[Cite as *State v. Hayes*, 2023-Ohio-1008.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO,	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff - Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
BERNARD HAYES,	:	Case No. CT2022-0021
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Muskingum County Court of Common Pleas, Case No. CR2021-0664
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	March 23, 2023

APPEARANCES:

For Plaintiff-Appellee

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Baldwin, J.

{¶1} The appellant appeals his conviction for felonious assault following a jury trial, and the jury's finding that the victim was a peace officer. Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND THE CASE

{¶2} The appellant, a diabetic, had been provided with free samples of a medication by his physician which he took by injection one time per week instead of his usual four insulin injections per day. The free medication samples ceased and, unable to afford the cost of the medication, the appellant reverted back to four insulin injections per day to control his diabetes. The appellant experienced side effects due to the change in medication, including blurry vision and irritability.

{¶3} On the night of December 4, 2021, the appellant awoke and administered an insulin injection, but was unaware of how much insulin he had actually taken. His girlfriend observed him to be incoherent, and recognized that his blood sugar levels had dropped. She engaged in efforts to stabilize his blood sugar levels, and when that failed to work she called 911.

{¶4} The appellant was transported by ambulance to Genesis Hospital, where he was treated by Dr. Philip Kray and his blood sugar levels stabilized. Dr. Kray testified at trial that he was concerned that the appellant's insulin overdose was indicative of possible self-harm so he issued a writ placing the appellant "on hold," thus preventing the appellant from leaving the hospital. Dr. Kray testified that he communicated to the appellant the precise reasons he was required to stay in the emergency department for treatment, during which the appellant was conscious and alert.

{¶5} The appellant became angry and aggressive, and indicated that he wanted to leave. Dr. Kray again attempted to explain to the appellant the reasons why he had been placed on a hold. The appellant became more upset, and attempted to get up from the bed while attached to a number of monitors and an IV. Genesis Hospital Security Officer Garret Wohlford was called to the treatment room to assist with the disturbance caused by the appellant. Dr. Kray testified that the appellant got out of bed and moved towards himself and Officer Wohlford. An altercation ensued, during which Officer Wohlford suffered significant injuries.

{¶6} Officer Wohlford testified that he was first commissioned as a peace officer in 2004/2005 at the Utica Police Department, where he worked until he moved to Florida. He returned to Ohio in 2009 and resumed work as a peace officer, starting with the Village of Thornville. He then took an auxiliary position with the Village of St. Louisville. He testified that he began working at Genesis in November of 2021.

{¶7} Officer Wohlford testified that as a Genesis public safety officer he has State of Ohio law enforcement and arrest powers over all Genesis properties. He wears a uniform, wears a radio holder, and wears a duty belt with numerous “keeps” that strap on to the duty belt in which he carries various items, including handcuffs, a key holder, and a duty belt holster in which he carries a sidearm.

{¶8} On the night of December 4, 2021 and early morning of December 5, 2021, Officer Wohlford entered emergency room number 8, where the appellant was being treated, to assist with the disturbance created by appellant. Officer Wohlford was met at the door by Dr. Kray, who told him the appellant was on a 72-hour hold but did not want to remain at the hospital. The appellant was lying in bed trying to get up, very angrily

cursing at everyone in the room. Officer Wohlford spoke to the appellant, and placed his hand on the appellant's chest in an attempt to push him back to lie down on the bed. This had no effect. The appellant again tried to get up, more forcefully, and Officer Wohlford placed his other hand on the appellant's chest to push him back down on to the bed. The situation escalated. The appellant got out of bed and stood across from Officer Wohlford, both men gripping each other in a "standoff" position. Words were exchanged and the appellant refused to lie back down or release Officer Wohlford, who then released his right hand and hit the appellant three or four times with his elbow to the appellant's temple area in an effort to get him to release his hold. This, again, had no effect. Officer Wohlford knew backup had been called. When something to his right caught his eye, he glanced in that direction, thinking it was his backup, at which time he testified it was "lights out."

