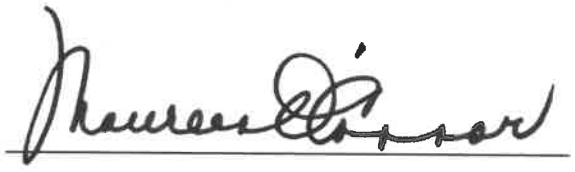
The Supreme Court of Ohio

State of Ohio	Case No. 2021-0860
v.	JUDGMENT ENTRY
Cronie W. Lloyd	APPEAL FROM THE COURT OF APPEALS

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is affirmed, consistent with the opinion rendered herein.

It is further ordered that mandates be sent to and filed with the clerks of the Court of Appeals for Cuyahoga County and the Court of Common Pleas for Cuyahoga County.

(Cuyahoga County Court of Appeals; No. 109128)



Maureen O'Connor
Chief Justice

The official case announcement, and opinion if issued, can be found at http://www.supremecourt.ohio.gov/ROD/docs/

SLIP OPINION NO. 2022-OHIO-4259

THE STATE OF OHIO, APPELLEE, *v.* LLOYD, APPELLANT.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State v. Lloyd*, Slip Opinion No. 2022-Ohio-4259.]

Criminal law—Ineffective assistance of counsel—Deficient performance—Felony murder and felonious assault—Defense counsel's argument identifying victim's death as a "serious physical harm" did not reflect a misunderstanding of the law—Defense counsel's failure to request jury instructions that defendant was not entitled to was not ineffective—Court of appeals' judgment affirmed.

(No. 2021-0860—Submitted June 14, 2022—Decided December 1, 2022.)

APPEAL from the Court of Appeals for Cuyahoga County,
No. 109128, 2021-Ohio-1808.

DEWINE, J.

{¶ 1} Cronie W. Lloyd was convicted of felony murder for a one-punch homicide. He argues that his trial counsel was ineffective for failing to ask for jury

instructions on lesser-included and inferior-degree offenses. And he contends that the usual presumption that an attorney's decision to take an all-or-nothing approach is a matter of trial strategy should not apply here, because his attorney misunderstood the elements of felony murder.

{¶ 2} As evidence that his attorney misunderstood the law, Lloyd points to statements she made in closing argument to the effect that Lloyd could not have known that one punch could *kill* the victim. Lloyd contends that because felonious assault requires only an intent to cause serious physical harm, these statements evince a misunderstanding of the law. And under Lloyd's theory, had his attorney not misunderstood the law, she would have asked for instructions on lesser-included and inferior-degree offenses.

{¶ 3} We are not convinced. Viewing counsel's closing argument as a whole, we conclude that Lloyd has failed to demonstrate that his counsel misunderstood the law. Moreover, Lloyd has not established that he would have been entitled to the additional jury instructions had his attorney requested them. Lloyd's attorney cannot be ineffective for failing to make a fruitless request. As a result, we affirm the decision of the court of appeals, which upheld Lloyd's conviction.

I. BACKGROUND

{¶ 4} Cronie Lloyd and Gary Power were involved in a fender bender early one morning while both men were leaving a bar in their separate vehicles. They pulled into a gas station to inspect the damage. Security cameras show that Lloyd pulled in behind Power, exited his Jeep, and walked slowly up to Power's vehicle, flicking his cigarette to the ground as he approached. The two men looked at the damage together and exchanged words. Then, without warning, the 47-year-old Lloyd punched the 83-year-old Power in the face, causing him to crash to the ground, strike his head on the concrete, and immediately lose consciousness. Lloyd

stood over Power and stared down at him, searched Power's pockets, and then calmly walked back to his Jeep and drove away. Power died from his injuries.

A. Closing Arguments

{¶ 5} The case proceeded to trial on charges of felony murder and felonious assault. At the close of evidence, the court instructed the jury on the law, including the elements of the offenses. The court made clear that for Lloyd to be convicted of felony murder, the state had to prove that he caused the death of Power as a proximate result of committing or attempting to commit felonious assault. The court then explained that to find Lloyd guilty of felonious assault, the jury would need to find that he "knowingly caused serious physical harm" to Power.

{¶ 6} When it came time for Lloyd's attorney to present her closing argument, she advanced two theories. First, she argued that Lloyd was not guilty because he did not "knowingly" cause serious physical harm. She reminded the jury that "knowingly" was an element of the offense and asserted that Lloyd could not have known that one punch would lead to Power's death. She explained: "[M]y client, he didn't hit Mr. Power with a bat. He didn't hit him with a gun. He didn't beat him with a pole. He didn't do the obvious thing that one would think someone would do with intent to cause serious physical harm." Ending her argument, she said, "Unfortunately, he did assault Mr. Power. But he did not knowingly do so with the intent to cause death."

{¶ 7} Next, Lloyd's attorney theorized that Lloyd should be found not guilty of felony murder because there was an independent, intervening cause of Power's death. She claimed that Power may have hit his head on the concrete a second time when police officers attempted to move him, and she speculated that this second impact might have been the cause of death. "There is a reasonable doubt there," she claimed. Alternatively, she suggested that Power could have died from two doses of Narcan that paramedics administered to him in the belief that he may have

overdosed on drugs. Unconvinced, the jury found Lloyd guilty of felony murder and felonious assault.

B. On Appeal, Lloyd Challenges his Counsel's Failure to Request Additional Jury Instructions

{¶ 8} Lloyd appealed to the Eighth District Court of Appeals, claiming, among other things, that he was "denied the effective assistance of counsel where trial counsel failed to request a jury instruction on the lesser-included offenses of assault and involuntary manslaughter" and "on the inferior offense[s] of aggravated assault and voluntary manslaughter." On appeal, Lloyd conceded that the evidence supported convictions on lesser-included or inferior-degree offenses, and he asserted that trial counsel should have "provide[d] the jurors with a meaningful middle ground verdict." He claimed that his attorney made the decision to go all-or-nothing because she misunderstood the law, and that had she understood the law, she would have requested instructions on the other offenses. Lloyd also asserted that the trial court committed plain error by not giving these instructions sua sponte.

{¶ 9} The lesser-included offenses identified by Lloyd were involuntary manslaughter and misdemeanor assault. To find a defendant guilty of misdemeanor assault, a jury must find that a defendant "knowingly cause[d] or attempt[ed] to cause physical harm to another." R.C. 2903.13(A) and (C)(1). When a misdemeanor assault results in death, a defendant is guilty of involuntary manslaughter. R.C. 2903.04(B) and (C).

{¶ 10} The inferior-degree offenses identified by Lloyd were aggravated assault and voluntary manslaughter. An aggravated assault occurs when a defendant knowingly causes serious physical harm in response to a serious provocation by the victim. R.C. 2903.12(A)(1). When an aggravated assault results in death, a defendant is guilty of voluntary manslaughter. R.C. 2903.03(A).

{¶ 11} The court of appeals rejected the contention that Lloyd's attorney provided ineffective assistance by failing to request jury instructions on the lesser-included and inferior-degree offenses. 2021-Ohio-1808, ¶ 22, 35. It presumed that his attorney's decision not to seek those instructions was part of an all-or-nothing trial strategy. *Id.* at ¶ 31-32. Trial strategy, it explained, should not be second-guessed by the court, but rather is a decision left to the defense attorney after consultation with his client. *Id.* at ¶ 32, 34.

{¶ 12} The court of appeals also concluded that "the trial court did not commit error, plain or otherwise," by not sua sponte instructing the jury on the lesser-included offenses. *Id.* at ¶ 44. It reached a similar conclusion as to the inferior-degree offenses. *Id.* at ¶ 45. The court of appeals explained that lesser-included- and inferior-degree-offense charges are warranted only when a court finds that "there is sufficient evidence to allow a jury to reasonably reject the greater offense and find the defendant guilty on the lesser-included or inferior offense." *Id.* at ¶ 25, citing *State v. Shane*, 63 Ohio St.3d 630, 632-633, 590 N.E.2d 272 (1992). The court said that when a victim suffers serious physical harm (e.g., death), rather than mere physical harm, the charge of misdemeanor assault is not appropriate. *Id.* at ¶ 44, citing *State v. Koch*, 2019-Ohio-4099, 146 N.E.3d 1238, ¶ 84 (2d Dist.), *State v. Thornton*, 2d Dist. Montgomery No. 20652, 2005-Ohio-3744, ¶ 48, and *State v. Brisbon*, 8th Dist. Cuyahoga No. 105591, 2018-Ohio-2303, ¶ 27. And, because a conviction on involuntary manslaughter would have depended on a conviction for misdemeanor assault, there was no basis to provide an involuntary-manslaughter instruction. *Id.* Similarly, the court found that an instruction on aggravated assault was not warranted, because that offense requires evidence of serious provocation by the victim—evidence that was entirely absent in this case. *Id.* at ¶ 45. And because an instruction on aggravated assault was not warranted, neither was an instruction on voluntary manslaughter.

{¶ 13} Lloyd appealed to this court, asking us to review (1) whether a person could knowingly cause serious physical harm with one punch, and (2) whether the presumption of reasonable trial strategy could be rebutted by evidence that trial counsel misunderstood the elements of the charged offense. We accepted jurisdiction over the second question only.[1] 164 Ohio St.3d 1446, 2021-Ohio-3336, 173 N.E.3d 1237.

II. ANALYSIS

{¶ 14} In all criminal prosecutions, the accused has the right to "the Assistance of Counsel for his defence." Sixth Amendment to the U.S. Constitution. Inherent in the right to counsel is "the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970), fn. 14. Attorneys are "strongly presumed to have rendered adequate assistance." *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, that presumption can be overcome.

