[Cite as *State v. Kleekamp*, 2010-Ohio-1906.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 23533

v. : T.C. NO. 2008 CR 03039/1

ROBERT TYLER KLEEKAMP : (Criminal appeal from Common Pleas Court)

Defendant-Appellant :

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OPINION

Rendered on the 30th day of April, 2010.

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FROELICH, J.

Robert Tyler Kleekamp was convicted after a jury trial in the Montgomery County Court of Common Pleas of murder, in violation of R.C. 2903.02(B). The court sentenced him to fifteen years to life in prison. Kleekamp appeals from his conviction, raising five assignments. For the following reasons, the trial court's judgment will be affirmed.

I

The State's evidence at trial established the following facts:

Late in the evening of February 1, 2008, Kleekamp met Robert Hancher; Hancher's half-brother, Antonio Gomez; Hancher's girlfriend, Grace Agullana; Agullana's cousin, Megan Hayes; Timothy (T.J.) Bradley; and two female friends of Agullana (Stacy Kinsel and a woman identified only as "Michelle") at Meercat's Bar, located at 1227 Wilmington Pike in Dayton, Ohio. Hancher called his friend, Paul Credlebaugh, to join them; Credlebaugh came with two other individuals, who left at approximately 11:30 p.m. Hayes invited Paul Day to come to Meercat's. Day came and later called his friend, Stephen Sipos, who met Day at Meercat's.

While in Meercat's, the group gathered at tables and at the bar. Hayes and Kinsel went behind the bar and served free mixed drinks to their friends. At one point, Sipos "made a pass" at Agullana. Agullana informed Hancher, who told Sipos that Agullana was his girlfriend. Sipos "brushed it off" and no confrontation occurred in the bar.

Shortly before 2:00 a.m. on February 2, 2008, the establishment's owner announced that the bar would be closing. Hancher, Gomez, and Agullana left Meercat's by the establishment's back door. Sipos came out of the back door soon thereafter and began "exchanging words" with Hancher in the parking lot located behind Meercat's and several other businesses. Sipos and Hancher grabbed each other. Kleekamp exited the bar from the back door and approached the two men. When Credlebaugh left the bar, Kleekamp was standing behind and within reaching distance of Sipos. Credlebaugh testified that he saw that Hancher was "pretty heated" over something and asked him what was going on. Hancher responded that Sipos had said something about his (Hancher's) girlfriend. Credlebaugh told Hancher to "let it slide," but Hancher said

that he would not let it slide.

Kleekamp "sucker punched" Sipos from behind, hitting him in the face. Sipos fell to the ground on his stomach. Hancher and Kleekamp began kicking him repeatedly in the face and on his head. Gomez punched Sipos in the head once and encouraged the assault on Sipos. Credlebaugh stated that he approached and tried to pull Hancher and Kleekamp away from Sipos. Hancher eventually stopped kicking Sipos. Credlebaugh grabbed Kleekamp by his sweatshirt and pulled him off of Sipos. Credlebaugh yelled at the group to go to the car. Throughout the assault, Sipos did not try to defend himself and appeared to be unconscious.

As Credlebaugh went to check on Sipos' condition, Kleekamp returned and stomped down on the back of Sipos' head with his foot. Kleekamp then went to his car and sped away to Gomez's nearby apartment with Hancher, Gomez, Agullana, and Kinsel. At that time, Sipos was still breathing, but unconscious. Credlebaugh observed that Sipos' face and head were covered in blood. Credlebaugh left the parking lot and walked to Gomez's apartment.

Soon thereafter, Hayes and Day left Meercat's by the back door and saw someone on the ground in the parking lot. They approached and observed Sipos lying face down with blood around his face. Sipos was breathing "really weird" as if he were gurgling blood. They tried unsuccessfully to turn him over. Day called 911 and waited nearby for emergency assistance to arrive. Hayes went back inside Meercat's and told Michelle and Bradley about Sipos; the three left through Meercat's front entrance and walked to Gomez's apartment.

Brian Rinderle, the bouncer for nearby Taggart's Pub, had observed Kleekamp, Hancher and others yelling to a woman to get into Kleekamp's car and, after she got in, saw the car leave the Meercat's parking lot and speed away down Wilmington Pike. Rinderle and a security guard

for Taggart's went to the back of Meercat's and discovered Sipos. The security guard contacted the police and learned that the police had already been notified of the assault. Rinderle and the security guard also waited for the police to arrive.

Dayton Police Officers John Howard and Dave Kluwan responded to the calls. Howard observed Day standing in the parking lot by the Pony Keg (another business that shared the parking lot with Meercat's); Day was waving his arms to get the officers' attention. Day advised Howard that his friend had been beaten, and he pointed the officers to Sipos' location. Medics arrived a few minutes later and transported Sipos to Miami Valley Hospital. Sipos died at the hospital.

At Gomez's apartment, Hancher and Kleekamp bragged about how they had beaten Sipos. When Hayes, Michelle, and Bradley arrived at Gomez's apartment, they informed the group that Sipos had died. Credlebaugh told Hancher that he was "done with [him]" and left the apartment. Hancher and Kleekamp began to discuss fleeing to Florida.