{¶9} Nurse Courtney Grant testified that she was in the room at the time of the altercation. She testified that the appellant was up off of the bed, and collided with Officer Wohlford, both men falling into a cabinet and then to the ground. She testified that the appellant was on top of Officer Wohlford with his hands around Wohlford's neck. Another officer arrived in the room to assist, along with a couple other hospital personnel, and someone got the appellant's hands off of Officer Wohlford's neck, at which time Nurse Grant noticed that he was unresponsive. The risk in the room was further heightened by the fact that Officer Wohlford's gun was loose in the room while he lay unconscious. There was an issue regarding whether the appellant had at any time acquired possession of the gun. Officer Wohlford was extracted from the room.

{¶10} Once Officer Wohlford was dragged out of the room and into the hallway, Dr. Kray attended to his injuries. Dr. Kray testified that Officer Wohlford was assessed

as a category 1 trauma alert, which is the most critical category of injury and mobilizes respiratory therapy, the blood bank, and trauma surgeons. He was evaluated using advanced trauma life support protocols, as his injuries were so severe that, absent intervention and medical treatment, they could potentially have been fatal. Officer Wohlford's injuries included a concussion with a loss of consciousness of 30 minutes or less; a traumatic subarachnoid hemorrhage; and, a traumatic pneumocephalus.

{¶11} While Dr. Kray was attending to Officer Wohlford in the hallway, the appellant exited his treatment room and began to roam the hallway, periodically moving toward Dr. Kray and an unconscious Officer Wohlford. Eventually the appellant wandered away, and Dr. Kray was able to move Officer Wohlford onto a hospital bed and get him wheeled to the trauma bay.

{¶12} Officer Wohlford testified that he suffered injuries to his neck, including a small laceration; traumatic brain injuries which entailed injuries to the back of his head, including multiple skull fractures; two to three brain bleeds; and, a concussion with lingering injuries. He was hospitalized for several days. He testified that, even at the time of trial, he was going to the concussion clinic two times per week. He testified that as a result of his brain injuries he no longer had a sense of smell, and he sometimes has difficulty recalling simple words. He was off work for approximately two months.

{¶13} The appellant continued to wander the halls of Genesis before being apprehended by Zanesville Police Department Patrol Officer Cody Dent and two other Genesis security officers.

{¶14} The appellant was charged with one count of attempted aggravated murder in violation of R.C. 2903.01(A) with a firearm specification in violation of R.C. 2941.145;

one count of felonious assault on a peace officer in violation of R.C. 2903.11(A)(1); one count of aggravated robbery in violation of R.C. 2911.01(B); and, one count of having a weapon while under disability in violation of R.C. 2923.14. He pleaded not guilty to all charges.

{¶15} The matter proceeded to jury trial. The appellee State of Ohio presented testimony from seven witnesses. In addition to the testimony summarized above, Officer Dent testified regarding the apprehension of the appellant, which required the discharge of his taser and the assistance of two Genesis public safety officers. Jonathan Pyers, Genesis Hospital Registered Nurse and charge nurse on the night in question, testified regarding the appellant's aggressive behavior and the altercation resulting in Officer Wohlford's injuries. Tyler Baker, Genesis Hospital Public Safety Officer, testified regarding the altercation and apprehension of the appellant. Following the aforesaid testimony and the admission of forty-six (46) exhibits, the appellee rested.

{¶16} The appellant's trial counsel moved for a directed verdict on all counts pursuant to Crim. R. 29. The trial court granted the appellant's motion regarding the firearm specification on count one, granted the motion on count three regarding aggravated robbery, and granted the motion on count four regarding having a weapon while under disability. The trial proceeded on the remainder of count one, attempted aggravated murder; and, on count two, felonious assault on a peace officer.

