

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-11-115
- vs -	:	<u>OPINION</u>
	:	10/22/2012
MARCUS ANTHONY ISREAL,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 11CR27405

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Jeffery E. Richards, 147 Miami Street, P.O. Box 536, Waynesville, Ohio 45068, for defendant-appellant

PIPER, J.

Statement of Facts

{¶ 1} Defendant-appellant, Marcus Isreal, appeals his convictions and sentence in the Warren County Court of Common Pleas for murder, felonious assault, receiving stolen property, failure to comply with an order or signal of a police officer, having weapons while under disability, and several accompanying firearm specifications.

{¶ 2} On May 9, 2011, at approximately 11:40 p.m., William Peters arrived at the Take a Break Lounge in Middletown, Ohio in a Cadillac (a black, four-door sedan) that he had borrowed from William Edwards. Shortly after midnight, Isreal was dropped off at the same lounge. Isreal exited the bar at 12:50 a.m. and stole the black Cadillac. Isreal returned to where he had been staying and armed himself with a .357 magnum revolver he had recently purchased. On his way to Dayton, Isreal drove the stolen Cadillac through Franklin.

{¶ 3} At approximately 1:49 a.m., Officer Jacob Lacon of the Franklin Police Department was on a routine patrol when he observed the black Cadillac traveling on the public roadway without working taillights. Officer Lacon pulled behind the Cadillac and activated his overhead lights in order to initiate a traffic stop, but the driver, later identified as Isreal, rapidly accelerated westbound on State Route 73 in Franklin. Isreal continued to accelerate and turned onto a side street in order to avoid Officer Lacon's pursuit. Officer Lacon, who had activated his sirens and informed dispatch of Isreal's failure to stop, pursued Isreal through Franklin. The side street that Isreal turned down was a residential area with cars parked on both sides and had a speed limit of 25 m.p.h., which Isreal grossly exceeded.

{¶ 4} Isreal continued his flight, and in the process, began to drive through stop signs and red lights. Officer Christopher Keene of the Franklin Police Department soon joined the chase and eventually became the lead car in the pursuit as the cars began traveling eastbound on SR 73. Officer Keene continued to follow Isreal, who was driving between 80 and 100 miles per hour over roads that had a 35 m.p.h. speed limit.

{¶ 5} During the pursuit, Isreal began going the wrong way down SR 73 and passed several civilians who were traveling westbound on SR 73. Once such civilian, Karen Richardson, was in her car and waiting to turn left when she saw Isreal approaching her head-on. Isreal swerved seconds before colliding with Richardson, and continued down the road. Isreal continued to drive at high rates of speed even through road construction which

included narrow roads bounded by concrete barriers and cones. Isreal drove through more red lights, and continued to travel at speeds greater than 80 m.p.h.

{¶ 6} Officer Chris Evens of the Springboro Police Department joined the pursuit, and blocked the entrance to Interstate 75 with his police cruiser so that Isreal could not merge onto I-75. Although Evens tried to employ stop sticks¹ to disable Isreal's tires, he was unable to do so because Isreal approached Evens' location at such a high rate of speed.

{¶ 7} Once through the construction zone, Isreal continued to flee eastbound along SR 73 at speeds in excess of 100 m.p.h. throughout a commercial district that contained multiple intersections and driveways. At that point, Sergeant Daniel Bentley of the Springboro Police Department tried to employ stop sticks, but Isreal was driving so fast that he was able to pass Sergeant Bentley's location before the stop sticks were deployed. Isreal passed Sergeant Bentley at 100 m.p.h., within three to five feet from where Sergeant Bentley stood.

{¶ 8} Isreal continued his flight and passed into Clearcreek Township, which is comprised of residential streets and rural areas. Because the roads began to dip and curve, Isreal dropped his speed from 105 m.p.h. to between 80-95 m.p.h. Officer Daniel Morgan of the Clearcreek Township Police Department joined the pursuit, but was also unable to deploy stop sticks. Morgan observed Isreal make several erratic lane changes while driving at speeds over 100 m.p.h. He could see the Cadillac rock from side to side, and that Isreal's driving maneuvers were "extremely hazardous."

{¶ 9} Isreal then entered Waynesville, reaching speeds in excess of 120 m.p.h. while driving on SR 73, which turns into a two-lane road. Isreal approached the intersection of SR

1. Officer Christopher Keene described stop sticks as devices laid on the roadway in the path of a fleeing suspect. If the suspect drives over the sticks, plastic hollow strips are injected into and slowly deflate the tires, bringing the vehicle to a controlled stop.

73 and U.S. 42 at about 120 m.p.h. and attempted to turn right onto southbound U.S. 42. However, due to the excessive speed, Isreal was unable to connect to southbound U.S. 42 and instead drove the wrong way in the northbound lanes of U.S. 42.

{¶ 10} Once Isreal entered U.S. 42, Deputy Troy Black of the Warren County Sheriff's Office joined the pursuit, traveling north in the northbound lanes of U.S. 42. As Deputy Black continued to drive north in the northbound "fast" lane, Isreal drove directly toward Deputy Black at approximately 115 m.p.h. Deputy Black was forced to turn right onto Waynesville Road in order to avoid a head-on collision with Isreal. Similarly, Deputy Nicholas Behymer joined the pursuit and was also forced to swerve off of the road in order to avoid a collision with Isreal. When Deputy Behymer swerved to avoid the collision, he hit a ditch, careened up a hill, and struck a tree.

