[Cite as *State v. Sutherland*, 2017-Ohio-9381.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	
	)	
PLAINTIFF-APPELLEE	)	
	)	CASE NO. 15 MA 0219
VS.	)	
	)	OPINION
ROBERT SUTHERLAND	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas, Mahoning County, Ohio Case No. 15 CR 588 A
JUDGMENT:	Affirmed.
APPEARANCES: For Plaintiff-Appellee	Attorney Paul Gains Mahoning County Prosecutor Attorney Ralph Rivera Assistant Prosecutor 21 West Boardman Street, 6th Floor Youngstown, Ohio 44503-1426
For Defendant-Appellant	Attorney Francisco Luttecke Assistant Public Defender Office of the Ohio Public Defender 250 East Broad Street, Suite 1400 Columbus, Ohio 43215
JUDGES: Hon. Mary DeGenaro Hon. Gene Donofrio Hon. Cheryl L. Waite	
	Dated: December 29, 2017

[Cite as *State v. Sutherland*, 2017-Ohio-9381.]
DeGENARO, J.

{¶1} Defendant-Appellant, Robert Sutherland, appeals the trial court judgment convicting him of felonious assault and an accompanying firearm specification. On appeal, Sutherland argues the trial court erred in failing to provide jury instructions on self-defense, that his attorney was ineffective, and that his conviction was against the manifest weight of evidence. For the following reasons, Sutherland's assignments of error are meritless and this matter is affirmed.

Facts and Procedural History

{¶2} Sutherland was indicted on one count of felonious assault (R.C. 2903.11(A)(2)(D)) and one count of aggravated assault (R.C. 2903.11(A)(2)(D)), each with a firearm specification (R.C. 2941.145(A)). The following facts were presented at trial:

{¶3} On the evening giving rise to the charges, between 5:00 and 6:00 p.m. Eric Van Cobb's girlfriend, Keisha Pugh, drove him to Daniel Bosak's house to purchase marijuana while she waited in the car. Van Cobb told Bosak that he wanted to buy four ounces of marijuana, but Bosak did not have it available at that time. Bosak testified that he had known Eric Van Cobb for about three weeks, and met with him exclusively for drug transactions.

{¶4} After Van Cobb left, Robert Sutherland came to Bosak's house to help him move. Bosak had known Sutherland since he was a child and considered him an uncle. Bosak asked Sutherland to get the marijuana for Van Cobb. Sutherland left and returned with the marijuana which he kept in a small cooler.

{¶5} Van Cobb returned to Bosak's around 7:00-8:00 p.m. with two hundred dollars and planned to buy as much marijuana as he could with that amount. Pugh again drove him there and remained outside in her vehicle.

{¶6} Van Cobb, Bosak, and Sutherland went into the living room where they smoked marijuana. After about thirty minutes, Van Cobb decided that he was not going to pay for the marijuana. Van Cobb asked Bosak for a cigarette, and Bosak went upstairs to retrieve one. While Sutherland was not paying attention, Van Cobb grabbed the marijuana and ran out the front door. Sutherland chased Van Cobb

outside the house. Van Cobb stated he ran off the porch when he heard the first shot.

{¶7} Pugh, who was waiting in her vehicle, observed the front door open and Van Cobb running towards the vehicle being chased by Sutherland with a gun in his hand. Pugh heard the first shot fired by Sutherland while Van Cobb was still running. Pugh opened the car door for Van Cobb so that he could get in when she heard the second shot. Van Cobb got in the car while a third shot broke the back window of Pugh's vehicle. Van Cobb was hit by a bullet before he reached the vehicle, but still managed to get inside the car. As Pugh was driving, Van Cobb slumped over and stated he had been shot.

{¶8} Michelle Fleming lived across the street from Bosak, and shortly after 9:00 p.m. heard gunshots outside. Fleming observed a male shooting at another male who was running towards a vehicle parked on the street. Fleming was unable to give a detailed description of the men because a vehicle obscured her view.

{¶9} Sutherland testified in his own defense stating that when Bosak went upstairs, he went outside to get water from his truck. As he walked down the front steps towards his truck, Van Cobb rushed out the front door, demanded money and stated he had a gun and would use it if he did not receive money. Sutherland did not see a gun, but noted that Van Cobb "had one hand cupped holding something under his shirt, and it was like tucked up into his waist." Sutherland was frightened and thought he could be shot or killed. Sutherland then pointed his gun at Van Cobb telling him "I don't effing think so" and ordered him to leave.

