

[Cite as *State v. McDowell*, 2011-Ohio-6815.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 10AP-509
 : (C.P.C. No. 09CR-04-2422)
 Jeffrey McDowell, :
 : (REGULAR CALENDAR)
 Defendant-Appellant. :

D E C I S I O N

Rendered on December 30, 2011

Ron O'Brien, Prosecuting Attorney, and *Sarah W. Creedon*,
for appellee.

Clark Law Office, and *Toki Michelle Clark*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, Jeffrey McDowell ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas entered upon a jury verdict, convicting him of felonious assault with a three-year gun specification, a second degree felony. For the following reasons, we affirm that judgment.

{¶2} On April 16, 2009, appellant shot Shawn Jarvis ("Jarvis") during an argument over four young girls who were drawing pictures with sidewalk chalk on appellant's property. Jarvis lived with Crystal Gussler, who was appellant's next door

neighbor. The girls drawing the pictures on appellant's property were Crystal's ten-year-old daughter Kaylee Brumfield, and three of her cousins, ages three, four, and nine.

{¶3} Apparently appellant became upset with what the girls were doing and verbally chastised them, ordering them to get off his property. Each time the girls were reprimanded by appellant, they reported it to Jarvis. Ultimately, Jarvis came out of the house, approached appellant, and a heated exchange developed between the two of them. Jarvis testified that after some heated words, he retreated towards Crystal's house and summoned the girls to follow him. His intention was to call the police and let them sort things out. However, as he was cutting across the driveway, he glanced back to see if the girls were coming, and instead saw appellant coming behind him.

{¶4} On direct examination, Jarvis was asked:

Q. What did you think at that point?

A. It was a little strange. I didn't know if I was going to have to defend myself. He is a pretty decent-sized gentleman. I'm not into all the fighting and commotion and carrying on. It's just not my nature.

Q. So what did you do?

A. I actually stopped at the back of my pickup truck, still had the dog in my hand and pulled out - - its right there - - the concrete pin out of the back of my pickup truck, thinking I was going to have to defend myself.

* * *

Q. And what did you do with it?

A. Basically, like I said, he was coming up behind me. He's - - There is another white car that's beside my truck. He was just getting past that, which would be about the center of my driveway, coming up behind me, so I would say six feet behind me * * * and I notice[d] something shiny that he's pulling out of the back of his pocket; and that's when he took

a shot at me with the pistol. I dropped the dog and dropped the pin and started to scurry around, trying to get away from him, because he is obviously shooting at me.

Q. Do you know how many shots he took at that point?

A. At that point it was just one.

Q. Did that shot hit you?

A. No, It didn't.

Q. What happened next?

A. After that, like I said, I was scurrying around. I already dropped the dog and the pin. I was scurrying around in the yard. There was some hedges here to the left side of my driver's door side, as I am getting about to drive in front of my truck, he is almost in front of the door of my home, same driver's side, left back corner, and that's when he took a shot at me and actually hit me in the hand.

(Jan. 26, 2010 Tr. 63-65.)

{¶5} The State called several other witnesses, including Kaylee Brumfield, Alexis Brumfield, and two neighbors, William Wardle and Nathan Wilcox, both of whom witnessed all or part of the incident. The testimony of these witnesses corroborated Jarvis' account of what happened.

{¶6} Kelby Ducat ("Ducat"), an employee with the Columbus Crime Lab, was also called to testify concerning the operability of the firearm used by the appellant. Ducat had been employed by the Columbus Crime Lab since August 2008 and his responsibilities are to conduct firearm operability testing and serial number restorations.

{¶7} Ducat testified he obtained a Bachelor of Science degree in Environmental Science from Bowling Green State University in 2006, and he has had extensive in-service training from three experienced firearms examiners in the lab. He further testified he had

completed and passed competency tests in firearms operabilities and serial number restorations in 2008. With respect to outside training, he attended two armorer courses at the Ohio Peace Officer Training Academy that were presented by Colt Management. He has also attended a serial and restoration class put on by the Bureau of Alcohol, Tobacco, Firearms and Explosives and has completed courses with the Association of Firearm and Tool Mark Examiners. Ducat further testified he has previously been declared an expert. Upon the motion of the assistant prosecutor and without objection from the defense, Ducat was declared by the court to be an expert in firearms operability in this case.

{¶8} Ducat proceeded to testify as to the procedure followed to move the weapon from the scene of the crime to the crime lab, including the chain of evidence. Ducat testified he received a written request from the lead detective to perform an operability test on the weapon. Ducat then identified the weapon in question (State's exhibit D) and testified as to the tests he performed on the weapon. The following exchange took place:

Q. In conducting your analysis, Mr. Ducat, was this firearm indeed operable?

A. Yes, I found this revolver to be operable.

(Jan. 27, 2010 Tr. 282.)