{¶ 11} After forcing the two deputies off the road, Isreal continued to flee southward in the northbound lane of U.S. 42. At that point, Isreal was traveling between 115 and 120 m.p.h. During this portion of the chase, Isreal forced three civilian travelers off of the road, and never slowed down or tried to avoid a collision with them.

{¶ 12} As Isreal continued his flight, Sergeant Brian Dulle of the Warren County Sheriff's Office positioned his cruiser, a Ford Expedition, at the northwest corner of U.S. 42 and Utica Road, and exited his cruiser in order to deploy stop sticks. Before the intersection of U.S. 42 and Utica Road, there is a bend in the road and a small hill crest. When Isreal reached the bend and crest, he was traveling between 120-126 m.p.h. and the Cadillac went airborne, hit a culvert, turned end-over-end, crashed into Sergeant Dulle's cruiser, and came to rest on the west side of U.S. 42. Sergeant Dulle was struck and killed during the wreck.

{¶ 13} Within seconds, Officers Keene and Morgan arrived at the intersection and approached the wrecked Cadillac. Officer Keene broke out the back window of the Cadillac in order to locate and retrieve the driver, but found the Cadillac empty because Isreal had

been ejected through the sunroof when the Cadillac rolled. Officer Keene and the other officers began to search for Isreal, but did not find him.

{¶ 14} The officers found the deceased Sergeant Dulle on the side of the road. Sergeant Dulle had sustained severe injuries, any of which could have been fatal. The injuries included abrasions, contusions, massive internal injuries, brain damage, a fractured pelvis, severely fractured ribs, fractured and separated clavicles, a severed spine, fractured leg, as well as fractures in his vertical vertebrae where the spine joins the skull. Sergeant Dulle's heart, lungs, esophagus, stomach, and diaphragm were torn loose from one another and from the internal structures that held them in place. The coroner ruled that Sergeant Dulle's death was caused by multiple blunt force injuries, and classified Sergeant Dulle's death as a homicide.

{¶ 15} At the scene of the crash, officers began to set up a perimeter in order to search for and contain Isreal. Police helicopters searched for Isreal from the sky and canine units were deployed on the ground to track his whereabouts. However, officers were not able to locate Isreal until several hours later when Deputy Black, who was returning to help with the investigation after having informed Sergeant Dulle's wife of his death, located Isreal on Drake Road, a short distance from the crash site.

{¶ 16} Isreal was taken to the police station, and questioned after he agreed to waive his *Miranda* rights. During the interview, Isreal denied having driven the Cadillac and causing Sergeant Dulle's death. Instead, Isreal claimed that someone named JJ was driving the vehicle during the chase, and that he had only been a passenger afraid for his life due to JJ's dangerous driving. However, Isreal's story later changed, and he admitted to having been the driver.

{¶ 17} Isreal was indicted and charged with felony murder, involuntary manslaughter, aggravated vehicular manslaughter, two counts of felonious assault against a peace officer,

receiving stolen property, failure to comply with an order or signal of a police officer, and two counts of having weapons while under disability. All of the charges carried corresponding firearm specifications.

{¶ 18} Isreal filed several pretrial motions, including a motion to change venue; a motion in limine to exclude photographs of the deceased Sergeant Dulle and videos captured by video cameras from police cruisers; and a motion to suppress any statements he made to the police while in custody. The trial court denied the motions, and the case proceeded to a six-day jury trial.

{¶ 19} The jury found Isreal guilty on all counts and specifications except for one of the two felonious assault charges. After merging the allied offenses, the trial court sentenced Isreal to serve an aggregate sentence of 25.5 years to life in prison, which included a mandatory 21-year prison term. Isreal now appeals his convictions and sentence, raising seven assignments of error.

Ineffective Assistance of Counsel

{¶ 20} Within Isreal's seventh assignment of error, he claims that his trial counsel was ineffective for six reasons. These reasons correspond to the six arguments Isreal raises in his assignments of error. For ease of discussion, we will address each ineffective assistance argument within its corresponding assignment of error. When analyzing these issues within the various assignments of error, we are cognizant of the following legal standard:

{¶ 21} The Sixth Amendment pronounces an accused's right to receive effective assistance of counsel. Warning against the temptation to view counsel's actions in hindsight, the United States Supreme Court has stated that judicial scrutiny of an ineffective assistance claim must be "highly deferential***." *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052 (1984). The *Strickland* court also stated that a reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional

assistance," and that a defendant must overcome "the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.*, quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158 (1955).

{¶ 22} Also within *Strickland*, the Supreme Court established a two-part test which requires an appellant to establish that first, "his trial counsel's performance was deficient; and second, that the deficient performance prejudiced the defense to the point of depriving the appellant of a fair trial." *State v. Myers*, 12th Dist. No. CA2005-12-035, 2007-Ohio-915, ¶ 33, citing *Strickland*.

{¶ 23} Regarding the first prong, an appellant must show that his counsel's representation "fell below an objective standard of reasonableness." *Strickland*, 466 U.S at 688. The second prong requires the appellant to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reviewing court need not address the deficiency issue if the appellant was not sufficiently prejudiced by counsel's performance because the appellant must prove both prongs in order to establish ineffective assistance of counsel. *Id.* at 697.

{¶ 24} We now turn to Isreal's assignments of error.

Jury Instructions

{¶ 25} Assignment of Error No. 1:

{¶ 26} THE TRIAL COURT COMMITTED PLAIN ERROR IN GIVING ITS INSTRUCTIONS TO THE JURY.

{¶ 27} Isreal argues in his first assignment of error that the trial court erred in failing to instruct the jury that reckless driving was insufficient to find him guilty of felonious assault, and therefore guilty of felony murder. Isreal also argues that his counsel was ineffective for failing to specifically request the jury instruction.

