[Cite as *State v. Ambartsoumov,* 2010-Ohio-6293.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 09AP-1054
v.	:	(C.P.C. No. 08CR-07-5039)
Garri Ambartsoumov,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 21, 2010

Ron O'Brien, Prosecuting Attorney, *Steven L. Taylor*, and *Sheryl L. Prichard*, for appellee.

Samuel H. Shamansky Co., L.P.A., and *Samuel H. Shamansky*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by defendant-appellant, Garri Ambartsoumov, from a judgment of sentence and conviction entered by the Franklin County Court of Common Pleas following a jury trial in which appellant was found guilty of felonious assault.

{¶2} This case arose out of an incident on May 17, 2008, in which two individuals, Tigran Safaryan and Arut Koulian, sustained knife wound injuries outside a Columbus restaurant. On July 11, 2008, appellant and a co-defendant, Eldar Veliev, were each indicted on one count of felonious assault, in violation of R.C. 2903.11. On

March 24, 2009, appellant and Veliev were also indicted on one count each of attempted murder, in violation of R.C. 2923.02 and 2903.02. The trial court subsequently granted the state's motion for joinder of appellant's trial with that of co-defendant Veliev, and the cases came for trial before a jury beginning August 24, 2009.

{¶3} The first witness for the state was Safaryan, who was born in Azerbaijan and came to the United States at age 18. Safaryan owns seven area businesses, including three auto body shops and an auto glass company, employing over 60 individuals. Many of his customers are from Russia and the Armenian community. Safaryan and appellant were acquainted with each other, having met 12 years prior to the incident; appellant, a former hairdresser who now owns a body shop, was at one time Safaryan's barber. Safaryan is also acquainted with co-defendant Veliev.

{¶4} Safaryan gave the following account of the events on May 17, 2008. Earlier that day, Alex Nercessian, a friend of Safaryan, made dinner reservations at Hawa Russia, a Russian club located on East Dublin Granville Road, Columbus. Safaryan and a friend, Koulian, met Nercessian at the restaurant. Safaryan knew other individuals in attendance at the club that night, including Alexander Dashovsky. Appellant and Veliev were also at the restaurant.

{¶5} Safaryan received a phone call shortly after arriving at the restaurant, and he stepped outside to a patio area to continue the conversation. Other individuals were also outside on the patio. As Safaryan finished the phone call, appellant, Veliev, and two other individuals came outside. Appellant started walking toward Safaryan, and Safaryan noticed "something black in his hand * * * like [a] knife." (Tr. Vol. I, 50.) Safaryan said to appellant: "[W]hat do you say to my cousin." (Tr. Vol. I, 50.) Appellant then slashed at

Safaryan with a knife, striking toward Safaryan's upper body. Safaryan tried to block the attack with his right arm, but the knife cut across his right forearm. Just before the attack, Safaryan heard appellant say "kill" in Russian. (Tr. Vol. I, 80.) After being cut, Safaryan struck appellant "so I could get * * * out of the railing." (Tr. Vol. I, 52.) Appellant fell to one knee, and Safaryan tried to get away from the porch area.

{¶6} At the time Safaryan first saw appellant come outside the restaurant, co-defendant Veliev was walking behind appellant. Safaryan's friend, Koulian, was also outside at this time, standing in the vicinity of Veliev. During the incident, Safaryan observed a silver knife in Veliev's hand, and then saw "blood all over" Koulian's shirt. (Tr. Vol. I, 55.)

{¶7} Following the altercation, Safaryan was assisted to the parking lot by Dashovsky, and someone placed a 911 call for an ambulance. Police officers arrived a short time later and ordered appellant to "stop and get on his knees," but "he wouldn't do that." (Tr. Vol. I, 60.) Safaryan testified that appellant was speaking in Russian, threatening him and his family; appellant "was yelling at us and said he would kill us." (Tr. Vol. I, 60.) Safaryan and Koulian were subsequently transported by ambulance to Grant Hospital. Safaryan was treated for a knife wound to his right arm of approximately ten inches in length, requiring stitches and staples.

{¶8} At trial, Safaryan identified appellant as his assailant. Safaryan testified that appellant had threatened him several months before the incident. Safaryan learned of the threat from his cousin, Sabina Shvets, during a phone conversation. Safaryan later spoke to his attorney about the threats, but his attorney "told me to just let it go." (Tr. Vol. I, 74.)

{¶9} On cross-examination, Safaryan stated he was aware that Nercessian had served five years in prison. Safaryan denied being in business with Nercessian. Safaryan further denied engaging in auto theft, trafficking in stolen vehicles, extortion or falsifying vehicle identification number tags.

{¶10} Koulian, age 28, is formerly from Russia, and moved to Columbus in 2001. In May 2008, Koulian was self-employed as the owner of a jewelry store in Gahanna. Koulian, who was at the Hawa Russia restaurant with Safaryan and Nercessian on May 17, 2008, gave the following testimony regarding the incident. A short time after arriving at the restaurant, Koulian went outside to smoke. At first he did not see Safaryan, but Koulian then noticed a commotion to his right. Koulian "heard the yelling and I saw a knife pulled out, which Ty was struck on his right arm." (Tr. Vol. I, 129.) Appellant "was threatening. Something along the lines I will kill you." (Tr. Vol. I, 130.) Koulian described the knife in appellant's hand as approximately five or six inches in length with a dark handle and blade. Safaryan punched appellant and then retreated, and Koulian observed appellant "getting up * * * to his feet with the knife in his right hand." (Tr. Vol. I, 129.)

{¶11} Koulian backed away from the scene, but another individual "was coming towards me. And I raised my arms * * * and I said, hey, stop, whatever is going on." (Tr. Vol. I, 129.) Koulian observed "something that resembled a medical scalpel" in the man's hand. (Tr. Vol. I, 129.) The individual shoved Koulian in the shoulder area; the man then pulled his hand back, and at that moment Koulian "saw blood coming down like crazy from my neck." (Tr. Vol. I, 130.) Someone pulled Koulian away, and Nercessian came outside to assist him. Koulian later learned that his assailant was an individual named "Eldar." At trial, Koulian identified co-defendant Eldar Veliev as his assailant.

{¶12} The wound to Koulian's neck area was eight inches in length. Koulian experiences occasional numbness in the area of the wound, and he was informed by doctors that some nerve endings had been damaged.