{¶ 15} The "benchmark" for determining ineffectiveness is "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. To establish that an attorney's conduct fell below the benchmark, the defendant must satisfy a two-part test. The defendant first must show that "counsel's performance was deficient." *Id.* at 687. The defendant then "must show that the deficient performance prejudiced the defense." *Id.*

{¶ 16} Courts determine deficient performance by asking whether the attorney's conduct "fell below an objective standard of reasonableness." *Id.* at 688.

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1. In his briefing to this court, Lloyd goes beyond the issue we accepted for review and the arguments he raised below by arguing that his attorney should have advised him to enter a guilty plea but that her misunderstanding of the law likely impaired her ability to properly counsel him on that decision. We are limited, however, to consider only the proposition of law we accepted and only the arguments raised below. *State v. Phillips*, 27 Ohio St.2d 294, 302, 272 N.E.2d 347 (1971). Thus, we will not consider Lloyd's guilty-plea argument.

The reasonableness of the attorney's conduct must be judged based on "the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. Only when the attorney's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" has the attorney engaged in deficient performance. *Id.* at 687.

{¶ 17} When the alleged error concerns what could be viewed as trial strategy, courts must be "highly deferential" to the attorney's strategic decisions. *Id.*, 466 U.S. at 689, 104 S.Ct. 2052, 80 L.Ed.2d 674. After all, each case is unique and capable of being argued in a variety of ways. *See id.* at 689-690. Nobody can predict the future, and "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* at 689. Hindsight is 20/20 after all. Accordingly, the defendant "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.*, quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955).

{¶ 18} To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The error must be so serious as to "undermine confidence in the outcome." *Id.*

A. The Record Does not Establish that Lloyd's Counsel Was Deficient

{¶ 19} The premise of Lloyd's argument is that his attorney misunderstood the law and, as a result, failed to ask for lesser-included- and inferior-degree-offense instructions. There are two problems with this argument, both of which are fatal to Lloyd's appeal. First, the record does not demonstrate that Lloyd's counsel misunderstood the law. Second, Lloyd would not have been entitled to the instructions had his counsel asked for them.

1. Lloyd has not shown that his attorney misunderstood the law

{¶ 20} There is caselaw to support the notion that an attorney's failure to know the law can cause blunders that amount to deficient performance. In *Williams v. Taylor*, defense attorneys failed to investigate the defendant's background before sentencing, "not because of any strategic calculation but because they incorrectly thought that state law barred access to such records." 529 U.S. 362, 395, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The United States Supreme Court recognized that this failure to investigate, which left undiscovered substantial evidence of childhood trauma and other mitigating evidence, constituted deficient performance. *See id.* at 395-396. Other courts have also recognized that an attorney's failure to know the law can lead to deficient performance. *See, e.g.*, *Smith v. Dretke*, 417 F.3d 438, 442 (5th Cir.2005) ("failing to introduce evidence because of a misapprehension of the law is a classic example of deficiency of counsel"); *People v. Pugh*, 157 Ill.2d 1, 19, 623 N.E.2d 255 (1993) ("counsel's advice, based upon a misapprehension of the law, fell outside the range of competence demanded of attorneys in criminal cases").

{¶ 21} But we are not convinced that Lloyd's attorney misunderstood the law. In arguing that his attorney did not understand the elements of the felonious-assault offense upon which the felony-murder charge was predicated, Lloyd zeroes in on several statements that she made in closing argument. Specifically, his attorney said, "[T]here is no way that Mr. Lloyd could have knowingly been aware that hitting someone with one punch would cause the death of that individual." According to Lloyd, this statement and others like it are proof that his attorney did not know the elements of the crime charged, because the state needed only to prove that Lloyd knowingly caused serious physical harm to the victim. The problem is that this interpretation does not take into account the totality of counsel's closing argument.

{¶ 22} In this case, the serious physical harm that occurred *was* the victim's death. One way of looking at counsel's statement that Lloyd could not have known that one punch would have killed the victim is that she was simply specifying the serious physical harm that was alleged to have occurred.

{¶ 23} Imagine that instead of killing the victim, Lloyd's punch broke his nose. Rather than use the phrase "serious physical harm," Lloyd's attorney could have said: "My client could not have known that one punch would break the victim's nose." It appears to us that this is what was going on here—Lloyd's attorney was simply using a more precise description of the serious physical harm that occurred. And one can understand why she might want the jury to focus on the precise harm that occurred here—no reasonable jury would conclude that Lloyd did not know that a hard-thrown punch to Power's face would cause serious physical harm, but a jury could easily conclude that Lloyd did not know his punch would kill Power. So, Lloyd's counsel had good reason to focus the jury on the specific serious physical harm that occurred here, rather than serious physical harm in the abstract.

{¶ 24} Indeed, other parts of closing argument demonstrate that Lloyd's attorney fully understood the elements of the felonious-assault charge. During closing, counsel also argued to the jury that Lloyd did not knowingly cause "serious physical harm." If we understand defense counsel's other statements as referring to death as the specific serious physical harm that occurred, then the statements work together. In contrast, it would make little sense for counsel to say that Lloyd did not knowingly cause serious physical harm, if she believed that the state was required to show that Lloyd knowingly killed the victim. When counsel's words are read in context, then, it is evident that she understood the law and was merely identifying death as the serious physical harm that happened in this case. We thus reject Lloyd's argument that his defense attorney misunderstood the law.

2. Lloyd's attorney was not deficient for failing to request alternative jury instructions

{¶ 25} Even if we were to assume that Lloyd's counsel misunderstood the law, she was not ineffective for failing to ask for instructions on the lesser-included and inferior-degree offenses. This is because Lloyd was not entitled to the alternative instructions and a request for them would have been futile.

{¶ 26} The court of appeals reviewed the trial court's failure to sua sponte provide instructions on the lesser-included offenses and concluded that the trial court did not err, "plain or otherwise." 2021-Ohio-1808 at ¶ 44. It also found that Lloyd "was not entitled to" an instruction on the inferior-degree offenses and noted that Lloyd's counsel had conceded as much in closing argument. *Id.* at ¶ 45. Lloyd did not advance a proposition of law challenging these conclusions. Thus, we are bound to accept the court of appeals' determination that under any standard, Lloyd was not entitled to the lesser-included and inferior-degree instructions. *See Meyer v. United Parcel Serv., Inc.*, 122 Ohio St.3d 104, 2009-Ohio-2463, 909 N.E.2d 106, ¶ 8, fn. 3 (explaining that the court of appeals' determination on an issue not accepted for review stood as "conclusively established"). But even if one could somehow read Lloyd's arguments before this court as challenging the court of appeals' conclusion that Lloyd would not have been entitled to the alternative instructions had he asked for them, we would conclude that the court of appeals got it right. Recall that a judge is to give instructions on lesser-included and inferior-degree offenses only when the evidence would allow a jury to reasonably reject the greater offense and find the defendant guilty on the lesser-included or inferior-degree offenses. 2021-Ohio-1808 at ¶ 25; *accord State v. Thomas*, 40 Ohio St.3d 213, 216-217, 533 N.E.2d 286 (1988); *Shane*, 63 Ohio St.3d at 632-633, 590 N.E.2d 272.

{¶ 27} For Lloyd to be entitled to the alternative instructions, there needed to be evidence that could cause a jury to reasonably conclude that he did not cause

"serious physical harm" to Power, or that he did not do so "knowingly." R.C. 2903.11(A)(1). "Serious physical harm" includes harm that requires hospitalization, incapacitates, disfigures, involves acute or prolonged pain, or carries a substantial risk of death. R.C. 2901.01(A)(5). A person acts "knowingly," in turn, when he "is aware that [his] conduct will probably cause a certain result." R.C. 2901.22(B).

{¶ 28} Here, Lloyd delivered a hard punch to the face of an 83-year-old man. There is no way that a reasonable jury would find that someone throwing this kind of punch to a senior citizen did not knowingly cause serious physical harm. Lloyd might not have known that his punch would kill the victim, but he was certainly aware that it would probably cause serious physical harm. Thus, it would have been error for the trial court to provide instructions on misdemeanor assault and involuntary manslaughter.

{¶ 29} Similarly, Lloyd would not have been entitled to an instruction on aggravated assault and voluntary manslaughter. Aggravated assault, the predicate offense for voluntary manslaughter, requires a serious provocation. And here, there is simply no evidence of provocation. The video of the incident shows nothing that would amount to serious provocation on the part of Power. Nor does any other evidence in the record suggest serious provocation. As Lloyd's counsel put it in closing argument: "Was he provoked in any way? Absolutely not." Thus, even if Lloyd's counsel had asked for these instructions, the trial court would have been compelled to deny the request.

{¶ 30} So, even if we assume that Lloyd's counsel misunderstood the law, counsel was not ineffective for failing to ask for alternative jury instructions. One cannot be ineffective for failing to make a request that would have been denied.

B. We Do not Reach Prejudice

{¶ 31} A defendant's failure to make a sufficient showing of either prong of the *Strickland* inquiry is fatal to his claim of ineffective assistance. 466 U.S. at

697, 104 S.Ct. 2052, 80 L.Ed.2d 674. Because we conclude that Lloyd has failed to demonstrate that his counsel was deficient, we do not reach the prejudice prong of the *Strickland* inquiry.

III. CONCLUSION

{¶ 32} Lloyd has failed to establish that his counsel was deficient in failing to ask for instructions on lesser-included and inferior-degree offenses. The judgment of the court of appeals is affirmed.

Judgment affirmed.

O'CONNOR, C.J., and KENNEDY and FISCHER, JJ., concur.

DONNELLY, J., dissents, with an opinion joined by STEWART and BRUNNER, JJ.

DONNELLY, J., dissenting.

