[Cite as *State v. Parks*, 2011-Ohio-4056.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-98 (C.P.C. No. 10CR-2770)
Pia Parks,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 16, 2011

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

David J. Graeff, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Defendant-appellant, Pia Parks ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas finding her guilty, pursuant to a jury verdict, of the stipulated lesser-included offense of assault, in violation of R.C. 2903.13, a misdemeanor of the first degree. For the following reasons, we affirm.

{¶2} On May 7, 2010, plaintiff-appellee, State of Ohio ("the state"), indicted appellant, charging her with one count of felonious assault, in violation of R.C. 2903.11, a felony of the second degree. On May 12, 2010, appellant entered a plea of "not guilty," and a jury trial commenced on October 18, 2010.

{¶3} The indictment arose out of an altercation which occurred between appellant and her husband, Lawrence Parks ("Mr. Parks"), at their 2281 Courtright Road residence. Appellant and Mr. Parks were married on December 4, 2009, and resided together since November of 2009.

{¶4} According to the record, the state presented testimony from Officers Matthew Wilson and Linda Northrup and Detective David Howard, of the Columbus Division of Police, and Mr. Parks.

{¶5} Mr. Parks testified that, on April 28, 2010, he went to his mother's house, ate something, and then went to his brother's house where he drank a couple of beers. He decided to go home around 9:00 p.m. and stayed downstairs for awhile before going up to the bedroom. Further, Mr. Parks testified that, when he went upstairs, appellant was in bed reading a book. At that time, Mr. Parks asked appellant about the location of one of their dogs, and she pointed her finger in his face stating, "I told you that dog was sick and if you had been paying attention to that." (Tr. 126.) The record reflects that the parties then began arguing about money, and Mr. Parks called appellant "a money-hungry hoe." (Tr. 127.)

{¶6} Further, Mr. Parks testified:

> [A]ll of a sudden [appellant] slapped me in the face and knocked my glasses off, and instantly she grabbed my privates.* * * I tried to get away from her but she kept twisting me real tight. * * *
>
> * * * I was going to try to call 911. So I got to the phone and then she stuck me in the stomach with her fingernails and dug in and set me around, bit me on the shoulder area, and slapped the phone out of my hand at the same time.

> * * * Finally I just decided there was nothing else I could do about it, so I took both hands and got my phone, and she was still grinding and pulling and tugging at my private area. So I took two fingers and hit 911 and I was like: Help.

(Tr. 127.)

{¶7} The prosecutor then played Mr. Parks' 911 call, wherein Mr. Parks identified himself and stated that he was bleeding because his wife grabbed his "privates." Further, Mr. Parks testified that, to the best of his knowledge, appellant has never called the police to the parties' residence because of any prior arguments, and appellant did not testify to the contrary.

{¶8} After the state concluded its case, appellant testified on her own behalf but called no additional witnesses. In her testimony, appellant alleged that, on the evening of April 28, 2010, she had gone to bed and heard Mr. Parks come home because he was very loud. Appellant stated that Mr. Parks had been drinking and that she could smell the alcohol. According to appellant's testimony, Mr. Parks came into the bedroom and inquired regarding the whereabouts of their dog. Appellant responded "[w]hy do you care now?" (Tr. 179.) Appellant alleged that an argument ensued, whereupon Mr. Parks "called me every kind of bitch he could think of." (Tr. 181.) During the argument, appellant told Mr. Parks that he could leave the marriage, but she wanted him to give her his cell phone, which she was paying for, and her ring. Further, appellant alleged that, upon attempting to take his phone, Mr. Parks "elbowed me in my chest." (Tr. 184.) Appellant testified as follows:

> A: * * * And he rolled on me. He had me pinned by my arms, and he had his knee in my thigh.
>
> Q: So you're immobilized?

A: Pretty much, yes. I'm trying to figure out what to do. I want him off. I'm not trying to give him a chance to hurt me.

Q: At this point are you scared?

A: Yes.

Q: Are you scared for your life?

A: I'm scared for my life. I'm scared he is going to really try to physically hurt me, black eye, knock my teeth out, whatever he can do, whatever he can get to.

* * *

Q: What did you do to defend yourself?

A: I couldn't raise my arms. I just grabbed him.

* * *

Q: Did you feel it necessary to defend yourself?

A: Yes, I did.

Q: Did you fear that he could cause—he could kill you?

A: Yes.

* * *

Q: Did you fear that he could cause serious harm to you?

A: Yes.

