**[Cite as *State v. Kovacic*, 2012-Ohio-219.]**

**IN THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**LAKE COUNTY, OHIO**

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| STATE OF OHIO, | : | **O P I N I O N** |
| Plaintiff-Appellee, | : | **CASE NO. 2010-L-065** |
| - vs - | : | |
| DANIEL EDWARD KOVACIC, | : | |
| Defendant-Appellant. | : | |

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 09 CR 000819.

Judgment: Affirmed.

*Charles E. Coulson*, Lake County Prosecutor, and *Joshua S. Horacek*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

*Jay F. Crook*, Shryock, Crook & Associates, L.L.P., 30601 Euclid Avenue, Wickliffe, OH 44092 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

**{¶1}** This appeal is from a final judgment of the Lake County Court of Common Pleas. Appellant, Daniel Edward Kovacic, raises four assignments of error in contesting the merits of his two convictions for felonious assault, in violation of R.C. 2903.11(A)(1) and R.C. 2903.11(A)(2), respectively, and tampering with evidence, a violation of R.C. 2921.12.

**{¶2}** On November 23, 2009, at 1:12 a.m., the victim, Anthony Keppes, sent a text message to Kelsea Snyder, appellant's girlfriend. This text message read: "U sleepin?" Snyder replied, "No who's this[?]" A phone call was then placed from Snyder's phone to Keppes' phone. Keppes and Snyder gave different accounts as to the content of this phone call. Keppes testified that he identified himself and that, immediately thereafter, appellant was on the phone. Appellant demanded to know why Keppes was calling his girlfriend. Appellant then told Keppes to come to his apartment within 10 minutes, or appellant would shoot-up Keppes' house. Keppes denied making any threats in return.

**{¶3}** Snyder, the girlfriend, testified that Keppes threatened appellant and her over the phone. Snyder further claimed that Keppes told appellant that he was going to come over to appellant's apartment, attack appellant, and sexually assault her. After the phone call ended, appellant continued to exchange text messages with Keppes. The last text message appellant sent to Keppes stated: "* * * I dont [sic] need any witnesses come in or I light up your house[.]"

**{¶4}** Keppes further testified that he drove with a friend to appellant's apartment. While Keppes expected an altercation, he was unarmed. Upon arriving at the apartment building, Keppes instructed his friend to remain in the car, and then walked into the building. Immediately upon his entry, appellant and Keppes exchanged blows in the hallway. During this altercation, Keppes saw appellant with what appeared to be a knife. Soon, Keppes was covered in blood. He then fled out the door to his vehicle. He had several large gashes on his face, head, and arm.

**{¶5}** Keppes testified that he never came into physical contact with Snyder as part of the altercation. At trial, Snyder testified that Keppes struck her during the altercation. However in a recorded jail phone call between herself and appellant prior to trial, Snyder admitted she did not know who had hit her.

**{¶6}** The trial court admitted into evidence, without objection from appellant, photographs showing blood splatter and blood smearing in the common area of his apartment building. Additionally, photographs of the victim and of the knife used in the altercation were admitted.

**{¶7}** After a full jury trial, appellant was found guilty on all three counts. The trial court merged the two felonious assault charges for purposes of sentencing. The trial court ordered appellant to serve eight years in prison for the felonious assaults, consecutive to two years for tampering with evidence.

**{¶8}** In seeking reversal of his convictions, appellant assigns the following as error:

**{¶9}** "[1.] The trial court committed prejudicial error in failing to consider and issue a jury instruction for self defense/defense of others where defense counsel only requested a simple self defense instruction, where evidence in favor of a defense of others instruction was present.

**{¶10}** "[2.] The trial court committed prejudicial error in allowing the admission of numerous exhibits, in the form of photographic representations showing blood pools and blood spatter, where the evidentiary value was more prejudicial than probative.

**{¶11}** "[3.] The trial court erred in upholding the jury's finding of guilty on Count 3 of the indictment, tampering with evidence, a violation of R.C. 29[21.12] as being against the manifest weight of the evidence.

**{¶12}** "[4.] Trial counsel was ineffective in failing to present witnesses that would further establish/strengthen Defendant-Appellant's case while simultaneously impeaching/weakening the evidentiary value of the victim's testimony, request appropriate and beneficial jury instructions based on the evidence presented and object to/file a motion in limine regarding the presentation of prejudicial photographic evidence."