{¶ 28} The record is clear that Isreal did not object to the jury instructions, which did not include an admonition to the jury that reckless driving was insufficient to find Isreal guilty of felonious assault, even after the trial court specifically gave the parties an opportunity to make suggestions or challenge the instructions *before* they were read and given to the jury. Therefore, Isreal has waived all but plain error on appeal. According to Crim.R. 52(B), "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." However, "[a]n alleged error does not constitute plain error unless, but for the error, the outcome of the trial clearly would have been otherwise. * * * Notice of plain error must be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Baldev*, 12th Dist. No. CA2004-05-106, 2005-Ohio-2369, ¶ 12.

{¶ 29} As previously stated, Isreal was charged with felony murder, which was predicated on the commission of felonious assault in violation of R.C. 2903.11(A)(2), which states "no person shall knowingly do either of the following: cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance." Isreal argues that had the jury been given an instruction that reckless driving was insufficient to prove felonious assault, he would have been acquitted of both felonious assault and felony murder. We disagree.

{¶ 30} According to R.C. 2901.22(B), "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. A person has knowledge of circumstances when he is aware that such circumstances probably exist." The trial court gave jury instructions which included essentially the same definition of knowingly as found in R.C. 2901.22(B). The trial court also defined "recklessly" for the jury in an instruction relating to involuntary manslaughter. This definition was virtually the same as the statutory definition set forth in R.C. 2901.22(C) which

states,

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. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

Therefore, the jury had before it correct definitions of knowingly and recklessly, and could readily determine if Isreal knowingly caused Sergeant Dulle physical harm with a deadly weapon.

{¶ 31} The jury was well aware that before it could find Isreal guilty of felonious assault, it had to first find that Isreal was aware that his conduct would probably cause a certain result or would probably be of a certain nature, mainly that he would cause serious physical harm as a result of his involvement in the police chase.

{¶ 32} During trial, both the state and defense counsel spent a great deal of time differentiating between knowingly and recklessly, and the state readily accepted the burden to prove knowingly. During the state's closing argument, the prosecutor stated, "I think probably the two most important areas we want to talk about, are deadly weapon and knowingly. * * * The term knowingly, is the one I think you will need to focus on most carefully* * *." Moreover, defense counsel stated in his closing, "In order to convict Mr. Isreal of murder, you have to convict him of felonious assault first. * * * The issue is whether or not he acted knowingly and that's why you hear me repeatedly asking everybody the question, about how would you describe his driving and how would you describe his mind set." Defense counsel then tried to set forth why Isreal acted recklessly, rather than knowingly on the night Isreal caused Sergeant Dulle's death. During the state's rebuttal, the prosecutor stated:

One thing that you'll appreciate as you go through these jury

instructions, is that sometimes the law looks the same and I would submit to you that when [the trial court] gets to the point where he actually gives you the instructions and how you'll be resolving this, that you'll look at conduct that fits into both categories and I think in this particular case, the conduct of Mr. Isreal was absolutely reckless. The conduct of Mr. Isreal was absolutely knowingly as well. Again, the definition that you're going to get as to knowingly, is that a person acts knowingly regardless of their purpose. Nobody here is suggesting that the defendant intentionally tried to kill Sergeant Dulle. * * * The issue is knowingly. Did he act knowingly, regardless of his purpose, was he aware that his conduct would probably cause physical harm to someone, would probably be of a certain nature. * * * Was Mr. Isreal aware that the way he was driving his vehicle, would probably cause physical harm to somebody, that there would probably be somebody further down that road that might get hurt, that there probably would be additional police officers * * *

While closing arguments are not evidence, these passages nonetheless indicate that both the state and the defense were laboring under the legal reality that the jury would have to acquit Isreal of felonious assault unless the state was able to prove beyond a reasonable doubt that Isreal acted knowingly when causing Sergeant Dulle physical harm.

{¶ 33} Given the trial court's jury instructions and the parties' arguments during trial and closing arguments, there is no indication from the record that the jury would have been confused by the difference between knowingly and recklessly, or that they were not fully informed of the legal difference between the two.

{¶ 34} Isreal relies on a decision from the Seventh District Court of Appeals in which the appellant's conviction for felonious assault was reversed because the trial court committed error by not instructing the jury that reckless conduct was not enough to prove felonious assault. *State v. Pack*, 110 Ohio App.3d 632 (7th Dist.1996). However, we find *Pack* readily distinguishable from the case at bar.

{¶ 35} In *Pack*, William Pack shot a man in the finger with a gun that he was trying to sell. When the victim testified at trial, he stated that Pack shot the gun into the floor and into

the ceiling, and then when the gun went off the next time, he had been shot in the finger. The victim called Pack's conduct "reckless" when asked by the prosecutor on direct examination whether Pack had aimed the gun in his direction. At the close of the state's case, Pack moved for a judgment of acquittal, which was denied.

{¶ 36} Defense counsel then asked the trial court if he would be permitted to argue mental states to the jury during closing arguments. The trial court responded, "you can argue, you can use my charge during your final argument." *Id.* at 634. When defense counsel again stated that he wanted to discuss reckless behavior with the jury based on the victim's testimony and evidence deduced at trial, the court responded, "you may not use the word recklessly; recklessly does not apply to felonious assault, nor does it apply to negligent assault. And there is nothing in between it applies to except simple assault when there is serious physical harm, which there is no evidence of. So, you may not." *Id.*

{¶ 37} On appeal, the Seventh District reversed the trial court's decision after finding that,

under the facts of the instant case, the jury should have been instructed that proof of reckless conduct is insufficient to prove the elements of felonious assault as set forth in R.C. 2903.11(A)(2). The prosecution's reference to the word "reckless" as well as the specific facts of this case leads us to conclude that, had the jury been given the definition of "reckless" with the instruction that proof of "recklessness" is not sufficient to prove the "knowingly" standard found in R.C. 2903.11(A)(2), the result herein would have been different.

