[Cite as *State v. Andrews*, 2010-Ohio-6126.]

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

STATE OF OHIO Appellee v. JAY SHERIDAN ANDREWS Appellant	C. A. No. 25114 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 09 06 1956

DECISION AND JOURNAL ENTRY

Dated: December 15, 2010

BELFANCE, Judge.

{¶1} Jay Sheridan Andrews appeals his convictions from the Summit County Court of Common Pleas. Upon careful review of the record and the arguments of the parties on appeal, we affirm.

BACKGROUND

{¶2} Jay Sheridan Andrews and Richard Bracken met while both were serving time in the Summit County Jail in early 2009. Mr. Bracken was in need of a place to live upon his release and Mr. Andrews desired to have a roommate who could offer security and companionship. Mr. Andrews had lived in various neighborhoods, had violent interactions with street gangs in these neighborhoods, and no longer wanted to live alone. Mr. Andrews offered to allow Mr. Bracken to live with him and in exchange, the two would perform remodeling work on some of the homes owned by Mr. Andrews' family. Mr. Bracken also admitted to Mr. Andrews

that he was addicted to drugs. Mr. Andrews offered to provide a sober environment in which Mr. Bracken could work on ending his addiction.

{¶3} Mr. Andrews and Mr. Bracken began living together in early spring of 2009 at a home on East Cuyahoga Street in Akron. Mr. Bracken knew that Mr. Andrews is homosexual and sometimes dresses in women's clothing, however, Mr. Bracken is not homosexual. The two men testified that they never had an intimate relationship. Mr. Andrews admitted that he had hoped to have a closer relationship with Mr. Bracken of a more intimate nature. From the outset, Mr. Andrews and Mr. Bracken argued on a regular basis. Despite his claim that he wanted to quit drugs, Mr. Bracken continued to abuse alcohol and use crack cocaine. Mr. Andrews did not approve of Mr. Bracken's habits and sought to keep the home a drug-free environment.

{¶4} On the night of June 21, 2009, Mr. Bracken and some friends were playing cards and drinking at the home on East Cuyahoga Street. Mr. Andrews was home and was dressed in women's clothing. Mr. Bracken was unhappy about this because he had asked Mr. Andrews to refrain from dressing that way around his friends. Mr. Bracken made some disparaging comments to Mr. Andrews in front of the guests. After the guests left around midnight, Mr. Andrews went to sleep in the living room where he and Mr. Bracken had set up a makeshift bedroom. Mr. Andrews slept with his machete that night as he normally did. Mr. Bracken came in and asked Mr. Andrews for some money so that he could buy crack cocaine. Mr. Andrews refused and Mr. Bracken began rifling through the kitchen cabinets looking for money.

{¶5} Hearing the commotion at approximately 2:00 a.m., Mr. Andrews went into the kitchen with his machete. He found the kitchen in complete disarray and Mr. Bracken assembling his Sawzall, a large reciprocating saw used in construction. According to Mr. Andrews, Mr. Bracken put down the Sawzall, picked up a hammer, and advanced toward him

with the hammer above his head. Mr. Bracken denies this. Regardless, it is undisputed that Mr. Andrews swung the machete at Mr. Bracken, hitting him on the head. The two engaged in a violent physical altercation during which Mr. Andrews hit Mr. Bracken two more times with the machete, stabbed him numerous times with a screwdriver, and bit him several times, including one bite that severed a portion of Mr. Bracken's left ear. Mr. Bracken attempted to defend himself against the attack, but did not strike Mr. Andrews.

{¶6} Mr. Bracken was eventually able to flee the home and go out into the street. He was weak, bleeding profusely and screaming for help. He testified at trial that he could feel a large piece of his scalp "flapping" on his head. Passers-by were able to notify a police officer further down the road who had responded to a traffic accident of Mr. Bracken's condition. Police and emergency medical services responded and Mr. Bracken was immediately taken to the hospital. His wounds were secured with staples and stitches, however, the missing portion of his ear was not recovered, thus, not able to be reattached.

