[Cite as *State v. Kyle*, 2010-Ohio-4456.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C.A. No. 24655
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
SHERMAN KYLE, III	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 08 10 3401

DECISION AND JOURNAL ENTRY

Dated: September 22, 2010

CARR, Judge.

{¶1} Appellant, Sherman Kyle III, appeals his conviction and sentence out of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On October 30, 2008, Kyle was indicted on one count of felonious assault in violation of R.C. 2903.11(A)(1)/(2), a felony of the second degree, along with a firearm specification pursuant to R.C. 2941.145, and a repeat violent offender specification pursuant to R.C. 2941.149; one count of having weapons while under disability in violation of R.C. 2923.13(A)(2)/(3), a felony of the third degree; one count of aggravated trespass in violation of R.C. 2911.211, a misdemeanor of the first degree; one count of aggravated menacing in violation of R.C. 2903.21, a misdemeanor of the first degree; one count of failure to comply with order or signal of a police officer in violation of R.C. 2921.331(A)/(B), a misdemeanor of the first degree; one count of criminal damaging or endangering in violation of R.C. 2909.06(A)(1), a

misdemeanor of the second degree; one stop sign violation pursuant to R.C. 4511.12, a minor misdemeanor; one red light violation pursuant to R.C. 4511.13, a minor misdemeanor; and one open container violation pursuant to R.C. 4301.62, a minor misdemeanor. Kyle pleaded not guilty to the charges.

{¶3} The matter proceeded to trial before the jury. The jury found Kyle guilty of felonious assault, the firearm specification, having weapons while under disability, aggravated trespass, aggravated menacing, failure to comply with an order or signal of a police officer, and criminal damaging or endangering. The charges alleging stop sign, red light, and open container violations were dismissed. Immediately prior to sentencing, the trial court held a hearing to determine whether Kyle was a repeat violent offender as alleged in the specification. The trial court determined that he was. The trial court then sentenced Kyle accordingly, imposing terms of incarceration for all counts to be run concurrently with one another but consecutively to the mandatory three-year prison term for the firearm specification. The trial court expressly declined to enhance the sentence based on the repeat violent offender determination.

{¶4} Kyle filed a timely appeal, raising four assignments of error for review.

II.

ASSIGNMENT OF ERROR I

> "DEFENDANT'S CONVICTION ON A FIREARM SPECIFICATION AND HAVING A WEAPON UNDER DISABILITY IS CONTRARY TO THE LAW BECAUSE THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE FIREARM INVOLVED WAS OPERABLE."

{¶5} Kyle argues that his convictions on the firearm specification and the charge of having weapons while under disability are not supported by sufficient evidence. This Court disagrees.

{¶6} The law is well settled:

> "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Galloway* (Jan. 31, 2001), 9th Dist. No. 19752, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

The test for sufficiency requires a determination of whether the State has met its burden of production at trial. *State v. Walker* (Dec. 12, 2001), 9th Dist. No. 20559; see, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390.

{¶7} Kyle was charged with a firearm specification in conjunction with the charge of felonious assault. R.C. 2941.145 requires proof beyond a reasonable doubt that "the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense." A "firearm" is:

> "any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. 'Firearm' includes an unloaded firearm, and any firearm that is inoperable but that can readily be rendered operable. When determining whether a firearm is capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant, the trier of fact may rely upon circumstantial evidence, including, but not limited to, the representation and actions of the individual exercising control over the firearm." R.C. 2923.11(B)(1) and (2).

{¶8} Kyle was charged with having weapons while under disability in violation of R.C. 2923.13(A)(2)/(3), which states:

> "Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if *** [t]he person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have

> been a felony offense of violence[, or] [t]he person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been an offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse."

