

[Cite as *State v. Johns*, 2011-Ohio-6823.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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| State of Ohio, | : | |
| Plaintiff-Appellee, | : | |
| v. | : | No. 11AP-203 (C.P.C. No. 10CR-01-388) |
| Kim Johns, | : | (REGULAR CALENDAR) |
| Defendant-Appellant. | : | |

D E C I S I O N

Rendered on December 30, 2011

Ron O'Brien, Prosecuting Attorney, and *Susan M. Suriano*, for appellee.

Richard D. Brown Law Office, and *Richard D. Brown*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Kim Johns, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas in which the court found him guilty, pursuant to a jury verdict, of felonious assault in violation of R.C. 2903.11, a felony of the second degree.

{¶2} Naomi Budnick had been dating appellant since around Labor Day 2009. She had a four-year-old son from another relationship. Budnick broke up with appellant on New Year's Eve 2009, after appellant punched the window of the vehicle in which she was seated. Appellant injured his hand as a result of punching the window.

{¶3} However, the two reconciled and were dating again as of January 10, 2010. Appellant and Budnick disagree as to whether appellant was living in Budnick's apartment at this time or had a key to the apartment. At about 10:30 p.m. on January 10, 2010, appellant was at his brother's house watching a movie and Budnick was at home with her son, and the two spoke by telephone, mainly about the need to get her son on a more regular schedule because school was starting soon.

{¶4} Appellant and Budnick disagree as to what happened next. At trial, appellant maintained that, in the early morning hours of January 11, 2010, he arrived back at Budnick's apartment to find Budnick's son awake and watching television, the house messy, toys and food everywhere, and Budnick upstairs sleeping. Budnick came downstairs to get something to eat and then returned to her bedroom to eat, at which point appellant and Budnick started arguing. Appellant claims he called Budnick a bad mother, and Budnick grabbed his injured hand and fingers. Appellant then struck Budnick in the head with an empty bottle. After Budnick punched him, appellant kicked her. The fight lasted only two to three minutes, and ended when Budnick's son came into the room. Appellant and Budnick then went to sleep.

{¶5} However, Budnick contended at trial that she woke up in her bed in the early morning hours of January 11, 2010, to find appellant punching her in the face. He then hit her with a mug and beer bottle, and then kicked her. She said the violence continued for several more hours. Budnick testified that, later that morning, she sent a text message and picture of her injuries to her sister, Adria Seyller, via her cell phone. Her sister called her at about 1:00 p.m., and Seyller subsequently called 911 while she was

en route to Budnick's apartment. Police arrived at Budnick's home, and Budnick went to the hospital.

{¶6} On January 22, 2010, appellant was indicted for aggravated burglary, kidnapping, and felonious assault. The matter was tried before a jury beginning January 19, 2011. The jury found appellant guilty of the felonious assault count and not guilty of the remaining counts. On February 16, 2011, the trial court held a sentencing hearing. On February 17, 2011, the trial court issued a judgment, in which it found appellant guilty of felonious assault and sentenced him to a seven-year jail sentence. Appellant appeals the judgment of the trial court, asserting the following assignments of error:

[I.] The State's Evidence was Legally Insufficient to Support Appellant's Conviction for Felonious Assault.

[II.] Appellant's Conviction for Felonious Assault Was Against the Manifest Weight of the Evidence.

[III.] Trial Counsel Rendered Ineffective Assistance of Counsel to Appellant, in Violation of the Sixth Amendment of the U.S. Constitution and Article I, Sections 10 and 16 of the Ohio Constitution.

[IV.] The Trial Court committed Error Prejudicial to Defendant by Effectively Denying Defendant's Motion in Limine to Exclude Photographs of Naomi Budnick, and by Allowing Certain Photographs of Naomi Budnick into Evidence over Objection of Defense Counsel.

{¶7} Appellant argues in his first assignment of error that the trial court's judgment with regard to his conviction was based upon insufficient evidence. In reviewing a sufficiency of the evidence claim, the relevant inquiry is whether any rational fact finder, viewing the evidence in a light most favorable to the state, could have found all of the

essential elements of the crime proven beyond a reasonable doubt. *State v. Jones*, 90 Ohio St.3d 403, 417, 2000-Ohio-187, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, and *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. Whether the evidence is legally sufficient is a question of law, not fact. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. On review for sufficiency, courts do not assess whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *Id.* at 390. In determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789. Consequently, a verdict will not be disturbed based upon insufficient evidence unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484, 2001-Ohio-4; *Jenks* at 273.

