**[Cite as *State v. Tolbert*, 2010-Ohio-2864.]**

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

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| STATE OF OHIO<br><br>Appellee<br><br>v.<br><br>GREGORY A. TOLBERT, SR.<br><br>Appellant | C. A. No. 24958<br><br><br><br>APPEAL FROM JUDGMENT<br>ENTERED IN THE<br>COURT OF COMMON PLEAS<br>COUNTY OF SUMMIT, OHIO<br>CASE No. CR 09 04 1333 |

DECISION AND JOURNAL ENTRY

Dated: June 23, 2010

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CARR, Judge.

**{¶1}** Appellant, Gregory Tolbert, Sr., appeals his conviction and sentence out of the Summit County Court of Common Pleas. This Court affirms.

I.

**{¶2}** On May 8, 2009, Tolbert was indicted on one count of felonious assault in violation of R.C. 2903.11(A)(1)/(2), a felony of the second degree; and one count of domestic violence in violation of R.C. 2919.25(A), a felony of the third degree. The matter was tried to a jury, who found Tolbert guilty of both counts. The trial court sentenced him accordingly. Tolbert appealed, raising six assignments of error for review.

II.

**ASSIGNMENT OF ERROR I**

"THE TRIAL COURT ERRED IN FAILING TO HOLD A HEARING ON A TIMELY CHALLENGED ARRAY OF JURORS[.]"

**{¶3}** Tolbert argues that the trial court erred by failing to hold a hearing on his challenge to the jury array. This Court disagrees.

**{¶4}** Tolbert objected prior to voir dire that none of the prospective jurors in the array were black. He requested another array which would more accurately reflect the community and his own peers. He requested a hearing including the jury commissioner to determine how the jury array was selected. The trial court denied the request for a hearing because Tolbert failed to assert that blacks had been systematically excluded from the jury array.

**{¶5}** Crim.R. 24(F) provides, in relevant part:

> "The prosecuting attorney or the attorney for the defendant may challenge the array of petit jurors on the ground that it was not selected, drawn or summoned in accordance with law. A challenge to the array shall be made before the examination of the jurors pursuant to division (B) of this rule and shall be tried by the court."

**{¶6}** The Ohio Supreme Court has held that a trial court does not err by failing to hold a hearing on a challenge to a jury array when counsel has merely "made an unsworn allegation, unsupported by any evidence, that minority persons had been excluded from the jury panel." *State v. Rahman* (1986), 23 Ohio St.3d 146, 155, citing *Frazier v. United States* (1948), 335 U.S. 497, and *State v. Wright* (1976), 290 N.C. 45. In this case, Tolbert failed even to allege that blacks had been systematically excluded from the array of prospective jurors; rather, he merely asserted that none of the prospective jurors was black. He declined the trial court's invitation to elaborate on his challenge to the array. "Absent any evidence or even a proffer for the record in support of this motion, we find no error in the trial court's failure to hold a hearing on appellant's challenge to the array." *Rahman*, 23 Ohio St.3d at 155. Tolbert's first assignment of error is overruled.

**ASSIGNMENT OF ERROR II**

"THE TRIAL COURT ERRED IN ADMITTING MEDICAL RECORDS DENYING CONSTITUTIONAL CONFRONTATION RIGHTS[.]"

**{¶7}** Tolbert argues that the trial court erred by admitting the victim's medical records because the admission violated his confrontation rights. This Court disagrees.

**{¶8}** Tolbert acknowledges that the victim's medical records were admitted pursuant to R.C. 2317.422 and the State's notice of intent to use them. R.C. 2317.422 allows for the admission of medical records which have been properly certified. Tolbert further recognizes that the Ohio Supreme Court has held that the statutory procedure set out in R.C. 2317.422 for the admission of medical records "preserves the confrontation rights of a criminal defendant." *State v. Spikes* (1981), 67 Ohio St.2d 405, paragraph one of the syllabus. He argues, however, that a recent decision by the United States Supreme Court, *Melendez-Diaz v. Massachusetts* (2009), 129 S.Ct. 2527, coupled with the testifying physician's inability to identify the entire packet of medical records, violated his right to confront witnesses against him.

