

[Cite as *State v. DeJoy*, 2011-Ohio-2745.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 10AP-919
 : (C.P.C. No. 09CR-10-6070)
 Samuel J. DeJoy IV, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on June 7, 2011

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for
appellee.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for
appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, Samuel J. DeJoy IV, filed this appeal seeking reversal of a judgment by the Franklin County Court of Common Pleas convicting him on a charge of felonious assault. For the reasons that follow, we affirm in part and reverse in part.

{¶2} This case arises from events that occurred on the evening of November 7 and 8, 2008. On that evening, Arthur Cramer was in Columbus visiting his cousin, Mark Barber. Cramer and Barber went to a party at a house on Summit Street where they met Barber's roommate, Jeremy Van Horne.

{¶3} The three went into a room in the house where a ping pong table was set up for the purpose of playing beer pong, a game in which ping pong balls are bounced into cups filled with beer. At the time they entered, the room was empty. As they completed setting up to play the game, a group of three individuals, including appellant, entered the room and stated that they had been playing on the table and that the table was still theirs. Some back and forth discussion occurred, culminating in a fight between the two groups.

{¶4} Cramer testified that the fight began when appellant threw a beer on Van Horne. Cramer further testified that he was engaged in a fight with a person wearing a Pittsburgh Penguins Sidney Crosby shirt, while Barber was engaged in a fight with a second person. Cramer stated that at that point, appellant stepped forward and stabbed him in the chest with a knife. Cramer described appellant as wearing a polo shirt and a flat-billed black baseball cap.

{¶5} Cramer then testified that he was taken to the hospital, where it was determined that the knife had collapsed one of his lungs and grazed his heart. Doctors also performed exploratory surgery to ensure that there were no further internal injuries. Cramer was released from the hospital three or four days later.

{¶6} A week after the incident, Cramer was interviewed by Columbus police detectives, who showed him a photographic array. Cramer identified the photograph in

the third spot of the array, appellant's photograph, as being that of the person that stabbed him.

{¶7} Jeremy Van Horne testified that he was standing away from where the fighting was happening. Van Horne stated that Cramer was wrestling with a person wearing a white polo shirt when a third person, who Van Horne described as wearing a black MLB hat and something like a sweater, stepped forward and stabbed Cramer. Police detectives showed the photographic array that had been prepared to Van Horne, but Van Horne was not able to identify any of the photographs as being of any of the individuals involved in the fight.

{¶8} Barber testified that when the fight started, he grabbed one of the members of the second group from behind and was holding him while Cramer fought with a person wearing a black Pittsburgh Penguins Sidney Crosby shirt. Barber further testified that the person who stabbed Cramer was wearing a dark colored polo shirt and a black hat. In court, Barber identified appellant as the person who stabbed Cramer. Police detectives showed the photographic array to Barber, and Barber identified the photograph in the second spot of the array as being involved. In court, Barber testified that this identification had not been intended as an identification of the person who stabbed Cramer, but rather was an identification of the person with whom Cramer was fighting when the third person stabbed him.

{¶9} At the conclusion of the state's case, appellant's counsel made a motion for acquittal pursuant to Crim.R. 29, which the trial court denied. Appellant's counsel then rested without calling any additional witnesses.

{¶10} Appellant's counsel asked that the jury be given an instruction on the reliability of witness identification based on *United States v. Telfaire* (1972), 469 F.2d 552. The trial court declined to give the requested instruction, instead giving an instruction on witness identification from Ohio Jury Instructions.

{¶11} During closing argument, the assistant prosecuting attorney during rebuttal argument stated, "[b]ecause I didn't hear – couldn't stand up here and say he wasn't there, could he?" (Tr. 196.) Appellant's counsel requested a sidebar conference, in which he argued that the prosecutor's statement constituted an improper comment on appellant's exercise of his constitutional right to decline to testify at trial. Counsel asked for a mistrial. The trial court declined to declare a mistrial, concluding that the prosecutor's statement was ambiguous. The court also declined to give an immediate curative instruction, but included in the instructions that were subsequently given an instruction that the jury was not to consider for any purpose the fact that appellant declined to testify.