Id. at 637.

{¶ 38} In the case at bar, the jury very clearly received instructions on both knowingly and recklessly, was informed by both the state and defense of the difference between the two mental states, and there is no indication that the jury was confused as to the difference. Moreover, and perhaps the most distinguishable fact between the case at bar and *Pack*, is that the court in *Pack* reversed the decision of the trial court because "the evidence

presented at trial was * * * insufficient to support a finding of 'knowingly' as required by R.C. 2903.11(A)(2)." *Id.* at 636. Here, however, the record contains ample evidence that supports the jury's finding that Isreal knowingly caused Sergeant Dulle physical harm, as this court will discuss with respect to Isreal's fifth assignment of error.

{¶ 39} After thoroughly reviewing the record, we find that the trial court properly instructed the jury regarding the knowing and reckless mental states, and therefore properly instructed the jury as to what proof was necessary to support a guilty verdict on the felonious assault and the associated felony murder charge. Any additional request for a separate jury instruction would have been superfluous, and the jury was well-aware of the pertinent legal standards.

{¶ 40} For this same reason, we also find that Isreal did not receive ineffective assistance of counsel. Given the lack of any error regarding the jury instructions, Isreal cannot demonstrate that his trial counsel's performance was deficient or that his counsel's choice not to ask for a superfluous jury instruction prejudiced the defense to the point of depriving him of a fair trial.

{¶ 41} Having found no error, plain or otherwise, we overrule Isreal's first assignment of error.

Testimony Regarding the Victim

{¶ 42} Assignment of Error No. 2:

{¶ 43} THE TRIAL COURT COMMITTED PLAIN ERROR IN ALLOWING TESTIMONY ABOUT THE VICTIM'S CHARACTER AND FAMILY.

{¶ 44} Isreal argues in his second assignment of error that the trial court erred in permitting the witnesses and the state to discuss Sergeant Dulle's character and the impact his death had on his family. Isreal also argues that his counsel was deficient for not objecting to the testimony.

{¶ 45} During its case-in-chief, the state presented testimony from Sheriff Larry Sims who testified about Sergeant Dulle's professional career in law enforcement. Sheriff Sims briefly reviewed the promotions, education, and training Sergeant Dulle had obtained, and then briefly discussed his knowledge of Sergeant Dulle's family by naming Sergeant Dulle's parents, children, and wife. Sheriff Sims also discussed that he had taken part in notifying Sergeant Dulle's wife of his death, and that he returned Sergeant Dulle's wedding ring to Mrs. Dulle at the funeral because it had fallen off during the wreck and was only later found. However, a review of the transcripts indicates that Sheriff Sims did not relay any details regarding the notification process, or how Sergeant Dulle's wife reacted. Nor did Sheriff Sims go into any detail regarding how Sergeant Dulle's wife responded to receiving the wedding ring.

{¶ 46} Isreal argues that this testimony was not related in any way to his guilt or innocence, and was offered only to "provoke sympathy towards the victim or anger against" himself. However, Isreal did not object to the state's questions or to Sheriff Sims' testimony. Therefore, we will review this issue for plain error.

{¶ 47} Regarding Sheriff Sims' testimony on Sergeant Dulle's promotions, education, and training, the record is clear that this testimony was meant to demonstrate that Sergeant Dulle was a police officer who was acting within his duties at the time of his death. This is an important fact because Isreal was charged with felonious assault on a peace officer.

{¶ 48} For example, Sheriff Sims testified that once Dulle was promoted to Sergeant, his responsibilities included county road patrol, and that Sergeant Dulle was second in command for the shift that he worked, responsible for overseeing the deputies that he worked with. Therefore, Sheriff Sims' testimony was meant to establish that Sergeant Dulle was a police officer, and that his actions on the night of his death were within the duties he had as a sergeant.

{¶ 49} Regarding Sims' testimony about finding Sergeant Dulle's wedding ring and returning it to Sergeant Dulle's wife, we cannot say that the absence of such testimony would have resulted in a different verdict. There is no question that this case had an emotional element that is inherent in most murder trials where a victim has been permanently removed from the lives of family, friends, and the community due to the criminal actions of another. However, the testimony regarding Sergeant Dulle's life, family, and the fact that Sheriff Sims returned Sergeant Dulle's wedding ring to Mrs. Dulle was not prejudicial. The state had a duty to prove the elements of felonious assault on a peace officer, and to meet that burden, elicited testimony from Sheriff Sims.

{¶ 50} Moreover, and given the raw emotion surrounding this case, the defense often made reference to sympathy and took several opportunities to cast Sergeant Dulle in a positive light. Defense counsel praised Sergeant Dulle during opening arguments, and did the same in closing. Counsel went so far as to relay his own personal feelings of anger that he felt upon hearing the news on the morning after Sergeant Dulle's death that a police officer had died as a result of a high-speed chase. However, counsel then pleaded with the jury to remove sympathy from their thought process and to focus on the legal distinction between knowing and reckless. Disregarding the obvious sympathy issue or objecting to testimony about Sergeant Dulle's life could have possibly backfired on the defense. Not objecting to testimony about Sergeant Dulle's life and directly facing the sympathy issues were obviously trial strategy.