{¶ 33} Respectfully, I dissent. The only question before this court is whether an attorney's misunderstanding of the law can rebut a presumption of sound trial strategy when analyzing the first prong of a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The majority decides that, well, actually, the defense attorney in this case didn't *really* misunderstand the law; she just spiced up her phrasing a bit here and there. After ducking the legal issue and engaging in error correction, the majority goes on to act as a 13th juror and assess the weight of the evidence against appellant, Cronie Lloyd. The majority's assessment belongs in an analysis of the prejudice prong of *Strickland* or of the proposition of law that this court declined to review.[2] It does not belong here. To make matters worse, the majority shoehorns its assessment of the weight of the evidence into its analysis of

2. The court declined jurisdiction over Lloyd's first proposition of law, which states: "The throwing of a single punch to the head, without more, may be the reckless—not knowing—causing of serious physical harm." *See* 164 Ohio St.3d 1446, 2021-Ohio-3336, 173 N.E.3d 1237.

the law under the first prong of *Strickland*, unnecessarily blurring the line between matters of fact and questions of law.

{¶ 34} I would hold that the presumption of sound trial strategy is rebutted when, as here, that strategy entails defense counsel's repeatedly misrepresenting the law in closing argument, conceding the defendant's guilt to lesser-included offenses, and then failing to seek instructions on those lesser-included offenses even though they were the only reasonable alternative to Lloyd being convicted of the charged offenses. I would further hold that when, as here, defense counsel admits to and identifies evidence supporting the elements of a lesser-included offense, an instruction on that offense must go to the jury. Whether the evidence adequately supports the elements of the offense is a question of fact for the jury to decide. And whether the jury might have reached a different decision is a question for the prejudice prong of a *Strickland* analysis, which both the court of appeals and the majority claim to not address. *See* 2021-Ohio-1808, ¶ 32, 34-35; majority opinion at ¶ 31. I would reverse the judgment of the court of appeals related to ineffective assistance of counsel and lesser-included offenses, and I would remand the cause to the court of appeals to properly examine whether Lloyd was prejudiced by the deficient performance of his trial counsel.

Relevant facts

{¶ 35} Prior to Lloyd's trial for felony murder with a predicate offense of felonious assault, the parties engaged in months of negotiations for a plea agreement. It was clear from the parties' positions that they believed that a conviction for the lesser-included offense of involuntary manslaughter would be appropriate under the facts of Lloyd's case. However, the state was not willing to reduce the felonious-assault charge or omit the repeat-violent-offender

specification attached to that charge. The negotiations ultimately fell apart, primarily over the issue of sentencing consequences.[3]

{¶ 36} At Lloyd's trial, overwhelming evidence established that Lloyd punched Gary Power and that Power died as a result of that punch. The only arguable issue was whether Lloyd "knowingly caused serious physical harm" to Power.[4]

{¶ 37} Lloyd's counsel deferred making an opening statement before the state's case-in-chief, waived opening statements after the state's case, and presented no defense. Immediately after the trial court instructed the jury on the meaning of "knowingly" and "serious physical harm" for the offense of felonious assault, Lloyd's counsel presented a closing argument that repeatedly urged the jury to find Lloyd not guilty of murder because he did not "knowingly cause [Power's] death," or assault Power "with the intent to cause death." Counsel also conceded that Lloyd had committed assault. Despite this admission, and despite the trial court's repeated prompts for the parties to request additional or different jury instructions, Lloyd's counsel did not request instructions on assault and involuntary manslaughter. In less than two hours, the jury reached its verdict, finding Lloyd guilty of felonious assault and felony murder.

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3. Although the parties disagreed over the appropriate length of a jointly recommended sentence, the trial court made it clear that it would ignore the parties' recommendation and impose a prison term of 15 years at an absolute minimum—and only as low as 15 years if the victim's family approved. The trial court's original statement to the parties regarding its intended sentence was unsurprisingly not put on the record, as the trial court shared it in a backroom discussion that would never have seen the light of day had defense counsel not brought the matter up on the record.

4. Lloyd also presented arguments at trial regarding causation and on appeal regarding instructions on the inferior-degree offenses of aggravated assault and voluntary manslaughter. Neither one of these arguments is viable in my view. Lloyd abandoned the causation argument, 2021-Ohio-1808, ¶ 53, and as the majority notes, he conceded at trial that he did not act under provocation, majority opinion at ¶ 29, foreclosing the possibility of instructions on aggravated assault and voluntary manslaughter.

Analysis

{¶ 38} The effective assistance of defense counsel is a critical component of a defendant's constitutional right to a fair trial. *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). To establish a claim of ineffective assistance of counsel, a defendant must (1) "show that counsel's performance was deficient," and (2) "show that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. An examination under the first prong of *Strickland* looks to whether counsel's performance was reasonable in light of the totality of the circumstances. *Id.* at 688.

{¶ 39} A reviewing court must presume that counsel's conduct was reasonable and that her decisions " 'might be considered sound trial strategy.' " *Id.* at 689, quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955). However, no presumption of sound trial strategy is due when counsel's actions are based on a misunderstanding of the law or otherwise have no logical justification. *See Kimmelman v. Morrison*, 477 U.S. 365, 385, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986) (decisions based on factual, procedural, and legal misunderstandings are not "strategy" as contemplated by *Strickland*); *Riley v. Wyrick*, 712 F.2d 382, 385 (8th Cir.1983) (presumption of sound trial strategy does not apply "[i]f a tactical choice is wholly without reason"); *United States v. Span*, 75 F.3d 1383, 1390 (9th Cir.1996) (failure to request an affirmative-defense instruction due to a misunderstanding of the law is not a "strategic decision"); *Richards v. Quarterman*, 566 F.3d 553, 569 (5th Cir.2009) (failure to request a lesser-included-offense instruction based on a misunderstanding of the law is not a "strategic decision").

{¶ 40} Counsel's failure to request instructions on lesser-included offenses can sometimes be deliberate, and it can be a valid strategic decision when pursuing what we have characterized as an "all-or-nothing defense" such as "alibi, mistaken identity, or self-defense," *State v. Wine*, 140 Ohio St.3d 409, 2014-Ohio-3948, 18

N.E.3d 1207, ¶ 33. However, it is unreasonable to force a jury into an all-or-nothing decision when a defendant is clearly guilty of *something*, as the jury is all but certain to find the defendant guilty. *See Vujosevic v. Rafferty*, 844 F.2d 1023, 1027 (3d Cir.1988) (failing to instruct on a lesser-included offense can create the "risk that a defendant might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because the jury wishes to avoid setting him free"); *Crace v. Herzog*, 798 F.3d 840, 848 (9th Cir.2015), citing *Keeble v. United States,* 412 U.S. 205, 212-213, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973). It is also unreasonable to pursue an all-or-nothing defense with the goal of causing the jury to disregard or disobey the trial court's instructions regarding the elements of the charged offense. *United States ex rel. Barnard v. Lane*, 819 F.2d 798, 803-805 (7th Cir.1987).

{¶ 41} In *Barnard*, the defendant was charged in an Illinois state court with murder for fatally shooting a man during an argument in the defendant's house. *Id.* at 799-800. The defendant admitted that he shot and killed the victim, *id.* at 802, and his only viable defense would have been to assert the mitigating element of "justification," which would have triggered a requirement for a jury instruction on the lesser-included offense of manslaughter, *id.* at 803. Defense counsel declined to request a justification instruction and thereby avoided the manslaughter instruction as part of an all-or-nothing strategy that apparently banked on the jury having sympathy for the defendant and being unwilling to find him guilty of murder despite his having admitted to all of the essential elements of the offense. *Id.* at 804-805. In a subsequent habeas action, the Seventh Circuit Court of Appeals held that counsel's performance was deficient because "[t]he spectrum of counsel's legitimate tactical choices does not include abandoning a client's only defense in the hope that a jury's sympathy will cause them to misapply or ignore the law they have sworn to follow." *Id.* at 805.

{¶ 42} In *Crace*, the defendant was charged in a Washington state court with second-degree assault for charging at a police officer while brandishing a sword. *Crace* at 844. The defense conceded that the defendant had committed the acts charged but argued that his diminished capacity prevented him from forming the requisite criminal intent. *Id.* The jury ultimately found him guilty of the lesser-included felony offense of attempted second-degree assault. *Id.* In a petition for a writ of habeas corpus, the defendant argued that his trial counsel had been ineffective for failing to request an instruction on a lesser-included misdemeanor offense of unlawful display of a weapon. *Id.* at 845. The relevant difference between the offenses was the mens rea element. *Id.* at 850. The Ninth Circuit noted that the defense attorney admitted that he had not thought to request the instruction, and it held that such ignorance constituted deficient performance. *Id.* at 852. The Ninth Circuit further held that even if defense counsel had purposefully chosen not to request the instruction as a matter of trial strategy, it still would have been deficient performance because there was no conceivable reason for such a strategy. *Id.* at 852-853.

{¶ 43} In this case, Lloyd was charged with felonious assault under R.C. 2903.11(A)(1) for "knowingly caus[ing] serious physical harm" to Power, and he was charged with felony murder under R.C. 2903.02(B) for causing Power's death as a result of the felonious assault. It was indisputable that Lloyd caused serious physical harm to Power, and defense counsel conceded that Lloyd assaulted Power. This is exactly the kind of case where a jury " 'is likely to resolve its doubts in favor of conviction' even if it has reservations about one of the elements of the charged offense, on the thinking that 'the defendant is plainly guilty of some offense.' " *Crace* at 848, quoting *Keeble*, 412 U.S. at 212-213, 93 S.Ct. 1993, 36 L.Ed.2d 844.