{¶9} On cross-examination by defense counsel, the following exchange took place:

Q. Did it appear that the firearm - - do firearms get dirty internally?

A. Yes, they do.

Q. Firearms are frequently cleaned; is that correct?

A. Yes, you should properly clean the weapon.

Q. Did this weapon appear to you to be a fairly clean weapon?

A. It properly functioned, so I would say, yes, it would be a clean weapon.

Q. How do you clean a firearm?

A. I have never cleaned a firearm before.

Q. Really?

A. I do not own a firearm personally.

(Jan. 27, 2010 Tr. 285.)

{¶10} Counsel for the defense further cross-examined Ducat concerning whether he had ballistic-type work training; how one determines the caliber of a weapon; the caliber of the weapon in question; and the meaning of .32 caliber. Ducat testified he was currently in training with respect to conducting ballistics comparisons and had not yet taken the competency test. Finally, counsel cross-examined Ducat concerning the various handgun caliber sizes and the category into which a .32 caliber might fall (small, medium or large) in comparison to other handguns. Ducat testified that a .32 caliber would probably fall in the medium range. Then, the following exchange took place:

Q. Would you have an opinion as to whether a [.32 caliber bullet, if it passed through and through a finger, what type of damage that might result in?

A. I have never done any training on how a projectile would go through any object. So, no, I don't know.

(Jan. 27, 2010 Tr. 288.)

{¶11} After the close of the State's case, the appellant testified on his own behalf.

{¶12} Appellant testified that he owned the gun and admitted firing it at Jarvis. However, his recollection and testimony concerning the event in question differed from that of Jarvis and the other State's witnesses. Appellant testified the children were drawing with chalk on his driveway and he asked them several times to stop. They would leave and then come back. He did not cuss or use abusive language. Eventually Jarvis came out of his house and appellant approached him and told him that the kids were drawing on the driveway. Appellant asked Jarvis to try to control the kids. This upset Jarvis, causing him to run between a car and his pickup truck and retrieve a metal bar (State's exhibit C). Appellant testified Jarvis then drew the bar back and as Jarvis was running in between the cars and coming towards appellant with the bar, Jarvis said, "I am going to crack your head." (Jan. 28, Feb. 2, and April 20, 2010 Tr. 362.) Appellant then testified he was not going to let that happen, so he went to his garage, retrieved his gun, and fired it two times. Appellant stated he fired the gun in rapid succession and did so because he felt threatened and that he did nothing and said nothing to provoke Jarvis. He, in fact, did not even realize that he had hit Jarvis until he was told by a police officer that Jarvis was hit in the finger. The first time he pulled the gun out of the garage was when Jarvis was on his property and coming at him with the bar. Finally, appellant testified that he was sure that Jarvis was going to use the bar and he was in fear of bodily harm. (Jan. 28, Feb. 2, and April 20, 2010 Tr. 360-71.)

{¶13} Appellant raises six assignments of error for our consideration:

ASSIGNMENT OF ERROR NO. 1:

THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW WHEN IT DECLARED A WITNESS A GUN EXPERT WHERE THE GUN EXPERT

ADMITTEDLY HAS NEVER EVEN CLEANED A GUN BEFORE.

ASSIGNMENT OF ERROR NO. 2:

A TRIAL COURT ABUSES ITS DISCRETION WHEN IT FAILS TO USE A JURY INSTRUCTION PROPOSED BY THE DEFENSE.

ASSIGNMENT OF ERROR NO. 3:

A CRIMINAL DEFENDANT FAILS TO RECEIVE A FAIR TRIAL WHERE HIS RIGHT TO DEFEND HIMSELF THROUGH SELF DEFENSE IS TRAMPLED UPON BY A PROSECUTOR WHO SUGGESTS TO THE JURY THAT HE HAS A DUTY TO RETREAT IN HIS OWN HOME.

ASSIGNMENT OF ERROR NO. 4:

A TRIAL COURT ERRS WHEN IT REFUSES TO GIVE A LESSER INCLUDED ASSAULT [INSTRUCTION] WHERE THE ELEMENTS OF ASSAULT ARE PRESENT.

ASSIGNMENT OF ERROR NO. 5:

A TRIAL COURT CAN ERR WHEN IT GIVES A HOWARD CHARGE TOO EARLY.

ASSIGNMENT OF ERROR NO. 6:

THE CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶14} In his first assignment of error, appellant contends the trial court abused its discretion by allowing Ducat to testify as an expert with respect to the operability of the weapon because he had never cleaned a gun. We disagree.

