

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2011-P-0003
TERRY L. SAWYER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2010 CR 0148.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Erik E. Jones, Corrigall & Jones, Inc., 57 South Broadway Street, Third Floor, Akron, OH 44308 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} Appellant, Terry L. Sawyer, appeals from the December 22, 2010 judgment of the Portage County Court of Common Pleas, sentencing him on two counts of felonious assault.

{¶2} Appellant was indicted on two counts of felonious assault, felonies of the second degree, in violation of R.C. 2903.11(A)(1) and (2). Appellant pleaded not guilty and the matter proceeded to a jury trial.

{¶3} The state called the following witnesses who collectively established that appellant committed felonious assault upon two victims, Chris Corcoran and Jeff Carroll:

{¶4} Candace Smith testified that she lives in Ravenna with her boyfriend, Nick Woodall. On the evening of November 25, 2009, they invited appellant, Chris, Jeff and his girlfriend Jessica, and Ronnie Legg and his girlfriend Corrie to their house for a party. During the party, there were no problems between appellant and any of the other guests. Later that night, everyone left the party and went to some bars in Kent. Candace and Nick did not witness a scuffle that later occurred outside of a bar among Chris, Jeff, and appellant. At the end of the night, Candace, Nick, Chris, Jeff, and Jessica left Kent and went back to Nick's house.

{¶5} Candace and Nick went to sleep in the back bedroom. Chris, Jeff, and Jessica slept in the living room. Candace and Nick were later awakened to loud noises and yelling. They heard Jeff "freaking out." Candace saw Chris lying on the living room couch with blood "everywhere." Chris' eye was "hanging off his face." She tried to help him. Candace then heard yelling outside. She saw Nick and Jeff outside and appellant with a pipe in his hand. Appellant's car was backed up at the end of the driveway with the driver's side door open. She said that Nick got the pipe from appellant and took it inside the house. Candace and Nick never saw the pipe before. Appellant drove away. Candace and Nick took Chris to the hospital, and Candace spoke with Patrolman Craig Wilmington. The police later came to Nick's house. Candace and Nick told them what they saw and where the blood was located.

{¶6} On cross-examination, Candace testified that after the incident occurred inside the house, Jeff grabbed a knife from the kitchen because he was scared.

{¶7} Nick testified that he had known appellant for about a year. When Nick was awakened that night by Jeff, Nick said that Jeff told him that appellant came over with a “bat.” Nick got up and saw Chris on the living room couch. Nick ran outside and saw appellant holding a pipe in the driveway next to his backed-up car. Nick asked appellant what he was doing. Appellant responded that he was sorry. Nick grabbed the pipe from appellant’s hand and told him to leave. Appellant complied. After Nick and Candace returned home from the hospital, he tried to clean up some of the blood in the living room. Nick did not notice any damage to any other rooms in the house.

{¶8} Later that night, Nick spoke with appellant on the phone. Appellant said he was sorry again for what had happened but did not offer any explanation. Nick told appellant that it was wrong to come over to his house with a pipe. Nick said there was no indication that appellant was a victim or that appellant had to defend himself.

{¶9} Chris testified that he met appellant for the first time at the party. Later that night in Kent, Chris asked appellant outside of a bar if appellant had seen Nick. Chris stated that appellant became aggressive and said, “I don’t know, who you talking to, mother f***er.” Chris said that appellant wanted to fight him. Chris brushed off the comment and turned around. Chris then saw appellant and Jeff “squaring off” in the street. After the scuffle, everyone went their separate ways. Chris was pretty intoxicated. He slept at Nick’s house. Chris remembers waking up with his eye “like hanging out of [his] head.” He did not recall being uncooperative with the police at the hospital.

{¶10} Chris’ injuries consisted of a fractured bone around his right eye, a fractured eye socket, a ruptured tear duct, and severe head trauma. He underwent

reconstructive surgery. However, his tear duct still does not work and his right pupil does not dilate. Several specialists told him that the scar tissue on his retina will never go away. In addition, Chris has a lot of migraine headaches and his eye area is still numb.

{¶11} Jeff testified that he also met appellant for the first time at Nick's house. While in Kent, Chris asked appellant if he had seen Nick. Jeff stated that appellant replied, "no," and told Chris to "get the hell out of [his] face." Jeff tried to separate Chris and appellant. Jeff stated that appellant asked him if he "wanted a piece of him." Jeff and appellant grabbed each other by the shirts but did not throw any punches. Jeff said the altercation in Kent lasted about eight seconds.