{¶12} The jury returned a verdict of guilty. At sentencing, the state offered a form seeking restitution in the amount of \$5,400 representing an unpaid medical bill. Appellant's counsel offered pictures taken of appellant after the incident showing appellant with a black eye in support of counsel's contention that appellant should be sentenced to a term of community control. The prosecutor argued that presentation of the pictures was inappropriate, as they would only have been relevant to a self-defense claim that appellant did not raise. The trial court nevertheless accepted the pictures for consideration.

{¶13} The trial court sentenced appellant to a period of three years of incarceration. The court also ordered that appellant pay restitution in the amount of \$5,400.

{¶14} Appellant then filed this appeal, and asserts five assignments of error:

ASSIGNMENT OF ERROR # 1

THE STATE VIOLATED APPELLANT'S 5TH AND 14TH AMENDMENT RIGHTS AGAINST SELF INCRIMINATION AND TO REMAIN SILENT WHEN IT IMPROPERLY COMMENTED ON THE APPELLANT'S DECISION NOT TO TESTIFY, AND THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO DECLARE A MISTRIAL.

ASSIGNMENT OF ERROR # 2

APPELLANT'S DUE PROCESS RIGHTS UNDER THE 6TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1 AND 16 OF THE OHIO CONSTITUTION WERE VIOLATED WHEN THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO INSTRUCT THE JURY WITH A REQUESTED *TELFAIRE* CHARGE ON WITNESS IDENTIFICATION.

ASSIGNMENT OF ERROR # 3

APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR # 4

THE SENTENCE WAS CONTRARY TO LAW.

ASSIGNMENT OF ERROR # 5

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 10, 16 OF THE OHIO CONSTITUTION.

{¶15} Initially, we address appellant's motion to supplement the record with: (1) the photographs of appellant offered at the sentencing hearing showing him with a black eye after the incident; and (2) an affidavit executed by appellant's father, stating that the assistant prosecuting attorney was pointing at appellant when she made the statement during closing argument that "[b]ecause I didn't hear – couldn't stand up here and say he wasn't there, could he?" The state does not object to supplementing the record with the photographs, but argues that it would be improper to supplement the record with the affidavit.

{¶16} The photographs were offered to the trial court during the sentencing hearing. Thus, it is appropriate for those photographs to be incorporated into the record. As for the affidavit, we question the appropriateness of introducing that type of evidentiary material at this stage of the proceedings. Moreover, we do not believe the affidavit is relevant to our disposition of this appeal. Consequently, appellant's motion to supplement the record is sustained as to the photographs, but denied as to the affidavit.

{¶17} In his first assignment of error, appellant argues that the trial court abused its discretion when it declined to declare a mistrial after the assistant prosecuting attorney purportedly commented on appellant's decision not to testify at trial during closing arguments. Generally, appellate courts will not disturb a trial court's decision on whether to grant a mistrial in the absence of an abuse of discretion. *State v. Sidibeh*, 10th Dist. No. 10AP-331, 2011-Ohio-712.

{¶18} Prosecutors are normally given wide latitude in their closing arguments. *State v. Maurer* (1984), 15 Ohio St.3d 239. However, a prosecutor may not comment on a defendant's failure to testify at trial, as such comments may violate the defendant's

Fifth Amendment rights. *State v. Fears*, 86 Ohio St.3d 329, 1999-Ohio-111. The test for determining whether such a violation has occurred is whether "the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Id.* at 336, citing *State v. Webb* (1994), 70 Ohio St.3d 325.

{¶19} In this case, the trial court expressed concern that the assistant prosecuting attorney's statement that, "[b]ecause I didn't hear – couldn't stand up here and say he wasn't there, could he?" was close to being an improper comment on appellant's exercise of his right not to testify, but ultimately concluded that the statement was ambiguous. We agree. Although the assistant prosecuting attorney's statement could be characterized as being a comment on the fact that appellant did not testify, it could as easily be characterized as a comment on the fact that all of the evidence showed that appellant was present at the party, and that there was no dispute on that point. Thus, we cannot say that the assistant prosecuting attorney's statement was clearly intended as a comment on appellant's decision not to testify, nor was it of such character that the jury would naturally and necessarily have taken it as a comment on appellant's failure to testify.

