[Cite as *State v. Edwards*, 2011-Ohio-3157.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 10AP-681
v.	:	(C.P.C. No. 09CR-10-6405)
Sanders Edwards,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 28, 2011

Ron O'Brien, Prosecuting Attorney, and *Sarah W. Creedon*, for appellee.

Howard Legal LLC, and *Felice Howard*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendant-appellant, Sanders Edwards, appeals the judgment of the Franklin County Court of Common Pleas, which convicted him of felonious assault and ordered him to pay $500 in restitution. We affirm.

{¶2} Appellant was indicted on one count of felonious assault, one count of aggravated robbery, and two counts of robbery. The charges arose from appellant's attack on Michael Lackey. Appellant pleaded not guilty, and a jury trial ensued.

{¶3} At trial, Lackey testified as follows on direct-examination. Lackey met appellant at a mental health support center. Lackey suffers from bipolar depression and volunteers at the center. Lackey saw appellant at the center on September 3, 2009, and invited appellant to his apartment for dinner. While at the apartment, they drank beer and smoked marijuana. They had a consensual sexual encounter, and appellant spent the night.

{¶4} While at his apartment on September 5, 2009, Lackey heard someone knocking at his door. It was appellant, and Lackey let him in. After they talked for awhile, appellant grabbed a paperweight and assaulted Lackey with it. Lackey ran to the support center and called the police.

{¶5} The police had Lackey transported to a hospital, where doctors told him that his facial bones were broken. He left the hospital the next day, and he went to the support center. Upon seeing appellant at the center, Lackey called the police and pointed him out to them. Afterward, Lackey noticed items missing from his home, and he told the police about this, too.

{¶6} One of the items missing was his draft of plans that would enable a utility company to obtain alternative sources of energy. He said that he was serious about selling these plans to a utility company and that they were not a "delusion." (Tr. Vol. I,

207.) Lackey also testified that he has never been diagnosed "as someone that is delusional or someone that hears things or sees things that aren't there." (Tr. Vol. I, 175.) Lastly, Lackey testified on direct examination that he checked himself into a mental heath hospital for treatment because of the stress from being attacked by appellant.

{¶7} On cross-examination, Lackey testified that he has had other kinds of mental health issues besides bipolar depression, but he could not recall what they were. He also testified that he was diagnosed with neuropathy, which is a prediabetic condition causing numbness to his fingers and toes, and he said that the condition does not affect his perception. Next, he testified that at the time he was assaulted, he was taking prescribed pain medications, Neurontin and Amatripoline. He also verified that he had smoked marijuana around that time for medicinal purposes, but he said that his judgment and perception were not impacted from his mixing marijuana with his prescription medication.

{¶8} Also on cross-examination, appellant's defense counsel attempted to show that Lackey was litigious. Specifically, defense counsel asked if Lackey sued the city after he injured his head on the sidewalk during another incident, but Lackey said no. Likewise, defense counsel asked if Lackey had consulted a lawyer about the fact the security door to his apartment complex was not working at the time appellant entered the building to assault him. Lackey said that he contacted a lawyer about the

matter, but took no further action. Lackey also denied wanting to bring a lawsuit against appellant, but he acknowledged that he wanted to obtain a protection order against him.

{¶9} Columbus Police Officer Matthew Hauser went to Lackey's apartment after the assault. He testified that the coffee table there had been broken and there were several droplets of blood on the floor around the table. He testified that State's Exhibit 3 depicted the broken coffee table. Columbus Police Detective Todd Cress testified that Lackey identified appellant in a photo array as the person who assaulted and robbed him. When Cress interviewed appellant about the incident, he admitted to punching Lackey in the face multiple times because Lackey was making sexual advances toward him, although he said the incident happened outside on the street and not in Lackey's apartment.

{¶10} Before closing argument, the trial court agreed to the defense's request to let the jury consider aggravated assault as an alternative to the felonious assault charge. An aggravated assault conviction would be a fourth-degree felony; a felonious assault conviction would be a second-degree felony.

