[Cite as *State v. Vu*, 2010-Ohio-4019.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 09AP-606 (C.P.C. No. 08CR-6109)
v.	:	(REGULAR CALENDAR)
Luc Tan Vu,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 26, 2010

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins, IV*, for appellee.

Yeura R. Venters, Public Defender, and *John W. Keeling*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendant-appellant, Luc Tan Vu ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas convicting him of one count of aggravated assault, a fourth-degree felony, in violation of R.C. 2903.12.

{¶2} Appellant came to this country from Vietnam in 1992 and has remained here since that time with permanent residency status. At the time of the incident giving rise to his conviction, appellant worked as a glass blower at Ikehot Glass. Hoa Huang, appellant's co-worker, invited appellant and others to his house for a social get-together. A number of people came to the house, including Vu Huynh ("Huynh") and Cuong Tran

("Cuong"). At trial, the testimony revealed several different versions regarding what happened that night at Huang's house and the events leading up to the altercation between appellant and Huynh.

{¶3} According to Huynh, appellant was argumentative and threw a beer bottle at Cuong after the two had argued. Huynh attempted to calm both parties, but then appellant complained that Huynh was shaking appellant's hand too hard. Huynh and Cuong decided to leave, and then appellant hit Huynh with a beer bottle. Appellant and Huynh fought in the garage until two others broke it up. Huynh and Cuong tried to leave a second time, but when Huynh was a few feet from the car door, appellant attacked him with an object that he was wielding in a stabbing motion. After being struck in the face, Huynh fell, and he was again stabbed in the leg and hand. Appellant then ran away leaving Huynh on the sidewalk.

{¶4} According to appellant, Huynh kept following appellant and insisting they shake hands, but every time appellant complied, Huynh would squeeze appellant's hand very hard. Finally, appellant told Huynh to stop grabbing his hand or he would hit Huynh. When Huynh refused to let go of appellant's hand, appellant hit Huynh and then Huynh bit appellant. The two scuffled until appellant ran out of the garage while others tried to restrain Huynh. Huynh freed himself and proceeded to hit appellant with something while Cuong held appellant. Appellant then grabbed an object from the garage and ran out to the street. Huynh also ran out to the street and proceeded to attack appellant, whereupon appellant hit Huynh with the object cutting Huynh's face. According to appellant, he had to do this just to survive.

{¶5} The police responded to a disturbance call where Columbus Police Officer Jason Gunther found appellant bleeding. Officer Gunther described Huynh as having a "big gash" in his left cheek that "[y]ou could see through" exposing Huynh's teeth. (Tr. 18.) Officer Gunther also stated that Huynh was going in and out of consciousness. Medics were called and Clinton Township Firefighter Paramedic Brian Childs testified Huynh was "beat up pretty well." (Tr. 24.) According to Childs, Huynh had a laceration to his left cheek, a "fat lip" and a missing tooth. (Tr. 25.) Additionally, Huynh's pupil was "semi blown," his trunk showed abrasions and scrapes, and he had a puncture wound on his leg. (Tr. 26.) Childs also described Huynh as "hard to wake" and "not oriented," and as he was being treated by medics, "he was starting to become more unconscious and having more of a difficult time breathing." (Tr. 27-28.) Huynh was transported to The Ohio State University Hospital, where according to Huynh, he remained for three days. Huynh also stated that he has a permanent scar on his face.

{¶6} On August 21, 2008, appellant was indicted for one count of felonious assault, a second-degree felony in violation of R.C. 2903.11. A jury trial began on February 9, 2009, and the jury found appellant guilty of the lesser-included offense of aggravated assault, a fourth-degree felony, in violation of R.C. 2903.12. Appellant was sentenced to a 17-month term of incarceration and awarded 29 days of jail-time credit.