{¶7} Police also went to the home on East Cuyahoga Street where they found Mr. Andrews. Mr. Andrews was arrested and the home was photographed and processed as a crime scene. Mr. Andrews was charged with attempted murder, one count of felonious assault with a deadly weapon, one count of felonious assault, and tampering with evidence. Because he had a prior conviction for felonious assault, repeat violent offender specifications were attached to Mr. Andrews' felonious assault charges.

{¶8} Mr. Andrews entered a not guilty plea and his case was tried before a jury. The State dismissed the charge of attempted murder before trial. The jury found Mr. Andrews not guilty of tampering with evidence, but guilty of both counts of felonious assault. The trial court found that Mr. Andrews was a repeat violent offender. The court sentenced him to eight years

incarceration for each aggravated assault conviction and seven years for each specification. Mr. Andrews was ordered to serve a total of fifteen years in prison.

{¶9} Mr. Andrews has appealed his convictions and has assigned three errors for our review. Mr. Andrews argues that: (1) trial counsel was ineffective because he failed to request a jury instruction on a lesser-included offense of felonious assault; (2) his convictions were based on insufficient evidence and against the manifest weight of the evidence, and; (3) the prosecutor's remarks during closing argument deprived him of a fair trial. For ease of analysis, we will address the assignments of error out of order.

SUFFICIENCY OF THE EVIDENCE

{¶10} Mr. Andrews claims in his second assignment of error that the jury's verdicts were based on insufficient evidence.

{¶11} Whether a conviction is based on sufficient evidence is a question of law this Court reviews de novo. *State v. Williams*, 9th Dist. No. 24731, 2009-Ohio-6955, at ¶18, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. The relevant inquiry is whether the State has met its burden of production by presenting sufficient evidence to sustain a conviction. *Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring). In reviewing the evidence, we do not evaluate credibility and must make all reasonable inferences in favor of the State. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273. The State's evidence is sufficient if it allows the jury to reasonably conclude that the essential elements of the crime charged were proven beyond a reasonable doubt. Id.

{¶12} Mr. Andrews' brief fails to identify the elements of the crime of felonious assault and fails to argue which elements he contends the State did not support with evidence. Mr. Andrews has not cited to applicable statutes, legal authority or the record of this case. See

App.R. 16(A)(7). Thus, we decline to speculate as to what Mr. Andrews' specific arguments might be regarding the sufficiency of the evidence relating to his convictions for felonious assault. *Catanzarite v. Boswell*, 9th Dist. No. 24184, 2009-Ohio-1211, at ¶¶16-17. To the extent that Mr. Andrews asserts that the jury's verdicts were based on insufficient evidence, his second assignment of error is overruled.

MANIFEST WEIGHT OF THE EVIDENCE

{¶13} In his second assignment of error, Mr. Andrews also contends that the jury's verdicts were against the manifest weight of the evidence. Mr. Andrews points to the fact that he and Mr. Bracken presented different accounts of the events of June 21, 2009 that led to the attack on Mr. Bracken. Mr. Andrews claims that his version of the events is more credible and that the jury lost its way when it chose to believe Mr. Bracken's testimony. Specifically, Mr. Andrews argues that it is illogical that he would attack Mr. Bracken for no reason. Instead, he contends that the evidence demonstrated that Mr. Bracken was angry at Mr. Andrews, Mr. Bracken possessed a weapon, and Mr. Bracken threatened and attacked Mr. Andrews with a hammer such that Mr. Andrews was merely defending himself. We interpret Mr. Andrews' argument to be that the jury lost its way because it should have determined that he acted in self-defense. As suggested by Mr. Andrews, the major inconsistency between the two versions of the attack concerns whether Mr. Bracken threatened Mr. Andrews with physical violence before Mr. Andrews attacked him with the machete.

{¶14} When determining whether a conviction is supported by the manifest weight of the evidence,

> "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. Cepec*, 9th Dist. No. 04CA0075-M, 2005-Ohio-2395, at ¶6, quoting *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

We must only invoke the discretionary power to grant a new trial in "extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant." *State v. Flynn*, 9th Dist. No. 06CA0096-M, 2007-Ohio-6210, at ¶9, citing *Otten*, 33 Ohio App.3d at 340. When reviewing a conviction pursuant to the manifest weight standard, we must determine whether the State met its burden of persuasion. *Cepec* at ¶6.

