohio St.3d at 333, and has also determined that where trial counsel did not request a jury instruction on a lesser-included offense as a matter of trial strategy there is no plain error. *Pigg* at ¶5, quoting *Davis* at ¶18, citing *Clayton*, 62 Ohio St.2d at 47, at fn. 2. In light of that precedent, it is essentially impossible for an appellant to successfully argue plain error under circumstances where trial counsel has failed to request a lesser-included offense instruction. Thus, we can only conclude that the alleged error Mr. Murphy points out does not amount to plain error. Thus, we overrule Mr. Murphy’s first assignment of error.

{¶10} Our resolution of the first assignment of error also resolves Mr. Murphy’s third assignment of error. In Mr. Murphy’s third assignment of error he argues that his trial counsel was ineffective for failing to request lesser-included offense instructions.

{¶11} In order to establish that Mr. Murphy’s trial counsel was ineffective Mr. Murphy must prove the following:

“First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant

makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.” *Strickland v. Washington* (1984), 466 U.S. 668, 687; see, also, *State v. Treesh* (2001), 90 Ohio St.3d 460, 489.

The Supreme Court of Ohio has held that the “[f]ailure to request instructions on lesser-included offenses is a matter of trial strategy and does not establish ineffective assistance of counsel.” *Griffie*, 74 Ohio St.3d at 333. We have likewise stated that ““debatable trial tactics do not give rise to a claim for ineffective assistance of counsel.”” *State v. Williams*, 9th Dist. No. 24169, 2009-Ohio-3162, at ¶37, quoting *State v. Hoehn*, 9th Dist. No. 03CA0076-M, 2004-Ohio-1419 at ¶45, quoting *In re Simon* (June 13, 2001), 9th Dist. No. 00CA0072, at *2. Again, we acknowledge that under the circumstances of this case, a compelling argument can be made that counsel was ineffective in failing to request the lesser-included offense instruction. However, Ohio precedent makes clear that counsel’s decision falls under the rubric of trial strategy. Therefore, Mr. Murphy’s third assignment of error is overruled.

III.

ASSIGNMENT OF ERROR II

“THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY NOT GRANTING A JUDGMENT OF ACQUITTAL PURSUANT TO THE RULE 29 MOTION.”

{¶12} In Mr. Murphy’s second assignment of error he alleges that the trial court erred in denying his Crim.R. 29 motion without providing this Court with any argument with respect to which elements he contends the State failed to prove. Mr. Murphy simply reiterates the rule and then recites facts from the record. He provides no argument establishing how those facts correlate to the conclusion that the State failed to present sufficient evidence. It is Mr. Murphy’s duty to present an argument with citations to authorities and the record. See App.R. 16(A)(7).

As Mr. Murphy has failed to do this, we do not address Mr. Murphy's second assignment of error.

IV.

ASSIGNMENT OF ERROR IV

“THE CONVICTION SHOULD BE REVERSED * * * BECAUSE THE EVIDENCE SUPPORTING THE CONVICTION WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE THE CONVICTION BEYOND A REASONABLE DOUBT IN VIOLATION OF THE UNITED STATES CONSTITUTION.”

{¶13} Mr. Murphy argues in a portion of his fourth assignment of error that the evidence presented by the State was insufficient to establish that Mr. Murphy knowingly caused Mr. Chisnell serious physical harm. Whether a conviction is supported by sufficient evidence is a question of law that we review de novo. *State v. Williams*, 9th Dist. No. 24731, 2009-Ohio-6955, at ¶18, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. The relevant inquiry is whether the prosecution has met its burden of production by presenting sufficient evidence to sustain a conviction. *Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring). In reviewing the evidence, we do not evaluate credibility and make all reasonable inferences in favor of the State. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273. The State's evidence is sufficient if, when viewing the evidence in a light most favorable to the prosecution, it allows a reasonable jury to conclude that the essential elements of the charged crime were proven beyond a reasonable doubt. *Id.*

{¶14} Mr. Murphy was convicted of felonious assault in violation of R.C. 2903.11(A)(1) which provides that “[n]o person shall knowingly * * * cause serious physical harm to another * * *.” “A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has

knowledge of circumstances when he is aware that such circumstances probably exist.” R.C. 2901.22(B).