**{¶9}** The United States Supreme Court discussed a criminal defendant's right of confrontation as follows:

> "The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, *Pointer v. Texas* (1965), 380 U.S. 400, 403, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him." In *Crawford* [*v. Washington* (2004) 541 U.S. 36], after reviewing the Clause's historical underpinnings, we held that it guarantees a defendant's right to confront those 'who "bear testimony"' against him. [Id.] at 51. A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. Id. at 54." *Melendez-Diaz*, 129 S.Ct. at 2531.

**{¶10}** The issue in *Melendez-Diaz* was whether affidavits which reported the results of forensic analyses of substances seized by the police were "testimonial" so that the defendant had

the right to confront the affiants pursuant to the Sixth Amendment. The high court held that the affidavits were testimonial and the analysts were witnesses for Sixth Amendment purposes because the affidavits were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Id. at 2532, quoting *Crawford*, supra, at 54.

**{¶11}** The *Melendez-Diaz* court distinguished between documents such as the forensic analysts' reports at issue in that case and other documents kept in the regular course of business, which "may ordinarily be admitted at trial despite their hearsay status." Id. at 2538. Evid.R. 803(6) provides an exception to the rule for the exclusion of hearsay for records kept in the course of a regularly conducted business activity. The *Melendez-Diaz* court explained:

> "Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because – having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial – they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here – prepared specifically for use at petitioner's trial – were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment." Id. at 2539-40.

**{¶12}** The medical records in this case were admissible as records kept in the ordinary course of business pursuant to Evid.R. 803(6). In addition, the records were properly certified pursuant to R.C. 2317.422. The professionals who made those records, however, were not subject to confrontation under the Sixth Amendment, because the records were not testimonial. That is, the medical records were not prepared specifically for use at Tolbert's trial. Accordingly, the trial court did not err by admitting them into evidence.

**{¶13}** Moreover, Dr. Santosh Potdar, the Chief of Trauma Surgery at Akron City Hospital, who treated the victim for injuries sustained as a result of the incident with Tolbert, testified at trial regarding the victim's injuries and also identified the portions of the medical

records which he prepared. Accordingly, Tolbert had the opportunity to question the doctor regarding the relevant medical records of the victim. Tolbert's second assignment of error is overruled.

**ASSIGNMENT OF ERROR III**

> "THE TRIAL COURT ERRED IN ADMITTING THE VICTIM'S HEARSAY STATEMENTS INSIDE THE AMBULANCE MADE TO A POLICE OFFICER[.]"

**{¶14}** Tolbert argues that the trial court erred by admitting statements made by the victim to a police officer in the ambulance as the victim was being transported to the hospital. This Court disagrees.

**{¶15}** Tolbert challenges the admission of the officer's testimony regarding two statements by the victim, specifically that (1) "he could actually see his intestines were out," and (2) "he kept saying his dad cut him and he just couldn't believe it[.]" Tolbert argues that these statements were testimonial and that their admission violated his constitutional right to confrontation.

**{¶16}** The State subpoenaed the victim to testify at trial, but the victim failed to appear. Although Officer Michael Radak of the Akron Police Department testified that he rode in the ambulance with the victim for the purpose of obtaining as much information as possible from the victim, he did not testify as to any specific questions he asked the victim. Accordingly, there is no evidence that the victim made the above statements in response to the officer's questions or request for information. In fact, the officer's testimony supports the inference that the victim made these particular statements spontaneously. Therefore, the statements are not testimonial and Tolbert's Sixth Amendment right to confrontation is not implicated.

**{¶17}** Moreover, the trial court did not err by admitting the victim's statements under Evid.R. 803(2) and 803(3).

**{¶18}** Evid.R. 803(2) provides that statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" are not excluded by the hearsay rule. In this case, Officer Radak testified that he arrived on scene as the victim was being taken by stretcher to the ambulance after being stabbed. The ambulance ride lasted approximately five minutes. Both statements by the victim related to the very recent physical assault by his father while the victim was still under the stress of the event. In fact, Officer Radak testified that the victim named his father as his attacker only after the victim "continued to go into shock, wasn't really sure what was going on[.]" Accordingly, both statements were admissible pursuant to the excited utterance exception to the hearsay rule.