{¶17} The appellant was the only witness to testify for the defense. He testified that he tried to stand up from the bed in order to alleviate cramps in his thighs. He testified further that when Officer Wohlford placed his hands on him he perceived it as a threat; acting on survival instinct, his Army training kicked in and he "had one option left, and it

wasn't even a personal choice." The appellant testified that he did not intend to hurt Officer Wohlford.

{¶18} The appellee called Patty Sharier as a rebuttal witness in response to the appellant's testimony that he "would never strangle anybody," during which she testified that the appellant had once tried to strangle her, resulting in criminal charges.

{¶19} The parties rested and submitted their respective closing arguments. The trial court instructed the jury, including the instruction that if they found the appellant guilty on count two, felonious assault on a police officer, it was their "duty to deliberate further and to decide if Officer Wohlford was a peace officer." The jury returned a verdict of not guilty on count one, the charge of attempted aggravated murder. The jury returned a verdict of guilty on felonious assault, and further found that Officer Wohlford was a peace officer.

{¶20} A pre-sentence investigation was prepared on March 17, 2022 and submitted to the trial court. On March 22, 2022, the trial court conducted a sentencing hearing. The appellee submitted its argument regarding sentencing, as did counsel for the appellant. The victim prepared a statement that he made to the trial court. In addition, the appellant submitted written correspondence to the trial court. The trial court, summarizing the PSI report and stating that the appellant had a history of criminal conduct including domestic violence, assault, and an additional instance of strangling another, and stating further that the appellee had expressed absolutely no remorse, sentenced the appellant to the statutory maximum sentence of eleven (11) years and an indefinite maximum term of sixteen and one-half (16 ½) years in prison. The appellant is also subject to three (3) years of post-release control upon his release.

{¶21} The appellant has appealed, raising the following assignments of error:

{¶22} "**ASSIGNMENT OF ERROR NO. 1:** HAYE'S TRIAL COUNSEL PERFORMED SO DEFICIENTLY AS TO DENY HIM EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO REQUEST A JURY INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF SIMPLE ASSAULT WHEN SUPPORTED BY THE EVIDENCE PRESENTED AT TRIAL, ATTEMPTED TO PRESENT A DEFENSE CONTRARY TO OHIO LAW, AND FAILED TO INVESTIGATE THE FACTUAL BASIS OF THE CHARGES. SIXTH AMENDMENT, UNITED STATES CONSTITUTION; SECTION 10, ARTICLE 1, OHIO CONSTITUTION."

{¶23} "**ASSIGNMENT OF ERROR NO. 2:** THERE WAS INSUFFICIENT EVIDENCE THAT HAYES ACTED "KNOWINGLY" TO SUSTAIN A CONVICTION UNDER THE UNITED STATES AND OHIO CONSTITUTIONS. FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION; SECTIONS 1, 2, 16, 19, ARTICLE 1, OHIO CONSTITUTION."

{¶24} **"ASSIGNMENT OF ERROR NO. 3:** HAYES WAS DENIED DUE PROCESS WHEN THE TRIAL COURT FAILED TO SUA SPONTE INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF MISDEMEANOR ASSAULT AND THE PEACE OFFICER SPECIFICATION."

ASSIGNMENT OF ERROR NO. 1

{¶25} In his first assignment of error, the appellant argues that he was denied effective assistance of counsel because his trial counsel failed to request a jury instruction on the lesser included offense of misdemeanor simple assault when supported by the evidence presented at trial; that he was denied effective assistance of counsel because

his trial counsel attempted to present a defense that is not viable under Ohio law; and, that his trial counsel failed to investigate and challenge the factual basis of the charges against him. We disagree.