Hancher, Kleekamp, Agullana, Hayes, and Bradley left Gomez's apartment and drove in Kleekamp's car to Hancher's father house near downtown Dayton. Hancher went inside to ask his father for money so that he could go to Florida. Hancher was unable to obtain money from his father, and he returned to the car. Kleekamp decided to drive to his uncle's house so that he could ask for money to go to Florida. Along the way, they took Hayes to her mother's home. Hayes tried to convince Agullana to come with her, too, but Agullana remained in the car.

Kleekamp and Hancher continued to talk about running to Florida as they drove to Kleekamp's uncle's home, and Kleekamp continued to brag about kicking Sipos. After Kleekamp talked with his uncle, the uncle called the police.

When the police arrived at Kleekamp's uncle's residence, Kleekamp, Hancher, Agullana, and Bradley went to the police station and provided statements. Kleekamp orally consented to the search of his vehicle and signed a form reflecting that consent. The police took photos of Kleekamp and Hancher and obtained Kleekamp's shoes and Hancher's boots and jeans; the police later obtained the jeans and polo shirt that Gomez had been wearing. Sipos' blood was found on Kleekamp's shoes, Hancher's boots, Hancher's jeans, and Gomez's shirt.

On November 24, 2008, Kleekamp and Hancher were indicted for murder, based on their having caused Sipos' death as a proximate result of committing felonious assault. Gomez was indicted for involuntarily manslaughter. Prior to trial, Kleekamp filed two motions for separate trials, both of which were overruled.

A joint trial began on June 15, 2009. On June 16, 2009, prior to opening statements, Gomez entered a guilty plea to involuntary manslaughter. Kleekamp again moved for separate trials; this motion was also denied. After hearing the State's evidence and Hancher's testimony on his own behalf, the jury found Kleekamp guilty of murder.

Kleekamp appeals from his conviction.

II

Kleekamp's first assignment of error states:

"DEFENDANT KLEEKAMP'S CONVICTION FOR MURDER WAS AGAINST THE WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

In his first assignment of error, Kleekamp claims that his conviction was based on insufficient evidence and was against the manifest weight of the evidence.

"A sufficiency of the evidence argument disputes whether the State has presented

adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law." *State v. Wilson*, Montgomery App. No. 22581, 2009-Ohio-525, ¶10, citing *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52. When reviewing whether the State has presented sufficient evidence to support a conviction, the relevant inquiry is whether any rational finder of fact, after viewing the evidence in a light most favorable to the State, could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 430, 1997-Ohio-372, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d. 560. A guilty verdict will not be disturbed on appeal unless "reasonable minds could not reach the conclusion reached by the trier-of-fact." Id.

In contrast, "a weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive." *Wilson* at ¶12. When evaluating whether a conviction is contrary to the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, 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." *Thompkins*, 78 Ohio St.3d at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

Because the trier of fact sees and hears the witnesses at trial, we must defer to the factfinder's decisions whether, and to what extent, to credit the testimony of particular witnesses. *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288. However, we may determine which of several competing inferences suggested by the evidence should be preferred. Id.

The fact that the evidence is subject to different interpretations does not render the

conviction against the manifest weight of the evidence. *Wilson* at ¶14. A judgment of conviction should be reversed as being against the manifest weight of the evidence only in exceptional circumstances. *Martin,* 20 Ohio App.3d at 175.

On appeal, Kleekamp argues that the State failed to produce sufficient evidence that Kleekamp's "intent" was to cause serious physical harm to Sipos. Although Kleekamp does not dispute that Sipos' death was caused by blunt force injuries to the head and neck, he asserts that "it does not follow that just because Kleekamp punched or even kicked Sipos that Kleekamp's blows were made with an intent to cause serious physical harm as that term is defined in the Revised Code." Kleekamp argues that his lack of intent to cause serious physical harm (and his lack of involvement in the assault) is demonstrated by the minimal amount of blood on his shoes, by the fact that Sipos' external injuries consisted of a split lip, a broken nose, and cuts above one eyebrow and his left ear, and by Sipos' lack of a broken skull, noticeable brain injury, broken bones (other than the nose), and damage to vital organs.

The indictment in this case charged that Kleekamp "did cause the death of another, to wit: STEPHEN SIPOS, as a proximate result of the offender's committing or attempting to commit an offense of violence, to wit: FELONIOUS ASSAULT, in violation of R.C. 2903.11(A)(1), a felony of the SECOND DEGREE ***." R.C. 2903.11(A)(1) provides that "[n]o person shall knowingly *** cause serious physical harm to another." "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B).

Contrary to Kleekamp's assertions, the State was not required to prove that he kicked and stomped Sipos with the intent to cause serious physical harm. Rather, the State had the burden

of proving that Kleekamp was aware that his conduct would probably cause serious physical harm to Sipos.