**{¶19}** Evid.R. 803(3) provides an exception to the hearsay rule for statements regarding a "then existing *** physical condition." Evid.R. 803(1) creates an exception for statements describing a condition made at the time the condition was perceived or immediately thereafter. The victim's statement that he saw his own intestines outside of his body after the recent assault was admissible pursuant to both exceptions. Accordingly, the trial court did not abuse its discretion by admitting the officer's testimony regarding the victim's statements in the ambulance.

**{¶20}** Assuming that the victim's statements were testimonial, any error was harmless. Crim.R. 52(A) provides that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."

**{¶21}** In this case, both Dr. Potdar's testimony and the victim's properly admitted medical records evidenced the nature and extent of the victim's injuries. Dr. Potdar testified that

the victim presented with a stabbing injury and that part of his abdominal viscera was coming out. The medical records also state that the victim suffered a "15 cm transverse laceration with evisceration of peritoneal contents." Accordingly, the admission of the victim's statement that he saw his intestines coming out of his body was harmless because it was merely cumulative of the medical evidence properly admitted at trial.

**{¶22}** The admission of the victim's statement that his father stabbed him was also harmless. Tolbert's defense was premised on self-defense and the trial court instructed the jury that "[t]he Defendant is asserting an affirmative defense known as self-defense." Because Tolbert did not dispute causing the injuries to his son, admission of the victim's statement that his father stabbed him constituted harmless error. Tolbert's third assignment of error is overruled.

## ASSIGNMENT OF ERROR IV

> "FAILURE TO FILE A MOTION TO SUPPRESS STATEMENTS DENIED THE CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL[.]"

**{¶23}** Tolbert argues that defense counsel's failure to file a motion to suppress denied him the right to the effective assistance of counsel. This Court disagrees.

**{¶24}** This Court uses a two-step process as set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 687, to determine whether a defendant's right to the effective assistance of counsel has been violated.

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id.

**{¶25}** To demonstrate prejudice, "the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691.

**{¶26}** This Court must analyze the "reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. The defendant must first identify the acts or omissions of his attorney that he claims were not the result of reasonable professional judgment. This Court must then decide whether counsel's conduct fell outside the range of professional competence. Id.

**{¶27}** Tolbert bears the burden of proving that counsel's assistance was ineffective. *State v. Hoehn*, 9th Dist. No. 03CA0076-M, 2004-Ohio-1419, at ¶44, citing *State v. Colon*, 9th Dist. No. 20949, 2002-Ohio-3985, at ¶49; *State v. Smith* (1985), 17 Ohio St.3d 98, 100. In this regard, there is a "strong presumption [] that licensed attorneys are competent and that the challenged action is the product of a sound strategy." *State v. Watson* (July 30, 1997), 9th Dist. No. 18215. In addition, "debatable trial tactics do not give rise to a claim for ineffective assistance of counsel." *Hoehn* at ¶45, quoting *In re Simon* (June 13, 2001), 9th Dist. No. 00CA0072, citing *State v. Clayton* (1980), 62 Ohio St.2d 45, 49. 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.

**{¶28}** "[A] defendant is not deprived of effective assistance of counsel when counsel chooses, for strategical reasons, not to pursue every possible trial tactic." *State v. Brown* (1988), 38 Ohio St.3d 305, 319, citing *State v. Johnson* (1986), 24 Ohio St.3d 87. In addition, "the end result of tactical trial decisions need not be positive in order for counsel to be considered 'effective.'" *State v. Awkal* (1996), 76 Ohio St.3d 324, 337.

**{¶29}** The Ohio Supreme Court has recognized that a court need not analyze both prongs of the *Strickland* test, where the issue may be disposed upon consideration of one of the factors. *State v. Bradley* (1989), 42 Ohio St.3d 136, 143. Specifically,

> "'Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing in one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.'" *Bradley*, 42 Ohio St.3d at 143, quoting *Strickland*, 466 U.S. at 697.