{¶12} Jeff testified that he slept on the floor at Nick's house and that Jessica and Chris slept on separate couches in the living room. Jeff, a light sleeper, woke up after hearing a "commotion." He saw appellant coming at him with a pipe. Jeff was able to block some of the force but appellant was able to hit him in the head with the pipe. Jeff saw a flash of light and stumbled to his feet. He saw appellant hit Chris, who was still sleeping on the couch, with the pipe. Jeff said the incident at Nick's lasted about 10 seconds. Jessica remained asleep during the two hits. Jeff ran into the bedroom and told Nick that appellant was there with a "bat." Jeff later determined that appellant had used a pipe rather than a bat. Jeff went into the kitchen and grabbed a knife because he was scared for his life.

{¶13} Jeff went outside and stood on the porch. He heard Nick yell at appellant, "What the hell [are] you doing? You came in and hit my friends in the head with a pipe, what the f*** [are] you doing?" Jeff said that appellant replied, "I should have brought

my gun.” Appellant then apologized to Nick. Nick grabbed the pipe from appellant. Appellant got in his running car, which was backed up in the driveway with its driver’s side door open, and drove away. Jeff and Jessica left Nick’s house and went to Jeff’s residence. Jeff suffered a bruised eye and cuts to his head.

{¶14} On cross-examination, Jeff testified that he was the only one that saw appellant hit him and Chris with the pipe. Jeff did not have a knife at the time of the incident or engage in a fight with appellant inside the living room.

{¶15} Patrolman Wilmington testified that he was dispatched to the hospital to investigate the assault. He met with Chris and photographed his injuries. Chris did not want to talk about the incident, was in a lot of pain, and had a laceration above his eyebrow. Patrolman Wilmington stated that Chris’ eyebrow was partially hanging off and that it was just barely attached to his eyelid.

{¶16} Patrolman Wilmington went to the scene to speak with Nick and Candace. He observed a pool of blood in the living room. Patrolman Wilmington photographed the carpet and couch. He noticed a bottle and scrub brush on the floor. Candace handed him the pipe and he took it into evidence.

{¶17} Detective Scott Krieger testified that about five days after the incident, Chris went to the station and made a statement. Detective Krieger re-photographed Chris’ injuries. Chris’ right eyelid and eyebrow had several stitches. A tube was inserted into Chris’ tear duct. Detective Krieger sent the pipe to the Ohio Bureau of Criminal Identification and Investigation (“BCI”) for testing. Nothing of any evidentiary value came back from the lab.

{¶18} About six days after the incident, Jeff and Nick went to the department to make statements. Detective Krieger photographed Jeff's injuries. He observed a healing cut at the top back portion of Jeff's head. Jeff told Detective Krieger that appellant hit him with a pipe.

{¶19} On cross-examination, Detective Krieger stated that he did not go to the hospital because Patrolman Wilmington told him that Chris was not willing to give a statement at that time. Detective Krieger further stated that he did not go to Nick's house or interview Jessica. He stated that the photographs of Chris' and Jeff's injuries are consistent with the statements made by Chris, Jeff, and Nick.

{¶20} After the close of the state's case-in-chief, appellant filed a Crim.R. 29 motion for acquittal. The trial court overruled it. The defense then presented its case.

{¶21} Ronnie, a friend of appellant's, testified that after bar-hopping in Kent, he and his girlfriend did not go back to Nick's house. On cross-examination, Ronnie said that he did not witness the scuffle that occurred in Kent.

{¶22} Appellant testified that he saw Chris and Jeff outside of a bar in Kent. He said that Jeff asked him for a piece of pizza and he gave him a slice. According to appellant, Chris said that Jeff did not need appellant's "f'ing charity" and an argument erupted between appellant and Chris. Appellant testified that Jeff said, "I'm with Chris." Appellant stated that Jeff walked towards him and that blows were thrown. Appellant said, "[Jeff] hit me, I hit him and his girlfriend jumped on my back." Everyone scattered after someone yelled that the police were coming.

{¶23} Later that night, appellant saw Nick. Appellant said that Nick invited him back over to his house. Appellant drove to Nick's alone. He testified that Jeff and Chris

were standing inside. According to appellant, Chris had a beer bottle in his hand and started towards him. Appellant grabbed a pipe. He said that Jeff grabbed the pipe and punched him. After appellant punched Jeff back, Jeff let go of the pipe and ran for the door. Appellant ran outside to his car. Nick yelled at them for fighting and appellant apologized. Appellant gave Nick the pipe and drove away.