Under the facts of this case, we have no difficultly finding that the State presented sufficient evidence that Kleekamp knowingly caused serious physical harm to Sipos, which resulted in Sipos' death. Credlebaugh and Agullana both testified that they saw Kleekamp "blindside" Sipos with a closed fist to the back of the head. Credlebaugh described Kleekamp's punch stating that Kleekamp "swung full – I mean he came – almost looked like he touched the ground when he swung. It was a haymaker." Credlebaugh and Agullana testified that Kleekamp repeatedly kicked Sipos in the head while he did not move and was unable to react. Agullana stated that she saw Kleekamp kicking and stomping Sipos more than once, with all blows directed at Sipos' head. Credlebaugh similarly testified that Kleekamp "[k]icked [Sipos] multiple, multiple times in the face and in the back of the head" and that Kleekamp "looked like he was trying to kick a field goal." According to Credlebaugh, Kleekamp resisted Credlebaugh's efforts to stop him and, after Credlebaugh pulled Kleekamp away, Kleekamp "walked up over top of [Sipos'] head and basically put his knee up to his chest and stomped down on the back of [Sipos'] head with everything that he absolutely had. It was the most ruthless thing I've every seen. It was like watching American History [X]." Upon returning to Gomez's apartment after the altercation, Kleekamp bragged about how he "beat the hell out of the guy."

Dr. Kent Harshbarger, forensic pathologist and deputy coroner for Montgomery County, conducted Sipos' autopsy. Dr. Harshbarger indicated that Sipos had suffered "multiple significant blows," and he identified at least ten separate impacts to Sipos' scalp. He stated that nearly all of Sipos' scalp had hemorrhage or blood loss due to

blunt force injury. He opined to a reasonable degree of medical certainty that Sipos had died from blunt for injuries of the head and neck.

The State's evidence, if believed, was sufficient to demonstrate that Kleekamp knowingly caused serious physical harm to Sipos and that Sipos died as a result of the felonious assault. Moreover, upon review of the evidence, we cannot say that the jury "lost its way" when it found Kleekamp guilty of murder as charged in the indictment.

Kleekamp's first assignment of error is overruled.

III

Kleekamp's second assignment of error states:

"THE TRIAL COURT ERRED BY FAILING TO ALLOW THE JURY TO CONSIDER THE LESSER INFERIOR CHARGE OF VOLUNTARY MANSLAUGHTER, LESSER-INCLUDED CHARGE OF INVOLUNTARY MANSLAUGHTER AND THE AFFIRMATIVE DEFENSE OF DEFENSE OF ANOTHER."

In his second assignment of error, Kleekamp claims that the trial court should have instructed the jury on voluntary manslaughter, involuntary manslaughter, and defense of another. The court and counsel discussed these instructions in chambers during the afternoon on June 18, 2009.[1] The court rejected Kleekamp's requests for instructions on voluntary manslaughter, involuntary manslaughter, and defense of another, reasoning that there was no evidence of Kleekamp's state of mind. The court noted that it was difficult, although not impossible, for Kleekamp to establish his state of

[1] This in-chambers discussion of the jury instructions was not transcribed. Nevertheless, we have reviewed the video of the discussion, which was on the CD of the trial proceedings.

mind without testifying on his own behalf. The court reiterated its ruling on June 19, 2009.

"A criminal defendant has the right to expect that the trial court will give complete jury instructions on all issues raised by the evidence." *State v. Williford* (1990), 49 Ohio St.3d 247, 251; *State v. Mullins*, Montgomery App. No. 22301, 2008-Ohio-2892, ¶9. As a corollary, a court should not give an instruction unless it is specifically applicable to the facts in the case. *State v. Fritz*, 163 Ohio App.3d 276, 2005-Ohio-4736, ¶19. The decision to give a requested jury instruction is a matter left to the sound discretion of the trial court, and the court's decision will not be disturbed on appeal absent an abuse of discretion. *State v. Davis*, Montgomery App. No. 21904, 2007-Ohio-6680, ¶14.

Voluntary manslaughter is an inferior degree of murder. *State v. Shane* (1992), 63 Ohio St.3d 630, 632. Thus, a defendant charged with murder is entitled to an instruction on voluntary manslaughter when the evidence presented at trial would reasonably support both an acquittal on the charged crime of murder and a conviction for voluntary manslaughter. Id.; *State v. Bell*, Montgomery App. No. 22448, 2009-Ohio-4783, ¶51.

The elements of voluntary manslaughter are set forth in R.C. 2903.03(A): "No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another ***."

When considering whether to give an instruction on voluntary manslaughter, the trial court must engaged in a two-part analysis. *State v. Miller*, Montgomery App. No.

22433, 2009-Ohio-4607, ¶23. First, the court must determine, using an objective standard, whether the provocation was reasonably sufficient to bring on sudden passion or a sudden fit of rage. Id. To be "reasonably sufficient," the provocation must be "sufficient to arouse the passions of an ordinary person beyond the power of his or her control." *Shane*, 63 Ohio St.3d at 633; *Miller* at ¶26, citing *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶81. If the standard for provocation is met, the court must determine, using a subjective standard, whether the defendant actually was under the influence of a sudden passion or in a sudden fit of rage. *Shane*, 63 Ohio St.3d at 633; *Miller* at ¶23. "It is only at that point that the '*** emotional and mental state of the defendant and the conditions and circumstances that surrounded him at the time ***' must be considered." *Shane*, 63 Ohio St.3d at 634, quoting *State v. Deem* (1988), 40 Ohio St.3d 205, paragraph five of the syllabus.

Kleekamp asserts that he was provoked by Sipos' attack on his friend, Hancher. According to Hancher's testimony, which is the basis for Kleekamp's argument, Sipos exited Meercat's and approached Hancher and Agullana in the parking lot, using obscene hand gestures and saying "Where the fuck you going?" Sipos grabbed Hancher by the front of his shirt, and Hancher grabbed Sipos. Sipos punched Hancher, causing Hancher to fall to the ground. Hancher weighed approximately 160 pounds compared to Sipos' weight of approximately 300 pounds.