{¶ 44} Lloyd's only viable defense in this context would have been to claim that he lacked the mens rea required for felonious assault and instead committed the offense of assault under R.C. 2903.13(A) or (B), which provide that "[n]o

person shall knowingly cause or attempt to cause physical harm to another * * *" and "[n]o person shall recklessly cause serious physical harm to another * * *." But instead of taking that approach, defense counsel told the jury that they should find Lloyd not guilty because he did not knowingly or intentionally *kill* Power. Defense counsel's misstatements of the law were irrelevant to the elements of felonious assault, and her credibility before the jury was surely compromised when her framing of the law differed so markedly from that of the trial-court judge, who had already accurately instructed the jury on "knowingly" and on "serious physical harm."

{¶ 45} Regardless of whether defense counsel's actions came from a misunderstanding of the law or from an attempted all-or-nothing-defense strategy, I would hold that counsel's performance was deficient under the first prong of *Strickland*.

{¶ 46} "A trial is a search for the truth as well as an effort by the state to convict." *State v. Edwards*, 52 Ohio App.2d 120, 122, 368 N.E.2d 302 (6th Dist.1975). That truth is for the trier of fact to determine after presentation of the evidence and *all* reasonable interpretations thereof. Today, the majority makes numerous assumptions about Lloyd's state of mind based on the tragic consequence of his action; but determining facts is not within the purview of this court.

{¶ 47} This court generally does not make determinations on the weight of the evidence. *State v. Cliff*, 19 Ohio St.2d 31, 33, 249 N.E.2d 823 (1969); R.C. 2953.02. However, the court has the authority to determine whether the evidence would allow reasonable minds to differ regarding the elements of an offense, and thus whether the defendant's guilt of that offense should be determined by the jury. *See Cliff* at 33; *State v. Antill*, 176 Ohio St. 61, 65, 197 N.E.2d 548 (1964).

{¶ 48} If reasonable minds could disagree whether a defendant is guilty of a lesser offense rather than a greater offense, then "the instruction on the lesser-included offense *must* be given" to the jury. (Emphasis added.) *State v. Wilkins*,

64 Ohio St.2d 382, 388, 415 N.E.2d 303 (1980). In this court's limited inquiry regarding the reasonable-minds rule, "[t]he evidence must be considered in the light most favorable to [the] defendant." *Id.* Further, "[t]he persuasiveness of the evidence regarding the lesser included offense is irrelevant." *Id.* And as the United States Supreme Court has observed, if there is "any evidence fairly tending to bear upon the issue of" the mens rea element of an offense, "it is the province of the jury to determine from all the evidence what the condition of mind was," and to determine whether the defendant committed a greater or lesser offense. *Stevenson v. United States*, 162 U.S. 313, 323, 16 S.Ct. 839, 40 L.Ed. 980 (1896).

{¶ 49} In other criminal cases involving a single punch that caused the death of another person, reasonable minds have come to different conclusions whether the defendant who threw the punch "knowingly" caused serious physical harm. *Compare State v. McFadden*, 10th Dist. Franklin No. 95APA03-384, 1995 WL 694481, *4 (Nov. 21, 1995) (holding that "it is reasonable to assume that a person would expect one punch to cause physical harm to another person" rather than "serious physical harm") *with State v. Hampton*, 8th Dist. Cuyahoga No. 103373, 2016-Ohio-5321, ¶ 28 (holding in a sufficiency analysis that punching a person in the face "suddenly and without provocation" constituted "knowingly caus[ing] serious physical harm"). Because reasonable minds can disagree whether a single punch can constitute assault rather than felonious assault, the issue is one that should be decided by those in the jury box rather than those in the ivory tower.

{¶ 50} Although the majority places great emphasis on the fact that Power was 83 years old, there is no evidence that Lloyd was aware of his age. In fact, the evidence at trial established that Power looked a lot younger than his actual age. He had a pierced ear and a full head of dark hair with peppered gray sideburns and moustache. A medical first responder gave Power two doses of Narcan "just in case he was taking drugs because he didn't look the age that he was." Lloyd and Power had both just left the same bar around 2:00 a.m. after it had closed. If

medical professionals believed Powers was the kind of person who would be running around town high on heroin at 2:00 a.m., then it is within the realm of possibility that someone might believe Powers was the kind of person who would suffer the normal results of a single punch. Additionally, there was no disparity in the size of the two men, as Lloyd and Power were almost exactly the same height and weight.

{¶ 51} Given the foregoing, I would hold that Lloyd was entitled to instructions on assault and involuntary manslaughter, and that defense counsel's failure to request the instructions constituted deficient performance. What the jury might have ultimately decided regarding the lesser-included offenses is irrelevant to the court's analysis under the first prong of *Strickland*.

{¶ 52} I would reverse the judgment of the Eighth District Court of Appeals and remand the cause to that court to properly examine whether Lloyd was prejudiced by the ineffective assistance of his trial counsel under the second prong of *Strickland*, and I therefore dissent.

STEWART and BRUNNER, JJ., concur in the foregoing opinion.

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Katherine Mullin, Assistant Prosecuting Attorney, for appellee.

Cullen Sweeney, Cuyahoga County Public Defender, and Noelle A. Powell, Assistant Public Defender, for appellant.

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

MAY 27 2021

STATE OF OHIO, :

Plaintiff-Appellee, :

No. 109128

v. :

CRONIE W. LLOYD, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: May 27, 2021

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-19-637149-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, Katherine Mullin and Brandon Summers, Assistant Prosecuting Attorneys, *for appellee.*

Cullen Sweeney, Cuyahoga County Public Defender, and Paul A. Kuzmins, Assistant Public Defender, *for appellant.*

EILEEN T. GALLAGHER, J.:

{¶ 1} Defendant-appellant, Cronie W. Lloyd ("Lloyd"), appeals from his convictions and sentence following a jury trial. He raises the following assignments of error for review:

1. Mr. Lloyd was denied due process of law and his right to a fair and impartial jury when the state was improperly permitted to remove a juror for cause.

2. Mr. Lloyd was denied the effective assistance of counsel where trial counsel failed to request a jury instruction on the lesser-included offenses of assault and involuntary manslaughter.

3. Mr. Lloyd was denied the effective assistance of counsel where trial counsel failed to request a jury instruction on the inferior offense of aggravated assault and voluntary manslaughter.[1]

4. Mr. Lloyd was denied due process of law and the trial court committed plain error when it failed to instruct the jury on the offenses raised by the evidence.

5. Mr. Lloyd's convictions for felonious assault and felony-murder are not supported by sufficient evidence.

{¶ 2} After careful review of the record and relevant case law, we affirm Lloyd's convictions and sentence.

I. Procedural and Factual History

{¶ 3} In February 2019, Lloyd was named in a two-count indictment, charging him with murder in violation of R.C. 2903.02(B), and felonious assault in violation of R.C. 2903.11(A)(1), with notice of prior conviction and repeat violent offender specifications. The indictment stemmed from allegations that Lloyd, then 48 years old, caused the death of the 83-year old victim, Gary Power ("Power"), during the commission of a felonious assault offense. Lloyd pleaded not guilty to

[1] Although the offense of voluntary manslaughter is identified in the third assignment of error, Lloyd has not presented an argument concerning the applicability of the offense in his appellate brief.

the offenses and the matter proceeded to a jury trial where the following facts were adduced.

{¶ 4} On February 3, 2019, Lloyd and Power were involved in a minor traffic accident while leaving a bar located in Independence, Ohio. The men pulled their vehicles into a nearby gas station, where they proceeded to engage in a verbal argument. During the verbal dispute, the men made gestures towards their vehicles and assessed the damage caused by the accident. The men were standing several feet apart when Power began walking towards the rear of his vehicle. As Power walked past Lloyd, Lloyd suddenly threw a single punch, without warning, that connected with Power's jaw. Power immediately lost consciousness and fell to the ground, striking his head on the concrete. Lloyd unsuccessfully attempted to throw a second punch as Power was falling to the ground. The incident, which lasted less than two minutes, was captured by nearby surveillance cameras.

{¶ 5} Lloyd quickly fled the scene without rendering aid or calling 911. Officer Everett Haworth ("Officer Everett") of the Independence Police Department testified that he was patrolling the area when he observed Lloyd's vehicle pull out of the gas station at a high rate of speed. Upon observing Lloyd drive through a red light, Officer Haworth activated his overhead lights and attempted to initiate a traffic stop of Lloyd's vehicle. Lloyd, however, ignored Officer Haworth's siren and "continued to accelerate." (Tr. 170.) Officer Haworth explained that he decided to terminate his pursuit of Lloyd's vehicle because he received a radio broadcast to respond to an altercation that was taking place in the parking lot of a nearby Denny's

restaurant. Officer Haworth stated that he prioritized the "40-person brawl" over Lloyd's traffic violations.

{¶ 6} After resolving the purported conflict in the Denny's parking lot, Officer Haworth noticed that there was a vehicle parked at the gas station where his pursuit of Lloyd's vehicle had begun. Upon further investigation, Officer Haworth observed "an older white male," later identified as Power, "laying on the pavement." (Tr. 171.) Power was unconscious and had a large laceration on the back of his head. Officer Haworth immediately called for an ambulance, and Power was transported to a nearby hospital. Power was pronounced dead two days after sustaining his injuries.

{¶ 7} Officer Haworth testified that he then made contact with the gas station attendant and obtained permission to review the gas station's security video footage. Based on his review of the video footage, Officer Haworth determined that a crime had occurred and that it was necessary to secure the scene and Power's vehicle. Relevant to this appeal, Officer Haworth testified that he collected a cigarette that was found near Power's body. Officer Haworth explained that he "believe[d] that the cigarette may have fallen from either the suspect or the victim." (Tr. 178.)

{¶ 8} Sergeant Michael Murphy ("Sgt. Murphy") of the Independence Police Department testified that he was assigned to investigate the incident. In the course of his investigation, Sgt. Murphy photographed Power in the hospital, spoke with Power's relatives, and reviewed surveillance footage recovered from the gas station and the bar where Lloyd and Power had been prior to the traffic accident. Following Power's death, the investigating officers submitted physical evidence to the crime

laboratory for forensic testing, including the cigarette recovered from the scene and swabs taken from areas of Power's vehicle that Lloyd had touched to regain his balance after punching Power.