{¶15} The admission or exclusion of expert testimony rests within the sound discretion of the trial court. *State v. Williams* (1983), 4 Ohio St.3d 53, 57-58. The Supreme Court in *Williams* clearly held: "We believe the Rules of Evidence establish adequate preconditions for admissibility of expert testimony, and we leave to the discretion

of this state's judiciary, on a case by case basis, to decide whether the questioned testimony is relevant and will assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* at 58.

{¶16} Counsel for appellant did, upon cross-examination, ask whether the weapon appeared to be a fairly clean weapon. Ducat responded that it did because it properly functioned. When asked by counsel, "How do you clean a firearm?" Ducat responded that he does not "own a firearm personally" and has "never cleaned" one. (Jan. 27, 2010 Tr. 285.)

{¶17} Counsel for appellant did not object to Ducat's qualifications as an expert and did not object to the introduction of the weapon, and thus on appeal, he has waived all but plain error.

{¶18} Under Crim.R. 52(B), plain errors or defects affecting substantial rights may be noticed even though they were not brought to the attention of the court. The rule places three limitations on a reviewing court's decision to correct the error, despite the absence of a timely objection at trial. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. First, there must be an error, i.e., a deviation from a legal rule. *Id.* Second, the error must be plain. To be "plain" within the meaning of Crim.R. 52(B), the error must be an "obvious" defect in the proceedings. *Id.* And third, the error must have affected "substantial rights," meaning the error must have affected the outcome of the trial. *Id.*

{¶19} Ducat's sole purpose in testifying as an expert was to testify that the weapon in question was operable. The State has the burden of proving that the weapon was operable at the time of the crime. In accordance with Evid.R. 702, which governs expert testimony, Ducat testified as to his education, training, and experience regarding

firearms operability. There is no question that he was qualified to testify as an expert in this regard. Ducat has been employed by the Columbus Crime Lab since August 2008 and his responsibilities are to conduct firearm operability tests and serial number restorations. He earned a Bachelor of Science degree in Environmental Science from Bowling Green State University in 2006 and has had extensive in-service training from three experienced firearm examiners in the lab. He also completed and passed competency tests in firearm operability and serial number restoration in 2008. With respect to outside training, he attended two armorer courses at the Ohio Peace Officer Training Academy. Finally, he has been previously declared an expert in other court proceedings.

{¶20} While there were several questions asked by appellant's counsel concerning the cleaning of a gun and whether it might affect the operability of a weapon, there was no evidence that the weapon in question was not a clean weapon. In fact, Ducat testified it appeared to be a fairly clean weapon as it properly functioned. Furthermore, appellant has failed to demonstrate how Ducat's lack of experience in cleaning a weapon undermines his qualifications to testify in this case. The fact that he did not own a weapon and never cleaned one himself does not in any way contradict his credentials as an expert witness and his ability to testify concerning the operability of the weapon in question.

{¶21} Therefore, there being no error committed by the court, no obvious defect in the court proceedings, and clearly no substantial right of the appellant affected, appellant's first assignment of error is overruled.

{¶22} In his second assignment of error, the appellant states that the court abused its discretion when it refused to use a jury instruction proposed by the defense. In the instant case appellant asked the trial court to give the following instruction:

"Self defense does not distinguish between the weapons used to defend oneself but only between deadly force and non-deadly force. I instruct you that you may consider the metal bar carried by Mr. Jarvis as deadly force just as you may consider the firearm carried by Mr. McDowell as deadly force. The defender's choice of a weapon is largely irrelevant[.]"

(Jan. 29, Feb. 2, April 20, 2010 Tr. 438., quoting *State v Miller*, 149 Ohio App.3d 782, 2002-Ohio-5812, ¶6.)

{¶23} First of all, appellant incorrectly quotes from *Miller*. The correct quote is: "the law of self-defense does not distinguish between the weapons used to defend oneself but only between deadly force and non-deadly force. *Provided that a person is justified in using deadly force*, the defender's choice of weapon is largely irrelevant, be it a gun or the defender's fists." *Id.* at ¶6. (Emphasis added.)

{¶24} Secondly, the facts and issue of law in *Miller* are so distinguishable from the facts and issue of law in the present case as to be no help at all in deciding this assignment of error. *Miller* fired a warning shot to thwart off an attack by his assailant, Ward, who burst through *Miller's* door with fists ready to strike. While the trial court found that *Miller* was in imminent fear of death or great bodily harm and that Ward was the aggressor, it also found that use of the weapon was inappropriate because *Miller* had other, less violent means available to avoid the attack. However, the court of appeals disagreed, finding *Miller* had the right to use whatever means were reasonable to defend himself without retreating further, including firing a warning shot, since *Miller* was inside his own home at the time of the incident and Ward had broken into the home. In reversing

Miller's conviction, the appellate court's rationale suggested that when you are talking about the use of *justifiable* deadly force, the type of weapon used to assert that deadly force is irrelevant. The language in *Miller* does not stand for the proposition submitted by appellant, which implies that the type of weapon used is irrelevant under all circumstances.

