[Cite as *State v. Smiley*, 2010-Ohio-4349.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93853

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SHER SMILEY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-518597

BEFORE: McMonagle, J., Gallagher, A.J., and Cooney, J.

RELEASED AND JOURNALIZED: September 16, 2010

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CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Sher Smiley, appeals from the trial court's judgment, rendered after a jury verdict, finding her guilty of felonious assault. She claims her counsel was ineffective because he did not ask for a jury instruction on the defense of accident and did not move to dismiss on double jeopardy grounds. We affirm.

I

{¶ 2} Smiley was charged in a two-count indictment with two counts of felonious assault in violation of R.C. 2903.11(A)(1) and (2). She pled not guilty and the case proceeded to trial.

{¶ 3} The State presented three witnesses. Cleveland patrol officer Thomas Barry testified that at approximately 9 p.m. on September 13, 2008, he and Officer Sean Smith were stationed in separate patrol cars in a parking lot on East 152nd Street, observing the area. Officer Barry testified that he saw a bicyclist go by next to the curb on the southbound side of East 152nd Street, and a moment later, a red Ford Contour went by. Barry heard the Contour honk its horn as it went by the cyclist; he then saw the Contour stop momentarily and then back up toward the cyclist. Barry testified that the cyclist swerved around the left side of the car into the passing lane, went around the front of the car, and then moved back to the curb. Barry then saw the Contour pull next to the cyclist and suddenly make a sharp right swerve into the cyclist. The impact flipped the bicycle into the air and knocked the cyclist to the ground, but the Contour did not stop.

{¶ 4} Officer Barry pulled his car next to the cyclist and made sure he was okay; he and Smith then followed the Contour and stopped it. According to Barry, the driver of the Contour, identified as Smiley, was immediately argumentative and denied hitting the bicyclist. When Barry told her that he had seen what happened, she changed her story and insisted that the cyclist had reached into her car and hit her niece, who was in the car, and then spit in the car. She then said that she had accidently hit the cyclist because he was riding in circles in the middle of the street. Officer Barry interviewed

two teenagers who were in the car; both denied that the cyclist had reached in the car or tried to spit in it.

{¶ 5} Officer Smith confirmed that Smiley was "argumentative and confrontational" with the officers when she was stopped; he also testified that he observed fresh scratches on the front passenger side of the Contour.

{¶ 6} Anton C. Clark, the cyclist, testified that as he was riding near the curb on East 152nd Street, a red car honked at him and the driver told him to "get the H--- out of the street." He flagged the car to go around him and kept riding. He then saw the car stop for a moment, its rear back-up lights come on, and then back up directly at him. Clark testified that he went left around the car to avoid being hit, but after he went back to the curb, the car came up beside him and deliberately hit him with its front bumper.

{¶ 7} In her defense, Smiley testified that she "tapped" Clark's bicycle with the front of her car as he rode around her car, but said it was an accident and that she actually tried to stop her car to avoid hitting him. She testified that she kept driving after she hit Clark because she thought the area was too dangerous to stop. Smiley denied that the car's back-up lights were operational that day.

{¶ 8} Smiley's daughter, 17-year-old Sade Smiley, likewise testified that her mother was trying to stop the car when she hit the cyclist.

{¶ 9} The trial court granted Smiley's Crim.R. 29 motion for acquittal regarding

{¶ 10} Count 1 (felonious assault in violation of R.C. 2903.11(A)(1)) and the jury found her guilty of Count 2 (felonious assault in violation of R.C. 2903.11(A)(2)). The judge sentenced her to one year of community control sanctions.

II

{¶ 11} In her first assignment of error, Smiley contends that she was denied her constitutional right to effective assistance of counsel because counsel did not request a jury instruction on accident, even though that was the defense theory of the case.

{¶ 12} To establish ineffective assistance of counsel, Smiley must demonstrate that her lawyer's performance fell below an objective standard of reasonable performance and that she was prejudiced by that deficient performance, such that, but for counsel's error, the result of the proceeding would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Sanders*, 94 Ohio St.3d 150, 151, 2002-Ohio-350, 761 N.E.2d 18. In short, counsel's errors must be so serious as to render the result of the trial unreliable.

{¶ 13} The court must give all instructions that are relevant and necessary for the jury to weigh the evidence and discharge its duty as the

factfinder. *State v. Joy* (1995), 74 Ohio St.3d 178, 181, 657 N.E.2d 503. Accident is an unintentional act that denies a culpable mental state. *State v. Skeens*, 7th Dist. No. 286, 2001-Ohio-3476; see, also, *State v. Stubblefield* (Feb.13, 1991), 1st Dist. No. C-890587. A party is entitled to an accident instruction when there is evidence presented at trial that the party acted lawfully and the result was unintended. *Skeens*, supra; *State v. Ross* (1999), 135 Ohio App.3d 262, 276-77, 733 N.E.2d 659.

{¶ 14} Smiley's accident theory was supported by her testimony and that of her daughter; hence, defense counsel should have requested an accident instruction.[1]

{¶ 15} Nevertheless, we do not find that Smiley was prejudiced by counsel's failure to request the instruction.