{¶13} Following the incident, appellant's sister visited Koulian's jewelry store, and she "basically told me * * * not to be dumb. I should be smarter than that and I should just get out of it and I shouldn't continue with this." (Tr. Vol. I, 180.) Koulian currently resides in Russia, and he "fled" the United States in September of 2008 after receiving "a threatening phone call" following his testimony during a grand jury proceeding. (Tr. Vol. I, 177.) The caller told him: "You will die tonight." (Tr. Vol. I, 177.) Koulian immediately closed up his jewelry store and left the Columbus area; he drove to the Russian consulate in New York in a car he had taken for a test drive from a Columbus car dealership. After experiencing a delay in New York in obtaining necessary paperwork, a friend assured Koulian he could get the paperwork in California. Koulian traveled back to Ohio and then took a bus from Columbus to California. A short time later, he flew from Los Angeles to Russia. Koulian did not tell his wife or parents that he was leaving. He acknowledged there are pending charges against him for unauthorized use of the motor vehicle he drove to New York, and he denied any intent to steal the vehicle. On cross-examination, Koulian admitted he had been late in making rental payments on the leased jewelry store premises and that he had received eviction notices from the rental agency prior to leaving the country.

{¶14} On the evening of May 17, 2008, Columbus Police Officer Matthew Ewing was dispatched to the Hawa Russia restaurant regarding a reported stabbing. When he arrived, Officer Ewing observed another officer struggling with a white male, later

identified as appellant. The individual was "very loud, very boisterous." (Tr. Vol. II, 10.) The man was "very angry," and was "looking back to a couple of individuals in the crowd." (Tr. Vol. II, 10.) Officer Ewing noticed that the man was bleeding from a cut to the right hand area near the thumb. The officer described the wound as a "clean cut. It was a slit * * * on his right hand." (Tr. Vol. II, 13.) Appellant was eventually subdued and placed in a medic wagon, and Officer Ewing accompanied appellant to the hospital. Officer Ewing testified that appellant "just basically ranted and raved about how he was disrespected in the club or disrespected with his business or something." (Tr. Vol. II, 14.) Appellant told the officer that he was an "important person" who owned businesses and had a "lot of money." (Tr. Vol. II, 15.)

{¶15} Columbus Police Officer Heath Graber was also dispatched to the Hawa Russia restaurant on May 17, 2008. Appellant was placed in a medical ambulance, and Officer Graber followed the ambulance to the hospital; upon arrival, Officer Graber accompanied the medics and appellant inside the hospital, and the officer noticed a deep cut to appellant's right thumb area.

{¶16} Dashovsky, age 24, was born in the former Soviet Union and came with his family to the United States in 1989. Dashovsky is employed as a sales manager at Safaryan's auto glass business, and he is acquainted with Koulian. Dashovsky has known appellant for a number of years; at one time, appellant was Dashovsky's hairdresser. Dashovsky was also familiar with Veliev, who works at appellant's body shop.

{¶17} On the night of the incident, Dashovsky was at the Hawa Russia restaurant for a birthday party. When he arrived, appellant and Veliev were at the restaurant. Later,

Safaryan and Koulian entered the restaurant. At some point in the evening, Safaryan got up from his table and went outside to smoke. Appellant then got up from his table and went to the bathroom. Dashovsky went outside to smoke; as he was walking toward the door, Dashovsky observed appellant pass a knife to Veliev. The knife had a black handle and was "foldable." (Tr. Vol. II, 86.) Dashovsky recognized the knife "from when Garri used to cut hair." (Tr. Vol. II, 86.)

{¶18} As Dashovsky walked outside he observed Safaryan "walking away, holding his arm." (Tr. Vol. II, 87.) Dashovsky then noticed that Safaryan was bleeding from a cut. Safaryan's arm was "severely cut down to the veins." (Tr. Vol. II, 87.) Dashovsky made a tourniquet out of a shirt for Safaryan's arm. He then heard Koulian yelling "I got cut, I got cut." (Tr. Vol. II, 87.) Koulian suffered a cut to the throat area, and Dashovsky ran to the kitchen and grabbed some towels and blankets. Dashovsky turned his attention to Safaryan "because I honestly didn't think Arut would make it." (Tr. Vol. II, 88.) Dashovsky made a 911 call for help. Appellant and Veliev went back inside the restaurant. Dashovsky did not observe either appellant or Veliev being hit or punched during the incident. At trial, the state played a recording of the 911 call placed by Dashovsky, in which he told the dispatcher that one of the assailants was "Armenian descent, first name Garri." (Tr. Vol. II, 96.)

{¶19} Dmitry Semikin, who was at the Hawa Russia restaurant on May 17, 2008, testified that he was standing outside the restaurant when he heard screams. He observed approximately 10 to 15 individuals near the entrance of the restaurant. Semikin saw a knife in appellant's hand, and "Tigran's arm was already cut and he was holding it with another hand." (Tr. Vol. III, 19.) He also "saw that Tigran punched Garri." (Tr. Vol.

III, 19.) Semikin observed Koulian "holding his neck, which was bleeding." (Tr. Vol. III, 21.) Veliev was standing across from Koulian at the time. Semikin went to help Koulian; Semikin later realized that he had also been cut. When appellant was taken into custody by police he was making "[h]is usual threats, that he will kill everybody and he will avenge everybody." (Tr. Vol. III, 25.)

{¶20} Columbus Police Officer Mark Marstiller was dispatched to the scene that evening and he attempted to locate witnesses. Although there were a number of individuals at the restaurant, "there was no cooperation. Nobody really wanted to be involved and talk to me specifically about anything." (Tr. Vol. II, 110.)

{¶21} Columbus Police Detective Glenn Siniff went to the hospital on the night of the incident and spoke with Safaryan. He also interviewed appellant that evening. The following day, Detective Siniff interviewed Koulian, who named the individual that cut his throat. Koulian picked out Veliev's picture from a photo array. Detective Siniff also spoke with Semikin, who identified Veliev as being involved in the incident.

{¶22} Shvets, age 20, is a cousin of Safaryan. In September 2007, Shvets was at a Columbus restaurant when appellant approached her and asked where she was from. Shvets responded that she was from Bakul, Azerbaijan. Shvets told appellant that she was related to Safaryan. When appellant heard Safaryan's name "he got mad and he started saying that he hates him, that he's going to kill his son, his family." (Tr. Vol. III, 82.) After appellant left, Shvets called Safaryan and asked him to come pick her up. She was very upset at the time. Appellant once told Shvets: "I'm the king of the city, and if I don't like someone, I'm going to kill the person." (Tr. Vol. III, 84.)

{¶23} Aydin Gasanov, appellant's father-in-law, was called as a witness by the defense. Gasanov was at the Hawa Russia restaurant on the evening of May 17, 2008, and gave the following account. During the evening, appellant and Veliev got up from their table; a short time later, Safaryan, Koulian, Nercessian, and several other individuals went outside to smoke. Gasanov later heard someone screaming and he ran outside. Veliev was lying on the floor and appellant "was on his knees, trying to get up. And in those 9 or 10 people – I'm not sure how many exactly – they were beating Garri and Eldar with their feet." (Tr. Vol. IV, 35-36.) Gasanov attempted to stop the fight; appellant and Veliev eventually went back inside the restaurant, and Gasanov followed them.