{¶25} Trial courts have a responsibility to give all jury instructions that are relevant and necessary for the jury to properly weigh the evidence and perform its duty as the fact-finder. *State v. Comen* (1990), 50 Ohio St.3d 206, paragraph two of the syllabus; *Columbus v. Aleshire*, 187 Ohio App.3d 660, 679, 2010-Ohio-2773, ¶6; *State v. Moody* (Mar. 13, 2001), 10th Dist. No. 98AP-1371. An instruction is proper if it adequately informs the jury of the law. *State v. Conway*, 10th Dist. No. 03AP-585, 2004-Ohio-1222, ¶24.

{¶26} When we review a court's refusal to give a requested instruction, we must determine whether the trial court's decision constituted an abuse of discretion under the facts and circumstances of the case. *State v. Smith*, 10th Dist No. 01AP-848, 2002-Ohio-1479, citing *State v. Wolons* (1989), 44 Ohio St.3d 64, 68. An appellate court will not reverse a conviction in a criminal case due to jury instructions unless the jury instructions amount to prejudicial error. *Moody*, citing *State v DeHass* (1967), 10 Ohio St.2d 230, paragraph two of the syllabus. When reviewing a specific challenged instruction on appeal, the instruction should not be judged in isolation, but within the context of the overall charge. *State v. Price* (1979), 60 Ohio St.2d 136, paragraph four of the syllabus; see also *Aleshire* at ¶52. Upon review, this court uses the following three-part test to determine when failing to give a jury instruction constitutes reversible error: (1) the requested instruction must be a correct statement of the law; (2) the requested instruction

must not be redundant of other instructions; and (3) the failure to give the requested instruction must have impaired the requesting party's theory of the case. *State v. Dodson*, 10th Dist. No. 10AP-603, 2011-Ohio-1092, citing *Gower v. Conrad* (2001), 146 Ohio App.3d 200, 203.

{¶27} In order to establish self defense through the use of deadly force, appellant was required to prove, by a preponderance of the evidence: (1) he was not at fault in creating the situation which gave rise to the affray; (2) he had an honest belief that he was in imminent danger of death or great bodily harm and his only means of escape from such danger was through the use of such force; and (3) he did not violate any duty to retreat or to avoid the danger. *Barnes* at 24, citing *State v. Robbins* (1979), 58 Ohio St.2d 74. A defendant may use as much force as is reasonably necessary to repel an attack. *State v. Harrison*, 10th Dist No. 06AP-827, 2007-Ohio-2872, ¶25, citing *State v. Jackson* (1986), 22 Ohio St.3d 281.

{¶28} In the instant case, the State is correct in asserting the instruction proposed by defense counsel would have been confusing to the jury. The proposed instruction implied that the type of weapon involved should not be considered in determining the application of self defense. However, it may or may not be relevant, depending on the facts proven in the case. In *Miller*, it did not make much difference because Miller was in his home when he was attacked, he was under no duty to retreat, and he was justified in using deadly force by whatever means reasonably necessary. In this case, the issue of law was, did appellant have a reasonable and honest belief that he was in imminent danger of death or great bodily harm and that his only means of escape, even though he may have been mistaken as to the existence of such danger, was to injure his assailant?

{¶29} Here, unlike in *Miller*, the event did not occur within the confines of the alleged offender's residence. In the instant case, appellant was required to prove that he had an honest belief that he was in imminent danger of death or great bodily harm, that his only means of escape was through the use of deadly force, and that the use of this force was reasonably necessary to repel the attack. This, among other things, made the weapons involved very relevant for the jury to consider.

{¶30} Furthermore, appellant's requested instruction seemed to improperly intermingle two separate concepts: "deadly weapon" and "deadly force." "Deadly weapon" is defined in the Ohio Jury Instructions as "[a]ny instrument, device, or thing capable of inflicting death and designed or especially adapted for use as a weapon or possessed, carried or used as a weapon." "Deadly force," on the other hand, means "any force that carries a substantial risk that it will proximately result in the death of any person." R.C. 2901.01(A)(2). Using this instruction, appellant's trial counsel seemed to be asking the trial court to, in essence, instruct the jury that the metal bar was a "deadly weapon" and therefore its use constituted "deadly force," the same as a handgun was a "deadly weapon," use of which also constituted "deadly force." However, such an instruction would improperly remove from the jury its duty to make a determination on this issue. The definition of "deadly weapon" was given by the court when it defined the elements of the charge of felonious assault. But, whether the metal bar in question (as well as this particular handgun) fits this definition is a factual finding for the jury to determine, pursuant to the definition. It is certainly not a matter of law to be charged by the court. Nevertheless, counsel for the defense was free to argue, and did in fact argue, in his closing remarks that appellant's use of the gun was necessary to ward off Jarvis'

attack by the use of the metal bar. For example, counsel argued that "the defendant has to prove by a preponderance of the evidence that Mr. McDowell was justified in using his handgun. * * * It's in the law. There are scenarios where you are justified in using deadly force to repel deadly force. Okay. It's - - it's fine to consider it." (Jan. 28, Feb. 2, and April 20, 2010 Tr. 478-79.)