After Hancher fell, "someone" punched Sipos from behind, causing Sipos to fall on top of Hancher. While the two were on the ground, Sipos hit Hancher on the back of his head. Hancher was able to get away from Sipos. Both men got up. Hancher was "discombobulated" and had been "damn near knocked *** out." Sipos left Hancher

alone and headed toward the cars, apparently looking for the person who had hit him from behind. As Hancher was "gathering [his] senses," Sipos again directed his attention to Hancher and "bulldozed" over him. The two men again fought on the ground. Hancher was able to get on top of Sipos with Sipos on his back. At this point, other individuals started kicking Sipos' head. Hancher heard Credlebaugh say, in an angry voice, "Oh, you mother fucker." Upon getting kicked, Sipos relaxed his arms and Hancher was able to get up. Hancher located one of his (Hancher's) shoes, which had fallen off, and left the parking lot with Kleekamp, Gomez, Kinsel, and Agullana. Hancher did not see Kleekamp strike or kick Sipos and did not know if Kleekamp had been involved in the fight.

Even if Hancher's version of events were true, we find insufficient evidence to warrant an instruction on voluntary manslaughter. As an initial matter, there is no evidence that Sipos engaged in any conduct *toward Kleekamp* that would have reasonably resulted in Kleekamp's having a sudden fit of rage against Sipos. Although Kleekamp's friend had been punched once and "bulldozed" by Sipos, who was a substantially larger man, Sipos' conduct was not reasonably sufficient to arouse Kleekamp's passions beyond his control such that Kleekamp was warranted in using deadly force. Hancher was able to extricate himself from Sipos after Sipos' initial punch knocked him to the ground and, at the time Hancher's friends began kicking Sipos, Hancher had gotten Sipos onto his (Sipos') back and the two were fighting on the ground. Hancher claimed that Sipos had only punched him once. Thus, even accepting Hancher's testimony, the evidence does not support a conclusion that Sipos' actions were reasonably sufficient provocation for Kleekamp's actions.

In addition, Kleekamp did not testify at trial, and there is no evidence as to his state of mind during the altercation in the Meercat's parking lot. Neither Kleekamp nor any other witness provided testimony that Kleekamp, in fact, felt a "sudden fit of rage" as a result of Sipos' actions. To the extent that Kleekamp argues that he reacted out of fear that Hancher would be injured by Sipos, a substantially larger man, "evidence supporting the privilege of self-defense, *i.e.,* that the defendant feared for his own and other's personal safety, does not constitute sudden passion or a fit of rage as contemplated by the voluntary manslaughter statute." *State v. Harris* (1998), 129 Ohio App.3d 527, 535. Accordingly, the trial court did not err in failing to instruct the jury on voluntary manslaughter.

Kleekamp further claims that the trial court should have instructed the jury on involuntary manslaughter under R.C. 2903.04, which states: "No person shall cause the death of another *** as a proximate result of the offender's committing or attempting to commit a felony." The culpable mental state for involuntary manslaughter is that of the underlying offense. *State v. Davis*, Clark App. Nos. 2007-CA-71, 2008-CA-55, 2009-Ohio-4583, ¶30. Kleekamp argues that the jury could have reasonably found that the underlying offense to the homicide was simple or aggravated assault rather than felonious assault.

The assault statute, R.C. 2903.13, provides, in part:

"(A) No person shall knowingly cause or attempt to cause physical harm to another ***.

"(B) No person shall recklessly cause serious physical harm to another ***."

Although Kleekamp does not specify whether he was relying on R.C. 2903.13(A)

or (B), we find neither provision to be applicable in this case. The coroner testified that Sipos suffered extensive hemorrhaging under his scalp as a result of repeated blunt force injuries. Witnesses who observed Sipos on the ground in the parking lot testified that Sipos' face was swollen and covered in blood and that he had difficulty breathing. Thus, the evidence established that Sipos suffered "serious physical harm," not just "physical harm" under R.C. 2903.13(A). To the extent that Kleekamp relied on R.C. 2903.13(B), the evidence demonstrated that Kleekamp – if he were involved in the assault on Sipos at all – repeatedly kicked and stomped Sipos' head while Sipos was on the ground. This conduct reflected knowing, not reckless, conduct by Kleekamp. Because Kleekamp's actions were not reckless, R.C. 2903.13(B) also did not apply.

The aggravated assault statute reads, in relevant part: "No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly: (1) Cause serious physical harm to another ***." R.C. 2903.12(A).

As discussed above, the evidence did not support a finding that Kleekamp's actions were the result of serious provocation by Sipos or that he acted under the influence of a sudden fit of rage. Accordingly, the trial court properly determined that Kleekamp was not entitled to an instruction on involuntary manslaughter based on aggravated assault.

Finally, Kleekamp argues that the trial court should have instructed the jury on the affirmative defense of defense of another.

"The affirmative defense of defense of another is a variation of self-defense.

State v. Moss, Franklin App. No. 05AP-610, 2006-Ohio-1647. Under certain circumstances, a person may be justified in using force to defend another person against an assault. However, the actor then stands in the shoes of the person he aids, and if the person aided is the one at fault in creating the affray, the actor is not justified in his use of force. Id. One who acts in defense of another must meet the criteria for self-defense. Id." *State v. Wilson*, Montgomery App. No. 22581, 2009-Ohio-525, ¶38.