“‘Serious physical harm to persons’ means any of the following:

“(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

“(b) Any physical harm that carries a substantial risk of death;

“(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

“(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

“(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.” R.C. 2901.01(A)(5).

{¶15} Mr. Murphy does not contest that the State presented sufficient evidence to establish that Mr. Chisnell suffered serious physical harm; he instead argues that the State failed to present sufficient evidence that Mr. Murphy knowingly caused Mr. Chisnell to suffer serious physical harm. It appears that essentially Mr. Murphy is arguing that the State did not prove that Mr. Murphy knew that his actions would result in the serious injury that occurred. We initially note that “the mental state of ‘knowingly’ does not require the offender to have the specific intent to cause a certain *result*-that is the mental state of ‘purposely’ as defined by R.C. 2901.22(A).” (Emphasis in original.) *State v. Powell*, 11th Dist. No. 2007-L-187, 2009-Ohio-2822, at ¶49, citing *State v. Huff* (2001), 145 Ohio App.3d 555, 563. “[W]hether a person acts knowingly can only be determined, absent a defendant's admission, from all the surrounding facts and circumstances, including the doing of the act itself.” *Huff*, 145 Ohio App.3d at 563. “[I]f a given result is probable, a person will be held to have acted knowingly to achieve it because one is charged by the law with knowledge of the reasonable and probable consequences

of his own acts.” (Internal quotations and citations omitted.) *State v. Dixon*, 8th Dist. No. 82951, 2004-Ohio-2406, at ¶16.

{¶16} The State presented twelve witnesses, several of whom saw the incident between Mr. Chisnell and Mr. Murphy and identified Mr. Murphy as the person who hit Mr. Chisnell. Among them was Mr. Chisnell who testified that Mr. Murphy was repeatedly bouncing into his wife, causing Mr. Chisnell to switch places with his wife. Mr. Chisnell took a stance to steady himself against Mr. Murphy’s bouncing and to prevent himself from being knocked into his wife. Mr. Murphy continued to jump into Mr. Chisnell. Then Mr. Chisnell was punched in the side of the head causing his glasses to be knocked to the ground. As he looked up, he was punched again in the top of the head. In court, Mr. Chisnell identified Mr. Murphy as the individual who hit him. Mr. Chisnell indicated that he did nothing to injure Mr. Murphy and had no idea why Mr. Murphy punched him. Mr. Chisnell testified that while he initially felt fine after the assault, he later required hospitalization and surgery, as the injuries caused his skull to fracture and ruptured an artery resulting in a hematoma. Mr. Chisnell experienced short term memory loss that gradually improved over time, as well as severe headaches and neck pain. His wife testified that she was informed at the hospital that Mr. Chisnell’s injuries were life threatening. At the time of trial, Mr. Chisnell still had difficulties sleeping on his left side due to pain. Mrs. Chisnell confirmed that Mr. Chisnell was punched twice. She later identified Mr. Murphy in a photo array and identified him in court as the person who punched her husband.

{¶17} Additionally, three of Mr. Chisnell’s friends testified about Mr. Murphy’s actions immediately after the incident. Michael Kimble stated that while Mr. Murphy was being restrained by his friends, Mr. Murphy “looked like he was egging [Mr. Chisnell] on to fight him.” Amy Preusser stated that Mr. Murphy appeared defensive and had “his fists up” following

the incident. Kevin Duff testified that he saw Mr. Murphy punch Mr. Chisnell and then saw Mr. Murphy “kind of back[] off and raise[] his fists like he was ready to fight[.]”

{¶18} Scott Terry, a member of the band, also testified. He saw Mr. Murphy outside the bar immediately after the concert. Mr. Terry knew Mr. Murphy, as Mr. Murphy was an avid fan of Mr. Terry’s band. Mr. Terry asked Mr. Murphy why he was leaving so soon. Mr. Murphy replied that he “got asked to leave[.]” Mr. Murphy was missing one of his sandals and Mr. Terry went back inside the bar to get it. The police questioned Mr. Terry about the incident. At the December 2007, concert Mr. Terry saw Mr. Murphy and pointed him out to police. After Mr. Murphy had been questioned about the incident, Mr. Terry saw Mr. Murphy at one of the band’s subsequent Youngstown concerts. Mr. Murphy talked with Mr. Terry about the incident with Mr. Chisnell. Mr. Murphy told Mr. Terry that “I didn’t do anything. I barely hit the kid.” Thus, there was sufficient evidence produced at trial that Mr. Murphy was the person who hit Mr. Chisnell and this resulted in a life threatening injury. Furthermore, it is not disputed that Mr. Chisnell suffered serious physical harm as a result of the punch. See R.C. 2901.01(A)(5).