{¶ 9} Andrea Davis ("Davis"), a forensic scientist with the Ohio Bureau of Criminal Investigation, testified that the cigarette and a swab taken from the passenger's side door of Power's vehicle contained a profile that was consistent with Lloyd's DNA. In addition, the investigating officers confirmed that Lloyd was the owner of a vehicle that was the same color, make, and model as the vehicle depicted on the surveillance video footage.

{¶ 10} Dr. David Dolinak, M.D. ("Dr. Dolinak"), provided extensive testimony regarding Power's medical history and the scope and nature of his injuries. Based on his review of the relevant medical records, Dr. Dolinak testified that Power sustained extensive head injuries, including fractures of his skull and bleeding and bruising in his brain. Dr. Dolinak explained that the initial impact to the left side of Power's jaw cause him to "fall to the ground hard enough to hit his head fairly hard on the ground." (Tr. 428.) Based on the nature and extent of his injuries, Dr. Dolinak opined, to a reasonable degree of medical certainty, that Power's cause of death was a blunt force head injury and that the manner of death was a homicide.

{¶ 11} At the conclusion of trial, Lloyd was found guilty of murder and felonious assault as charged in the indictment. He was sentenced to life in prison with the possibility of parole after 15 years.

{¶ 12} Lloyd now appeals from this convictions and sentence.

II. Law and Analysis

A. Removal of Juror

{¶ 13} In his first assignment of error, Lloyd argues he was denied due process of law and the right to a fair and impartial jury when the trial court improperly permitted the state to remove Juror No. 7 for cause. Lloyd contends that there was not good cause shown for the removal of the juror for bias and, therefore, the state was essentially provided with an additional peremptory challenge than provided under law.

{¶ 14} Defendants in criminal prosecutions are guaranteed the right to a trial by an impartial jury through the Due Process Clause of the Fourteenth Amendment and Sixth Amendment to the United States Constitution, as well as the Ohio Constitution, Article I, Section 10. *See Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). Due process requires "an impartial trier of fact—'a jury capable and willing to decide the case solely on the evidence before it.'" *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984), quoting *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). "Voir dire examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors." *Id.*

{¶ 15} The Rules of Criminal Procedure regulate the number and manner of exercising peremptory challenges. Crim.R. 24(D) and (E). Peremptory challenges provide both a defendant and the state an opportunity to dismiss potential jurors for

any reason, except for an impermissible basis such as race or gender, without inquiry and without the trial court's approval. *See* Crim.R. 24(D); *see also State v. Reynolds*, 80 Ohio St.3d 670, 675, 687 N.E.2d 1358 (1998). To ensure that the parties are equally able to employ peremptory challenges, Crim.R. 24 mandates that they receive the same number of peremptory challenges.

{¶ 16} Challenges for cause permit the parties to reject jurors on narrowly specified bases that must be demonstrated in the record and found by the trial court. Crim.R. 24(C). A prospective juror may be challenged for cause if he or she demonstrates bias toward the defendant or the state. R.C. 2945.25(B); Crim.R. 24(C)(9). Moreover, pursuant to R.C. 2313.17(B)(9), a potential juror may be challenged for cause if the person "discloses by the person's answers that the person cannot be a fair and impartial juror or will not follow the law as given to the person by the court."

{¶ 17} The trial court has broad discretion in determining a juror's ability to be impartial. *State v. Nields*, 93 Ohio St.3d 6, 20, 752 N.E.2d 859 (2001). Resolution of the impartiality issue rests in large part on the trial court's assessment of the juror's credibility and demeanor, and the context in which the issue arises. *Skilling v. U.S.*, 561 U.S. 358, 386, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010); *State v. Williams*, 79 Ohio St.3d 1, 8, 679 N.E.2d 646 (1997). Therefore, a reviewing court will defer to the trial judge who sees and hears the juror. *See, e.g., Chang v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga No. 82033, 2003-Ohio-6167, ¶ 6.

{¶ 18} We review the trial court's decision on whether to remove a juror for cause for an abuse of discretion. *State v. Smith*, 80 Ohio St.3d 89, 105, 684 N.E.2d 668 (1997). "A court abuses its discretion when a legal rule entrusts a decision to a judge's discretion, and the judge's exercise of that discretion is outside of the legally permissible range of choices." *State v. Hackett*, Slip Opinion No. 2020-Ohio-6699, ¶ 19, citing *U.S. v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 372, 81 S.Ct. 1243, 6 L.Ed.2d 318 (1961) (Frankfurter, J., dissenting). Abuse-of-discretion review is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court. *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34.

{¶ 19} In this case, Juror No. 7 indicated that her nephew had previously been convicted of a felony offense in Cuyahoga County. The juror expressed her belief that her nephew was "unfairly convicted" and endured an unfair prosecution. (Tr. 70; 73.) In response to her statements, the prosecutor asked Juror No. 7 whether she believed she could be fair to the state of Ohio. The juror indicated that she could not be fair because she was still upset about the state's role in her nephew's criminal conviction. (Tr. 74.) When asked by defense counsel if she could listen to the evidence and render a fair decision, the juror responded, "probably." (Tr. 75.) At the conclusion of voir dire, the state sought to remove Juror No. 7 for good cause. The trial court granted the state's request, finding that Juror No. 7 "clearly can't be fair." (Tr. 141.)

{¶ 20} After careful review of the voir dire transcript, we are unable to conclude that the trial court abused its discretion by excusing Juror No. 7 for cause. Juror No. 7's answers to the state's questions gave reasonable cause for concern that she could not be fair and impartial, supporting a valid challenge under R.C. 2313.17. Moreover, and without addressing the implications of a "principal challenge" as defined under R.C. 2913.17(B)(9) and (C),[2] we are not persuaded by Lloyd's contention that Juror No. 7 was sufficiently rehabilitated by defense counsel. Although defense counsel attempted to demonstrate that Juror No. 7 was capable of applying the law to the facts of this case, the prospective juror declined to state with certainty that she could be fair and impartial, and maintained her position that "people lie" and "get away with stuff." (Tr. 75.) Under these circumstances, we find the record supports the trial court's dissatisfaction with defense counsel's attempt

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[2] R.C. 2313.17, provides, in relevant part:

> The following are good causes for challenge to any person called as a juror:
>
> * * *
>
> (9) That the person discloses by the person's answers that the person cannot be a fair and impartial juror or will not follow the law as given to the person by the court.
>
> (C) Each challenge listed in division (B) of this section shall be considered as a principal challenge, and its validity tried by the court.

Id. See Hunt v. E. Cleveland, 2019-Ohio-1115, 128 N.E.3d 265, ¶ 34 (8th Dist.) (finding "a challenge under R.C. 2313.17(B)(9) is a 'principal challenge.'"); *see also Cordova v. Emergency Professional Servs.*, 2017-Ohio-7245, 96 N.E.3d 906, ¶ 27 (8th Dist.) ("[W]here a party establishes the existence of facts supporting a principal challenge, this finding 'result[s] in automatic disqualification,' and no rehabilitation of the potential juror can occur.").

to show that Juror No. 7's expressed biases would not substantially impair the performance of her duty.

{¶ 21} Lloyd's first assignment of error is overruled.

B. Ineffective Assistance of Counsel

{¶ 22} In his second and third assignments of error, Lloyd argues defense counsel rendered ineffective assistance of counsel by (1) failing to request a jury instruction on the lesser-included offenses of assault and involuntary manslaughter, and (2) by failing to request a jury instruction on the inferior offense of aggravated assault.

{¶ 23} The lesser-included-offense doctrine is codified in Ohio law in R.C. 2945.74 and Crim.R. 31(C), which are substantially similar. R.C. 2945.74 provides, in relevant part:

> When the indictment or information charges an offense, including different degrees, or if other offenses are included within the offense charged, the jury may find the defendant not guilty of the degree charged but guilty of an inferior degree thereof or lesser-included offense.

See also Crim.R. 31(C).

{¶ 24} A lesser-included offense is one in which

> (i) the offense carries a lesser penalty than the other; (ii) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, 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, 533 N.E.2d 294 (1988), paragraph three of the syllabus. By contrast, "an offense is an 'inferior degree' of the indicted offense where

its elements are identical to or contained within the indicted offense, except for one or more additional mitigating elements." *Id.* at paragraph two of the syllabus.

{¶ 25} Generally, "a charge on a lesser-included or inferior 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 or inferior offense." *State v. Carter*, 2018-Ohio-3671, 119 N.E.3d 896, ¶ 59 (8th Dist.), citing *State v. Thomas*, 40 Ohio St.3d 213, 533 N.E.2d 286 (1988), paragraph two of the syllabus. In determining whether a lesser-included or inferior offense instruction is appropriate, the trial court must view the evidence in the light most favorable to the defendant. *Id.* at ¶ 59, citing *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, 827 N.E.2d 285, ¶ 37. An instruction is not warranted, however, every time "some evidence" is presented on a lesser-included or inferior offense. *State v. Smith*, 8th Dist. Cuyahoga No. 90478, 2009-Ohio-2244, ¶ 12, citing *State v. Shane*, 63 Ohio St.3d 630, 590 N.E.2d 272 (1992).

> To require an instruction * * * every time some evidence, however minute, is presented going to a lesser-included (or inferior-degree) offense would mean that no trial judge could ever refuse to give an instruction on a lesser-included (or inferior-degree) offense.

Id., quoting *Shane* at 633. Thus, a court must find there is sufficient evidence to allow a jury to reasonably reject the greater offense and find the defendant guilty on the lesser-included or inferior offense. *Shane* at 632-633.