{¶7} This appeal followed, and appellant brings the following three assignments of error for our review:

> ASSIGNMENT OF ERROR NUMBER ONE
>
> THE TRIAL COURT ERRED WHEN IT INSTRUCTED THE JURY THAT IN ORDER TO ESTABLISH SELF-DEFENSE, THE DEFENDANT MUST PROVE BY A PREPONDRANCE

> OF THE EVIDENCE THAT HE HAD AN HONEST BELIEF THAT HE WAS IN DANGER OF DEATH OR GREAT BODILY HARM AND THAT THE USE OF SUCH FORCE WAS HIS ONLY MEANS OF ESCAPE FROM SUCH DANGER AND THAT HE DID NOT VIOLATE ANY DUTY TO RETREAT WHEN THE EVIDENCE INDICATED THAT DEADLY FORCE WAS NOT USED BY THE DEFENDANT AND THAT HE WAS ENTITLED TO THE INSTRUCTION REGARDING THE USE OF LESS THAN DEADLY FORCE.
>
> ASSIGNMENT OF ERROR NUMBER TWO
>
> THE TRIAL COURT ERRED WHEN IT FAILED TO ADMINISTER AN OATH TO THE INTERPRETER TO MAKE A TRUE TRANSLATION OF THE TESTIMONY AND BY FAILING TO RECORD THE FOREIGN LANGUAGE TESTIMONY AS REQUIRED BY LAW.
>
> ASSIGNMENT OF ERROR NUMBER THREE
>
> THE TRIAL COURT ERRED WHEN IT ALLOWED THE COMPLAINANT, OVER OBJECTION, TO TESTIFY THAT WHENEVER THE DEFENDANT GOT DRUNK HE GOT INTO A FIGHT WITH SOMEONE AS THIS CONSTITUTED INADMISSIBLE AND PREJUDICIAL OTHER BAD ACT AND CHARACTER EVIDENCE. THIS ERROR WAS COMPOUNDED WHEN THE TRIAL COURT THEREAFTER REFUSED TO LIKEWISE ALLOW THE DEFENDANT TO ELICIT CHARACTER OR REPUTATION EVIDENCE REGARDING THE COMPLAINANT'S PROPENSITY TOWARDS VIOLENCE.

{¶8} In his first assignment of error, appellant argues the trial court should have given the jury an instruction on self-defense pertaining to the use of non-deadly force instead of the instruction it gave, which was an instruction on self-defense and the use of deadly force.

{¶9} At appellant's request, the trial court instructed the jury on the lesser-included offense of aggravated assault and self-defense based upon the use of deadly force. Appellant, having requested this instruction, did not object to the same. Therefore,

appellant is precluded from raising this issue on appeal unless he can show plain error. *State v. New* (Sept. 20, 1994), 10th Dist. No. 92AP-904; Crim.R. 30 (unless, prior to deliberations, a party specifically objects to the giving of any jury instruction, the matter may not be raised on appeal); Crim.R. 52 (although not brought to the attention of the trial court, plain errors affecting substantial rights may be noticed). A party claiming plain error must show that the outcome of the proceedings would have been different absent the alleged error. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶17.

{¶10} We, however, find no error, plain or otherwise, in the given jury instruction. The self-defense instruction based on the use of deadly force requires a defendant to prove by a preponderance of the evidence: (1) that he was not at fault in creating the situation giving rise to the altercation; (2) that he had a bona fide belief that he was in immediate danger of bodily harm and that his only means of escape from such danger was the use of force; and (3) that he did not violate any duty to retreat or to avoid the danger. *State v. D.H.*, 169 Ohio App.3d 798, 2006-Ohio-6953, ¶30, citing *State v. Jackson* (1986), 22 Ohio St.3d 281, 284; *State v. Griffin*, 2d Dist. No. 20681, 2005-Ohio-3698, ¶18. In contrast, to establish self-defense against non-deadly force, the defendant must establish: (1) that the defendant was not at fault in creating the situation giving rise to the altercation; and (2) that he had reasonable grounds to believe and an honest belief, even though mistaken, that he was in imminent danger of bodily harm and that his only means to protect himself from such danger was by the use of force not likely to cause death or great bodily harm. *D.H.* at ¶30, citing *State v. Hansen,* 4th Dist. No. 01CA15, 2002-Ohio-6135, ¶24; *Griffin* at ¶18.