**{¶13}** Under his first assignment, appellant argues that the trial court erred in failing to consider and give jury instructions for self-defense and defense of others. He contends that evidence supporting a "defense of others" instruction was presented because it was demonstrated that his girlfriend, Kelsea Snyder, became involved in the physical altercation between himself and the victim.

**{¶14}** The standard of review for failure to give a requested jury instruction is abuse of discretion. *State v. Davis*, 2d Dist. No. 21904, 2007-Ohio-6680, at ¶14. However, a defendant who fails to object to the absence of a jury instruction waives all but plain error on appeal. *State v. Powell,* 176 Ohio App.3d 28, 2008-Ohio-1316, at ¶13. Plain error exists only where, but for the error, the outcome of the trial would have been different. Id. "Plain error is to be invoked only in exceptional circumstances to avoid a miscarriage of justice." *State v. Bennett*, 11th Dist. No. 2002-A-0020, 2005-Ohio-1567, at ¶55. Therefore, to warrant reversal for plain error, this court must find that: (1) there was an error, i.e., a deviation from a legal rule; (2) the error was plain,

i.e., there was an "obvious" defect in the trial proceedings; and (3) the error affected substantial rights, i.e., affected the outcome of trial. Id. at ¶56.

**{¶15}** In our case, appellant requested jury instructions only for self-defense and aggravated assault; no request was made for a "defense of others" instruction. Hence, this court will reverse only if the trial court's failure to give a defense of others instruction was plain error. See *Powell,* 176 Ohio App.3d at ¶13. A jury instruction is proper where "(1) the instruction is relevant to the facts of the case; (2) the instruction gives a correct statement of the relevant law; and (3) the instruction is not covered in the general charge to the jury." *Mentor v. Hamercheck* (1996), 112 Ohio App.3d 291, 296.

**{¶16}** Defense of others is a variation of self-defense. *State v. Moss*, 10th Dist. No. 05AP-610, 2006-Ohio-1647. An actor is legally justified in using force only where the person he is aiding would have been justified in using force to defend themselves. See *State v. Wilson*, 2d Dist. No. 22581, 2009-Ohio-525, at ¶38. In this respect, the defender of another person acts at his own peril; if the original person was not acting in self-defense, the defender is not allowed to employ force to protect that person. *State v. Abalos,* 6th Dist. No. L-09-1280, 2011-Ohio-3489, at ¶14. In other words, if the person the actor is defending was at fault in creating the altercation, then the actor is not justified in his use of force. *Wilson*, 2009-Ohio-525, at ¶38.

**{¶17}** Thus, for appellant to be entitled to an instruction on the defense of others he must show: (1) that the person he sought to protect, his girlfriend, Kelsea Snyder, was not at fault in creating the situation giving rise to the affray; (2) that she had a bona fide belief that she was in imminent danger of death or great bodily harm and that her only means of escape from such danger was in the use of force; and (3) that she did not

violate any duty to retreat or avoid the danger. *State v. Robbins* (1979), 58 Ohio St.2d 74, paragraph two of the syllabus.

**{¶18}** A trial court must instruct the jury on self-defense or defense of others only where the defendant presents sufficient evidence at trial to warrant such an instruction. See *State v. Robinson* (1976), 47 Ohio St.2d 103, 110-113. The trial court should view this evidence in the light most favorable to the defendant and determine, if the evidence is believed, would it permit a finding of reasonable doubt as to guilt under the legal test for self-defense or defense of others. Id. If the evidence is insufficient to raise a claim of self-defense or defense of others, then the trial court should remove those issues from the jury's considerations. Id.

**{¶19}** As to the first prong of the standard for defense of others, appellant asserts that, since Snyder did not initiate the ongoing physical altercation, it cannot be said that she was to blame for creating the possible danger to herself. However, pursuant to Snyder's own trial testimony, this was not a situation in which her involvement in the fight was unavoidable; rather, it is undisputable that she made a conscious decision to intervene in the altercation. Synder specifically testified that, instead of retreating into appellant's apartment and locking the door, she chose to attempt to insert herself between the two combatants. Regardless of her motive in trying to intervene, she clearly was not acting in defense of herself. For this reason, this court holds that, as to her own involvement in the physical altercation, Snyder was at fault in placing herself in harm's way.