STANDARD OF REVIEW

{¶26} A claim for ineffective assistance of counsel requires a two-prong analysis. The first prong entails a review regarding whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong entails a review regarding whether the appellant was prejudiced by counsel's ineffectiveness. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. "Prejudice from defective representation sufficient to justify reversal of a conviction exists only where the result of the trial was unreliable or the proceeding fundamentally unfair because of the performance of trial counsel." *State v. Carter* (1995), 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (citing *Lockhart v. Fretwell* (1993), 506 U.S. 364, 370, 113 S.Ct. 838, 122 L.Ed.2d 180). The United States Supreme Court and the Ohio Supreme Court have both held that a reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Bradley*, 42 Ohio St.3d at 143 (citing *Strickland*, 466 U.S. at 697).

ANALYSIS

{¶27} This court, in *State v. Moses*, 5th Dist. Richland No. 2001CA104, 2003-Ohio-5830, stated:

> An instruction on a lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense. *State v. Thomas* (1988), 40 Ohio St.3d 213, 533 N.E.2d 286. Upon review, we conclude there is no plain error, and the trial court did not abuse its discretion by not, sua sponte instructing the jury on the lessor included offense.

Id. at ¶ 20.

{¶28} The appellant argues that his trial counsel was ineffective because he failed to request a jury charge in the lesser included offense of simple assault as set forth in R.C. 2903.13(B), which provides that "[n]o person shall recklessly cause serious physical harm to another." "A person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature" R.C. 2901.22(C).

{¶29} The appellant was charged with, inter alia, 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 purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B).

{¶30} The evidence presented at trial did not support an acquittal on the charge of felonious assault. While the appellant testified that he did not intend to harm Officer Wohlford, the appellee presented seven (7) witnesses who provided evidence regarding

the appellant's words and actions. The appellant, enraged and angry, engaged in a violent physical altercation with Officer Wohlford, grabbing on to his person and crashing into him so forcefully that it took them both to the ground, at which time he placed his hands around Officer Wohlford's neck. The appellant's actions were such that they would "probably cause" serious physical harm to Officer Wohlford, and in fact did. Officer Wohlford suffered significant serious harm, including but not limited to injuries to the back of his head, including multiple skull fractures, multiple brain bleeds, and a concussion with lingering injuries. The jury, who was in the best position to ascertain the veracity of the appellant, did not find the appellant to be a credible witness when he testified that he "did not intend to hurt" Officer Wohlford.

{¶31} The decision regarding whether to request a jury instruction is generally a trial strategy decision. As stated in *Moses,* supra:

> Tactical or strategic trial decisions, even if ultimately unsuccessful, do not generally constitute ineffective assistance. *State v. Carver* (1995), 72 Ohio St.3d 545, 558, 651 N.E.2d 965. The failure to request instructions on lesser-included offenses is a matter of trial strategy and does not establish ineffective assistance of counsel. *State v. Clayton* (1980), 62 Ohio St.2d 45, 402 N.E.2d 1189; *State v. Griffie,* (1996), 74 Ohio St.3d 332, 333, 658 N.E.2d 764. Therefore, appellant's ineffective assistance argument is overruled.

Id. at ¶18.

{¶32} The evidence regarding the appellant's actions supported a finding that he acted knowingly, not merely recklessly. The appellant's trial counsel did not fall below the

objective standard of reasonable representation when he failed to request an instruction on the lesser included offense of simple assault.

{¶33} Further, appellant's trial counsel effectively persuaded the trial court to dismiss the firearm specification contained in the attempted aggravated murder charge, the aggravated robbery charge, and the possession of a weapon while under disability charge. In addition, the appellant's trial counsel persuaded the jury to return a verdict of not guilty on the attempted aggravated murder charge. The fact that appellant's trial counsel did not request a jury instruction on simple misdemeanor assault, particularly when the evidence so strongly supported felonious assault, did not prejudice the appellant.

{¶34} Nor did the appellant's trial counsel fall below the objective standard of reasonable representation with regard to his arguments concerning the appellant's mental state. While appellant's trial counsel did not proffer an insanity defense, his trial strategy included an implication that the appellant's medical condition may have impacted his thought process. To the extent it may have been a diminished capacity argument, clearly the jury did not accept it as such. Further, to the extent it may have been a diminished capacity argument, it benefited the appellant and worked against the appellee. It constitutes trial strategy, and does not rise to the level of ineffective assistance of counsel, as the appellant was not prejudiced by the same.