* * *

Q: How long did you hold onto his scrotum?

A: It was during the whole fight. * * *

(Tr. 184-86.) Further, appellant testified that she did not call 911 because she "figured that the thing had calmed down * * * it had been 20 minutes, half an hour had gone by. I was going to drop it." (Tr. 201.)

{¶9} On October 20, 2010, subsequent to closing arguments, but prior to deliberation, the trial court instructed the jury regarding the following: (1) felonious assault, (2) the lesser-included offense of assault, and (3) the affirmative defense of self-defense. In its instruction to the jury regarding self-defense, the trial court stated:

> Now, if you find that the State has proved the elements of felonious assault or assault, you then should consider self-defense. To establish self-defense to felonious assault the Defendant must prove by a preponderance of the evidence the following: Number one, the Defendant was not at fault in creating the situation giving rise to the felonious assault; number two, the Defendant had reasonable grounds to believe and an honest belief, even though mistaken, that she was in imminent danger of great bodily harm and that her only means to protect herself from such danger was in the use of such force.
>
> Now, to establish self-defense to assault the Defendant must prove by a preponderance of the evidence the following: The Defendant was not at fault in creating the situation giving rise to the assault; number two, the Defendant had reasonable grounds to believe and an honest belief, even though mistaken, that she was in imminent danger of bodily harm and that her only means to protect herself from such danger was in the use of such force.
>
> A Defendant is not in a position to claim self-defense if she provoked a fight or renewed a fight that had broken off. In determining whether the Defendant had reasonable grounds for an honest belief that she was in imminent danger you must put yourself in the position of the Defendant with her characteristics, her knowledge or lack of knowledge, and under the circumstances and conditions that surrounded her at the time.

> You must consider the conduct of Lawrence Parks and determine if the acts and words caused the Defendant to reasonably and honestly believe that she was about to be killed or to receive great bodily harm or receive bodily harm.
>
> Vile or abusive language or verbal threats, no matter how provocative, do not justify a felonious assault or an assault.
>
> Now, the law does not measure nicely the degree of force which may be used to repel an assault. If a person who is assaulted uses more force than reasonably appears to be necessary under the circumstances and if the force used is so grossly disproportionate to her apparent danger as to show an unreasonable purpose to injure her assailant, then the defense of self-defense is not available.
>
> Now, if you find that the State proved beyond a reasonable doubt all of the essential elements of the offense of felonious assault, and that the Defendant failed to prove by a preponderance of the evidence the defense of self-defense, your verdict must be guilty of felonious assault.
>
> If you find that the State proved beyond a reasonable doubt all of the essential elements of felonious assault and that the Defendant proved by a preponderance of the evidence the defense of self-defense, your verdict must be not guilty of felonious assault.
>
> If you find that the State proved beyond a reasonable doubt all of the essential elements of assault and that the Defendant failed to prove by a preponderance of the evidence the defense of self-defense, your verdict must be guilty of assault.
>
> If you find that the State proved beyond a reasonable doubt all of the essential elements of assault and the Defendant proved by a preponderance of the evidence the defense of self-defense, then your verdict must be not guilty as to assault.

(Tr. 253-56.)

{¶10} That same day, the jury returned a verdict of guilty as to the lesser-included offense of assault, in violation of R.C. 2903.13. On December 22, 2010, the trial court

sentenced appellant to one year of community control/basic supervision and ordered restitution in the amount of $235.81. Further, on January 3, 2011, the trial court filed a judgment entry journalizing appellant's sentence.

{¶11} On January 31, 2011, appellant filed a timely notice of appeal, setting forth a sole assignment of error for our consideration:

> PLAIN ERROR OCCURS IN THE SELF-DEFENSE INSTRUCTION GIVEN TO THE JURY WHEN NO "DUTY TO RETREAT" IN ONE'S RESIDENCE, RECOGNIZED IN STATE V. THOMAS (1997), 77 OHIO ST.3D 323, IS NOT PART OF THE INSTRUCTION, RESULTING IN AN UNFAIR TRIAL, CONTRA THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

{¶12} Pursuant to Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." In *State v. Morton*, 10th Dist. No. 10AP-562, 2011-Ohio-1488, ¶7, this court stated that, in order "[t]o constitute plain error, there must be: (1) an error, i.e. a deviation from a legal rule, (2) that is plain or obvious, and (3) that affected substantial rights, i.e., affected the outcome of the trial." Further, "[e]ven if an error satisfies these prongs, appellate courts are not required to correct the error." Id. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus. "Plain error does not exist unless it can be said that, *but for the error*, the outcome of the trial clearly would have been otherwise." (Emphasis added.) *State v. Warren*, 10th Dist. No. 10AP-376, 2010-Ohio-5718, ¶6, citing *Long* at 97.