**{¶20}** In conjunction with the foregoing, we further conclude that Snyder's own testimony showed that she had a duty to retreat in this instance. Concerning the third

prong of the "defense of others" standard, appellant maintains that Snyder was under no such duty because she was a guest in his apartment. Yet, there is no dispute that appellant and Snyder waited outside his apartment in a hallway which was shared by the other tenants of the building. To that extent, they were not within the confines of appellant's actual home, i.e., his apartment. Thus, appellant cannot claim that Snyder had no duty to retreat as a guest in his apartment, because the altercation did not occur within the confines of the apartment. See *State v. Lansberry*, 9th Dist. No. 21006, 2002-Ohio-4401 (Where defendant voluntarily leaves the sanctuary of his own home, goes out on to his driveway and uses a deadly weapon against a victim, he is not entitled to a "no duty to retreat" instruction).

**{¶21}** Leaving aside the question of whether Snyder had a bona fide belief that Keppes intended to impose great bodily harm upon her, the nature of her testimony was such that she could not satisfy the first and third prongs for acting in self-defense. In light of this, it follows that appellant could not justify his own actions on the need to "defend" her. Therefore, because appellant did not present sufficient evidence to establish that he was entitled to a "defense of others" instruction, the trial court's failure to instruct the jury on defense of others does not amount to plain error.

**{¶22}** Appellant also challenges the trial court's denial of his request for a self-defense instruction. We review that decision for an abuse of discretion. *Davis*, 2007-Ohio-6680, at ¶14. Again, this court would indicate that, in order to be entitled to an instruction on self-defense, a defendant is required to present some evidence as to each of the following three elements: "(1) that the defendant was not at fault in creating the situation giving rise to the affray; (2) that the defendant had a bona fide belief that

he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) that the defendant did not violate any duty to retreat or avoid the danger." *State v. Barnes* (2002), 94 Ohio St.3d 21, 24.

**{¶23}** As to the first element for self-defense, our review of the trial transcript shows that there was no dispute that appellant was directly responsible for the situation that gave rise to the altercation. As noted above, he called the victim and made a threat to "light up his house." Moreover, even though the victim may have made a threat in response, appellant expressly told the victim to come to his apartment building. More importantly, appellant hid in the common area of the building and waited for the victim to arrive. Finally, when the victim came through the door, appellant engaged him in physical combat.

**{¶24}** Furthermore, since appellant initiated the altercation outside the confines of his own apartment, he clearly violated his duty to retreat and avoid the supposed danger. Thus, even if there were a legitimate factual dispute as to whether appellant acted out of fear of imminent danger of death or great bodily harm, the evidence submitted by appellant was not legally sufficient to satisfy two of the elements for justifying his conduct as self-defense.

**{¶25}** As a final point, this court would note that trial counsel for appellant requested an aggravated assault instruction, in addition to the self-defense instruction. The trial court instructed the jury on aggravated assault, concluding that the evidence could be interpreted to show that appellant was angry and may have acted under provocation. This court has indicated in previous opinions that an aggravated assault

instruction is incompatible with a self-defense instruction, and that the two should not be given together *in most situations. State v. Beaver* (1997), 119 Ohio App.3d 385, 397; *State v. Jones* (May 12, 1995), 11th District No. 94-T-5021, 1995 Ohio App. LEXIS 1967, at *9; *State v. Smith* (Jan. 14, 1993), 11th Dist. No. 92-A-1695, 1993 Ohio App. LEXIS 1109, at *6. Given our holding that an instruction on self-defense was not warranted, it is not necessary to determine if the specific facts of this case would have justified the recognition of an exception to the foregoing principle.

**{¶26}** Appellant did not present sufficient evidence to support either a self-defense instruction or a "defense of others" instruction**.** Moreover, the trial court correctly instructed the jury on the lesser included charge of aggravated felonious assault. Accordingly, the court's decision not to instruct on self-defense did not constitute error. Therefore, appellant's first assignment of error is without merit.

**{¶27}** Under his second assignment, appellant maintains that "the trial court committed prejudicial error in allowing the admission of numerous exhibits, in the form of photographic representations showing blood pools and blood spatter, where the evidentiary value was more prejudicial than probative." Specifically, he contends that State's Exhibits 5a-5s and 9a-9c should have been excluded from evidence because their probative value was outweighed by the photographs' prejudicial effect.

**{¶28}** Appellant did not object to the trial court admitting the exhibits in question; therefore, the standard of review is plain error. *State v. Worley,* 11th Dist. No. 2001-T-0048, 2002-Ohio-4516, at ¶186. As discussed under the first assignment, appellant can prevail under the "plain error" standard only when he can establish that the outcome of

the trial clearly would have been different, but for the error. Id., quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus.