**{¶30}** Tolbert argues that trial counsel was ineffective for failing to file a motion to suppress statements he made to police after his arrest because his arrest warrant was void for lack of probable cause. This argument is not well taken.

**{¶31}** R.C. 2935.09(C) states that "[a] peace officer who seeks to cause an arrest or prosecution under this section may file with a reviewing official or the clerk of a court of record an affidavit charging the offense committed." This Court has stated that "[b]efore an arrest warrant may issue, the complaint must establish probable cause that the defendant committed the

offense charged. Crim.R. 4(A)(1); and *Whitely v. Warden* (1971), 401 U.S. 560." *State v. Moore* (1985), 28 Ohio App.3d 10, 11. The United States Supreme Court in *Whitely* held that "before a warrant for either arrest or search can issue [the Fourth Amendment probable-cause requirements] require that the judicial officer issuing such a warrant be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant." Id. at 564.

**{¶32}** In this case, Officer Lamm of the APD swore out an affidavit in support of the complaint giving rise to the warrant for Tolbert's arrest. Officer Lamm averred that "Gregory Tolbert Sr.[,] on or about the 24th day of April 09 at 1063 Wyley Ave Akron, OH[,] did argue with then assault his son, Gregory Tolbert Jr. Used an unknown object to slice victim's stomach causing serious physical harm. Suspect has prior convictions for Domestic Violence on 5/24/93 – 93CRB4484 and 9/20/00 00CRB10962." Officer Lamm swore that "the above statement is correct and true to the best of my knowledge and belief." Tolbert describes the officer's statement as a "bare bones recitation[] of facts" which is insufficient to establish probable cause, i.e., whether it is more likely than not that Tolbert committed the acts. The officer's statement, however, is explicit as to the location of the assault, the identity of the victim by both name and relationship to Tolbert, the nature of the injury suffered by the victim, and prior convictions for domestic violence. Tolbert's argument that the affidavit is "facially invalid" must therefore fail.

**{¶33}** Because the affidavit in support of the warrant for arrest is sufficient on its face to establish probable cause, defense counsel was not deficient for failing to file a motion to suppress Tolbert's statements to police after his arrest. Accordingly, the fourth assignment of error is overruled.

## ASSIGNMENT OF ERROR V

"THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON LESSER INCLUDED OFFENSES OF FELONIOUS ASSAULT[.]"

**{¶34}** Tolbert argues that the trial court erred by failing to instruct the jury on the lesser included offenses of felonious assault. This Court disagrees.

**{¶35}** Tolbert argues that the trial court erred by failing to instruct the jury as to the lesser included offenses of felonious assault, to wit: aggravated assault, simple assault, and disorderly conduct. At trial, however, Tolbert requested only that the trial court instruct the jury on the lesser included offense of disorderly conduct.

**{¶36}** The Ohio Supreme Court set out the test to determine whether an offense is a lesser included offense of another:

> "An offense may be a lesser included offense of another if (i) the offense carries a lesser penalty than the other; (ii) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (iii) some element of the greater offense is not required to prove the commission of the lesser offense." *State v. Deem* (1988), 40 Ohio St.3d 205, paragraph three of the syllabus.

**{¶37}** Relevant to jury instructions, the Ohio Supreme Court has stated:

> "In determining whether an offense is a lesser included offense of the charged offense, the evidence presented in a particular case is irrelevant to the determination of whether an offense, as statutorily defined, is necessarily included in a greater offense. However, the evidence in a particular case is relevant in determining whether a trial judge should instruct the jury on the lesser included offense. If the evidence is such that a jury could reasonably find the defendant not guilty of the charged offense, but could convict the defendant on the lesser included offense, then the judge should instruct the jury on the lesser offense." (Internal quotations and citations omitted.) *Shaker Hts. v. Mosely*, 113 Ohio St.3d 329, 2007-Ohio-2072, at ¶11.