{¶8} R.C. 2903.11 provides, in pertinent part:

(A) No person shall knowingly do either of the following:

(1) Cause serious physical harm to another or to another's unborn.

{¶9} R.C. 2901.22(B) defines "knowingly" as follows:

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.

{¶10} R.C. 2901.01(A)(5) defines "serious physical harm" and provides:

"Serious physical harm to persons" means any of the following:

(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

(b) Any physical harm that carries a substantial risk of death;

(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

{¶11} Here, appellant's specific argument is that there was insufficient evidence that Budnick suffered "serious physical harm." Appellant points out that there was no evidence from any hospital, physician or medical practitioner to demonstrate the nature and extent of Budnick's injuries. Appellant also points out that, although Budnick received a laceration on her forehead and scalp during the fight, and claimed she had a scar from it, she never showed the jury the scar. Also, appellant asserts, although Budnick testified that one of the photographs showed a "scar," it showed only an out-of-focus laceration and no healed "scar." Budnick also testified that her scalp laceration was never sutured or even bandaged. In sum, appellant contends that, while some photographs showed various cuts, scratches, swelling, and bruising, none of the photographs showed "serious physical harm."

{¶12} At trial, Budnick testified about her injuries. She said she woke up after appellant started beating her face with his fists while straddled over her. Appellant kept repeating to her that she was going to die. He then swung a coffee mug at her, and it shattered against her hand when she defended herself. The mug then hit her forehead. She tried to run out of the bedroom, but appellant grabbed her and slammed her into the wall. They struggled on the floor, and appellant bashed her head into the floor. She said their fighting continued for an hour to several hours, during which time he also smashed a beer bottle on her head. Appellant directed her to take a shower but she had to take a bath instead because of the pain; she was bruised from head to toe. Appellant then shoved her head under the water trying to drown her, leaving bruises on her neck. She kicked at him and got out of the tub. Appellant then pushed her to the floor, beating her head on the ground and kicking her in her back. Her hair was coming off on his boots. After she was eventually taken to the hospital by ambulance, plastic surgeons examined the broken bones in her face. Additionally, she had broken bones in her hand. She said that doctors did not put bandages or stitches on her forehead because they wanted a plastic surgeon to examine her. She identified at trial a "fuzzy" photograph of her forehead. She stated, "It is my forehead, or my head right here. I am actually branded. It is a scar." The prosecutor then asked, "You have a scar there from this?" She replied "Yes, he did it with his boot." She also identified photographs of her arm and hand, from which she had to pull shards of glass. She had a fracture of her fifth metacarpal in her right hand after the incident, which was re-broken during the struggle after it had healed several months prior.

{¶13} Seyller, Budnick's sister, testified that Budnick texted her pictures of her face the morning of the incident, and her face was badly battered. She had blood on her forehead, and her face was completely swollen. When Seyller saw Budnick at the hospital, Budnick had large pieces of skin missing from her forehead.

{¶14} Brian Meister, a detective with the Franklin County Sheriff's Office, testified that, when he saw Budnick in the hospital, she had a cast on her arm, her face was swollen, and she had cuts on her head.

{¶15} We find this evidence, if believed, would be sufficient to demonstrate "serious physical harm." Budnick's injuries required her to seek medical attention at the hospital. In *State v. Walker* (June 18, 1987), 8th Dist. No. 52391, the court of appeals held that, where injuries are serious enough to cause a victim to seek medical treatment, a jury may reasonably infer that the force used by a defendant caused serious physical harm. Budnick also conclusively testified that she had a scar on her forehead from appellant kicking her with his boot. A scar is a permanent disfigurement. See *State v. Edwards* (1992), 83 Ohio App.3d 357, 360 (where victim received cut above eye, resulting in permanent scar, jury could reasonably find that victim sustained some permanent disfigurement constituting serious physical harm); *State v. Ward*, 10th Dist. No. 10AP-430, 2011-Ohio-608, ¶15 (permanent scars caused by the defendant's splashing boiling water on the victim was serious physical harm); *State v. Jamhour*, 10th Dist. No. 06AP-20, 2006-Ohio-4987, ¶11 (scarring is a permanent disfigurement and evidence supported finding of serious physical harm). Despite appellant's claim, as outlined above, Budnick did, in fact, testify she had a scar. The testimony also demonstrated Budnick had numerous cuts on her face, arms, and hand, as a result of

