[Cite as *State v. Feliciano*, 2010-Ohio-2809.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO	C. A. No. 09CA009595
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
RAFAEL FELICIANO	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellant	CASE No. 08CR075317

DECISION AND JOURNAL ENTRY

Dated: June 21, 2010

MOORE, Judge.

{¶1} Appellant, Rafael Feliciano, appeals from his conviction in the Lorain County Court of Common Pleas. This Court affirms.

I.

{¶2} On January 29, 2008, Rafael Feliciano received his tax return check. He used some of the money to purchase crack cocaine. Neighbors in his apartment building warned him that there was a plot to rob him, and that he should be careful. As a result, he armed himself and his friend, Fletcher Windham, with knives. Through the evening hours, Feliciano began to suspect Windham of being involved in the plot to rob him. Consequently, Feliciano stabbed Windham. Windham died as a result of the stab wounds. Feliciano testified that he felt that he had no choice but to stab Windham and that he felt that he was fighting for his life.

{¶3} On February 7, 2008, Feliciano was indicted on one count of murder, in violation of R.C. 2903.02(A), a second count of murder, in violation of R.C. 2903.02(B), a count of

felonious assault, in violation of R.C. 2903.11(A)(1), and a second count of felonious assault, in violation of R.C. 2903.11(A)(2). Feliciano pled not guilty to the charges. On March 4, 2008, the trial court appointed a Spanish-speaking interpreter. On August 28, 2008, a supplemental indictment was filed, charging Feliciano with murder, in violation of R.C. 2903.02(B). Feliciano filed a notice of intent to use the affirmative defense of self-defense.

{¶4} On April 7, 2009, the jury trial commenced. At the beginning of the trial, the State dismissed the second count of murder, as contained in the original indictment. On April 10, 2009, the jury found Feliciano guilty of all the remaining charges. On May 5, 2009, the trial court sentenced Feliciano to a total of 19 years of incarceration. Feliciano timely appealed from his conviction and sentence and has raised seven assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ERRED TO [FELICIANO'S] PREJUDICE IN ITS JURY INSTRUCTIONS ON SELF-DEFENSE AND THE DUTY TO RETREAT IN ONE'S OWN HOME REGARDING [] FELICIANO'S AFFIRMATIVE DEFENSE."

{¶5} In his first assignment of error, Feliciano contends that the trial court erred to his prejudice in its jury instructions on self-defense and the duty to retreat in one's own home regarding his affirmative defense. We conclude that he has forfeited any alleged error.

{¶6} The trial court asked the parties whether they had reviewed the jury instructions. Feliciano's counsel indicated that he had. He also stated that he had no objections to the proposed instructions. In *State v. Underwood* (1983), 3 Ohio St.3d 12, syllabus, the Supreme Court held that "[t]he failure to object to a jury instruction 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. (*State v. Long*, 53 Ohio St.2d 91 [], approved and followed.)" *Underwood*, decided

long before the Supreme Court clarified the difference between waiver and forfeiture, mixes the two concepts. The Supreme Court recently clarified that

> "'[w]aiver is the intentional relinquishment or abandonment of a right, and waiver of a right cannot form the basis of any claimed error under Crim.R. 52(B). On the other hand, forfeiture is a failure to preserve an objection[.] *** [A] mere forfeiture does not extinguish a claim of plain error under Crim.R. 52(B).'" (Internal citations and quotations omitted.) *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶23.

If *Underwood* were decided today, the Court would likely write that "the failure to object to a jury instruction constitutes a *forfeiture* of any claim of error relative thereto" rather than establishing a "waiver."

{¶7} Notwithstanding the confusion caused by the language of the *Underwood* syllabus, our task is to conduct a case-by-case review to determine whether the appellant has intentionally relinquished a known right – waiver – or, instead, failed to preserve an objection – forfeiture. An example of a waiver can be found in *State v. Clayton* (1980), 62 Ohio St.2d 45. The Supreme Court recognized that a defendant may intentionally and voluntarily forego a jury instruction to which he is otherwise entitled, noting that a defendant may "elect[] to seek acquittal rather than to invite conviction of the lesser offense." Id. at 47 (citation omitted). The Supreme Court held that Clayton waived his right to a lesser-included offense instruction for this very reason. Although the trial court "had the duty to instruct on the lesser-included offense, [] this in no way affected defendant's concomitant right, through his counsel, to waive the instruction." Id. at n.2. Clayton waived his right to the jury instruction by asking the Court not to instruct on the lesser-included offense. This strategy may not have worked, because he was convicted of the higher offense, but the outcome does not alter the waiver analysis.

{¶8} In this case, the record does not reflect that Feliciano intentionally relinquished a known right. Instead, he failed to preserve an objection to the jury instruction and, thus, he has

forfeited the issue for appeal. Where a party has forfeited an objection by failing to raise it, the objection may still be assigned as error on appeal if a showing of plain error is made. *State v. Hairston*, 9th Dist. No. 05CA008768, 2006-Ohio-4925, at ¶9; Crim.R. 52(B). However, Feliciano has neither argued plain error, nor has he explained why we should delve into these issues for the first time on appeal. Accordingly, Feliciano's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "[FELICIANO] WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO FILE A MOTION TO SUPPRESS THE INTERROGATION CONDUCTED IN ENGLISH AND NOT [] FELICIANO'S NATIVE LANGUAGE, SPANISH."

{¶9} In his second assignment of error, Feliciano contends that he was denied his constitutional right to effective assistance of counsel when his attorney failed to file a motion to suppress the interrogation conducted in English and not Spanish, Feliciano's native language. We do not agree.