Said another way, "[e]ven though an offense may be statutorily defined as a lesser included offense of another, a charge on such lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a

conviction upon the lesser included offense." *State v. Thomas* (1988), 40 Ohio St.3d 213, paragraph two of the syllabus; *State v. Carter* (2000), 89 Ohio St.3d 593, 600.

**{¶38}** Felonious assault, in violation of R.C. 2903.11(A)(1)/(2) provides, in relevant part: "No person shall knowingly *** [c]ause serious physical harm to another *** [or] [c]ause or attempt to cause physical harm to another *** by means of a deadly weapon or dangerous ordnance." Felonious assault is a felony of the second degree.

**{¶39}** Tolbert requested an instruction on disorderly conduct in violation of R.C. 2917.11(A)(1) which provides: "No person shall recklessly cause inconvenience, annoyance, or alarm to another by *** [e]ngaging in fighting, in threatening harm to persons or property, or in violent or turbulent behavior[.]" A violation of this provision constitutes a minor misdemeanor.

**{¶40}** Assuming, without deciding, that disorderly conduct is a lesser included offense of felonious assault, this Court now considers whether the trial court erred by failing to instruct on disorderly conduct under the circumstances of the case because the jury could reasonably have found the defendant not guilty of felonious assault, but could have convicted Tolbert of the lesser included offense. In this case, the trial court should have instructed the jury on disorderly conduct only if the jury could have reasonable concluded that Tolbert did not knowingly cause serious physical harm to the victim or cause or attempt to cause physical harm to the victim by means of a deadly weapon, but instead recklessly caused the victim inconvenience, annoyance, or alarm by engaging in violent or turbulent behavior.

**{¶41}** At trial, Tina Chappell testified that she was with Tolbert when his son approached. She testified that Tolbert and his son fought, that Tolbert carries a knife, and that, although she did not see the victim get cut, she was aware that he got cut during the fight. Detective Jeffrey Lamm of the APD testified that he interviewed Tolbert who admitted that he

fought with his son and held a knife to his throat. Moreover, Tolbert raised the defense of self-defense at trial, thereby not disputing that he knowingly cut his son during their fight. He merely asserted that he was justified in doing so. Given this evidence, the jury could not reasonably have found Tolbert not guilty of felonious assault and yet guilty of disorderly conduct. Accordingly, the trial court did not err by failing to instruct on the lesser included offense of disorderly conduct because there was no evidence which would have reasonably supported an acquittal on the charge of felonious assault but a conviction for disorderly conduct. See *State v. Robb* (2000), 88 Ohio St.3d 59, 74.

**{¶42}** Tolbert further alleges error in regard to the trial court's failure to instruct the jury on the lesser included offenses of aggravated assault and simple assault, arguments he failed to raise before the trial court. Crim.R. 30(A) provides, in relevant part:

> "On appeal, a party may not assign as error the giving of the failure to give any instructions unless the party objects before the jury retires to consider the verdict, stating specifically the matter objected to and the grounds of the objection."

**{¶43}** Moreover, this Court has long held that "an appellate court will not consider as error any issue a party was aware of but failed to bring to the trial court's attention[]" at a time when the trial court might have corrected the error. *State v. Dent*, 9th Dist. No. 20907, 2002-Ohio-4522, at ¶6. "[F]orfeiture 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 omitted.) *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶23. By failing to raise the issue below, Tolbert has forfeited his objection to the trial court's failure to instruct the jury on the offenses of aggravated assault and simple assault. His argument fails, however, for the same reasons enunciated above in regard to disorderly conduct. By claiming self-defense, Tolbert admitted to cutting his son during their fight. Accordingly, the trial court did not err by refusing to instruct

the jury on the lesser included offenses of aggravated assault and simple assault. Tolbert's fifth assignment of error is overruled.

**ASSIGNMENT OF ERROR VI**

"THE SENTENCE IMPOSED IS CONTRARY TO LAW AND VIOLATES DOUBLE JEOPARDY PROTECTIONS[.]"

**{¶44}** Tolbert argues that his sentence is contrary to law and violates double jeopardy protections. This Court disagrees.

**{¶45}** Tolbert first argues that his sentence is invalid because the assigned judge did not sign the sentencing entry. This argument is not well taken.