{¶ 51} The Eighth District Court of Appeals has recognized that a defense counsel's decision to not object to testimony regarding the victim can be considered trial strategy. *State v. Brown*, 8th Dist. No. 84059, 2004-Ohio-6862.

[R]epeated objections to the testimony of the victim's wife may have soured the jury. It is possible that the jurors would have viewed counsel's objections as an affront to a sympathetic

witness, and counsel could rationally conclude that an objection was not worth the risk of antagonizing the jury. While we admit that all of this is in the realm of possibility, not probability, our standard of review for ineffective assistance of counsel requires us to give strategic decisions of counsel wide latitude.

Id. at ¶ 38. See also *State v. Boeddeker*, 12th Dist. No. CA2009-05-029, 2010-Ohio-106.

{¶ 52} In addition to sound trial strategy, we also conclude that Isreal has failed to demonstrate the requisite prejudice because there is no reason to believe that the results of the trial would have been different had Sheriff Sims' not testified about Sergeant Dulle's life and family. This is especially true where there was ample evidence to support the conviction. See *State v. Wharton*, 9th Dist No. 23300, 2007-Ohio-1817 (rejecting ineffective assistance of counsel claim where victim impact evidence was not prejudicial because of other evidence of guilt).

{¶ 53} Having found no plain error in allowing Sheriff Sims' testimony, Isreal's second assignment of error is overruled.

Admissibility of Photographs and Video

{¶ 54} Assignment of Error No. 3:

{¶ 55} THE TRIAL COURT ERRED BY ALLOWING PREJUDICIAL PHOTOS AND VIDEOS OF THE VICTIM INTO EVIDENCE.

{¶ 56} Isreal argues in his third assignment of error that the trial court erred in admitting photographs of Sergeant Dulle at the scene of the wreck, autopsy photographs, as well as videos taken from police cruisers during the chase. Isreal also argues that his trial counsel was ineffective for not successfully moving the court to exclude the photographs and videos.

{¶ 57} The admission or exclusion of photographic evidence is left to the discretion of the trial court. *State v. Blankenburg*, 197 Ohio App.3d 201, 2012-Ohio-1289, ¶ 91 (12th Dist.). An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or

unconscionable. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶ 130. Pursuant to Evid.R. 403, a trial court may reject an otherwise admissible photograph that, because of its inflammatory nature, creates a danger of prejudice that substantially outweighs the probative value of the photograph as evidence, but absent such danger, the photograph is admissible. *State v. Morales*, 32 Ohio St.3d 252, 257 (1987).

{¶ 58} Essentially, Isreal argues that because he did not deny that he caused Sergeant Dulle's death, the state should not have been permitted to offer the photographs and videos into evidence to prove that Sergeant Dulle was killed as a result of the wreck. We disagree. Isreal pled not guilty to all of the charges, and he did not stipulate any of the elements of any of the charges. Therefore, the state was required to prove each and every element of every charge as set forth in the indictment. *See State v. Cutshaw*, 4th Dist. No. 91CA8 (Mar. 6, 1992) (recognizing that a not guilty plea puts all elements of a charged offense at issue).

{¶ 59} The photographs of Sergeant Dulle's injuries and autopsy were offered to prove elements of felonious assault and the accompanying felony murder charge as evidence that Isreal caused Sergeant Dulle physical harm, and that the vehicle was a deadly weapon based on the damage it caused. The coroner testified that the pictures would assist in explaining the nature of the injuries that Sergeant Dulle suffered and what ultimately caused his death. Similarly, the video evidence was offered to help demonstrate how Sergeant Dulle's death occurred, and was probative of Isreal's mental state while was driving in the seconds leading up to Sergeant Dulle's death.

{¶ 60} Before the photographs were published to the jury, the trial court gave the following admonition: "[T]he photographs, ladies and gentlemen are very graphic, and I want to prepare you for that. But, they may help understand evidence. They are not to be used to just excite you. Hopefully, it will help you to better understand the testimony and the

evidence that you would use for that purpose." Therefore, the jury was aware that it was to focus on the photographs for their probative value, rather than to focus on any emotional response the photographs may have elicited.

{¶ 61} Regarding the amount of photographs, the record indicates that the state offered only 10 photographs of Sergeant Dulle's body and four x-rays out of a possible 75 photographs and x-rays taken during the autopsy. Regarding the position and condition of Sergeant Dulle's body at the crash site, the state offered only six photographs, and the court ordered that one photograph of Sergeant Dulle's body not be shown to the jury because it was "duplicative" of another depiction of the body. Therefore, we cannot say that the amount of photographs admitted was excessive or prejudicial.

{¶ 62} Moreover, after defense counsel objected to the admission of the photographs and the videos into evidence, the trial court made the following observation outside the presence of the jury:

As to the affect [sic] on the jurors, I particularly watched their faces and their expressions as they looked at these photographs and frankly none of them displayed any particular action. They looked at it dispassionately, without any visible, emotional reaction. So, since we have allegations of a murder, it is impossible to prove the elements of a murder without showing a dead body. Unlike television, people don't die neatly and cleanly. Many times it is bloody and gruesome and unpleasant to look at but the elements of the crime still have to be proven beyond a reasonable doubt.

{¶ 63} This court has reviewed the photographs and the videos. The photographs that were admitted and published were limited in number and not repetitive. While they depict Sergeant Dulle after his tragic death, they are highly relevant and probative as evidence of the charges. Therefore, we cannot say that the trial court abused its discretion in admitting the evidence or committed any error, plain or otherwise.