{¶31} For the reasons hereinbefore stated, the requested instruction did not reflect a correct statement of the law, considering the facts and circumstances of this case. It would have confused and hindered the jury in the performance of its factfinding responsibilities. Further, counsel was able to argue in his closing statement that appellant had a right to meet force with force, so it did not impair appellant's theory of the case. Therefore, appellant's second assignment of error is overruled.

{¶32} In his third assignment of error, appellant alleges prosecutorial misconduct occurred when the prosecutor suggested in closing argument that appellant had a duty to retreat in his own home in order to avoid the conflict, and that such a misstatement of the law was prejudicial to the defense. We disagree.

{¶33} When reviewing allegations of prosecutorial misconduct, the test for appellate courts is whether the prosecutor's conduct was improper, and if so, whether that conduct prejudicially affected the substantial rights of the accused. *State v. Pilgrim*, 184 Ohio App.3d 675, 2009-Ohio-5357, ¶57. " '[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.' " *State v. Wilkerson*, 10th Dist. No. 01AP-1127, 2002-Ohio-5416, ¶38, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 947. Accordingly, prosecutorial misconduct will not be grounds for reversal unless the defendant has been

denied a fair trial. *State v. Maurer* (1984), 15 Ohio St.3d 239, 266. In order to reverse a conviction for prosecutorial misconduct, the defendant must demonstrate that the comments were improper and that they materially prejudiced the substantial rights of the defendant. *State v. McClurkin*, 10th Dist. No. 08AP-781, 2009-Ohio-4545, ¶66, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14. A prosecutor is afforded wide latitude in closing argument, which must be reviewed in its entirety in order to determine whether the challenged remarks prejudiced the defendant. *State v. Hill* (1996), 75 Ohio St.3d 195, 204. Furthermore, even if there were prosecutorial misconduct, such conduct is only treated as reversible error in rare circumstances. *State v. Banks*, 10th Dist No. 03AP-1286, 2005-Ohio-1943, ¶6; and *State v. Davis*, 10th Dist. No. 09AP-869, 2011-Ohio-1023, ¶29.

{¶34} A review of the record shows that defense counsel did not object to any of the comments made by the prosecutor during closing argument concerning the defendant's duty to retreat. Therefore, appellant has waived any error on that issue on appeal except for plain error. Again, to be "plain" within the meaning of Crim.R. 52(B) an error must: (1) be a deviation from a legal rule; (2) be plain or obvious, i.e., an obvious defect in the trial proceedings; and (3) have affected a substantial right in that it affected the outcome of the trial.

{¶35} During closing arguments, the prosecutor argued to the jury:

Now, you have heard testimony about the distance apart. Mr. Rosenberg was asking Mr. McDowell if this had been thrown at him. That's what we have come to? We know he wasn't hit with it. We know it wasn't swung at him. We know he wasn't in reach of the victim. So that's what we have come to? If he threw this at you, what would happen? Come on here. Other options. Other options.

He obviously had other means of escape, and that ties into number three, too, that he could have left the scene, that he didn't violate any duty to retreat, and he did retreat. He went into his garage when it was all over. Clearly, there is nothing blocking his path to prevent him from leaving. He could have left at any time to prevent this from happening. This is common sense.

(Jan. 28, Feb. 2, and April 20, 2010 Tr. 465.)

{¶36} In her rebuttal argument, the prosecutor made the following statement with respect to appellant's duty to retreat:

Look at the second element, the fear element. The victim never swung. He was feet away. He had plenty of options. He had a number of other options he could have used. His duty to retreat, could have retreated at any time and he chose not to. * * *

(Jan. 28, Feb. 2, and April 20, 2010 Tr. 492.)

{¶37} Appellant argues that he was in his own home and had no duty to retreat and therefore the prosecutor misstated the facts and the law in closing argument when she claimed appellant had a duty to retreat. However, the testimony of the witnesses, including appellant's own testimony, does not support that assertion.