{¶11} The key difference between the two instructions is that the deadly force instruction contains a more rigid standard than the non-deadly force instruction in that the non-deadly force instruction requires only a reasonable belief the conduct was necessary to defend himself, and the non-deadly force instruction does not carry, in any circumstance, a duty to retreat. *Hansen*, supra. Deadly force is defined in R.C. 2901.01(A)(2) as "any force that carries a substantial risk that it will proximately result in the death of any person." According to R.C. 2901.01(A)(8), a " 'substantial risk' means a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist."

{¶12} Appellant contends Huynh started the incident by biting appellant and that he responded to the situation with "less than deadly force." According to appellant, there is neither medical testimony nor records pertaining to the severity of Huynh's injuries and that all Huynh suffered was a small laceration on his cheek, an insignificant-appearing puncture wound on his leg, and some other minor abrasions. Essentially what appellant seeks is for this court to find that he used less than deadly force and that he did so in self-defense. We cannot find in appellant's favor.

{¶13} In *State v. Ford* (June 6, 1989), 10th Dist. No. 88AP-503, this court was presented with a defendant charged with felonious assault after hitting another with a beer mug. The defendant in *Ford*, like appellant, argued the jury should have been instructed on self-defense as it related to non-deadly force, rather than deadly force. Rejecting the defendant's argument that the state failed to produce evidence that the victim was near death or could have died from the blows, this court stated that the fact that the victim "was lucky enough to not be in jeopardy of losing his life is not the test to

determine whether appellant used deadly force. The relevant test is whether the force used creates a substantial risk of causing death. We can only conclude that repeatedly beating someone in the head with a glass beer mug does create a substantial risk of causing death." Id.

{¶14} Similarly, in *State v. Wagner* (July 14, 2000), 11th Dist. No. 99-L-043, the defendant, charged with felonious assault, argued on appeal that the jury should have been instructed on self-defense relevant to less than deadly force. The charges in *Wagner* arose out of a bar fight in which the defendant struck another with a broken wine glass causing a hairline skull fracture and a long cut across the forehead of the victim. The *Wagner* court stated, "Clearly, the jagged edge of a broken wineglass, when used as a weapon toward someone's head, carries a substantial risk of death. Hence, the felony self-defense instruction was warranted in this case." Id.

{¶15} In *State v. Kewer*, 9th Dist. No. 07CA009128, 2007-Ohio-7047, the defendant was charged with felonious assault after a fight. The defendant argued he was entitled to a self-defense instruction referencing non-deadly force. The court stated:

> In cases where a defendant has defended himself with his hands, courts have found that a non-deadly force instruction was appropriate. In contrast, when a defendant has used a weapon to inflict serious harm on the victim, courts have found no error in denying an instruction on non-deadly force.

Id. at ¶7 (internal citations omitted). The *Kewer* court found the defendant, who admitted to forcefully hitting the victim with a piece of "rough cut oak" was not entitled to an instruction on the use of non-deadly force.

{¶16} Perhaps most akin to the case sub judice is *State v. Allen* (Nov. 30, 2000), 8th Dist. No. 76672, where, after an argument, the defendant attacked her brother with an

unknown object. The court described that the defendant got out of her car "with an object in her hand" and "struck [the victim] in the mouth." According to the victim, he needed four stitches inside and four stitches outside of his mouth in addition to dental work on his left side. The defendant argued she was entitled to the non-deadly force self-defense instruction but the *Allen* court disagreed and found no error in the trial court's jury instruction.

{¶17} Though appellant cites several cases to support his argument that the trial court committed reversible error by failing to instruct the jury on self-defense and the use of non-deadly force, those cases involved defendants who were not alleged to have used objects or weapons. In the case sub judice, appellant admitted to using an object to strike Huynh. Appellant testified on direct examination as follows:

> Q. So after you fell down, did you pick up some type of weapon?
>
> A. Yes. At that time when I fall down, I don't remember what I grabbing, but I grab something, and then my eye is swelling. So I run out to the street.
>
> * * *
>
> Q. At some point during this whole incident that you described did you cut Vu?
>
> A. Yes. When I first get onto the street, he approached me on the street. I cut him.
>
> Q. With the thing that was in your hand?
>
> A. Yes. I hold something, but I don't know what is in my hand, but I saw his face, and when we approached to the light, and then I see him get a cut.

