[Cite as *State v. Barker*, 2012-Ohio-522.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NO. 2010-P-0044**
ADRIAN A. BARKER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2009 CR 0688.

Judgment: Affirmed in part, reversed in part, and remanded.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Daniel R. Warren, *Karl Fanter*, *Lisa M. Ghannoum*, and *Karen Swanson Haan*, Baker & Hostetler, L.L.P., 3200 PNC Center, 1900 East Ninth Street, Cleveland, OH 44114-3482 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Adrian A. Barker, appeals from the judgment of conviction entered by the Portage County Court of Common Pleas, after trial by jury, on one count of felony murder, one count of murder, one count of felonious assault, and one count of tampering with evidence. We affirm the trial court's judgment as it relates to the conviction for tampering with evidence. The trial court, however, did not apply the proper legal standard for determining whether lesser included offense instructions were

required. The proper standard mandates a court to consider whether the evidence, viewed in the defendant's favor and with disregard for its persuasiveness, could reasonably support both an acquittal on the crimes charged and a conviction on the proposed lesser included offenses. Instead of employing this test, the court declined to instruct the jury on the proposed lesser included offenses based upon appellant's assertion of a "complete defense." Employing the appropriate legal standard, the court was required to instruct the jury on assault, involuntary manslaughter, and reckless homicide, which are lesser included offenses of felonious assault, felony murder and murder, respectively. As the court erred in failing to instruct the jury on these lesser included offenses, appellant's convictions for felonious assault, felony murder, and murder are reversed and the matter remanded for a new trial.

{¶2} **<u>The Incident</u>**

{¶3} On November 14, 2009, appellant, a student at the University of Akron, and his friend, Ronald Kelly, attended a fraternity party at Kent State University. At the party, they drank vodka and juice from milk jugs and caroused with other partygoers. At approximately midnight or 12:30 a.m., Glenn Jefferson, also a University of Akron student and friend of appellant and Kelly, met the duo at the party. The three young men went into the basement of the fraternity house where they partied and danced until leaving at approximately 2:00 a.m.

{¶4} The three entered Jefferson's white 1995 Honda Civic, which was parked in a lot near the fraternity house. At approximately the same time, Christopher Kernich, Bradley Chelko, Dave Clements, and Christopher Pataky were on their way home from an evening of drinking and socializing. As Jefferson's car was beginning to exit the lot,

Kernich, Chelko, Clements, and Pataky were passing the parking lot on foot. Jefferson's Honda left the lot quickly and nearly hit Pataky as it exited; the near-miss prompted Pataky to shout some "unfriendly" words at the car. As they drove away, Jefferson asked his companions "what the fuck did they say?" And Kelly immediately instructed Jefferson to "pull the fuck over." Jefferson complied and, at the end of the block, pulled the vehicle in the driveway of a realty business.

{¶5} In the meantime, Kernich, Chelko, Clements, and Pataky continued walking in the direction of the parked vehicle, Pataky and Clements ahead of Chelko and Kernich. As the walkers passed Jefferson's car, appellant and Kelly exited the vehicle. Kelly shoved Chelko into the Honda's rear bumper then punched him in the face. After regaining his balance, Chelko threw a punch at Kelly that missed and Kelly hit Chelko a second time. The second blow knocked Chelko to his knees with a bleeding chin. Kernich then entered the affray, "squaring off" with Kelly.

{¶6} Kernich and Kelly, each with their fists up, moved into the middle of the street. As Kelly and Kernich "danced" in the street, each in a fighting posture, appellant, running at a full sprint, blindsided Kernich with a punch to the head. Kernich collapsed to the ground unconscious, cracking his head on the pavement. Appellant and Kelly then commenced kicking and stomping the defenseless Kernich. After both appellant and Kelly had administered between two and three kicks and/or stomps to the head and chest of Kernich, appellant was heard exclaiming to a crowd of horrified onlookers: "Yeah we killed that n*****, yeah we'll kill somebody else too."

{¶7} During the melee, Jefferson went to retrieve his vehicle; he ripped off its temporary tags to avoid identification and returned to the scene to pick up appellant and

Kelly. Kelly entered the vehicle but appellant had fled down the street. Jefferson drove in the same direction and discovered appellant in the parking lot of a local auto shop with three or four civilian witnesses attempting to detain him.

{¶8} Meanwhile, several concerned individuals called 9-1-1 and, within minutes, emergency medical personnel and police had arrived at the scene. After speaking with multiple eyewitnesses, appellant and Kelly were detained and eventually arrested. Kernich was quickly transported to the trauma center at Akron City Hospital. Upon arrival, Kernich was nonresponsive and comatose. A CAT scan confirmed he sustained severe head injuries, including a skull fracture, multiple cranial and cerebral contusions, as well as significant subdural hemorrhaging. Given the nature and extent of the injuries, Kernich's brain began to swell aggressively following the assault. Because, however, the injuries affected both sides of the brain, nothing could be done to relieve the swelling. Shortly after his arrival at the hospital, his physician concluded Kernich's brain had herniated such that the blood flow had been completely cut off. In short, Kernich's condition was irreversible and consistent with brain death. Several days later, Kernich was removed from life support and was pronounced dead.

{¶9} On November 19, 2009, the Portage County Grand Jury indicted appellant for felonious assault, a felony of the second degree, in violation of R.C. 2903.11(A)(1), and obstructing official business, a felony of the first degree, in violation of R.C. 2921.31. After Kernich was pronounced dead, the grand jury filed a supplemental indictment charging appellant with two counts of murder in violation of R.C. 2903.02(A) and (B). Two additional misdemeanor assault charges were included in a supplemental indictment, filed February 26, 2010. The February supplemental indictment also

included one count of tampering with evidence, a felony of the third degree, in violation of R.C. 2921.12(A)(1) and (B), and an additional count of obstructing official business. In March 2010, the grand jury filed an additional amended supplemental indictment to reflect the certified date of Kernich's death.

{¶10} **Trial Testimony**

{¶11} Numerous motions were filed and a jury trial commenced on April 13, 2010. At trial, many eyewitnesses testified; although the accounts of the fight differed in certain respects, the witnesses for the state conveyed, for the most part, a similar rendition of the events they observed. A summary of the relevant eyewitness testimony is as follows:

{¶12} Christopher Pataky testified that he, Kernich, Chelko, and Clements had been out visiting various bars on November 14, 2009. He stated each member of their group had been drinking, but no one was excessively drunk. In particular, Pataky, who is 6'7" and 255 lbs, testified he consumed approximately eight beers over a four-to-five hour period; given his size, he testified, such a quantity of alcohol did not render him impaired.

{¶13} While walking home, Pataky testified he was nearly struck by a white Honda Civic leaving the parking lot of the Firestone station located on the corner of Deypeyster and East Main Streets in Kent, Ohio. Pataky testified he yelled at the vehicle, advising the driver that his "piece of shit car" nearly struck him. According to Pataky, the car stopped further down East Main and parked "sloppily" in a driveway. Pataky testified the group continued down the street; he and Clements about 15 yards in front of Kernich and Chelko. Pataky stated he and Clements passed the car without

incident; after passing the vehicle, however, he turned around and observed Chelko on the ground adjacent to the white Civic. Pataky noticed that Kernich, who was 6'3" and approximately 200 lbs, in the street with Kelly, 5'10" and 235 lbs.

{¶14} Pataky rushed to assist Chelko and, after confirming Chelko was fine, Pataky looked out to the street and witnessed appellant, 6'0" and approximately 180 lbs, and Kelly stomping on Kernich's head. Pataky testified he was in "disbelief" that the two men were stomping on his unconscious friend. Pataky testified he then ran toward appellant and pushed him away from the unresponsive Kernich. According to Pataky, after being shoved, appellant punched him in the lip and fled the scene.

{¶15} Overall, Pataky testified he witnessed appellant stomp Kernich twice. On cross-examination, Pataky acknowledged that he never mentioned anything about Kelly stomping Kernich in his original statement, written on November 17, 2009.

{¶16} Bradley Chelko, Kernich's roommate, similarly testified that as he and his friends were walking down East Main, a white Honda came out of a parking lot and almost hit the group. He stated his group yelled at the car, which stopped in a driveway up the street. According to Chelko, the rear bumper was halfway on the sidewalk. Chelko testified as he attempted to pass the vehicle, two black males and one white male exited the car. The larger of the two black males, later identified as Kelly, pushed Chelko into the vehicle's bumper and then punched him in the face. As he stood up, Chelko stated he took a swing at Kelly but missed. Kelly then punched Chelko a second time, knocking him down. The second punch cut Chelko's chin and stunned him; when he looked up, he noticed Kernich was in the street "dancing" with Kelly. Chelko testified he then saw appellant charge Kernich and strike him with a running

punch. Kernich fell immediately and, according to Chelko, both appellant and Kelly began kicking Kernich in the head and abdomen. Chelko stated he had consumed approximately five or six beers over the course of the night, but was "very attentive." Approximately 20 minutes after the assault, Chelko later identified each assailant for police during a show-up identification. Chelko conceded both appellant and Kelly were visibly handcuffed at the time of the identification.

{¶17} Dave Clements, Kernich's close friend and fellow student at Kent State, stated he had consumed between seven and eight beers over the course of the evening. Similar to Pataky and Chelko, Clements testified that the white Honda nearly hit him and his friends, after which words were exchanged. He stated that he and Pataky had passed the vehicle up the street without incident; when he turned around to see where Kernich and Chelko were, however, he witnessed Chelko being pushed into the vehicle and subsequently punched by a black male later identified as Kelly. After Chelko was hit, Clements stated Kernich "got involved." He testified Kelly and Kernich were "squaring up" in the street when a taller, light-skinned black male in a white t-shirt, later identified as appellant, ran at Kernich and blindsided him with a "powerful punch" to the head. After Kernich fell, Clements testified he witnessed appellant stomp on Kernich's head.

{¶18} Clements stated he was 100 percent certain appellant stomped on Kernich's head twice. After the stomping, Clements testified he heard Kelly yelling at the surrounding crowd. As Kelly retreated, Clements testified he followed Kelly and shouted at him as he left. Kelly ultimately turned and punched Clements in the face. Clements later identified appellant and Kelly at a show-up identification approximately

20 minutes after the incident. He testified he did not see the men in handcuffs or in a police cruiser but, given the police presence, he knew they were being detained.