{¶11} During closing argument, the prosecutor asserted that in order for the jury to render a guilty verdict for aggravated assault, it must find that Lackey provoked appellant into trying to kill him. The prosecutor also said that appellant was "lying about some things in [his] statement to the police." (Tr. Vol. II, 327.) The prosecutor explained that evidence of damage to Lackey's property belied appellant's claim to Cress that he committed the assault outside in the street. Also, referring to that

damage, the prosecutor said that Lackey was not "exaggerating his loss here. He's not making things up." (Tr. Vol. II, 333.) Defense counsel noted during closing argument that an aggravated assault offense occurs when a person is provoked to the point that "they use deadly force. Not so much that they mean to kill but that they use something that could kill." (Tr. Vol. II, 349.) During rebuttal argument, the prosecutor clarified that aggravated assault required "provoking a person into using deadly force." (Tr. Vol. II, 359.) And the trial court instructed the jury that aggravated assault involves "serious provocation occasioned by the victim that is reasonably sufficient to incite the [defendant] into using deadly force." (Tr. Vol. II, 369.)

{¶12} The jury found appellant guilty of felonious assault and not guilty of the remaining charges. During the sentencing hearing, the trial court sentenced appellant to four years imprisonment. At the hearing, defense counsel claimed that appellant was indigent, and the court did not impose fines or costs. Nevertheless, the court ordered appellant to pay $500 restitution to Lackey to cover his deductible for the insurance claim he made for items that were damaged during the felonious assault. Before the court ordered restitution, defense counsel noted that, at the time of the offense, appellant "had a job making funnel cakes for one of those carnival type deals" and "that the employment's still open to him." (May 13, 2010 Tr. 5.) In its sentencing entry, the trial court stated that it "considered [appellant's] present and future ability to pay" restitution. (June 25, 2010 Judgment Entry, 2.)

{¶13} Appellant appeals, raising two assignments of error:

> [I.] Mr. Edwards' right to the effective assistance of counsel was violated when counsel's performance fell below an objectively reasonable standard and his deficient performance resulted in prejudice at trial.
>
> [II.] The trial court committed plain error when in ordering restitution without considering Mr. Edwards' present and future ability to pay.

{¶14} In his first assignment of error, appellant argues that his defense counsel rendered ineffective assistance. We disagree.

{¶15} The United States Supreme Court established a two-pronged test for ineffective assistance of counsel. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. First, the defendant must show that counsel's performance was outside the range of professionally competent assistance and, therefore, deficient. Id., 466 U.S. at 687, 104 S.Ct. at 2064. Second, the defendant must show that counsel's deficient performance prejudiced the defense and deprived the defendant of a fair trial. Id. A defendant establishes prejudice if "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." Id., 466 U.S. at 694, 104 S.Ct. at 2068.

{¶16} Appellant first contends that his defense counsel was ineffective for failing to object to the prosecution asking its witnesses leading questions. Evid.R. 611(C) provides that leading questions should not be used on direct examination of a witness except as may be necessary to develop his testimony. Due to a trial court's broad discretion to allow leading questions, however, an attorney's decision not to object is

within the realm of trial strategy. *State v. Tyler*, 10th Dist. No. 05AP-989, 2006-Ohio-6896, ¶37. Thus, we need not second-guess the decision of appellant's defense counsel to not object to leading questions. See *Tyler* at ¶37-38. See also *State v. Jackson*, 92 Ohio St.3d 436, 449, 2001-Ohio-1266 (declining to find ineffective assistance of counsel from an attorney's failure to object to excessive leading questions by the prosecution).

{¶17} In any event, Lackey testified to the essential aspects of the assault in narrative form with the prosecutor merely asking "[w]hat happened" and "[w]hat happened next?" (Tr. Vol. I, 183-85.) And, as for any of the leading questions, the prosecutor could have simply rephrased them. For all these reasons, we conclude that appellant's defense counsel was not ineffective for failing to object to the prosecution asking its witnesses leading questions.