{¶20} Consequently, the trial court did not abuse its discretion when it declined to declare a mistrial. Therefore, appellant's first assignment of error is overruled.

{¶21} In his second assignment of error, appellant argues that the trial court abused its discretion when it declined to give the jury a proffered instruction on witness identification as set forth in *Telfaire*. The *Telfaire* instruction requires a jury to consider "the capacity and opportunity of the witness to observe the defendant; the identification

being or not being the product of the witness' own recollection, given the strength of the identification and the circumstances under which it was made; the inconsistent identifications that may have been made by the witness; and the general credibility of the witness." *State v. Guster* (1981), 66 Ohio St.2d 266, fn. 1.

{¶22} The Supreme Court of Ohio has approved the language of the *Telfaire* instruction, but has not mandated its use in Ohio courts, instead concluding that whether to give the instruction is left to the sound discretion of the trial court. *Id.* at syllabus. Appellate courts have found no abuse of discretion in a trial court's failure to give the *Telfaire* instruction where the court has provided a different instruction that adequately addresses the issues of witness identification and credibility. See *State v. Allen*, 10th Dist. No. 07AP-473, 2008-Ohio-700.

{¶23} In this case, the instruction given by the trial court was as follows:

Some things you may consider in weighing the testimony of identifying witnesses are capacity of the witness, that is, the age, intelligence, defective senses, if any, and the opportunity of the witnesses to observe; the witness' degree of attention at the time he observed the offender; the accuracy of the witness' prior description or identification, if any; whether the witness had had occasion to observe the defendant in the past; the interval of time between the event and the identification; all surrounding circumstances under which the witness has identified defendant, including deficiencies, if any, in lineup, photo display, or one-on-one.

If, after examining the testimony of the identifying witness you are not convinced beyond a reasonable doubt the defendant is the offender, you must find the defendant not guilty.

(Tr. 210-11.)

{¶24} The trial court took this instruction from Ohio Jury Instructions, section 409.05. We have concluded that a trial court does not err when it uses the instruction set forth in section 409.05. *State v. Pilgrim*, 184 Ohio App.3d 675, 2009-Ohio-5357. Because the instruction given by the trial court represented an accurate statement of the law on witness identification, the trial court did not abuse its discretion when it denied appellant's request that the jury be given a *Telfaire* instruction.

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

{¶26} In his third assignment of error, appellant argues that his conviction was against the manifest weight of the evidence. In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a "thirteenth juror." Under this standard of review, the appellate court weighs the evidence in order to determine whether 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. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. However, in engaging in this weighing, the appellate court must bear in mind the factfinder's superior, first-hand perspective in judging the demeanor and credibility of witnesses. See *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The power to reverse on "manifest weight" grounds should only be used in exceptional circumstances when "the evidence weighs heavily against the conviction." *Thompkins* at 387.

{¶27} A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was offered at trial. *State v. Campbell*, 10th Dist. No. 07AP-1001, 2008-Ohio-4831. The trier of fact is free to believe or disbelieve any or all of the testimony presented. *State v. Jackson*, 10th Dist. No. 01AP-973, 2002-Ohio-

1257. The trier of fact is in the best position to take into account the inconsistencies in the evidence, as well as the demeanor and manner of the witnesses, and to determine which witnesses are more credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503. Consequently, although appellate courts must sit as a "thirteenth juror" when considering a manifest weight argument, it must also give great deference to the trier of fact's determination on the credibility of the witnesses. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037.

{¶28} In support of his argument that his conviction was against the manifest weight of the evidence, appellant points to inconsistencies between the testimony of the various witnesses presented at trial. Specifically, appellant points to: (1) inconsistencies between the testimony of Cramer, Van Horne, and Barber as to the clothing worn by the person with whom Cramer was fighting and the person who stabbed him; (2) Cramer's description of the manner in which he was stabbed, which appellant argues could not have occurred in the manner Cramer described; and (3) the fact that all of the witnesses testified that they had consumed alcohol during the party.