{¶15} Mr. Andrews was convicted of one count of felonious assault pursuant to R.C. 2903.11(A)(2), which states in pertinent part that "[n]o person shall knowingly * * * [c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance." He was also convicted of one count of felonious assault pursuant to R.C. 2903.11(A)(1), which states in pertinent part that "[n]o person shall knowingly * * * [c]ause serious physical harm to another * * *."

{¶16} Mr. Andrews did not deny that he attacked Mr. Bracken with a machete and a screwdriver, nor did he deny that he bit Mr. Bracken, severing part of his ear. There is also no dispute that his actions caused physical harm to Mr. Bracken. Mr. Andrews claimed that he did those acts in self-defense because Mr. Bracken first threatened to hit him with a hammer and eventually struck him with the hammer. By claiming self-defense, Mr. Andrews "concedes [that] he had the purpose to commit the act, but asserts that he was justified in his actions." (Citation and quotation omitted.) *State v. Hudson*, 9th Dist. No. 24009, 2008-Ohio-4075, at ¶9. In order to prevail on a claim of self defense, Mr. Andrews must demonstrate:

> "(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." (Citation and quotation omitted.) Id.

Further, one does not have a duty to retreat from one's own home if one was not at fault in creating the affray. *State v. Thomas* (1997), 77 Ohio St.3d 323, 326-327. Mr. Andrews was required to establish each element of the defense, *State v. Skinner*, 9th Dist. No. 06CA009023, 2007-Ohio-5601, at ¶18, and had the burden to prove the affirmative defense of self-defense by a preponderance of the evidence. *State v. Howe* (July 25, 2001), 9th Dist. No. 00CA007732, at *2, quoting *State v. Williford* (1990), 49 Ohio St.3d 247, 249.

{¶17} With respect to the first two elements, there was conflicting testimony as to whether Mr. Bracken or Mr. Andrews was the initial aggressor and whether Mr. Andrews had a bona fide belief that he was in imminent danger such that the circumstances necessitated the use of deadly force. Mr. Bracken's testimony reveals that prior to the actual assault, he had engaged in rude and insulting behavior toward Mr. Andrews. He stated that on the night of June 21, he and friends played cards and were drinking until one or two o' clock in the morning. He was drinking throughout the day, but denied taking any drugs. He admitted that he made insulting comments towards Mr. Andrews during the card game. After the guests left, Mr. Andrews went to bed in the living room, but Mr. Bracken stayed up drinking alone. At some point, he asked Mr. Andrews for drug money then, began rummaging through the kitchen looking for money. Although he denied causing the extent of damage to the kitchen shown in the pictures offered by the State, Mr. Bracken admitted that he "wrecked the kitchen" looking for money to buy drugs. He also admitted that he had done the same thing about a month earlier. The defense presented photographs taken by Mr. Andrews of the condition of kitchen the last time Mr. Bracken destroyed it looking for money.

{¶18} Mr. Bracken stated that when he was unable to find any money, he abandoned his search and decided to check the batteries on his power tools. He sat on the floor in the doorway

between the kitchen and the attached mudroom where he kept his toolbag. According to Mr. Bracken, he then felt a blow to his head and blood running down his face. He looked up to see Mr. Andrews getting ready to strike him with the machete. Mr. Andrews hit Mr. Bracken a total of three times before Mr. Bracken was able to grab the blade of the machete. The two struggled in the mudroom. Because Mr. Bracken had a hold of the machete, Mr. Andrews picked up a screwdriver and repeatedly stabbed Mr. Bracken in the chest while he pinned Mr. Bracken to the floor. Mr. Bracken was eventually able to grab the screwdriver as well. Both men were holding on to both weapons and Mr. Andrews was pinning Mr. Bracken to the floor in the corner of the mudroom. Mr. Andrews then began to bite Mr. Bracken on his chest and face. Mr. Andrews bit off the top of Mr. Bracken's left ear then, attempted to bite his mouth area. Mr. Bracken turned his head and Mr. Andrews bit the side of his face, causing a tear to his left cheek near his mouth. Finally, Mr. Bracken was able to flip Mr. Andrews off him and exit the house to seek assistance. While on the witness stand, Mr. Bracken was shown photographs taken of the house by the police. Notably, he averred that the hammer shown on the kitchen floor was not his hammer because his hammer was a certain brand. Mr. Bracken surmised that the hammer in evidence belonged to Mr. Andrews and came out of one of the drawers in the kitchen while Mr. Bracken was looking for money.