{¶ 26} Relevant to this case, the parties do not dispute that the misdemeanor offense of assault in violation of R.C. 2903.13(A) is a lesser-included offense of

felonious assault. *See State v. Addison*, 8th Dist. Cuyahoga No. 96514, 2012-Ohio-260, ¶ 34, citing *State v. Caster*, 8th Dist. Cuyahoga No. 87783, 2006-Ohio-6594. The charge of simple assault requires a person to knowingly cause physical harm as opposed to the element of serious physical harm required for felonious assault. In addition, this court has recognized that the offense of involuntary manslaughter is a lesser-included offense of murder in violation of R.C. 2903.02. *State v. Johnson*, 8th Dist. Cuyahoga No. 108621, 2020-Ohio-2940, ¶ 42, citing *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185, ¶ 79; *State v. Thomas*, 40 Ohio St.3d 213, 533 N.E.2d 286 (1988), paragraph one of the syllabus.

{¶ 27} In turn, although the offense of aggravated assault is not a lesser-included offense of felonious assault, it is an inferior-degree offense. *Deem*, 40 Ohio St.3d 205, at 210-211, 533 N.E.2d 294 (1988). Aggravated assault is an inferior-degree offense of felonious assault because the elements of the two crimes are identical except that aggravated assault contains the additional mitigating element of serious provocation. *Id.* Thus, the difference between the elements of aggravated and felonious assault is provocation involving sudden passion or fit of rage. *State v. McDuffie*, 8th Dist. Cuyahoga No. 100826, 2014-Ohio-4924, ¶ 22.

> Provocation, to be serious, must be reasonably sufficient to bring on extreme stress and the provocation must be reasonably sufficient to incite or to arouse the defendant into using deadly force. In determining whether the provocation was reasonably sufficient to incite the defendant into using deadly force, the court must consider the emotional and mental state of the defendant and the conditions and circumstances that surrounded him at the time.

State v. Mabry, 5 Ohio App.3d 13, 449 N.E.2d 16 (8th Dist.1982), paragraph five of the syllabus.

{¶ 28} In *Shane*, 63 Ohio St.3d 630, 590 N.E.2d 272, the Supreme Court elaborated on what constitutes "reasonably sufficient" provocation in the context of voluntary manslaughter. First, an objective standard must be applied to determine whether the alleged provocation is reasonably sufficient to bring on a sudden passion or fit of rage. That is, the provocation must be "sufficient to arouse the passions of an ordinary person beyond the power of his or her control." *Id.* at 635. If this objective standard is met, the inquiry shifts to a subjective standard, to determine whether the defendant in the particular case "actually was under the influence of sudden passion or in a sudden fit of rage." *Id.* at 634-635.

{¶ 29} With the foregoing standards in mind, Lloyd argues the evidence adduced at trial warranted additional jury instructions on the applicable lesser-included and inferior-degree offenses. Because defense counsel failed to request the jury instructions, Lloyd contends he was denied his constitutional right to effective assistance of counsel. To establish ineffective assistance of counsel, the defendant must demonstrate that counsel's performance fell below an objective standard of reasonable representation and that he or she was prejudiced by that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Prejudice is established when the defendant demonstrates "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

{¶ 30} In Ohio, a licensed attorney is presumed to be competent. *State v. Calhoun*, 86 Ohio St.3d 279, 289, 714 N.E.2d 905 (1999). In evaluating trial counsel's performance, appellate review is highly deferential as there is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland* at 689. Appellate courts are not permitted to second-guess the strategic decisions of trial counsel. *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995). Even instances of debatable strategy very rarely constitute ineffective assistance of counsel. *See State v. Thompson*, 33 Ohio St.3d 1, 10, 514 N.E.2d 407 (1987).

{¶ 31} Relevant to the circumstances presented in this case, it is well settled that there is a presumption that "the failure to request an instruction on a lesser-included offense constitutes a reasonable 'all or nothing' trial strategy." *State v. Lewis*, 8th Dist. Cuyahoga No. 108463, 2020-Ohio-5265, ¶ 51, quoting *State v. Jackson*, 6th Dist. Sandusky No. S-15-020, 2016-Ohio-3278, ¶ 20. "By not requesting an instruction on a lesser-included offense, the hope is that the jury will acquit the defendant if the evidence does not support all the elements of the offense charged." *Id.* at ¶ 52, citing *State v. Vogt*, 4th Dist. Washington No. 17CA17, 2018-Ohio-4457, ¶ 119 ("It would have been inconsistent to argue for complete acquittal while at the same time arguing for the lesser-included offense."); *State v. Viers*, 7th Dist. Jefferson No. 01JE19, 2003-Ohio-3483, ¶ 47 (Trial courts tend to overrule [ineffective assistance] arguments based upon reviewing court's deference to the all-or-nothing trial strategy.); *State v. Griffie*, 74 Ohio St.3d 332, 333, 658 N.E.2d 764

(1996) ("Failure to request instructions on lesser-included offenses is a matter of trial strategy and does not establish ineffective assistance of counsel.").

{¶ 32} Regarding the applicable lesser-included offenses, Lloyd argues defense counsel rendered ineffective assistance of counsel by failing to request a jury instruction on assault and involuntary manslaughter because the state failed to establish that he knowingly caused the victim serious physical harm. This argument fails to overcome the presumption that defense counsel made a tactical decision to seek an acquittal rather than a conviction on a lesser-included offense. Similar to the sufficiency of the evidence arguments posed in Lloyd's fifth assignment of error, defense counsel argued throughout closing arguments that the nature and breadth of Lloyd's conduct in this case could not support the necessary elements of felonious assault and felony murder. While defense counsel did not dispute that Lloyd struck Power, she reiterated that Lloyd landed a single punch and could not have acted knowingly or otherwise anticipated the serious physical harm that resulted from the impact of Power's fall. We recognize that Lloyd believes that counsel's theory of defense was inadequate or impractical under the facts of this case. However, the decision about which defense or theory to pursue at trial is a matter of trial strategy "'within the exclusive province of defense counsel to make after consultation with his [or her] client.'" *State v. Murphy*, 91 Ohio St.3d 516, 524, 747 N.E.2d 765 (2001), quoting *Lewis v. Alexander*, 11 F.3d 1349, 1354 (6th Cir.1993). Accordingly, we cannot say counsel's performance was deficient simply because she decided not to request a lesser-included offense instruction.

{¶ 33} Furthermore, we are unable to conclude that defense counsel rendered ineffective assistance of counsel by failing to request a jury instruction on the inferior-degree offense of aggravated assault. Importantly, the test utilized to determine if an instruction should have been given on an inferior-degree offense is the same test used to determine if an instruction should have been given on a lesser-included offense. *Shane*, 63 Ohio St.3d 630, at 632, 590 N.E.2d 272. In this case, defense counsel argued during closing arguments that while Lloyd "was not provoked," the state failed to prove the necessary elements for a felonious assault conviction beyond a reasonable doubt. Counsel argued that the single punch only caused minimal injuries to Power's jaw, while the unforeseen and unpredictable fall was the ultimate cause of death.

{¶ 34} Contrary to, and inconsistent with, defense counsel's theory and interpretation of the evidence, Lloyd now argues that a jury instruction on the inferior-degree offense of aggravated assault was warranted in this case because the evidence established that he acted in a sudden fit of rage that was provoked by the victim and the circumstances surrounding the car accident. As stated, however, defense counsel sought an acquittal in this case based upon her perception of the state's evidence; not a conviction on an inferior offense. *See State v. Scarton*, 8th Dist. Cuyahoga No. 108474, 2020-Ohio-2952, ¶ 99; *State v. Lenard*, 8th Dist. Cuyahoga Nos. 105342 and 105343, 2018-Ohio-4847, ¶ 18; *State v. Carter*, 8th Dist. Cuyahoga No. 104653, 2017-Ohio-5573, ¶ 53-54 (Failing to request an instruction on an inferior offense does not rise to the level of ineffective assistance of counsel

where trial counsel's strategy was to obtain an acquittal rather than a conviction of an inferior offense.). Such a trial strategy, even if "questionable" or "if, in hindsight, it looks as if a better strategy had been available," does not support a claim of ineffective assistance of counsel. *See, e.g., State v. Cottrell*, 4th Dist. Ross Nos. 11CA3241 and 11CA3242, 2012-Ohio-4583, ¶ 21; *State v. Henderson*, 7th Dist. Mahoning No. 15 MA 0137, 2018-Ohio-2816, ¶ 71-73. Accordingly, we find Lloyd has failed to overcome the presumption that defense counsel's decision to forego an inferior-degree-offense instruction was a strategic maneuver designed to obtain an acquittal, instead of a conviction on an inferior-degree-offense. *See, e.g., State v. Fouts*, 4th Dist. Washington No. 15CA25, 2016-Ohio-1104, ¶ 73.

{¶ 35} Lloyd's second and third assignments of error are overruled.

C. Plain Error

{¶ 36} In his fourth assignment of error, Lloyd argues the trial court committed plain error when it failed to instruct the jury on the lesser-included and inferior-degree offenses that were supported by the evidence.

{¶ 37} Ordinarily, an appellate court reviews a trial court's refusal to instruct the jury on a lesser-included offense under the abuse of discretion standard. *State v. Henderson*, 8th Dist. Cuyahoga No. 89377, 2008-Ohio-1631, ¶ 10, citing *State v. Wright*, 4th Dist. Scioto No. 01 CA2781, 2002-Ohio-1462. As discussed, however, Lloyd failed to request instructions on lesser-included or inferior-degree offenses. Thus, our review of the trial court's failure to sua sponte provide the disputed instructions is limited to plain error. To establish plain error, a defendant must

show that (1) there was an error or deviation from a legal rule, (2) the error was plain and obvious, and (3) the error affected the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). Notice of plain error "is to be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 108.