{¶29} We cannot say that the evidence cited by appellant is such that the jury clearly lost its way in convicting appellant. The jury as trier of fact was in the position to evaluate the credibility of the witnesses and to resolve any inconsistencies between the testimony offered. Thus, this is not one of the rare cases requiring reversal because the conviction is against the manifest weight of the evidence.

{¶30} Consequently, appellant's third assignment of error is overruled.

{¶31} In his fourth assignment of error, appellant argues that the sentence imposed on appellant was contrary to law. First, appellant argues that the \$5,400 in

restitution ordered by the trial court was not supported by competent, credible evidence in the record. Appellant also argues that the trial court should have held an evidentiary hearing regarding the amount of restitution.

{¶32} We note that appellant did not object to the court's restitution order during the sentencing hearing, but instead filed a pleading entitled a "MOTION TO OBJECT TO RESTITUTION" three days after the sentencing hearing. Because appellant failed to raise a timely objection to the restitution order, we review for plain error. *State v. White*, 10th Dist. No. 10AP-34, 2011-Ohio-2364. In order to constitute plain error, the error must be so obvious that it should have been apparent to the trial court without objection. *Id.*

{¶33} An order of restitution must be supported by competent, credible evidence in the record from which the amount of restitution can be discerned to a reasonable degree of certainty. *State v. Strickland*, 10th Dist. No. 08AP-164, 2008-Ohio-5968. The evidence to support a restitution order can take the form of either documentary evidence or testimony. *State v. Holt*, 8th Dist. No. 95520, 2011-Ohio-1582. The court can base the restitution order on "an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information." R.C. 2929.18(A)(1).

{¶34} In this case, the only basis for the trial court's order of restitution in the amount of \$5,400 was a form titled "RESTITUTION REQUESTED" signed by the assistant prosecuting attorney, and the assistant prosecuting attorney's statement during the sentencing hearing that the amount represented one medical bill incurred by

Cramer that had not been paid. A copy of the bill itself was not offered, and no other evidence regarding the bill was offered.

{¶35} This did not constitute sufficient competent, credible evidence to have allowed the trial court to discern to a reasonable degree of certainty that restitution should have been ordered. Consequently, we sustain appellant's fourth assignment of error as to the trial court's restitution order, and remand the case to the trial court for further consideration on the issue of restitution.

{¶36} Appellant also argues under his second assignment of error that the trial court erred when it sentenced him to a period of incarceration rather than community control. The Supreme Court of Ohio has set forth a two step process for review of a felony sentence: the appellate court first looks to whether the sentence is clearly and convincingly contrary to law, i.e., whether the sentencing court has complied with all applicable sentencing statutes; if so, the appellate court considers whether the sentencing court abused its discretion in the sentence it imposed. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. *Kalish* was a plurality opinion, and therefore is of limited precedential effect. Since *Kalish*, we have applied prior precedent in which we have limited our review to whether the sentence was clearly and convincingly contrary to law. *State v. Allen*, 10th Dist. No. 10AP-487, 2011-Ohio-1757.

{¶37} Regardless of which approach is used, appellant's argument fails because the sentence imposed by the trial court was not contrary to law, and we cannot say the trial court abused its discretion when it imposed the sentence. Appellant's conviction was for a felony of the second degree. Consequently, pursuant to R.C. 2929.13(D)(1), there was a presumption that a prison term would be imposed in order to comply with

the purposes and principles of sentencing. The presumption in favor of a prison term can be overcome if the trial court makes two findings: (1) a community control sanction would adequately punish the offender and protect the public from future crime, and (2) a community control sanction would not demean the seriousness of the offense. R.C. 2929.13(D)(2).

{¶38} In this case, at the sentencing hearing, the trial court specifically concluded that a community control sanction would demean the seriousness of the offense. The court also stated that it had considered the factors it was required to consider in imposing a sentence, and determined that a three-year sentence was appropriate. Thus, the sentence imposed was not clearly and convincingly contrary to law. Furthermore, assuming that we must apply the second step of the *Kalish* analysis, we cannot say the trial court abused its discretion in the sentence it imposed.