(Tr. 183-84.)

{¶18} Huynh testified that "[appellant] came and stabbed me, I don't know with a knife or something else." (Tr. 74.) According to Huynh, appellant stabbed at him over four times before making contact with his face and then stabbed him again when he was on the ground resulting in a puncture wound to the leg and a lost tooth.

{¶19} The evidence adduced at trial established that appellant came at Huynh with an object in his hand, swinging in a stabbing motion. Appellant swung several times before striking Huynh's face and slashing his cheek. The officers described Huynh as "going in and out of consciousness" with blood coming from a "big gash" in his left cheek that exposed Huynh's teeth. The testimony also demonstrated that appellant "blew out" one of Huynh's pupils and knocked out one of his teeth. Thus, we find that if appellant was defending himself, he did so with deadly force, and, thus, the trial court's self-defense instruction regarding the use of deadly force was proper.

{¶20} However, even if the trial court had erred by instructing the jury as it did, appellant could not complain because he invited the error by requesting the instruction. *State v. Bey*, 85 Ohio St.3d 487, 493, 1999-Ohio-283. Under the invited-error doctrine, "[a] party will not be permitted to take advantage of an error which he himself invited or induced." Id., quoting *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co*. (1986), 28 Ohio St.3d 20, paragraph one of the syllabus; *State v. Seiber* (1990), 56 Ohio St.3d 4, 17.

{¶21} Appellant also devotes a paragraph under this assigned error to the assertion that he received ineffective assistance of counsel. Citing *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, appellant states his counsel was ineffective for failing to object to the self-defense jury instruction. However, we note that appellant has not set forth a separate assignment of error related to this issue. App.R. 16

expressly requires an appellant to separately set forth each assigned error and, pursuant to App.R. 12, we are required to determine the appeal based upon those assigned errors. *In re J.F.*, 10th Dist. No. 06AP-1225, 2007-Ohio-2360, ¶21, citing *Wells v. Michael*, 10th Dist. No. 05AP-1353, 2006-Ohio-5871, ¶18. Even if we were to address this argument, it clearly fails because we have already determined it was not error for the trial court to instruct the jury as it did. Consequently, there is no error for failing to object to an appropriate jury instruction.

{¶22} Accordingly, appellant's first assignment of error is overruled.

{¶23} In his second assignment of error, appellant contends the trial court erred in failing to administer an oath to the interpreters and in failing to record the foreign language testimony as required by law. Indeed, R.C. 2311.14(B) provides, in relevant part:

> Before entering upon official duties, the interpreter shall take an oath that the interpreter will make a true interpretation of the proceedings to the party or witness, and that the interpreter will truly repeat the statements made by such party or witness to the court, to the best of the interpreter's ability.

{¶24} Additionally, Evid.R. 604 states: "An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation." With respect to the administration of the oath or affirmation, Evid.R. 603 states: "Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so."

{¶25} On the first day of trial, both interpreters signed written oaths that stated:

> I do solemnly swear that I will make a true interpretation of the proceedings to the party or witness, and that I will truly repeat the statements made by such party or witness to the court, to the best of my ability.

(Feb. 10, 2009 Oaths.)

{¶26} Thus, the record reflects both interpreters indeed executed oaths that mirror the language found in R.C. 2311.14(B). We assume then that appellant's argument focuses on the fact that the transcript does not reflect the interpreters' oaths. At trial, no objection or other alleged impropriety was raised with respect to the trial court's alleged failure to administer an oath or to qualify the interpreters as expert witnesses. Moreover, there was no objection to the adequacy of the interpreters' translation. Consequently, appellant has waived all but plain error with respect to this issue. *State v. Newcomb*, 10th Dist. No. 03AP-404, 2004-Ohio-4099, ¶23.

{¶27} We find no plain error as there is no evidence, either in the record or presented by appellant, that the interpreters failed to make a truthful interpretation of the proceedings or failed to truly repeat the statements made by the witnesses to the best of their ability. Id. at ¶24. Appellant also suggests the transcripts are inadequate because they consist only of the English version of the testimony. We, however, are not aware of any requirement that the transcript include non-English, in this case Vietnamese, versions of the testimony, particularly in light of the fact that testimony is taken by a stenographer who may or may not be conversant in non-English languages.