{¶24} On cross-examination, appellant said he never meant to purposefully hurt Chris. Appellant testified he shoved the pipe in Chris' eye because he was trying to protect himself. He stated he never swung the pipe at Jeff and that neither Chris nor Jeff swung the pipe at him.

{¶25} On re-direct examination, appellant testified that he did not have the pipe with him when he entered Nick's house.

{¶26} Appellant renewed his Crim.R. 29 motion for acquittal at the conclusion of all the evidence. The trial court overruled it.

{¶27} The jury found appellant guilty on both counts of felonious assault. Thereafter, appellant filed a motion for new trial on the grounds that the verdict was not sustained by sufficient evidence. The trial court overruled it.

{¶28} The trial court sentenced appellant to concurrent terms of five years in prison for each offense. The court also notified appellant that three years of postrelease control is mandatory. Appellant filed a timely appeal and raises the following assignments of error:

{¶29} "[1.] Appellant's convictions were contrary to the manifest weight of the evidence.

{¶30} “[2.] The appellant proved the defense of self defense by a preponderance of the evidence.

{¶31} “[3.] The trial court erred when it denied appellant’s Criminal Rule 29 motion for acquittal for the charge of felonious assault against Jeffrey Carroll.

{¶32} “[4.] The trial court erred when it denied the appellant’s motion for a new trial.

{¶33} “[5.] The appellant’s conviction should be reversed due to evidentiary ruling errors made by the court.

{¶34} “[6.] The appellant received ineffective assistance of counsel.”

{¶35} In his first assignment of error, appellant argues that his convictions were contrary to the manifest weight of the evidence. Specifically, he contends that the jury saw pictures of the living room after attempts were made to clean the area; there was no forensic evidence on the pipe linking him to the crimes; Detective Krieger did not interview all potential witnesses; and the state’s witnesses all drank alcohol on the night of the incidents.

{¶36} In *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, at *14-15, this court stated:

{¶37} “[M]anifest weight’ requires a review of the weight of the evidence presented, not whether the state has offered sufficient evidence on each element of the offense.

{¶38} “[In determining whether the verdict was against the manifest weight of the evidence, “(***) the court reviewing the entire record, *weighs the evidence* and all reasonable inferences, considers the credibility of witnesses and determines whether in

resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. (***)” (Citations omitted.) ***” (Emphasis sic.)

{¶39} A judgment of a trial court should be reversed as being against the manifest weight of the evidence “only in the exceptional case in which the evidence weighs heavily against the conviction.” *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶40} With regard to the manifest weight of the evidence, we note that the jury is in the best position to assess the credibility of witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶41} In the instant case, again, state witnesses testified that the evening involved alcohol consumption. State witnesses stated that a scuffle occurred among Chris, Jeff, and appellant outside of a bar in Kent and that appellant was the aggressor. Later that night at Nick’s house, Candace and Nick were sleeping in a bedroom and Chris, Jeff, and Jessica were sleeping in the living room. Appellant went to Nick’s, backed up his car in the driveway, kept the engine running, and left the driver’s side door opened. Jeff was first awakened after hearing a “commotion.” Jeff saw appellant come toward him and strike him with a pipe. Jeff also saw appellant hit Chris, who was still asleep. Candace and Nick observed Chris lying on the couch with blood “everywhere” and his eye “hanging off his face.” Neither Candace nor Nick ever saw the pipe before at Nick’s house. Nick stated that appellant later apologized to him and that appellant said it was wrong to come over to his house with a pipe.

{¶42} The jury saw pictures of blood in the living room after attempts were made to clean the area. The jury also heard Nick's testimony that the house he lived in was owned by his mother. Nick stated that his mother would freak out and "kill" him if the furniture and carpet were ruined. Therefore, Nick attempted to clean up the blood after returning from taking Chris to the hospital.

{¶43} Nick said that there was no indication that appellant was a victim or that appellant had to defend himself. Although Jessica was not interviewed by police nor did she testify at trial, Detective Krieger said that the photographs of Chris' and Jeff's injuries were consistent with the statements made by Chris, Jeff, and Nick.