{¶18} Next, appellant argues that his counsel was ineffective for failing to object when the prosecutor said during closing argument that Lackey was not "exaggerating his loss here. He's not making things up." (Tr. Vol. II, 333.) Appellant contends that this statement from the prosecutor improperly vouched for Lackey's credibility. A prosecutor improperly vouches for a witness's credibility by implying knowledge of facts outside the record. *State v. Dennis*, 10th Dist. No. 08AP-369, 2008-Ohio-6125, ¶15. A prosecutor is permitted, however, to make a fair comment on the credibility of witnesses based upon their testimony in open court. Id. Here, the prosecutor made a fair statement about Lackey's credibility based on evidence verifying his testimony that he

sustained property damage during the assault, and thus, appellant's defense counsel was not ineffective for failing to object to that statement. Id. at ¶16, 29.

{¶19} Appellant also argues that his counsel was ineffective for not objecting when the prosecutor said during closing argument that appellant was "lying about some things in [his] statement to the police." (Tr. Vol. II, 327.) We have already recognized that the prosecutor was referring to the fact that evidence of damage to Lackey's property belied appellant's claim to Cress that he committed the assault outside in the street. Thus, the prosecutor's statement against appellant's credibility was rooted in evidence, and defense counsel did not render ineffective assistance when he failed to object to it. See *State v. Hill* (1996), 75 Ohio St.3d 195, 204 (finding no prejudice from a prosecutor's statement that a defendant lied because "the prosecutor did not suggest that the jury should doubt [the defendant's] credibility based simply on the fact that the prosecutor believed him to be a liar, but rather referred to evidence of [the defendant's] inconsistent statements, which suggested falsity"). See also *State v. Shaw* (Sept. 23, 1999), 10th Dist. No. 98AP-1338 (concluding that a defendant was not prejudiced from a prosecutor calling defense witnesses liars because the statement was "based upon the testimony and evidence presented at trial").

{¶20} Appellant additionally claims that his defense counsel was ineffective for not objecting to the prosecutor misinforming the jury about the definition of aggravated assault during closing argument. R.C. 2903.12(A) states that aggravated assault "is brought on by serious provocation occasioned by the victim that is reasonably sufficient

to incite the person into using deadly force." Deadly force means any force that carries a substantial risk that it will proximately result in the death of any person. R.C. 2901.01(A)(2).

{¶21} Appellant asserts that the prosecutor misconstrued the definition of aggravated assault by arguing that in order for the jury to render a guilty verdict on that offense, it must find that Lackey provoked appellant into trying to kill him. Appellant contends that this misstatement interfered with the jury's ability to consider aggravated assault as an alternative to felonious assault. But the jury had sufficient grounds to discount the prosecutor's misstatement about aggravated assault, and therefore, appellant was not prejudiced by it. In particular, appellant's defense counsel corrected the prosecution during his closing argument, noting that an aggravated assault offense occurs when a person is provoked to the point that they "use deadly force. Not so much that they mean to kill but that they use something that could kill." (Tr. Vol. II, 349.) And, during rebuttal argument, the prosecutor clarified that aggravated assault involved "provoking a person into using deadly force." (Tr. Vol. II, 359.) Also, the trial court instructed the jury that aggravated assault involves "serious provocation occasioned by the victim that is reasonably sufficient to incite the [defendant] into using deadly force." (Tr. Vol. II, 369.) This was a proper instruction, and the jury is presumed to follow the court's instructions. *State v. Stallings*, 89 Ohio St.3d 280, 286, 2000-Ohio-164. Consequently, appellant's counsel did not render ineffective assistance by failing to

object to the prosecutor misinforming the jury about the definition of aggravated assault during closing argument.

{¶22} Lastly, appellant argues that his counsel failed to put on an adequate defense. Appellant complains that Lackey was never confronted with information in his medical records (1) describing him as litigious, delusional, and having grandiose ideas, (2) discussing an unprovoked violent outburst he had at the mental health hospital, (3) mentioning that, at the time of the felonious assault, he was using more prescription drugs than the Neurontin and Amatripoline he testified about, and (4) referring to his use of marijuana as a form of substance abuse, and not, as he testified, for a legitimate medical purpose. But the medical records were admitted into evidence, and therefore, this information was already before the jury.