{¶10} In considering a defendant's claim of ineffective assistance of counsel, this court employs a two-step process. *Strickland v. Washington* (1984), 466 U.S. 668, 669. First, we must determine whether trial counsel engaged in a "'substantial violation of any *** essential duties to his client.'" *State v. Bradley* (1989), 42 Ohio St.3d 136, 141, quoting *State v. Lytle* (1976), 48 Ohio St.2d 391, 396. Second, we must determine if the trial counsel's ineffectiveness resulted in prejudice to the defendant. *Bradley*, 42 Ohio St.3d at 141-142, quoting *Lytle*, 48 Ohio St.2d at 396-397. A defendant may demonstrate prejudice in cases where there is a reasonable probability that the trial result would have been different but for the alleged deficiencies of counsel. *Bradley*, 42 Ohio St.3d at paragraph three of the syllabus.

{¶11} We conclude that Feliciano's trial counsel's decision not to file a motion to suppress the videotaped interrogation was a trial tactic. We have consistently held that "[t]here are numerous avenues through which counsel can provide effective assistance of counsel in any given case, and debatable trial strategies do not constitute ineffective assistance of counsel." *State v. Diaz*, 9th Dist. No. 04CA008573, 2005-Ohio-3108, at ¶23 citing *State v. Clayton* (1980), 62 Ohio St.2d 45, 49 and *State v. Gales* (Nov. 22, 2000), 9th Dist. No. 00CA007541, at *9. We conclude that, in this instance, trial counsel's decision not to file a motion to suppress was a trial tactic.

{¶12} On appeal, the State contends that Feliciano's counsel was attempting to play the videotape for the jury during the State's case-in-chief so that Feliciano would not have had to take the stand to support his assertion that he acted in self-defense, thus subjecting him to cross-examination. Feliciano's counsel sought to introduce the videotape of Feliciano's police interrogation during his cross-examination of Detective Steyven Curry. Detective Curry was the lead investigator on the case and interviewed Feliciano at the police station several hours after the incident. The State objected to Feliciano's attempt to play the tape for the jury. At a sidebar on the issue, Feliciano's counsel explained that "my position is the police did not treat my client fairly in this interview, and that the way they interviewed him indicate a bias against him in favor of murder and against self-defense. And I think the jury should see that interview so they can judge for themselves." Up to this point in the State's case-in-chief, there had been no discussion of self-defense. The trial court sustained the objection. Eventually, Feliciano's counsel presented the videotape during Feliciano's testimony in his case-in-chief. We conclude that Feliciano's counsel made a tactical decision not to attempt to suppress evidence of the police interrogation.

{¶13} Even if this Court questions trial counsel's strategic decisions, we must defer to his judgment. *Clayton*, 62 Ohio St.2d at 49. The Ohio Supreme Court has stated:

> "'We deem it misleading to decide an issue of competency by using, as a measuring rod, only those criteria defined as the best of available practices in the defense field.' *** Counsel chose a strategy that proved ineffective, but the fact that there was another and better strategy available does not amount to a breach of an essential duty to his client." Id., quoting *State v. Lytle* (1976), 48 Ohio St.2d 391, 396.

{¶14} Upon review of the record, this Court finds that Feliciano has failed to meet the first prong of the test set forth in *Strickland*, 466 U.S. at 687. We need not address the second prong. Accordingly, Feliciano's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

> "THE TRIAL COURT ERRED WHEN IT DID NOT ALLOW THE INTERPRETER AT TRIAL TO PROPERLY TRANSLATE THE PROCEEDINGS AND [] FELICIANO WAS DENIED INEFFECTIVE [SIC] ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY DID NOT MAKE A STANDING OBJECTION TO HIM TESTIFYING WITHOUT THE INTERPRETER."

{¶15} In his third assignment of error, Feliciano contends that the trial court erred when it did not allow the interpreter at trial to properly translate the proceedings and that Feliciano was denied the effective assistance of counsel when his attorney did not make a standing objection to his client's testifying without the interpreter. We do not agree.

{¶16} At the outset of the trial, the prosecutor noted that there was a translator who would be translating the proceedings. There is no indication from the record before this Court that the trial court denied Feliciano "the right to continuous interpretation[.]" He does not point this Court to any discussion in which he requested continuous interpretation of the proceedings and the trial court denied his request. App.R. 16(A)(7); App.R. 12(A)(2). Instead, it is clear from the record that an interpreter was present. Thus, with regard to any allegations that the trial

court abused its discretion by failing to "allow" the interpreter to "properly translate" the proceedings, we conclude that he has forfeited this argument for purposes of appeal. *Hairston*, supra, at ¶9. Where a party has forfeited an objection by failing to raise it, the objection may still be assigned as error on appeal if a showing of plain error is made. Id; Crim.R. 52(B). Feliciano has neither argued plain error, nor has he explained why we should delve into this issue for the first time on appeal.

{¶17} Next, Feliciano contends that he was denied the effective assistance of counsel when his trial counsel failed to object to the proposed use of the interpreter during his testimony. We conclude that Feliciano has failed to demonstrate prejudice, i.e., that but for his trial counsel's error, the results of his trial would have been different. See *Strickland*, supra.

{¶18} Prior to Feliciano's testimony, the parties discussed the use of the interpreter. Feliciano's counsel requested that the interpreter be seated next to Feliciano so that if his client did not feel confident answering a question in English or did not understand a question, the interpreter could assist him. Thus, the interpreter was not to be used unless Feliciano advised her that he did not understand the question completely. When asked if he agreed with this proposed procedure, Feliciano himself, not through his attorney, agreed.

{¶19} After a few questions on direct-examination, Feliciano's trial counsel requested a sidebar to discuss Feliciano's thick accent. He stated that he was concerned that he jury could not understand Feliciano's testimony. The trial court decided to utilize the interpreter to avoid any potential problems regarding his accent. However, there was no indication that Feliciano could not *understand* the proceedings. Therefore, Feliciano was to answer the questions in Spanish, which the interpreter would then translate to English. Later, due to a concern regarding a Spanish-speaking juror, the parties agreed to return to the arrangement whereby Feliciano

would answer questions in English, if he felt confident in doing so. The interpreter explained this to Feliciano. There was no objection raised by defense counsel.