{¶44} Appellant's witness, his friend Ronnie, did not witness the scuffle in Kent among Chris, Jeff, and appellant. Also, Ronnie did not witness the incident that later occurred at Nick's house. Appellant testified that he did not start the scuffle in Kent. Appellant said that he went to Nick's later that night and Chris came after him with a beer bottle. Appellant stated that he grabbed a pipe that was already there and that he was punched by Jeff. Appellant punched Jeff back, then ran outside. Although appellant stresses the lack of forensic evidence on the pipe, we note that on cross-examination, appellant testified that he shoved the pipe in Chris' eye and that he was the only individual with control over the pipe inside Nick's house.

{¶45} The jury was free to believe all, part, or none of the witnesses' testimony. The jury apparently found the state's witnesses more credible than appellant's self-defense claim and placed greater weight on the state's witnesses over appellant and his witness. Based on the evidence presented, pursuant to *Schlee* and *Thompkins*, *supra*,

we cannot say that the jury clearly lost its way in finding appellant guilty of two counts of felonious assault.

{¶46} Appellant's first assignment of error is without merit.

{¶47} In his second assignment of error, appellant contends that he proved the defense of self-defense by a preponderance of the evidence. He alleges that the jury's verdict rejecting his self-defense claim was against the manifest weight of the evidence.

{¶48} "In order to establish a claim of self-defense, the defendant must prove 'by the greater weight of the evidence that (A) (he) was not at fault in creating the situation giving rise to (the altercation); and (B) (he) had reasonable grounds to believe and an honest belief, even if mistaken, that (he) was in (imminent) (immediate) danger of bodily harm.' 4 Ohio Jury Instructions (2006), Section 411.33(2); *State v. Fritz*, 163 Ohio App.3d 276, 2005-Ohio-4736, at ¶20 ***; *Stevens v. Provitt*, 11th Dist. No. 2002-T-0076, 2003-Ohio-7226, at ¶26 ('(s)elf-defense may be asserted if a defendant has reasonable grounds and an honest belief that he was in immediate danger of bodily harm')." *State v. Fink*, 11th Dist. No. 2007-A-0073, 2008-Ohio-1503, at ¶21. (Parallel citation omitted.)

{¶49} In our case, appellant's main contention is that he was not the instigator of the altercations. At the jury trial, appellant took the witness stand and testified. He stated that Chris came after him with a beer bottle at Nick's house. Appellant said that he grabbed a pipe and was punched by Jeff. Appellant punched Jeff back then ran outside. On cross-examination, appellant testified he shoved the pipe in Chris' eye and that he was the only individual with control over the pipe. Appellant admitted he used the pipe as a weapon.

{¶50} This evidence is considered in the context of all evidence presented by the state and previously discussed. Contrary to the argument raised by appellant on appeal that he was not the instigator, the evidence he presented at trial failed to support his claim for self-defense. Also, the evidence appellant presented was contradicted by the state's witnesses. Appellant failed to prove by the greater weight of the evidence that he was not at fault in creating the situation giving rise to the altercations. In addition, appellant did not establish an honest belief that he was in imminent danger of great bodily harm and that his only means of escape from such danger was by the use of force. Appellant further failed to show any impediment preventing him from retreating from the living room and exiting Nick's house.

{¶51} To reiterate the manifest weight of the evidence standard, as a reviewing court, we review the entire record and weigh the evidence giving deference to the jury as finders of fact and reverse only where the jury clearly lost its way and created a manifest miscarriage of justice. *Schlee*, supra, at *14-15.

{¶52} We cannot say that the jury clearly lost its way in rejecting appellant's claim of self-defense.

{¶53} Appellant's second assignment of error is without merit.

{¶54} In his third assignment of error, appellant alleges that the trial court erred by denying his Crim.R. 29 motion for acquittal for the charge of felonious assault against Jeff. Appellant contends that the state presented no evidence that the pipe was a deadly weapon or that Jeff suffered serious physical harm.

{¶55} With regard to a Crim.R. 29 motion for acquittal, in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, the Ohio Supreme Court established the test for determining

whether such a motion is properly denied. The Supreme Court stated that “[p]ursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt.” *Id.* at syllabus. “Thus, when an appellant makes a Crim.R. 29 motion, he or she is challenging the sufficiency of the evidence introduced by the state.” *State v. Patrick*, 11th Dist. Nos. 2003-T-0166 and 2003-T-0167, 2004-Ohio-6688, at ¶18.