{¶19} At trial, Mr. Andrews testified to a slightly different version of events. Mr. Andrews stated that he was frustrated that he and Mr. Bracken were not able to move their relationship past friendship and grew tired of tolerating Mr. Bracken's drinking and drug use. Mr. Andrews was adamant that Mr. Bracken was very high on drugs on June 21 in light of his unusual behavior throughout the day. He told the jury that Mr. Bracken was exceptionally insulting to him during the card game that evening. After the card game ended around midnight,

Mr. Andrews went to sleep in the living room and Mr. Bracken stayed up. Mr. Andrews claims that after he refused to give Mr. Bracken drug money, Mr. Bracken threatened to trash the house as he had before. Unfazed, Mr. Andrews stayed in the living room while Mr. Bracken began to rummage through the kitchen.

{¶20} Mr. Andrews also told the jury that he had a roommate in the past who had destroyed the home they lived in during an angry rampage. That incident made Mr. Andrews feel as though he had been taken advantage of and he was determined to not be taken advantage of in that way again. He said he did not want to "run like a scared rabbit" and be a "coward" the next time he was bullied.

{¶21} Mr. Andrews decided to try to reason with Mr. Bracken. He took his machete into the kitchen and went to speak with Mr. Bracken. When reason did not work, Mr. Andrews told Mr. Bracken that he needed to move out of the house. According to Mr. Andrews, Mr. Bracken became even more angry. He stormed past Mr. Andrews into the living room saying that he planned to take a quick nap, then get up and "beat [Mr. Andrews'] a**." Mr. Andrews followed him into the living room and "berate[d] him for tearing apart [their] happy home[.]" When Mr. Andrews would not leave Mr. Bracken alone, Mr. Bracken got up and went back into the kitchen. Shortly thereafter, Mr. Andrews walked back to the kitchen with his machete.

{¶22} Once in the kitchen, Mr. Andrews saw Mr. Bracken kneeling next to his toolbag in the doorway between the kitchen and the mudroom with the Sawzall in his hands. Mr. Andrews was concerned that he would use the Sawzall to further destroy the house. Next, Mr. Bracken put the saw down and retrieved a hammer from his toolbag. Mr. Andrews testified that Mr. Bracken stood up, turned toward him, raising the hammer above his head and said, "now you're going to pay." With his back against the kitchen cabinets, across the room from Mr.

Bracken who was near the mudroom, Mr. Andrews felt physically threatened and raised the machete he had been carrying with him. He acknowledged at trial that he intended to "beat [Mr. Bracken] to the punch[]" and hit him with the machete before he got hit with the hammer. Mr. Bracken then moved toward Mr. Andrews in the kitchen with the hammer raised. When Mr. Andrews brought the machete down on Mr. Bracken's head, it jarred Mr. Bracken and he was only able to graze the top of Mr. Andrews' head with the hammer. Mr. Andrews continued to strike Mr. Bracken with the machete, but Mr. Bracken continued to try to swing the hammer at Mr. Andrews. The two began to wrestle and ended up on the floor of the mudroom. Mr. Andrews stated that Mr. Bracken remained aggressive, so Mr. Andrews stabbed him with the screwdriver and resorted to biting him. He admitted to the injuries that he caused Mr. Bracken, but claimed that they were inflicted in self-defense.