{¶13} In her sole assignment of error, appellant contends that, pursuant to *State v. Thomas*, 77 Ohio St.3d 323, 1997-Ohio-269, the trial court committed plain error by

failing to instruct the jury that, because the altercation occurred in the parties' own home, appellant did not have a duty to retreat prior to using force against Mr. Parks. In response, the state, citing *Long*, contends that "[a]n erroneous jury instruction does not amount to plain error unless, but for the error, the result of the trial clearly would have been different." (See appellee's brief at 3.)

{¶14} According to *Thomas*, the elements of self-defense are: "(1) the defendant was not at fault in creating the violent situation, (2) the defendant had a bona fide belief that she was in imminent danger of death or great bodily harm and that her only means of escape was the use of force, and (3) that the defendant did not violate any duty to retreat or avoid the danger." Id. at 326, citing *State v. Williford* (1990), 49 Ohio St.3d 247, 249. With regard to the third element, in *Thomas*, the Supreme Court of Ohio held that "[t]here is no duty to retreat from one's own home before resorting to lethal force in self-defense against a cohabitant with an equal right to be in the home." Id. at 328.

{¶15} In further support of her argument, appellant also cites the Fourth District Court of Appeals' decision in *State v. Ward*, 168 Ohio App.3d 701, 2006-Ohio-4847. In *Ward*, a jury convicted the appellant of one count of felonious assault for slicing open her boyfriend's abdomen during an altercation in their own home. Id. at ¶2, 4 and 10. The appellant claimed that her boyfriend attacked her and that she acted in self-defense. Id. at ¶10. The trial court's instruction to the jury advised regarding the first two elements of self-defense but failed to advise regarding the third element of whether the appellant had a duty to retreat. Id. at ¶11-12. The trial court's jury instruction in *Ward* stated, in relevant part, that:

> To establish self defense, the Defendant must prove that she was not at fault in creating the situation that gave rise to the incident and that the Defendant has reasonable grounds to believe and an honest belief, even though mistaken, that she was in immediate danger of serious bodily harm or death, and that her only means to protect herself from such danger, was by the use of deadly force.

Id. at ¶11. Because the appellant failed to object to the jury instruction, the Fourth District Court of Appeals reviewed under the plain-error doctrine.

{¶16} In its analysis regarding the first two prongs of the plain-error doctrine, the Fourth District found that: (1) the trial court erred because the instruction improperly implied that the appellant had a duty to retreat; and (2) the error was plain. Further, in analyzing the third prong of the plain-error doctrine, while the court found that the trial court's instruction affected the appellant's substantial rights, it did so "because [the instruction] 'may' have induced the jury to reach an erroneous verdict." Id. at ¶35. In reaching this conclusion, the court applied the standard applied in *Parma Heights v. Jaros* (1990), 69 Ohio App.3d 623, 630, for examining a jury instruction objected to at trial.[1] The court did not, however, apply the standard established in *Long* for examining an unobjected-to jury instruction pursuant to the plain-error doctrine: whether, but for the error, the outcome of the trial clearly would have been otherwise. See *Long* at syllabus.

{¶17} Here, in applying the plain-error doctrine to the present matter, we first examine whether the trial court committed an error. The record establishes that the trial court instructed the jury on the first two elements required to establish a claim of self-defense; however, it failed to instruct the jury regarding the third element of self-

[1] We note that *Jaros* is silent as to whether the appellant objected to the jury instructions at trial; however, we assume that appellant objected to the jury instructions because the court, in its analysis, does not discuss plain error or waiver pertaining to the jury instructions.

defense—whether appellant violated any duty to retreat. We conclude that, pursuant to *Thomas*, the trial court committed an error in failing to instruct the jury that, because the altercation occurred in the parties' own home, appellant had no duty to retreat prior to using force against Mr. Parks. Therefore, appellant has met the first prong of the plain-error doctrine.

{¶18} Next, we examine whether the error was "plain." See Crim.R. 52(B). As stated above, in order for an error to be "plain," it must be obvious. See *Morton* at ¶7. Here, Ohio law clearly states that "[t]here is no duty to retreat from one's own home before resorting to lethal force in self-defense against a cohabitant with an equal right to be in the home." See *Thomas* at 328. Therefore, the error is plain, and appellant has met the second prong of the plain-error doctrine.