Self-defense is an affirmative defense which the accused has the burden to prove by a preponderance of the evidence. R.C. 2901.05(A); *State v. Jackson* (1986), 22 Ohio St.3d 281. "In order to establish self-defense, a defendant must prove: (1) that the defendant was not at fault in creating the situation giving rise to the affray; (2) that the defendant had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) that the defendant did not violate any duty to retreat or avoid the danger." *State v. Davis*, Montgomery App. No. 21904, 2007-Ohio-6680, ¶14, citing *State v. Robbins* (1979), 58 Ohio St.2d 74.

Hancher's testimony, if believed, established that the first element of self-defense, i.e., that Sipos instigated his physical altercation with Hancher. According to Hancher, Sipos approached Hancher and Hancher's girlfriend, using obscene hand gestures and profanity. When Sipos got near, he grabbed Hancher's shirt and punched Hancher in the face. After this initial altercation ended, Sipos reinitiated the fight by "bulldozing" Hancher and knocking him to the ground.

Although Hancher testified that he was "discombobulated" by Sipos' assault, the evidence does not support a claim that Kleekamp had a bona fide belief that Hancher

was in imminent danger of death or great bodily harm and that his (Hancher's) only means of escape from such danger was in the use of deadly force. After Sipos "bulldozed" Hancher, Hancher "some how got on top of him" and the two fought on the ground. Hancher stated that Sipos started getting kicked in the head, at which point he "relaxed his arms" and Hancher was able to get up. Other than the initial blow which nearly knocked out Hancher, Hancher's testimony does not reflect that he suffered any serious blows from Sipos and was in any danger of great bodily harm. No one testified that Kleekamp began to kick Sipos in order to stop him from inflicting imminent death or serious physical harm to Hancher; indeed, there was no evidence – from Kleekamp or anyone else – that reflected Kleekamp's mental state during Hancher's altercation with Sipos. In addition, accepting Hancher's evidence as true, Hancher first saw Kleekamp in the parking lot "when we got into the car to leave" (and Kleekamp was getting into the driver's seat of the car), and he did not observe Kleekamp strike or kick Sipos. In light of the evidence presented, the trial court did not abuse its discretion in failing to instruct the jury on defense of another.

The second assignment of error is overruled.

IV

Kleekamp's third assignment of error states:

"IT WAS PLAIN ERROR FOR THE TRIAL COURT TO NOT INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF RECKLESS HOMICIDE."

Although Kleekamp did not request an instruction on reckless homicide, he claims that the trial court committed plain error by failing instruct the jury on reckless homicide.

A defendant's failure to object to the absence of the jury instructions about which he complains on appeal waives all but plain error. See *State v. McGhee*, Montgomery App. No. 23226, 2010-Ohio-977, ¶43; *State v. Powell*, 176 Ohio App.3d 28, 2008-Ohio-1316, ¶13. Plain error does not exist unless, but for the error, the outcome of the trial clearly would have been otherwise. Id.

R.C. 2903.041, the reckless homicide statute, states: "(A) No person shall recklessly cause the death of another ***. "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature." R.C. 2901.22(C).

The evidence does not support a conclusion that Kleekamp acted recklessly. The State's witnesses testified that Kleekamp "sucker punched" or "blindsided" Sipos, hitting him in the face from behind. After Sipos was lying on the ground unresponsive, Kleekamp repeatedly kicked Sipos in the head and face "like he was trying to kick a field goal." Credlebaugh testified that, after pulling Kleekamp away from Sipos, Kleekamp walked up, raising his knee, and stomped Sipos' head "with everything that he absolutely had." The coroner's substantiated that Sipos had suffered multiple serious blows to the head and neck; one contusion near Sipos' left ear had a pattern consistent with a shoe tread. Dr. Harshbarger stated that Sipos had died from the blunt force injuries. In light of the testimony regarding Kleekamp's conduct and the injuries suffered by Sipos, an instruction on reckless homicide would have been inconsistent with the testimony offered at trial. We find no error, plain or otherwise, in the trial court's failure to provide a reckless homicide instruction.

The third assignment of error is overruled.

V

Kleekamp's fourth assignment of error states:

"THE TRIAL COURT SHOULD HAVE ORDERED A MISTRIAL BASED UPON PROSECUTORIAL MISCONDUCT."

In his fourth assignment of error, Kleekamp claims that numerous instances of prosecutorial misconduct deprived him of a fair trial and that he should have been granted a mistrial.

"[T]he trial judge is in the best position to determine whether the situation in [the] courtroom warrants the declaration of a mistrial." *State v. Glover* (1988), 35 Ohio St.3d 18, 19. See, also, *State v. Williams*, 73 Ohio St.3d 153, 167, 1995-Ohio-275. This court will not second-guess such a determination absent an abuse of discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, 182. Moreover, mistrials need be declared only when the ends of justice so require and a fair trial is no longer possible. *State v. Franklin* (1991), 62 Ohio St.3d 118, 127, citing *Illinois v. Somerville* (1973), 410 U.S. 458, 462-463, 93 S.Ct. 1066, 35 L.Ed.2d 425.