{¶19} In addition to the above witnesses, the State offered the testimony of Dr. Donich, Mr. Chisnell’s neurosurgeon who confirmed the life threatening nature of Mr. Chisnell’s injuries. Dr. Donich indicated that compared to punching someone in the forehead, punching someone in the temple, where Mr. Chisnell sustained his injury, would carry “a greater risk of injury[.]” He testified that “[t]ypically if people are fighting, a lot of times people will sustain an impact of the temple; it’s the area where people say if you’re a boxer you can knock someone out, temple is the classic area.” Dr. Donich concluded that it would have taken a very large force to fracture Mr. Chisnell’s skull. Dr. Donich’s testimony thus not only established that Mr. Chisnell suffered

serious physical injury, it also was evidence offered by the State to establish that such serious injury was the natural and probable result of such a force to the head.

{¶20} Given the above evidence, we conclude that the State presented sufficient evidence to establish that Mr. Murphy knowingly caused Mr. Chisnell serious physical harm. Mr. Murphy contends that he did not intend to cause Mr. Chisnell serious physical harm and that he did not intend to cause the actual harm that Mr. Chisnell suffered. However, neither Mr. Chisnell's purpose nor his lack of knowledge that his act would cause the precise injury Mr. Chisnell suffered, are the relevant inquiries when examining the evidence required to establish the knowingly element. See *Powell* at ¶49. "To act 'knowingly,' Mr. [Murphy] need not have intended to cause the result. Rather, for the law to hold him to have acted 'knowingly,' it is only necessary that the serious physical harm is a 'reasonable and probable' result of his action." *Id.* at ¶52. Serious physical harm, as defined by the statute, while not all-encompassing, is certainly broad. See R.C. 2901.01(A)(5). Given the doctor's testimony concerning the consequences of punches to this area of the head, and the amount of force that Mr. Murphy must have used, a reasonable jury could conclude that based on all the evidence presented by the State, that serious physical harm was a reasonable and probable result of his act and therefore Mr. Murphy knowingly caused serious physical harm to Mr. Chisnell. Accordingly, we overrule Mr. Murphy's fourth assignment of error with respect to this argument.

V.

ASSIGNMENT OF ERROR IV

"THE CONVICTION SHOULD BE REVERSED BECAUSE IT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE * * *."

{¶21} Mr. Murphy argues that his conviction for felonious assault is against the manifest weight of the evidence. When determining whether a conviction is supported by the manifest weight of the evidence,

“an appellate court 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. Cepec*, 9th Dist. No. 04CA0075-M, 2005-Ohio-2395, at ¶6, quoting *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

We must only invoke the discretionary power to grant a new trial in “extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant.” *State v. Flynn*, 9th Dist. No. 06CA0096-M, 2007-Ohio-6210, at ¶9, citing *Otten*, 33 Ohio App.3d at 340.

{¶22} We cannot conclude that the jury lost its way. *Cepec* at ¶6, quoting *Otten*, 33 Ohio App.3d at 340. Mr. Chisnell testified that he, his wife, and his brother and father arrived at the Barley House around 8-9 p.m. on August 24, 2007 for the Red Wanting Blue concert. The concert started around 10 p.m. Mr. Chisnell consumed two to three drinks that evening. Before the concert began, Mr. Chisnell and his group moved toward the stage and got a position approximately three to four rows of people from the stage. He noticed that a group of four people, who turned out to be Mr. Murphy’s group, was being more rowdy than the rest of the crowd; a girl in that party appeared to be highly intoxicated and one individual in the group was spraying beer over the crowd. Around midnight, during the last song, Mr. Murphy began jumping into Mrs. Chisnell. Mr. Chisnell traded places with his wife and took a stance and braced his arm out to keep himself from being knocked over onto his wife. Mr. Chisnell’s friend, Michael Kimble, warned him that Mr. Murphy seemed to be a little out of hand. Then, Mr. Chisnell was punched in the left side of the head, taking him by surprise and knocking his glasses to the ground. As Mr. Chisnell looked up, he was punched again in the top of the head.