{¶9} Kyle challenges the sufficiency of his conviction only with regard to the evidence regarding the operability of the firearm involved in the commission of the acts. As we have stated:

> "This Court 'evaluate[s] the evidence of a firearm's operability by examining the totality of the circumstances.' *State v. McElrath* (1996), 114 Ohio App.3d 516, 519, citing *State v. Murphy* (1990), 49 Ohio St.3d 206, 208. In *McElrath*, this Court found that in cases where no shots are fired and the firearm is not recovered, circumstantial evidence, such as the representations and actions of the gun operator, are of crucial importance. Id. Specifically, this Court found that '"the implicit threat of brandishing a firearm" supports an inference that the firearm was operable.' *State v. Williams* (Dec. 27, 2000), 9th Dist. No. 19559, citing *McElrath*, 114 Ohio App.3d 519-520. Moreover, we have a long precedent of finding operability sufficiently established, even though a weapon is not recovered, when one brandishes a gun in a threatening manner and the victim testifies to the threat and describes the gun. See *McElrath* and *Williams* supra; see, also, *State v. Hayes*, 9th Dist. No. 22168, 2005-Ohio-1464[,] and *State v. Young* (May 26, 1993), 9th Dist. No. 15927." *State v. Ware*, 9th Dist. No. 22919, 2006-Ohio-2693, at ¶13.

In addition, the Ohio Supreme Court has held that "where an individual brandishes a gun and implicitly but not expressly threatens to discharge the firearm at the time of the offense, the threat can be sufficient to satisfy the state's burden of proving that the firearm was operable or capable of being readily rendered operable." *Thompkins*, 78 Ohio St.3d at 384.

{¶10} At trial, Melissa Wartman testified that she and Kyle had been in a romantic relationship but that they had broken up earlier in the day on October 10, 2008. She testified that she had a few people at her house that evening and that she was with her guests when Kyle broke into the house and began to hit her. She testified that two guests were able to push Kyle outside, after which she and her friend Eric held the front door shut. Ms. Wartman testified that Kyle

returned to the front door and began beating on it with a sawed-off shotgun. She testified that Kyle eventually broke out one of the windows in the door.

{¶11} Ms. Wartman testified that Eric ran away upstairs, thinking that Kyle had begun shooting. She testified that, without Eric to help hold the door, Kyle broke in and began hitting her all over with the butt of the shotgun, yelling, "Die, bitch. How does it feel, bitch?" She testified that she screamed for Eric, who returned. She testified that Kyle then chased Eric back upstairs with the gun, while she fled out the front door.

{¶12} Ms. Wartman testified that Kyle had both the sawed-off shotgun and a handgun that he kept in his car with him when he broke through her front door. She testified that she heard gunshots fired behind her outside as she ran away. She testified that she was "[a] hundred percent for certain there were gunshots fired." Her medical records verified her statements to medical providers that her ex-boyfriend struck her repeatedly with a sawed-off shotgun and that he had a handgun as well.

{¶13} Ms. Wartman testified that she believed that Kyle fired at her with the handgun because, as far as she knew, no one had ever purchased any ammunition for the shotgun. She testified at one point that she did not believe the shotgun still had "the trigger thing." She testified that the shotgun belonged to her nephew who brought it to her house when he was living with her. She asserted that she told him to get it out of her house, and when he did not, Kyle took it and put it in the trunk of his car, transported it to his home, and stored it in a closet.

{¶14} Eric Ray testified that he was at Ms. Wartman's home during the evening of October 10, 2008, when Kyle broke in and assaulted Ms. Wartman. He verified that other guests were able to force Kyle out of the house and that he helped Ms. Wartman hold the front door shut. Mr. Ray testified that Kyle yelled from outside that "I am going to go to my trunk." Mr.

Ray testified that he believed that Kyle meant that he was going to get a gun or other weapon from his trunk. He testified that he saw Kyle open his trunk and then return to beat on the door with a shotgun. Mr. Ray testified that he ran upstairs but he returned when he heard Ms. Wartman scream for him. He testified that he saw Kyle beating the victim with the butt of the shotgun wherever he could hit her.