{¶56} As this court stated in *Schlee*, *supra*, at *13-14:

{¶57} “‘Sufficiency’ challenges whether the prosecution has presented evidence on each element of the offense to allow the matter to go to the jury, while ‘manifest weight’ contests the believability of the evidence presented.

{¶58} ““(***) The test (for sufficiency of the evidence) is whether after viewing the probative evidence and the inference[s] drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all of the elements of the offense beyond a reasonable doubt. *The claim of insufficient evidence invokes an inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence.* ***”

{¶59} “In other words, the standard to be applied on a question concerning sufficiency is: when viewing the evidence ‘in a light most favorable to the prosecution,’ *** ‘(a) reviewing court (should) not reverse a jury verdict where there is substantial evidence upon which the jury could reasonably conclude that all of the elements of an offense have been proven beyond a reasonable doubt.’ ***” (Emphasis sic.) (Citations omitted.)

{¶60} “*** [A] reviewing court must look to the evidence presented *** to assess whether the state offered evidence on each statutory element of the offense, so that a rational trier of fact may infer that the offense was committed beyond a reasonable doubt.” *State v. March* (July 16, 1999), 11th Dist. No. 98-L-065, 1999 Ohio App. LEXIS 3333, at *8. The evidence is to be viewed in a light most favorable to the prosecution when conducting this inquiry. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. Further, the verdict will not be disturbed on appeal unless the reviewing court finds that reasonable minds could not have arrived at the conclusion reached by the trier of fact. *State v. Dennis* (1997), 79 Ohio St.3d 421, 430.

{¶61} In the present case, appellant is challenging his conviction for felonious assault against Jeff. Although appellant argues in his appellate brief that there was no evidence that Jeff suffered “serious physical harm,” we note that the section of the statute that appellant was indicted under with respect to Jeff requires only “physical harm.” See R.C. 2903.11(A)(2). In addition, appellant’s argument that there was no evidence presented that the pipe was used as a “deadly weapon” also deals with only count two of the indictment dealing with Jeff.

{¶62} For clarification purposes, we note that count one of the indictment, dealing with Chris and not at issue under the present assignment of error, provides that appellant knowingly caused serious physical harm to Chris in violation of R.C. 2903.11(A)(1).

{¶63} Count two of the indictment, dealing with Jeff and the only issue provided under the present assignment of error, states that appellant committed felonious assault in violation of R.C. 2903.11(A)(2) because he knowingly caused or attempted to cause

physical harm to Jeff by means of a deadly weapon or dangerous ordnance, i.e., an aluminum pipe, as defined in R.C. 2923.11.

{¶64} “Physical harm to persons” is defined as “any injury, illness, or other physiological impairment, regardless of its gravity or duration.” R.C. 2901.01(A)(3).

{¶65} “Deadly weapon” is defined as “any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.” R.C. 2923.11(A).

{¶66} Regarding culpable mental states, R.C. 2901.22(B) provides: “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.”

{¶67} Again, the testimony revealed the following: a scuffle occurred among Chris, Jeff, and appellant outside of a bar in Kent; later that night, appellant showed up at Nick’s house; appellant backed up his car in the driveway, kept the engine running, and left the driver’s side door opened; appellant entered Nick’s house while everyone was asleep; Jeff, a light sleeper, woke up after hearing a “commotion;” appellant came after Jeff with a pipe; Jeff was able to block some of the force but appellant was able to hit him in the head with the pipe; Jeff saw a flash of light; Jeff suffered a bruised eye and cuts to his head; Candace and Nick were awakened after hearing Jeff “freaking out;” Jeff, Candace, and Nick saw appellant holding the pipe; and Candace and Nick never saw the pipe before at Nick’s house.

{¶68} The evidence presented was sufficient to establish that appellant knowingly caused physical harm to Jeff by means of a deadly weapon. R.C.

2903.11(A)(2). Appellant used the pipe as a weapon. Jeff suffered physical harm as a result of being hit with the pipe. The evidence sufficiently establishes that the pipe used by appellant was a deadly weapon as it was capable of inflicting death and was possessed, carried, or used as a weapon. R.C. 2923.11(A).

{¶69} Pursuant to *Schlee*, supra, there is sufficient evidence upon which the jury could reasonably conclude beyond a reasonable doubt that the elements of felonious assault with respect to Jeff have been proven.

{¶70} Appellant's third assignment of error is without merit.