{¶38} At best, appellant was in his garage when he went to retrieve the gun. He then came out of the garage and fired twice at the victim. He may or may not have been on his own property when he fired the shots, depending on whether the State's witnesses are to be believed or the defendant is to be believed. He certainly was not in his own home, even by his own testimony. The "Castle Doctrine," which provides an exception to the duty to retreat when one is attacked in one's own home, applies when the person against whom the defensive force is used is unlawfully entering the other person's residence. See R.C. 2901.05 and 2901.09. See also *State v. Williford* (1990), 49 Ohio

St.3d 247, 250 (under most circumstances, a person cannot use deadly force if there is available a reasonable means of retreat, but where one is assaulted in his own home, he may use such means as are necessary to repel the attack, including the taking of a life).

{¶39} Here, appellant contends the "no duty to retreat" exception applies to him because he was "at" his residence. However, according to the evidence, appellant was not inside his residence, and even the statutory authority and/or case law which indicates the exception has been extended to certain types of porches does not apply here. Instead, the evidence demonstrates the shooting occurred, at best, in appellant's front yard. Even if counsel had requested the "no duty to retreat" exception, appellant has failed to show how it could be applicable here.

{¶40} Therefore, we find the prosecutor argued only the facts in evidence and made no misstatement of the law as it applied to the facts of this case. After reviewing the evidence, we find no error, plain or otherwise.

{¶41} Accordingly, we overrule appellant's third assignment of error.

{¶42} Appellant's fourth assignment of error asserts that the trial court committed error when it refused to instruct the jury on the lesser included offense of assault. Appellant argues an assault charge was reasonable, given the fact that he testified he felt threatened by Jarvis. He further contends that under the totality of the circumstances, the jury could have concluded that his conduct was reckless, thereby supporting an instruction for the lesser offense of assault.

{¶43} A review of the record shows that at no time during the court's reading of the jury instructions and prior to deliberations did counsel for the defendant request an instruction on any lesser included offense, nor did he object to the jury instructions as

given. The case was given to the jury on January 28, 2010 in late afternoon and they continued their deliberation on January 29, 2010. On February 1, 2010, several questions were sent out by the jury concerning whether the word "knowingly" attached to "cause serious physical harm," as well as "caused or attempted to cause physical harm." The court determined it would answer the questions in the affirmative. It was at this time that counsel for the appellant asked that the court charge the jury on the lesser included offense of assault and/or negligent assault.

{¶44} Where the evidence at trial would reasonably support both an acquittal on the crime as charged in the indictment, as well as a conviction upon a lesser included offense, a trial court must instruct the jury on the lesser included offense. *Pilgrim* at ¶68. However, where the failure to request a jury instruction is the result of a deliberate, tactical decision on the part of trial counsel, it is not plain error. *State v. Clayton* (1980), 62 Ohio St.2d 45, 47-48. Because appellant failed to object to the jury instructions before the jury began its deliberations, he has waived all but plain error. See Crim.R. 30(A) (a party may not assign as error on appeal the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict). See also *Williford* at 251; and *State v. Underwood* (1983), 3 Ohio St.3d 12, syllabus.

{¶45} In the case at hand, there was overwhelming evidence that appellant intentionally and purposely fired two shots at Jarvis, in rapid fire, and that one shot, which struck Jarvis, was fired while Jarvis was fleeing. The only defense asserted by appellant was that he was in fear of being inflicted with serious bodily harm by a metal bar retrieved by Jarvis from the back of his truck. When a deadly weapon, such as a gun, is used in the manner in which it was used in this case, to instruct on the lesser offense of assault would

be incongruous, particularly given appellant's self defense claim, which asserts a purposeful act that was purportedly justified. *State v. Wiley*, 10th Dist. No. 03AP-340, 2004-Ohio-1008, ¶25. Quite simply, an instruction on the lesser offense was not warranted, based upon the evidence presented at trial, as there was no indication of the presence of the culpable mental states of recklessness or negligence, as would be required for an instruction on assault and/or negligent assault, respectively. Certainly appellant's reliance on self defense was indicative of not only its strategy, but also of how it viewed the evidence at the close of the case.

{¶46} The record in this case does not support plain error or, for that matter, any error or defect within the meaning of Crim.R. 52(B). For the above-stated reasons, we overrule appellant's fourth assignment of error.

{¶47} Appellant asserts in his fifth assignment of error that the trial court erred when it gave the *Howard* charge too early in the jury deliberations. See *State v. Howard* (1989), 42 Ohio St.3d 18, paragraph two of the syllabus. Appellant asserts it was inappropriate to give the *Howard* charge to the jury when it is not deadlocked and when it has been less than half a day since the jury began deliberating. We disagree.