{¶28} Accordingly, appellant's second assignment of error is overruled.

{¶29} In his third assignment of error, appellant contends the trial court erred in overruling his objection to Huynh's testimony on cross-examination, which was as follows:

> [Huynh]: Whenever Luc get drunk, he get into a fight with someone.
>
> [Appellant's counsel]: Objection. Motion to strike. Unresponsive.
>
> [The court]: Overruled. Go ahead, ask the next question.

(Tr. 91.)

{¶30} According to appellant, this testimony is not admissible pursuant to Evid.R. 404(A). At trial, however, appellant did not object under Evid.R. 404, but, rather, he objected on the grounds that the answer was unresponsive to the question. An objection to the admissibility of evidence on one ground does not preserve objections to the evidence on other grounds for purposes of appeal. *State v. Gulertekin* (Dec. 3, 1998), 10th Dist. No. 97APA12-1607, citing *State v. Hunt* (Oct. 12, 1995), 10th Dist. No. 95APA03-370, citing Whiteside, Ohio Appellate Practice (1994) 27, Section 1.15(D). " 'Where a party makes a specific objection to the introduction of evidence, the party is considered to have waived all other grounds for excluding the evidence.' " *Hunt*, quoting *AMF, Inc. v. Mravec* (1981), 2 Ohio App.3d 29, 32. Therefore, all but plain error has been waived. *State v. J.G.*, 10th Dist. No 08AP-921, 2009-Ohio-2857, ¶13.

{¶31} In the present case, having waived all but plain error, appellant cannot show that he would not have been convicted but for the admission of this testimony. It is important here to include the exchange that took place just prior to the challenged testimony, which was:

> [Appellant's counsel]: How long after that did Luc hit you with a beer bottle?

> [Huynh]: At that time after I shake hand and turn around, tell Brother Hoang I go home, then Luc hit me with the beer bottle behind.
>
> [Appellant's counsel]: From behind?
>
> [Huynh]: Right here.
>
> [Appellant's counsel]: And did you do anything to provoke him?
>
> [Huynh]: No.
>
> [Appellant's counsel]: You were just shaking his hand and saying goodbye?
>
> [Huynh]: Yes, because I knew Luc, and Luc brother over ten years, and we have no miscommunication at all. Luc, whenever he got some drunk, he got drunk.
>
> [Appellant's counsel]: Objection. Unresponsive.
>
> [The court]: I have no idea whether it is responsive or not. Overruled. Go ahead.
>
> [Huynh]: Whenever Luc get drunk, he get into a fight with someone.
>
> [Appellant's counsel]: Objection. Motion to strike. Unresponsive.
>
> [The court]: Overruled. Go ahead, ask the next question.

(Tr. 90-91.)

{¶32} The record demonstrates that appellant's counsel asked Huynh if he did anything to provoke appellant and Huynh responded, "no." Appellant's counsel then asked a follow-up question prompting the response of which appellant now complains. As stated by this court in *State v. Cockroft*, 10th Dist. No. 04AP-608, 2005-Ohio-748, "appellant cannot open the door to the issue and then seek to close it right behind him."

Id. at ¶15. Nonetheless, appellant suggests this error is compounded by the fact that the trial court would not allow him to introduce evidence of Huynh's "propensity and reputation for violence." (Appellant's brief at 31.) However, a review of the transcript reveals that when appellant was asked about Huynh's reputation for violence, appellant answered, "I don't know about his reputation, but after two week, the incident happened, somebody told me[.]" (Tr. 173.) Therefore, the trial court sustained the state's objection because appellant's testimony was relating to something somebody told him after the incident in question. At a sidebar, the trial court indicated that after the defense of self-defense was set forth and if appellant had personal knowledge, then appellant would be permitted to testify about Huynh's reputation. Appellant does not allege that he was prohibited from pursuing this line of questioning at a later time. Upon review, we find no merit to the arguments raised in appellant's third assignment of error and, accordingly, overrule the same.

{¶33} For the foregoing reasons, appellant's three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

TYACK, P.J., and SADLER, J., concur.

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