{¶24} Appellant, age 45, testified on his own behalf. Appellant was born in Bakul, Azerbaijan, part of the ex-Soviet Union, and he graduated from National Beauty Academy after moving to the United States. Appellant, who currently owns a body shop, has known Safaryan for 15 years; he has known Veliev for 12 years.

{¶25} On May 17, 2008, appellant was invited to dinner at the Hawa Russia restaurant by a friend, Dimitri Zubrich. Other friends and relatives of appellant were also in attendance. Koulian, Safaryan, and Nercessian subsequently arrived at the restaurant. That evening, appellant went to the restroom and then went outside with Veliev to smoke. While they were standing outside, Safaryan, Koulian, and Nercessian "started coming closer." (Tr. Vol. IV, 68.) As the other men approached, "Ty says I want to talk to you." (Tr. Vol. IV, 69.) Appellant testified that he told Safaryan that he was with family and "I don't want any problems." (Tr. Vol. IV, 69.) Safaryan then "smacked me twice. And I walked back and tried to go, and he hit me." (Tr. Vol. IV, 69.) After being hit twice, appellant "hit [Safaryan] back." (Tr. Vol. IV, 69.) Safaryan hit appellant a third time and

appellant fell down. When appellant fell down, he "tried to push this guy. I get * * * cut very badly." (Tr. Vol. IV, 70.) Appellant's father-in-law walked outside and started to push the other men, and appellant went back inside the restaurant.

{¶26} A short time later, when the police arrived, appellant refused a police officer's order to get on his knees. Appellant told the officer to "cuff me" instead. (Tr. Vol. IV, 72.) The officer then used a Taser gun on him. Appellant denied having a knife that evening or slashing Safaryan's arm. He also denied observing a knife in Veliev's hand.

{¶27} Zubrich, who invited appellant to the Hawa Russia restaurant on the night of the events at issue, gave the following testimony. According to Zubrich, "everybody knows that Tigran doesn't like Garri and has been trying to get him for something." (Tr. Vol. IV, 151.) That evening, appellant and Veliev went outside to smoke, and the individuals at the table where Safaryan was seated got up and also went outside. Zubrich observed Safaryan hit appellant. Zubrich did not want to get involved, so he went back to the table to be with his girlfriend. A short time later, appellant, Veliev, and appellant's father-in-law came back inside the restaurant, and Zubrich heard sirens. Zubrich also observed five or six individuals running inside the restaurant from the front door toward the back kitchen door.

{¶28} Following the presentation of evidence, the jury returned verdicts finding appellant guilty of felonious assault. The jury also returned verdicts finding co-defendant Veliev guilty of attempted murder and felonious assault. On October 22, 2009, the trial court conducted a sentencing hearing. With respect to appellant's conviction for felonious assault, the trial court imposed a sentence of eight years incarceration.

{¶29} On appeal, appellant sets forth the following seven assignments of error for this court's review:

> Assignment of Error No. 1:
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> The trial court improperly excluded defense witnesses under Evidence Rules 404 and 608 that rebutted the State's characterizations of an alleged victim's good character, thereby violating Appellant's right to present a meaningful defense as guaranteed by the Compulsory Process Clause of the Sixth Amendment, the Due Process [C]lause of the Fourteenth Amendment to the United States Constitution, and Article I, Section 10 of the Ohio Constitution.
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> Assignment of Error No. 2:
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> The trial court improperly quashed Appellant's subpoena of an non-confidential criminal investigation that rebutted the State's characterizations of an alleged victim's good character, thereby violating Appellant's right to present a full defense as guaranteed by the Compulsory Process Clause of the Sixth Amendment, the Due Process [C]lause of the Fourteenth Amendment to the United States Constitution, and Article I, Section 10 of the Ohio Constitution.
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> Assignment of Error No. 3:
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> The trial court improperly quashed Appellant's subpoena of an non-confidential criminal investigation that rebutted the State's characterizations of an alleged victim's good character, thereby violating the Due Process [C]lause of the Fourteenth Amendment and comparable provisions of the Ohio Constitution.
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> Assignment of Error [No.] 4:
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> The trial court improperly limited Appellant's cross-examination and implied in the presence of the jury that Appellant should testify at trial thereby violating Appellant's Fifth Amendment right to remain silent, Sixth Amendment right to a trial by jury, and Sixth Amendment right to [confront] his accusers, the Due Process [C]lause of the Fourteenth Amendment and comparable provisions of the Ohio Constitution.

> Assignment of Error No. 5:
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> The court improperly excluded evidence that rebutted Arut Koulian's assertions that his motive for leaving town was due to threats from Appellant's family with evidence of his financial difficulty, thereby violating Appellant's right to present a meaningful defense as guaranteed by the Compulsory Process Clause of the Sixth Amendment, the Due Process [C]lause of the Fourteenth Amendment to the United States Constitution, and Article I, Section 10 of the Ohio Constitution.
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> Assignment Error No. 6:
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> The trial court erred in overruling Appellant's motion for a mistrial when the State elicited testimony from two Columbus Police Officers that Appellant did not tell them how he cut his hand and that he did not tell them he was the victim of an assault and thus commenting on his constitutional right to remain silent, thereby violating Appellant's Fifth Amendment right to remain silent, and his right to Due Process under the Fourteenth Amendment.
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> Assignment of Error No. 7:
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> The Trial Court violated Appellant's right to Due Process as Guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution by entering verdicts of Guilty, as the jury's verdict was against the manifest weight of the evidence.

{¶30} Appellant's first, second, and third assignments of error are interrelated and will be discussed together. Under the first assignment of error, appellant argues that the trial court erred in excluding former law enforcement officials from providing testimony regarding a task force criminal investigation that, appellant contends, would have rebutted the state's assertions that Safaryan was an upstanding community leader who ran a legitimate business. Under his second assignment of error, appellant argues the trial court erred in excluding and sealing certain subpoenaed documents relating to the task force criminal investigation. Under the third assignment of error, appellant argues that the

trial court's decision to quash appellant's subpoena of the task force criminal investigation records prevented the defense from obtaining favorable evidence in violation of *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194.

{¶31} By way of background, on August 24, 2009, shortly prior to the start of trial, the trial court addressed a motion to compel discovery and/or exculpatory evidence filed by counsel for appellant. Counsel argued that several of the state's witnesses "are heavily steeped in criminal activity, including Nercessian who was in prison." (Tr. Vol. I, 8.) Counsel for co-defendant Veliev joined in the motion. In response, the prosecution argued there was no "[*Brady*] information" regarding Safaryan, Nercessian or Koulian. (Tr. Vol. I, 10.) Also on that date, counsel for appellant filed a subpoena with the Organized Crime Investigations Commission Task Force (via the office of the Ohio Attorney General).