{¶ 38} In this assigned error, Lloyd reiterates his argument that a jury could have reasonably found that his conduct against Power was provoked or, alternatively, resulted in physical harm rather than serious physical harm. Thus, Lloyd maintains that the trial court committed plain error by failing to provide jury instructions on the inferior-degree offense of aggravated assault and the lesser-included offenses of assault and involuntary manslaughter. Lloyd contends that the "trial court's failure to give the required instructions * * * led to a sentence that is disproportionate to Lloyd's conduct and morally incongruent with his conduct."

{¶ 39} After careful review, we find the circumstances presented in this case are analogous to those addressed by the Ohio Supreme Court in *State v. Clayton*, 62 Ohio St.2d 45, 47-48, 402 N.E.2d 1189 (1980). In *Clayton*, the defendant was charged with and convicted of two counts of attempted murder. *Id.* at 45. On appeal, the defendant challenged trial counsel's decision not to request a jury instruction on the lesser-included offense of attempted voluntary manslaughter. *Id.* at 46, 48-49. The Ohio Supreme Court held that the decision not to request the mitigating instruction, despite being a "questionable" strategy, did not rise to the

level of ineffective assistance of counsel. *Id.* at 48-49. Simply because there was "another and better strategy available" did not mean that counsel provided ineffective assistance. *Id.* at 49. In addition, the court found the trial court did not commit plain error by failing to provide the jury instructions sua sponte. Noting that trial counsel's decision not to request an instruction on a lesser-included offense was based on "counsel's strategy to seek a total acquittal for [Clayton]," the court held that a defendant "cannot claim the protections of Crim.R. 52(B) to negate the effect of [a] tactical decision." *Id.* at 47. The court explained as follows:

> Even if the defendant did elicit some evidence of mitigating circumstances (fit of anger), he still had the right to intentionally waive a jury instruction on the lesser-included offense of attempted voluntary manslaughter. Having elicited some evidence in mitigation of attempted murder, the court had the duty to instruct on the lesser-included offense, but this in no way affected defendant's concomitant right, through his counsel, to waive the instruction.

Id. at 47, fn. 2.

{¶ 40} Since the release of *Clayton*, the Ohio Supreme Court has continued to emphasize that the decision establishes "the consequences that follow a defendant's decision to waive a jury instruction that may have inured to his benefit." *State v. Wine*, 140 Ohio St.3d 409, 2014-Ohio-3948, 18 N.E.3d 1207, ¶ 31. In *Wine*, the court reiterated the implications of the plain error doctrine and the deference given to counsel's trial strategy, stating:

> In *Clayton*, this court held that defendant's counsel's decision not to request an instruction on lesser-included offenses — seeking acquittal rather than inviting conviction on a lesser offense — was a matter of trial strategy. *Id.* This court essentially said in *Clayton*'s second footnote that although the trial court erred in not including the lesser-

> included-offense charge, the defendant waived that error in furtherance of his counsel's trial strategy. Once the defendant made his tactical gambit * * * he could not then successfully claim plain error upon appeal. This court thus concluded that the trial court's failure to instruct the jury on lesser-included offenses and the defendant's subsequent conviction "[did] not amount to a manifest miscarriage of justice and [was] not plain error." *Id.* at 47-48. This court further concluded that although his strategy was questionable, Clayton's counsel did not provide ineffective assistance. *Id.* at 49.

Wine at ¶ 30.

{¶ 41} Thus, the Ohio Supreme Court has clarified that although "it is the quality of the evidence offered * * * that determines whether a lesser-included offense charge should be given to a jury," *Wine* at ¶ 26, the court's failure to provide jury instructions on lesser-included or inferior-degree offenses does not amount to plain error "[w]hen the decision not to request a particular jury instruction may be deemed to be part of a reasonable trial strategy," *State v. Mohamed*, 151 Ohio St.3d 320, 2017-Ohio-7468, 88 N.E.3d 935, ¶ 27, citing *Clayton* at 47-48. "Put differently, a trial court does not commit plain error in failing to provide an unrequested jury instruction where the decision to not request the instruction could be considered trial strategy." *State v. Jones*, 4th Dist. Ross No. 16CA3574, 2018-Ohio-239, ¶ 27, citing *Mohamed* at ¶ 27.

{¶ 42} Having determined that counsel's decision not to request a jury instruction on the lesser-included or inferior-degree offenses fell within a reasonably trial strategy, we find the trial court did not commit plain error in failing to provide the jury the unrequested instructions. Lloyd has failed to show that the trial court's judgment was obvious error, that it deviated from clear legal rules, or

that it affected the outcome of the trial. *See, e.g., State v. Kiehl*, 11th Dist. Portage No. 2015-P-0020, 2016-Ohio-8543, ¶ 30, citing *State v. Hubbard*, 10th Dist. Franklin No. 11AP-945, 2013-Ohio-2735, ¶ 35; *State v. McDowell*, 10th Dist. Franklin No. 10AP-509, 2011-Ohio-6815, ¶ 44, *State v. White*, 6th Dist. Lucas No. L-06-1363, 2008-Ohio-2990, ¶ 56; *State v. Miller*, 6th Dist. Erie No. E-02-037, 2003-Ohio-6375, ¶ 17; *State v. Harris*, 129 Ohio App.3d 527, 533, 718 N.E.2d 488 (10th Dist.1998).

{¶ 43} Moreover, even if this court were to ignore the deference afforded to defense counsel's trial tactics, we find the court's failure to provide instructions on the lesser-included and inferior-degree offenses did not amount to plain error based on the evidence presented at trial.

{¶ 44} As previously stated, the misdemeanor offense of assault is a lesser-included offense of felonious assault. However, "when the victim suffers serious physical harm, a misdemeanor assault under R.C. 2903.13(A) should not be considered as a lesser-included offense of felonious assault." *State v. Koch*, 2d Dist. Montgomery No. 28000, 2019-Ohio-4099, ¶ 84, citing *State v. Thornton*, 2d Dist. Montgomery No. 20652, 2005-Ohio-3744, ¶ 48; *see also State v. Brisbon*, 8th Dist. Cuyahoga No. 105591, 2018-Ohio-2303, ¶ 27. Consistent with our discussion of the evidence supporting Lloyd's convictions below, we find the evidence presented at trial demonstrated that Lloyd knowingly caused Power serious physical harm. Thus, an acquittal on the felonious assault charge was not reasonable, and an instruction for the offense of assault was not warranted. In the absence of a misdemeanor

predicate offense, Lloyd's argument concerning an instruction on the lesser-included offense of involuntary manslaughter in violation of R.C. 2903.04(B)[3] is equally unsupported by the evidence. Accordingly, the trial court did not commit error, plain or otherwise, by failing to instruct the jury on the lesser-included offenses of assault and involuntary manslaughter.

{¶ 45} Finally, we find there was insufficient evidence of serious provocation, such that a jury could have reasonably acquitted Lloyd of felonious assault and convict him of aggravated assault. Beyond speculation concerning the words exchanged between Lloyd and Power, the record contains no evidence that Lloyd's actions were influenced by sudden passion or fit of rage at the time he punched Power. Rather, the evidence presented at trial demonstrated that Lloyd suddenly, and without warning, struck Power in his jaw as he attempted to walk past Lloyd while inspecting his vehicle. Viewing the conditions and circumstances surrounding the incident in their entirety, we find there is no evidence to conclude that Power's conduct was sufficient to arouse the passions of an ordinary person beyond the power of his or her control. Counsel admitted as much during closing arguments. Accordingly, Lloyd was not entitled to an instruction on aggravated assault.

{¶ 46} Lloyd's fourth assignment of error is overruled.

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[3] Involuntary manslaughter is defined in R.C. 2903.04(B) as: "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." The intent required to commit involuntary manslaughter is the intent assigned to the underlying offense. *State v. Losey*, 23 Ohio App.3d 93, 97, 491 N.E.2d 379 (10th Dist.1985).

D. Sufficiency of the Evidence

{¶ 47} In his fifth assignment of error, Lloyd argues his convictions for felonious assault and felony murder are not supported by sufficient evidence.

{¶ 48} "[T]he test for sufficiency requires a determination of whether the prosecution met its burden of production at trial." *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 13. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. The state may use direct evidence, circumstantial evidence, or both, in order to establish the elements of a crime. *See State v. Durr*, 58 Ohio St.3d 86, 568 N.E.2d 674 (1991). Circumstantial evidence is "proof of facts or circumstances by direct evidence from which the trier of fact may reasonably infer other related or connected facts that naturally or logically follow." *State v. Seals*, 8th Dist. Cuyahoga No. 101081, 2015-Ohio-517, ¶ 32.

{¶ 49} Lloyd was found guilty of murder in violation of R.C. 2903.02(B). The statute provides, "[n]o person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 [voluntary manslaughter] or 2903.04 [involuntary manslaughter] of the Revised Code." In this case, Lloyd was found guilty of causing Power's death while committing felonious assault under R.C. 2903.11(A)(1), an offense of violence as

defined by R.C. 2901.01(A)(9). R.C. 2903.11(A)(1) provides that, "[n]o person shall knowingly * * * [c]ause serious physical harm to another * * * ."

{¶ 50} To have acted "knowingly," a person need not have specifically intended to cause a particular result. "A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B). In other words, a defendant acts knowingly when, although not necessarily intending a particular result, he or she is aware that the result will probably occur.