{¶19} On cross-examination, Clements admitted that, during an interview that took place on November 16, 2009, he was unable to say with certainty that the individual who punched Kernich was white or black. Nevertheless, he consistently maintained the individual who struck Kernich had dark hair, like appellant, not short red hair, like Jefferson, the only other individual with Kelly.

{¶20} Megan Prescott, also a student at Kent State and friend of Kernich, was with friends and fellow students Ali Gantz and Kerra Coticchia on the night of the incident. The young women were at a local bar until they left at approximately 2:00 a.m. Prescott testified she consumed two mixed drinks and a shot over a four-hour period. As the girls were walking home, Prescott saw Kernich walking with some friends. Kernich acknowledged her, shouting, "hey, Prescott." She testified that, although it was dark, the street lighting was sufficient to "easily distinguish people."

{¶21} After passing Kernich and his friends, Prescott testified she witnessed a white car speed past her. She stated a white male was driving and two black males were passengers. She subsequently heard a car door slam and heard a male exclaim: "Are you talking shit?" Prescott trained her attention toward the remark and witnessed Kernich and the lighter-skinned black male in the road. She testified that each man had thrown a punch or two, but no one connected. According to Prescott, Kernich appeared to throw up his hands in a gesture indicating he did not want to fight; at that point, the lighter-skinned black male, later identified as appellant, struck Kernich in the side of the head with a punch that "definitely had intention behind it."

{¶22} After Kernich fell, Prescott, who was approximately ten feet from the incident, testified appellant and another black male, later identified as Kelly, began kicking Kernich's head like a soccer ball. Prescott was able to identify the clothing each assailant was wearing and identified appellant as the individual who first hit Kernich with "110 percent" certainty. Throughout the entire investigation, Prescott consistently maintained that the assailants were two black males, one with lighter skin than the other.

{¶23} Ali Gantz, who was with Prescott and was a friend of Kernich, also witnessed the assault. She testified she had been out with friends that night and consumed two beers and one shot over the course of the evening. According to Gantz, as she, Prescott, and Coticchia were walking home, she witnessed one of Kernich's friends, with whom she was unfamiliar, being pushed into the white Honda by a black male in a red shirt. She testified this male, later identified as Kelly, and Kernich started a "boxing match" in the street. Gantz testified the fight was beginning to "disburse" when, suddenly, appellant charged Kernich and, with a "running leap," punched Kernich in the head. According to Gantz, Kernich did not see it coming and the force of the blow rendered him completely unconscious. She then witnessed appellant kick Kernich twice in the torso. Gantz testified she did not witness Kelly kick Kernich after he fell. With respect to her level of certainty, Gantz testified she was "100 percent certain" appellant was the individual who punched Kernich in the head and "100 percent certain" appellant "soccer kicked" Kernich after he was down.

{¶24} Charles Johansen, another Kent State student, testified he was walking home after consuming three or four beers over the course of the evening. As he made

his way down East Main Street, Johansen testified he observed a black male arguing and pushing a white male in the street. He testified a separate black male charged the white male and struck the white male with an over-arm punch to the side of the head. The white male collapsed to the ground and, according to Johansen, the black male who struck the victim stomped or kicked the latter in the vicinity of his head. Between ten and 15 minutes after the assault occurred, Johansen, through a show-up identification procedure, identified appellant as the individual who threw the punch and subsequently stomped the victim. Johansen testified he was aware appellant was being detained by police at the time of the show-up.

{¶25} Thomas Coleman, a Kent State student who also worked Kent State campus security, testified he was on the porch of a fraternity house when he observed two black males accost a white male in the street. He testified he was approximately 50 feet from the incident, and he saw a black male in a red shirt yelling at the white male. According to Coleman, the white male did not appear interested in fighting because he had his hands at his side. Coleman testified, however, that a black male in a white shirt suddenly sucker-punched the white male in the head. Coleman witnessed the white male collapse and hit his head on the pavement. Coleman could hear the thud of the victim's head hit the street and analogized the sound to "dropping a bowling ball on the floor." Coleman approached the scene and witnessed appellant kicking the victim in the head using a "soccer ball kick." By the time he reached the melee, Coleman testified he was approximately one foot away from appellant and Kelly. Coleman, who had approximately six cans of beer over the course of the night, later identified appellant and Kelly by photographs first published in a local newspaper several days after the assault.

{¶26} Robert Clouden, a student at Kent State and risk manager for the fraternity throwing the party attended by Coleman, also witnessed the incident. Clouden testified he was inside the fraternity house when he heard someone exclaim "fight." Clouden testified he went outside and observed a light-skinned, black male with puffy, curly hair in a white t-shirt stomping on an unconscious individual's head. Clouden left the porch and approached the scene. He testified he came within arm's length of the attacker, who he later identified as appellant. A white Honda arrived on the scene and, for the first time, Clouden saw Kelly. Clouden testified he had only two Bud Lights over the course of the entire evening. Similar to Coleman, Clouden also identified appellant and Kelly via the photograph that appeared in the newspaper.

{¶27} Anthony Gallas, another Kent State student, testified he was with his friends, Tyler Martin and Jared Bartholomew, on the night of the incident. The three young men had spent the evening at several bars where Gallas had between eight and ten beers over a four-hour period. As they were walking home, Gallas witnessed the fight in its entirety. He testified he saw a white male in a black shirt and a black male in a red shirt, later identified as Kelly, in the middle of the street. He testified that a second black male in a white v-neck shirt, later identified as appellant, charged the white male and punched him in the side of the head knocking the white male out immediately. As the victim collapsed, Gallas noted, his head bounced off the pavement. According to Gallas, the victim was completely blindsided by the attack. Once the victim fell, Gallas testified that Kelly then proceeded to kick him in the top of the head while appellant simultaneously stomped on the victim's head and chest; Gallas further testified he saw an individual later identified as Jefferson throw an "aftermath kick" to the victim's

stomach. On cross-examination, the defense pointed out that in two previous statements, Gallas never specifically identified Jefferson as an individual who kicked the victim.

{¶28} Tyler Martin testified that, on the night in question, he had six drinks over the course of a three-hour period while out with his friends, Gallas and Bartholomew. As the three young men walked down East Main Street on their way home, Martin testified he witnessed a black male in a red, short-sleeved t-shirt, later identified as Kelly, "squared off" with a white male, later identified as Kernich. He then saw a second, lighter-skinned black male in a white v-neck shirt "come pretty much out of nowhere on a 15-yard sprint at the * * * victim - - and he was running at full speed and he crow hopped and hit him in the back of the head."[1] Martin testified the victim was knocked out immediately and, as he fell, his head bounced off the concrete. Once the victim hit the ground, Martin testified appellant violently stomped the victim three or four times. According to Martin, appellant clearly "wanted to hurt" the victim. When asked to explain his testimony, Martin stated, "[w]hy else would you kick someone that's not moving on the ground and not protecting themselves[?]"

{¶29} By the end of the assault, Martin testified he was within five or six feet of the assailants and got a "very good look" at each. As police arrived, Martin sought them out immediately to give a statement and provide identification of the attackers. Officer Sarah Berkey, the first responding officer, testified Martin approached her, very upset, and, while pointing to appellant and Kelly, told the officer "don't let them leave." On

1. According to testimony, a "crow hop" is a baseball term used to describe the pronounced wind up an outfielder utilizes when throwing a ball from the outfield into the infield.

cross-examination, Martin admitted he did not see well at night because he is blind in his left eye, as well as color blind.

{¶30} Glenn Jefferson, a sophomore at the University of Akron and Ronald Kelly's roommate, testified appellant and Kelly asked him to go to a party with them at Kent State on the night of November 14, 2009. He declined, but later changed his mind. Jefferson arrived at Kent at approximately 12:00 or 12:30 a.m. where he met appellant and Kelly at a fraternity house. The trio drank and danced until approximately 2:00 a.m. when they left. Upon leaving the party, Jefferson testified the three young men clambered into his white Honda Civic at which point "a group of guys and a couple girls" passed by the vehicle. According to Jefferson, some harsh words were exchanged between the walkers and his companions. After pulling out of the parking lot, Jefferson testified Kelly ordered him to pull over. Once the car stopped, Kelly and appellant leapt out of the vehicle. By the time Jefferson exited, he testified he saw an individual getting up from the ground near the rear of the vehicle and noticed appellant and Kelly "marching down the street."

{¶31} Jefferson testified he was then accosted by an unknown male. According to Jefferson, the unidentified male took a swing at him; Jefferson ducked and countered with a punch, which connected; as his alleged attacker fell back, Jefferson testified he kicked to the unidentified male's stomach to keep him away. After kicking his purported attacker, Jefferson testified he looked up and saw "[Kelly] and [appellant] stomping some kid on the ground." Jefferson testified he specifically witnessed Kelly stomp on the victim's head twice and appellant stomp on the victim's head once. Jefferson

returned to his vehicle, ripped off his temporary tag to avoid being identified, and returned to the scene to pick up his companions. Kelly jumped in the car, but, according to Jefferson, appellant had left the immediate area. As Jefferson and Kelly drove up the street, they saw appellant in the parking lot of a local auto service business surrounded by three or four individuals. Jefferson testified when he and Kelly exited the vehicle, "a couple guys came up to [Kelly] and I got in the way saying, 'Let's stop this fighting, and I'm trying to get my two dudes so we can go home.' And one of the guys told me, 'Well, your two dudes just fucked my friend up on the street.'" After this exchange, the police arrived and surrounded Jefferson, Kelly, and appellant in the parking lot.

{¶32} During his testimony, Jefferson admitted he lied to police throughout the course of the investigation to cover for his companions; he initially told police the fight was a result of a group of people threatening the three young men and casting racial slurs at appellant and Kelly. He testified, however, that despite his numerous fabrications throughout the course of the investigation and indictment process, he was being completely truthful in his testimony at trial.