appellant beating and breaking objects over her head, which may constitute serious physical harm. See *State v. Reckers*, 1st Dist. No. C-060451, 2007-Ohio-3679, ¶16 (evidence sufficient to support finding of serious physical harm where victim suffered numerous cuts and abrasions to head and face, necessitating treatment at hospital and resulting in a scar or indentation). Budnick further testified that her hand was re-broken during the incident, which supports a finding of serious physical harm. See *State v. Nelson*, 8th Dist. No. 90827, 2008-Ohio-5735, ¶24 (a broken hand, bruises, lacerations, and a swollen eye demonstrate serious physical harm). Our own review of the photographs reveals Budnick's face and neck were bright red with abrasions, and she had a swollen and cut lip, significant lacerations to her forehead, blackened and swollen eyes, cuts under her eyes, bruising behind her ears, and red sclera. See *State v. Plemmons-Greene*, 8th Dist. No. 92267, 2010-Ohio-655, ¶29 (photograph of black eye, swelling, scratches on neck, and bruising, in conjunction with testimony, sufficient for a finding of serious physical harm). Viewing the evidence in a light most favorable to the state of Ohio, plaintiff-appellee, we find there was sufficient evidence to support the element of "serious physical harm." Therefore, appellant's first assignment of error is overruled.

{¶16} Appellant argues in his second assignment of error that his conviction was against the manifest weight of the evidence. This court's function when reviewing the weight of the evidence is to determine whether the greater amount of credible evidence supports the verdict. *Thompkins* at 387. In order to undertake this review, we must sit as a "thirteenth juror" and review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether the trier of

fact clearly lost its way and created a manifest miscarriage of justice. *Id.*, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. If we find that the fact finder clearly lost its way, we must reverse the conviction and order a new trial. *Id.* On the other hand, we will not reverse a conviction so long as the state presented substantial evidence for a reasonable trier of fact to conclude that all of the essential elements of the offense were established beyond a reasonable doubt. *State v. Getsy*, 84 Ohio St.3d 180, 193-94, 1998-Ohio-533.

{¶17} In addressing a manifest weight of the evidence argument, we are able to consider the credibility of the witnesses. See *Martin* at 175. However, in conducting our review, we are guided by the presumption that the jury, or the trial court in a bench trial, is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. Thus, a reviewing court must defer to the factual findings of the jury or judge in a bench trial regarding the credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Concerning the issue of assessing witness credibility, the general rule of law is that "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123. Indeed, the fact finder is free to believe all, part or none of the testimony of each witness appearing before it. *Hill v. Briggs* (1996), 111 Ohio App.3d 405, 412. If evidence is susceptible to more than one construction, reviewing courts must give it the interpretation that is consistent with the verdict and judgment. *White v. Euclid Square Mall* (1995), 107 Ohio App.3d 536, 539. Mere disagreement over the credibility of witnesses is not

sufficient reason to reverse a judgment. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶24.

{¶18} Here, appellant's argument with regard to manifest weight of the evidence concerns the same issue as raised in his first assignment of error. Appellant contends that the greater amount of credible evidence demonstrated that Budnick's injuries did not rise to the level of "serious physical harm." We disagree. Appellant first points to the testimony of Byron Smith, a Franklin Township police officer, that Budnick only had some dried blood on her forehead and he considered her injuries "minor." Appellant's summary of Smith's testimony is incomplete. Although Smith did describe Budnick's injuries as "some dried blood" on her forehead, he only saw her very briefly before she went to the medic, and he never talked to her again. As for the contention that Smith called her injuries "minor," the officer actually said it was believed that the injury "was minor at that point." Smith then continued that he later found out otherwise. Thus, we reject appellant's argument in this respect.

{¶19} Appellant also argues that Budnick's testimony was not credible. We first note that appellant points out several apparent conflicts in Budnick's testimony. However, the vast majority of these conflicts were on minor factual points wholly unrelated to the issue before us regarding whether Budnick's injuries constituted "serious physical harm." Appellant points to conflicts regarding whether Budnick was holding her child when police arrived, whether appellant was technically living with her at the time of the incident, whether she had any alcohol the night of the incident, the length of the incident, and how far she actually went into the air after appellant kicked her. We have reviewed the testimony on these points and find the testimony on some of these matters to be vague at

times and uncertain at other times, but we do not find any of the testimony relevant to the salient element of "serious physical harm" and are not persuaded that such should render her testimony about the extent of her injuries not credible. Furthermore, appellant's citation to Seyller's testimony that Budnick can sometimes blow things out of proportion is taken out of context. Seyller followed up this statement by stating that she dismissed the possibility that Budnick was exaggerating when she saw the pictures Budnick texted to her, and she immediately telephoned Budnick. Thus, this argument is not persuasive.