{¶35} Finally, the appellant's trial counsel did not fall below the objective standard of reasonable representation for failing to challenge whether Officer Wohlford was a "peace officer."

{¶36} R.C. 2935.01(B) defines the term "peace officer" as follows:

"Peace officer" includes, except as provided in section 2935.081 of the Revised Code, a sheriff; deputy sheriff; marshal; deputy marshal; member of the organized police department of any municipal corporation, including a member of the organized police department of a municipal corporation in an adjoining state serving in Ohio under a contract pursuant to section 737.04 of the Revised Code; member of a police force employed by a metropolitan housing authority under division (D) of section 3735.31 of the Revised Code; member of a police force employed by a regional transit authority under division (Y) of section 306.05 of the Revised Code; state university law enforcement officer appointed under section 3345.04 of the Revised Code; enforcement agent of the department of public safety designated under section 5502.14 of the Revised Code; employee of the department of taxation to whom investigation powers have been delegated under section 5743.45 of the Revised Code; employee of the department of natural resources who is a natural resources law enforcement staff officer designated pursuant to section 1501.013 of the Revised Code, a forest-fire investigator appointed pursuant to section 1503.09 of the Revised Code, a natural resources officer appointed pursuant to section 1501.24 of the Revised Code, or a wildlife officer designated pursuant to section 1531.13 of the Revised Code; individual designated to perform law enforcement duties under section 511.232, 1545.13, or 6101.75 of the Revised Code; veterans' home police officer appointed under section 5907.02 of the Revised Code; special police officer employed by a port authority under

section 4582.04 or 4582.28 of the Revised Code; police constable of any township; police officer of a township or joint police district; a special police officer employed by a municipal corporation at a municipal airport, or other municipal air navigation facility, that has scheduled operations, as defined in section 119.3 of Title 14 of the Code of Federal Regulations, 14 C.F.R. 119.3, as amended, and that is required to be under a security program and is governed by aviation security rules of the transportation security administration of the United States department of transportation as provided in Parts 1542. and 1544. of Title 49 of the Code of Federal Regulations, as amended; the house of representatives sergeant at arms if the house of representatives sergeant at arms has arrest authority pursuant to division (E)(1) of section 101.311 of the Revised Code; an assistant house of representatives sergeant at arms; the senate sergeant at arms; an assistant senate sergeant at arms; officer or employee of the bureau of criminal identification and investigation established pursuant to section 109.51 of the Revised Code who has been awarded a certificate by the executive director of the Ohio peace officer training commission attesting to the officer's or employee's satisfactory completion of an approved state, county, municipal, or department of natural resources peace officer basic training program and who is providing assistance upon request to a law enforcement officer or emergency assistance to a peace officer pursuant to section 109.54 or 109.541 of the Revised Code; a state fire marshal law enforcement officer described in division (A)(23) of section 109.71 of the Revised Code; a

> gaming agent, as defined in section 3772.01 of the Revised Code; and, for the purpose of arrests within those areas, for the purposes of Chapter 5503. of the Revised Code, and the filing of and service of process relating to those offenses witnessed or investigated by them, the superintendent and troopers of the state highway patrol.

(Emphasis added.)

{¶37} The court in *State v. Henry*, 10th Dist. Franklin No. 16AP-846, 2018-Ohio-1128, 110 N.E.3d 103, addressed the definition of "peace officer":

> In interpreting the language of R.C. 2935.01, the Supreme Court of Ohio has held that "[t]he use of the word 'includes' in the definition of 'peace officer' evidences an intent that the General Assembly did not mean to exclude other constituted officers who may be granted enforcement powers by the General Assembly." *State v. Colvin,* 19 Ohio St.2d 86, 92, 249 N.E.2d 784 (1969). Rather, in order to determine if an individual is a "peace officer" for purposes of R.C. 2935.01, "it is necessary to ascertain the extent of his [or her] enforcement powers." *Id*.