**{¶46}** The Ohio Supreme Court has held that a judgment of conviction must contain "(1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court." *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, at ¶18. The sentencing entry is signed by a judge, albeit by the Honorable Thomas Teodosio "for" the Honorable Brenda Burnham Unruh, the judge assigned to the case. Tolbert cites *State ex rel. Lomaz v. Court of Common Pleas of Portage Cty.* (1988), 36 Ohio St.3d 209, 212, in support of his argument that the judgment is invalid for lack of proper assignment. *Lomaz* is distinguishable, however, because that case involved the assignment of an injunctive relief action by the administrative judge of a common pleas general division to a domestic relations court judge. He cites this Court's decision in *White v. Summit Cty.* (2000), 138 Ohio App.3d 116, in support of his argument that we must vacate his sentence. *White* is also distinguishable because all parties in that case agreed that there was no justification in the record for a visiting judge to decide the case. Id. at 117.

**{¶47}** Crim.R. 25(B) states, in relevant part: "If for any reason the judge before whom the defendant has been tried is unable to perform the duties of the court after a verdict or finding

of guilt, another judge designated by the administrative judge *** may perform those duties." In this case, the transcript reflects that Judge Unruh sentenced Tolbert on the record at the sentencing hearing. The judgment entry of conviction mirrors the sentence pronounced on the record. Moreover, Judge Teodosio signed "for" the assigned judge over Judge Unruh's signature line. Because Judge Unruh had already imposed sentence, and the sentencing entry reflects both her sentence and her name, Judge Teodosio's signing on her behalf was a ministerial act. "Although the file does not explain why another judge signed the [entry], defendant still 'has not contradicted the presumption of regularity accorded all judicial proceedings.'" *Robb*, 88 Ohio St.3d at 87, quoting *State v. Hawkins* (1996), 74 Ohio St.3d 530, 531.

**{¶48}** Second, Tolbert argues that postrelease control was not properly addressed at the sentencing hearing. He acknowledges that the sentencing entry accurately reflects the appropriate period of postrelease control. The State's sole response to all assignments of error is that Tolbert's sentence is void and must be vacated pursuant to *State v. Bedford*, 9th Dist. No. 24431, 2009-Ohio-3972, at ¶14, and that this Court does not have jurisdiction to consider the merits of the appeal. In reply, Tolbert cites *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, and asserts that "the sentencing entry is not void due to any prejudicial error concerning post release control." The *Singleton* court recently enunciated the procedural remedy to address this issue: "For criminal sentences imposed on and after July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall apply the procedures set forth in R.C. 2929.191." Id. at paragraph two of the syllabus. Tolbert makes no argument as to how the trial court's improper recitation of postrelease control otherwise prejudiced him or requires reversal.

**{¶49}** Third, Tolbert argues that his sentence for felonious assault violates principles of double jeopardy. This Court disagrees.

**{¶50}** Tolbert concedes that this Court has held that felonious assault and domestic violence do not constitute allied offenses of similar import, so that a defendant's sentence on both charges does not violate double jeopardy. *State v. Marshall*, 9th Dist. No. 22706, 2005-Ohio-5947, at ¶49-50. He asks us to revisit that holding in light of the Ohio Supreme Court's recent decisions in *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, and *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323. Neither case analyzes whether felonious assault and domestic violence are allied offenses of similar import.

**{¶51}** "[W]hether cumulative punishments for two separate offenses stemming from the same conduct violate the Double Jeopardy Clause is determined by the legislative intent found in R.C. 2941.25, Ohio's multiple-count statute." *Winn* at ¶6. R.C. 2941.25 provides:

> "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

**{¶52}** The Ohio Supreme Court has established a two-part test to determine whether two crimes are allied offenses of similar import. *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117.

> "In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's conduct is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were

> committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses." (Emphasis omitted.) Id., citing *State v. Mughni* (1987), 33 Ohio St.3d 65, 67; *State v. Talley* (1985), 18 Ohio St.3d 152, 153-154; *State v. Mitchell* (1983), 6 Ohio St.3d 416, 418; *State v. Logan* (1979), 60 Ohio St.2d 126, 128.