{¶15} Mr. Ray testified that he spoke with Kyle after his arrest. He testified that Kyle insinuated that he never had a gun during the incident. Mr. Ray testified that he initially understood Kyle's remark as a threat not to testify, but Kyle clarified that he was not trying to threaten him.

{¶16} Deshawn Coleman testified that he was at Ms. Wartman's residence on the evening of October 10, 2008, when Kyle came in and attacked the victim. He testified that he and another guest were able to force Kyle outside. He testified that Kyle walked to his car, saying, "I am going to get my shit." Mr. Coleman testified that that is a euphemism for "gun." He testified that he saw Kyle retrieve a sawed-off shotgun from his car. He testified that Ms. Wartman later ran out of the house screaming, as Kyle chased her with a gun.

{¶17} Two neighbors testified that they heard a lot of noise, commotion, and screams around 10:00 p.m. on October 10, 2008. They testified that they saw Kyle open his trunk, remove something, and return to the victim's house. Another neighbor, Pearline Jackson, testified that she heard the victim screaming for help and a noise "like gun fires." She testified that she saw Kyle with a shotgun, as well as a handgun he retrieved from the back seat of his car. Ms. Jackson testified that he stuck the handgun in his pants. She testified that Kyle chased the victim outside with the shotgun, yelling, "Get your MF'ing a-s-s back here, b-i-t-c-h, before I kill you."

{¶18} Officer Jamie Rea of the Akron Police Department ("APD") testified that he was dispatched to the scene on reports that shots had been fired and someone was chasing someone else with a gun.

{¶19} Officer Patrick Didyk of the APD testified that he was dispatched to the scene for a "shots fired" call. He testified that various witnesses at the scene reported that shots had been fired. The officer testified that, although there was no tangible evidence found at the scene to indicate that shots had been fired, he has been to scenes where shots had been confirmed even in the absence of the presence of bullets or shell casings.

{¶20} Detective Jason Hill of the APD testified that he was the lead detective on this case. He testified that he did not order a gunshot residue test of Kyle's hands because Kyle had admitted having a shotgun during the attack on Ms. Wartman. The detective identified pieces of the shotgun or rifle found at the scene, including the butt of the weapon, several pieces of wood, and part of a plastic trigger guard.

{¶21} Reviewing the evidence in a light most favorable to the State, this Court concludes that any rational trier of fact could have found that the operability of the firearm was proved beyond a reasonable doubt. See *Jenks* at paragraph two of the syllabus. There was evidence that Kyle in fact had two firearms, a sawed-off shotgun and a handgun, on his person during the incident on October 10, 2008. Kyle used the shotgun to beat the victim. While the victim testified that she did not believe that the shotgun was operable, she testified that was because no one had ever purchased ammunition for it. She testified that she was not aware of any mechanical defect that would prevent its operability, however. In addition, she testified that Kyle had removed the shotgun from her home some time earlier, placed it in his trunk, and later stored it in a closet in his home. Clearly, Kyle returned it to his trunk after storing it in his closet.

There was no evidence that Kyle did not have the time or the means to procure ammunition in the interim for a weapon he decided to carry in his car.

{¶22} Ms. Wartman testified that Kyle chased her with a gun and fired several shots at her. She testified he used the handgun to fire at her and she ran around a corner to avoid being hit. Numerous witnesses testified that Kyle fired shots and threatened the victim. There was evidence that Kyle brandished firearms in a threatening manner and actually fired shots in an attempt to harm the victim. Accordingly, the State presented sufficient evidence to establish the operability of two firearms in his possession at the time of the incident. Therefore, the State presented sufficient evidence to establish the elements of the firearm specification and the charge of having weapons while under disability. Kyle's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT ERRED BY FAILING TO SUA SPONTE DECLARE A MISTRIAL WHEN AN APPARENT CONFLICT OF INTEREST AROSE BETWEEN TRIAL COUNSEL AND APPELLANT IN THE COURSE OF THE TRIAL."