{¶20} Feliciano does not argue on appeal that, but for his trial counsel's alleged failure to make a standing objection to him testifying "without the interpreter[,]" the results of his trial would have been different. In fact, the record shows that the jurors and the court reporter were made aware that if they could not understand Feliciano's testimony, they could raise their hand and have the interpreter translate the statements to English. In fact, this procedure was utilized by the parties, the court reporter, and the trial court. Further, Detective Curry testified that during his initial interview with Feliciano he learned that Feliciano spoke fluent English. Lastly, the record before this Court reveals that Feliciano clearly answered the questions in English, and when he had trouble expressing his thoughts, he spoke in Spanish, which was then translated by the interpreter. Feliciano has failed to explain how, with the continuous use of an interpreter, his testimony would have been any different, and that therefore, the result of his trial would have been different. Therefore, we conclude that Feliciano was not prejudiced by any alleged error on the part of his trial counsel to object to the utilization of the interpreter.

ASSIGNMENT OF ERROR IV

> "[FELICIANO] WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BECAUSE OF PROSECUTORIAL MISCONDUCT DURING THE TRIAL WHICH CAUSED SUBSTANTIAL PREJUDICE TO [] FELICIANO."

{¶21} In his fourth assignment of error, Feliciano contends that he was denied his constitutional right to a fair trial because of prosecutorial misconduct during the trial which caused prejudice. We do not agree.

{¶22} In deciding whether a prosecutor's conduct rises to the level of prosecutorial misconduct, a reviewing court determines if the prosecutor's actions were improper, and, if so,

whether the substantial rights of the defendant were actually prejudiced. *State v. Smith* (1984), 14 Ohio St.3d 13, 14. "[A] judgment may only be reversed for prosecutorial misconduct when the improper conduct deprives the defendant of a fair trial." *State v. Knight*, 9th Dist. No. 03CA008239, 2004-Ohio-1227, at ¶6, citing *State v. Carter* (1995), 72 Ohio St.3d 545, 557. The defendant must show that there is a reasonable probability that but for the prosecutor's misconduct, the result of the proceeding would have been different. *State v. Loza* (1994), 71 Ohio St.3d 61, 78, overruled on other grounds.

{¶23} Feliciano specifically contends that the prosecutor committed misconduct on redirect examination when she asked the investigating officer whether Feliciano ever requested that any evidence be sent to the Bureau of Criminal Identification and Investigation ("BCI") for testing. Feliciano objected to this question. The trial court overruled the objection.

{¶24} Feliciano cannot show that there was a reasonable probability that but for the prosecutor's "misconduct" the result of his trial would have been different. A review of the record reveals that during his cross-examination, Feliciano's counsel questioned Detective Curry about the previous testimony from the BCI employees. Specifically, counsel asked Detective Curry how BCI got the evidence it evaluated. Feliciano's counsel questioned whether Detective Curry, in his initial interview with Feliciano, asked Feliciano "if there was any evidence he wished to be examined by BCI?" Detective Curry responded, "No, that's a question I've never really asked anyone who may have been a defendant in a case, or accused, is there any evidence that you would want?" The prosecutor, on redirect, asked Detective Curry, "Did the defense ever request that any evidence be sent to BCI for testing?" The Detective responded in the negative. Thus, Feliciano himself initiated the conversation regarding any request to have

evidence tested. We do not conclude that, as Feliciano argues on appeal, the State's questioning implied that the burden of proof shifted to him.

{¶25} Despite overruling Feliciano's objection with regard to the prosecutor's question, the trial court issued the following curative instruction:

> "Understand, ladies and gentlemen of the jury, that there's no burden of proof with regard to the Defendant to disprove any of the allegations by the State of Ohio in this regard. But I'll still allow the question as a relevant issue based upon the questions raised by the defense counsel."

{¶26} "It is well established that a jury is presumed to follow a curative instruction given it by a trial judge." *Perillo v. Fricke*, 9th Dist. No. 08CA0044-M, 2009-Ohio-1130, at ¶15, citing *State v. Garner* (1995), 74 Ohio St.3d 49, 59. Accordingly, we conclude that Feliciano was not prejudiced by the prosecutor's question. Feliciano's fourth assignment of error is overruled.

ASSIGNMENT OF ERROR V

> "[FELICIANO] WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BECAUSE OF PROSECUTORIAL MISCONDUCT FOR OFFERING CONSIDERATION TO A WITNESS IN EXCHANGE FOR TESTIMONY."

{¶27} In his fifth assignment of error, Feliciano contends that he was denied his constitutional right to a fair trial because of prosecutorial misconduct for offering consideration to a witness in exchange for testimony. We do not agree.

{¶28} Feliciano specifically points this Court to the testimony of one of Feliciano's neighbors, Domingo Gutierrez. On direct examination, the prosecutor asked Gutierrez about his criminal history. Gutierrez indicated that he had a pending case and that when he met the prosecutor at the county jail, he asked her for consideration in his pending case. Gutierrez testified that in response to his request, the prosecutor told him that she "can't do nothing but talk to the Judge, that I cooperated in this case." The prosecutor reiterated that "I let you know is all I

could do is let the Judge know you testified; is that right?" Gutierrez agreed. Feliciano did not object during this line of questioning. When the defendant fails to object to the purported acts of prosecutorial misconduct, he waives all but plain error. *State v. Smith*, 97 Ohio St.3d 367, 2002-Ohio-6659, at ¶45, citing *State v. Slagle* (1992), 65 Ohio St.3d 597, 604.