{¶33} After the prosecution rested, the defense put several witnesses on the stand whose statements contradicted the foregoing general rendition of events. First, Jacquelyne Slicker, another student at Kent State, testified she was approximately 75-80 feet from the incident when it occurred. In a statement to police, she stated the individual who struck the victim was a white male, with dirty-blonde hair. Jefferson was the first individual she saw upon speaking with police, and she immediately identified him as the assailant. She testified, however, after observing appellant at the scene, she

began to question her own identification. Slicker ultimately testified that she did not want to recant on her original identification but, after considering what she witnessed, she recognized she may have provided police with a misidentification. She further testified that Kelly was the only individual she witnessed kicking the victim.

{¶34} Carl Belfiore, another Kent State student, was with Slicker when the incident occurred. At the scene, Belfiore gave a written statement. The statement was read into the record as follows:

> **{¶35}** Conflict between a white male and an African American male. Third white male charges and knocks out white male fighting with African American male. White male is unconscious. African American male kicks unresponsive male in the head at least two times. (Sic.)

{¶36} Although Belfiore identified a "third white male" as the assailant, in a second statement, after talking to police, he identified appellant as the individual who threw the knock-out punch. Belfiore testified that, despite the potential conflicts in his statements, he consistently maintained the assailant had dark, wavy hair. And, after seeing appellant's picture, Belfiore testified he was certain appellant was the attacker. Like Slicker, Belfiore testified he only witnessed Kelly kicking the victim after he was rendered unconscious.

{¶37} Danielle Contrada, a Kent State student, also provided an initial statement to police that a white male struck the victim in the head; she also stated she only saw Kelly kicking the victim while he was on the ground. Contrada testified, however, that she did not get a good look at the assailant and her statement was based upon her

perception that the attacker *looked* white because Kelly's skin color was significantly darker than the person who punched the victim from behind. On cross-examination, Contrada testified that she knew the individual who struck the victim had dark hair; thus, had she known that Jefferson had red hair, she would have specifically excluded him as the potential suspect at the time she made the statement.

{¶38} Jared Bartholomew testified he was with Gallas and Martin on the evening in question and was also a witness to the incident. In his statement to police, however, Bartholomew identified Kelly as the individual who punched the victim and identified a light-skinned male as the only party who kicked the victim. Bartholomew later identified the "light-skinned male" as appellant. He testified after the victim fell, appellant "ran up and kicked like * * * [a] soccer style kick, pretty hard, two times. Stomped * * * pretty hard on his chest."

{¶39} In addition to the foregoing eyewitness testimony, DNA evidence was taken from blood stains found on appellant's shirt and shoe. Sergeant Edward Wheeler, of the Kent Police Department, testified he arrived on the scene approximately two minutes after receiving the call; he later took appellant to the police station. In the course of his interviewing appellant, Wheeler observed what appeared to be blood on appellant's shirt, which appellant could not explain. Also, after appellant was arrested, a video taken while he was in custody depicted appellant licking his thumb and wiping the side of his shoe. The shirt and shoe were collected by police and analyzed by forensic scientists at BCI and a separate, private DNA laboratory.

{¶40} At trial, Chad Britton, a forensic scientist at BCI, testified he tested and analyzed the items. Britton concluded six stains on appellant's shirt tested

presumptively positive for blood; similarly, appellant's shoe tested presumptively positive for blood on the heel. Linda Eveleth, a forensic scientist at BCI's DNA division, performed the next battery of tests and issued a report concluding of the six blood stains on appellant's shirt, three included a mixture of DNA from the victim, appellant, and Kelly. Eveleth further concluded that the major profile from two of these six stains was consistent with the victim's DNA. According to Eveleth, the expected frequency of occurrence of this major profile is one in 24 quintillion, 930 quadrillion unrelated individuals.

{¶41} Further, DeWayne Winston, a forensic scientist in the Forensic Identity Department at Laboratory Corporation of America, testified he received a DNA swab sample from BCI that was taken from appellant's shoe. Winston testified he extracted DNA from the swab and then employed a DNA test which examined 17 different genetic markers that are known to be different between separate individuals. Winston testified he was able to develop a profile from the swab with 16 of the 17 different genetic systems. Extrapolating from this data, Winston concluded the victim could not be excluded as a contributor of the DNA taken from appellant's shoe. According to Winston, the probability of finding another individual in the general population that had the same DNA profile obtained from appellant's shoe is one in six billion, 500 million, a figure greater than the earth's current population.

{¶42} Finally, Dr. George Sterbenz, a forensic pathologist for the Summit County Medical Examiner, testified he conducted the autopsy on the victim. Dr. Sterbenz testified he reviewed the victim's treatment history from the EMS' arrival on the scene of the assault to the date the victim was pronounced dead. In light of this history, the

doctor conducted a physical examination of the victim. In the course of the examination, the doctor documented the victim suffered a displaced skull fracture some 10 centimeters in length; multiple skull and brain bruises; and significant subdural hemorrhaging, which the doctor described as "bleeding around the brain" within the cranial cavity as well as bleeding within the actual tissue of the brain.

{¶43} The doctor explained to the jury that the victim's treatment history and injuries indicated the victim's brain began to swell immediately after the assault and, because of the severity of the beating, he failed to improve regardless of medical treatment. The continued herniation of the victim's brain disrupted blood flow which quickly compromised the brain tissue. Eventually, blood was no longer entering or leaving the brain, which resulted in death based on neurologic criteria. The doctor concluded that the specific cause of death was craniocerebral blunt force trauma by homicide from being struck by another person or persons. The doctor testified the victim suffered multiple blows to the head consistent with two or more blows to the right side of the head; two or more blows to the left side of the head; and two or more blows to the back of the head. The totality of these blows caused the injuries that were the proximate cause of the victim's death.

{¶44} After hearing and deliberating on the foregoing evidence, the jury returned a verdict of guilty on the charges felonious assault, felony murder, murder, and tampering with evidence. The jury acquitted appellant on the alleged assault of Christopher Pataky. On May 26, 2010, the trial court determined that the two counts of murder merged for purposes of sentencing and that the felonious assault and felony murder charge were allied offenses of similar import. The trial court then sentenced

appellant to life in prison with eligibility for parole following 15 years for the murder of Christopher Kernich and a concurrent term of five years imprisonment for tampering with evidence. The trial court additionally ordered appellant to pay restitution to Christopher Kernich's family for medical and funeral expenses. This appeal followed and, after granting both appellant and the state leave to extend their briefs beyond the 35-page limit, appellant filed his brief assigning eight errors for this court's review.

{¶45} For ease of discussion, appellant's assignments of error shall be addressed out of sequence.

{¶46} **Conviction for Tampering with Evidence**

{¶47} Appellant's fifth and sixth assigned errors shall be addressed together, they provide:

{¶48} "[5.] There was insufficient evidence to convict Barker for tampering with evidence."

{¶49} "[6.] Barker's conviction for tampering with evidence was against the manifest weight of the evidence."

{¶50} "An appellate court reviewing whether the evidence was sufficient to support a criminal conviction examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the mind of the average juror of the defendant's guilt beyond a reasonable doubt." *State v. Troisi*, 179 Ohio App.3d 326, 329, 2008-Ohio-6062 (11th Dist.). A reviewing court may not reweigh or reinterpret the evidence; rather, the proper inquiry is, after viewing the evidence most favorably to the prosecution, whether the jury could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks,* 61 Ohio St.3d 259, 273 (1991).

{¶51} Alternatively, in *State v. Schlee,* 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, *14-*15 (Dec. 23, 1994), this court observed:

> **{¶52}** "[M]anifest weight" requires a review of the weight of the evidence presented, not whether the state has offered sufficient evidence on each element of the offense.
>
> **{¶53}** "In determining whether the verdict was against the manifest weight of the evidence, '* * * the court reviewing the entire record, **weighs the evidence** and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" (Emphasis sic.)

{¶54} A judgment of a trial court should be reversed as being against the manifest weight of the evidence "only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997).

{¶55} Appellant was convicted of tampering with evidence pursuant to R.C. 2921.12, which provides, in relevant part:

> **{¶56}** (A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely instituted shall do any of the following:

{¶57} (1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation.

{¶58} In this case, the tampering charge was based upon the state's theory that appellant, while in the booking room on November 15, 2009, observed blood on his shoe; after noticing the alleged evidence, he licked his finger and wiped the alleged blood off of his shoe. In support of this theory, the state submitted a video of the allegedly incriminating behavior. The video depicts appellant sitting in a chair in his socks. Appellant picks up his shoes, which were sitting next to the chair, and puts them on his feet. Prior to putting his right shoe on, appellant inspects the shoe's exterior; he then puts the shoe on his foot, licks his right thumb and rubs the outside of his right shoe. Appellant then, with both hands, appears to rub his hands on the interior of both the left and right shoes. On the other side of the room, two officers appear to be conversing.

{¶59} Lieutenant Ray Stein testified he initially observed appellant's actions on the video. Stein indicated he was immediately concerned because, given the nature of the allegations against appellant, he had reason to believe there was blood evidence involved. The officer testified that blood evidence is important in a case such as this because "if the blood comes back to the victim * * * then that shows that defendant obviously had contact with the victim."

{¶60} Chad Britton, a forensic scientist with BCI, testified he received appellant's shoes and detected small stains on the heel of appellant's shoe. After swabbing the stains, Britton stated the samples tested presumptively positive for blood. Although

Britton identified additional stains which he tested, those stains did not test positive for blood. The prosecution subsequently played Britton the video of the booking room where appellant allegedly wiped blood from his shoes. After watching the video, Britton was asked whether, in his estimation, appellant's conduct could have removed potential evidence. Britton responded: "Well, anything that would have potentially removed a sample, yes, would cut down on the amount that I find." Britton later added: "if you're touching [a blood stain] and you have some saliva or fluid on your finger, then you're going to remove some of that stain. If you're touching the stain you're going to take some with you."

{¶61} The booking room videotape clearly demonstrates appellant inspecting his right shoe before placing it on his foot. Appellant then, albeit nonchalantly, licks his thumb and wipes the side of the shoe. This video, taken together with the multiple eyewitnesses who testified that appellant not only delivered the initial blow, but then proceeded to violently kick and/or stomp the victim, and Britton's testimony that wiping a blood stain with saliva could remove the stain, provides a credible foundation for the state's circumstantial theory. We therefore hold the jury could have reasonably concluded that, after visually inspecting his right shoe, appellant observed blood and knowingly wiped it off the side of his shoe with the purpose of impairing its value as evidence in the investigation. We therefore hold the verdict on the tampering charge was supported by sufficient, credible evidence beyond a reasonable doubt.