Moreover,

> "[i]n determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar imports." *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, paragraph one of the syllabus.

**{¶53}** Even considering the Ohio Supreme Court's rejection of the "strict textual comparison" test, see *Winn* at ¶12, this Court declines to modify our holding in *Marshall* that felonious assault and domestic violence are not allied offenses of similar import. Domestic violence requires proof that appellant (1) knowingly, (2) caused or attempted to cause, (3) physical harm, (4) to a family or household member. Felonious assault requires proof that appellant (1) knowingly, (2) caused, (3) serious physical harm, (4) to another; or (1) knowingly, (2) caused or attempted to cause, (3) physical harm, (4) to another, (5) by means of a deadly weapon or dangerous ordnance.

**{¶54}** This Court reiterates our holding in *Marshall*:

> "Comparing the elements of the two crimes, this Court does not find that the elements correspond to such a degree that the commission of domestic violence necessarily results in the commission of felonious assault. Domestic violence may occur without a felonious assault, where the harm does not rise to the level of serious physical harm[, or where the use of a deadly weapon or dangerous ordnance is not implicated]. Likewise, felonious assault may occur without domestic violence, where the victim is not a family or household member.
>
> "Because this Court finds that the elements of domestic violence and felonious assault do not correspond to such a degree that the commission of one crime will result in the commission of the other, we need not reach the second step of analyzing appellant's conduct. Based on our analysis of the first step, this Court

> [concludes] that domestic violence and felonious assault are not allied offenses of similar import. Accordingly, the trial court did not err by convicting appellant of both crimes." Id. at ¶49-50.

**{¶55}** Tolbert also argues that his sentence for felonious assault in violation of R.C. 2903.11(A)(1) and (A)(2) violates the Double Jeopardy Clause. The Ohio Supreme Court has held that felonious assault in violation of R.C. 2903.11(A)(1) is an allied offense of similar import to felonious assault in violation of R.C. 2903.11(A)(2). *Harris* at ¶20. In *Harris*, the defendant was charged, convicted, and sentenced on multiple counts of felonious assault. Tolbert, however, was charged, alternatively, with only one count of felonious assault in violation of either R.C. 2903.11(A)(1) or (A)(2). He was convicted of only one count of felonious assault. The trial court sentenced him on only one count of felonious assault. Accordingly, he has not been sentenced twice for the same offense, and his sentence for felonious assault does not violate the Double Jeopardy Clause.

**{¶56}** Finally, Tolbert argues that his verdict form for felonious assault is defective because it fails to recite the degree of the offense or additional elements necessary to convict on a higher degree of the offense.

**{¶57}** R.C. 2945.75 addresses degrees of offenses and states, in relevant part:

> "(A) When the presence of one or more additional elements makes an offense one of more serious degree:
>
> "(1) The affidavit, complaint, indictment, or information either shall state the degree of the offense which the accused is alleged to have committed, or shall allege such additional element or elements. Otherwise, such affidavit, complaint, indictment, or information is effective to charge only the least degree of the offense.
>
> "(2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged."

**{¶58}** Tolbert was charged with felonious assault in violation of R.C. 2903.11(A). R.C. 2903.11(D) provides that a violation of that section is a felony of the second degree. Where the victim is a peace officer or investigator of the bureau of criminal identification and investigation ("BCI"), however, felonious assault is a felony of the first degree. Id.

**{¶59}** Tolbert was indicted on one count of felonious assault as a felony of the second degree. The verdict form indicates that the jury found him "guilty of the offense of FELONIOUS ASSAULT." Because the verdict form did not state the degree of offense or that the jury found that the victim was a peace officer or BCI investigator, his guilty verdict constitutes a finding of guilty of the least degree of felonious assault, specifically a felony of the second degree. The trial court properly sentenced him on a felony of the second degree.