{¶23} Faced with conflicting evidence, the jury was not required to believe Mr. Andrews' version of events. Because the jury's determination involved in part an assessment of Mr. Andrews' credibility, we note that the State presented evidence calling into question Mr. Andrews' credibility. For example, the State played a video at trial of statements Mr. Andrews made while in the back of a police car on the night of the fight. Initially, Mr. Andrews denied knowing Mr. Bracken at all and claimed that the blood in house was a result of Mr. Andrews falling down and injuring his nose. Mr. Andrews eventually told police about the altercation.

{¶24} Mr. Andrews also consistently maintained that Mr. Bracken was very high on drugs the night of the incident, which he alleged resulted in Mr. Bracken's unusually aggressive behavior. Mr. Andrews made these assertions when he spoke with the police after the incident and throughout the trial. Mr. Bracken testified that he had been drinking throughout the day on June 21, but denied taking any drugs. He also stated that he last ingested crack cocaine about

two or three days prior to the incident. Mr. Bracken's medical records from the hospital were admitted into evidence. The toxicology screen completed at the hospital demonstrated that there was a very low amount of cocaine in Mr. Bracken's system and no other drugs. He also had a low level of alcohol in his blood. Despite this evidence, Mr. Andrews remained adamant that that Mr. Bracken was on a drug-fueled rampage on June 21.

{¶25} Although at trial he claimed Mr. Bracken injured him with a hammer, Mr. Andrews did not report to police that Mr. Bracken actually hit him in the head with a hammer and he did not tell police that he suffered a head injury. Mr. Andrews stated at trial that his wound bled a great deal, but that he rinsed his hair and it had stopped bleeding by the time the police arrived. In contrast, the State presented several witnesses who stated that there was no physical evidence that Mr. Andrews had been hit with a hammer and that Mr. Andrews had "defensive wounds" while Mr. Bracken did not. Officer Ingham, who had examined the crime scene, opined that the evidence demonstrated that Mr. Andrews was the aggressor. Mr. Andrews had some scratches on his face; however, these scratches appeared to be defensive wounds inflicted by someone who was trying to fend him off. Although, Mr. Andrews had blood-soaked hair, police observed that the injury to his head was not bleeding and was not severe enough to have caused his hair to be bloodied.

{¶26} Furthermore, despite Mr. Andrews' claim that he was hit with the hammer in the kitchen and that he inflicted three blows to Mr. Bracken with the machete in the kitchen, there was no blood found in the kitchen at all. The State offered evidence that was consistent with Mr. Bracken's testimony that the altercation occurred in the mudroom. One officer opined that the fight started in the mudroom because there was no blood in the kitchen and a lot of blood in the

mudroom. The photographs of the scene confirmed that there was no blood in the kitchen but blood splatters, pools and smears throughout the mudroom.

{¶27} Finally, although Mr. Andrews claimed that Mr. Bracken attacked him with a hammer, the hammer allegedly used in the attack was not found. At trial, Mr. Andrews stated that the hammer shown in the photographs and admitted into evidence was not the hammer he asserted Mr. Bracken used during the altercation. Mr. Andrews confirmed that the hammer in evidence was his and had been in a drawer in the kitchen. He also stated that Mr. Bracken's hammer was identifiable as a specific brand. On this point, Mr. Andrews offered the testimony of his niece, Porsha Simon. Ms. Simon stated that she and her mother, Mr. Andrews' sister, went to Mr. Andrews' house after the police had processed the scene. According to Ms. Simon, she found a bloody hammer out in the open in the middle of the kitchen floor. She stated that she picked up the hammer, then her mother told her to put it down because it was evidence, so she placed it by Mr. Bracken's toolbag in the mudroom. She said she did this because Mr. Bracken was to come by the house later to collect his possessions. Ms. Simon's description of the hammer she found matched the description given by Mr. Andrews of the hammer Mr. Bracken allegedly used to hit him on the head. Ms. Simon acknowledged that she did not call the police about the hammer because she assumed that the officers had collected everything that they needed for their investigation. Ms. Simon further testified that there was no blood in the kitchen, but there was a blood splatter in the doorway between the kitchen and the mudroom. The State rebutted Ms. Simon's testimony by calling Officer Dorsey to the stand again. Officer Dorsey reaffirmed that the crime scene was photographed before any items were moved or collected in order to preserve the scene. He confirmed that there was only one hammer found, the one depicted in the photographs and evaluated by BCI.