{¶62} Appellant's fifth and sixth assignments of error are without merit.

{¶63} **Ineffective Assistance Relating to Tampering Charge**

{¶64} Appellant's seventh assignment of error provides:

{¶65} "Barker did not receive effective assistance of counsel on the tampering charge, in violation of the Sixth and Fourteenth Amendments."

{¶66} To sustain a claim of ineffective assistance of counsel, a defendant must show: (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the outcome of the proceeding would have been different when considered in relation to the totality of the evidence before the court. See, generally, *Strickland v. Washington*, 466 U.S. 668 (1984).

{¶67} With regard to the first prong, counsel is entitled to a strong presumption that his or her conduct falls within the vast range of reasonable professional assistance. Appellant must therefore overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *Id*. at 689. Strategic and tactical decisions fall squarely within the scope of professionally reasonable judgment. *Id*. at 699.

{¶68} With respect to the second prong, appellant must demonstrate she was prejudiced by "a probability sufficient to undermine confidence in the outcome." Id. at 694. The inquiry is whether counsel's errors were so serious as to deprive appellant of a proceeding whose results are reliable, i.e., "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

{¶69} Any questions regarding the ineffectiveness of counsel must be viewed in light of the evidence against the defendant with a strong presumption that counsel's

conduct is within the broad range of professional assistance. *E.g.*, *State v. Bradley*, 42 Ohio St.3d 136, 142-143 (1989).

{¶70} Appellant asserts his counsel was ineffective for the following reasons: (1) failing to elicit testimony from Officer Darrah at trial that he did not observe blood on appellant's shoes at the scene, a fact to which Darrah testified at the motion hearing; (2) failing to question Officer Wheeler regarding his inspection of appellant's shoes in the booking room; (3) failing to object to the state's presentation of only a portion of the booking room video; and (4) failing to make a sufficiency argument to the jury during closing.

{¶71} According to appellant, the first two points would have provided circumstantial evidence that, although appellant wiped something off his shoe in the booking area, it was not blood. With respect to the third point, appellant maintains that, had the jury reviewed the entire video, they would have observed his demeanor both before and after the alleged tampering took place. In appellant's view, appellant's demeanor strongly negates he acted with the purpose of destroying evidence. And, finally, in conjunction with the above points, appellant argues counsel's failure to draw the jury's attention to the weakness of the state's case for tampering in closing, fundamentally undermines any confidence in the outcome. Considered individually, as well as cumulatively, we do not agree.

{¶72} First of all, a review of the record demonstrates that questioning the officers regarding their purported inspections of appellant's shoes would have had little to no impact on appellant's defense. While Officer Darrah testified at the motion

hearing that he did not observe blood on appellant's shoes, he also testified he did not thoroughly inspect the shoes. Instead, he testified:

> **{¶73}** I took a flashlight and shone on the shoes. What I was looking for at the time was basically blood splatter. I was not aware of the nature of [the victim's] injuries at that time and the fact that the damage was to the back of his skull. What I was looking for was for splatter that would have been created from, say, a nose rupturing or a lip rupturing.

{¶74} When placed in proper context, Officer Darrah's statement that he saw no blood on appellant's shoes was based on an admittedly cursory inspection. The officer stated he was looking for blood *splatters* and, observing no such evidence, went no further. Because the officer did not meticulously inspect the shoe for blood, the admission appellant seizes upon was somewhat unremarkable. Had counsel cross-examined the officer at trial on his earlier statement, therefore, his admission could have been explained away on redirect. We recognize the motion hearing testimony would not have hampered appellant's defense; we cannot say, however, it would have advanced it in an appreciable way. Under these circumstances, not using Officer Darrah's motion hearing testimony can be seen as a reasonable tactical decision.

{¶75} Further, the booking room video does depict Officer Wheeler picking up each of appellant's shoes and briefly scanning their soles. This inspection, however, lasted seconds. He did not fully inspect the shoes or slowly inspect the entirety of each shoe. Even if Officer Wheeler testified he noticed no blood on the shoes, the video demonstrates his observations would have been based upon a quick and cursory view.

Similar to the above analysis, not cross-examining the officer on this issue was not unreasonable and can therefore be viewed as strategic.

{¶76} Next, even though counsel never objected to the jury viewing only portions of the booking room video, we fail to see how such conduct could be construed as unreasonable. Most of the near fifty minute video is tedious and uneventful. Requesting the jury to view the entire session would have been time-consuming and potentially distracting. It was therefore not unreasonable for counsel to allow the state to play only the portions of the video without objecting.

{¶77} Even, however, assuming arguendo, counsel should have objected, appellant was not prejudiced by counsel's omission. Appellant contends his general composure throughout his stay in the booking area demonstrates he was not acting with the specific intent to destroy evidence. The jury, however, could have drawn this inference from the limited portion of the video used by the state. As indicated under appellant's fifth and sixth assignments of error, appellant's demeanor in wiping his shoe is unassuming and nonchalant. Appellant does not look around the room for officers or cameras and, at no point does he appear either anxious or flustered. In other words, prior to, during, and after appellant wipes his shoe, his general physiognomy suggests a calm and otherwise normal mode of behavior. The jury was therefore able to observe and generally appreciate appellant's demeanor without seeing the entire video. Counsel's failure to object, therefore, did not prejudice appellant's defense.

{¶78} Finally, although defense counsel did not attack the sufficiency of the evidence during closing argument, they did discuss the evidence in support of acquittal for the underlying felonious assault, felony murder, and murder charges. In so doing,

they argued, in effect, appellant was not one of the assailants involved in the kicking and/or stomping of the victim. Pursuant to this defense, counsel implicitly argued that appellant's action of wiping his shoe was coincidental because, as an uninvolved party, no blood would have been on the side of his right shoe. Tacit in counsels' closing, therefore, was an argument that appellant could not have tampered with evidence because there could not have been blood stains on the side of his shoe. Thus, even though counsel did not directly attack the state's evidence as it pertained to the charge of tampering, their closing can be reasonably viewed as a general attack on the sufficiency of the state's evidence on that charge. We therefore hold counsels' performance did not fall below professional standards of reasonableness in their summation to the jury. And, even assuming counsel should have made a direct challenge to the evidence, counsels' strategy during closing did not undermine the proper functioning of the judicial process or the reliability of the jury's verdict.

{¶79} Considered in its entirety, we therefore hold appellant's argument that trial counsel did not render effective assistance is without merit. Appellant's seventh assignment of error is therefore overruled.

{¶80} **Tampering Sentence**

{¶81} Appellant's eighth assignment of error alleges:

{¶82} "The trial court erred by giving Barker the maximum sentence for tampering with evidence."

{¶83} Under his final assignment of error, appellant argues the trial court abused its discretion in sentencing appellant to the maximum sentence for tampering because

the factors relating to the seriousness of the offense and the likelihood of recidivism support a lower term. We do not agree.

{¶84} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, the Supreme Court of Ohio established a two-step analysis for an appellate court reviewing a felony sentence. In the first step, we consider whether the trial court "adhered to all applicable rules and statutes in imposing the sentence." *Id.* at 25. "As a purely legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G)." *Id.* Next, we consider, with reference to the general principles of felony sentencing and the seriousness and recidivism factors set forth in Sections 2929.11 and 2929.12, whether the trial court abused its discretion in selecting the defendant's sentence. *See id.* at 27.

{¶85} With respect to the first prong of *Kalish*, the Supreme Court did not specifically offer guidance as to the "laws and rules" an appellate court must consider to ensure the sentence clearly and convincingly conforms with Ohio law. *State v. Burrell*, 11th Dist. No. 2009-P-0033, 2010-Ohio-6059, ¶17. Consequently, if the sentence falls within the statutory range for the felony of which a defendant is convicted, it will be upheld as clearly and convincingly consistent with the law. *Id.*, citing *Kalish*, *supra*, at ¶15; *see also State v. Gooden*, 9th Dist. No. 24896, 2010-Ohio-1961, ¶48. If the sentence is within the purview of the applicable "laws and rules," we then consider whether the trial court acted within its discretion in fashioning the sentence at issue.

{¶86} In light of the jury's verdict, the trial court did not act unreasonably in sentencing appellant to the maximum. In accepting the state's theory, the jury determined appellant destroyed or altered blood evidence with the specific intent to

undermine the investigation of the underlying crimes and, by implication, shield himself from being specifically implicated in the crime. Considering the purposes and principles of felony sentencing as well as the information included in the record of the sentencing hearing, the trial court did not abuse its discretion in imposing a maximum sentence for the crime of tampering with evidence.

{¶87} Appellant's eighth assignment of error lacks merit.

{¶88} **Alleged Improper Jury Instructions**

{¶89} Appellant's first assignment of error provides:

{¶90} "The trial court erred by improperly instructing the jury on murder, felony murder, and felonious assault."

{¶91} An appellate court reviews a trial court's decision to give the jury a particular set of jury instructions under an abuse of discretion standard. *State v. Martens,* 90 Ohio App.3d 338, 343 (3d Dist.1993). If, however, the jury instructions incorrectly state the law, then an appellate court will conduct a de novo review to determine whether the incorrect jury instruction probably misled the jury in a matter materially affecting the complaining party's substantial rights. *State v. Kovacic*, 11th Dist. No. 2010-L-018, 2010-Ohio-5663, ¶17. Furthermore, an appellate court must review jury instructions in the context of the entire charge. *State v. Hardy,* 28 Ohio St.2d 89, 92 (1971). In *Hardy*, the court held:

> **{¶92}** In determining the question of prejudicial error in instructions to the jury, the charge must be taken as a whole, and the portion that is claimed to be erroneous or incomplete must be considered in its relation to, and as it affects and is affected by the other parts of the

> charge. If from the entire charge it appears that a correct statement of the law was given in such a manner that the jury could not have been misled, no prejudicial error results.