{¶23} Kyle argues that the trial court committed plain error by failing to sua sponte declare a mistrial because a conflict of interest arose during trial between Kyle and his attorney. This Court disagrees.

{¶24} Pursuant to 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." To constitute plain error, the error "must be obvious and have a substantial adverse impact on both the integrity of, and the public's confidence in, the judicial proceedings." *State v. Tichon* (1995), 102 Ohio App.3d 758, 767. A reviewing court must take notice of plain error only with the utmost caution, and only then to prevent a manifest miscarriage of justice. *State v. Bray*, 9th Dist. No. 03CA008241, 2004-Ohio-1067, at ¶12. This Court may not reverse the judgment of the trial

court on the basis of plain error, unless Kyle has established that the outcome of the trial clearly would have been different but for the alleged error. *State v. Kobelka*, 9th Dist. No. 01CA007808, 2001-Ohio-1723, citing *State v. Waddell* (1996), 75 Ohio St.3d 163, 166.

{¶25} The Ohio Supreme Court has stated:

> "The determination of whether to grant a mistrial is in the discretion of the trial court. *State v. Glover* (1988), 35 Ohio St.3d 18, 19; *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, at ¶42. '[T]he trial judge is in the best position to determine whether the situation in [the] courtroom warrants the declaration of a mistrial.' *Glover*, 35 Ohio St.3d at 19; see, also, *State v. Williams* (1995), 73 Ohio St.3d 153, 167. This court will not second-guess such a determination absent an abuse of discretion." *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, at ¶92.

{¶26} Kyle asserts that a mistrial was warranted because of a conflict of interest which arose between him and his trial counsel when the complaining witness Melissa Wartman testified. "The term 'conflict of interest' bespeaks a situation in which regard for one duty tends to lead to disregard of another." *State v. Getsy* (1998), 84 Ohio St.3d 180, 187, quoting *State v. Manross* (1988), 40 Ohio St.3d 180, 182. Kyle asserts that Ms. Wartman implicated his trial counsel in a scheme to fabricate testimony in order to "get rid of the felony." Kyle asserts that Ms. Wartman's testimony necessarily required that his trial counsel testify in the case.

{¶27} A review of the record indicates that Kyle misconstrues Ms. Wartman's testimony. While she admitted that she conferred with Kyle and his mother to concoct a story in which Kyle did not have a firearm during the assault, she never testified that Kyle's trial counsel was involved in the fabrication. Moreover, she never testified that Kyle's trial counsel was aware that she had lied to him about the incident or regarding her testimony to the grand jury. Ms. Wartman admitted that she lied earlier to protect Kyle at a time when she felt responsible for his attack. She testified, however, that with counseling she has come to realize that Kyle caused his situation himself by engaging in violent criminal acts and that she is not to blame for his

behavior. Her testimony did not require testimony by defense counsel in response. Her credibility as a witness remained for consideration by the trier of fact. Defense counsel's integrity and duty to his client were in no way impugned by Ms. Wartman's testimony. Accordingly, there was no conflict of interest between trial counsel's duty to himself and his duty to his client. Therefore, there was nothing to indicate that a mistrial was warranted and the trial court did not err by failing to sua sponte grant a mistrial. Kyle's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

> "SHERMAN'S TRIAL COUNSEL'S PERFORMANCE FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS. THIS INEFFECTIVENESS UNFAIRLY PREJUDICED SHERMAN AND DENIED HIM A FAIR TRIAL[.]"

{¶28} Kyle argues that his trial counsel was ineffective. This Court disagrees.

{¶29} This Court uses a two-step process as set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 687, to determine whether a defendant's right to the effective assistance of counsel has been violated.

> "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." Id.

{¶30} To demonstrate prejudice, "the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the

judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691.

{¶31} This Court must analyze the "reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. The defendant must first identify the acts or omissions of his attorney that he claims were not the result of reasonable professional judgment. This Court must then decide whether counsel's conduct fell outside the range of professional competence. Id.