**{¶29}** When considering the admissibility of photographic evidence in a non-capital case, a trial court must use the balancing test under Evid.R. 403. *State v. Ware*, 10th Dist. No. 04AP-43, 2004-Ohio-6984, at ¶31. Evid.R. 403(A) provides that "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

**{¶30}** The disputed photographs are of blood droplets and smearing in both the hallway and stairwell of appellant's apartment building, as well as within the victim's vehicle. A review shows that the photographs are not of a particularly gruesome nature, as most of the blood droplets do not appear to exceed the diameter of a dime. None of the photographs display the victim's body, but instead reveal only blood droplets and blood smearing.

**{¶31}** Appellant asserts that none of these photographs were necessary for the state to prove its case. We disagree. State's Exhibits 5a-5s provide location evidence of two material facts to the state's case. First, the concentration of blood splatter near the entrance of the building corroborates the victim's testimony that he was attacked as soon as he entered the apartment building. Conversely, appellant's girlfriend, Kelsea Snyder, originally told the investigating police officer that the altercation had occurred at the door to appellant's apartment. Although Snyder ultimately corroborated the victim's testimony that appellant was lying in wait just inside the apartment building's common area, the state could not predict, as part of its case in chief, that she would do so.

**{¶32}** Furthermore, the photographs of blood splatter appearing on the stairwell to the second-floor constituted circumstantial evidence that appellant walked upstairs to the second floor and hid the knife under the register, thereby providing material proof on the tampering with evidence charge. It was undisputed that the altercation occurred on the first floor of the apartment building, and that appellant's apartment is also on the first floor. Thus, the photographs of blood splatter that appears in a trail going up the stairs, coupled with the facts that the fight occurred on the first floor and that appellant lives on the first floor, helped to demonstrate that the knife was purposefully hidden on the second floor. To this extent, appellant cannot reasonably argue that the photographs lack probative value.

**{¶33}** As to State's Exhibits 9a-9c, which depict blood splatter on the interior of the victim's vehicle, these photographs are likewise not particularly gruesome and, as stated above, reveal only small amounts of blood droplets and smearing. Moreover, the photographs set forth probative evidence of the victim's blood loss, which has been held to be relevant circumstantial evidence regarding the nature of the weapon used in an assault. *In re N.S.,* 8th Dist. No. 93153, 2010-Ohio-1057, at ¶23-24. While photographs of the knife itself were also presented, this court concludes that the photographs in State's Exhibits 9a-9c had some probative value. When considered in the context of the entire evidentiary submission, the photographs of small droplets of blood and some blood smearing in the interior of the vehicle does not create a prejudicial effect sufficient enough to substantially outweigh the evidence's probative value.

**{¶34}** Therefore, since the probative value of the disputed photographs was not substantially outweighed by the potential of any undue prejudice, they were admissible under Evid.R. 403. For this reason, we conclude that the admission of the state's photographic exhibits did not result in a plain error warranting the reversal of the underlying conviction. Appellant's second assignment is without merit.

**{¶35}** Under his next assignment of error, appellant argues that his conviction for tampering with evidence, pursuant to R.C. 2921.12, is against the manifest weight of the evidence. The knife appellant wielded during the altercation was later found beneath a radiator on the second floor of the apartment building, giving rise to this specific charge. He now submits that there was no evidence presented establishing that he put the knife beneath the radiator, and that he had knowledge of an actual or likely pending criminal investigation. In this regard, appellant also contests the sufficiency of the evidence on these two elements of the tampering offense.

**{¶36}** In determining whether evidence is sufficient to sustain a conviction, the reviewing court asks whether reasonable minds could differ as to whether each material element of a crime has been proven beyond a reasonable doubt. *State v. Bridgeman* (1978), 55 Ohio St.2d 261. If reasonable minds could differ as to whether each material element has been proven, a Crim.R. 29 motion for acquittal must be overruled. Id. The evidence adduced at trial and all reasonable inferences must be viewed in the light most favorable to the state. *State v. Maokhamphiou,* 11th Dist No. 2006-P-0046, 2007-Ohio-1542, at ¶20.

**{¶37}** In contrast, a "manifest weight" challenge requires the reviewing court to play the role of a "thirteenth juror." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

A reviewing court should be cognizant of the fact that the jury is in the best position to assess the credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. For an appellate court to overturn a conviction as being against the manifest weight of the evidence, it must be found that "'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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" *Thompkins*, 78 Ohio St.3d at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

**{¶38}** As to the charge of tampering with the evidence under R.C. 2921.12, the state had the burden of proving beyond a reasonable doubt that appellant, knowing that an official investigation was in progress, about to be, or was likely to be instituted, did "alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation." *State v. Barnes*, 6th Dist. No. WD-07-024, 2008-Ohio-1854, at ¶14. As noted above, appellant claims that, immediately after the altercation, he had absolutely no knowledge regarding whether an official investigation was either in progress or was likely to be instituted.