{¶ 51} If a result is a probable consequence of a voluntary act, the actor "'will be held to have acted knowingly to achieve it'" because a person "'is charged by the law with knowledge of the reasonable and probable consequences of his [or her] own acts.'" *State v. Dixon*, 8th Dist. Cuyahoga No. 82951, 2004-Ohio-2406, ¶ 16, quoting *State v. McDaniel*, 2d Dist. Montgomery No. 16221, 1998 Ohio App. LEXIS 2039, 16 (May 1, 1998); *see also State v. McCurdy*, 10th Dist. Franklin No. 13AP-321, 2013-Ohio-5710, ¶ 16 ("'[F]elonious assault under R.C. 2903.11, combined with the definition of "knowingly" found in R.C. 2901.22(B), does not require that a defendant intended to cause "serious physical harm," but rather, that the defendant acted with an awareness that the conduct probably would cause such harm.'") (emphasis deleted), quoting *State v. Smith*, 10th Dist. Franklin No. 04Ap-726, 2005-Ohio-1765, ¶ 28. "Stated another way, when a defendant voluntarily acts in a manner that is likely to cause serious physical injury, the factfinder can infer that the defendant was aware that his actions would cause whatever injury results from

his actions, or, in other words, that he acted knowingly." *State v. Reed*, 8th Dist. Cuyahoga No. 89137, 2008-Ohio-312, ¶ 10. "'To be actionable it is only necessary that the result is within the natural and logical scope of risk created by the conduct.'" *State v. Hampton*, 8th Dist. Cuyahoga No. 103373, 2016-Ohio-5321, ¶ 13, quoting *State v. Smith*, 4th Dist. Ross No. 06CA2893, 2007-Ohio-1884, ¶ 29. The defendant need not have known that his or her actions would cause the precise injury sustained by the victim. *See, e.g., State v. Perez*, 8th Dist. Cuyahoga No. 91227, 2009-Ohio-959, ¶ 42. Absent an admission, whether a defendant acted "knowingly" must be determined "from all the surrounding facts and circumstances, including the doing of the act itself." *Dixon* at ¶ 16, quoting *State v. Huff*, 145 Ohio App.3d 555, 563, 763 N.E.2d 695 (1st Dist.2001).

{¶ 52} "Serious physical harm," as defined in R.C. 2901.01(A)(5), is very broad and includes any of the following:

> (a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;
>
> (b) Any physical harm that carries a substantial risk of death;
>
> (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;
>
> (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;
>
> (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

Loss of consciousness, "'irrespective of its duration,'" has been found to constitute severe physical harm under R.C. 2901.01(A)(5)(c). *State v. Watson*, 10th Dist. Franklin No. 17AP-834, 2018-Ohio-4964, ¶ 11, quoting *State v. Sales*, 9th Dist. Summit No. 25036, 2011-Ohio-2505, ¶ 19.

{¶ 53} Because Lloyd's murder conviction is predicated on the underlying felonious assault offense, Lloyd's sufficiency argument focuses on the evidence supporting his felonious assault conviction. On appeal, Lloyd does not dispute that the state presented sufficient evidence that he caused serious physical harm to Power. Rather, Lloyd argues that the state failed to present sufficient evidence that he *knowingly* caused Power to suffer serious physical harm. Lloyd contends that "it is simply not probable that serious physical harm would result from a single punch to the jaw of Mr. Power."

{¶ 54} In support of his position, Lloyd relies on the Tenth District's decision in *State v. McFadden*, 10th Dist. Franklin No. 95APA03-384, 1995 Ohio App. LEXIS 5144 (Nov. 21, 1995). In *McFadden*, the defendant was convicted of felonious assault after throwing one "blind-side punch" to the right side of the victim's head. *Id.* at 4, 12. The defendant and the victim were of "similar size and body weight" and the defendant lacked any "boxing or fighting experience." *Id.* at 11. The court indicated that, under the circumstances of that case, while it was "reasonable to assume that a person would expect one punch to cause physical harm to another person," it could not be said that "a reasonably prudent person would have been aware that the throwing of one punch had the propensity to cause serious physical

harm to another person." *Id.* at 11-12. Accordingly, the court held that the evidence was insufficient to convict the defendant of felonious assault. *Id.*

{¶ 55} After careful consideration, we are unpersuaded by Lloyd's reliance on *McFadden* and his assertion that the decision created a bright-line rule precluding a felonious assault conviction when an assailant with no fighting experience strikes a victim with a single punch. As outlined above, the determination of whether an assailant acted knowingly requires a review of all the facts and circumstances on a case-by-case basis. Furthermore, since *McFadden* was decided in 1995, numerous Ohio courts, including this court, have determined that a single punch to the head or face can support a conviction for felonious assault even in the absence of evidence that the assailant had fighting or boxing experience, or was more physically imposing than the victim. *See, e.g., State v. Jacinto*, 8th Dist. Cuyahoga No. 108944, 2020-Ohio-3722, ¶ 107, citing *State v. Watson*, 10th Dist. Franklin No. 17AP-834, 2018-Ohio-4964, ¶ 16 (affirming felonious assault conviction where defendant struck the victim "with a strong closed fist punch to the side of his head" with enough force "that it knocked [the victim] to the ground, left him unconscious for an extended period of time, and damaged his skull and brain"); *State v. Eisenman*, 10th Dist. Franklin No. 17AP-475, 2018-Ohio-934, ¶ 11-12 (affirming felonious assault conviction where defendant punched the victim once in the head with sufficient force to "knock [the victim] out immediately"); *Hampton*, 8th Dist. Cuyahoga No. 103373, 2016-Ohio-5321, at ¶ 2, 14, 24, 27-28 (evidence of a single, forceful intentional punch to the head could support the inference that defendant knowingly

caused serious physical harm); *State v. Westfall*, 9th Dist. Lorain No. 10CA009825, 2011-Ohio-5011, ¶ 2, 10 (single punch to the victim's face was sufficient to support felonious assault conviction); *State v. Shepherd*, 11th Dist. Ashtabula No. 2003-A-0028, 2006-Ohio-4315, ¶ 28 (one punch to the face with sufficient force to crack two of the victim's teeth was sufficient to support a conviction for felonious assault); *State v. Redman*, 3d Dist. Allen No. 1-15-54, 2016-Ohio-860, ¶ 22 ("'Punching someone in the face satisfies the requisite culpable mental state for felonious assault.'"), quoting *State v. Beaver*, 3d Dist. Union No. 14-13-15, 2014-Ohio-4995, ¶ 37; *State v. Vanover*, 4th Dist. Lawrence No. 98CA38, 1999 Ohio App. LEXIS 2357, 14-15 (May 16, 1999) ("[T]he mere act of punching someone in the head area carries with it the risk of causing serious physical harm. * * * Serious physical harm is unquestionably a natural and logical consequence of punching, without warning or provocation, an intoxicated person whose faculties are likely impaired.").

{¶ 56} In this case, the evidence adduced at trial showed that Lloyd, without warning or provocation, punched Power on the left side of his jaw with a closed fist. Power had no opportunity to brace himself and was knocked unconscious by the impact of Lloyd's blow. Power immediately fell to the ground and sustained severe brain injuries. Although Lloyd may not have anticipated that Power would sustain a serious brain injury, considering all the circumstances, it could be reasonably inferred that Lloyd knew that some form of serious physical harm to Power was a reasonable and probable consequence of his forceful punch to Power's jaw. The state did not have to prove that defendant intended to cause Power's death, only that

Lloyd knowingly caused serious physical harm. *Hampton*, 8th Dist. Cuyahoga No. 103373, 2016-Ohio-5321, at ¶ 28, citing *State v. Irwin*, 4th Dist. Hocking Nos. 03CA13 and 03CA14, 2004-Ohio-1129, ¶ 18.

{¶ 57} Moreover, we are unpersuaded by Lloyd's attempt to separate Power's injuries into two categories: (1) the minimal bruising to Power's jaw that resulted from the single punch, and (2) the significant head injuries sustained as a result of his fall. Although Lloyd contends that he should be held responsible for the former but not the latter, we reiterate that a defendant is responsible for the natural and logical consequences of his conduct. Thus, "it is not necessary that the accused be in a position to foresee the precise consequences of his conduct; only that the consequence be foreseeable in the sense that what actually transpired was natural and logical in that it was within the scope of the risk created by his conduct." *State v. Smith*, 4th Dist. Lawrence No. 94 CA 37, 1996 Ohio App. LEXIS 916, 22 (Mar. 6, 1996). Under the circumstances presented in this case, we find Power's fall and resulting head injuries were natural and logical consequences of Lloyd's conduct in punching the unsuspecting Power's in his head area. *See State v. Vanover*, 4th Dist. Lawrence No. 98CA38, 1999 Ohio App. LEXIS 2357, 14 (May 16, 1999) ("The victim falling down and striking his head against the pavement are natural and logical consequences of punching someone in the mouth.").

{¶ 58} Finally, we note that after Lloyd's punch rendered Power motionless on the ground, Lloyd simply fled the scene. Lloyd's response to the immediate impact of his punch could reasonably support the inference that he was

"unsurprised by its severity" and that he was aware that his punch to Power's jaw would probably cause him serious physical harm. *See Jacinto*, 8th Dist. Cuyahoga No. 108944 , 2020-Ohio-3722, at ¶ 110, citing *Watson*, 10th Dist. Franklin No. 17AP-834, 2018-Ohio-4964, at ¶ 16.

{¶ 59} Viewed in a light most favorable to the state, the evidence demonstrated beyond a reasonable doubt that Lloyd knowingly caused serious physical harm to Power that resulted in his death. Accordingly, we find there was sufficient evidence supporting Lloyd's conviction for murder and felonious assault.

{¶ 60} Lloyd's fifth assignment of error is overruled.

{¶ 61} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Eileen T. Gallagher

EILEEN T. GALLAGHER, JUDGE

ANITA LASTER MAYS, P.J., and
MARY EILEEN KILBANE, J., CONCUR

FILED AND JOURNALIZED
PER APP. R. 22(C)

MAY 27 2021

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By GREG HERCIK Deputy