{¶48} After more than one partial and one full day of deliberations, the jury informed the trial court that it had two questions and that one juror was having trouble agreeing with the others on a verdict. The court proceeded to answer the two questions and then, over the objection of defense counsel, to give the *Howard* charge to the jury. Appellant's counsel argued to the court that it was too soon in the jury deliberations to give the charge and that the only time it should be given is when the jury is deadlocked. (Jan. 28, Feb. 2, and April 20, 2010 Tr. 516.) The court made the following statement:

* * * What I said was that they are having a difficult time, that there is one person that will not agree with the others; and what they said was they were having a difficult time. So what I advised counsel in the back was that we will go ahead and answer their question - - go ahead and answer their question and then give them the Howard charge and then see what happens from there.

(Jan. 28, Feb. 2, and April 20, 2010 Tr. 515.)

{¶49} In *Howard* at 25, the Supreme Court of Ohio opined:

In promulgating a supplemental instruction to be used by this state's trial courts in situations where it is appropriate, we are mindful of our two stated goals. It must encourage a verdict where one can conscientiously be reached. In addition, the instruction must be balanced, asking all jurors to reconsider their opinions in light of the fact that others do not agree.

{¶50} The decision to give a *Howard* charge is reviewed under an abuse of discretion standard. *State v. Shepard*, 10th Dist. No. 07AP-223, 2007-Ohio-5405, ¶11. The only timeline guidance given by the Supreme Court in *Howard* is that the statement is to be given "in situations where it is appropriate." *Id.* at 25. We have previously found the reading of the *Howard* charge to be appropriate in similar circumstances.

{¶51} In *Shepard* at ¶11, this court determined "[t]here is no required period that a trial court must wait in order for the *Howard* charge to be appropriate." We further noted that the delivery of the *Howard* charge after only a few hours of deliberation had been upheld by numerous courts, citing to *State v. Clifton*, 172 Ohio App.3d 86, 2007-Ohio-3392, *State v. Edwards*, 11th Dist. No. 2006-T-0038, 2006-Ohio-6349, and *State v. Adams*, 7th Dist. No. 02 JE 32, 2003-Ohio-1225, among others. See also *State v. Arthurs*, 09AP-409, 10th Dist. No. 2010-Ohio-624, ¶51. Thus, we find the trial court did not abuse its discretion in delivering the *Howard* charge after several hours of deliberation over a

period of three days and, therefore, we find no error based upon the period of deliberation time that had passed prior to the delivery of the charge.

{¶52} In addition, appellant claims the trial court improperly gave the *Howard* instruction before determining that the jury was indeed deadlocked. However, such action does not constitute an abuse of discretion. In *Shepard*, we relied upon *State v. Minnis* (Feb. 11, 1992), 10th Dist. No. 91AP-844, and found "there is no formula provided to determine exactly when a jury is deadlocked and exactly when the supplemental charge from *Howard* should be read to the jury." *Shepard* at ¶12. Although the jury in *Shepard* did not explicitly indicate that it was deadlocked, we determined there is no requirement that the jury make an explicit statement to that effect. *Id.*

{¶53} That rationale is applicable here as well. It is apparent from the record that the two questions submitted by the jury were asked to satisfy the query of one juror and the rest of the jurors were in agreement. Answering the questions the way the court did and giving the *Howard* charge under the circumstances was appropriate and was clearly not an abuse of discretion.

{¶54} Based on the hereinbefore stated reasoning, we overrule appellant's fifth assignment of error.

{¶55} In his sixth and final assignment of error, appellant argues his conviction for felonious assault is against the manifest weight of the evidence.

{¶56} In support of his assignment of error, appellant argues that based upon the totality of the evidence, it is clear that Jarvis was not a credible witness. Appellant points out that Jarvis lied to state officials by claiming he was gainfully employed in order to obtain victims of crime compensation. Appellant further attacks Jarvis' character, noting

Jarvis was unemployed, had deserted his wife and eight-month old child, and moved in with his pregnant girlfriend, and was motivated to lie. Appellant's counsel compares Jarvis' character to that of appellant, who is 60 years old, hard-working, and without a criminal past, arguing appellant was a much more credible witness. Appellant also claims it is apparent from the evidence in the record that he was simply trying to protect himself from the much younger and much taller Jarvis. As a result, appellant argues it is evident that the jury lost its way in rejecting appellant's self defense claim.

{¶57} The criminal manifest weight of the evidence standard addresses the evidence's effect of inducing belief. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶25, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. Under the manifest weight of the evidence standard, a reviewing court must ask the following question: whose evidence is more persuasive - the state's or the defendant's? *Id.* at ¶25. Although there may be legally sufficient evidence to support a judgment, it may nevertheless be against the manifest weight of the evidence. *Thompkins* at 387; See also *State v. Robinson* (1955), 162 Ohio St. 486 (although there is sufficient evidence to sustain a guilty verdict, a court of appeals has the authority to determine that such a verdict is against the weight of the evidence); *State v. Johnson*, 88 Ohio St.3d 95, 2000-Ohio-276.