In reviewing claims of prosecutorial misconduct, the test is "whether remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused." *State v. Jones*, 90 Ohio St.3d 403, 420, 2000-Ohio-187. "The touchstone of analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" Id., quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 947, 71 L.Ed.2d 78. Where it is clear beyond a reasonable doubt that a jury would have found the defendant guilty even absent the alleged misconduct, the defendant has not been prejudiced and his

conviction will not be reversed. See *State v. Loza* (1994), 71 Ohio St.3d 61, 78, 1994-Ohio-409. We review the alleged wrongful conduct in the context of the entire trial. *State v. Stevenson*, Greene App. No. 2007-CA-51, 2008-Ohio-2900, ¶42, citing *Darden v. Wainwright* (1986), 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144.

First, Kleekamp asserts that the prosecutor made a "blatantly improper remark" while Credlebaugh was testifying about how he had witnessed Kleekamp kick Sipos' head. Credlebaugh testified that Kleekamp "walked up over top of his head and basically put his knee up to his chest and stomped down on the back of his head with everything that he absolutely had. It was the most ruthless thing I've ever seen. It was like watching American History [X]." Kleekamp's attorney objected to the testimony; the objection was overruled. Immediately afterward, the prosecutor stated, "Judge, I'd object, too." Hancher's counsel objected to the prosecutor's remark. The court sustained the objection, told the jury to disregard the last comment, and asked counsel to approach.

During the sidebar discussion, Kleekamp's and Hancher's counsel requested a mistrial due to prosecutorial misconduct. They argued that the prosecutor was inflaming the jury and the comment was "completely uncalled for." After taking an evening recess and reviewing a video of the testimony and the prosecutor's remark, the court concluded that the "tone and tenor" of the prosecutor's statement "insinuat[ed] that if someone had evidence that damaging against them, that they would object too." The court found that the prosecutor's comment was "improper," but did not find that the single comment rose to the level of prosecutorial misconduct. The court denied the motions for a mistrial. Upon resumption of proceedings, the court instructed the jury as

follows:

"I will tell that at the close of evidence yesterday, there was an improper comment that was made. I instructed you then and I will instruct you now to ignore that comment.

"When you are instructed to ignore something, you will treat it as though it never happened. What the attorneys say in this case is not evidence. I will instruct you later on this, but I want to instruct you now, that you will decide this case on the evidence of the case and not statements of counsel."

Kleekamp concedes that this one comment by the prosecutor, alone, did not deprive him of a fair trial, and we find that the trial court appropriately addressed the matter to prevent any prejudice to the defendants.

Second, Kleekamp asserts that the prosecutor engaged in misconduct by repeatedly stating that Hancher and Kleekamp "kicked and stomped Sipos to death." Kleekamp contends that the prosecutor expressed as fact his opinion of Kleekamp's guilt. Kleekamp cites to twelve instances during the trial where the prosecutor referred to Sipos' being stomped and kicked. We note that, for some of these instances, only Hancher's counsel objected to the prosecutor's question. For those circumstances, Kleekamp has waived all but plain error. *State v. Crosky*, Franklin App. No. 06AP-816, 2007-Ohio-6533, ¶23, n.3 ("Appellant's failure to object, notwithstanding her co-defendant's objection, waives all but plain error.").

We find no misconduct based on the prosecutor's repeated references to Sipos' being stomped and kicked. The coroner, who testified as the State's first witness, opined that Sipos had died from multiple, serious blows to the head and neck, one of

which was consistent with shoe tread. Credlebaugh, the State's second witness, testified that he saw Kleekamp brutally kicked and stomp Sipos in the head and face. Three of Kleekamp's citations to the record involved the prosecutor's questions to Credlebaugh about his observations. The prosecutor's subsequent references to Sipos' having been kicked and stomped to death in questions to witnesses were reasonably based on evidence already admitted at trial and were not gratuitously mentioned in an effort to inflame the jury. Where the prosecutor did refer needlessly to Sipos' having been stomped and kicked, Hancher's counsel objected and the trial court sustained the objection.

Third, Kleekamp contends that the prosecutor improperly suggested at least three different times that Hancher's version of events was not true, because no one witnessed Hancher's being "pounded and pounded and pounded" against a fence by Sipos. Kleekamp argues that Hancher did not testify to such events in his testimony, that the prosecutor was alluding to matters that were not supported by the evidence, and that the prosecutor's conduct denigrated both defendants' credibility.

During the State's case, the prosecutor asked Credlebaugh if he had observed Sipos "pounding and pounding the Defendant Hancher all the way to the fence line." Credlebaugh said, "No." The prosecutor likewise asked Agullana, "Did [Sipos] pound away at Hancher and push him all the way up against the fence line I showed you that picture of?" Agullana responded that she did not remember that. The prosecutor also cross-examined Hancher about whether Sipos had pounded him "over and over and over and over again." Hancher responded that he had been hit one time.

Although no one, including Hancher, testified that he was repeatedly pounded by

Sipos, the prosecutor's questions to witnesses were apparently in response to Hancher's counsel's opening statement, which included the following remarks:

"Robert [Hancher] went out the bar, left the bar first. Stephen Sipos followed him out, grabbed him. That's were it started, grabbed him. My client backing up, Mr. Hancher backing up. He backed up all the way up to that fence you saw went behind that place when you did the jury view. Notice that fence line? Backed all the way up to that fence, 320-pound man, 6'2", against Hancher at 160, pounding on him. He went down. Hancher – somebody picked him up eventually.