{¶ 16} Generally, although a trial court errs by failing to provide a jury instruction on the accident defense when the facts of a case warrant such an instruction, and counsel errs in not requesting such an instruction, "if the trial court's general charge was otherwise correct, it is doubtful that this error of omission would ever satisfy the tests for plain error or ineffective assistance of counsel." *Stubblefield*, supra, citing *State v. Sims* (1982), 3 Ohio App.3d 331, 335, 445 N.E.2d 245. This is so "'[b]ecause the accident

[1]Because the evidence warranted the instruction, the trial court should have given an accident instruction, even absent a request. *Joy*, supra. We find no plain error, however, for the same reasons we do not find ineffective assistance of counsel.

defense is not an excuse or justification for the admitted act,' and the effect of such an instruction 'would simply * * * remind the jury that the defendant presented evidence to negate the requisite mental element,' such as purpose. In this regard, '[i]f the jury had credited [the defendant's] argument, it would have been required to find [the defendant] not guilty * * * pursuant to the court's general instructions.'" *State v. Johnson*, 10th Dist. No. 06AP-878, 2007-Ohio-2792, ¶63 (internal citations omitted).

{¶ 17} Thus, in *Skeens*, supra, for example, the Seventh District held that the court's failure to give an accident instruction, and such failure was not objected to, was not plain error where the defendant was charged with reckless homicide by starting a fire and the trial court properly instructed the jury on the mens rea element of recklessness. The court held that such a definition "could easily allow jurors to understand that reckless conduct goes beyond what is considered to be an accident." Id. Likewise, in *Johnson*, supra, the Tenth District found no plain error where the defendant was charged with murder, and the trial court instructed the jury that the State bore the burden of proof beyond a reasonable doubt on every element of the offense, including the "purposely" mental element, and then defined "purposely." See, also, *State v. Martin* (Dec. 31, 2007), 10th Dist. No. 07AP-362 ("accident defense instruction would not have added anything to the general instruction in regards to appellant's reckless homicide charge"

where court otherwise properly instructed jury regarding burden of proof and elements of offense, including mental element of reckless).

{¶ 18} Here, Smiley was convicted of felonious assault in violation of R.C. 2903.11(A)(2), which provides that "no person shall knowingly cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance." The record reflects that the trial judge properly instructed the jury that the State bore the burden of proof beyond a reasonable doubt on every essential element of the offense, including the "knowingly" mens rea element of felonious assault. The trial court also defined the "knowingly" mental element, stating that "[k]nowingly means that a person is aware of the existence of the facts, and that her acts will probably cause a certain result or be of a certain nature." (Tr. 320.)

{¶ 19} These instructions clearly instructed the jurors that felonious assault is knowing conduct that goes beyond that considered to be an accident; thus, as in *Martin*, supra, an accident instruction would not have added anything to the general instructions. If the jury had believed Smiley's accident defense, it would have been required to find her not guilty in accord with the court's instructions as given, and hence, we find that Smiley was not prejudiced by counsel's failure to request an accident instruction.

{¶ 20} Appellant's first assignment of error is therefore overruled.

III

{¶ 21} Smiley next contends that counsel was ineffective for failing to move for dismissal on the grounds of double jeopardy. She contends that her conviction in Cleveland Municipal Court for failure to stop after accident upon streets in violation of Cleveland Codified Ordinances 435.15, based upon the same incident at issue in this case, resolved the question of whether this was an accident, and that double jeopardy principles bar the relitigation in a second prosecution of issues determined in the first prosecution. Therefore, she asserts that counsel should have filed a motion to dismiss based on double jeopardy grounds.

{¶ 22} The Double Jeopardy Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, protects from multiple prosecutions and punishments for the same offense. *N. Carolina v. Pearce* (1969), 394 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656. For the purposes of double jeopardy, state and municipal courts are the same entity. *Waller v. Florida* (1970), 397 U.S. 387, 395, 90 S.Ct. 1184, 25 L.Ed.2d 435; *State v. Delfino* (1982), 22 Ohio St.3d 270, 273, 490 N.E.2d 884.

{¶ 23} The established test for determining whether two offenses constitute the same offense under the Double Jeopardy Clause was set forth in *Blockburger v. United States* (1932), 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306. "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether

there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not."

{¶ 24} Cleveland Codified Ordinances 435.15 provides in relevant part that "[i]n case of accident to or collision with persons or property upon any of the public streets or highways, due to the driving or operation thereon of any motor vehicle, the person so driving or operating such motor vehicle, having knowledge of such accident or collision, shall immediately stop his motor vehicle at the scene of the accident or collision and shall remain at the scene of such accident or collision until he has given his name and address * * * to any person injured in such accident or collision * * * or to the operator * * * of any motor vehicle damaged in such accident or collision, or to any police officer at the scene * * *."

{¶ 25} It is readily apparent that felonious assault requires proof of facts not required for the offense of failure to stop after accident upon streets; i.e., knowingly causing or attempting to cause physical harm to another by means of a deadly weapon or dangerous ordnance. R.C. 2903.11(A)(2). Hence, Smiley could be tried and convicted under both statutes.

{¶ 26} Smiley's argument that her conviction in municipal court established her accident defense lacks merit. Cleveland Codified Ordinances 435.15 is very clear that one is guilty of violating the ordinance if one leaves the scene of *either* an accident or collision. Thus, Smiley's conviction for

violating the ordinance established that she left the scene after hitting Clark with her car, but did not determine whether she hit Clark intentionally or accidentally. Moreover, as this court has recognized, "the *Blockburger* test is satisfied notwithstanding a substantial overlap in the proof offered to establish the crimes. Repetition of the evidence alone does not violate double jeopardy." *State v. Crayton* (Aug. 17, 1989), 8th Dist. No. 55856.

{¶ 27} Accordingly, counsel was not ineffective for not moving to dismiss on double jeopardy grounds; appellant's second assignment of error is therefore overruled.

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. 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.

CHRISTINE T. McMONAGLE, JUDGE

SEAN C. GALLAGHER, A.J., and
COLLEEN CONWAY COONEY, J., CONCUR