{¶20} Appellant also argues that the jury lost its way when it failed to conclude that appellant committed an aggravated assault rather than a felonious assault. Aggravated assault is not a lesser-included offense of the offense of felonious assault. Instead, aggravated assault is an inferior degree of felonious assault because its elements are identical to or contained within the offense of felonious assault, coupled with the additional presence of one or both mitigating circumstances of sudden passion or a sudden fit of rage brought on by serious provocation occasioned by the victim. *State v. Logan*, 10th Dist. No. 08AP-881, 2009-Ohio-2899, citing *State v. Deem* (1988), 40 Ohio St.3d 205; see also R.C. 2903.12; *State v. Stewart*, 10th Dist. No. 10AP-526, 2011-Ohio-466, ¶7. A defendant bears the burden of proving the mitigating factor by a preponderance of the evidence. *State v. Rhodes* (1992), 63 Ohio St.3d 613, syllabus.

{¶21} Here, appellant testified that he acted with sudden passion and a sudden fit of rage when, after he arrived at the apartment and had an argument with Budnick over the messy condition of the apartment, the lack of structure in her young son's life, and his calling her a bad mother, Budnick grabbed his recently injured fingers and hand and squeezed, causing him excruciating pain. Appellant testified that he reacted to the pain by

striking Budnick with an empty beer bottle to get her to release her grip on his hand. However, we find nothing in the record to suggest that the jury did not give due and fair consideration to the inferior offense of aggravated assault. Rather, it appears as though the jury simply did not believe appellant's version of the events. As explained above, the jury was in the best position to view appellant and Budnick during their testimonies and decide who was more credible. Although appellant faults Budnick's version of the events as being unbelievable because she provided no reason for appellant's assault, the jury might have found it difficult to fault Budnick for not knowing what had enraged appellant because she had been sleeping. Furthermore, the jury may well have believed part of appellant's story; that is, the part that he came to the apartment to find it messy and Budnick's son still awake, and believed this is what prompted him to assault Budnick. A jury is free to believe all, part or none of any witness' testimony, *State v. Antill* (1964), 176 Ohio St. 61, and the jury may have only believed part of his testimony here. We simply have no evidence that the jury did not fairly consider appellant's testimony, and we cannot conclude it lost its way when it found Budnick more credible. For these reasons, we find the jury's verdict was not against the manifest weight of the evidence. Appellant's second assignment of error is overruled.

{¶22} Appellant argues in his third assignment of error that he received ineffective assistance of counsel. The Sixth Amendment to the United States Constitution guarantees a criminal defendant the effective assistance of counsel. *McMann v. Richardson* (1970), 397 U.S. 759, 771, 90 S.Ct. 1441, 1449. Courts employ a two-step process to determine whether the right to effective assistance of counsel has been violated. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.*

{¶23} An attorney properly licensed in the state of Ohio is presumed competent. *State v. Lott* (1990), 51 Ohio St.3d 160, 174. The defendant has the burden of proof and must overcome the strong presumption that counsel's performance was adequate or that counsel's action might be sound trial strategy. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. In demonstrating prejudice, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus.

{¶24} In the present case, appellant argues that his counsel was ineffective in several respects. Appellant first contends his trial counsel was ineffective when he failed to object to the prosecutor's comment in his opening statement that the jury would be seeing photographs of Budnick's injuries and then compounded the error by saying they were "bad" and "aren't pretty" in his own opening statement, all while a motion in limine to preclude the photographs was still technically pending before the trial court. Appellant also claims his counsel failed to object when the prosecutor published some of the photographs to the jury. Although appellant's counsel did unsuccessfully object to some of the photographs after the prosecutor sought to admit them into evidence, on the bases

that they were inflammatory and cumulative, appellant asserts his counsel should have objected to them earlier. Appellant maintains the photographs were unfairly prejudicial.

{¶25} Appellant's present argument essentially amounts to a claim that his trial counsel was ineffective when he failed to make any motions or objections to preclude the mention and admittance of the photographs showing Budnick's injuries. When a claim of ineffective assistance of counsel is based on counsel's failure to file a motion or make an objection, the appellant must show that the motion had a reasonable probability of success. *State v. Adkins*, 161 Ohio App.3d 114, 2005-Ohio-2577, ¶14 (motion); *State v. McClellan*, 3d Dist. No. 1-09-21, 2010-Ohio-314, ¶62 (objection). If the motion or objection would not have been successful, then the appellant cannot prevail on an ineffective assistance of counsel claim. *State v. Barbour*, 10th Dist. No. 07AP-841, 2008-Ohio-2291, ¶14. In the present case, we find any motion or objection to preclude the mention or admittance of the photographs of Budnick's injuries would have been unsuccessful.