**{¶39}** "Whether defendant had actual notice of an impending investigation is irrelevant. When an offender commits an unmistakable crime, the offender has constructive knowledge of an impending investigation of the crime committed." *State v. Schmitz,* 10th Dist. No. 05AP-200, 2005-Ohio-6617, at ¶17.

**{¶40}** In our case, appellant's actions clearly constituted an unmistakable crime. The evidence showed that he used a knife in an altercation to inflict deep lacerations to

the victim's face, head, and arms. He had been lying in wait for the victim. Regarding this point, appellant claims that, because the victim came to his apartment building to "facilitate" an altercation and left immediately after it ended, he therefore would not have been alerted that police involvement was imminent. Yet, appellant was aware that his actions with the knife had resulted in lacerations and bleeding from the victim's face. Given the seriousness of the injuries and the manner in which they were inflicted, appellant had sufficient knowledge to realize that he had committed an "unmistakable crime" which would lead to a police investigation into the matter.

**{¶41}** Appellant further asserts that no evidence was presented that he was the person who placed the knife below the register, or that it was placed there with intent to conceal it. Appellant concedes that, since the knife was found underneath a heating register in the second floor hallway of the apartment building, its location constitutes at least some evidence of intent to conceal the knife. This is because the altercation took place on the first floor, and appellant's apartment is also on the first floor. Yet, appellant still claims that he or another party could have "thrown it [the knife] away without regard to its direction and/or location."

**{¶42}** Simply stated, appellant's assertion as to the possible disposition of the knife is not supported by the evidence before the jury. That is, the knife could not have just been haphazardly thrown into the location where it was found because a lip on the register would have prevented it from rolling underneath. Additionally, blood was found leading up to the second floor landing, providing circumstantial evidence that the appellant walked up the stairs onto the second floor and specifically placed the knife under the register.

**{¶43}** Circumstantial evidence has the same probative value as direct evidence. *State v. Franklin* (1991), 62 Ohio St.3d 118, 124. A conviction can be predicated upon circumstantial evidence. Id. In this appeal, the circumstantial evidence concerning the placement of the knife under the register was sufficient to sustain a conviction against appellant for tampering with evidence under R.C. 2921.12. Moreover, the weight of the evidence supported a finding of guilt on the tampering with the evidence charge. The state presented considerable circumstantial evidence that appellant placed the knife under the register, with the intent to conceal it, and that he was aware of facts sufficient for him to form a belief that a police investigation was imminent. Thus, since, appellant's tampering with evidence conviction was not against the manifest weight of the evidence, his third assignment is without merit.

**{¶44}** Under his last assignment of error, appellant asserts that his conviction must be reversed because he was denied his constitutional right to effective assistance of trial counsel. In support of this assertion, appellant maintains that his counsel failed to call certain witnesses which would have been beneficial to his case. He also refers to the attorney's actions in relation to the jury instructions and the admission of the various photographs of the scene and the vehicle.

**{¶45}** In order to prevail on a claim of ineffective assistance of counsel, appellant must establish that: (1) the performance of defense counsel was seriously flawed and deficient; and (2) the result of appellant's trial would have been different if defense counsel had provided proper representation. See *Strickland v. Washington* (1984), 466 U.S. 668. We are to be highly deferential in our review of trial counsel's performance. Id. at 689. Moreover, it is well-settled that counsel benefits from a strong presumption

of competence. See *State v. Smith* (1985), 17 Ohio St.3d 98. In other words, defense counsel is not ineffective unless his or her performance fell below an objective standard of reasonable representation, and the defendant is prejudiced from that performance. *State v. Bradley* (1989), 42 Ohio St.3d 136, 143. Nevertheless, analysis of whether counsel's performance was deficient is not necessary if a claim can be disposed of by showing a lack of sufficient prejudice. Id.

**{¶46}** Appellant first claims that defense counsel was ineffective for not choosing to call appellant himself to testify. The decision to call a witness is within the province of counsel's trial tactics. *State v. McKay,* 11th Dist. No. 2001-A-0008, 2002-Ohio-3960, at ¶43. "Debatable strategic and tactical decisions will not form the basis for a claim of ineffective assistance of counsel, even if there had been a better strategy available." *State v. Beesler*, 11th Dist. No. 2002-A-0001, 2003-Ohio-2815, at ¶13. Thus, failure to call a witness will not substantiate a claim for ineffective assistance of counsel unless prejudice is shown. Id.