{¶ 64} For this reason, Isreal's claim that his counsel was ineffective lacks merit. The

record is clear that defense counsel objected to the videos and photographs of Sergeant Dulle at the scene of the wreck, objected to autopsy photographs being admitted, and even filed a pretrial motion moving the court to exclude this evidence. The fact that the trial court overruled the objection and the motion, however, does not render counsel's assistance deficient or prejudicial in any way.

{¶ 65} Having found that the trial court did not abuse its discretion in admitting the photographs and videos, Isreal's third assignment of error is overruled.

Consecutive Firearm Specification Sentences

{¶ 66} Assignment of Error No. 4:

{¶ 67} THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO MULTIPLE SENTENCES FOR THE HANDGUN SPECIFICATIONS.

{¶ 68} Isreal argues in his fourth assignment of error that the trial court erred in sentencing him on multiple firearm specifications because all of the specifications were related to a single transaction. Isreal also argues that his trial counsel was ineffective for failing to object to the sentence.

{¶ 69} The trial court ordered Isreal to serve mandatory, one-year sentences for firearm specifications related to felony murder, receiving stolen property, and failure to comply. According to R.C. 2929.14(B)(1)(a)(iii), a sentencing court must impose a one-year sentence when a defendant is convicted of a firearm specification within R.C. 2941.141 (offender had firearm during offense). However, and according to R.C. 2929.14(B)(1)(b), a court may not impose additional firearm specifications for felonies that were committed as part of the same act or transaction unless R.C. 2929.14(B)(1)(g) applies. R.C. 2929.14(B)(1)(g) states

If an offender is convicted of or pleads guilty to two or more felonies, if one or more of those felonies are aggravated murder, murder, attempted aggravated murder, attempted murder,

aggravated robbery, felonious assault, or rape, and if the offender is convicted of or pleads guilty to a specification of the type described under division (B)(1)(a) of this section in connection with two or more of the felonies, the sentencing court *shall impose* on the offender the prison term specified under division (B)(1)(a) of this section for *each of the two most serious specifications* of which the offender is convicted or to which the offender pleads guilty and, *in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications.*

(Emphasis added.)

{¶ 70} The record is clear that Isreal was convicted of multiple felonies, including murder and felonious assault. Therefore, the trial court was required by R.C. 2929.14(B)(1)(g) to sentence Isreal to the two most serious firearm specifications, and then had the discretion to impose any other prison term for the remaining gun specifications. Isreal does not argue that R.C. 2929.14(B)(1)(g) is not applicable. Instead, he argues that the trial court should have ordered the firearm specifications to run concurrently, rather than consecutively. We disagree.

{¶ 71} Isreal argues that because he committed his crimes as part of a single criminal objective, mainly to flee from the police, his sentences should be run concurrently. As support, Isreal cites several cases in which courts analyze whether crimes were committed as part of single transaction, and then hold that sentences imposed for firearm specifications must run concurrently if committed as part of a single criminal objective. *See, e.g., State v. Moore*, 161 Ohio App.3d 778, 2005-Ohio-3311 (7th Dist.). However, regardless of whether Isreal's crimes were a single transaction, R.C. 2929.14(B)(1)(g) specifically states that when a defendant is sentenced to more than one felony, including murder or felonious assault, the sentencing court "shall impose" the two most serious gun specifications and then may, in its discretion, impose additional sentences for additional firearm specifications. *See also State v. Cassano*, 8th Dist. No. 97228, 2012-Ohio-4047.

{¶ 72} Isreal further argues that the case law he cites is controlling because the statute does not address whether the trial court is required to order the sentences consecutive or concurrent. However, we disagree and find that pursuant to R.C. 2929.14(B)(1)(g), sentences for multiple gun specifications should be run consecutive to each other. See *State v. Glenn*, 8th Dist. No. 97314, 2012-Ohio-3075; and *State v. Fischer*, 9th Dist. No. 26110, 2012-Ohio-3665.

{¶ 73} While the General Assembly did not include the word "consecutive" in R.C. 2929.14(B)(1)(g), it nonetheless carved out an exception to the general rule that a trial court may not impose multiple firearm specifications for crimes committed within a single transaction. The mandatory language of the statute ("the court shall impose") also indicates the General Assembly's intention that the defendant serve multiple sentences for firearm specifications associated with the enumerated crimes, such as murder or felonious assault. Had the Legislature intended a *per se* rule that sentences for firearm specifications must be served concurrent with one another, it could have stated as much. Or, the Legislature could have chosen not to codify R.C. 2929.14(B)(1)(g), which serves as an exception to the rule that multiple firearm specifications must be merged for purposes of sentencing when the predicate offenses were committed as a single criminal transaction.

{¶ 74} Although Isreal did not argue that the trial court abused its discretion in ordering the third firearm specification as set forth in R.C. 2929.14(B)(1)(g), we nonetheless find that the trial court did not abuse its discretion in ordering the additional firearm specification in addition to the other two required by statute. The trial court took into consideration the fact that Isreal had a lengthy criminal past, and that his actions during the police chase caused the death of Sergeant Dulle and placed countless other officers and civilians in danger. The fact that Isreal had a gun on his person during the chase only heightened the potential danger. The trial court's decision to impose the additional firearm specification was not

unreasonable, arbitrary, or unconscionable.

{¶ 75} Although Isreal argues that his trial counsel was ineffective for not arguing against consecutive sentences for the firearm specifications, we find no deficient or prejudicial conduct by defense counsel because the trial court did not err in sentencing Isreal as it did. Isreal's fourth assignment of error is overruled.