{¶58} "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *Wilson* at ¶25, quoting *Thompkins* at 387. In determining whether a conviction is against the manifest weight of the evidence, the appellate court must review the entire record,

weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether, in resolving any conflicts in the evidence, the jury clearly lost its way and thereby created such a manifest miscarriage of justice that the conviction must be reversed and a new trial must be ordered. *Thompkins* at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶59} A conviction should be reversed on manifest weight grounds only in the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶10, quoting *State v. Long* (Feb. 6, 1997), 10th Dist. No. 96APA04-511.

{¶60} "The weight of the evidence concerns the inclination of the greater amount of credible evidence offered in a trial to support one side of the issue rather than the other." *State v. Brindley*, 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶16, citing *State v. Gray* (Mar. 28, 2000), 10th Dist. No. 99AP-666; See also *State v. Chandler*, 10th Dist. No. 05AP-415, 2006-Ohio-2070, ¶8. The weight to be given to the evidence, as well as the credibility of the witnesses, are issues which are primarily to be determined by the trier of fact. *State v. Hairston*, 10th Dist. No. 05AP-366, 2006-Ohio-1644, ¶20, citing *State v. DeHass* (1967), 10 Ohio St.2d 230.

{¶61} A defendant is not entitled to a reversal on manifest weight grounds simply because there was inconsistent evidence presented at trial. *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21; *State v. Stewart*, 10th Dist. No. 08AP-33, 2009-Ohio-

1547, ¶17. The trier of fact is in the best position to take into account any inconsistencies, along with the witnesses' demeanor and manner of testifying, and determine whether or not the witnesses' testimony is credible. *Chandler* at ¶9, citing *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶58; *Stewart* at ¶17. A jury, as the finder of fact and the sole judge of the weight of the evidence and the credibility of the witnesses, may believe or disbelieve all, part, or none of a witness's testimony. *State v. Antill* (1964), 176 Ohio St. 61, 67; *State v. Jackson*, 10th Dist. No. 01AP-973, 2002-Ohio-1257; *Chandler* at ¶13; *Raver* at ¶21.

{¶62} A conviction is not against the manifest weight of the evidence merely because the jury believed the prosecution testimony. *State v. Houston*, 10th Dist. No. 04AP-875, 2005-Ohio-4249, ¶38 (reversed and remanded in part on other grounds); *Stewart* at ¶22. An appellate court must give great deference to the factfinder's determination of the witness credibility. *Chandler* at ¶19; *State v. Webb*, 10th Dist. No. 10AP-189, 2010-Ohio-5208, ¶16.

{¶63} In essence, appellant's reasoning in support of this assignment of error is that Jarvis was not a credible witness, appellant was far more credible, and therefore, the jury clearly lost its way in finding appellant guilty. However, in making this argument, appellant completely ignores the fact that all of Jarvis' "character flaws" were elicited in cross-examination, at which time appellant's counsel had the opportunity to undermine Jarvis' credibility, and to subsequently attack his credibility before the jury in closing arguments. Nevertheless, the attacks on Jarvis' credibility did not render his testimony so unreliable as to make it not credible as a matter of law. Additionally, all of appellant's "attributes" were elicited and made known as well. The jury was free to disbelieve

appellant's version of events and to believe Jarvis' version of events. That decision was within the province of the jury. See *State v. Williams*, 10th Dist. No. 08AP-719, 2009-Ohio-3237, ¶¶18-19 (jury's decision to reject appellant's claim of self defense and believe State's version of events was not against the manifest weight of the evidence).

{¶64} Appellant's argument also ignores the testimony of the State's corroborating witnesses: Kaylee Brumfield, Alexis Brumfield, William Wardle, and Nathan Wilcox. None of the State's witnesses supported appellant's claim that he went into his garage to get his gun after Jarvis retrieved a metal pipe from his truck. Based upon the verdict, it is obvious the jury chose to believe Jarvis and the State's four corroborating witnesses. Again, it was within the province of the jury to assess the credibility of the witnesses and to determine which part or parts of their testimony it found to be believable. Additionally, the forensic evidence as well as appellant's own testimony supported the finding that appellant fired a deadly weapon twice at Jarvis.

{¶65} Therefore, based on our analysis as set forth above, and in reviewing the entire record, weighing the evidence and all reasonable inferences, and in considering the credibility of the witnesses, as well as resolving all conflicts of evidence, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice in rejecting appellant's self defense claim and in finding appellant guilty of felonious assault with a firearm specification. Appellant's conviction need not be reversed nor a new trial ordered, as this is not an " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Accordingly, we overrule the appellant's sixth assignment of error.

{¶66} In conclusion, appellant's first, second, third, fourth, fifth, and sixth assignments of error are overruled. The judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT, P.J., and FRENCH, J., concur.