**{¶47}** In this case, the record before this court does not contain any indication as to whether the decision not to testify was made by trial counsel or appellant himself. If appellant decided not to testify, trial counsel cannot be held responsible for his decision. Id. at ¶14.

**{¶48}** In addition, this court cannot speculate as to what the nature of appellant's testimony would have been if he had taken the stand. In light of the fact that the trial record obviously does not contain any statement as to what the substance of appellant's testimony would have been, appellant is simply unable to show that the outcome of his trial would have been different if he had testified. Thus, as to this particular issue,

appellant cannot satisfy either prong of the *Strickland* standard for showing ineffective assistance.

**{¶49}** In other words, since the trial record does not set forth sufficient facts to allow this court to properly address the issue, post-conviction relief, as opposed to this direct appeal, is the proper medium to contest whether appellant should have testified in his own behalf. See *State v. Bond*, 2d Dist. No. 20674, 2005-Ohio-3665.

**{¶50}** Appellant also claims that defense counsel was ineffective for failing to call his parents to testify. Appellant asserts that his parents had information that the victim had solicited money from them in exchange for a refusal to testify against appellant or charge him. The victim was cross-examined on this allegation at trial and expressly denied soliciting the parents in such a manner. Relying on the cross-examination of the victim, appellant now argues that, because trial counsel cross-examined the victim on the point, the decision not to call his parents to impeach the victim's testimony amounts to ineffective assistance of counsel.

**{¶51}** As noted above, it is within trial counsel's province to decide who will and who will not testify. *McKay*, 2002-Ohio-3960, at ¶43. Therefore, without a showing of prejudice, a failure to call a witness will not constitute ineffective assistance of counsel. *Beesler,* 2003-Ohio-2815, at ¶13. Furthermore, "[s]peculation as to what additional evidence might have revealed is insufficient to succeed on an ineffective assistance of counsel claim." *State v. Pruiett,* 9th Dist. No. 21889, 2004-Ohio-4321, at ¶32. Again, as we cannot engage in any speculation as to what the substance of the parents' actual testimony may have been, it is impossible to determine whether the outcome of the trial would have been different. Id.

**{¶52}** For this reason, appellant's second claim of ineffective assistance of trial counsel must also fail as the second prong of the *Strickland* test cannot be met. Id. Because a finding of ineffective assistance of counsel cannot be based upon alleged facts that are not within the record, direct appeal is not the appropriate forum for requesting relief.

**{¶53}** In his third claim of ineffective assistance, appellant contends that his trial counsel was ineffective in failing to request a jury instruction for defense of others. As was noted above, the evidence presented did not support a jury instruction for defense of others. In light of our extensive discussion of the relevant evidence under the first assignment, no further analysis of the point is warranted.

**{¶54}** Therefore, given the lack of evidence that supports a finding of defense of others with respect to appellant's girlfriend, his trial counsel's decision not to seek a jury instruction on defense of others did not amount to "flawed and deficient" performance. See *Strickland*, 466 U.S. at 688. Under such circumstances, a finding of ineffective assistance is not justified.

**{¶55}** Under his fourth claim of ineffective assistance, appellant argues that trial counsel was ineffective in failing to object to the admission of State's Exhibits 5a-5c and 9a-9c. As was noted previously, appellant claims that the exhibits should have been excluded because the probative value of the photographs, which showed various blood droplets and smears in the apartment building and vehicle, was minimal in comparison to the possibility of undue prejudice. As part of our analysis under appellant's second assignment, this court has already held that the disputed photographs were relevant and that their probative value was not substantially outweighed by the danger of unfair

prejudice. To this extent, any objection to the state's exhibits would not have been justified.

**{¶56}** The failure to object, when there is no meritorious reason for such an objection, does not constitute ineffective assistance of counsel. See *State v. Cashin,* 10th Dist. No. 09AP-367, 2009-Ohio-6419, at ¶12. Accordingly, since none of the four claims raised by appellant are legally sufficient to satisfy the standard for establishing ineffective assistance of trial counsel, his fourth assignment lacks merit.

**{¶57}** Consistent with our disposition of appellant's four assignments of error, it is the order of this court that the judgment of the trial court is affirmed.

DIANE V. GRENDELL, J.,

MARY JANE TRAPP, J.,

concur.