"***

"This had nothing to do with some rassler (sic) or somebody like that inside Meercat's Bar. This was a big drunk picking on a guy 160 pounds and gonna pound him, at a bar at 2:00 in the morning. Two sides to this. Just keep and open mind till you hear it all. ***"

In light of Hancher's counsel's opening statement, the State reasonably asked Credlebaugh, Agullana, and Hancher if Sipos "pounded" Hancher to the fence line. We find nothing improper in this line of questioning.

Fourth, Kleekamp claims that the prosecutor asked leading and improper questions throughout his direct examinations of the witnesses, sometimes even immediately after being warned by the court not to do so following a sustained objection. We agree with Kleekamp that the prosecutor asked leading questions of State's witnesses throughout the trial, although not all of the questions challenged on appeal were leading and/or improper. However, Kleekamp has not demonstrated that he was prejudiced by those questions. The trial court repeatedly sustained objections

to the leading questions and, in most instances, the prosecutor simply rephrased the question and elicited the same testimony; Kleekamp has not suggested that the testimony itself was inadmissible

Fifth, Kleekamp complains that the prosecutor made a blatantly improper remark during his cross-examination of Hancher. The prosecutor asked Hancher if it was a coincidence that "Sipos' blood and DNA is all over your boots, jeans, Kleekamp's sneakers, and your brother's polo shirt." After Hancher answered, "I can't answer that," the prosecutor remarked, "I know." Hancher's counsel immediately objected. The trial court sustained the objection and ordered the jury to "disregard the last comment."

Hancher's counsel asked to approached and requested a mistrial based on the prosecutor's editorializing during his cross-examination of Hancher. Kleekamp's counsel joined in the motion. The court ruled that the prosecutor's comment was "improper" and "should not have been made." The court declined to grant a mistrial and asked the prosecutor if he had another area that he wanted to question Hancher about.

We do not condone the prosecutor's editorial comments during the presentation of evidence, and we agree with the trial court that the prosecutor's comment should not have been made. However, we cannot conclude that Kleekamp was unfairly prejudiced by the prosecutor's comment. The prosecutor could, and did, argue during the State's rebuttal closing argument: "Hancher's story makes no sense. He can't explain the blood on any of these Defendant's shoes and /or pants or shirt. And he tries to tell you that before any of that blood was around , he and Kleekamp had already disappeared from that scene. And it doesn't make sense. ***" Although the prosecutor

should have waited until closing argument to make any comments on the evidence, we cannot say that the outcome of Kleekamp's trial would have been different absent the prosecutor's improper remark.

Finally, Kleekamp claims that the cumulative effect of the prosecutor's improper comments and the leading and improper questions deprived him of a fair trial. Although, as stated above, we agree that the prosecutor made improper remarks and attempted to use leading questions, we do not conclude, upon reviewing the trial as a whole, that the prosecutor's actions affected Kleekamp's substantial rights and deprived him of a fair trial.

The fourth assignment of error is overruled.

VI

Kleekamp's fifth assignment of error states:

"THE TRIAL COURT ERRED IN DENYING DEFENDANT KLEEKAMP'S MOTIONS FOR SEPARATE TRIALS."

Kleekamp's fifth assignment claims that the trial court should have granted his motions for separate trials.

Kleekamp first moved for separate trials in December 2008. Citing *Bruton v. United States* (1968), 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476, and *State v. Moritz* (1980), 63 Ohio St.2d 150, he claimed that statements given by Hancher and Gomez to the police would inculpate him, that he would have no ability to cross-examine his co-defendants on those statements, and that the co-defendants' defenses were antagonistic. Hancher and Gomez also filed motions for separate trials.

The trial court overruled the motions, stating that the prosecutor had represented

that the State did not intend to introduce any statements of a co-defendant implicating another co-defendant. The court further noted that "antagonistic defenses" did not necessarily require separate trials. The court ordered that the State was precluded from introducing into evidence any statement of a defendant which implicated a co-defendant. It further ordered that, "before the introduction of any statement of a Defendant, the prosecutor shall inform the Court and counsel so that a voir dire examination of that witness may be conducted, if necessary, to insure that a *Bruton* problem does not arise."

On May 6, 2009, Kleekamp filed a second motion for separate trials based on newly-received statements by Hancher that implicated Kleekamp. At a hearing on that motion, counsel clarified that the motion was based on interviews that a detective had with two inmates, who reported statements allegedly made by Hancher that also implicated Kleekamp and Gomez. The court denied the second motion for separate trials, but again ordered the State not to introduce statements by one defendant that implicated a co-defendant and required the prosecutor to inform the court before introducing any statement by a defendant.

After the jury had been seated but prior to opening statements, Gomez entered a plea to involuntary manslaughter. During a discussion of the matter between the trial judge and counsel in another courtroom, Kleekamp and Hancher renewed their motions for separate trials, arguing that an instruction to the jury regarding Gomez's absence would be inadequate. The court overruled the motions and gave the jury the following instruction:

"Ladies and gentlemen of the jury, Antonio Gomez and his attorney are not

present. The case against Antonio Gomez has been separated from this trial and will be dealt with by the Court at a later time. You are not to consider and you are not to discuss that case in any way in further proceedings in this case." (Tr. 544.)