Mr. Chisnell initially felt well enough and so stayed to watch the end of the show. Mr. Murphy and his friends left the bar. Mr. Chisnell denied injuring Mr. Murphy and stated he had no idea why Mr. Murphy hit him. After the concert, his wife drove him, his father and his brother to his father's house. Mr. Chisnell was supposed to work on his father's computer but he began to not feel well. While at the house, Mr. Chisnell began to experience cold sweats, nausea, and vomiting and was taken to the hospital. Doctors discovered that Mr. Chisnell had a fractured skull and a hematoma requiring immediate surgery. Mr. Chisnell has suffered significant short-term and long-term consequences as a result of the injuries as has been already detailed above. Mr. Chisnell was able to identify Mr. Murphy in court as the person who hit him.

{¶23} On cross-examination, Mr. Chisnell indicated that prior to the incident he did not ask Mr. Murphy to stop bumping into him because he did not want to have a confrontation with Mr. Murphy. The defense also asked Mr. Chisnell if his statement to the police was accurate that when he traded places with his wife he took a stance and extended his elbow. Mr. Chisnell indicated that he did not remember telling the police that, and if he did, he meant to say that he extended his forearm to brace himself, and not his elbow.

{¶24} Mrs. Chisnell's testimony comports with much of her husband's testimony. Mrs. Chisnell was not drinking that evening. She stated that she and her husband switched places during the last song so that Mr. Murphy would not bump into her anymore. She never saw her husband throw a punch, but did see him get punched twice. She identified Mr. Murphy in a photo array and also identified him in court as the person who punched her husband. Mrs. Chisnell further testified to the extent of Mr. Chisnell's injury and the treatment required.

{¶25} On cross-examination Mrs. Chisnell was questioned about what she told police about the incident. The police report indicated that she said that Mr. Chisnell pushed Mr.

Murphy. Mrs. Chisnell did not recall saying that and said that what actually happened was that Mr. Chisnell braced against any action by Mr. Murphy, but did not push him. She indicated that during the end of the concert she was focused on Mr. Murphy, and not the concert, as Mr. Murphy was spraying beer over the crowd and kept bumping into her.

{¶26} Mr. Chisnell's friend Elizabeth Obert also testified. She was at the concert with a couple friends and noticed that four people were being rowdy. Mr. Murphy bumped into her several times during the course of the concert, and she finally asked him to stop bumping into her. However, he continued to bump into her. Ms. Obert saw Mr. Chisnell get hit once. He seemed to be fine and so they finished watching the concert. Ms. Obert picked Mr. Murphy out of a photo array and identified him in court as the person who struck Mr. Chisnell.

{¶27} Melanie Galmish, a friend of Mr. Chisnell was also at the concert with her boyfriend, Michael Kimble, and her cousin. Ms. Galmish also noticed the activity of Mr. Murphy's group. The group kept bouncing into her and appeared to be intoxicated. Ms. Galmish did not observe Mr. Chisnell get punched. Ms. Galmish later identified Mr. Murphy at another Red Wanting Blue concert and called the police. On cross-examination Ms. Galmish admitted that the police were called only after the severity of Mr. Chisnell's injury was discovered.

{¶28} Michael Kimble, another friend of the Chisnells testified. He stated that he went to the concert with his girlfriend, Melanie Galmish. He sat towards the back of the bar during the beginning portion of the concert. However, as the concert continued he noticed that a group of individuals near the stage was being rowdy and pushing and shoving and spraying beer. He warned Mr. Chisnell to keep an eye on the group. He heard the commotion caused by the assault but did not see Mr. Chisnell get punched. However, Mr. Kimble saw Mr. Murphy being

restrained and said that it “looked like he was egging [Mr. Chisnell] on to fight him.” Mr. Kimble saw Mr. Murphy at a later Red Wanting Blue concert and talked with him to be sure that it was the right person. Mr. Kimble also identified Mr. Murphy out of a photo array and identified him in court.