{¶32} The next morning, August 25, 2009, the trial court addressed the filing of the subpoena, at which time counsel for co-defendant Veliev joined in appellant's subpoena motion. The court informed the parties: "The state's lawyers have advised me that the office of the attorney general wants to move to quash the subpoena on the argument that it is confidential, investigative material, and that the prosecuting attorney of Franklin County does not have access to this material." (Tr. Vol. I, 14.)

{¶33} Following the start of trial, the trial court, outside the presence of the jurors, again addressed the issue of the subpoenaed documents. The prosecutor noted on the record: "After speaking with some people, it seems as though the documents that have been requested are not confidential, as this was a closed case." (Tr. Vol. I, 86.) The trial court questioned Jerry Maloon, an assistant attorney general, who had conducted a

search for the requested documents. Maloon had located several old administrative files, but stated that the task force "has been over for at least five years," and that "[t]he vast majority - - I'm going to say 99.99 percent of any and all documentation having to do with this task force of Organized Crime has been destroyed per our record retention polices." (Tr. Vol. I, 87-88.) Maloon noted that, pursuant to a document dated October 12, 1999, a task force had been initiated in 2000.

{¶34} Maloon searched for the names mentioned in the subpoena (Safaryan, Koulian, and Nercessian), and stated that "Nercessian is the subject of a Dispatch article, January 17th, 2003, talking about a drug ring, and it looks like he got 30 months' incarceration at the federal level for that." (Tr. Vol. I, 88-89.) Maloon also found "the proposal from the CPD detective * * * that was dated October 12th, 1999." (Tr. Vol. I, 89.) Maloon requested that the trial court conduct an in camera review of the documents, stating: "There is a great deal of sensitive information in the proposal." (Tr. Vol. I, 89.) Maloon further represented: "In my review of that material * * * [t]here's not one shred of evidence in there as to Ty * * * Safyran's criminal conduct. It's just not there. I know what they're looking for." (Tr. Vol. I, 100.)

{¶35} The trial court conducted an in camera review of the documents. Following its review, the court noted that the documents included a photocopy of an article from the Columbus Dispatch, dated January 17, 2003, "entitled 'Drug Ring Operated at Club,' that appears to reflect a conviction in the federal district court, and Mr. Nercessian is reflected in this article as, quote, who is in jail and is expected to plead guilty to his role in the ring next month, unquote." (Tr. Vol. I, 90-91.) The trial court indicated it would allow defense counsel to have a copy of that article.

{¶36} The trial court noted that the "other document that I've been provided * * * is entitled summary of investigation in to Russian emigre criminal activity in the Columbus area prepared October 12th, 1999, and then there's what I understand from counsel to be a Columbus Police officer listed as the author." (Tr. Vol. I, 91.) The court related that the document contained various "unnumbered pages, of which the following subheadings are included: Auto thefts, insurance frauds, body shop frauds, odometer frauds, title frauds, other frauds, tax fraud. Exceptions, drug trafficking, prostitution, organized crime connections." (Tr. Vol. I, 91.) The court indicated that the document also included a "two-page list entitled 'Individuals Involved' with some phone numbers and purported information about their employment. There look to be 20 or so individuals listed." (Tr. Vol. I, 92.) Further, the document included "four pages of * * * businesses involved." (Tr. Vol. I, 92.) The last pages of the document included a USA Today newspaper article, dated August 24, 1999, as well as a 1998 U.S. News and World Report cover story: "Dirty Diamonds. How the FBI and some honest Moscow cops broke up a ring that was looting tons of gold and gems from the Russian National Treasury." (Tr. Vol. I, 92.)

{¶37} The trial court concluded: "I do not believe that under [*Brady*] that any of this material is subject to being turned over." (Tr. Vol. I, 93.) The trial court made clear it was providing some of the information, and that the "only thing I'm not giving you is this summary of investigation by police officers 10 years ago." (Tr. Vol. I, 95.) Defense counsel argued, however, that the investigative report should be turned over to refute Safaryan's suggestion that he was a legitimate businessman. The trial court noted that the issue of admissibility was "really a 403 issue for me," and "that it's terribly prejudicial and confuses the issues and does not have any focus on what we're here to talk about."

(Tr. Vol. I, 96.) The court reiterated its view that the documents did not contain "[*Brady*] material." (Tr. Vol. I, 99.)

{¶38} We initially address appellant's contention that the trial court erred in excluding law enforcement officials from providing testimony to rebut the state's assertions that Safaryan was an upstanding community leader who ran a legitimate business. Appellant maintains the state went to great lengths to portray Safaryan as a legitimate businessman who had won a governor's award. Appellant argues the defense sought to refute this testimony by calling law enforcement officers to contradict such assertions. At the close of the evidence, counsel for appellant made a proffer that, if permitted, the defense would have called retired Columbus Police Detective Ralph Kisor (the author of the subpoenaed task force investigative report), as well as a retired FBI agent and a retired state trooper. Counsel proffered that these former law enforcement personnel would have testified as to an investigation of local Russians involved in a stolen vehicle ring, as well as drugs and extortion. Appellant argues that such evidence was not violative of Evid.R. 608(B), and that it was admissible under Evid.R. 616(C) and/or Evid.R. 404(B).

{¶39} Evid.R. 608(B) states in part as follows:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of crime as provided in Evid.R. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if clearly probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

{¶40} One commentator has noted that, "[u]nder Rule 608(B), a witness may be impeached on cross-examination by interrogation as to specific prior instances of conduct which are probative of untruthfulness." Weissenberger, Ohio Evidence Courtroom Manual (2008) 169. Under the rule, "specific acts of untruthful behavior may only be inquired into on cross-examination, and they may not be established by extrinsic evidence." Id. Thus, "if the witness on cross-examination denies the prior untruthful act, the cross-examiner is said to be 'stuck with the answer.' " Id. However, "the limitation on the admissibility of extrinsic evidence contained in Rule 608(B) concerns only those specific acts of conduct which are inferentially probative of untruthful character and not those otherwise relevant to credibility in general." Id. A trial court's "decision to admit evidence of earlier misconduct of a witness for impeachment under Evid.R. 608(B) is 'within the sound discretion of the trial court.' " *State v. Drummond,* 111 Ohio St.3d 14, 2006-Ohio-5084, ¶100, quoting *State v. Boggs* (1992), 63 Ohio St.3d 418, 424.