{¶93} Under his first assignment of error, appellant contends the trial court incorrectly instructed the jury regarding necessary elements of the murder, felony murder, and felonious assault charges and unnecessarily confused the jury. Specifically, appellant argues the court's instruction on causation and, in particular, on foreseeability: (1) reduced the state's burden of proof from "serious physical harm" and/or "death" to merely "some harm"; (2) was inconsistent with the culpable mental states of "knowingly" and/or "purposefully"; and (3) confused the jury to appellant's prejudice.

{¶94} **Alleged Reduction of the State's Burden**

{¶95} In this case, the court used the same causation instruction for felonious assault, murder, as well as felony murder. The court instructed, in relevant part:

> **{¶96}** Cause is an act which in a natural and continuous sequence directly produces serious physical harm to [or in the case of murder, the death of] Christopher Kernich and without which it would not have occurred. The defendant's responsibility is not limited to the immediate or most obvious result of the defendant's act. The defendant is also responsible for the natural and foreseeable consequences that follow in the ordinary course of events from an act.

{¶97} The test for foreseeability is not whether a person should have foreseen the injury exactly as it happened to a specific person, the test is whether under all circumstances a reasonably careful person would have anticipated that the act or failure to act would likely cause *some injury*. (Emphasis added.)

{¶98} With respect to appellant's first issue, he cites *State v. Jeffers*, 11th Dist. No. 2007-L-011, 2008-Ohio-1894 in general support of his proposition that the above instruction misled the jury by instructing that it could convict appellant on felonious assault, murder, and felony murder by proof of merely "some harm." *Jeffers* is distinguishable from this case.

{¶99} In *Jeffers*, the defendant was charged with involuntary manslaughter and felonious assault. In the course of instructing the jury on the definition of the mental state "knowingly," the trial court stated: "In analyzing knowledge as a mental state, culpability is inferred from the voluntary performance of the act itself, where the risk of a resulting harm is present." Jeffers was found guilty on both counts. On appeal, Jeffers asserted, inter alia, that the trial court's jury instruction required the jury to accept an improper mandatory presumption regarding the manner in which it considered the evidence relating to the knowingly element of felonious assault. The majority opinion in *Jeffers* agreed with Jeffers' argument, reasoning:

{¶100} [T]he phrase [culpability is inferred] creates a mandatory presumption rather than permissive inference. The use of the word "is," in the context of the instruction, does not provide the jury any deference to reject the inference. Rather, the instruction mandated

a finding that Jeffers acted with knowledge if the jury found he acted voluntarily. *Id.* at ¶43.

{¶101} The majority in *Jeffers* also expressed concern about the use of the phrase "resulting harm" in the instruction. It observed, "[h]ad the instruction been given as 'where the risk of *serious physical harm* is present,' it would have been a more accurate statement of the law." *Id.* at ¶44. By instructing the jury as it did, the majority reasoned, the trial court "permitted the jury to find Jeffers guilty if there was only the risk of 'a harm,' while the felonious assault statute requires Jeffers be aware that his conduct will probably result in 'serious physical harm.'" *Id.*

{¶102} Notwithstanding the foregoing points, however, the majority found neither of these problems reversible error unto themselves. In sustaining Jeffers' assignment of error, the lead opinion concluded:

{¶103} "*Taken together*, Jeffers was prejudiced by the errors contained in this erroneous instruction.

{¶104} "* * *

{¶105} "Because the instruction was not a correct statement of the law *and* created a mandatory presumption, the trial court abused its discretion by giving this instruction." (Emphasis added.) *Id.* at ¶46-50.

{¶106} As the reversal in *Jeffers* was a result of the cumulative effect of both errors in the court's jury instruction, the case is essentially distinguishable from this case. Nevertheless, we agree with appellant that the trial court's use of the phrase "some injury" in its instruction was error. Felonious assault and felony murder are crimes that *require* proof of a greater quanta of harm than merely "some injury." The

former requires "serious physical harm," and the latter, "death." As stated, therefore, the causation instruction given by the trial court was inappropriate, was clearly error, and should not have been utilized in this case.

{¶107} This conclusion notwithstanding, prior to instructing the jury on causation, a necessary element of each crime at issue, the trial court provided a full and unequivocal statutory definition of each particular crime and instructed the jury on the legal meanings of each substantive element. With respect to felonious assault, the court stated the jury must find appellant "knowingly caused *serious physical harm*" to the victim beyond a reasonable doubt. Regarding murder, the court stated the jury must find appellant "purposely caused the *death*" of the victim beyond a reasonable doubt. Finally, as to felony murder, the court instructed the jury that it must find appellant "caused the *death* of [the victim] as a proximate result of committing felonious assault" beyond a reasonable doubt. Each crime required proof of appellant's mental state, causation, and a specific type of prohibited harm. Each element of each crime is discretely defined and the court emphasized that each element had to be independently proven beyond a reasonable doubt.

{¶108} The erroneous instruction in this case provided the jury with a general test for foreseeability within the narrow context of legal causation, which is independent from the specific type of injury set forth in the substantive crimes. When read in the context of the entire instruction, therefore, the language of the foreseeability test does not imply the jury to find appellant guilty of the charged crimes if they found he caused just "any injury." Rather, the phrase "some injury," in the context of this case, relates back to the type of harm which is particularly denoted in the substantive charge; namely, that injury

the defendant is alleged to have proximately caused, which, as the court explicitly instructed, must be either "serious physical harm" or "death." Read in its totality, therefore, the instruction in this case did not lessen the state's burden of proof regarding the harm appellant was alleged to have caused. We again emphasize, however, that use of the phrase "some injury" in this case erroneously misstated the law. Such an instruction should therefore be avoided in future, similar criminal prosecutions lest a court risk a potentially preventable reversal.

{¶109} **Alleged Dilution of Mens Rea Requirements for Crimes of Violence**

{¶110} Appellant next asserts the instructions impermissibly diluted the state of mind requirements of felonious assault, murder, and felony murder. Felonious assault and, in this case, felony murder, require a defendant to act knowingly; murder requires purposeful action. Appellant asserts, however, that the civil foreseeability instruction created a potential for the jury to convict appellant if it found his actions were negligent. In support, appellant cites the Eighth Appellate District's holding in *State v. Jacks*, 63 Ohio App.3d 200 (8th Dist.1989).

{¶111} In *Jacks*, the court reversed a defendant's murder conviction due to the trial court's instructions relating to the meaning of the legal concept of "foreseeability," i.e., "'the test is whether a reasonably prudent person, in like or similar circumstances would have anticipated that death [would] likely result to anyone from the performance of the unlawful act.'" *Id.* at 205 quoting trial court's jury instruction. The court determined that, even though the trial court instructed the jury on the proper definition of "purposefully," it could not say "beyond a reasonable doubt that the erroneous

instruction did not lead the jury to find the defendant guilty of murder based upon a lesser mens rea." *Id.* at 205.

{¶112} Appellant also cites the Supreme Court of Ohio's decision in *State v. Burchfield*, 66 Ohio St.3d 261 (1993). In *Burchfield*, although the Supreme Court dismissed the appeal for lack of a conflict, the court expressed concern with the use of the civil foreseeability instruction in murder cases given "its potential to mislead jurors." Id. at 263.[2]

{¶113} Despite the above points, this court has upheld the use of the foreseeability instruction in past criminal cases involving felonious assault. See *State v. Magnusson*, 11th Dist. No. 2006-L-263, 2007-Ohio-6010; see, also, *State v. Crain*, 11th Dist. No. 2001-L-147, 2003-Ohio-1204. In both *Magnusson* and *Crain*, like this case, the appellants argued that the foreseeability instruction impermissibly reduced the mens rea requirement for felonious assault from knowingly to a civil negligence standard. The *Magnusson* court, in rejecting this argument, held:

> **{¶114}** The legal concept of "knowingly" incorporates the scienter requirement that one ought to know one's actions will "probably cause certain results." The concept of reasonable probability literally embraces the concept of foreseeability. Rather than reduce the state's burden, the instructions ostensibly provide clarity into the meaning and import of "probabilities," i.e., a term necessarily built

2. Notwithstanding the *Burchfield* court's concern, it advised that, had the merits of the case been considered, the trial court's use of the instructions in its case would not have led to a reversal. They pointed out that the trial court, in using the questionable instruction, provided extensive instructions regarding "purpose" prior to the causation instruction and, immediately following the causation instruction, the trial court reiterated the purpose requirement for murder.

> into the definition of the mens rea requirement for the underlying crime. *Id.* at ¶51.

{¶115} Furthermore, in *Cain*, this court observed that, regardless of the use of the foreseeability test, the instructions, when read in their totality, taken together with the prosecutor's closing argument, which included statements of law clarifying the state's burden on the mens rea element, were sufficient to cure any potential confusion. *Id.* at ¶41.

{¶116} Here, the trial court (as well as the prosecutor in her closing argument) provided the statutory definition of knowingly and, prior to providing the instruction on causation, the court stated:

> **{¶117}** Since you cannot look into the mind of another, knowledge is determined from all the facts and circumstances in evidence. You will determine from these facts and circumstances whether there existed at the time in the mind of [appellant] an awareness of the probability that [appellant] would cause serious physical harm to [the victim.]

{¶118} The instructions, viewed in the context of the entire charge, demonstrate that the jury was adequately apprised of what the law requires to prove appellant acted knowingly. This, in conjunction with the recognition that, in considering whether appellant acted knowingly the jury was required to consider probabilities, permits the conclusion that the trial court did not err in giving the foreseeability instruction for the felonious assault and felony murder charges.

{¶119} With respect to "purposefulness," we are mindful of the Supreme Court's caveat in *Burchfield* that the foreseeability instruction should be avoided in murder cases. We are also mindful, however, that the *Burchfield* court did not completely condemn the instruction's usage. *Id.* at 263; *see also Magnusson*, *supra*, at fn. 2; *Cain*, *supra*, at ¶44. We must consequently examine whether, in light of the instruction, the jury could still reasonably understand and appreciate the burden of proof necessary to convict appellant of purposeful murder.

{¶120} In its murder charge, the trial court instructed the jury as follows:

{¶121}

> Purpose to cause the death of [the victim] is an essential element of the crime of murder. A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case at the time in question there was present in the mind of [appellant] a specific intention to cause the death of [the victim.]