{¶29} Amy Preusser, another friend of the Chisnells was also present at the August 2007 concert. She had a single drink that evening, which she did not finish. She noticed the group of individuals acting rowdy and pushing and hitting each other. She tried to keep her distance from them, but they still kept bumping into her. She took a beer away from one of the female members of the group because she kept spilling it on Ms. Preusser and the stage. Ms. Preusser did not see Mr. Chisnell get punched, but saw him immediately after and indicated that he looked shocked. She also stated that Mr. Murphy looked defensive and had his fists up. Ms. Preusser was also at the December 2007 Red Wanting Blue concert and saw Mr. Murphy there. She was subsequently able to identify him from a photo array and in court.

{¶30} Kevin Duff, a friend of Mr. Chisnell, also testified. That night at the concert he had a few drinks. He was initially at the back of the bar and moved towards the front to talk to his friends. He noticed a man and a woman who were intoxicated, spraying beer, and bumping into people, including him. Mr. Duff saw Mr. Murphy throw a punch at Mr. Chisnell which hit him on the top of the head. Mr. Chisnell looked shocked. Mr. Duff saw Mr. Murphy raise his fists like he was ready to fight. Mr. Duff got in front of Mr. Chisnell so he would not get hit again. Mr. Duff did not see Mr. Chisnell do anything aggressive either before or after the incident. Mr. Duff indicated that a bouncer escorted Mr. Murphy to the back of the bar. Mr. Duff was at the December 2007 Red Wanting Blue concert, saw Mr. Murphy there and called the

police. Mr. Duff identified Mr. Murphy in a photo array and identified him in court as the person who punched Mr. Chisnell.

{¶31} Another one of Mr. Chisnell's friends, Peter Gray also testified. Mr. Gray had two drinks early in the evening, but none during the concert. During the concert he was about fifteen to twenty feet from the stage, near Mr. and Mrs. Chisnell. Mr. Gray noticed three to four people jumping and shaking their drinks. He saw Mr. Chisnell standing in a braced, defensive posture. Then Mr. Gray felt a hand graze across his forehead and then hit Mr. Chisnell. Mr. Gray did not see Mr. Chisnell actually get hit with the punch but saw Mr. Chisnell's glasses fall to the ground. Mr. Gray did not get a close look at the person who hit Mr. Chisnell, but thought he later saw someone sitting outside the bar who looked like the person.

{¶32} Scott Terry, a member of Red Wanting Blue also testified. He was not aware that the incident occurred at the concert in August 2007 until police contacted him. Police told him that people had seen him talking to the suspect after the concert. That night immediately after the concert, Mr. Terry spoke with Mr. Murphy, commenting on Mr. Murphy's early departure from the show. Mr. Murphy said he had been asked to leave and that he had left his sandal inside. Mr. Terry offered to go back inside and get it for him. At the December 2007 Red Wanting Blue concert, Mr. Terry saw Mr. Murphy in attendance and stopped the concert to point him out to the police. Mr. Terry saw Mr. Murphy again at a subsequent Youngstown concert and again spoke with him. Mr. Murphy brought up the incident and asked Mr. Terry if he knew anything about it. Mr. Terry denied knowing anything. Mr. Murphy began to explain that the police suspected him and at first denied any participation and said that it was not him. Later, Mr. Murphy admitted punching Mr. Chisnell stating that he "barely hit the kid."

{¶33} Detective Joseph Urbank testified about his investigation into the incident. Detective Urbank went to the hospital on August 25, 2007, and took statements from Mr. and Mrs. Chisnell and Melanie Galmish. Detective Urbank was also given the names of other witnesses to contact. The witnesses did not have any identifying information about the person who hit Mr. Chisnell, and thus police had no suspect. Detective Urbank attended Red Wanting Blue concerts with several of the witnesses to see if they could locate and identify the suspect; they were unsuccessful. Detective Urbank also talked to Mr. Terry about the incident. At the December 2007 concert, Mr. Terry pointed Mr. Murphy out to Melanie Galmish and she called the police. The police filled out a field interrogation card and took a picture of Mr. Murphy. Detective Urbank set up a photo array and several witnesses identified Mr. Murphy as the person who hit Mr. Chisnell. A warrant for Mr. Murphy's arrest was then issued.

{¶34} During cross-examination, the Detective discussed the statements he received from the defense witnesses. He noted that the witnesses told him conflicting stories; one witness said that Mr. Chisnell punched Mr. Murphy first; another witness claimed that Mr. Murphy fell on top of her and that she was certain Mr. Murphy was pushed or hit, but she did not see it; and the third witness said that Mr. Murphy told him that Mr. Chisnell pushed Mr. Murphy and that there was a fight.