{¶10} Sutherland further testified that as Van Cobb was getting into the vehicle he "suddenly raised up his right hand and pointed it at me." Sutherland could not see what Van Cobb had in his right hand and thought it was a firearm. Sutherland fired three shots at Van Cobb; closing his eyes and turning his head while he fired the weapon toward the vehicle in order to scare Van Cobb enough to not shoot him.

{¶11} The jury found Sutherland guilty of felonious assault and a firearm specification and acquitted him of aggravated assault. The trial court sentenced Sutherland to seven years in prison for the felonious assault conviction consecutive

to a three year sentence for the firearm specification.

Jury Instructions

{¶12} In his first of three assignments of error, Sutherland asserts:

> The Mahoning County trial court committed plain error in failing to provide jury instructions on self-defense, in violation of Sutherland's right to due process under the Fourteenth Amendment to the United States Constitution and Article I, Section 16, of the Ohio Constitution.

{¶13} "It is well-settled that a criminal defendant is entitled to a complete and accurate jury instruction on all issues raised by the evidence." *State v. Levonyak*, 7th Dist. No. 05 MA 227, 2007-Ohio-5044, ¶ 53. "When reviewing the trial court's jury instructions, we must view the instructions in their totality, if the law is clearly and fairly expressed, a reviewing court should not reverse a judgment." *Id.* "The jury instructions must be considered as a whole and a single portion of the instruction should not be viewed in isolation." *Id.* (Internal citations omitted.)

{¶14} A defendant must prove self-defense by a preponderance of the evidence and may use his own testimony to do so if necessary. *State v. Koliser*, 7th Dist. No. 97-CO-16, 2000 WL 288518, *2 (March 15, 2000). To sufficiently raise a claim of self-defense, the defendant must show:

> The elements of self-defense through the use of deadly force include that the defendant: (1) was not at fault at creating the situation giving rise to the affray; (2) had a bona fide belief that they were in imminent danger of death or great bodily harm and their only means of escape from such danger was the use of such force; and (3) did not violate any duty to retreat or avoid the danger.

State v. Robbins, 58 Ohio St.2d 74, 388 N.E.2d 755 (1979), paragraph two of the syllabus.

{¶15} Sutherland is correctly asking us to review for plain error as the issue

was not raised in the trial court. "To prevail under the plain error doctrine, a defendant must demonstrate that, but for the error, the outcome of trial clearly would have been different." *State v. Bailey*, 7th Dist. No. 06 JE 22, 2007 Ohio 4995, ¶ 8. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B).

{¶16} The trial court instructed the jury as follows:

> Self-defense. The Defendant is asserting an affirmative defense on each of these charges known as self-defense. The burden of going forward with the evidence of self-defense and the burden of proving an affirmative defense are upon the defendant. He must establish such a defense by a preponderance of the evidence.
>
> A preponderance means evidence that is more probable, more persuasive, or of greater probative value. It is the quality of the evidence that must be weighed. Quality may or may not be identical with quantity.
>
> In determining whether or not an issue has been proved by a preponderance of the evidence, you should consider all the evidence bearing upon that issue regardless of who produced it. If the weight of the evidence is equally balanced, or if you are unable to determine which side of an issue has the preponderance, then the party who has the preponderance has not established such issue.
>
> Effect of self-defense. If the defendant fails to establish the defense of self-defense by a preponderance of the evidence, the state still must prove to you beyond a reasonable doubt all the elements of the crime charged.
>
> If you find by a preponderance of the evidence that defendant acted in

self-defense, you will find him not guilty of both charges.

{¶17} Although the jury was instructed regarding the burden of proof and the effect of self-defense, the trial court failed to give instructions for the elements that constitute self-defense. However, Sutherland testified that he did not intend to shoot Van Cobb.

> "Accident involves the denial of a culpable mental state and is tantamount to the defendant not committing an unlawful act. In contrast, a defendant claiming self-defense concedes he had the purpose to commit the act, but asserts that he was justified in his actions. The Supreme Court of Ohio has considered this paradox and stated: 'Self-defense presumes intentional, willful use of force to repel force or escape force. Accidental force * * * is exactly the contrary, wholly unintentional and unwillful.' " *State v. Barnd* (1993), 85 Ohio App.3d 254, 260, quoting *State v. Champion* (1924), 109 Ohio St. 281, 286-287.

State v. Levonyak, 7th Dist. No. 05 MA 227, 2007-Ohio-5044, ¶ 100.