{¶19} Finally, we examine whether the error affected appellant's "substantial rights." See Crim.R. 52(B). We analyze the third prong of the plain-error doctrine by determining whether, but for the error, the outcome of the trial clearly would have been otherwise. See *Long* at syllabus; see also *State v. Miller*, 10th Dist. No. 10AP-632, 2011-Ohio-952. As noted above, the elements of self-defense are: "(1) the defendant was not at fault in creating the violent situation, (2) the defendant had a bona fide belief that she was in imminent danger of death or great bodily harm and that her only means of escape was the use of force, and (3) that the defendant did not violate any duty to retreat or avoid the danger." *Thomas* at 326. Further, pursuant to R.C. 2901.05(A), a defendant must prove the affirmative defense of self-defense by a preponderance of the evidence. See *State v. New*, 10th Dist. No. 05AP-262, 2005-Ohio-6471, ¶9.

{¶20} In its instruction to the jury, the trial court defined preponderance of the evidence as follows:

> Preponderance of the evidence is the greater weight of the evidence. That is evidence that you believe because it outweighs or overbalances in your mind the evidence opposed to it. A preponderance means evidence that's more probable, more persuasive, or of greater probative value.
>
> It is the quality of the evidence that must be weighed. Quality may or may not be identical with the quantity or the greater number of witnesses. In determining whether an issue has been proved [sic] by a preponderance of the evidence you should consider all of the evidence regardless of who produced it. If the weight of the evidence is equally balanced or if you are unable to determine which side of an issue has the preponderance, then the party who has the burden of proof has not established such issue by a preponderance of the evidence.

(Tr. 264-65.)

{¶21} Here, even in applying the above-cited preponderance of the evidence burden, it is not clear that a jury would have found that appellant acted in self-defense. Mr. Parks testified that, after he called appellant "a money-hungry hoe," appellant slapped his face, knocked off his glasses, and instantly grabbed his "privates." (Tr. 127.) Further, Mr. Parks made the only 911 call, claiming that appellant "grabbed" him and that he "didn't lay a hand on her." (Tr. 130.) Finally, Mr. Parks testified that, while he was "bleeding everywhere," appellant "got in bed like she hadn't done nothing * * * she just blinked and went back to bed." (Tr. 131.) In addition, although appellant testified that she was scared for her life, she did not call 911 and testified that she "was going to drop it." (Tr. 185, 201.)

{¶22} Based upon the record, a jury could reasonably conclude that appellant did not prove, by a preponderance of the evidence, that she acted in self-defense because: (1) appellant was at fault in creating the violent situation; and/or (2) appellant did not have a bona fide belief that she was in imminent danger of death or great bodily harm and that her only means of escape was the use of force.

{¶23} First, if the jury believed Mr. Parks' testimony that (1) he did not lay a hand on appellant, and (2) appellant slapped his face, knocked off his glasses and grabbed his "privates," the jury may have concluded that appellant was the aggressor and, therefore, at fault in creating the violent situation. Further, the jury may have placed some weight on the fact that Mr. Parks made the 911 call claiming to be the victim of an attack at the hands of appellant. Therefore, the jury may have concluded that, based upon the evidence, appellant did not prove the first element required to claim self-defense.

{¶24} Second, if the jury believed Mr. Parks' testimony that, after the attack, appellant immediately got back into bed and went to sleep, the jury may have concluded that appellant was not being truthful when she testified that she was scared for her life and, therefore, did not have a bona fide belief that she was in imminent danger of death or great bodily harm and that her only means of escape was the use of force. Therefore, the jury may have concluded that, based upon the evidence, appellant did not prove the second element required to claim self-defense.

{¶25} This is a case of "he said, she said." We note that there is nothing in the record indicating that Mr. Parks' or appellant's testimony was more or less credible than the other. As such, it is reasonable that the jury may have concluded that the evidence

was equally credible and that appellant did not meet her burden of proof under the preponderance of the evidence standard.

{¶26} Based upon *this* record, we cannot say that, but for the erroneous jury instruction, the outcome of the trial clearly would have been otherwise. Therefore, appellant has not met the third prong of the plain-error doctrine, and her sole assignment of error is not well-taken.

{¶27} For the foregoing reasons, appellant's assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT, P.J., and BROWN, J., concur.

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