{¶122} The prosecutor also highlighted the foregoing instruction and, utilizing evidence adduced at trial, provided examples of how the jury could conclude appellant acted with purpose in causing the victim's death.

{¶123} The trial court advised the jury that, in order to convict appellant of murder, it was required to find, beyond a reasonable doubt, appellant "purposely caused the death" of the victim. The court additionally clarified that such a purposeful act entails a specific intent to cause death. We therefore hold, viewing the charge as a whole, in conjunction with emphasis on the type of evidence required to show purposefulness offered in the prosecution's closing, a reasonable juror would not be misled by the

foreseeability instruction given by the court. The trial court, therefore, did not err when it instructed the jury on foreseeability in the context of the murder charge.

{¶124} As a final note on this issue, we recognize, as the Supreme Court emphasized in *Burchfield*, that the inclusion of a foreseeability instruction in a murder case could potentially mislead jurors if adequate clarifications are not provided. Still, we also acknowledge that, in the course of considering whether a defendant acted with specific intent to kill, a rational trier of fact will look at the evidence and, perhaps reflexively, make an initial assessment of whether, under the circumstances, the alleged purposeful conduct at issue created a probability that the victim would die. Once firmly convinced of this, a juror will then weigh the evidence and decide whether the facts support the allegation that a defendant indeed acted with the specific intention to cause a victim's death. Because a juror cannot enter the mind of a defendant, he or she invariably considers common-sense, causal probabilities throughout the deliberation process. Considered thusly, a foreseeability instruction, although admittedly unnecessary, has some utility even in murder cases, precisely to the extent the state's burden of proof is fully and clearly articulated in the overall charge. Appellant's second issue is overruled.

{¶125} **Jury Confusion**

{¶126} Finally, appellant argues the subject instruction on causation was contrary to law because it *actually* confused the jury. Appellant points out the jury asked the court during deliberations to "[c]larify the difference between murder and felony murder." This question, according to appellant, demonstrates the subject instruction misled and confused the jury. We do not agree.

{¶127} The difference between murder and felony murder does not necessarily relate to the instructions appellant alleges are erroneous. Following appellant's argument, the foreseeability instructions are problematic because (1) they fail to appropriately denote the specific kind of injuries set forth in the charges, and (2) they dilute the necessary mens rea statutorily codified by the crimes of felonious assault, murder, and felony murder. The causation instruction, stated nearly verbatim in each charge, however, does not impact the theoretical or legal distinctions between murder and felony murder. We therefore hold, on its face, the purported juror confusion was not specifically related to the foreseeability instruction.

{¶128} For the above reasons, appellant's first assignment of error is overruled.

{¶129} **Refusal to Instruct the Jury on Lesser Included Offenses**

{¶130} For his second assignment of error, appellant asserts:

{¶131} "The trial court erred by refusing to instruct the jury on lesser included offenses."

{¶132} Under this assignment of error, appellant contends the trial court was required to instruct the jury on the lesser included offenses of simple assault, involuntary manslaughter, and reckless homicide. Appellant asserts there was substantial evidence that appellant threw only a single punch during the fight which led to the victim's death. As a result, the evidence was such that the court was required to instruct the jury on the proposed lesser included charges.

{¶133} The Supreme Court of Ohio has held:

{¶134} An offense may be a lesser included offense of another if (i) the offense carries a lesser penalty than the other; (ii) the greater

> offense cannot * * * ever be committed without the lesser offense * * * also being committed; and (iii) some element of the greater offense is not required to prove the commission of the lesser offense. *State v. Deem*, 40 Ohio St.3d 205 (1988), paragraph three of the syllabus.

{¶135} Here, there is no dispute that assault is a lesser included offense of felonious assault; involuntary manslaughter is a lesser included offense of murder and felony murder; and reckless homicide is also a lesser included offense of murder and felony murder. Still, a defendant is not automatically entitled to an instruction on a lesser included offense. The Supreme Court of Ohio has held "a charge on such lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense." *State v. Thomas*, 40 Ohio St.3d 213 (1988), paragraph two of the syllabus. If this test is met, the court *must* give the instruction. *State v. Shane,* 63 Ohio St.3d 630, 632 (1992).

{¶136} In construing the evidence, the Supreme Court of Ohio has further held that a trial court may not engage in a weighing exercise. In *State v. Wilkins*, 64 Ohio St.2d 382 (1980), the Court held:

> **{¶137}** The persuasiveness of the evidence regarding the lesser included offense is irrelevant. If under any reasonable view of the evidence it is possible for the trier of fact to find the defendant not guilty of the greater offense and guilty of the lesser offense, the instruction on the lesser included offense must be given. The evidence *must*

> be considered in the light most favorable to [the] defendant. (Emphasis added.) *Id.*, at 388; *see also Shane*, *supra*, at 637.

{¶138} Courts of Ohio, including this court, have held the failure to instruct a jury on a lesser included offense, where the instruction is required, is reversible error. *State v. Grant*, 11th Dist. No. 92-L-037, 1993 Ohio App. LEXIS 3579, *14 (July 16, 1993) (holding "the jury could have found that appellant's conduct was negligent rather than reckless if it had believed the defense witnesses who testified that appellant was not intoxicated at the time of the accident"); see, also, *State v. Solomon*, 66 Ohio St.2d 214, 222 (1981) (where the evidence demonstrated the jury could have reasonable doubt regarding aggravated murder but could convict on murder or voluntary manslaughter, the Supreme Court of Ohio held the trial court committed reversible error in failing to instruct the jury on the lesser offenses); *State v. Beasley*, 1st Dist. No. C-940899, 1995 Ohio App. LEXIS 3176, at *6 (Aug. 2, 1995) (holding the evidence was such that the jury could have found the appellant acted negligently rather than recklessly in causing the death of the victim).

{¶139} In refusing to instruct the jury on the proposed lesser included offenses, the trial court stated, on record:

{¶140} [R]easonable minds can come to but one conclusion, number one, that a person blindsided, or sucker punched [the victim]; that that rendered him unconscious; that one, two, or three people kicked him about the head or body; that the defense has been, number one, in his statement that "I did not do it," and number two, an attack on the identification of the defendant. That is a total denial

> and, therefore, under Ohio law, * * * citing * * * State of Ohio versus Nolton, 19 Ohio St.2d 133 [sic] * * * [t]he Court would find that it would be inappropriate to cite the lesser included offenses.[3]

{¶141} The trial court's reliance on *Nolton* was premised upon the state's strenuous opposition to the jury being instructed on the lesser included offenses. At the hearing on the issue, the state made the following argument:

> **{¶142}** The issue at hand here at this complete trial is identity. When identity is the issue, it was me or wasn't me. If it wasn't me that is a complete defense to the charge. *** [W]here the defendant completely denies any involvement in the crime he is not entitled to an instruction on a lesser included offense. That is clearly the case here.

{¶143} In response to the state's position, defense counsel, citing *Shane*, supra, argued appellant was entitled to the instructions because the evidence at trial "would allow a jury to reasonably reject the greater offense and find the defendant guilty on the lesser included or inferior degree offense requires a jury instruction on the lesser included offense." Defense counsel also underscored that the evidence must be viewed in a light most favorable to the defendant.

{¶144} In refusing to instruct the jury on the lesser included offenses, the court accepted the state's argument that a complete defense invariably precludes such an instruction. That argument, however, is based upon an inaccurate statement of the law.

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3. In *State v. Nolton*, 19 Ohio St.2d 133 (1969), the Supreme Court of Ohio held: "If in a criminal case the evidence adduced on behalf of the defense is such that if accepted by the trier of the facts it would constitute a complete defense to all substantive elements of the crime charged, the trier will not be permitted to consider a lesser included offense." *Id.* at syllabus.

While a complete defense may generally preclude an instruction on a lesser included offense, see *Solomon*, *supra*, at paragraph two of the syllabus, the analysis does not end with this assessment. As discussed above, the instruction is *still required* where the evidence, viewed in a defendant's favor, could reasonably support an acquittal on the greater charge and a conviction on the lesser. *Thomas*, *supra*; *Shane*, *supra*; *Wilkins*, *supra*.[4]

{¶145} Given the governing authority in this area, therefore, it is clear the court inappropriately based its refusal to provide the lesser included offense instructions merely on its view that appellant's assertion of a complete defense precludes the instructions. Despite the court's application of the wrong standard, we shall consider, by applying the proper standard, whether the trial court's resolution of the issue was legally appropriate.

{¶146} **Assault**

{¶147} R.C. 2903.13(A) and (B) define assault as follows:

{¶148} "No person shall knowingly cause or attempt to cause physical harm to another.

{¶149} "No person shall recklessly cause serious physical harm to another."

{¶150} R.C. 2903.11(A)(1) defines felonious assault, and provides:

{¶151} "No person shall knowingly *** cause serious physical harm to another or to another's unborn."

4. Notwithstanding the state's insistence at trial that the "complete defense" standard pronounced in *Nolton*, et al., governed the issue, the prosecutor conceded during the appellate hearing that the test set forth in *Thomas*, et al., is the proper legal standard for determining whether a lesser included offense instruction is required. Thus, both parties on appeal agree that the trial court, in arriving at its decision applied the wrong standard.

{¶152} R.C. 2901.22(B) provides:

{¶153} 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.

{¶154} A person acts recklessly when:

{¶155} 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. R.C. 2902.22(C).

{¶156} Further, R.C. 2901.01(A)(5) defines "serious physical harm" as follows:

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

{¶158} (b) Any physical harm that carries a substantial risk of death;

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

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

{¶161} (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.

{¶162} In this case, there was significant evidence that appellant charged the victim, sucker-punched him in the back of the head, and followed the initial attack with multiple kicks to the unresponsive victim's head and body. However, the jury also heard testimony from two defense witnesses that the initial attacker was a white male who *did not* participate in kicking the unconscious victim after the initial punch. Jacqueline Slicker and Danielle Contrada each testified that they saw a white male charge and punch the victim. While each conceded on cross-examination that the "white male" they identified could have been appellant due to his light complexion and hair style/color, each witness consistently maintained they did not witness the initial attacker kicking or stomping the victim. Rather, they specifically testified to witnessing *only* Ronald Kelly kicking the victim after the initial punch.