{¶28} The jury was able to observe the witnesses' demeanor during extensive testimony and use these observations to weigh the credibility and resolve the conflicts in the testimony. See *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. A verdict is not against the manifest weight of the evidence because the jury chose to believe the State's witnesses rather than the defense witnesses. *State v. Fallon*, 9th Dist. No. 23002, 2007-Ohio-1478, at ¶22. In light of the evidence, we cannot say that the jury lost its way in determining Mr. Andrews did not act in self-defense. If the jury chose to believe Mr. Bracken's version of events as well as the testimony of the State's other witnesses, it could have reasonably concluded that Mr. Andrews was the initial aggressor or at least not without fault in creating the confrontation when he approached Mr. Bracken in the mudroom and hit him with the machete. It would also be reasonable for the jury to conclude that Mr. Bracken did not attempt to strike Mr. Andrews with a hammer, thus, Mr. Andrews lacked "a bona fide belief that he was in imminent danger of death or great bodily harm[]." (Citation and quotation omitted.) *Hudson* at ¶9.

{¶29} We cannot conclude that the jury lost its way in finding that Mr. Andrews failed to support his self-defense claim by a preponderance of evidence. *Howe*, at *2, quoting *Williford*, 49 Ohio St.3d at 249.

INEFFECTIVE ASSISTANCE

{¶30} In his first assignment of error, Mr. Andrews argues that he was deprived of his constitutional right to due process because his trial counsel was ineffective for failing to request a jury instruction on a lesser-included offense. We do not agree.

{¶31} In order to prove that trial counsel was ineffective, a defendant must demonstrate: (1) deficiency in his attorney's representation and, (2) prejudice from the deficiency. *Strickland v. Washington* (1984), 466 U.S. 668, 687; *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142.

Deficiency of representation "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. When evaluating counsel's performance, this Court must be "'highly deferential[]'" and "'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance * * *.'" *Bradley*, 42 Ohio St.3d at 142, quoting *Strickland*, 466 U.S. at 689.

{¶32} "In the context of ineffective assistance of counsel, the Supreme Court of Ohio has stated that the "'[f]ailure to request instructions on lesser-included offenses is a matter of trial strategy[.]'" *State v. Murphy*, 9th Dist. No. 24753, 2010-Ohio-1038, at ¶8, quoting *State v. Griffie* (1996), 74 Ohio St.3d 332, 333. Accordingly, the failure to request that the jury be instructed on a lesser-included offense, even if the instruction would be appropriate, is not considered a deficiency in representation. If the defendant claims self-defense at trial, there is a strong presumption that counsel's failure to request a lesser-included offense instruction is a strategic decision made to avoid confusing the jury or lessening the chance of an acquittal. *Murphy* at ¶9, citing *State v. Harris* (1998), 129 Ohio App.3d 527, 533. See, also, *State v. Catlin* (1990), 56 Ohio App.3d 75, 78-79.

{¶33} Mr. Andrews was convicted of felonious assault and argues that trial counsel should have requested a jury instruction on the offense of aggravated assault. Specifically, Mr. Andrews argues on appeal that an instruction on aggravated assault was appropriate because Mr. Bracken's actions on the night of the attack constituted adequate provocation to support the instruction. Throughout the entire trial, Mr. Andrews advanced a theory of self-defense; he did not argue that Mr. Bracken provoked him to attack. Presumably, trial counsel hoped to secure an acquittal and did not want to risk a conviction on a lesser offense by requesting that the jury

consider aggravated assault. Trial counsel's decision not to request a jury instruction on aggravated assault is consistent with Mr. Andrews' claim of self-defense and does not amount to ineffective assistance. *Murphy* at ¶8, quoting *Griffie*, 74 Ohio St.3d at 333. Mr. Andrews' first assignment of error is overruled.

PROSECUTORIAL MISCONDUCT

{¶34} In his third assignment of error, Mr. Andrews claims that the prosecution inappropriately commented on the veracity of one of Mr. Andrews' witnesses during closing argument. Mr. Andrews also asserts that the prosecutor mischaracterized the evidence during closing argument. Mr. Andrews asserts that these actions rose to the level of prosecutorial misconduct, thereby depriving him of his constitutional right to a fair trial.