**{¶60}** Tolbert argues, however, that his guilty verdict constitutes a finding of guilty only as to misdemeanor assault. He was not charged with assault, however. Tolbert is correct in his assertion that the Ohio Supreme Court has concluded that the language of R.C. 2945.75(B)(2) is "clear and complete[.]" *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, at ¶12. However, the plain language of the statute does not require a finding of guilty on the least degree of an offense of the defendant's choosing. Tolbert was neither charged with nor convicted of "assault." He was charged and convicted of "felonious assault." He was properly sentenced on the least degree of the offense charged.

**{¶61}** For the reasons above, Tolbert's sixth assignment of error is overruled.

III.

**{¶62}** Tolbert's assignments of error are overruled. The judgment of the Summit 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 Summit, 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.

DONNA J. CARR
FOR THE COURT

DICKINSON, P. J.
CONCURS

BELFANCE, J.
CONCURS IN JUDGMENT ONLY, SAYING:

**{¶63}** I concur in the majority's judgment and much of the majority opinion. However, I write separately to address several issues concerning Mr. Tolbert's first and fourth assignments of error.

**{¶64}** In his first assignment of error, Mr. Tolbert argues that the trial court erred in failing to grant him a hearing on his challenge to the jury array. The majority, citing *State v. Rahman* (1986), 23 Ohio St.3d 146, 155, concluded that Mr. Tolbert made a bare challenge

without any supporting facts. However, I am hard-pressed to know when a person in Mr. Tolbert's position could ever successfully get a hearing before the court to challenge the jury array. It is clear, that prior to actually seeing the prospective jurors walk into the court room, neither Mr. Tolbert nor his counsel could ever know the composition of the array. Thus, upon seeing that the array did not have a single African American, it is only then that Mr. Tolbert could mount a challenge. Mr. Tolbert would not be in the position at that moment in time to be armed with statistics, demographics or other information from which he could make evidentiary assertions. However, even without statistics it is evident that African Americans comprise a significant portion of the local population. Thus, the mere fact that the prospective array had no African Americans at all could certainly serve as a basis to hold a hearing to at least explore whether there was some irregularity in the process. As Justice Thomas pointed out in *Georgia v. McCollum* (1992), 505 U.S. 42, 60 (Thomas, J., concurring in the judgment), the United States Supreme Court over 100 years ago acknowledged in *Strauder v. West Virginia* (1880), 100 U.S. 303, 309, that the racial composition of a trial can affect the outcome of the case and the fairness of the trial:

> "In the course of the [*Strauder*] decision, we observed that the racial composition of a jury may affect the outcome of a criminal case. We explained: 'It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.' Id. at 309. We thus recognized, over a century ago, the precise point that Justice O'Connor makes today. Simply stated, securing representation of the defendant's race on the jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial." *McCollum*, 505 U.S. at 60-61 (Thomas, J., concurring in the judgment).

**{¶65}** Given that Mr. Tolbert was confronted with a jury array that did not have a single African American, it would not have been onerous for the trial court to conduct a brief hearing in order to ensure that there was no irregularity in the jury selection process.

**{¶66}** In his fourth assignment of error, Mr. Tolbert argues that he was denied the right to effective assistance of counsel because his counsel failed to file a motion to suppress statements made after Mr. Tolbert's arrest. Mr. Tolbert contends that suppression of the statements was appropriate because his arrest and continued detention were based on warrants issued without probable cause. I believe that Mr. Tolbert's contention that the warrant was defective is proper. In this case, the warrant was issued based upon a bare bones affidavit that was devoid of any information as to the source of the officer's information. *Whiteley v. Warden, Wyoming State Penitentiary* (1971), 401 U.S. 560, 564-565; see, also, *State v. Johnson* (1988), 48 Ohio App.3d 256, 259-260 (Stephenson, J., concurring). Notwithstanding, I agree that Mr. Tolbert's assignment of error should be overruled because he failed to fully develop his argument that he was denied the right to effective assistance of counsel. Assuming that his trial counsel committed error, Mr. Tolbert does not explain or argue that absent the error, the result of the trial would have been different. Thus, I would overrule Mr. Tolbert's fourth assignment of error because he failed to adequately develop his argument on appeal. See App.R. 16(A)(7).

APPEARANCES:

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