{¶29} Feliciano contends that Gutierrez's testimony indicates that his conviction was based upon "brokered testimony." This argument is not supported by case law and is without merit. Feliciano cites this Court to *United States v. Singleton* (C.A.10, 1998) 144 F.3d 1343 (*Singleton I*), for the proposition that brokered testimony presented by the State should have been suppressed. A review of this case reveals that the 10th Circuit's decision that testimony given as a result of the prosecution's promise of leniency should be suppressed was vacated by an en banc panel. *United States v. Singleton*, (C.A.10, 1999) 165 F.3d 1297. After a rehearing, the 10th Circuit affirmed the district court's denial of the motion to suppress the testimony. Id. at 1302. Thus, the 10th Circuit maintained the "longstanding practice sanctioning the testimony of accomplices against their confederates in exchange for leniency." (Citations omitted.) Id. at 1301. Accordingly, Feliciano's reliance upon *Singelton I* is misplaced, as the argument he advances has been rejected by the sole case he utilized to support his argument.

{¶30} Finally, Feliciano has failed to show that the results of his trial would have been different but for the "brokered testimony." The State presented the testimony of Nancy Tate, another of Feliciano's neighbor's, who repeated much of Gutierrez's testimony regarding the events surrounding Windham's death. Further, Feliciano's testimony also reiterated Gutierrez's testimony. Accordingly, there is no indication from the record that, but for Gutierrez's "brokered testimony," Feliciano would not have been convicted of Windham's murder. Feliciano's fifth assignment of error is overruled.

ASSIGNMENT OF ERROR VI

"THE JURY VERDICTS ON COUNTS ONE, TWO, THREE AND FOUR WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE."

{¶31} In his sixth assignment of error, Feliciano contends that the jury verdicts were not supported by sufficient evidence. We do not agree.

{¶32} To determine whether the evidence in a criminal case was sufficient to sustain a conviction, an appellate court must view that evidence in a light most favorable to the prosecution:

> "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶33} Initially, we note that Feliciano attempts to incorporate his first five assignments of error to support his contention that no rational trier of fact could have found him guilty of two counts of murder and two counts of felonious assault. It is not appropriate to "incorporate" his previous arguments to support his insufficiency contention. App.R. 16(A)(7); Loc.R. 7(B)(7). That fact aside, we have overruled his previous assigned errors, and thus, the arguments would not successfully support his contention that his convictions were not supported by sufficient evidence.

{¶34} Feliciano contends that "there was insufficient evidence to convict him of murder and felonious assault. Instead, there was ample evidence that Mr. Feliciano acted out of self defense." First, Feliciano does not set forth the elements he feels the State failed to prove for each conviction. App.R. 16(A)(7). Second, he fails to support his argument with references to

the record or to case law. Id. Lastly, his argument that he set forth ample evidence to support his self defense claim is an argument regarding the weight of the evidence. A statement that he presented evidence regarding self-defense does not necessarily lead to the conclusion that the State failed to prove the elements of murder. "If an argument exists that can support [Appellant's contentions], it is not this court's duty to root it out." *Cardone v. Cardone* (May 6, 1998), 9th Dist. No. 18349, at *8; App.R. 16(A)(7); App.R. 12(A)(2). Feliciano has failed to present an argument to support his contention that his convictions were based on insufficient evidence. Feliciano's sixth assignment of error is overruled.

ASSIGNMENT OF ERROR VII

> "THE JURY VERDICT FINDING [] FELICIANO GUILTY TWO COUNT OF FELONY MURDER AND TWO COUNTS OF FELONIOUS ASSAULT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶35} In his seventh assignment of error, Feliciano contends that his convictions were against the manifest weight of the evidence. We do not agree.

{¶36} "While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600, at *1, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). A determination of whether a conviction is against the manifest weight of the evidence does not permit this Court to view the evidence in the light most favorable to the State to determine whether the State has met its burden of persuasion. *State v. Love*, 9th Dist. No. 21654, 2004-Ohio-1422, at ¶11. Rather,

> "an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, 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. Otten* (1986), 33 Ohio App.3d 339, 340.

This discretionary power should be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. Id.

{¶37} Feliciano argues that the weight of the evidence supported his claim of self-defense. We do not agree.

{¶38} By claiming self-defense, Feliciano "'concedes [that] he had the purpose to commit the act, but asserts that he was justified in his actions.'" *State v. Howe* (July 25, 2001), 9th Dist. No. 00CA007732, at *2, quoting *State v. Barnd* (1993), 85 Ohio App.3d 254, 260. Feliciano had the burden at trial to prove self-defense by a preponderance of the evidence. *Howe*, supra, at *2. To meet this burden, Feliciano must have demonstrated

> "'(1) that he was not at fault in creating the situation giving rise to the affray, (2) that he 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 deadly force, and (3) that he did not violate any duty to retreat or avoid the danger.'" *State v. Rust*, 9th Dist. No. 23165, 2007-Ohio-50, at ¶10, quoting *State v. Caldwell* (1992), 79 Ohio App.3d 667, 679.

{¶39} Presuming Feliciano presented sufficient evidence on each of these elements, the issue with regard to the manifest weight of the evidence is whether the jury clearly lost its way when it chose not to believe Feliciano's testimony with regard to self defense. *Otten*, 33 Ohio App.3d at 340.

{¶40} The State presented testimony from 11 witnesses. Feliciano's neighbors, Nancy Tate and Domingo Gutierrez, and Melissa Volak, who was visiting the apartment complex on January 29, 2008, testified that they heard fighting in Feliciano's apartment. All three State's witnesses explained that they heard a man screaming that someone was killing him and that he could not get out of the apartment. Tate and Gutierrez, who knew Windham, identified him as the man screaming for help. All three stated that as they were trying to get Windham to unlock

the door so they could help, Feliciano informed them that Windham was high on drugs and that it was just a joke.