{¶39} Consequently, appellant's fourth assignment of error is overruled to the extent that appellant argues that the trial court erred in imposing the sentence it did.

{¶40} In his fifth assignment of error, appellant argues that he received ineffective assistance of counsel. In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that trial counsel's performance fell below an objective level of reasonable representation and that the defendant suffered prejudice as a result. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S. Ct. 2052.

{¶41} Appellant argues that trial counsel was ineffective in three respects. First, appellant argues that counsel failed to object to several instances of prosecutorial misconduct, including instances in addition to the one raised in appellant's first assignment of error in which appellant argues that the assistant prosecuting attorney

commented on appellant's failure to testify.¹ Appellant also argues that prosecutorial misconduct occurred when the assistant prosecuting attorney continually asked leading questions of the witnesses, and that his trial counsel's failure to object to those leading questions constituted ineffective assistance of counsel.

{¶42} Failure to object to prosecutorial misconduct "does not constitute ineffective assistance of counsel per se, as that failure may be justified as a tactical decision." *State v. Gumm*, 73 Ohio St.3d 413, 428, 1995-Ohio-24. Furthermore, we have already concluded that the prosecutor's statement that "[b]ecause I didn't hear – couldn't stand up here and say he wasn't there, could he?" was ambiguous and was therefore not manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on appellant's decision not to testify. Similarly, the other statements appellant argues were improper comments on the decision not to testify were ambiguous, and were not manifestly intended or of such character that the jury would naturally and necessarily take it to be a comment on appellant's decision not to testify. As such, because it appears that any objections on the grounds of prosecutorial misconduct based on those statements would not have been successful, trial counsel was not ineffective for failing to raise those objections.

{¶43} As to appellant's claim that trial counsel was ineffective for failing to object to leading questions by the assistant prosecuting attorney, we cannot say that the outcome of the trial would clearly have been different if trial counsel had objected to

¹ In addition to the statement cited in appellant's first assignment of error, appellant points to statements made by the prosecutor that "[w]e don't know, there's been no evidence presented, no one knows who the other two guys are or were," and "I don't have to prove – I don't know why that man stabbed Art Cramer. I don't think anybody does. I don't know why and I'm not going to profess or stand up here and tell you why. Only he knows." (Tr. 168, 194.)

those questions. Consequently, even assuming that appellant is correct in his assertion that the questions cited constituted improper leading questions, appellant cannot satisfy the prejudice prong of the *Strickland* test.

{¶44} Appellant further argues that trial counsel was ineffective for failing to object to the court's restitution order in a timely manner and for failing to object to the sentence imposed by the trial court. Our disposition of appellant's fourth assignment of error establishes that appellant cannot show prejudice for purposes of establishing ineffective assistance of counsel.

{¶45} Finally, appellant argues that trial counsel was ineffective for failing to assert a claim of self-defense. A defendant does not receive ineffective assistance of counsel merely by trial counsel's failure to pursue every possible trial strategy. *State v. Wiley*, 10th Dist. No. 03AP-340, 2004-Ohio-1008. In assessing trial counsel's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

{¶46} In this case, at the sentencing hearing, trial counsel stated that he had considered asserting self-defense, but ultimately had not pursued that option. It is clear that trial counsel chose to defend the case by asserting that there was insufficient proof that appellant was the person that stabbed Cramer. We cannot say that this decision fell outside the wide scope of reasonable professional assistance.

{¶47} Consequently, appellant's fifth assignment of error is overruled.

{¶48} Having overruled appellant's first, second, third, and fifth assignments of error, and having overruled in part and sustained in part appellant's fourth assignment of

error, we affirm in part and reverse in part, and remand this case to the Franklin County Court of Common Pleas for further proceedings consistent with our opinion.

*Motion to supplement the record sustained
as to the photographs, denied as to the affidavit.
Judgment affirmed in part, reversed in part,
and cause remanded.*

BRYANT, P.J., and KLATT, J., concur.