Manifest Weight/Sufficiency

{¶ 76} Assignment of Error No. 5:

{¶ 77} THE TRIAL COURT ERRED IN NOT ACQUITTING [sic] APPELLANT OF FELONIOUS ASSAULT.

{¶ 78} Isreal argues in his fifth assignment of error that the trial court should have acquitted him of felonious assault because there was insufficient evidence to support the conviction, and because the jury's verdict was against the manifest weight of the evidence. Isreal also argues that his trial counsel was ineffective for failing to request a new trial based on the jury's different verdicts on the two felonious assault charges.

{¶ 79} Manifest weight and sufficiency of the evidence are quantitatively and qualitatively different legal concepts. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). When reviewing the sufficiency of the evidence underlying a criminal conviction, an appellate court examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Wilson*, 12th Dist. No. CA2006-01-007, 2007-Ohio-2298. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any reasonable trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus, superseded on other grounds.

{¶ 80} While the test for sufficiency requires an appellate court to determine whether the state has met its burden of production at trial, a manifest weight challenge examines the

inclination of the greater amount of credible evidence offered at a trial to support one side of the issue rather than the other. *Wilson*, 2007-Ohio-2298.

In determining whether a conviction is against the manifest weight of the evidence, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.

State v. Cummings, 12th Dist. No. 2006-09-224, 2007-Ohio-4970, ¶ 12.

{¶ 81} While appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, "these issues are primarily matters for the trier of fact to decide since the trier of fact is in the best position to judge the credibility of the witnesses and the weight to be given the evidence." *State v. Walker*, 12th Dist. No. CA2006-04-085, 2007-Ohio-911, ¶ 26. Therefore, an appellate court will overturn a conviction due to the manifest weight of the evidence only in extraordinary circumstances to correct a manifest miscarriage of justice, and only when the evidence presented at trial weighs heavily in favor of acquittal. *Thompkins*, 78 Ohio St.3d at 387.

{¶ 82} "Because sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency. Thus, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." *Wilson*, 2007-Ohio-2298 at ¶ 35, citing *State v. Lombardi*, 9th Dist. No. 22435, 2005-Ohio-4942, fn. 4.

{¶ 83} As previously stated, Isreal was charged with and convicted of felonious assault. According to R.C. 2903.11(A)(2), "no person shall knowingly do either of the following: Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance." Isreal maintained throughout trial that he did not knowingly cause physical harm to Sergeant Dulle, but instead, caused the crash

and resulting harm through reckless driving. In addition to arguing that his mental state was reckless, rather than knowing, Isreal also argues that the jury could not have acquitted him of one felonious assault charge, without also acquitting him of the other felonious assault charge. We disagree with Isreal's arguments.

{¶ 84} One felonious assault charge was specific to the physical harm caused to Sergeant Dulle, and the other charge was specific to running Deputy Black off the road to avoid a head-on collision. Essentially, Isreal argues that because both acts were the result of his reckless driving, the jury's not guilty verdict on the second felonious assault charge demonstrates that the jury did not believe that he had a knowing mental state throughout the police chase, and therefore could not have found that he knowingly caused Sergeant Dulle physical harm.

{¶ 85} Isreal's argument asks us to assume that his driving and thought process during the chase did not change. However, the record reveals otherwise. Isreal led the police on a high-speed chase that traversed 18 miles, crossed over 44 intersections, and encountered 404 driveway cuts. During the chase, Isreal's speed fluctuated between 80 m.p.h. to greater than 120 m.p.h. Isreal changed his driving depending on what he encountered along the road, including residential and commercial zones, construction, and the curvature of the road itself. Isreal knew that U.S. 42 had changed as he continued to drive, and that the portion of the road leading up to the intersection with Utica Road had hills and curves. Isreal had just forced Deputies Black and Behymer off the road, as well as three civilians, and therefore knew that his driving was creating dangerous conditions for others.

{¶ 86} An accident reconstructionist, Sergeant Charles Scales, provided expert testimony that Sergeant Dulle's flashing lights were visible 1,950 feet before the sight of the crash, and that Isreal therefore had an adequate distance to stop safely. Officer Morgan testified that as he approached the site of the wreck, he saw the flashing lights and was able

to bring his cruiser to a safe stop. Isreal knew that the police were chasing him, and upon seeing Sergeant Dulle's flashing lights, knew that police were also in front of him. Sergeant Scales testified that the 1,950 feet gave Isreal approximately seven and one-half seconds to react, and that studies have shown that a person is able to perceive and react to a given situation within one and one-half seconds. However, Isreal chose not to stop or slow down, and continued to drive toward Sergeant Dulle with his foot on the gas pedal at a high rate of speed over a cresting hill.

{¶ 87} During the trial, Isreal took the stand and testified in his own defense. During the state's cross-examination, Isreal admitted that he was unfamiliar with the area, had never had a driver's license, and had only driven "several" times in his life. Isreal also admitted that he lost control of the Cadillac when he tried to turn onto U.S. 42 because he was going too fast, and as a result, began driving the wrong way in the northbound lane. Isreal admitted on cross-examination that he never slowed down or stopped as he approached Utica Road and Sergeant Dulle's position despite these dangerous driving conditions and despite his inability to handle the car due to the extreme speeds.