{¶35} Mr. Andrews did not raise any objections to the prosecutor's alleged improper statements during closing, thus, he has forfeited all but plain error. *Akron v. McGuire*, 9th Dist. No. 24638, 2009-Ohio-4661, at ¶11. A plain error is a defect that affects a defendant's substantial rights. Crim. R. 52(B). "A plain error must be obvious on the record, such that it should have been apparent to the trial court without objection." *State v. Kobelka* (Nov. 7, 2001), 9th Dist. No. 01CA007808, at *2. "As notice of plain error is to be taken with utmost caution and only to prevent a manifest miscarriage of justice, the decision of a trial court will not be reversed due to plain error unless the [appellant] has established that the outcome of the trial clearly would have been different but for the alleged error." (Citation omitted.) *State v. Chapman*, 9th Dist. No. 07CA009161, 2008-Ohio-1452, at ¶24. Likewise, "[the appellant] must show that there is a reasonable probability that but for the prosecutor's misconduct, the result of the proceeding would have been different." Id. at ¶22, citing *State v. Loza* (1994), 71 Ohio St.3d 61, 78. "[T]he prosecution must avoid insinuations and assertions which are calculated to

mislead the jury." *State v. Smith* (1984), 14 Ohio St.3d 13, 14. However, "[i]t is not prosecutorial misconduct to characterize a witness as a liar or a claim as a lie if the evidence reasonably supports the characterization." (Quotation and citation omitted.) *McGuire* at ¶13.

{¶36} During closing argument, the State suggested that Ms. Simon's testimony concerning the hammer she found in Mr. Andrews' kitchen the day after the attack was not truthful. As stated above, Ms. Simon stated that she discovered a bloody hammer in the middle of the kitchen floor and her description of that hammer matched Mr. Andrews' description of the hammer Mr. Bracken used against him. However, Ms. Simon's testimony was not consistent with the photographic and testimonial evidence offered by the State. Specifically, the State demonstrated that photographs were taken before the items in the home were moved, and that there is only one hammer in the photographs and in evidence. It is evident that the prosecutor suggested that Ms. Simon had lied because her testimony did not comport with the evidence. It was not misconduct for the prosecutor to claim that Ms. Simon lied because this characterization was reasonably supported by the evidence. See id. Absent a showing of misconduct, Mr. Andrews cannot demonstrate prejudice. See *Chapman* at ¶22, citing *Loza*, 71 Ohio St.3d at 78.

{¶37} Mr. Andrews also claims that the State mischaracterized the evidence by stating in closing argument that the only evidence presented that Mr. Bracken carried his hammer as a weapon was offered by Mr. Andrews. Again, this is a fair characterization of the evidence, thus, there is no prosecutorial misconduct. See *McGuire* at ¶10. Mr. Bracken admitted that he would carry a weapon when he was experiencing drug-induced paranoia. He never testified that he carried his hammer as a weapon, only that he would use "[w]hatever [Mr. Andrews] wasn't using." He also stated that he carried a weapon to protect himself from people outside of the home he believed would try to get in. He did not carry a weapon as protection against Mr.

Andrews. Mr. Andrews was the only witness to testify that Mr. Bracken regularly carried a hammer as a weapon. Therefore, the prosecutor did not commit misconduct and Mr. Andrews was not prejudiced. See *Chapman* at ¶22, citing *Loza*, 71 Ohio St.3d at 78.

{¶38} Mr. Andrews' third assignment of error is without merit and is overruled.

CONCLUSION

{¶39} We overrule each of Mr. Andrews' assignments of error. 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.

EVE V. BELFANCE
FOR THE COURT

MOORE, J.
CONCURS

DICKINSON, P. J.
CONCURS, SAYING:

{¶40} I concur in the majority's judgment and most of its opinion. I write separately to note that Mr. Andrews' convictions are supported by sufficient evidence.

APPEARANCES:

CHRISTOPHER R. SNYDER, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.