{¶41} Gutierrez and Tate verified that they had warned Feliciano earlier in the day that there was a plan to rob him of his recently claimed tax refund. Both witnesses admitted that they had smoked crack earlier in the day. All three testified that they had prior convictions of crimes of dishonesty.

{¶42} Dr. Paul Matus, the Lorain County Coroner testified that Windham's cause of death was exsanguination, or "bleeding out[.]" Specifically, he explained that Windham suffered from two significant chest wounds caused by a knife. One stab wound went all the way into the lung, exited the back of the other lung and entered the back of the chest wall. He explained that this wound was made with a downward direction. He explained that this wound would have caused Windham difficulty moving and talking within a very short amount of time. There was a significant amount of bleeding associated with this wound. The second stab wound perforated his chest, lung and the sac around his heart.

{¶43} Dr. Matus further testified that Windham had lacerations on his fingers and wounds on his joints from the knife. He stated that these wounds were typical defense wounds and were "absolutely classic in anybody's book." He explained that the wounds most likely occurred when Windham tried to grab the blade or prevent himself from getting more injuries. He explained that the toxicology report indicated that Windham tested positive for marijuana and that he had smoked the drug sometime within the hour of death. Dr. Matus explained that marijuana is a mild depressant that "makes people mellow[.]" He explained that it does not make many people aggressive. Further, he testified that crack cocaine is a stimulant that characteristically causes more agitation that he described as a "violent type of reactivity." He

stated that "[m]ost people on crack are a little bit agitated and more volatile." Finally, Dr. Matus stated that Windham injured his left arm a month or so prior to his death and that the injury required surgery. He further testified that Windham had a claw-type deformity, an inability to use his hand, and sensory problems with the digits of his left hand. In other words, he explained, Windham's arm and hand movement was impaired.

{¶44} On cross-examination, Dr. Matus stated that he ruled the death a homicide, which he defined as "died at the hands of another person or with the involvement of another person." On re-direct examination, he stated that the two significant knife wounds were consistent with the knives found at the scene of the homicide. On re-cross examination, Dr. Matus testified to photos of Feliciano taken immediately following the incident. He stated that the wounds on Feliciano's hands would not be described as defensive wounds.

{¶45} Police officers that responded to the scene testified that they located two knives, one a butcher-style knife, the other a paring knife, with blood on the blades, blood on the apartment door, walls, refrigerator, cell phone and furniture. The larger of the two knives was bent in a "u" shape. Detective Curry testified that Feliciano had no obvious injuries and that he had blood on his hands and fingernails.

{¶46} Forensic scientists from BCI verified that the blood on the blades of both knives was Windham's. The blood on the handle of the butcher knife, the larger of the two, was a mixture with the dominant contributor consistent with Feliciano's blood. The blood on the paring knife handle was also a mixture, with the dominant contributor consistent with Windham and the minor contributor consistent with Feliciano.

{¶47} Feliciano testified on his own behalf. He stated that he anticipated a tax refund check for $2,000 and that he had told Windham about the expected refund. He stated that

Windham, who was his friend, and another neighbor, Monk, went with him to cash the check. Monk asked him to buy crack cocaine as an "investment." After Feliciano, Monk, and Windham arrived back at their apartment building, Feliciano testified that he observed Monk and Windham conversing in the laundry room. Windham brought crack cocaine back to Feliciano's apartment. Feliciano tried the crack cocaine to "make sure it was good[,]" and gave some to Tate and Gutierrez. He stated that Windham was making a marijuana cigarette to smoke.

{¶48} Feliciano explained that Tate and Gutierrez warned him that someone was plotting to rob him and to watch his back. In response, Feliciano armed himself with a knife and gave Windham a knife. He explained that he did this to "protect each other, and I had his back and he was going to have mine." Soon thereafter, Feliciano observed Windham talking to Monk on his cell phone. He stated that this surprised him, and that after the call, Windham started to "act oddly[.]" He stated that there was "aggressive going on in the outside of the apartment. Aggressivity. And he was just sitting down calm in the apartment doing nothing except just text messaging on his cell phone." He stated that he recognized the voices outside his door, one belonging to Monk. He testified that they were knocking so loudly on his door that they left dents. Feliciano testified that he observed Windham looking at the place he had hidden his money, which made him suspicious. He then heard whistling through the windows and Windham made a noise on the floor and started coughing. He explained that this behavior lasted for about two and a half hours. He stated that he was "noticing strange movements of [Windham] inside, and I couldn't get out or open the door because I knew there were people outside trying to get in." He stated that he called 911 for help, but hung up because Windham asked him who he was calling. 911 called him back, and he informed them that he did not have an emergency yet. Feliciano testified that Windham was trying to hide the paring knife in his

sleeve. "I was waiting for something to happen, you know. I know I got somebody in my house already that wasn't my friend no more." Feliciano testified that Windham grabbed his knife and stood up and swung at him. Feliciano tried to grab the knife, hurting his hand in the process. "So I got the big knife and stabbed him over here, and my knife got bent. That's the only time that I stabbed him with that knife." Windham screamed to everyone outside that Feliciano had stabbed him and then they started fighting. Windham dropped the paring knife, Feliciano grabbed it, and Windham jumped on him from behind. As a result, Feliciano started swinging the paring knife at Windham. Feliciano testified that Windham was much bigger than he. He further stated that the people in the hallway were still trying to get in his apartment, but that he was afraid to let them in because he thought they would kill him. Feliciano stated that Windham tried to let them in, but he stopped him. He stated that he was defending himself and felt like he was fighting for his life.

{¶49} On cross-examination, Feliciano testified that after he stabbed Windham and the two fought, "[h]e was laying (sic) on the floor, we through fighting, and I cover his mouth." He did this, he testified, because Windham was still screaming. He then put his hand on Windham's throat because he was still breathing. Feliciano covered his mouth so the incident would "be over so I can use his cell phone[,]" to call 911. Feliciano further admitted that he chose to stab Windham in the chest and that he did so as Windham was starting to stand up from the couch. Feliciano denied Tate's testimony that when she was outside his door and Windham was screaming that he told her not to call the police and that Windham was just high.