{¶35} Dr. Donich, Mr. Chisnell's neurosurgeon testified about Mr. Chisnell's injuries and the treatment required. The injury Mr. Chisnell suffered was a life-threatening emergency which put his life at risk for one to two days even following the surgery. Mr. Chisnell had a fractured skull and an epidural hematoma. Dr. Donich testified that hitting someone in that area is more likely to cause injury than hitting someone on the top of the head. He also noted that punching someone in that area can knock the person unconscious. He opined that the injury was

caused by a “large blunt trauma impact.” He stated that a very large force is necessary to fracture the skull and that head injuries are generally dangerous. During surgery, a portion of Mr. Chisnell’s skull was removed, the bleeding was stopped, and metal plates and screws were inserted to replace the fractured portion of skull. The surgical wound was closed with stitches. Had Mr. Chisnell not gone to the emergency room, he would have likely died.

{¶36} On cross-examination, Dr. Donich testified that the amount of force necessary to fracture someone’s skull would vary depending on the individual, and in part on the density of their bones. The doctor also stated that most people that get knocked out from punches do not get hematomas. As to the life-threatening nature of Mr. Chisnell’s condition, the doctor stated that “it’s sort of the most basic thing we learn as a neurosurgeon, get them to the Operating Room immediately or you’re going to be dealing with a dead patient; it’s just that risky.” On re-direct, the doctor clarified that Mr. Chisnell did not have an exceptionally thin, or eggshell, skull.

{¶37} Finally, a toxicologist testified for the State. The toxicologist testified concerning blood alcohol concentrations. He indicated that the legal limit in Ohio is .08. He further stated that at 2:20 a.m. on August 25, 2007, Mr. Chisnell’s blood alcohol was .033 and at 4:47 a.m. the level of alcohol in Mr. Chisnell’s blood was undetectable, meaning that it was below .01. The toxicologist conjectured about what the average person’s blood alcohol level would have been at midnight if that person had a blood alcohol level of .033 at 2:20 a.m., and gave figures ranging from .06 to .073, but said it was only an estimate. On cross-examination the toxicologist admitted that he could not know what Mr. Chisnell’s blood alcohol level was at midnight, nor what physiological consequences that level would have on him.

{¶38} The defense presented four witnesses. Mr. Murphy testified that on August 24, 2007 he went to the Barley House to see one of his favorite bands, Red Wanting Blue. Mr.

Murphy was celebrating his acceptance into a graduate program. He said that no one complained about his behavior that night. During the last song, he was jumping up and down and felt a push and ended up bumping into his friend Heather Pringle. Mr. Murphy was pushed again and ended up knocking Ms. Pringle over onto the stage and he fell on top of her. Then Mr. Murphy stated that he was hit near his left eye. Mr. Murphy had a beer in his right hand and returned the punch with his left hand. He said that he was concerned about sustaining immediate physical harm and that the punch was reactionary to the one he received. Mr. Murphy testified that he only threw one punch. His friend Amanda Johnson grabbed him and told him they were leaving, and Mr. Murphy lost his sandal on the way out. Mr. Murphy conversed with Mr. Terry while he was outside of the bar after the concert. Mr. Murphy testified that he did not intend to seriously injure Mr. Chisnell and that he would never have foreseen his actions causing someone to require brain surgery. Mr. Murphy said that he felt that he had to punch Mr. Chisnell in order to defend himself. Mr. Murphy was not aware of the severity of Mr. Chisnell's injuries until after his arrest. Mr. Murphy stated that during the December 2007 concert at the Barley House, police stopped him and took information and a photo of him.

{¶39} During cross examination, Mr. Murphy stated that he had six to seven beers that evening. Prior to the concert, Mr. Murphy made hotel reservations at a nearby hotel so that he would not have to drive all the way home after drinking at the concert. Mr. Murphy admitted that he did not see who pushed him, but believes it was Mr. Chisnell due to Mr. Chisnell's positioning relative to his own. Mr. Murphy stated that as he got up and turned around after falling into Ms. Pringle he was punched or elbowed in the face by Mr. Chisnell. He received a cut above his left eye. He denied that a bouncer kicked him out or that he was asked to leave. He stated that he did not tell Mr. Terry that he was asked to leave, only that he would not go

back in to retrieve his sandal; Mr. Murphy did not want to have another altercation. Mr. Murphy admitted that he was aware that punching someone in the head could result in many different injuries including losing a tooth or splitting a lip and that the injury could require stitches. Mr. Murphy admitted that he used the full force of his body to punch Mr. Chisnell and did not hold back at all when he punched Mr. Chisnell. He stated that there was nowhere to retreat.