{¶71} In his fourth assignment of error, appellant maintains that the trial court erred when it denied his motion for new trial. He alleges again that the verdict was not supported by sufficient evidence because he proved by a preponderance of the evidence that he acted in self-defense. Appellant contends again there was no evidence presented that the pipe was a deadly weapon as charged under count two of the indictment with respect to Jeff. Also, appellant states again that there is no evidence of serious physical harm with regard to Jeff.

{¶72} The allowance or denial of a motion for new trial is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *State v. Hill* (1992), 64 Ohio St.3d 313, 333. An abuse of discretion is the trial court's "failure to exercise sound, reasonable, and legal decision-making." *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶73} Crim.R. 33(A)(4) provides in part: “A new trial may be granted on motion of the defendant for *** causes affecting materially his substantial rights *** [including] that the verdict is not sustained by sufficient evidence or is contrary to law. ***.”

{¶74} As already addressed in appellant’s second assignment of error, based on the evidence presented, we cannot say that the jury clearly lost its way in rejecting appellant’s claim of self-defense. Also, as fully discussed in appellant’s third assignment of error, the evidence presented was sufficient to establish that appellant knowingly caused physical harm to Jeff by means of a deadly weapon, i.e., the pipe.

{¶75} There is sufficient evidence upon which the jury could reasonably conclude beyond a reasonable doubt that appellant did not act in self-defense and that the elements of felonious assault have been proven with respect to Jeff. Thus, the trial court did not abuse its discretion in overruling appellant’s Crim.R. 33(A)(4) motion.

{¶76} Appellant’s fourth assignment of error is without merit.

{¶77} In his fifth assignment of error, appellant argues that his conviction should be reversed due to evidentiary ruling errors made by the court. First, appellant asserts that because Patrolman Wilmington was not qualified as an expert, his testimony identifying the red material in the photographs as blood was inadmissible. Second, appellant alleges that the state did not establish a chain of custody regarding the pipe and that it should not have been allowed into evidence. Third, appellant maintains that the trial court erred by permitting Candace to testify to inadmissible hearsay evidence regarding statements made by Jeff.

{¶78} A “trial court has broad discretion in the admission and exclusion of evidence.” *State v. Hymore* (1967), 9 Ohio St.2d 122, 128. The trial court’s decision on

whether to admit or exclude evidence will be upheld absent an abuse of discretion. *Shull v. Itani*, 11th Dist. No. 2002-L-163, 2004-Ohio-1155, at ¶39.

{¶79} First, regarding appellant's assertion that Patrolman Wilmington was not an expert and that his testimony identifying the red material as blood was inadmissible, we note that the officer provided lay opinion testimony.

{¶80} Evid.R. 701 governs lay opinion testimony and states:

{¶81} "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

{¶82} "A police officer may give a lay opinion that a stain depicted in a photograph appears to be blood where the opinion is based upon the officer's perception and is helpful to a determination of a fact in issue." *State v. Stout* (1987), 42 Ohio App.3d 38, paragraph two of the syllabus.

{¶83} Patrolman Wilmington's lay opinion testimony was based upon his perception of the evidence. He visited the crime scene, observed a pool of blood in the living room, and photographed the area. The pictures were presented as evidence at the trial. Patrolman Wilmington testified that the photographs were a fair and accurate depiction of the carpet and couch area. The photographs also showed a bottle and scrub brush. Prior to showing the photographs to the jury, appellant's counsel asked Patrolman Wilmington on cross-examination if the attempt by Nick to clean up the blood constituted an alteration of the crime scene. He responded in the affirmative. As the state's direct examination continued, Patrolman Wilmington stated that the red

substance he observed in the photographs was blood. Defense counsel objected. The trial court overruled the objection.

{¶84} Patrolman Wilmington's testimony regarding the red substance was properly admissible under Evid.R. 701. The record establishes that defense counsel himself referenced the red substance as blood. Again, Patrolman Wilmington personally observed the extent of Chris' injuries initially at the hospital. He later witnessed the blood stains on the couch and carpet in Nick's living room. Patrolman Wilmington observed a bottle and scrub brush. Nick informed Patrolman Wilmington that he attempted to clean the blood off the couch and carpet. Based on the facts presented, the court did not abuse its discretion in overruling defense counsel's objection.

{¶85} Second, with respect to appellant's contention regarding the chain of custody regarding the pipe, we note that defense counsel raised no objection to the pipe at trial.