Kleepkamp claims that the trial court should have granted his motions for a separate trial, because his defense and trial strategy were different from Hancher's. Kleepkamp states that his and Hancher's "involvement in the situation were of differing degrees," that he would not have become involved absent Hancher's confrontation with Sipos, and that Hancher's decision to testify "undermined Kleekamp's defense because of the manner in which Hancher conducted himself under cross-examination." Kleekamp further argues that Gomez's "obvious and significant absence from the trial" likely confused the jury and suggested that Gomez – as well as Kleekamp and Hancher – was guilty; he asserts that separating Hancher's trial from his trial would have eliminated the confusion and the appearance of guilt.

The joinder of defendants is governed by Crim.R. 8(B). It provides:

"Two or more defendants may be charged in the same indictment, information or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses, or in the same course of criminal conduct. Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count."

Joinder is favored by the courts; it allows for the conservation of judicial resources, diminishes inconvenience to the witnesses, and reduces the chance of incongruous results in successive trials. *State v. Torres* (1981), 66 Ohio St.2d 340, 343; *State v. Thomas* (1980), 61 Ohio St.2d 223, 225.

If it appears, however, that a defendant or the State is prejudiced by the joinder of defendants, the court may order separate trials. Crim.R. 14. The defendant seeking severance bears the burden to affirmatively demonstrate that his right to a fair trial will be prejudiced by the joinder. *State v. Humphrey*, Clark App. No. 02 CA 25, 2003-Ohio-2825, ¶30. We review the trial court's denial of a motion for separate trials for an abuse of discretion. *State v. Patterson*, Clark App. No. 05 CA 128, 2007-Ohio-29, ¶30; *Humphrey* at ¶55, citing *Torres*, supra.

As an initial matter, the trial court's joinder of Kleekamp, Hancher and Gomez for trial was proper under Crim.R. 8(B), because Kleepkamp and Hancher were both charged with murder, in violation of R.C. 2903.02(B), based on the same course of criminal conduct outside of Meercat's on February 2, 2008, which resulted in Sipos' death. Gomez was charged with involuntary manslaughter based on his conduct relative to the same incident.

We find no fault with the trial court's decision to deny Kleekamp's motions for a separate trial. Based on the representations of the prosecutor that he would not introduce statements by one co-defendant against another, the trial court reasonably concluded that Kleekamp would not be prejudiced by inculpatory statements of his co-defendants. The court made certain that no *Bruton* problem would occur by ordering the prosecutor not to introduce statements by one defendant that implicated a co-defendant and by requiring the prosecutor to inform the court before introducing any statement by a co-defendant. In addition, throughout the trial, the trial court instructed the jury that a statement by one defendant is admissible only as evidence against that defendant and must not be considered for any purpose as evidence against any other defendant.

The court also reasonably determined that severance of the trials was not necessitated by "antagonistic defenses." "Antagonistic defenses exist when each defendant is trying to exculpate himself and inculpate his co-defendant." *State v. Humphrey*, Clark App. No. 2002-CA-30, 2003-Ohio-3401, ¶68. Although antagonistic defenses can be so prejudicial that they can deny a co-defendant a fair trial, antagonistic defenses are not prejudicial per se and separate trials are not required whenever co-defendants have conflicting defenses. Id., citing *State v. Daniels* (1993), 92 Ohio App.3d 473, and *Zafiro v. United States* (1993), 506 U.S. 534, 113 S.Ct. 933, 122 L.Ed.2d 317. As stated in *Zafiro* in the context of Fed.R.Civ.P. 14, which is substantially similar to Crim.R. 14, "a [trial] court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 539. In many cases, limiting instructions are sufficient to prevent any prejudice to a co-defendant. Id.

Here, Kleekamp did not articulate how Hancher's defense was antagonistic to his own defense. During Hancher's testimony, Hancher did not identify Kleekamp as one of Sipos' attackers. Rather, Hancher claimed that he did not know who had hit Sipos from behind, that he did not see Kleekamp or Gomez strike Sipos, and that Credlebaugh was one of the kickers. Although Kleekamp now argues that "the manner in which Hancher conducted himself under cross-examination" undermined his (Kleekamp's) defense, the court repeatedly instructed that jury that it must consider Kleekamp's and Hancher's guilt or innocence separately, and that evidence may be admitted against one defendant even though it must not be considered as evidence

against another defendant. We find no basis to conclude that Kleekamp's right to a fair trial was comprised by the court's failure to sever the trials based on antagonistic defenses.

Finally, we find that the court's limiting instructions adequately addressed Gomez's unanticipated absence from the trial. The instruction informed the jury that Gomez's case would be addressed separately without implying that Gomez or any other defendant was guilty or innocent. The jury was instructed not to consider Gomez's case, and we presume the jury followed that instruction. In short, the trial court did not abuse its discretion by denying the motions for separate trials and, instead, opting to address any potential prejudice through limiting instructions.

The fifth assignment of error is overruled.

VII

Having overruled each of Kleekamp's assignments of error, the judgment of the trial court will be affirmed.

. . . .

BROGAN, J. and GRADY, J., concur.

Copies mailed to:

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