{¶41} Evid.R. 616(C) provides:

> Facts contradicting a witness's testimony may be shown for the purpose of impeaching the witness's testimony. If offered for the sole purpose of impeaching a witness's testimony, extrinsic evidence of contradiction is inadmissible unless the evidence is one of the following:
>
> (1) Permitted by Evid.R. 608(A), 609, 613, 616(A), 616(B), or 706;
>
> (2) Permitted by the common law of impeachment and not in conflict with the Rules of Evidence.

{¶42} Evid.R. 616(C) allows extrinsic evidence to impeach the testimony of a witness "only under limited circumstances." *State v. Kopchock,* 8th Dist. No. 92353, 2010-Ohio-3079, ¶31. Specifically, "Evid.R. 616(C) allows impeachment by extrinsic

evidence that contradicts a witness' testimony, but only if such extrinsic evidence is permitted by Evid.R. 608(A), 609, 613, 616(A) or (B), or 706, or by the common law of impeachment not in conflict with the Rules of Evidence." *State v. Spence,* 10th Dist. No. 05AP-891, 2006-Ohio-6257, ¶62, citing Evid.R. 616(C)(1) and (2).

{¶43} Evid.R. 404(B) provides that evidence of "other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶44} Appellant argues he did not seek to introduce testimony by former law enforcement officers to impeach Safaryan's character for truthfulness; rather, the testimony was offered to rebut Safaryan's testimony that he never engaged in criminal activity. Appellant contends that the state put the matter at issue by "continuously and consistently bolstering" Safaryan's business accomplishments, thereby leaving the jury with the impression that the witness was a legitimate businessman. Appellant maintains the proffered testimony would have shown appellant had no motive to be jealous of Safaryan's business accomplishments.

{¶45} While appellant argues that the state put the matter of Safaryan's potential criminal activity at issue by touting his business accomplishments, including receipt of a governor's award, the record does not reflect that the state questioned Safaryan extensively during direct examination about his business interests. Rather, during direct, the prosecution asked limited questions of the witness about his "line of work," how many businesses he owned, and the "types" of businesses in which he was involved. (Tr. Vol.

I, 38.) Those questions elicited responses by Safaryan that he owned seven businesses, including three auto body shops, and that he employed over 60 individuals.

{¶46} During cross-examination of Safaryan, the following exchange took place between defense counsel and the witness:

> Q. And * * * you started this legitimate body business and rental car agency and auto glass shop that employs 60 people?
>
> A. Yes.
>
> Q. Right. Now [I] presume that your answer to the question that you engage in auto theft and traffic in stolen vehicles would be no, correct?
>
> A. Absolutely.
>
> Q. And you know what a VIN tag is, right, vehicle identification number tag?
>
> A. Yes, I do.
>
> Q. You've never been involved in flipping or falsifying VIN tags, correct?
>
> A. No, Sir.
>
> Q. And you've never been involved in extorting other business people, correct?
>
> A. No, sir.
>
> Q. You've never been involved in selling stolen cars out of the northern district of Ohio?
>
> A. Absolutely not.

(Tr. Vol. I, 111.)

{¶47} Safaryan was not questioned during direct examination about whether he had received any business related awards. Rather, testimony regarding Safaryan's

receipt of a governor's award came during redirect in response to defense counsel's cross-examination. Specifically, during redirect, the prosecutor noted that defense counsel had "asked you if it was a legitimate business." (Tr. Vol. I, 115.) The prosecutor then asked Safaryan: "Have you ever been recognized or had any recognition for your businesses?" (Tr. Vol. I, 115.) In response, the witness stated that he had received a governor's award "[f]or international businessman." (Tr. Vol. I, 115.)

{¶48} In general, "[t]he admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. The record reflects that the trial court excluded the evidence at issue after conducting a balancing under Evid.R. 403.

{¶49} As previously noted, the record does not indicate that the prosecution questioned Safaryan extensively during direct examination about his business interests. Further, while precluding the admission of extrinsic testimony by retired law enforcement officers as to an investigation initiated in 1999, the trial court permitted defense counsel to cross-examine the witness about whether he had ever been involved in stolen automobiles, trafficking in stolen vehicles or extorting other businessmen. The court ruled it would allow counsel to "ask those questions, but he's stuck with the answers." (Tr. Vol. I, 103-04.) As also noted above, evidence that Safaryan received a governor's award was elicited on redirect in response to questions raised during cross-examination.

{¶50} Even assuming that the evidence at issue was admissible, its admissibility is still subject to Evid.R. 403, which commits to the trial court's discretion the decision to exclude even relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. *State v. Buchanan,* 12th Dist. No. CA2008-04-001, 2009-

Ohio-6042, ¶57. See also McCormick, Evidence (6th Ed.2006) 216, Section 45 (judge may exercise discretion under Evid.R. 403 to limit specific contradiction impeachment). Further, the Supreme Court of Ohio has noted that the "rights to confront witnesses and to defend are not absolute and may bow to accommodate other legitimate interests in the criminal process." *Boggs* at 422, citing *Chambers v. Mississippi* (1973), 410 U.S. 284, 295, 93 S.Ct. 1038, 1046. This includes discretion on the part of the trial court in considering the admission of extrinsic evidence that could "invite a trial within a trial" or lead to "juror confusion." *Boggs* at 422. In the present case, the trial court expressed concern about conducting a trial within a trial, and the potential for confusion and delay, based upon testimony regarding a law enforcement investigation of approximately 20 individuals conducted almost ten years prior to the events in question and which resulted in no charges against the witness. Upon review, we find no abuse of discretion by the trial court in finding that the probative value of the proffered extrinsic evidence was substantially outweighed by the danger of unfair prejudice.

{¶51} We next consider appellant's second and third assignments of error, which challenge the trial court's handling of the subpoenaed task force investigative records. Appellant argues that defense counsel issued a valid subpoena for records in the possession of the Ohio Attorney General, and that the state advised the trial court that the requested documents were not confidential. Appellant maintains that nothing in the record shows that the state overcame its burden of proving that the subpoenaed documents were exempt. Appellant further argues that the trial court's ruling may have prevented the defense from obtaining *Brady* material. Appellant contends that the court's ruling resulted in prejudice because (1) the documents may have been useful as a tool to

refute Safaryan's characterizations as a legitimate businessman, and (2) the documents may have been the "tip of the iceberg" for other relevant and exculpatory evidence.

{¶52} In general, R.C. 149.43 establishes "a statutory right of access to public records and the procedure for exercising that right." *State v. Lawson,* 11th Dist. No. 2001-L-071, 2002-Ohio-5605, ¶30. Pursuant to that statute, a "public record does not include 'confidential law enforcement investigatory records.' " Id., quoting R.C. 149.43(A)(1)(h).