{¶50} Given this evidence, we cannot conclude that the jury clearly lost its way when it chose to disbelieve Feliciano's testimony that he was acting in self defense. "The jury did not lose its way simply because it chose to believe the State's version of the events, which it had a

right to do." *State v. Morten*, 2d Dist. No. 23103, 2010-Ohio-117, at ¶28. Dr. Matus' testimony indicates that the deep stab wound occurred in the downward direction. Thus, the jury could have concluded that Feliciano stabbed Windham before Windham made any move to indicate that he was going to hurt Feliciano. Further Dr. Matus explained that with such a severe injury, Windham would not have been able to move and talk for a very long time. Therefore, the jury could have disbelieved Feliciano's testimony regarding the ensuing physical fight. Dr. Matus further testified that the photos of Feliciano taken shortly after the incident did not indicate that he had any defensive wounds on his hands. Detective Curry corroborated this testimony when he explained that Feliciano had no obvious injuries.

{¶51} Further, Feliciano testified that after he stabbed Windham, the two engaged in a physical fight, and Windham was lying on the floor, Feliciano attempted to suffocate Windham, simply because he wanted it to be over so he could use his cell phone. The jury could have believed the testimony of Tate and Gutierrez that they were trying to help Windham after they heard him screaming, but Feliciano discouraged them from doing so. Accordingly, we cannot conclude that the jury clearly lost its way when it convicted Feliciano, despite his testimony regarding self defense.

{¶52} Accordingly, Feliciano's seventh assignment of error is overruled.

III.

{¶53} Feliciano's assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
CONCURS

DICKINSON, P. J.
CONCURS, SAYING:

{¶54} I agree with the majority's judgment and most of its opinion. I write separately for two reasons. First, although in this case the majority has correctly labeled Mr. Feliciano's failure to object to the trial court's instruction on self-defense as forfeiture rather than waiver, this Court has not always correctly distinguished between the two. See *State v. Zander*, 9th Dist. No. 24706, 2010-Ohio-631, at ¶58; *State v. Arnold*, 9th Dist. No. 24400, 2009-Ohio-2108, at ¶8. Because our past opinions could cause confusion, a further explanation is necessary. Second, I

disagree with the majority's refusal to consider whether the trial court committed plain error by giving an incorrect instruction on self-defense.

{¶55} Criminal defendants have certain rights. There are four things that can happen in a criminal proceeding regarding those rights. For example, a defendant has a right to jury trial under the Sixth and Fourteenth Amendments to the United States Constitution. The four things that can happen regarding that right to jury trial are (1) the defendant can have a jury trial, (2) the defendant, despite his timely objection, can be denied a jury trial, (3) the defendant can waive his right to jury trial, or (4), although the defendant has not waived his right to jury trial, the trial court can fail to provide it and the defendant fail to timely object to that denial.

{¶56} If the defendant is provided a jury trial, the first possibility, he doesn't have anything to argue on appeal related to his right to jury trial. He had a right to jury trial and he got a jury trial. The trial court neither erred nor committed plain error regarding the defendant's right to jury trial.

{¶57} If the defendant did not get a jury trial despite his timely objection, the second possibility, he can obtain a reversal on appeal based on the trial court's error. He had a right to jury trial, which he did not waive, and he didn't get a jury trial. Because he preserved the error by timely objecting, he is not limited to arguing that the denial of his right to jury trial was plain error within the meaning of Rule 52(B) of the Ohio Rules of Criminal Procedure, but, rather, can argue that it was error. Although with most rights a defendant would have to show that the trial court's error was prejudicial rather than harmless under Rule 52(A) of the Ohio Rules of Criminal Procedure, the denial of a jury trial would be "structural error" and prejudice would be assumed. E.g., *State v. Robinson*, 2nd Dist. No. 22646, 2009-Ohio-898, at ¶23.

{¶58} If the defendant waived his right to jury trial, the third possibility, just as with the first possibility, he doesn't have anything to argue on appeal related to his right to jury trial. Although he had a right to jury trial, he waived it, and, therefore, the trial court neither erred nor committed plain error by not providing him a jury trial. As the United States Supreme Court has explained, "waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). The Ohio Supreme Court, in *State v. Payne*, adopted that same description of waiver and held that, if a right has been waived, the failure to provide that right is neither error nor plain error. *State v. Payne*, 114 Ohio St. 3d 502, 2007-Ohio-4642, at ¶23 (quoting *State v. McKee*, 91 Ohio St. 3d 292, 299 (2001) (Cook, J., dissenting)).

{¶59} If the defendant did not waive his right to jury trial, the trial court failed to provide it, and the defendant failed to timely object to that failure, the fourth possibility, the defendant has forfeited his right to argue that the trial court's failure was error. He can still, however, argue that the trial court's failure to provide him a jury trial was plain error under Rule 52(B) of the Ohio Rules of Criminal Procedure. *State v. Payne*, 114 Ohio St. 3d 502, 2007-Ohio-4642, at ¶23 (quoting *State v. McKee*, 91 Ohio St. 3d 292, 299 n.3 (2001) (Cook, J., dissenting)). As the United States Supreme Court explained in *Olano*, "[i]f a legal rule was violated during the [trial] court proceedings, and if the defendant did not waive the rule, then there has been an 'error' within the meaning of Rule 52(b) [of the Federal Rules of Criminal Procedure] despite the absence of a timely objection." *United States v. Olano*, 507 U.S. 725, 733-34 (1993) (quoting Fed. R. Crim. P. 52(b)); see *United States v. Marcus*, 78 U.S.L.W. 4453 (May 24, 2010). Under Ohio law, in order for a defendant to obtain a reversal based on plain error under Rule 52(B) of the Ohio Rules of Criminal Procedure, he usually must demonstrate

three things: "First, there must be an error, *i.e.*, a deviation from the legal rule. . . . Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. . . . Third, the error must have affected 'substantial rights.' We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial." *Payne*, 2007-Ohio-4642, at ¶16 (quoting *State v. Barnes*, 94 Ohio St. 3d 21, 27 (2002)). If the error is structural, the defendant does not have to demonstrate that the outcome would have been different but for the error. *Id*. at ¶18.