{¶32} Kyle bears the burden of proving that counsel's assistance was ineffective. *State v. Hoehn*, 9th Dist. No. 03CA0076-M, 2004-Ohio-1419, at ¶44, citing *State v. Colon*, 9th Dist. No. 20949, 2002-Ohio-3985, at ¶49; *State v. Smith* (1985), 17 Ohio St.3d 98, 100. In this regard, there is a "strong presumption [] that licensed attorneys are competent and that the challenged action is the product of a sound strategy." *State v. Watson* (July 30, 1997), 9th Dist. No. 18215. In addition, "debatable trial tactics do not give rise to a claim for ineffective assistance of counsel." *Hoehn* at ¶45, quoting *In re Simon* (June 13, 2001), 9th Dist. No. 00CA0072, citing *State v. Clayton* (1980), 62 Ohio St.2d 45, 49. Even if this Court questions trial counsel's strategic decisions, we must defer to his judgment. *Clayton*, 62 Ohio St.2d at 49. The Ohio Supreme Court has stated:

> "'We deem it misleading to decide an issue of competency by using, as a measuring rod, only those criteria defined as the best of available practices in the defense field.' *** Counsel chose a strategy that proved ineffective, but the fact that there was another and better strategy available does not amount to a breach of an essential duty to his client." Id., quoting *State v. Lytle* (1976), 48 Ohio St.2d 391, 396.

{¶33} "[A] defendant is not deprived of effective assistance of counsel when counsel chooses, for strategical reasons, not to pursue every possible trial tactic." *State v. Brown* (1988), 38 Ohio St.3d 305, 319, citing *State v. Johnson* (1986), 24 Ohio St.3d 87. In addition, "the end

result of tactical trial decisions need not be positive in order for counsel to be considered 'effective.'" *State v. Awkal* (1996), 76 Ohio St.3d 324, 337.

{¶34} The Ohio Supreme Court has recognized that a court need not analyze both prongs of the *Strickland* test, where the issue may be disposed upon consideration of one of the factors. *State v. Bradley* (1989), 42 Ohio St.3d 136, 143. Specifically,

> "'Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing in one. In particular, a 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. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.'" *Bradley,* 42 Ohio St.3d at 143, quoting *Strickland*, 466 U.S. at 697.

{¶35} Kyle first argues that trial counsel was ineffective for failing to move for a mistrial when it became apparent that a conflict of interest had arisen. This Court has already concluded that no conflict of interest arose due to Ms. Wartman's testimony because she never implicated defense counsel in her scheme to fabricate a story which precluded Kyle's conviction for a felony offense. Kyle's argument in this regard fails.

{¶36} Kyle next argues that trial counsel was ineffective for failing to object to the admission of the victim's medical records from DOVE (Developing Options for Violent Emergencies) because the records were not authenticated. In support, Kyle cites only *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, which addresses Confrontation Clause issues and is not relevant to his argument.

{¶37} The DOVE records were endorsed and certified as "true, accurate and complete copies" of the records by a "duly authorized representative under whose supervision copies of DOVE records are prepared." Ignoring this, Kyle argues there was no authentication because Ms. Wartman was not competent to authenticate a document she did not prepare. However, the State merely asked her whether she had in fact given the history to the medical providers as reflected in the records. Even assuming the DOVE records were not properly authenticated, Kyle fails to assert how their admission was prejudicial, particularly in light of the fact that Ms. Wartman independently testified to the matters noted in the medical history notes.

{¶38} Kyle concludes this argument by asserting that trial counsel derived "no tactical advantage into allowing inadmissible hearsay evidence to come in at trial." Statements made for purposes of medical diagnosis or treatment, however, constitute an exception to the hearsay rule. Evid.R. 803(4). Accordingly, Kyle's argument that trial counsel was ineffective in regard to his failure to object regarding the DOVE records is not well taken.