{¶53} The state argues that the materials at issue were not withheld by the prosecution, and that the trial court never specifically reached a determination whether or not the records were confidential; rather, the trial court conducted an independent review of the records and determined that some of the information in the records was not admissible, and that the records contained no *Brady* material. The record supports the state's contention that the trial court did not make a determination as to confidentiality of the documents under R.C. 149.43 but, instead, the court reviewed the materials in camera and concluded they did not contain *Brady* material and were not relevant to the issues before the jury.

{¶54} There are three components of a *Brady* violation: "[T]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene* (1999), 527 U.S. 263, 281-82, 119 S.Ct. 1936, 1948.

{¶55} The sealed investigative task force report which the trial court reviewed is part of the record before this court, and we have reviewed that record to determine

whether there is any support for appellant's assertion that a *Brady* error may have occurred as a result of the failure to provide that information. Having conducted our own independent review of the report, we are satisfied that there is nothing contained in that report which would have altered the jury verdicts, nor do we find error with the trial court's determination that the report did not contain material required to be disclosed under *Brady*. *State v. Lawson* (June 4, 1990), 12th Dist. No. CA88-05-044 (appellate court's own review of sealed materials found no violation of *Brady* rule and no materials that could have affected outcome of trial). Further, based upon our discussion above, the trial court did not abuse its decision in excluding admission of the nearly ten-year-old investigatory report under Evid.R. 403.

{¶56} Based upon the foregoing, appellant's first, second, and third assignments of error are without merit and are overruled.

{¶57} Under the fourth assignment of error, appellant asserts the trial court improperly suggested that appellant's co-defendant should take the stand in the presence of the jury. Appellant argues that the comments by the trial court were made in front of the jury and suggested that appellant's testimony was not credible.

{¶58} The comments at issue occurred during the cross-examination of appellant by counsel for co-defendant. Specifically, counsel questioned the witness about whether an individual, Semikin, worked as security personnel at the restaurant. During this exchange, the following colloquy occurred:

> Q. And you're of the opinion or at least it appeared to everybody at your table that he was a security guard of some sort, right?
>
> A. Yes, sir.

> [Counsel for Veliev]: Judge, if I may ask this witness to come out and demonstrate what happened out on the patio that night from his point of view.
>
> THE COURT: Well, Mr. Shamansky is his lawyer. He didn't do it, so I'm not going to allow it at this point. You can do it with your own client if you want to. But you don't represent this client. I'm not going to have any demonstrations at this point. Thank you.

(Tr. Vol. IV, 81-82.)

{¶59} Upon review, we deem the trial court's response as exercising its discretion in whether to permit demonstrative evidence, and we agree with the state that the comments, when read in context, merely stress that the attorney should have his own client perform demonstrations. We do not, however, find that the trial court indicated a disbelief in appellant's testimony or somehow cast doubt on his credibility. We also note that no objection was made to the comments, nor did defense counsel request a limiting instruction.

{¶60} Finding that the trial court committed no error, plain or otherwise, appellant's fourth assignment of error is overruled.

{¶61} Under the fifth assignment of error, appellant argues the trial court erred in excluding evidence that Koulian fled the country because he was in financial trouble. Appellant contends the court's ruling prevented him from refuting Koulian's testimony that he left because appellant's sister threatened him. According to appellant, the attorney and property manager for Gahanna Creekside Investments, the management company that leased space for Koulian's jewelry business, would have testified that Koulian represented his business as an LLC, and that the business was actually in financial straits. Appellant further maintains the evidence would have refuted Koulian's testimony

that he had no contact with anyone in Columbus by showing that Koulian's father came to the store and removed over $100,000 of inventory after Koulian left the area.

{¶62} At trial, outside the presence of the jury, counsel for appellant indicated he would be calling the attorney for Gahanna Creekside Investments, as well as the property manager, "to establish that this guy is a liar." (Tr. Vol. I, 223.) The prosecutor objected to this line of testimony, arguing that the Rules of Evidence did not permit extrinsic evidence of specific instances of misconduct. Counsel for appellant asserted that the testimony was admissible under Evid.R. 616(C). The trial court ruled that the evidence was inadmissible under Evid.R. 616(C), but that even if that rule was applicable it would be excluded under Evid.R. 403 based upon the court's view that "it leads to confusion of the issues and would mislead the jury." (Tr. Vol. I, 227.)

{¶63} We find no abuse of discretion by the trial court's ruling. To the extent counsel sought to show that the witness was a "liar," extrinsic evidence of such matters would be limited by Evid.R. 608(B). Weissenberger at 169. Further, while the court precluded testimony by the management of the Creekside property, defense counsel cross-examined Koulian about whether he listed his business as an LLC, and whether he was behind in his lease payments prior to leaving the country. Defense counsel also presented a copy of the lease to Koulian during cross-examination, reflecting that the name "Koulian Design, LLC" appeared on the document. (Tr. Vol. I, 198.) Koulian acknowledged during cross-examination that he had been late in some of his rental payments, and that he had received eviction notices. He also acknowledged that his landlord offered to restructure some of the lease payments. Koulian was further questioned as to whether his father later removed his jewelry inventory from the store.

{¶64} Even accepting that extrinsic evidence showing Koulian was behind in his rent was relevant and admissible under Evid.R. 616, the trial court was within its discretion in finding the evidence at issue subject to Evid.R. 403. Nor does it appear that extrinsic evidence would have added substantially to evidence elicited from Koulian during cross-examination with respect to late payments and his representation that the business was an LLC.

{¶65} Accordingly, the fifth assignment of error is without merit and is overruled.

{¶66} Under the sixth assignment of error, appellant argues that the state's questioning of Officers Ewing and Graber elicited responses commenting on appellant's right to remain silent. As noted under the facts, Officer Ewing testified that he accompanied appellant to the hospital with medical personnel. During direct examination, the prosecutor asked Officer Ewing if appellant ever explained how he hurt his hand. Officer Ewing responded: "No, I asked him a number of times. * * * That's the first thing that the nurses and doctors asked when they came in to the ER * * *. He could never explain how he cut --." (Tr. Vol. II, 15.) During cross-examination, counsel for appellant asked Officer Ewing: "Were you asking him specifically how he cut his thumb?" (Tr. Vol. II, 22.) The officer responded that he asked appellant "a couple of times * * * how did that happen," and "[h]e could not give us an answer." (Tr. Vol. II, 22.) According to the officer, appellant "just didn't answer. He just did not answer the question and went to a different subject and began * * * talking in different directions." (Tr. Vol. II, 23.)

{¶67} Officer Graber was also with appellant at the hospital following the incident. Officer Graber testified that appellant made remarks about the altercation; specifically, that he was inside the club and was approached by two individuals who started verbally

attacking him, and that he felt disrespected. The officer further noted, however, that appellant did not talk about the specific injury to his hand.