{¶23} Appellant also asserts that his counsel should have asked Lackey if his mental illness caused him to engage in self-injurious behavior and about what the warning labels on his medications said. Likewise, appellant claims that his defense counsel failed to call a witness who would have corroborated his statement to police that the altercation with Lackey occurred in the street. Appellant, however, is assuming evidence not in the record. "An appellate court's direct review of an ineffective assistance claim 'is strictly limited to the record that was before the trial court' and cannot be based upon speculation." *State v. McClurkin*, 10th Dist. No. 08AP-781, 2009-Ohio-4545, ¶61, quoting *State v. Lewis*, 10th Dist. No. 04AP-1112, 2005-Ohio-6955, ¶35-36.

{¶24} In any event, the jury could have reasonably rejected appellant's proposed evidence given that he admitted to attacking Lackey under the version of events he told Cress. In addition, appellant's defense counsel obtaining an acquittal on the bulk of the charges refutes appellant's claim that he was not given an adequate defense.

{¶25} For all these reasons, we conclude that appellant's counsel did not render ineffective assistance. We overrule appellant's first assignment of error.

{¶26} In his second assignment of error, appellant argues that the trial court committed plain error by ordering him to make restitution without determining his present and future ability to pay, as required by R.C. 2929.19(B)(6). We disagree.

{¶27} Because appellant did not raise this issue in the trial court, he forfeited all but plain error. See *State v. Policaro*, 10th Dist. No. 06AP-913, 2007-Ohio-1469, ¶6. Plain error exists when there is error, the error is an obvious defect in the proceedings, and the error affects substantial rights. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. A court recognizes plain error with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. Id.

{¶28} Appellant notes that the trial court never asked him about his financial status, employment history, skill level or educational background. There are no express factors to be considered or specific findings to be made when a court determines a defendant's present and future ability to pay restitution, however. *State v. Conway*, 10th Dist. No. 03AP-1120, 2004-Ohio-5067, ¶7. Rather, we need only determine whether

there is some evidence in the record that the trial court considered a defendant's present and future ability to pay restitution. Id.

{¶29} Appellant asserts that the trial court could not properly conclude that he had a present and future ability to pay restitution because he was indigent. Appellant relies on *State v. Moody*, 5th Dist. No. 09 CA 90, 2010-Ohio-3272, ¶44-57, where the appellate court reversed a restitution order imposed on an indigent defendant. In *Moody*, the appellate court concluded that the restitution order could not stand under R.C. 2929.19(B)(6) because "the trial court specifically stated on the record that it was 'aware of the likelihood that the defendant may not be able to contribute to [restitution].' " Id. at ¶53-55. *Moody* is inapplicable because the trial court made no similar type of statement directly indicating appellant's inability to pay restitution.

{¶30} Furthermore, this court has held that the fact that a defendant is indigent is not a bar to an order for restitution. *Conway* at ¶6. For instance, here, although defense counsel claimed that appellant was indigent, he provided no proof that appellant was unable to either start making some restitution payments or satisfy his restitution order with payments in the future. See *State v. Collier*, 184 Ohio App.3d 247, 2009-Ohio-4652, ¶13 (recognizing the defendant's burden to demonstrate an inability to pay a financial sanction when presented with the opportunity to do so). In fact, defense counsel noted that appellant was employed at the time of the felonious assault and that his employer was "open" to continuing his employment. (May 13, 2010 Tr. 5.) This information allowed the trial court to consider that appellant would be able to pay off his

$500 restitution order because he had been making money prior to the sentencing hearing, and he would be employable in the future after his release from prison. Finally, also supporting the trial court's restitution order is that the court confirmed in the sentencing entry that it considered appellant's "present and future ability to pay." (June 25, 2010 Judgment Entry, 2.)

{¶31} In short, there is sufficient evidence in the record to show that the trial court considered appellant's present and future ability to pay when it imposed the restitution order. There being no error, let alone plain error, we overrule appellant's second assignment of error.

{¶32} In summary, we overrule appellant's first and second assignments of error. Accordingly, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and DORRIAN, JJ., concur.