{¶163} Furthermore, defense-witness Carl Belfiore also initially identified the first assailant as a white male. Belfiore, however, later made a second statement identifying the initial attacker as appellant. Still, he, like Slicker and Contrada, testified Kelly was the sole individual who kicked or stomped the fallen victim.

{¶164} Given this testimony, a reasonable inference can be drawn that even if appellant threw the initial punch, Ronald Kelly was the *only individual* who kicked or stomped the victim. Disregarding the persuasiveness of the foregoing evidence *and* viewing it in a light most favorable to appellant, a juror could consequently have reasonable doubt as to whether appellant, in merely punching the victim, committed felonious assault. And the same juror could also reasonably conclude appellant was

guilty of simple assault by either: (1) knowingly causing physical harm to the victim by way of the initial punch; or (2) with heedless indifference to the consequences, causing the victim serious physical harm via the initial punch. That is, if a reasonable juror chose to believe that appellant *was* the individual who threw the initial punch, but *did not* stomp or kick the victim after he was on the ground, he or she could reasonably conclude that appellant, in assaulting the victim, knowingly caused or attempted to cause physical harm *or* recklessly caused serious physical harm but *did not* knowingly cause serious physical harm.

{¶165} By failing to instruct the jury on simple assault pursuant to R.C. 2903.13(A) or (B), the trial court took the matter away from the jury. We therefore hold the trial court erred in failing to instruct the jury on simple assault as requested by the defense.

{¶166} **Involuntary Manslaughter**

{¶167} In his brief, appellant argues he was entitled to an instruction on involuntary manslaughter under R.C. 2903.04(B). That statutory subsection provides, in relevant part:

{¶168} "No person shall cause the death of another *** as a proximate result of the offender's committing or attempting to commit a misdemeanor of any degree ***."

{¶169} As appellant was entitled to an instruction for misdemeanor assault under both R.C. 2903.13(A) and (B), he was also entitled to an instruction *based upon* that charge. As discussed above, the medical examiner determined the totality of the blows sustained by the victim caused the injuries that were the proximate cause of the victim's death. The testimony indicated the victim was first punched, which rendered him unconscious, and subsequently suffered multiple blows to the head. If the jury believed

Slicker's, Contrada's, and Belfiore's construction of the evidence relating to who kicked the victim, it could also conclude, beyond a reasonable doubt, that the victim died as a proximate result of appellant's commission of assault, a first degree misdemeanor. Thus, we hold the trial court erred in refusing to instruct the jury on involuntary manslaughter.

{¶170} **Reckless Homicide**

{¶171} Reckless homicide requires proof that a defendant "recklessly caus[ed] the death of another." R.C. 2903.041. As discussed above, the jury could have determined that appellant, in punching the victim, may have acted with heedless indifference to the consequences, i.e., he was reckless. As the injuries were such that no single punch or kick (or flurry of blows) could be isolated as *the* coup de grace, appellant could be found guilty of reckless homicide and, by implication, acquitted of purposeful murder. The trial court therefore erred in failing to instruct the jury on reckless homicide.

{¶172} Because the evidence submitted by the defense witnesses, if believed, would have supported both an acquittal on the crimes of felonious assault, felony murder, and purposeful murder *and* a conviction on simple assault, involuntary manslaughter, and reckless homicide, the trial court was *required* to charge the jury on the lesser included offenses at issue. See *Thomas*, *supra*. By failing to do so, the trial court committed reversible error.

{¶173} Appellant's second assignment of error is sustained.

{¶174} **Complicity Instructions**

{¶175} Appellant's third assignment of error provides:

{¶176} "The court erred by improperly instructing the jury on complicity."

{¶177} The trial court provided the jury with the following instructions on complicity:

> **{¶178}** The law allows complicity in violation of Ohio Revised Code Section 2923.03 to be charged in the terms of complicity or in the terms of a principal offense. Complicity is aiding another in committing an offense or soliciting or procuring another to commit an offense and acting with the kind of culpability required for the commission of that offense.
>
> **{¶179}** Aided and abet means supported, assisted, encouraged, cooperated with, advised or incited.
>
> **{¶180}** Solicited means to seek, to ask, to influence, to invite, to tempt, to lean on or to bring pressure to bear.
>
> **{¶181}** Procured means to get, obtain, induce or bring about or motivate.
>
> **{¶182}** The mental culpability for a complicitor or a principal are the same, either purposely, knowingly or recklessly. Those terms will be defined for you at a later time.

{¶183} Appellant contends the trial court erred in issuing the foregoing instruction to the extent it told the jury that the mental culpability for a complicitor in this case could be "recklessly," but did not instruct the jury on an offense with a mens rea of recklessness. Appellant is correct that the trial court's complicity instructions were erroneous because none of the charged crimes included an element of recklessness. Because the trial court erred as a matter of law in failing to provide the jury with instructions relating to the lesser included offenses discussed above, each of which implicated the mens rea of recklessness, the matter must be reversed. The misleading

nature of the complicity instruction could have contributed to juror confusion regarding the level of proof that was required to convict appellant. Under different circumstances, the trial court's misstatement may not constitute reversible error. In this case, however, the error, when viewed in conjunction with the court's failure to properly instruct the jury on the lesser included offenses, rises to the level of cumulative error.

{¶184} Appellant's third assignment of error is sustained.

{¶185} Pursuant to our analysis of appellant's second and third assignments of error, appellant's convictions for felonious assault, felony murder, and murder must be reversed and are therefore subject to a new trial. We shall nevertheless address appellant's first and fourth assignments of error because the issues raised are either independent of our disposition of the other assigned errors or capable of repetition in future proceedings.

{¶186} **Identification Evidence**

{¶187} Appellant's fourth assignment of error asserts:

{¶188} "The trial court erred by failing to exclude identification testimony."

{¶189} Appellant contends the trial court erred by allowing various witnesses to identify appellant as the assailant at trial because the show-up identification process was overly suggestive. We do not agree.

{¶190} This court has observed:

{¶191} "[F]or identification testimony to be inadmissible as violative of due process two elements must be present: (1) unnecessarily suggestive confrontation and (2) unreliable identification. * * * See *State v. Davis* (1996), 76 Ohio St.3d 107, 1996-Ohio-414. Second, the determination must be made looking at the totality of the

> circumstances. *Neil v. Biggers* (1972), 409 U.S. 188, 196-197, * * *; [*State v.*] *Waddy,* 63 Ohio St.3d [424] at 439 [(1992)]. The factors to be considered in determining the reliability of the identification are the witness's opportunity to view the defendant, the witness's degree of attention, the accuracy of the witness's prior description of the suspect, the witness's certainty, and the time elapsed between the crime and the identification. *Biggers* and *Waddy*. The goal of this inquiry is to determine whether the suggestive procedures used by law enforcement, if any, created a '"very substantial likelihood of irreparable misidentification."' *State v. Johnson* (1991), 77 Ohio App.3d 212, 217, quoting *Simmons v. United States* (1968), 390 U.S. 377. (Footnote omitted.) *State v. Combs*, 11th Dist. No. 97-L-049, 1998 Ohio App. LEXIS 4525, at *10-*11 (Sep. 25, 1998).

{¶192} **Show-up Identifications**

{¶193} Less than a minute after the 9-1-1 calls were placed at the scene, Officer Sarah Berkey responded and noticed a group of approximately 15 to 20 individuals gathered together arguing and cursing. Immediately after her arrival, Officer Berkey was approached by Tyler Martin and Jared Bartholomew. At the motion hearing, the officer testified that Martin was "very shaken [and] visibly upset." She also testified that Martin advised her that the victim was "up the street" and "needed immediate attention and needed an ambulance right away." Martin then pointed to "a black male in a red vee neck shirt and also another lighter skinned black male in a white vee neck shirt," who were standing in the parking lot at the time, and told the officer "you can't let them

leave." The individuals, later identified as Kelly and appellant, respectively, were standing nearby in a parking lot at the time of the identification.

{¶194} The officer then spoke with Bartholomew, who also appeared "scared" and "shaken." Bartholomew explained he had witnessed the assault, provided the officer with a statement, which, like Martin, identified appellant and Kelly. According to Officer Berkey, neither appellant nor Kelly had been detained at the time Martin and Bartholomew gave their initial statements and identifications. Although the officer could tell they had been drinking, she testified neither Martin nor Bartholomew seemed impaired by alcohol.

{¶195} Within "a minute" of Officer Berkey's arrival, Sergeant Edward Wheeler responded to the scene. He observed Berkey separating two groups of individuals. One group included appellant, Kelly, and Jefferson. Sgt. Wheeler testified that several individuals in the other group identified appellant as an individual involved in the assault to which the officers were responding. After these preliminary identifications, Sgt. Wheeler separated appellant from Kelly and Jefferson and handcuffed appellant to prevent him from escaping.

{¶196} Approximately four or five minutes after the dispatch, Officer Ben Darrah arrived at the scene. He testified when he arrived there was a great deal of commotion; several officers were present as well as paramedics. Officer Darrah began moving the crowd back so the paramedics could attend to the victim. As the officer was addressing the crowd, he was approached by Charles Johansen.

{¶197} Johansen told the officer he witnessed the assault and provided the officer with a statement of what he saw. According to Johansen, after the assault, he approached the scene and was "face to face, probably a foot away, or two feet away"

from Kelly and appellant was "probably four feet behind [Kelly.]" According to Johansen, there were only two individuals involved in the assault and he was able to identify them. Officer Darrah had learned two suspects had been detained for the assault and, based upon the facts of Johansen's statement, the officer asked the witness if he would take part in a show-up identification. Johansen agreed.

{¶198} According to the officer, the lighting conditions were fine and Johansen stood approximately 30 to 35 feet from the suspects. Darrah asked Johansen if he recognized appellant and Johansen identified appellant as the individual who initially struck and later stomped the victim. Johansen testified he did not see handcuffs, but stated he was aware appellant was being detained and was "in trouble." Johansen's identification took place between ten and 15 minutes after the incident, and he testified he was "95 percent" certain his identification was accurate. Johansen testified he had "a couple of beers four hours earlier" and was not intoxicated.