{¶68} Following Officer Graber's testimony, counsel for appellant made a motion for mistrial, joined by counsel for co-defendant. Specifically, counsel argued that the prosecutor's questioning of the officer as to how he cut his hand "allowed the jury to hear that he offered no explanation." (Tr. Vol. II, 61.) Counsel argued that the question and response went to the issue of "post-arrest silence." (Tr. Vol. II, 61.) The trial court denied the motion for mistrial.

{¶69} In ruling on this issue, the court noted that appellant was handcuffed at the time he was transported to the hospital, and, therefore, in custody, but the court further found that the testimony regarding appellant's transport to the hospital involved "no in-custody interrogation by police." (Tr. Vol. IV, 6.) Rather, appellant was "very upset and angry, and basically, quote, ranted and raved * * * about some of the circumstances." (Tr. Vol. IV, 6.) The trial court further held:

> [T]there's neither a due process nor a *Doyle [v. Ohio* (1976), 426 U.S. 610, 96 S.Ct. 2240] violation on this record. First, although the defendant was in custody, I find there was no interrogation by police. The officer explicitly disavowed in his testimony that he was purposely interrogating the witness. At page 12 he said, quote, I, of course, didn't ask him any questions basically because we're kind of taught not to do that, unquote.
>
> Even on cross-examination, I did not find evidence of any intention to interrogate without giving Miranda Rights such as to take advantage of the defendant or to invade his Constitutional Rights.
>
> Now two questions were presented according to the testimony. The question first asked by the assistant prosecutor was * * * did he ever explain how he hurt his hand * * *. The officer said he did ask that question, but in doing

> so, the record shows he was merely parroting what medical personnel were more or less simultaneously asking in order to ensure proper medical treatment.
>
> It would seem to this court to defy logic and human nature if the law somehow precluded such question of a person who was bleeding and being transported on an emergency basis to a hospital, even when they're under arrest.
>
> The second question asked by the assistant prosecutor was, quote, did he ever mention being assaulted himself, unquote. That, too, was not interrogation in this context, and the answer elicited was not precluded by [*Doyle*].
>
> Here, as the record makes very clear, we had a bleeding man volunteering a lot of statements over a number of minutes at the scene, followed by more statements in the ambulance.
>
> It does not violate Constitutional Rights to silence for the officer to ask in the course of those statements if the man had said someone had assaulted him. That was the nature and scope of the question, and it did not, in my view, constitute the kind of interrogation which would violate [*Doyle*] or [*Miranda*].

(Tr. Vol. IV, 7-9.)

{¶70} In *Doyle v. Ohio* (1976), 426 U.S. 610, 96 S.Ct. 2240, "the United States Supreme Court held that use of a defendant's post-arrest, post-*Miranda* silence for *impeachment* purposes violates the Due Process Clause of the Fourteenth Amendment." *State v. Leach,* 102 Ohio St.3d 135, 2004-Ohio-2147, ¶16. (Emphasis sic.) The Supreme Court of Ohio has held that "the use of pre-arrest silence * * * as substantive evidence of guilt in the state's case-in-chief undermines the very protections the Fifth Amendment was designed to provide." Id. at ¶31.

{¶71} Volunteered statements, however, are not barred by the Fifth Amendment. *Rhode Island v. Innis* (1980), 446 U.S. 291, 300, 100 S.Ct. 1682, 1689. Further, "the special procedural safeguards outlined in *Miranda* are required not where a suspect is

simply taken into custody, but rather where a suspect in custody is subjected to interrogation." Id. The United States Supreme Court has held that: " 'Interrogation,' as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." Id. Interrogation includes words or actions on the part of the police that the police "should know are reasonably likely to elicit an incriminating response." Id. at 301, 100 S.Ct. 1689.

{¶72} Upon review, we agree with the trial court that the officer's conduct while accompanying appellant in the ambulance to the hospital did not rise to the level of a custodial interrogation. The trial court noted that appellant, who was bleeding, had offered "a lot of statements" at the scene, followed by more statements in the ambulance. Officer Ewing testified that, during the transport to the hospital, appellant talked "very much" about various matters. (Tr. Vol. II, 14.) Specifically, appellant "just basically ranted and raved about how he was disrespected in the club or disrespected with his business or something." (Tr. Vol. II, 14.) Although appellant was in custody, Officer Ewing testified: "I * * * didn't ask him any questions, basically, because we're * * * taught not to do that." (Tr. Vol. II, 14.) The officer did ask how appellant cut his hand; specifically, the officer testified: "[T]hat's the first thing that the medics asked. That's the first thing that the nurses and the doctors asked when they came in to the ER." (Tr. Vol. II, 15.) Officer Graber similarly testified that appellant discussed the altercation, but did not talk about the specific injury he received.

{¶73} The record supports the trial court's finding that the limited questioning by the police with respect to the circumstances of how appellant was injured did not, under the circumstances, constitute interrogation. See *State v. Geasley* (1993), 85 Ohio App.3d

360, 371 ("[t]he police must be permitted some leeway into inquiring into the present medical condition of the arrestee. The purpose of such inquiry is not to elicit incriminating responses, but rather to ensure the safety and well-being of the suspect while in the custody of the police"). See also *People v. Hester* (1990), 161 A.D.2d 665, 666 (question by police as to how defendant received cuts "related to his present physical condition and was appropriate for processing him. There is no evidence that the officer was seeking to incriminate him"). Further, as found by the trial court, the evidence indicates that appellant voluntarily offered statements about the altercation, but did not talk about the specific injury. Under similar circumstances, courts have found no *Doyle* violation. See *State v. Walter,* 8th Dist. No. 90196, 2008-Ohio-3457, ¶44 (where defendant did not remain silent he cannot rely upon *Doyle* to prevent the prosecuting attorney from attempting to draw out what he said and did not say). Accordingly, finding no violation of appellant's right to remain silent, the trial court did not err in denying the motion for mistrial.

{¶74} Appellant's sixth assignment of error is without merit and is overruled.

{¶75} Under the seventh assignment of error, appellant argues the jury verdict finding him guilty of felonious assault was against the manifest weight of the evidence. We note that appellant does not challenge the sufficiency of the evidence supporting his conviction (i.e., a determination whether, after viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt). *State v. Sexton,* 10th Dist. No. 01AP-398, 2002-Ohio-3617, ¶31. Rather, appellant argues that his conviction was

against the manifest weight of the evidence because the testimony of the state's witnesses contained inconsistencies and was not trustworthy.