{¶60} The reason it is significant, therefore, whether a defendant has waived a right, the third possibility discussed above, or simply forfeited his right to argue error on appeal related to that right, the fourth possibility discussed above, is because of the impact the distinction has on the defendant's ability to argue plain error under Rule 52(B) of the Ohio Rules of Criminal Procedure. If the defendant has waived his right, he can neither argue error nor plain error. If he has forfeited his right to argue error on appeal, he can not argue error but can still argue plain error under Rule 52(B). The problem is that it is not always easy to distinguish between waiver and forfeiture.

{¶61} Some rights are not waivable. If a right is waivable, exactly what constitutes a waiver depends upon the right: "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *United States v. Olano*, 507 U.S. 725, 733 (1993). It also depends on the situation. For example, Rule 23(A) of the Ohio Rules of Criminal Procedure deals with waiver of the right to jury trial. In serious offense cases, a defendant's waiver of his right to jury trial, "before commencement of the trial," must be knowing, intelligent, voluntary, and in writing.

But in petty offense cases, a defendant waives his right to jury trial by failing to demand it in writing not less than ten days before the date set for trial or on or before the third day following his receipt of notice of the trial date, whichever is later. Although failing to demand a jury trial looks a lot like what in other situations would be forfeiture, in petty offense cases it is waiver. Generalizations about forfeiture, therefore, are dangerous. It is necessary to look carefully at each situation.

{¶62} Mr. Feliciano's first assignment of error in this case is that the trial court incorrectly instructed the jury on self-defense and "the duty to retreat in one's own home." The self-defense instruction given by the trial court was confusing. It included that the defendant had to show "that his only reasonable means of retreat or escape from such danger was by the use of deadly force." It also included, however, that "[i]f the Defendant was involved in his home, the Defendant could use such means as are necessary to repel the assailant from the home, or to prevent any forcible entry to the home, even deadly force, provided that he had reasonable grounds to believe, in an honest belief, that the use of deadly force was necessary to repel the assailant or to prevent the forcible entry."

{¶63} Part of the problem is that there was no evidence in this case about a forcible entry. The victim was present in Mr. Feliciano's house at Mr. Feliciano's invitation. Inclusion of a discussion of forcible entry in the instructions was unnecessary and added to the confusion. The State's position is that the inclusion of the statement that if the defendant "was involved in his home" he could "use such means as are necessary to repel the assailant from the home" implied that he did not have a duty to retreat. It is unclear, however, that the jury would have drawn that inference after having already been told that the defendant had to show "that his only

reasonable means of retreat or escape from such danger was by the use of deadly force." For purposes of discussion, I will assume that the trial court's instruction was wrong.

{¶64} There are three references in the record to Mr. Feliciano's lawyer reviewing the trial court's proposed instructions before they were given. The first was during a discussion of Mr. Feliciano's motion for acquittal at the close of his case. The subject of self-defense came up, and trial court mentioned that it and the lawyers had gone over the proposed instructions: "Well, let me just say this, because I think that possibly the additional argument is now he's been able to put forth his evidence with regard to the affirmative defense of self-defense, which, as we discussed when we were going over the jury instructions, would negate – even if the State did establish all of its elements, I think he's speaking now to the issue of the self-defense affirmative defense." Interestingly, in denying the motion for acquittal, the trial judge read into the record some comments about self-defense using some of the same language that he ultimately included in the jury instructions. After reading the language about the only means of retreat being the use of deadly force, he said "and we'll have to talk about that when we get the jury instructions finalized because this one says he did not violate any duty to retreat or escape to avoid the danger. I think that there may well be there is no duty to retreat under circumstances within your own residence."

{¶65} The second reference was as court closed that same day. After the jury had been dismissed, the judge stated that he wanted to work toward finalizing the instructions and again specifically mentioned self-defense: "Any other issues for the Court to address with counsel other than the jury instructions? I want to be able to finalize those before we leave here this afternoon, or at least have a good idea as to how we're going to finalize them. I think there were

outstanding issues regarding the self-defense instruction. We don't have to do it now on the record."

{¶66} The third reference was when the court reconvened several days later. A different judge was then presiding, apparently because the judge who had presided up until that time was ill. The judge asked whether the lawyers had reviewed the proposed instructions and, after they acknowledged that they had, whether they had any objections. They responded that they did not. The case then proceeded to closing arguments and jury instructions.

{¶67} At the close of the instructions, the judge asked the lawyers whether they had anything further, and they responded that they did not. The record does not indicate whether the judge asked that question outside the hearing of the jury, as required by Rule 30(A) of the Ohio Rules of Criminal Procedure.

{¶68} Rule 30(A) provides that, "[o]n appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury." Despite the apparent definitiveness of Rule 30(A), the Ohio Supreme Court has held that, if the record indicates that the trial court was "fully apprised of the correct law governing a material issue in dispute, and the requesting party has been unsuccessful in obtaining the inclusion of that law in the trial court's charge to the jury, such party does not waive his objections to the court's charge by failing to formally object thereto." *State v. Wolons*, 44 Ohio St. 3d 64, 67 (1989); *State v. McKnight*, 107 Ohio St. 3d 101, 2005-Ohio-6046, at ¶232.