{¶ 88} According to the elements of felonious assault, the state was not under any legal duty nor did it have the burden to prove that Isreal intended to cause physical harm to Sergeant Dulle, only that Isreal was aware that his conduct would probably result in physical harm to another. When viewed in a light most favorable to the prosecution, the state presented evidence regarding the excessive speed at which Isreal approached Sergeant Dulle, the road conditions, and the accident reconstruction details. Based on this evidence, the jury could have found that Isreal was aware that his conduct would probably result in harm to another, and that Isreal therefore knowingly caused physical harm to Sergeant Dulle. As such, we cannot say that the jury lost its way and created a manifest mischarge of justice or that Isreal's conviction for felonious assault is not supported by sufficient evidence.

{¶ 89} Nor can we say that Isreal's trial counsel was ineffective for failing to request a new trial based on inconsistent verdicts. "The several counts of an indictment containing more than one count are not interdependent and an inconsistency in a verdict does not arise out of inconsistent responses to different counts, but only arises out of inconsistent responses to the same count." *State v. Brown*, 12 Ohio St.3d 147 (1984), syllabus; see also *State v. Davis*, 12th Dist. No. CA2010-06-143, 2011-Ohio-2207, ¶ 37. "Each count in an indictment charges a distinct offense and is independent of all other counts; a jury's decision as to one count is independent of and unaffected by the jury's finding on another count." *State v. Cope*, 12th Dist. No. CA2009-11-285, 2010-Ohio-6430, ¶ 69.

{¶ 90} In addition to the fact that the two counts of felonious assault were charged separately, the jury was free to determine that Isreal did not knowingly cause physical harm to Deputy Black. Such a finding is not solely predicated on or indicative of the jury's belief that Isreal did not act knowingly. Instead, the jury could have found that Isreal did not cause or attempt to cause physical harm to Deputy Black by forcing the deputy to turn onto a side street. Regardless of its reasoning, the fact remains that the jury's verdict was not inconsistent. As such, Isreal's trial counsel's decision to not file a motion for new trial based upon inconsistent verdicts was not deficient conduct, and did not result in any prejudice.

{¶ 91} Having found that Isreal's conviction for felonious assault was supported by sufficient evidence and was not rendered against the manifest weight of the evidence, his fifth assignment of error is overruled.

Constitutionality of R.C. 2941.141

{¶ 92} Assignment of Error No. 6:

{¶ 93} THE STATUTE THAT MAKES POSSESSION [sic] OF A FIREARM DURING THE COMMISSION OF A CRIME, WHEN THAT FIREARM WAS NOT USED IN A CRIME, A SPECIFICATION SUBJECT TO INCARCERATION, IS UNCONSTITUTIONAL.

{¶ 94} Isreal argues in his sixth assignment of error that R.C. 2941.141, and the firearm specifications therein, is unconstitutional because the United States Constitution guarantees the right to bear arms. Isreal also argues that he received ineffective assistance of counsel because counsel did not challenge the constitutionality of R.C. 2941.141 at trial.

{¶ 95} The record is undisputed that Isreal was a convicted felon who was prohibited from possessing a weapon. However, Isreal armed himself after he stole the Cadillac, and had the gun during the commission of the offenses that night. Isreal is not challenging the statute prohibiting felons from possessing weapons, but is instead challenging the mandatory prison sentence required by R.C. 2941.141 for having a gun during the commission of an offense. Isreal argues that this sentencing statute is in violation of the right to possess firearms guaranteed by the Second Amendment to the United States Constitution.

{¶ 96} Regardless of his arguments, and although we find that they lack merit, Isreal did not raise this issue at trial, and has waived this issue on appeal. *State v. Miller*, 12th Dist. No. CA2011-04-028, 2012-Ohio-995, ¶ 40. Even so, it is within our discretion to consider Isreal's constitutional challenge. *In re M.D.*, 38 Ohio St.3d 149 (1988).

{¶ 97} The Ohio Supreme Court has not been asked to determine the constitutionality of imposing sentences for firearm specifications. However, it is well-settled that the right to bear arms is not absolute and is instead subject to the reasonable regulation pursuant to the state's police power. *Arnold v. City of Cleveland*, 67 Ohio St.3d 35 (1993); *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783 (2008). Additionally, federal courts have held that federal firearm enhancements, which are the equivalent to firearm specifications, do not run afoul of the Second Amendment. *United States v. Goodlow*, 389 Fed.App. 961 (11th Cir.2010); *United States v. Jacobson*, 406 Fed. Appx. 91 (8th Cir.2011); *Benson v. United States*, W.D.Mich. No. 1:11-CV-368, 2011 WL 6009961 (Dec. 1, 2011). We agree with the reasoning of these courts and find that R.C. 2941.141 is constitutional.

{¶ 98} Accordingly, Isreal's argument that his counsel was ineffective for failing to raise a constitutional challenge to R.C. 2941.141 is without merit. Given the constitutionality of the statute, defense counsel's failure to pursue a constitutional challenge was neither deficient nor prejudicial.

{¶ 99} Having found that R.C. 2941.141 does not violate the Second Amendment, Isreal's sixth assignment of error is overruled.

Overruling Ineffective Assistance Claims

{¶ 100} Assignment of Error No. 7:

{¶ 101} THE JUDGMENT OF CONVICTION SHOULD BE OVERTURNED DUE TO APPELLANT RECEIVING INEFFECTIVE ASSISTANCE OF COUNSEL.

{¶ 102} As previously stated, Isreal raised ineffective assistance claims specific to each of the other arguments espoused within the previous six assignments of error. Having found within each of the previous assignments of error that Isreal received effective assistance, his final assignment of error is overruled.

Conclusion

{¶ 103} After thoroughly reviewing the record and considering all of Isreal's assignments of error, we overrule each in turn.

{¶ 104} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.