{¶18} In light of Sutherland's testimony, he did not have the requisite intent and cannot claim self-defense as the necessary element of purpose has not been met. The record further demonstrates that Sutherland did not have a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape was the use of force. Sutherland was pursuing Van Cobb as he fled the house with the stolen marijuana. Sutherland had time to retreat and avoid danger but instead escalated the situation when he brandished his revolver and stated "I don't effing think so."

{¶19} Accordingly, the trial court did not commit error, let alone plain error, in failing to instruct on the elements of self-defense, and Sutherland's first assignment of error is meritless.

Ineffective Assistance

{¶20} In his second of three assignments of error, Sutherland asserts:

> Trial counsel provided ineffective assistance of counsel, in violation of the Sixth Amendment to the United States Constitution and Article I, Section 10, of the Ohio Constitution.

{¶21} To prove an allegation of ineffective assistance of counsel, the defendant must satisfy a two-prong test; that counsel's performance has fallen below an objective standard of reasonable representation, and that he was prejudiced by counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E .2d 373 (1989), at paragraph two of the syllabus. To demonstrate prejudice, the defendant must prove that, but for counsel's errors, the result of the trial would have been different. *Id*. at paragraph three of the syllabus. In Ohio, a properly licensed attorney is presumed to be competent and the burden is on the defendant to prove otherwise. *State v. Hamblin*, 37 Ohio St.3d 153, 155, 524 N.E.2d 476 (1988).

{¶22} This error rests on Sutherland's claim that the failure to request a complete jury instruction on self-defense was ineffective. As we have rejected this argument in our resolution of Sutherland's first assigned error, he has not established the first prong of the ineffective assistance test. Accordingly, Sutherland's second assignment of error is meritless.

Manifest Weight of Evidence

{¶23} In his final assignment of error, Sutherland asserts:

> The trial court violated his rights to due process and a fair trial when it entered judgments of conviction for felonious assault against the manifest weight of evidence

{¶24} "Weight of the evidence concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the

other." (Emphasis sic.) *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. A conviction will only be reversed as against the manifest weight of the evidence in exceptional circumstances. *Id*. This is so because the triers of fact are in a better position to determine credibility issues, since they personally viewed the demeanor, voice inflections and gestures of the witnesses. *State v. Hill*, 75 Ohio St.3d 195, 204, 661 N.E.2d 1068 (1996); *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967).

{¶25} Thus, an appellate court must review the entire record, weigh the evidence and all reasonable inferences and determine whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins* at 387. However, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. No. 99 CA 149, 2002–Ohio–1152, *2, citing *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999). Under these circumstances, the verdict is not against the manifest weight and should be affirmed.

{¶26} Felonious assault is defined as knowingly attempting or causing physical harm with a deadly weapon. R.C. 2903.11(A)(2). A person acts knowingly when, regardless of purpose, is "aware that his conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B). Aggravated assault is an inferior offense of felonious assault. *State v. Deem*, 40 Ohio St.3d 205, 211, 533 N.E.2d 294 (1988).

{¶27} Sutherland was indicted for both felonious and aggravated assault. The jury found him guilty on the felonious assault and not guilty on the aggravated assault. Thus, the jury considered the serious provocation element and disagreed with Sutherland's interpretation of the evidence.

{¶28} An independent review of the record supports Sutherland's conviction for felonious assault and a firearm specification. Sutherland fired three shots at Van

Cobb hitting him with one. Van Cobb and Pugh testified Sutherland shot in the direction of the car hitting the rear window of Pugh's vehicle and also Van Cobb while he was attempting to flee. A neighbor testified to hearing gunshots outside her house and observing a male shooting at another male that was running towards a vehicle parked on the street. Sutherland admitted chasing and shooting in the direction of Van Cobb, but asserting he did not intend to shoot Van Cobb. The jury was in the best position to weigh the credibility of the witnesses when reaching their verdict.

{¶29} As the manifest weight of evidence supported Sutherland's conviction for felonious assault and the accompanying firearm specification, his third assignment of error is meritless.

{¶30} In sum, the trial court did not err in failing to provide jury instructions on self-defense. Further, Sutherland's attorney was not ineffective for failing to request these instructions as the evidence did not warrant it. Finally, his conviction for felonious assault was not against the manifest weight of the evidence. Accordingly, Sutherland's assignments of error are meritless and this matter is affirmed.

Donofrio, J., concurs.

Waite, J., concurs.