{¶26} Photographs of a victim's injuries are relevant and almost always admissible in an assault case. *State v. Root*, 2d Dist. No. 20366, 2005-Ohio-448, ¶17. It is well-settled that the admission of photographs is left to the discretion of the trial court. *State v. Smith*, 80 Ohio St.3d 89, 108, 1997-Ohio-355. An abuse of discretion involves more than an error of judgment; it connotes an attitude on the part of the trial court that is unreasonable, unconscionable or arbitrary. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. A trial court may reject a photograph, otherwise admissible, due to its inflammatory nature if on balance the unfair prejudice to the defendant substantially outweighs its probative value. See Evid.R. 403(A). However, the mere fact that a

photograph is gruesome is not sufficient to render it per se inadmissible. *State v. Woodards* (1966), 6 Ohio St.2d 14, 25.

{¶27} Here, the trial court's decision to admit the photographs of Budnick's injuries was not unreasonable, unconscionable or arbitrary. The photographs accurately demonstrated the state of Budnick's injuries and were used to support the state's burden of proving she suffered serious physical harm. Our own review of the photographs reveals that they are neither particularly graphic nor arouse great emotion. They do show the extent of Budnick's injuries, but they do not appear to be gratuitously gory. There are several close-up views of the injuries, but they too are straightforward representations that are not inflammatory. Budnick suffered several different injuries, and the photographs illustrate the individual wounds and abrasions. Furthermore, the various injuries depicted in the photographs support Budnick's claims as to what specific events occurred. Therefore, appellant cannot establish that the potential unfair prejudice of the photographs substantially outweighed their probative value.

{¶28} Appellant also argues that his counsel provided ineffective assistance by admitting appellant was guilty of aggravated assault. Appellant points out that defense counsel stated in his opening statement that appellant's actions were a reaction to Budnick's actions, and what he did "is an aggravated assault, not a felonious assault." Defense counsel then stated in closing argument that the state failed to prove "serious physical harm," and, therefore, appellant did not even commit aggravated assault; yet, defense counsel already admitted such in opening statement. Defense counsel also stated in closing argument that he believed the jury needed to consider aggravated assault. Appellant claims that his trial counsel's admission that his actions constituted

aggravated assault predisposed the jury to conclude that, in fact, serious physical harm was inflicted upon Budnick.

{¶29} However, as we have already found that the jury's verdict finding appellant guilty of felonious assault was based upon sufficient evidence and not against the manifest weight of the evidence, appellant's claims, in this respect, are moot. The jury correctly found that appellant was guilty of felonious assault, regardless of defense counsel's comments regarding aggravated assault. Furthermore, we observe that the trial court expressly instructed the jury that opening statements and closing arguments of counsel are not evidence but only designed to assist the jury. A jury is presumed to follow the instructions of the court. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶86. Thus, we presume the jury found appellant guilty of the elements of felonious assault based upon the actual evidence adduced at trial and not defense counsel's statements. For all of the above reasons, we find this argument is without merit. Therefore, we find appellant's trial counsel did not provide ineffective assistance, and appellant's third assignment of error is overruled.

{¶30} Appellant argues in his fourth assignment of error that the trial court erred when it effectively denied his motion in limine to exclude photographs of the victim and when it allowed certain photographs of the victim into evidence over objection. A motion in limine is a request that the court limit or exclude use of evidence that the movant believes to be improper and is made in advance of the actual presentation of the evidence to the trier of fact, usually prior to trial. *State v. Winston* (1991), 71 Ohio App.3d 154, 158. The motion asks the court to exclude the evidence unless and until the court is first shown that the material is relevant and proper. *Id.* Thus, because a trial court's

decision on a motion in limine is a ruling to admit or exclude evidence, our standard of review on appeal is whether the trial court committed an abuse of discretion that amounted to prejudicial error. *State v. Yohey* (Mar. 18, 1996), 3d Dist. No. 9-95-46, citing *State v. Graham* (1979), 58 Ohio St.2d 350, and *State v. Lundy* (1987), 41 Ohio App.3d 163.

{¶31} In addressing appellant's third assignment of error, we have already found that the trial court's decision to admit the photographs of Budnick's injuries was not unreasonable, unconscionable or arbitrary. The photographs accurately demonstrated the state of Budnick's injuries and were not inflammatory. Therefore, the trial court did not err when it effectively denied appellant's motion in limine to exclude the photographs of Budnick and when it allowed photographs of Budnick into evidence over objection. Appellant's fourth assignment of error is overruled.

{¶32} Accordingly, appellant's four assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

FRENCH and DORRIAN, JJ., concur.