(Emphasis added.) *Id.* at ¶ 43.

{¶38} The *Henry* court went on to state that Ohio appellate courts have held that "certain officers, albeit not specifically listed under R.C. 2935.01, are "peace officers" within the meaning of that term." *Id*. at ¶45.

{¶39} The case of *State v. Moore,* 2nd Dist. Montgomery No. 18337, 2001 WL 28670, (Jan. 12, 2001) is instructive. In *Moore,* the defendant was taken to the emergency room for treatment. While there, he was "loud and belligerent," "swearing, cussing,

screaming, obnoxious, and distrupt[ive] of the normal flow of the emergency room." *Id*. at *1. The defendant became so disruptive and abusive that emergency room staff requested the assistance of hospital security officers. The defendant bit one of the officers, and was later convicted of assaulting a peace officer. The hospital security officer wore a dark blue uniform, carried a firearm with extra ammunition, mace, handcuffs, an asp tactical baton, and a pocketknife. The defendant appealed, arguing that the officer was not "acting in a traditional police capacity or activity." The court of appeals disagreed and affirmed the conviction, stating that there was "little doubt that [the officer] was acting 'in the performance of his official duties' when he acted to restrain the defendant." *Id.* at *2.

{¶40} In this case, Officer Wohlford had State of Ohio law enforcement and arrest powers over all Genesis properties, wore a uniform, wore a radio holder, and wore a duty belt with numerous "keeps" that strap on to the duty belt in which he carried various items, including handcuffs, a key holder, and a duty belt holster in which he carried a sidearm. As in *Moore,* there is little doubt that Officer Wohlford was acting in the performance of his official duties as a peace officer at Genesis hospital when he was assaulted by the appellant.

{¶41} The appellant's first assignment of error is overruled.

ASSIGNMENT OF ERROR NO. 2

{¶42} In his second assignment of error, the appellant argues that the appellee used legally insufficient evidence to prove he acted knowingly, and that due process therefore requires that his sentence be vacated. We disagree.

STANDARD OF REVIEW

{¶43} Sufficiency of the evidence was addressed by the Ohio Supreme Court in *State v. Worley,* 164 Ohio St.3d. 589, 2021-Ohio-2207, 174 N.E.3d 754:

> The test for sufficiency of the evidence is "whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, *superseded by constitutional amendment on other grounds as stated in State v. Smith*, 80 Ohio St.3d 89, 102, 684 N.E.2d 668 (1997), fn. 4, and following *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). "'Proof beyond a reasonable doubt' is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of the person's own affairs." R.C. 2901.05(E). A sufficiency-of-the-evidence challenge asks whether the evidence adduced at trial "is legally sufficient to support the jury verdict as a matter of law." *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 219.

Id. at ¶57.

{¶44} Thus, a review of the constitutional sufficiency of evidence to support a criminal conviction requires a court of appeals to determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

ANALYSIS

{¶45} The appellant argues that there is insufficient evidence to support the conclusion that the appellant "knowingly" caused Officer Wohlford's injuries while trying to leave his hospital bed. This characterization is misleading. The evidence, summarized above, clearly supports a finding that the appellant stood up during the altercation, grasped onto Officer Wohlford, and when Officer Wohlford glanced to the right took him to the ground, thereafter sitting atop Officer Wohlford with his hands around the Officer's neck. The jury, who was in the best position to ascertain the veracity of the witnesses and weigh the evidence, did not find the appellant to be a credible witness. The evidence regarding the appellant's actions supported a finding that he acted knowingly, not merely recklessly. We find, after viewing the evidence in the light most favorable to the prosecution, that any rational trier of fact could have found the essential elements of the crime of felonious assault beyond a reasonable doubt. Further, we find that any rational trier of fact could have found that Officer Wohlford was a peace officer.