{¶199} Next, Officer Darrah encountered Bradley Chelko, who was bleeding from the chin, and Dave Clements. The officer could tell Chelko and Clements were intoxicated, but stated they were not "falling down drunk" and, according to the officer, the witnesses were able to relate events in a meaningful manner. The officer testified the two young men were "very excited, very disturbed" about what they witnessed and "very concerned" for the victim. Both Chelko and Clements provided the officer with a statement regarding what they witnessed.

{¶200} At the motion hearing, Chelko specifically testified he had approximately five drinks over a five-hour period and did not believe he was under the influence. Chelko stated that, prior to the show-up, he was aware that the initial assailant was wearing a white t-shirt, but only obtained a side view of his face. He was able to clarify,

however, that this individual was a "light-skinned black person." Both Chelko and Clements agreed to participate in a show-up identification.

{¶201} First, Officer Darrah took Chelko to where appellant was being detained. Chelko was approximately "20 meters" from appellant, who was in handcuffs speaking with a separate officer at the time, when he identified appellant. Chelko testified he was 100 percent certain appellant was the individual who initially punched and ultimately kicked the victim. Chelko's identification occurred between 15 and 20 minutes after the assault.

{¶202} Officer Darrah then conducted a show-up with Clements. According to Clements, he was approximately 60 feet from the incident and had seen each assailant's face and described him as a black male with a white t-shirt. Clements testified he was approximately 20 to 30 feet from each subject at the show-up. Clements identified both appellant and Kelly; Clements testified he did not see either individual in handcuffs and did not remember seeing them in a patrol car. He was aware, however, that both appellant and Kelly were being detained by police. Clements identified the assailants approximately 20 minutes after witnessing the assault.

{¶203} Anthony Gallas was also asked by police to participate in a show-up. At the motion hearing, Gallas testified he was approximately 25 feet away from the scene of the assault and, because of the illumination of the street lights, he could see everything. Gallas testified he was asked to participate in the identification "probably ten minutes after the whole thing happened." Gallas stated he was approximately 16 to 18 feet from the individuals when he made his identification. According to Gallas, appellant and Kelly were in police cruisers when he arrived. Appellant was taken out of the cruiser and Gallas positively identified him as the individual who blindsided the

victim and eventually stomped the victim's head. Gallas admitted he had consumed approximately eight beers over a three- to four-hour period, but was not intoxicated. Gallas testified he was 100 percent certain his identification was accurate.

{¶204} Preliminarily, the evidence at the motion hearing indicates that both Bartholomew and Martin independently approached Officer Berkey, prior to appellant being detained by law enforcement, and independently identified appellant and Kelly as the assailants. This identification was the result of the voluntary actions of the witnesses and thus was not show-up facilitated by law enforcement. Further, the identification occurred minutes after the assault by two individuals who observed the incident and could provide a description of the assailants. Although the young men had been drinking, the officer testified neither individual was impaired. And Martin's unequivocal statement that Officer Berkey should not let appellant nor Kelly leave demonstrates the witness was attentive and focused upon what he had observed. Given these points, both Martin's and Bartholomew's initial identification of appellant and Kelly were reliable and admitting the same did not violate due process.

{¶205} Next, Johansen approached Officer Darrah of his own volition in order to provide a statement. In the course of doing so, Johansen indicated he was within feet of both assailants and, given the opportunity, he could identify them. Although Johansen was aware appellant was being detained and "in trouble" when he identified him, the identification occurred approximately ten minutes after the incident and Johansen stated he was "95 percent" certain appellant punched and later stomped the victim. While the circumstances in which Johansen viewed appellant, e.g., being detained by law enforcement, were suggestive, other features of Johansen's observations demonstrate his identification is reliable. In particular, the identification

took place minutes after the incident and Johansen had an opportunity to get a close look at each of the assailants. The admission of Johansen's identification was therefore consistent with due process.

{¶206} With respect to the remaining witnesses, Chelko, Clements, and Gallas all had been drinking on the night in question, but were able to relate what they observed to officers; each witness observed the assault from a reasonably close distance and each provided a basic description of the assailant that was ultimately consistent with appellant's appearance (Chelko testified he was approximately 60 feet from the attack and, although he only saw the initial assailant from the side, he stated the attacker was a light-skinned black individual in a white t-shirt; Clements, who was also 60 feet from the attack, testified he was able to see the assailant's face and described him as a black male with a white t-shirt; finally, Gallas stated he witnessed the entire event and was a mere 25 feet away from the attack.)

{¶207} We again acknowledge that, like Johansen's identification, the show-ups in which Chelko, Clements, and Gallas participated were obviously suggestive. Still, courts have held that, under proper circumstances, a one-person show-up occurring near the time of the alleged criminal act is sufficient to ensure accuracy. See *State v. Gonzalez*, 10th Dist. No. 10AP-628, 2011-Ohio-1193, ¶9; *see also State v. Brown*, 12th Dist. No. CA2006-10-247, 2007-Ohio-7070, ¶14, citing *State v. Madison*, 64 Ohio St.2d 322, 332 (1980). In this case, each witness' identification occurred reasonably close in time to the assault. (Chelko and Clements identified appellant approximately 20 minutes after the incident; Gallas' identification occurred ten minutes after the attack.) Moreover, each particular witness testified there was no question in his mind that appellant was the individual that initially punched and subsequently stomped the victim.

We therefore hold that the admission of Chelko's, Clements', and Gallas' show-up identifications did not violate due process.

{¶208} **Photographic Identification**

{¶209} Appellant next asserts the photo identifications by Pataky, Coleman, and Clouden were inherently unreliable because the witnesses were not given a sufficiently large array of suspects; appellant also contends the manner in which the photos were presented was fundamentally suggestive. We do not agree.

{¶210} When considering a motion to suppress photographic identification procedures, courts must determine whether the photos or procedures used were "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384 (1968). "Suggestiveness depends on several factors, including the size of the array, its manner of presentation, and its contents." *State v. Wills*, 120 Ohio App.3d 320, 325 (8th Dist.1997), citing *Reese v. Fulcomer*, 946 F.2d 247, 260 (3d Cir.1991).

{¶211} In this case, Pataky testified that, although he did not specifically see the initial punch, he did observe appellant stomping on the victim's head. Pataky stated he was within 15 yards of the assault. He further testified he charged appellant and pushed him away from the victim. According to Pataky, appellant then struck him in the mouth and ran away. Pataky testified he was 100 percent certain appellant was the individual he observed stomping the victim. Appellant, in his brief, fails to provide a specific reason or argument why Pataky's photo identification was unreliable. Such an omission stands in violation of App.R. 16(A)(7). Nevertheless, even if the photo array he viewed was limited and therefore suggestive, Pataky's proximity to the incident and his contact with appellant render his identification reliable.

{¶212} Robert Clouden was interviewed by Officer Robert Treharn on November 19, 2009. Clouden told the officer he was inside his house when he heard "a commotion" outside. He went outside and observed the victim lying on the street while a light-skinned black male, with puffy, curly hair, wearing a white v-neck t-shirt stomped the victim's head twice. Clouden indicated he came within arm's length of appellant after the incident and was therefore able to see appellant's face well. Clouden advised the officer that he had seen photos of the suspects in the Daily Kent Stater, a local newspaper. Clouden told Officer Treharn that the individuals in the newspaper photos were, in fact, the individuals he witnessed attacking the victim. The officer then provided Clouden with copies of the same photos and asked the witness to write under each photo what he observed each suspect doing on the night in question.

{¶213} Next, Thomas Coleman was interviewed by Officer Treharn on November 20, 2009. Coleman told the officer he observed some "commotion" on the street from the porch of his fraternity house. He told the officer that he witnessed a light-skinned black male wearing a white t-shirt come from behind the victim and throw a punch that knocked the victim out. After the victim fell, Coleman testified he observed the suspect in the white t-shirt kick the motionless individual in the head, while another suspect, a dark-skinned black male wearing a red t-shirt, stomped the victim's body. In an attempt to assist the victim, Coleman stated he came within a foot of appellant. Coleman advised the officer he had seen the pictures of the suspects in the local paper and, through these photos, determined that appellant and Kelly were the assailants. After Coleman made it clear he had already identified the assailants from the photos in the paper, Officer Treharn provided the witness with the same photos and asked him to specify, in writing, what he saw each individual suspect do to the victim.

{¶214} After arriving at the station, both Clouden and Coleman advised Officer Treharn the individuals depicted in the photographs in the Daily Kent Stater were the individuals they witnessed beating the victim. The record therefore indicates that these eyewitnesses had identified appellant and Kelly *prior to* their interview with Officer Treharn. Clouden's and Coleman's identifications were a coincidental by-product of the media coverage the crime had generated and not a result of specific actions on behalf of Officer Treharn. To the contrary, after each witness conceded the newspaper photos depicted the individuals they witnessed committing the assault, Officer Treharn simply asked them to explain, in writing, what each suspect did.

{¶215} Given the facts and testimony adduced at the motion hearing, Officer Treharn did not produce the photos for the purpose of a photographic identification. The witnesses' statements to the officer revealed they had already identified appellant and Kelly as the assailants, via the photos, through a different, independent medium. In essence, Officer Treharn's actions were akin to obtaining an additional statement from each witness and, as such, we hold appellant's due process rights were not implicated by the methods the officer employed during the interviews in question.

{¶216} Appellant's fourth assignment of error is therefore overruled.

{¶217} For the reasons discussed in this opinion, appellant's first, fourth, fifth, sixth, seventh, and eighth assignments of error are overruled. Pursuant to our analysis, therefore, appellant's conviction for felony-three tampering with evidence remains valid. Appellant's second and third assignments of error, however, are sustained. Due to the trial court's failure to instruct the jury, as required by law, on the lesser included offenses of assault, involuntary manslaughter, and reckless homicide, appellant's convictions for felonious assault, felony murder, and murder must be reversed and the

matter remanded for a new trial on these charges. The judgment of conviction entered by the Portage County Court of Common Pleas is hereby affirmed in part, reversed in part, and the matter remanded for a new trial.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.

concur.