{¶40} On redirect, Mr. Murphy reiterated that he did not believe he had any realistic place to retreat. On re-cross examination, Mr. Murphy admitted that while his punch may have been reactionary, he also knowingly decided to throw the punch. Mr. Murphy also stated that while he believed he was in danger of physical harm after being punched, he did not believe his life was in danger.

{¶41} Heather Pringle, Mr. Murphy's girlfriend also testified. Ms. Pringle attended the August 24, 2007 concert with Mr. Murphy. They had dinner at a table and were joined later by their friends Shawn Pedani and Amanda Johnson. They proceeded towards the stage for the concert. During the concert, they were dancing and singing. Mr. Murphy and Ms. Johnson were situated behind Ms. Pringle who was right against the stage. Mr. Murphy pushed Ms. Pringle twice; the second of which pushed Ms. Pringle on to the stage and Mr. Murphy fell on top of her. He apologized and said that someone pushed him. Ms. Pringle did not see what happened between Mr. Murphy and Mr. Chisnell. The next thing she knew, Ms. Johnson had grabbed Mr. Murphy's hand and said that they were leaving. Mr. Murphy said that someone had hit him. The group left and no bouncers were involved. They saw Mr. Terry on the way out and explained that Mr. Murphy got hit and lost his sandal. Mr. Terry volunteered to go get it. Mr. Murphy had a cut on his eye that was not there prior to the concert. Mr. Murphy was stopped by police at a December 2007 concert.

{¶42} On cross examination, Ms. Pringle indicated that she and Mr. Murphy reserved a hotel room the night of the August 2007 concert since they both lived far away and were drinking that evening. She admitted having five beers that night and testified that Mr. Murphy was spraying the crowd with beer. Ms. Johnson drove the two of them to the hotel following the concert. Despite being upset over Mr. Murphy's injury, Ms. Pringle and Mr. Murphy did not call the police because Mr. Murphy's injury was nothing serious. Ms. Pringle listed a variety of injuries that could result from being punched in the head including getting a black eye, a broken nose, a cut, a brain injury, or getting knocked unconscious.

{¶43} Amanda Johnson, a former co-worker and friend of Mr. Murphy also testified. At the concert, Ms. Johnson saw Mr. Chisnell push Mr. Murphy and Mr. Murphy responded by pushing Mr. Chisnell back. Then Mr. Chisnell punched Mr. Murphy and Mr. Murphy punched Mr. Chisnell. Ms. Johnson did not know what precipitated the altercation and did not feel Mr. Murphy's behavior had been rowdy. She indicated that they were not escorted out by bouncers and left on their own.

{¶44} Shawn Pedani, a co-worker of Mr. Murphy's also testified. Mr. Pedani attended the August 2007 concert but left before the last song when the altercation took place. At work the following Monday, he noticed that Mr. Murphy had a cut above his eye. Mr. Murphy told Mr. Pedani that there had been an incident after Mr. Pedani left. On cross examination, Mr. Pedani indicated that he told police that Mr. Murphy told him that things got "crazy." Mr. Pedani told police that it sounded like a mosh pit. Mr. Pedani indicated that he got that impression from Mr. Murphy telling him that someone pushed Mr. Murphy and Mr. Murphy had pushed or hit back.

{¶45} After a thorough review of the entire record, we cannot conclude that the jury lost its way and created a manifest miscarriage of justice. *Cepec* at ¶6, quoting *Otten*, 33 Ohio App.3d at 340. Mr. Murphy punched Mr. Chisnell with the full force of his body. Several witnesses saw the incident and confirmed Mr. Chisnell's version of events which indicated that Mr. Chisnell did not initiate the aggressive behavior. It is also clear that Mr. Chisnell sustained a life-threatening injury which required dangerous and invasive surgery to correct. Mr. Murphy may not have intended to cause serious physical harm nor anticipated that punching Mr. Murphy would probably result in the precise injury Mr. Chisnell received. However, as we stated above, neither his specific purpose nor precise knowledge of the resulting injury are determinative in evaluating whether Mr. Murphy knowingly caused serious physical harm. See *Powell* at ¶49.