{¶86} "It is well established that 'the failure to object [at the trial court level] constitutes a waiver of any claim of error relative thereto, unless, *but for the error, the outcome of the trial clearly would have been otherwise.*' (Emphasis added.)" *State v. Schlee*, 11th Dist. No. 2004-L-070, 2005-Ohio-5117, at ¶28, quoting *State v. Underwood* (1983), 3 Ohio St.3d 12, syllabus, citing *State v. Long* (1978), 53 Ohio St.2d 91; Crim.R. 52(B). "Furthermore, 'notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.'" *Id.*, citing *State v. Gordon* (Mar. 22, 1996), 11th Dist.

No. 92-A-1696, 1996 Ohio App. LEXIS 1078, at *3-4, quoting *Long* at paragraph three of the syllabus.

{¶87} Pursuant to the foregoing, we will review appellant's argument concerning the pipe under a plain error analysis. The record establishes that Candace handed the pipe to Patrolman Wilmington during his investigation of the scene. Patrolman Wilmington took the pipe into evidence. Detective Krieger sent the pipe to BCI to be tested. BCI returned the pipe to the Ravenna Police Department. Patrolman Wilmington transported the pipe from the Ravenna Police Department to the court for trial. We find no plain error in the court's admission of the pipe as the chain of custody was established at trial.

{¶88} Third, appellant alleges that Candace was impermissibly permitted to testify to inadmissible hearsay evidence regarding statements made by Jeff.

{¶89} We note that appellant did not provide any citation to the record indicating which testimony he found to be objectionable. Thus, appellant did not comply with the requirements of App.R. 16(A)(7), which states in part that "[t]he appellant shall include in its brief *** [a]n argument containing the contentions of the appellant *** with citations to the *** parts of the record on which appellant relies." Even assuming *arguendo* that a statement made by Candace regarding Jeff involved alleged hearsay evidence, we stress that Jeff himself testified at the jury trial. Thus, even if there was error, such error was harmless. See *State v. Hutson*, 11th Dist. No. 2007-P-0026, 2008-Ohio-2315, at ¶18-22.

{¶90} Appellant failed to demonstrate that the trial court erred in any of the foregoing evidentiary rulings.

{¶91} Appellant's fifth assignment of error is without merit.

{¶92} In his sixth assignment of error, appellant alleges that he received ineffective assistance of counsel. He contends that his counsel was ineffective because he failed to object to the presentation of the pipe and allowed questioning on the pipe before arguing its admissibility. Also, appellant maintains that his counsel was ineffective because he did not cross-examine on the photographs of Chris' injuries.

{¶93} In evaluating ineffective assistance of counsel claims, we apply the following two-part test enunciated by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668, 687:

{¶94} "[a] convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction *** has two components. 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 *** resulted from a breakdown in the adversary process that renders the result unreliable."

{¶95} "*** When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-688. *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, quoting *Strickland*, *supra*, at 694, states: "[t]o warrant reversal,

‘(t)he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’”

{¶96} This court stated in *State v. Rudge* (Dec. 20, 1996), 11th Dist. No. 95-P-0055, 1996 Ohio App. LEXIS 5807, at *35-36, that: “[s]trategic and tactical decisions will not form the basis of a claim of ineffective assistance of counsel, even if there had been a better strategy available to him. ***’ “Errors of judgment regarding tactical matters do not substantiate a claim of ineffective assistance of counsel.” ***.’ *State v. Lundgren* (Apr. 22, 1994), [11th Dist. No. 90-L-15-125, 1994 Ohio App. LEXIS 1722], at 40-41.”

{¶97} In the present case, defense counsel pursued a self-defense trial strategy. Under the defense’s theory, appellant used the pipe as a weapon to defend himself. Also, under the defense’s theory, the injuries Chris received, which were depicted in the photographs, demonstrated the fear appellant believed he was in and the force he felt was necessary to defend himself. We fail to see, and appellant has not established, how the failure to object to the presentation of the pipe and the failure to cross-examine on the photograph’s of Chris’ injuries prejudiced him. The pipe and photographs were consistent with defense counsel’s theory and self-defense trial strategy.

{¶98} Thus, based on *Strickland*, appellant has failed to demonstrate that his counsel was deficient, or that such deficiency resulted in prejudice to him. Appellant has not shown, pursuant to *Bradley*, that but for his counsel’s claimed unprofessional errors, the result of the proceeding would have been different.

{¶99} Appellant's sixth assignment of error is without merit.

{¶100} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Portage County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.