{¶46} Accordingly, the appellant's second assignment of error is overruled.

ASSIGNMENT OF ERROR NO. 3

{¶47} In his third assignment of error, the appellant argues that he was prejudiced because the trial court failed to sua sponte instruct the jury on a lesser included offense and sentencing enhancement that were demonstrated by the evidence. We disagree.

STANDARD OF REVIEW

{¶48} The appellant did not request an instruction on the lesser included offense of simple assault, nor on the peace officer specification. "A party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury

retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection" Crim.R. 30(A). Thus, appellant's third assignment of error is reviewed for plain error. Crim.R. 52(B). *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804.

{¶49} Plain error was addressed by the Ohio Supreme Court in *State v. Payne*, 114 Ohio St.3d 502. 2007-Ohio-4642873 N.E.2d 306:

> "First, there must be an error, *i.e.,* a deviation from the legal rule. * * * Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. * * * Third, the error must have affected 'substantial rights.' We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial." *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240. Courts are to notice plain error "only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, paragraph three of the syllabus.
>
> The burden of demonstrating plain error is on the party asserting it. See, e.g., *State v. Jester* (1987), 32 Ohio St.3d 147, 150, 512 N.E.2d 962. A reversal is warranted if the party can prove that the outcome "would have been different absent the error." *State v. Hill* (2001), 92 Ohio St.3d 191, 203, 749 N.E.2d 274.

Id. at ¶16-17.

ANALYSIS

{¶50} Plain error must only be utilized to prevent a miscarriage of justice. The plain error in the trial court's failure to sua sponte instruct the jury on the lesser included offense of simple assault and the peace officer designation must be obvious, and must have affected the outcome of the trial. Notice of plain error must be taken with the utmost caution, and only under exceptional circumstances.

{¶51} As set forth in *Moses, supra*:

> We next address appellant's argument the trial court erred in failing to instruct the jury on the lesser included offense of robbery. Appellant failed to request such an instruction at trial; therefore, waiving all but plain error, i.e. but for the error, the outcome of the trial clearly would have been otherwise. See, *State v. Goodwin,* 84 Ohio St.3d 331, 347, 703 N.E.2d 1251, 1999 Ohio 356; *State v. Underwood* (1983), 3 Ohio St.3d 12, 444 N.E.2d 1332.
>
> An instruction on a lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense. *State v. Thomas* (1988), 40 Ohio St.3d 213, 533 N.E.2d 286. Upon review, we conclude there is no plain error, and the trial court did not abuse its discretion by not, sua sponte instructing the jury on the lessor included offense.

Id. at ¶19-20.

{¶52} In this case there was sufficient evidence presented at trial to support a finding that the appellant's conduct rose to the level of felonious assault. The facts did not warrant a lesser included offense instruction, and as such the trial court had no duty to give one. *See, also*, *State v. Fouts,* 4th Dist. Washington No. 15CA25, 2016-Ohio-1104, at ¶5, ¶85 ("[j]ust as trial counsel was not required to request a jury instruction that was not warranted by the evidence, likewise, the trial court had no duty to sua sponte give a lesser included offense instruction based on our record.)

{¶53} In addition, the trial court's instruction on felonious assault provided that if the jury found the appellant guilty on count two, felonious assault on a police officer, it was their "duty to deliberate further and to decide if Officer Wohlford was a peace officer." As set forth above, there was sufficient evidence to support a finding that Officer Wohlford was a peace officer. There has been no miscarriage of justice in the matter before us. As such, the appellant's third assignment of error is overruled.

CONCLUSION

{¶54} Based upon the foregoing, the appellant's Assignments of Error Numbers 1, 2, and 3 are overruled, and the judgment of the Muskingum County Court of Common Pleas is hereby affirmed.

By: Baldwin, J.

Gwin, P.J. and

Hoffman, J. concur.