{¶46} Further, while both Mr. Chisnell and Mr. Murphy consumed alcohol that evening, there were witnesses to the event who had not done so, some of whom corroborated Mr. Chisnell's version of events. It is true that Mr. Murphy and his witnesses presented testimony contradicting the State's witnesses that indicated Mr. Chisnell did nothing to cause the altercation. This is certainly a case in which the jury was presented with two competing versions about what happened; however, they are not completely dichotomous versions. The common thread in both the State's and the defense's testimony is that Mr. Murphy did punch Mr. Chisnell causing serious physical harm. The only conflicting testimony involved whether Mr. Murphy was justified in doing so. The jury concluded that Mr. Murphy was not acting in self-defense and based upon our review of the testimony presented that decision was not against the manifest weight of the evidence.

VI.

{¶47} In light of the foregoing, we affirm the decision of the Summit County Court of Common Pleas.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

EVE V. BELFANCE
FOR THE COURT

MOORE, P. J.
CONCURS

WHITMORE, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶48} Although I concur in judgment, I would affirm only on the following, limited grounds. I would overrule Murphy's first assignment of error because plain error does not exist.

Murphy did not request a jury instruction on assault and has not shown that the result of his trial would have been different if the jury had received an assault instruction. See *State v. Cadle*, 9th Dist. No. 24064, 2008-Ohio-3639, at ¶14 (defining plain error, in part, as an outcome determinative error); *State v. Williams*, 9th Dist. No. 24169, 2009-Ohio-3162, at ¶12 (providing that a defendant is entitled to a lesser-included offense instruction only if the evidence would reasonably support an acquittal on the greater offense). Similarly, I would overrule Murphy's third assignment of error because the choice to request an instruction on a lesser-included offense is a matter of trial strategy and does not support a finding of ineffective assistance here. *State v. Patel*, 9th Dist. 24030, 2008-Ohio-4693, at ¶29.

{¶49} As to Murphy's second assignment of error and fourth assignment of error, as far as it argues sufficiency, I would conclude that the State presented sufficient evidence to convict Murphy of felonious assault. Murphy admits that he hit Chisnell and that Chisnell suffered serious physical harm. Murphy only argues that he did not knowingly cause the harm. The mens rea "knowingly" only requires the probability of a certain result. R.C. 2901.22(B). Murphy suffered a skull fracture and a hematoma. Dr. Donich testified that it would have taken a very large amount of force to fracture Chisnell's skull. Based on the degree of force used, a rational juror could have concluded that Murphy knowingly caused Chisnell serious physical harm. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. Accordingly, I would overrule Murphy's second and fourth assignments of error to the extent they argue sufficiency.

{¶50} Finally, as to Murphy's remaining manifest weight argument in his fourth assignment of error, I also would conclude that Murphy's argument lacks merit. Once again, the only element of felonious assault that Murphy contests is the mens rea element. He argues that

Chisnell's "injury was a fluke" that he did not intend to cause and that the perception of both parties was likely skewed by the alcohol they consumed prior to the fight. Felonious assault, however, does not require purposeful intent. It only requires a person to have acted knowingly. R.C. 2903.11(A)(1). Several witnesses testified about Chisnell's injury. Dr. Donich specifically testified that a person would have had to exercise a very large amount of force to cause Chisnell a skull fracture and hematoma. Based on the evidence in the record, there is no indication that the jury lost its way in convicting Murphy. *State v. Otten* (1986), 33 Ohio App.3d 339, 340. There is credible evidence that Murphy knowingly caused Chisnell serious physical harm. The fact that alcohol was involved is irrelevant because "[v]oluntary intoxication may not be taken into consideration in determining the existence of a mental state that is an element of a criminal offense." *State v. Vonnjordsen*, 9th Dist. No. 24157, 2009-Ohio-836, at ¶19, quoting R.C. 2901.21(C). Consequently, Murphy's fourth assignment of error lacks merit.

{¶51} Because I agree with the ultimate result in this matter, I respectfully concur in judgment only based on the foregoing analyses.

APPEARANCES:

BECKY L. DOHERTY, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.