{¶39} Finally, Kyle argues that trial counsel was ineffective for failing to object to the assistant prosecutor's leading of witnesses during direct examination. In support, Kyle cites to only one page of the transcript, where he emphasizes that the trial court itself recognized the State's error. Trial counsel had objected to the leading nature of the State's questions. On the page of the transcript cited by Kyle, the trial court stated, "Mr. [assistant prosecutor], you are leading the witness and there had been an objection. Please." Kyle fails to cite to any parts of the record which support his argument as required by App.R. 16(A)(7). Even so, trial counsel's tactical decision not to object to every single leading question, particularly where he had already noted his objection for the record, does not constitute ineffectiveness. Kyle's third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

> "PURSUANT TO ARTICLE IV [SECTION] 3(B)(3) OF THE OHIO CONSTITUTION, THE VERDICT OF GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED AT TRIAL[.]"

{¶40} Kyle argues that his conviction for felonious assault was against the manifest weight of the evidence. This Court disagrees.

> "In determining whether a criminal conviction is against 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. Otten* (1986), 33 Ohio App.3d 339, paragraph one of the syllabus.

This discretionary power should be exercised only in exceptional cases where the evidence presented weighs heavily in favor of the defendant and against conviction. Id. at 340.

{¶41} Kyle was charged with felonious assault in violation of R.C. 2903.11(A)(1)/(2), which states: "No person shall knowingly *** either *** [c]ause serious physical harm to another *** [or c]ause or attempt to cause physical harm to another *** by means of a deadly weapon or dangerous ordnance."

{¶42} Kyle admits that he hit Ms. Wartman, but he argues that the weight of the evidence establishes that he was acting in self-defense and/or that he did not use a firearm in committing the offense. He does not dispute that he knowingly caused physical harm to the victim.

{¶43} Deshawn Coleman testified that after Kyle was initially removed from the victim's home, he reentered the home with a sawed-off shotgun. Eric Ray and Ms. Wartman testified that Kyle used the shotgun to hit Ms. Wartman all over her body after he reentered the home. Photographs of the victim's injuries showed a cut requiring stitches and multiple bruises

all over her body. In addition, Ms. Wartman testified that Kyle chased her with a handgun, firing several shots at her, which caused her to run around a corner in an attempt to avoid harm. Ms. Wartman admitted that she earlier lied to the grand jury and defense counsel about the incident because she wanted to help Kyle in hopes of reconciling. Neighbor Pearline Jackson also testified that Kyle chased the victim with a gun and threatened to kill her. Detective Hill testified that Kyle told him that it was the victim who pulled out the shotgun and that he merely grabbed it from her. The detective testified, however, that all witnesses at the scene reported that Kyle retrieved the shotgun from his car.

{¶44} This Court will not overturn the trial court's verdict on a manifest weight of the evidence challenge only because the trier of fact chose to believe certain witness' testimony over the testimony of others. *State v. Crowe*, 9th Dist. No. 04CA0098-M, 2005-Ohio-4082, at ¶22.

{¶45} A review of the record indicates that this is not the exceptional case, where the evidence weighs heavily in favor of Kyle. A thorough review of the record compels this Court to find no indication that the trial court lost its way and committed a manifest miscarriage of justice in convicting Kyle of felonious assault. Kyle does not dispute that he assaulted Ms. Wartman. Although he argues that he hit Ms. Wartman with his hands and feet in self-defense, all eye witnesses to the incident testified that he retrieved firearms after being thrown out of the home and that he returned and initiated the beating of Ms. Wartman with the shotgun. No witnesses testified that Ms. Wartman first attacked Kyle. In fact, the testimony established that Ms. Wartman was enjoying the company of her guests when Kyle broke in and attacked her. Accordingly, Kyle's conviction for felonious assault was not against the manifest weight of the evidence. The fourth assignment of error is overruled.

III.

{¶46} Kyle's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

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.

DONNA J. CARR
FOR THE COURT

DICKINSON, P. J.
WHITMORE, J.
CONCUR

APPEARANCES:

JILL K. FANKHAUSER, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.