{¶76} In *Sexton* at ¶31, this court discussed an appellate court's standard in considering a manifest weight challenge as follows:

> A manifest weight argument * * * requires us to engage in a limited weighing of the evidence to determine whether there is enough competent, credible evidence so as to permit reasonable minds to find guilt beyond a reasonable doubt and, thereby, to support the judgment of conviction. * * * Issues of witness credibility and concerning the weight to attach to specific testimony remain primarily within the province of the trier of fact, whose opportunity to make those determinations is superior to that of a reviewing court. * * * Nonetheless, we must review the entire record. With caution and deference to the role of the trier of fact, this court weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether, in resolving conflicts in the evidence, the jury, as the trier of facts, clearly lost its way, thereby creating such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against a conviction. * * *

{¶77} R.C. 2903.11(A), which sets forth the offense of felonious assault, states in part: "No person shall knowingly * * * (1) [c]ause serious physical harm to another" or (2) "[c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance."

{¶78} Appellant's manifest weight challenge is directed at the credibility of four witnesses, Safaryan, Koulian, Semikin, and Dashovsky, and, thus, we briefly summarize their testimony. Safaryan testified that he was standing outside the restaurant and was approached by appellant, co-defendant Veliev, and two other individuals. Safaryan noticed something black, like a knife, in appellant's hand. Safaryan heard appellant say

"kill" in Russian, and appellant then slashed at Safaryan with a knife, cutting through Safaryan's right forearm. Safaryan struck at appellant in order to get away from a railing area. At the time Safaryan first saw appellant come outside the restaurant, co-defendant Veliev was walking behind appellant. During the incident, Safaryan observed a silver knife in Veliev's hand, and then saw "blood all over" Koulian's shirt. When police officers arrived, appellant refused their orders to "stop and get on his knees." Appellant was speaking in Russian and threatened Safaryan and his family, "yelling at us" and stating "he would kill us." Safaryan was treated for a knife wound to his right arm of approximately ten inches in length, requiring stitches and staples. At trial, Safaryan identified appellant as his assailant.

{¶79} Koulian testified that he stepped out of the restaurant and "heard the yelling and I saw a knife pulled out, which Ty was struck on his right arm." Appellant "was threatening. Something along the lines I will kill you." Safaryan punched appellant and then retreated, and Koulian observed appellant "getting up * * * to his feet with the knife in his right hand." Koulian then observed co-defendant Veliev "coming towards me." Koulian raised his arms and observed "something that resembled a medical scalpel" in Veliev's hand. Veliev shoved Koulian in the shoulder area; Veliev pulled his hand back, at which point Koulian "saw blood coming down like crazy from my neck." At trial, Koulian identified co-defendant Veliev as his assailant.

{¶80} Dashovsky testified that, as he was walking toward the restaurant door, he saw appellant pass a knife to Veliev. The knife had a black handle and was "foldable." Dashovsky recognized the knife "from when Garri used to cut hair." Dashovsky walked outside and observed Safaryan "walking away, holding his arm," bleeding from a cut.

Safaryan's arm was "severely cut down to the veins." He then heard Koulian yelling "I got cut, I got cut." Koulian suffered a cut to the throat area, and Dashovsky ran to the kitchen and grabbed some towels and blankets.

{¶81} Semikin was standing outside the restaurant when he heard screams. He saw approximately 10 to 15 individuals near the entrance of the restaurant. Semikin observed a knife in appellant's hand, and that "Tigran's arm was already cut and he was holding it with another hand." He also "saw that Tigran punched Garri." Semikin observed Koulian "holding his neck, which was bleeding," and Veliev was standing across from Koulian at the time. When appellant was taken into custody by police, he was making "[h]is usual threats, that he will kill everybody and he will avenge everybody."

{¶82} In challenging his conviction as against the manifest weight of the evidence, appellant argues that Semikin's testimony was inconsistent because he gave differing accounts to Detective Siniff about whether he actually observed anyone getting cut. At trial, Semikin testified that he "didn't see the [actual] cutting." (Tr. Vol. III, 42-43.) During cross-examination, a taped audio conversation was played involving an interview of Semikin by a police detective. Semikin was questioned during cross-examination as to whether he was wrong in telling the detective he saw someone actually cut someone else. Semikin denied telling the detective that he observed "the actual moment." (Tr. Vol. III, 44.) On re-direct, Semikin reiterated that he "didn't see the actual moment. I just saw Garri hold the knife, and I saw Tigran punch Garri." (Tr. Vol. III, 67.) Upon review, we conclude the jury was in the best position to consider any inconsistencies and assess the credibility of the witness. This court has previously noted that, "[w]hile the jury may take note of the inconsistencies and resolve or discount them accordingly, * * * such

inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Nivens* (May 28, 1996), 10th Dist. No. 95APA09-1236.

{¶83} Appellant argues that Dashovsky's testimony was not trustworthy because, despite portraying himself as helping everyone in need of assistance, he did not remain at the restaurant that night to make a statement to police. Dashovsky, however, was questioned as to why he did not talk to the police that evening, and he testified: "I didn't want to be involved." (Tr. Vol. II, 102.) He further testified that he wanted "nothing to do with this case," but that he was testifying "because that's what I saw, and I have to say what I saw." (Tr. Vol. II, 103.) Here, the jury was free to accept or reject as credible Dashovsky's testimony that he did not speak to police officers that evening because he did not want to get involved.

{¶84} Appellant maintains that the testimony of Safaryan and Veliev did not match the physical evidence. Appellant challenges Safaryan's testimony that he was able to punch appellant after having his right arm slashed; appellant maintains that such movement by Safaryan should have resulted in blood spewing on appellant. However, testimony that Safaryan was able to strike appellant came from several witnesses in addition to Safaryan, and we do not find such testimony as incompatible with the physical evidence.

{¶85} Appellant also argues that Koulian's neck wound was more consistent with being attacked from behind. As noted above, Koulian testified that Veliev came toward him holding a knife-like instrument that resembled a scalpel. Koulian put up his hands to say "hey stop," but Veliev "reached over" and "shoved me in the shoulder area * * * and

pulled his hand back." Blood immediately rushed from Koulian's neck. Koulian testified that Veliev was no more than two feet away when he began approaching him. Safaryan also observed a knife in Veliev's hand right before observing "blood all over" Koulian's shirt, and Dashovsky testified that he observed appellant pass a knife to Veliev just prior to the incident. Upon review, we do not view the testimony of a frontal assault as contrary to the physical evidence.

{¶86} Having reviewed the entire record, weighing the evidence and all reasonable inferences, and considering the credibility of all the witnesses, we do not find that the jury lost its way and created a manifest miscarriage of justice such that the verdict was against the manifest weight of the evidence. Accordingly, the seventh assignment of error is without merit and is overruled.

{¶87} Based upon the foregoing, appellant's seven assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BRYANT and McGRATH, JJ., concur.

_____