{¶69} In this case, Mr. Feliciano did not formally object to the trial court's instruction on self-defense. As noted, it is unclear whether his lawyer was given an opportunity to object

outside the hearing of the jury as required by Rule 30(A), but he has not suggested that he was not. Although the record indicates that the trial judge had some knowledge regarding the fact that a person within his own home does not have a duty to retreat, it does not show that he was "fully apprised" of the law on that issue. *State v. Wolons*, 44 Ohio St. 3d 64, 67 (1989). For example, the record does not include any proposed instructions submitted by Mr. Feliciano's lawyer. Mr. Feliciano, therefore, neither complied with Rule 30(A) nor preserved an error related to the self-defense instruction under the alternative method recognized in *Wolons*. The issue, therefore, is whether he waived his right to an instruction that a person in his own home does not have a duty to retreat or only forfeited his opportunity to argue on appeal that the trial court erred by not giving such an instruction.

{¶70} In *Wolons*, the Court wrote that the defendant had not "waived" his objection by failing to comply with Rule 30(A). *State v. Wolons*, 44 Ohio St. 3d 64, 67 (1989). But too much should not be made of that word choice. As noted by Justice Cook in *McKee*, "[the Supreme Court has] often referred to the failure to object as a waiver of any error. A failure to object, however, is more accurately characterized as forfeiture." *State v. McKee*, 91 Ohio St. 3d 292, 299 n.3 (2001) (Cook, J., dissenting) (citing *United States v. Olano*, 507 U. S. 725, 733 (1993)). See *State v. Payne*, 114 Ohio St. 3d 502, 2007-Ohio-4642, at ¶23.

{¶71} In *State v. Long*, 53 Ohio St. 2d 91 (1978), the defendant argued that the trial court had given an incorrect instruction on self-defense, and the Ohio Supreme Court agreed. As in this case, however, the defendant had failed to object to the instruction as given. As in *Wolons*, the Court used the word waiver regarding the defendant's failure to object: "Ordinarily, the failure to timely object to a jury instruction violative of R.C. 2901.05(A) constitutes a waiver of any claim of error relative thereto. Crim.R. 30." *Long*, 53 Ohio St. 2d 91, at syllabus

paragraph one. Despite that, it analyzed whether the trial court's incorrect instruction constituted plain error under Rule 52(B) of the Ohio Rules of Criminal Procedure, thereby treating the failure to object as a forfeiture. It concluded that the incorrect instruction did not amount to plain error: "A jury instruction violative of R.C. 2901.05(A) does not constitute a plain error or defect under Crim.R. 52(B) unless, but for the error, the outcome of the trial clearly would have been otherwise." *Id.*, at syllabus paragraph two.

{¶72} Similarly, in *State v. Underwood*, 3 Ohio St. 3d 12, syllabus (1983), although again using the word waiver, the Court treated a defendant's failure to object to an instruction as forfeiture and applied a plain error analysis: "The failure to object to a jury instruction 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." And finally, in *State v. Taylor*, 78 Ohio St. 3d 15 (1997), a case decided after *Wolons* but before *Payne*, the Court wrote: "Moreover, except as noted below, appellant at trial did not propose instructions on issues he now raises or object to the instructions given. Appellant's failure to propose instructions and to object to those given waives any error 'unless, but for the error, the outcome of the trial clearly would have been otherwise.'" *Taylor*, 78 Ohio St. 3d at 28 (quoting *State v. Underwood*, 3 Ohio St. 3d 12, syllabus (1983); and citing *State v. Long*, 53 Ohio St. 2d 91, syllabus paragraph two (1978); *State v. Wolons*, 44 Ohio St. 3d 64, syllabus paragraph one (1989)).

{¶73} Rule 30(A) of the Ohio Rules of Criminal Procedure does not use either the word waiver or forfeiture. Rather, it provides that a party who does not object to an instruction "may not assign as error the giving or failure to give [that] instruction[ ]." Crim. R. 30(A). The failure to object, even if the trial court provides an opportunity to object out of the hearing of the jury, is not an "intentional relinquishment or abandonment of a right." *State v. Payne*, 114 Ohio St. 3d

502, 2007-Ohio-4642, at ¶23. It is not, therefore, a waiver. It is a forfeiture of the opportunity to "assign as error [on appeal] the giving or failure to give [that] instruction[ ]." Crim. R. 30(A). A defendant who fails to timely bring an erroneous instruction to the trial court's attention may still argue on appeal that the giving of that instruction was plain error under Rule 52(B) of the Ohio Rules of Criminal Procedure.

{¶74} In this case, the majority has recognized that Mr. Feliciano's forfeiture did not foreclose him from arguing that the trial court's instruction on self defense was plain error. It has refused to engage in a plain error analysis, however, because Mr. Feliciano failed to use the magic phrase "plain error" in his assignment of error. Such procedural roadblocks are a hindrance to the interests of justice. I read Mr. Feliciano's use of the word "error" in has first assignment of error as including "plain error." Accordingly, I will consider whether the trial court's instruction on self defense amounted to plain error.

{¶75} In this case, Mr. Feliciano stabbed his victim multiple times. Further, he testified at trial that, after he and the victim were through fighting, the victim was screaming to people outside Mr. Feliciano's apartment to break down the door, so he covered the victim's mouth with one hand and put his other hand on the victim's neck so that he could not breath. I cannot conclude that, if the trial court had clearly instructed the jury in this case that Mr. Feliciano did not have a duty to retreat within his own home, the outcome of his trial would have been different. Even if the trial court's instructions were erroneous, therefore, giving them was not plain error. Accordingly, I concur with the majority's affirmance of Mr. Feliciano's conviction.

APPEARANCES:

DENISE G. WILMS, Attorney at Law, for Appellant.

DENNIS WILL, Prosecuting Attorney, and MARY R. SLANCZKA, Assistant Prosecuting Attorney, for Appellee.